No. 07-9505

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EASTERN NAVAJO DINÉ AGAINST URANIUM MINING, SOUTHWEST RESEARCH AND INFORMATION CENTER, MARILYN MORRIS AND GRACE SAM,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES

Respondents,

and

HYDRO RESOURCES, INC.,

Intervenor-Respondent.

BRIEF *AMICUS CURIAE* OF THE NAVAJO NATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

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The Navajo Nation urges this Court to rehear this matter. This case is extraordinarily important because it will determine whether the NRC may ignore known health risks in licensing decisions nationwide under its new interpretation of 10 C.F.R. § 20.1301(a)(1). As the dissent points out, the majority's decision in this case unjustifiably jeopardizes the health and safety of the Navajo people living on and near the proposed mine site. The NRC's and the majority's interpretation violates the central principles of President Reagan's formal Guidance on which the regulation was based and contravenes numerous decisions of this Court and the Supreme Court governing the proper construction of statutes and regulations.

I. BACKGROUND

The NRC granted a license to Hydro Resources, Inc. ("Hydro") to process uranium on two tracts of land. Hydro owns one of the tracts in fee ("Section 8 Land"); the adjacent tract, the "Section 17 Land," is held in trust by the United States for the Navajo Nation, with a reservation of minerals. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-52 (10th Cir. 2000).

The people living on and near this land are members of the Navajo Nation. *Morris v. NRC*, 598 F.3d 677, 683 (10th Cir. 2010). The land is located within the Church Rock Chapter, the local unit of Navajo government established by the United States. *HRI*, 198 F.3d at 1249. Of the 2802 residents of the Church Rock Chapter, 2,737 are Navajo.[1]

"Uranium mining has left the Navajo Nation with a legacy of over 500 abandoned

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[1] *Hydro Resources, Inc. v. U.S.E.P.A.*, 562 F.3d 1249 (10th Cir. 2009), *reh'g granted*, No. 07-9506 (argued Jan. 12, 2010), R13b, App. 246, 261, 135, 152-53. The Navajo Nation requests that this Court take judicial notice of the Record in this related case. *See St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

uranium mines (AUMs), four inactive milling sites, a former dump site, contaminated groundwater, structures that may contain elevated levels of radiation, and environmental and public health concerns." Bureau of Indian Affairs, *et al.*, *Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Five-Year Plan* ("*Five-Year Plan*") 4 (June 9, 2008) (submitted to House Committee on Oversight and Government Reform). The Church Rock area was the location of the largest release of radioactive contamination in the history of the United States. *See UNC Resources, Inc. v. Benally*, 514 F.Supp. 358, 360 (D.N.M. 1981) (concerning the "Church Rock spill" of 94 million gallons of radioactive sludge). The Section 17 Land itself includes the abandoned Old Church Rock Mine, contaminated by "dust and rocks apparently lost from trucks hauling the [uranium] ore from the site" emitting high levels of airborne radiation. *In re Hydro Resources, Inc.*, CLI-06-14, 63 NRC 510, 514 (2006); J.A. 226, 827; *Morris*, 598 F.3d at 683.

The companies operating in Navajo country failed to clean up after themselves. *Morris*, 598 F.3d at 683; *id.* at 705 (Lucero, J., dissenting). But federal agencies with authority to mandate clean-up have also defaulted in their duties. In this case, the NRC elevated the industry's interests over those of the Navajo public, interpreting its regulations in a manner contrary to the governing statute and basic rules of construction.

II. THE MAJORITY'S ERRONEOUS READING OF THE REGULATION IMPLICATES ISSUES OF NATIONAL SIGNIFICANCE.

The governing statute requires the NRC to deny a license application if granting it "would be inimical to . . . the health and safety of the public." 42 U.S.C. § 2099. Under that

statute, the NRC promulgated a regulation, requiring licensees to conduct operations so that

> [t]he total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contributions from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released under § 35.75, from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage . . . .

10 C.F.R. § 20.1301(a)(1). The question here is whether the NRC correctly interpreted that regulation to add another exclusion from "dose contributions" – radioactive dose contributions from man-made, non-background, sources of contamination located throughout the Section 17 Land. NRC decided that it could exclude those dose contributions. The result: the Navajo people will experience "total radiation levels nine to fifteen times the permitted regulatory limit." *Morris*, 598 F.3d at 705 (Lucero, J. dissenting).

NRC's consistent interpretation of the statute, from 1957 through at least 1991, required consideration of "both unlicensed and unregulated sources of radiation in its calculation" of the dose contributions, along with the licensed sources of radiation. *Id.* at 688. The majority decided that 1991 regulatory amendments changed this policy, *id.*, but in fact the 1991 regulations continued to require consideration of both licensed and unregulated sources, with limited exceptions identified with particularity in 10 C.F.R. § 20.1301(a)(1). The majority's interpretation of § 20.1301(a)(1) impermissibly contravenes the statutory commitment to protect public health, is inconsistent with the text and purpose of the regulation, and renders superfluous the narrow and specific exclusions from dose

contributions set forth in that regulation. *Morris*, 598 F.3d at 705-08 (Lucero, J., dissenting).

The 1991 regulations were focused on public health and safety, not industry promotion. They were intended to "reflect changes in the basic philosophy of radiation protection" and to conform to President Reagan's "Radiation Protection Guidance to Federal Agencies for Occupational Exposure" ("Guidance"), 52 Fed. Reg. 2822 (1987), itself based on the Recommendations of the International Commission on Radiological Protection ("ICRP Report") (Publ. No. 26 Jan. 13, 1977) (Addendum hereto). *See* 56 Fed. Reg. 23,360 (1991). The Guidance repeatedly endorsed the "ALARA" principle, to reduce exposures to levels that are "as low as reasonably achievable." *E.g.*, Guidance, 52 Fed. Reg. at 2826. The 1991 regulations embraced that philosophy. *See, e.g.*, 56 Fed. Reg. at 23,366-68.

Contrary to the NRC's present view that it can ignore man-made sources of radiation under the licensee's control, the ICRP Report on which both the Guidance and the 1991 rules were based provides that dose assessments "must . . . take into account not only the radiation resulting from the practice under consideration but also the total exposure resulting from all the practices that contribute to general exposure." ICRP Report at 38, ¶ 213. While the narrow carve-outs in § 20.1301(a)(1) for true background radiation[2] and for medical and

[2] The Reagan Guidance terms this "normal background radiation." *E.g.*, 52 Fed. Reg. at 2833. Judge Lucero's dissent negates any contention that the radiation caused by the industrial debris left on the Section 17 Land is "background radiation." *Morris*, 598 F.3d at 707 (citing 10 C.F.R. § 20.1003 (defining same)); *accord* ICRP Report at 18, ¶ 89 ("dose-equivalent limits have not been regarded as applying to, or including, the 'normal' levels of natural radiation, but only as being concerned with those components of natural radiation that result from man-made activities or in special environments.").

sanitary sewerage applications are consistent with the principles of the Guidance, *see* 52 Fed. Reg. at 2833; *accord* ICRP Report at 18, ¶¶ 89, 91-93, NRC's *ad hoc* addition of a wholly different and expansive exception not stated in § 20.1301(a)(1) is contrary to the ICRP Report, at 30 ¶ 161 ("For the purposes of this report occupational exposure comprises *all* the dose equivalents and intakes incurred by a worker during period of work (excluding those due to medical and *natural* radiation).") (emphases added); the Guidance, 52 Fed. Reg. at 2833 (ICRP's dosimetric conventions and models "may be used for determining conformance with these recommendations"); and the NRC's consistent practice under the Administrative Procedures Act of providing notice and the opportunity for the public to comment on even the most minor changes to § 20.1301(a)(1), *see, e.g.*, 67 Fed. Reg. 62,872 (2002); *see also* 59 Fed. Reg. 30,724 (1994); 60 Fed. Reg. 4872 (1995); 60 Fed. Reg. 48,623, 48,625 (1995); 62 Fed. Reg. 4120, 4133 (1997); 63 Fed. Reg. 43,516 (1998); 63 Fed. Reg.43,580 (1998); 67 Fed. Reg. 20,250, 20,370 (2002) (all concerning, in part, medical exclusion language in § 20.1301(a)(1)).

NRC's present construction of this regulation further contravenes the expressed regulatory intent in the 1991 rule making, to include in the computation of radiation doses all "doses from radiation and radioactive materials under the licensee's control." *See* 56 Fed. Reg. 23,360, 23,374 (1991). Its definition of "public dose"complementing the public's dose limits in § 20.1301(a)(1) included "the dose received by a member of the public from exposure to radiation or to radioactive material released by a licensee, *or to another source*

of radiation either within a licensee's controlled area or in unrestricted areas." 56 Fed. Reg. at 23,393 (emphasis added). 10 C.F.R. § 20.1003 (2009) now defines "public dose" as including exposures "to any other source of radiation under the control of a licensee". The area "under the control of a licensee" defines the "licensed operation" geographically.

Hydro owns part of the mine land in fee and holds surface use rights to the Section 17 land. *HRI*, 198 F.3d at 1231. The radioactive materials strewn on Hydro's lands are clearly under its "control." *See also* ICRP Report at 16, ¶ 81 ("When a source of exposure is subject to control it is feasible to apply the Commission's system of dose limitation."); *id.* at 30, ¶ 161 (quoted on page 5, *supra*, with emphasis added).

The Guidance was also extremely sensitive to the need to protect the unborn without violating the employment rights of women of child-bearing age. 52 Fed. Reg. at 2828-29, 2832. However, if the NRC's and majority's rulings are upheld, women of childbearing age need not apply at Hydro's facility, because pregnancy is often not detected for several weeks and because the total man-made contamination at the facility during that period would exceed by orders of magnitude the limits considered safe for fetuses. *See* 46 Fed. Reg. 7836, 7839 (1981) ("we believe that the maximum dose to the unborn should be a factor of ten below the maximum permitted adult workers in any year"); *id.* at 7842.

NRC's and the majority's interpretation of § 20.1301(a)(1) violates another rule of interpretation applicable in cases involving Indian lands. In exchange for Navajo recognition of the United States' "sole and exclusive right of regulating the trade and intercourse" with

the Navajo, the United States agreed to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo. *Treaty with the Navajo Tribe of Indians*, Arts. 3, 11, 9 Stat. 974, 974-75 (1850). This language indicates the Government's "willing assumption" of trust duties. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 n.1 (10th Cir. 1984) (Seymour, J., concurring and dissenting), *adopted as majority op. as mod.*, 782 F.2d 855 (*en banc*), *supp.*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986). One of the most important components of the trust duty is the protection of tribal trust property such as the Section 17 Land. *HRI*, 198 F.3d at 1245. All agencies of the federal Government, including the NRC, share this distinctive obligation of trust to the Navajo Nation. *HRI*, 198 F.3d at 1245; *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995).

The treaty provision and trust relationship give rise to the canon of construction that statutes be construed generously in favor of the Indian tribes. *See Montana v. Blackfeet Indian Tribe*, 471 U.S. 759, 766 & n.4 (1985). Because the canons for statutory construction apply to the interpretation of regulations, *see Supron*, 728 F.2d at 1568; *HRI*, 198 F.2d at 1245, an agency must "consider its strict fiduciary obligation when interpreting regulations that directly affect its 'administration of Indian lands.'" *HRI*, 198 F.3d at 1246 (citation omitted). Thus, if an agency regulation may be construed reasonably in two ways, the agency must adopt the interpretation that is most consonant with the unique federal/tribal relationship. *Supron*, 728 F.2d at 1569. The NRC neither considered its trust duty nor interpreted the governing regulation in conformity with these principles.

The general rule requiring deference to an agency's interpretation of its governing authorities is subordinate to the canon of interpretation favoring Native Americans. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997); *cf. Morris*, 598 F.3d at 684-85 (deferring to NRC's interpretation). The interpretation of § 20.1301(a)(1) that protects Navajo trust land and the "prosperity and happiness" of the Navajo is clearly a permissible one. The NRC's contrary *ad hoc* interpretation, adding a major exclusion from its dose contribution calculations in licensing decisions, is inimical to the health and safety of the public in the Church Rock area and nationwide and should be rejected by this Court on rehearing.

III. CONCLUSION

Rehearing by the panel or by this Court *en banc* should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief *Amicus Curiae* of the Navajo Nation in Support of Appellants' Petition for Rehearing and Rehearing *En Banc* was filed with the Court's electronic filing system, where it is automatically provided to those counsel registered with the system, and also served on counsel of record by placing same in the United States mail, first-class postage prepaid and addressed as follows, this 29th day of April, 2010:

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