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## Uranium In-Situ Leaching Project Held Not to Require EIS

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# URANIUM IN-SITU LEACHING PROJECT HELD NOT TO REQUIRE EIS

## NATURAL RESOURCES LAW

The impact on human environment of uranium mining and milling activities in the San Juan Basin region does not appear to be significant enough to require a regional environmental impact statement.

*Peshlakai v. Duncan*, No. 78-2416 (D.D.C. Sept. 3, 1979).

Plaintiffs, Friends of the Earth and 72 Navajos,<sup>1</sup> seek to halt federal approvals<sup>2</sup> for uranium mining and milling activities in the San Juan Basin region.<sup>3</sup> Pending a hearing on the merits of the case, plaintiffs requested a preliminary injunction for a Mobil Oil Corporation leaching project.<sup>4</sup> In denying the injunction, the U.S. District Court for the District of Columbia reached the merits on some issues of the case and predicted its final outcome.

Plaintiffs alleged three violations of the National Environmental Policy Act by defendants: first, that approval of the in-situ project is a major federal action significantly affecting the quality of the human environment and an environmental impact statement (EIS) is required; second, that the lease sale underlying the proposed project requires either an EIS or an environmental assessment; and third, that the project is one of a number of projects for which a regional EIS should be required.

The court dismissed the first of these allegations, finding that the possible impacts<sup>5</sup> were minor and speculative. The court stated that,

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1. Friends of the Earth is an international environmental organization. The Navajo individuals reside in the San Juan Basin region.

2. Federal defendants are the Department of Agriculture, the Department of the Interior, the Department of Energy, and the Environmental Protection Agency. Mobil Oil Corporation has intervened as a defendant as have six other private companies: United Nuclear Corporation, Kerr-McGee Oil Corporation, Gulf Oil Corporation, Exxon Corporation, Phillips Uranium Corporation and Continental Oil Corporation.

3. *Peshlakai v. Duncan*, No. 78-2416 (D.D.C. Sept. 3, 1979). The San Juan Basin is located in Northwestern New Mexico and portions of Colorado and Utah.

4. In-situ uranium leaching (known also as solution mining) involves the circulation of water and a chemical solution called leachate to underground areas where the uranium is located by a means of systems of injection and production wells. The uranium is oxidized and brought to the surface as part of a fluid. The uranium is extracted from the fluid which is then pumped back underground, with the chemical solution added, in a continuous cycle.

5. Plaintiffs alleged that the project may adversely affect water quality in the area, expose the public to potentially harmful radon gas, disturb the existing land uses, and disrupt the cultural, religious and socioeconomic order of the area.

while plaintiffs need only show that a particular federal action might have a significant effect on human environment,<sup>6</sup> defendants were not required to ensure that no impacts would occur.<sup>7</sup> In reviewing the decision of whether or not a federal agency will require an EIS for a project, the court "must ensure that the agency has taken a 'hard look' at the environmental consequences."<sup>8</sup> If the agency has satisfied this requirement, the decision may be reversed only if it is arbitrary or capricious.<sup>9</sup> While the court did not define "hard look," it nevertheless determined that the Department of the Interior had met that requirement by preparing a lengthy and detailed environmental assessment.<sup>10</sup> Thus, the court deferred to the agency's conclusion that any impact likely to occur was not significant enough to require an EIS.

In considering whether an EIS should be required, the court also weighed the relative injuries and equities involved<sup>11</sup> and concluded that the resulting delay in uranium production would be more significant than the impacts alleged by plaintiffs. The court pointed out that NEPA represents a congressional judgment that legitimate environmental concerns must be considered in major federal actions. However, other congressionally mandated policies may not be ignored. The court stated that Congress had made a policy decision to try nuclear energy<sup>12</sup> and that such a fundamental decision is "not subject to reexamination in the federal courts under the guise of judicial review of agency action."<sup>13</sup> The court concluded that the NEPA concerns involved were insubstantial and were, in effect, a tool used by plaintiffs to assert their preference that uranium production be stopped.

The court determined that NEPA requires an EIS for the sale of uranium exploration and mining leases on Navajo lands.<sup>14</sup> However, the failure to raise the issue for seven years barred plaintiffs from asserting it. Applying the doctrine of laches, the court considered the

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6. No. 78-2416 at 5; *see also* *City of Davis v. Coleman*, 521 F.2d 661, 674 (9th Cir. 1975).

7. No. 78-2416 at 11 n.24; *see also* *Hanly v. Kliendienst*, 471 F.2d 823 (2d Cir. 1972).

8. No. 78-2416 at 4.

9. *Id.*

10. The court noted other agency actions in which the government "took a look" at environmental consequences: (1) a draft EIS prepared in connection with uranium development in the area, (2) a generic EIS on uranium milling, (3) an administrative hearing at which plaintiffs unsuccessfully presented arguments to an Administrative Law Judge.

11. Other factors considered were the impending lack of domestic energy sources and the creation of employment through development of uranium production.

12. Atomic Energy Act, 42 U.S.C. § 2011 (1976).

13. No. 78-2416 at 24.

14. *Id.* at 12.

expenditures made by Mobil in reliance on the validity of the leases, and concluded that the defendants had suffered substantial prejudice as a result of the delay. Further, the court noted that the failure to prepare an EIS at the time of the lease sale was being effectively cured in a number of ways—particularly through the environmental assessment of the project and a draft EIS of uranium mining for the area.<sup>15</sup>

Finally, the court found that plaintiffs had failed to provide a basis for determination that a regional EIS for the San Juan Basin was required. Regional impact statements are required in only two instances: (1) when there is a comprehensive federal plan for the development of the region<sup>16</sup> and (2) where various federal actions in a region have a cumulative or synergistic impact on the region.<sup>17</sup> Currently, no comprehensive plan exists for the San Juan Basin region. The court remained unconvinced that the various federal actions in the region were so related as to require a comprehensive impact statement.<sup>18</sup>

The court stated further that even if a regional impact statement were required, plaintiffs could not succeed on the request for injunction. Since the environmental impacts had been adequately analyzed elsewhere<sup>19</sup> the court found no reason to enjoin the project pending the preparation of a regional statement, if one were required.

### CONCLUSION

Should plaintiffs prevail, the effect on uranium exploration and mining would be dramatic—almost half of the nation's uranium production would be delayed or effectively ended.<sup>20</sup> This consideration will continue to be influential when the case is heard on its merits. Ultimately, as the court points out, it appears unlikely that plaintiffs will be able to overcome their failure to provide a basis for determination that the lack of a regional EIS is based on a decision by defendants that was arbitrary, unreasonable or clearly erroneous.

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15. Other "effective cures" are listed in note 10 *supra*.

16. No. 78-2416 at 16.

17. *Id.*

18. Plaintiffs listed numerous federal actions taken or planned since 1970 in the San Juan Basin region. Though admitting that the number and variety of those activities appeared impressive, the court noted that they were implemented by six different federal agencies with different statutory programs and purposes. Further, the actions were taken or planned over a thirty year span, without any conscious over-all planning. *Id.* at 18.

19. See note 10 *supra*.

20. No. 78-2416 at 15.