

June 24, 1999

SECY-99-164

FOR: The Commission

FROM: John F. Cordes, Jr. /s/
Solicitor

SUBJECT: LITIGATION REPORT - 1999 - 3

El Paso Natural Gas Co. v. Neztosie, No. 98-6 (U.S. Supreme Court, decided May 3, 1999)

This case raised complex jurisdictional questions under the Price-Anderson Act. The underlying lawsuits were filed in Navajo Tribal Courts and claimed damages against the owners of abandoned uranium mines and mills for claimed adverse health effects. The owners sought a federal court injunction against continuation of the tribal court suits on the ground that "nuclear tort" claims arise exclusively under the federal Price-Anderson Act and lay outside the jurisdiction of tribal courts. The lower courts refused injunctive relief and required the owners to exhaust their tribal court remedies. The Supreme Court then took up the case. The Solicitor General filed an amicus curiae brief urging reversal.

The Court, in an opinion by Justice Souter, reversed, embracing the position taken in the government's amicus brief. The Court decided that the usual doctrine requiring defendants in tribal court to exhaust tribal court remedies does not apply in the Price-Anderson Act context, which preempts state and tribal law. The Court held that the mine and mill owners were entitled to insist that federal courts, not tribal courts, decide the question whether plaintiffs' claims in fact fall under the Price-Anderson Act.

We worked closely with the Department of Justice and the Department of Energy on the government's amicus brief and on the oral argument in this case.

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Thermal Science, Inc. v. NRC, No. 98-3147 (8th Cir., stay order issued May 28, 1999)

In this longstanding lawsuit, Thermal Science, Inc. (TSI), seeks to derail NRC consideration of a \$900,000 civil penalty for alleged misstatements regarding its Thermo-Lag fire retardant product. Last summer the district court dismissed the lawsuit as premature, and TSI appealed. Both the district court and the court of appeals refused to stay further administrative proceedings pending the appeal. In May, however, after the NRC staff had completed its review of TSI's response to the proposed civil penalty, and decided to impose it, subject to an opportunity for an ASLBP hearing, TSI returned to the court of appeals for a stay and this time the Court granted it.

Thus, further administrative proceedings are stayed until the court of appeals decides TSI's pending appeal. The court heard oral argument on the appeal in March, and a decision therefore could come at any time.

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Eastern Navajo Dine Against Uranium Mining v. NRC, Nos.99-1190, 99-1194, 99-1195, 99-1196 (D.C. Cir., filed May 20 and May 25, 1999)

These four lawsuits all challenge partial initial decisions issued by the presiding officer in the pending Hydo Resources adjudication. All four decisions currently are the subject of petitions for review pending before the Commission. The lawsuits, therefore, are in our view premature, and we shortly will move to dismiss them.

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