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May 23, 2000

40-8907

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Re: Church Rock - Natural Resource Damages Issue

Dear Ms. Leavitt and Ms. Padilla:

This letter follows up our meeting in Santa Fe on March 3, 2000, where United Nuclear Corporation ("UNC") representatives presented technical justification for terminating certain operation and maintenance actions at the Church Rock facility (the "Facility") despite current and anticipated elevated concentration levels for TDS, sulfate and manganese in Zone 1 ground water outside of the (the "Facility") boundary. As we explained in the meeting, UNC anticipates that such constituents may remain elevated above "background"¹ levels that EPA has identified as applicable or relevant and appropriate requirements ("ARARs") in the Church Rock Site Record of Decision dated September 1988 (the "ROD"), as modified by NRC (NRC Evaluation of Background Water Quality at Church Rock, Aug. 14, 1996) and NMED (letter from Maura Hanning to UNC dated 1/6/98).

UNC has completed 17 years of corrective actions at the Facility including: source neutralization, source removal (1989), ground water extraction/evaporation and tailings reclamation. In the September 1998 Five-year Review Report, the USEPA concluded further ground water extraction in Zone 1 would be ineffective because all of the wells met the decommissioning criteria set forth in the ROD. EPA further concluded that part of the Zone 3 extraction system should be shut

¹Appropriate background concentrations have been a disputed issue at this site for many years. While UNC maintains that concentrations are currently at background levels, the EPA ROD sets forth lower levels as background levels. Although UNC reserves its rights to contest the issue of appropriate background levels, the purpose of this letter is not to revisit this issue.

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down for the same reason, and further recognized that the continued pumping of the remaining Zone 3 wells would be counterproductive because it would enhance the downgradient migration of seepage-impacted water to previously unimpacted areas. USEPA recommended that Alternate Concentration Limits (ACLs) or Technical Impracticability (TI) waivers be submitted to complete the corrective action process. UNC initiated the ACL and TI effort by completing a geochemical model of the system which shows that concentrations of the remaining constituents-of-concern are attenuated or controlled by natural processes. The continued operation of the extraction system will have no additional beneficial effect on achieving cleanup goals beyond the natural processes that are occurring. Therefore, Monitored Natural Attenuation (MNA) is also proposed as a component of the response activities at the Facility.

At our March 3 meeting, the State and the Navajo Nation indicated that they may raise claims for natural resource damages at the Facility under CERCLA, which claims have not yet been evaluated, and that these claims could be addressed as part of the Facility closure process. NMED and the Navajo Nation stated that they would like to link potential natural resource damages claims with their consideration of the ACL, TI or MNA components. As we expressed at the meeting, UNC maintains that there are absolutely no legal or factual bases for assertion of any claim, much less recovery, of natural resource damages at the Facility. UNC will vigorously contest any assertion of natural resource damages liability at Church Rock. We further emphasized that it is inappropriate to link claims for natural resource damages with our mutual objective of moving towards termination of response activities at the Facility. This letter outlines the bases for UNC's position on these issues.

1. Any State or Navajo Nation claims for natural resource damages under CERCLA are time barred by the applicable statute of limitations.

Under CERCLA, any claims by the State or the Navajo Nation for natural resource damages based on elevated concentrations of ground water constituents are time barred because more than three years (State claims) or five years (Navajo claims) have passed since completion of the remedial action (excluding operation and maintenance) at the Facility. See 42 U.S.C. §§ 9613(g)(1)(B) and 9626(d). With respect to State claims, CERCLA § 113(g)(1)(B) defines the statute of limitations applicable to natural resource damages actions as follows:

With respect to any facility listed on the National Priorities List (NPL) . . . , an action for [natural resource] damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities)

Id. With respect to Navajo Nation claims, CERCLA §126(d) provides:

no action under this chapter by an Indian Tribe shall be barred until the later of the following:
(1) The applicable period of limitations has expired. (2) Two years after the United States,

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in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this chapter.

Id.

In this instance, completion of the remedial action for ground water at the Facility occurred no later than 1991, thus triggering the CERCLA § 113(g)(1)(B) 3-year statute of limitations at that time. All ground water related activities carried out since that date, if not before, constitute operation and maintenance of the remedy.

The ROD identified the following components of the response action for the Facility:

- 1 Implementation of a ground water monitoring program;
- 2 Operation of existing seepage extraction systems in Zone 1 and Zone 3;
- 3 Containment and removal of contaminated ground water in Zone 3 utilizing existing and additional wells;
- 4 Containment and removal of contaminated ground water in the Southwest Alluvium utilizing existing and additional wells;
- 5 Evaporation of ground water removed from aquifers using evaporation ponds supplemented with mist or spray systems; and
- 6 Implementation of a performance monitoring and evaluation program.

See ROD § 6.1. According to EPA's monitoring report for the Facility and other available information, each component of the CERCLA remedial action had been constructed and was operational no later than 1991. See generally, U.S. EPA, Five-Year Review Report, United Nuclear Corporation Ground Water Operable Unit, McKinley County, New Mexico (Sept. 1998) (hereinafter the "Five-Year Review Report"):

- UNC completed installation of the required network of ground water monitoring and extraction wells at the Facility from 1989 to 1991 (Canonie, 1989 – Annual Review – 1989 Ground water Corrective Action Report)
- Zone 1 and Zone 3 seepage extraction systems had been constructed and were operational as of the issuance of the ROD in 1988.

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- UNC completed installation of the additional Zone 3 ground water extraction wells in 1991; and, by 1993, several had met the applicable decommissioning criteria and were shut down. See Five-Year Review Report at 9-10.
- UNC completed installation of all Southwest Alluvium extraction and monitoring wells by August 1991. Id. at 8-9.
- UNC completed construction of the evaporation ponds and spray systems in 1989. See Canonie (1989) As-built Report, Evaporation Pond Construction, Church Rock Site, Gallup, New Mexico.

UNC has been diligently performing the necessary operation and maintenance required to ensure the continued performance of the remedy from 1991 and earlier to the present date. CERCLA specifically excludes such operation and maintenance activities from any determination of when the completion of the remedial action occurred for the purposes of the running of the statute of limitations. See 42 U.S.C. § 9613(g)(1)(B). Thus, the statutory period for natural resource damages at the Facility began to run upon the completion of the remedial action on or before 1991, notwithstanding ongoing operations and maintenance activities. With respect to the State, the statute of limitations lapsed at the latest in 1994. With respect to the Tribe, the statute of limitations lapsed at the latest two years later in 1996, assuming that the United State's did not give notice to the Navajo Nation that it did not intend to pursue an NRD claim in its capacity as Trustee prior to 1994. Accordingly, any potential claims by the State and the Navajo Nation for natural resource damages are time-barred.

2. UNC has no natural resource damages liability because there is and has been no ground water natural resource amenable to a damage claim at the Facility.

Irrespective of the statute of limitations issue, UNC is not liable to the State or the Navajo Nation for natural resource damages in connection with elevated ground water constituent concentrations at the Facility because the ground water at issue cannot be the subject of a CERCLA natural resource damages claim.

Unlike the typical situation where the natural resource exists prior to the alleged release of hazardous substances, in this particular case there was no shallow ground water aquifer prior to the activity that resulted in the release of contaminants. According to the EPA, it was the discharge of water from the Church Rock Mine into the Pipeline Arroyo itself that gave rise to the ground water that is the subject of the current response activities. See Five-Year Review Report at 2, 4 ("historical data indicate that, prior to mining and milling operations, a shallow ground water aquifer did not exist

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in the area[;]" and "mine water that was discharged into Pipeline Arroyo beginning in 1969 . . . is the primary source of recharge to the formations in the site vicinity.")

Since there was no ground water before discharges from the mine began, there is no resource for which a natural resource damages action can be maintained.

The Department of Interior's ("DOI") regulations for conducting natural resource damages assessments (the "NRD Rule") provide that only "committed uses" of a natural resource may be considered in estimating the change from the baseline value of the resource. 43 C.F.R. § 11.84(b)(2). Thus, to recover compensable value damages under CERCLA, a resource must have been put to or planned for public uses "for which there is a documented legal, administrative, budgetary, or financial commitment established before . . . the release of a hazardous substance is detected." 43 C.F.R. § 11.14(h) (definition of "committed use"). Moreover, "[t]he baseline uses must be reasonably probable, not just in the realm of possibility. Purely speculative uses of the injured resource are precluded from consideration in the estimation of damages." 43 C.F.R. § 11.84(b)(2).

This regulation implements the holding of the D.C. Court of Appeals in Ohio v. U.S. Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989). The Ohio court upheld DOI's decision to use established or committed uses of a resource to determine value and to avoid speculative claims for resource service losses; according to the Court:

Viewed in this light, the "committed use" standard is an eminently reasonable construction of the [CERCLA] statute, because it avoids the need for unreliable, and likely self-serving, speculation regarding future possible uses.

Id. at 462. Thus, a natural resource trustee can only determine compensable value damages where the subject resource was committed to a current or documented future public use at the time of a release. In addition, documentation of committed uses must show that use was by the public and must be a matter of public record. See Preamble to NRD Rule, 59 Fed. Reg. 14262, 27695 (Mar. 25, 1994).

The State and Navajo Nation cannot recover compensable value natural resource damages from UNC because, among other things, ground water at the Facility was not committed to a current or future public use before UNC began discharging mine water in 1969. Because no shallow ground water resource existed prior to mine water discharges at the Facility, any commitment to a public use was not even possible. Therefore, no committed use of ground water existed at the Facility for the purpose of determining natural resource compensable value damages.

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The State and Navajo Nation are similarly precluded from recovering CERCLA restoration or rehabilitation damages for ground water contamination at the Facility. Simply put, there is no baseline condition to which the Facility's aquifers can be restored:

The NRD Rule specifically provides that:

Restoration and rehabilitation actions are those actions taken to return injured resources to their baseline condition, as measured in terms of the physical, chemical, or biological properties that the injured resources would have exhibited or the services that would have been provided by those resources had the . . . release of the hazardous substance under investigation not occurred.

43 C.F.R. § 11.82(b)(1)(i)

Because "a shallow aquifer did not exist" at the Facility prior to the initiation of mining and milling operations, which is when the release of constituents of concern began, see Five-Year Review Report at 2, there is no reference point to serve as a measure of natural resource injury. Thus, it is legally and logically impossible to return the ground water resource to its baseline condition. Consequently, no basis exists for the State or the Navajo Nation to assert claims for restoration of ground water at the Facility.²

3. Injury to ground water has not occurred because background conditions make the Facility ground water unsuitable for a public water supply.

Even if the State and Navajo Nation were able to identify a baseline condition and committed use for Facility ground water, they still could not assert natural resource damages claims against UNC because they cannot show that, but for the release of hazardous substances, the resource would have been potable. To collect natural resource damages under the NRD Rule, a trustee must first determine whether an injury to a natural resource has occurred. 40 C.F.R. § 11.61(a). Demonstrating an injury to ground water resources requires proof of a change in:

- (i) Concentrations of substances in excess of drinking water standards, established by sections 1411-1416 of the SDWA [Safe Drinking Water Act, 42 U.S.C. § 300f et seq.], or by other Federal or State laws or regulations that establish such

² UNC further notes that it has undertaken extensive ground water response actions at the Facility, and that assessing damages for ground water restoration would be duplicative and violate the CERCLA §107(f)(1) "double recovery" prohibition.

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standards for drinking water, *in ground water that was potable before the discharge or release*;

(ii) Concentrations of substances in excess of water quality criteria, established by section 1401(1)(d) of the SDWA, or by other Federal or State laws or regulations that establish such criteria for public water supplies, *in ground water that before the discharge or release met the criteria and is a committed use, as the phrase is used in this part, as a public water supply*;

(iii) Concentrations of substances in excess of applicable water quality criteria, established by section 304(a)(1) of the CWA [Clean Water Act, 33 U.S.C. § 1251 et seq.]1401(1)(d) of the SDWA, or by other Federal or State laws or regulations that establish such criteria for domestic public water supplies, *in ground water that before the discharge or release met the criteria and is a committed use, as that phrase is used in this part, as a domestic water supply*; or

(iv) Concentration of substances sufficient to have caused injury . . . to surface water, air, geologic or biologic resources, when exposed to ground water.

40 C.F.R. § 11.62(c)(1) (emphasis added).

The ROD identified the mine discharge water (the post-mining, pre-tailings water) as the background water for the site. Even if the State or Navajo Nation used this background water as the reference or baseline ground water resource for identifying natural resource injury at the Facility, no natural resource injury could be identified since the background water does not satisfy the above-listed basic requirements in the NRD Rule for potability, pre-release attainment of water quality criteria, and committed use. As shown in the following table, background concentrations of nitrate, sulfate, TDS and manganese each exceed the NMED permitting and ground water standards intended “to protect all ground water of the state of New Mexico . . . for present and potential future use as domestic and agricultural water supply.” 20 N.M.A.C. Ch. 6.2, § 3101, 3103.

Constituent	EPA Background Concentration ³	NRC/ NMED Background ⁴	§ 3103 NMED Ground Water Standard ⁵
Nitrate	30.0 mg/l	190 mg/l	10.0 mg/l
Sulfate	2,160.0 mg/l	2125 mg/l	600.0 mg/l
TDS	3,170.0 mg/l	4800 mg/l	1000.0 mg/l
Manganese	2.6 mg/l	N/A	0.2 mg/l

Background sulfate, TDS and nitrate concentrations exceed applicable ground water standards by at least three-fold; the background manganese concentration exceeds the standard by more than 10-fold. Therefore the background water is not “ground water that before the discharge or release met the [State] criteria and is a committed use” as a public or domestic water supply. 40 C.F.R. § 11.62(c)(1)(ii, iii). In addition, background water was not “potable before the discharge or release,” since the background nitrate concentration exceeds the state human health standard for nitrate. 40 C.F.R. § 11.62(c)(1)(i). Lack of potability is further demonstrated because the background nitrate concentration exceeds the federal maximum contaminant level for nitrate (10.0 mg/l, 40 C.F.R. § 141.62), defined as the “the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.”⁶

³ EPA Record of Decision

⁴ NRC (1996), NMED Letter to UNC (1/6/98)

⁵ See 20 N.M.A.C. ch. 6.2, § 3103.

⁶ Moreover, the background nitrate concentration exceeds the value of 20 mg/l, which, according to the national primary drinking water regulations may be allowed in a non-community water system at the discretion of the State if the supplier of water demonstrates to the satisfaction of the State that:

- (1) Such water will not be available to children under 6 months of age; and
- (2) There will be continuous posting of the fact that nitrate levels exceed 10 mg/l and the potential health effects of exposure; and
- (3) Local and State public health authorities will be notified annually of nitrate levels that exceed 10 mg/l; and
- (4) No adverse health effects shall result.

40 C.F.R. § 141.11(d).

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These comparisons show that background water at the Facility does not satisfy the threshold water quality requirements necessary for defining a natural resource injury to ground water consistent with the NRD Rule. The prior discussion further shows that there is no committed use for impacted ground water at the Facility. Accordingly, because the State and Navajo Nation cannot identify an injury to the ground water resource at the Facility under the NRD Rule, they cannot assert CERCLA natural resource damages claims against UNC.

4. The State and Navajo Nation cannot assert natural resource damages based on releases of sulfate and TDS because these are not hazardous substances under CERCLA.

Liability under CERCLA § 107(a) is strictly limited to situations where there has been a release of a hazardous substance.⁷ CERCLA § 107(a)(4)(C) further provides that natural resource damages must result from a release of a hazardous substance. Without a release of a hazardous substance, CERCLA NRD liability cannot accrue.

CERCLA specifically defines “hazardous substances” in § 101(14), and requires EPA in § 102(a) to promulgate regulations designating all elements, compounds, mixtures, solutions and substances that are to be considered hazardous substances under the Act. EPA promulgated such regulations at 40 C.F.R. § 302.4. The accompanying table to the regulations does not list sulfate or TDS as CERCLA hazardous substances. Therefore, the State and Navajo Nation will be unable to assert natural resource damages claims, to the extent such claims allege injury based on ground water releases of these constituents.⁸

⁷ In contrast to CERCLA § 104(a), which permits a removal or other remedial action whenever there has been a release of any hazardous substance *or* “any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare,” CERCLA § 107(a) imposes liability only for releases of hazardous substances.

⁸ UNC also is not liable for natural resource damages at the Facility because any damages that could be claimed were specifically identified as an irreversible and irretrievable commitment of natural resources in Section 5.3 and 5.6 of the Applicant’s Environmental Report on Church Rock New Mexico Uranium Mill & Mine (1975). Section 5.11 of the report presents a compilation of the environmental approvals and consultations.

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Conclusion

We appreciate the opportunity to demonstrate that UNC has no liability for natural resource damages at the Facility. The analysis above is not intended to be exhaustive; rather we wanted to provide you with the reasoning behind our firmly held belief that NRD and site closure should not be linked at Church Rock. UNC fully intends to cooperate in moving towards our stated mutual goal of terminating response activities at the Facility. We respectfully submit that there is no reason to link alleged natural resource damages with our technically justified requests to terminate operations at Church Rock in accordance with the approach outlined in UNC's May 18, 2000 "procedural roadmap" correspondence. We request your concurrence that UNC be allowed to proceed with that approach, and that natural resource damages claims not be linked to the termination process.

Sincerely,



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for
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RWL/cw

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