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Response to The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics

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COMMENT

The following is in response to a draft article entitled *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics* by Noah Sachs. This response was edited by Wendell Chino, President of the Mescalero Apache Tribe.

We would like the readership of the *Natural Resources Journal* to note that none of the Members of the Mescalero Apache Tribe, their legal counsel, project negotiators or other parties involved in the interim spent fuel project were ever contacted by Mr. Sachs. It appears that only opponents to the project have apparently been interviewed and quoted in this article. Mr. Sachs has never been to our Reservation. A question of objectivity arises in this text.

Mr. Sachs raises some issues in this piece we find laudable; others we find objectionable. He is to be commended for recognizing the broken promises to both Indian tribes and the nuclear utility industry on the part of the government. Whether in treaties with Indian tribes or in subscribing to the law laid out in the Nuclear Waste Policy Act of 1982, the federal government has failed to adequately bear its responsibilities.

"Paternalism" is another key factor that can be unwanted, unmerited or otherwise distasteful to an ethnic minority group, and we appreciate Mr. Sachs' addressing it. Mr. Sachs makes quite a few other valid points. Yes, there was dissent within the Tribe about this project; we expected that. Yes, utility customers have to pay twice for storing spent fuel. Yes, sometimes people try to take advantage of the Indians. Yes, the Tribe doggedly pursues and aggressively negotiates prospective business ventures. Yes, we should be free to consider and pursue economic options on our own. Yes, there is tremendous stigma in the public perception of nuclear waste.

What is most disconcerting is that a study about our project does not include our input. If we are perceived as the supposed victims of environmental injustice, or our community disproportionately harmed, why not place the Tribe's point of view in the study alongside that of the "analysts [opposed to the project]" in the context of a history of oppression of indigenous peoples . . . "Environmentalists" and other "experts" are quoted at length, while the original environmental stewards of Americans lands, if proponents of the project, are not interviewed by Mr. Sachs."

So much of the research in this study is out of date. It appears references to the Tribe and its leadership are from previously erroneously published information. Is this study really more of a dated literature review with very selective interviews? Why, for instance, quote a former Governor and his aide, when they've been out of office since 1994? To

demonstrate the political wisdom of said governor who also told federal judges "a promise is not an obligation"? A former governor who refused our invitation to look at interim dry storage first-hand? Has Mr. Sachs seen interim dry storage first-hand?

As for the alleged lack of outreach or information, we beg to differ. Every federal and tribal employee got a day off before the referendum to attend an all-day meeting on the project. Dozens of opponents and proponents took field trips to interim storage sites across the country before and after the referendum. Seeing is believing, and most of the opponents returned from these trips in favor of the project. Even *after* the negotiations with the utility consortium broke down, the Tribe took, at our own expense, more than a dozen elected and appointed state and local officials on a site visit to a spent fuel storage facility in Virginia.

As for information about the negotiations, there is no business in the world that conducts all of its negotiations in the public area. To do so would render both parties ineffectual. Nevertheless we were fully aware of the tremendous scrutiny that would come into play once the project went into the public domain of the NRC licensing process—*results* of said negotiations would be disclosed in detail at that time.

Do the readers of this publication honestly believe that we Indians are so poor and pathetic, our leadership so greedy and dictatorial, as to risk the health and safety of our people? Do you believe we would deliberately contaminate what little remains of our ancestral homelands? Do you believe we would be so naïve as to pursue a private nuclear storage initiative without benefit of expert advice? Would we compromise the tens of millions of dollars in tourism we generate annually for the local economy? Would our Tribal members follow their leaders into the wolves' den like sheep, in this age of free press and political correctness, too threatened and intimidated to speak for themselves? Of course not.

There was no coercion on the part of the Tribal leadership in the referendum process. Legally, it was not necessary to have a referendum, and even in the face of a contrary outcome, the Tribal Council could have proceeded with the project. But that's not our way. We wanted to determine how tribal members felt about the project.

The assertion that "the governmental structure of the Tribe was not conducive to true democratic decision making" is unfounded. We know people are skeptical of election fraud or abuse, so in order to assure fairness we invited other Apaches in the U.S. as neutral observers. And we appointed an avowed opponent of the project to the Elections Commission.

The first vote went against the project, despite the Tribal Council's efforts to inform the electorate. Why? Tribal members were

frightened by misinformation distributed against the project. Too bad Mr. Sachs could only interview those Indians and non-Indians who were paid by outside activist groups to oppose the project, rather than the average voters who had just received a video depicting gruesome footage of Chernobyl's reactor meltdown, as if that had any bearing on the spent fuel storage facility we had under consideration. There is no relevance between Chernobyl's reactor and interim spent fuel storage. Of course, had the Tribal leadership been as controlling and dictatorial as opponents imply, why would demonstrators or anti-nuclear activists have ever been allowed on the Reservations?

Such scare tactics worked at the eleventh hour. That was a temporary reaction however. The long term impact left tribal members with the impression they had been lied to-and it was that broken trust of being lied to by outsiders that led them to pursue a second referendum.

Mr. Sachs states that "building community support through honest dialogue has been found to be vital in cases of facility siting." The Mescalero Apache Tribe could not agree more. When evidence of the aforementioned tactics became apparent, discovered by the other Apache people we brought in as neutral observers, the tribal membership saw that their vote had been tampered with by outsiders as well as tribal members. They wanted more information and they wanted another vote. Allegations of coercion and intimidation are partly true, but it was on the first vote and due to intervention on the part of paid anti-nuclear activists.

Mr. Sachs further contends that "The Mescalero decision making process should be idealized as consensual, deliberative democracy". Outsiders not aware of the governmental and traditional structures of tribal governments should be wary not to overstate their positions. To be sure, tribes do not have exactly the same electoral process used throughout the United States, but neither do we operate as many of the Indian pueblos in this state. To condemn us without factual basis or understanding of our traditions, history and methods of communication is unacceptable.

The petition for a new vote was led by the younger generation of the Tribe, the group that would live to see the project through fruition. Tribal members saw another video of their friends and neighbors on site visits looking firsthand at dry storage (not reactor) technology. It was on these site visits that many opponents became proponents of the Mescalero project. Had Mr. Sachs' information been up-to-date he would know that former opponent Donalyn Torres later became a proponent. The outcome of the second referendum was due to better education on the project. If anyone bothered to ask the average Tribal voter they would tell you they resent any implications to the contrary.

Nobody lost their jobs for opposing the project. Nobody lost housing opportunities for opposing the project. Some of our project principals are *still* waiting for housing, there just plain aren't enough homes for our tribal members. These are tired rumors perpetuated by people, even our fellow Tribal member Rufina Laws, who were paid by anti-nuclear activists to oppose the project.

Ms. Laws, who is referred to frequently in this text, has not lived on the Reservation in 20 years and was being paid by outsiders to propagate information to derail the project. Does the phrase "conflict of interest" mean anything? Mr. Sachs' typo in his draft about a "sold" core of opposition within the Tribe has an enlightening double entendre to it.

Ms. Laws also contends that "the Tribe is being actively obligated to agreements and contracts without the consent of the people." No such thing. The Letter of Intent had no legally binding status, it was never signed, and no one representing the Tribe, its administration or its Council signed any contracts of any kind before or after January 1995. How does one make sense out of reference that the Tribe signed (we did not) a Letter of Intent even though it was not disclosed to us? What do these assertions mean for fact checking?

We had our reasons for not signing the Letter of Intent, one of which was precisely the fact that it provided for a Board of Directors with a majority vote of the utilities. We also would not sign anything that would pass the ownership or title of the spent fuel to the Tribe at any time. Nor would we permit any extensions to the temporary life of the project—we would not allow the project to exist beyond 40 years. We *demand*ed that the project only be temporary—short term—and without bulletproof guaranties we would not pursue it. Period.

Sachs is in error when he says that our facility would have stored more than half the spent fuel in the United States. Even at its peak capacity 20 years from now the Mescalero facility would only hold 33-40 percent of the nation's commercial spent fuel from domestic utilities. The high level waste from the military and national laboratories would need to be stored elsewhere.

In another citation in his text, Mr. Sachs writes, "Some . . . say the federal government had a role in making the tribes poor . . . the proper question is . . . whether the federal government should take action to alleviate tribal poverty . . ." Are we supposed to continue to wait around for the federal government to build our housing, roads, sewers, hospitals and so forth, or might we be wiser to pursue our own economic independence? Do the rumors about the mythical check to the Indians still persist?

Probably the most offensive comment is "there are serious questions about the advisability of such a facility being owned by an Indian tribe with little experience with nuclear waste." The comment borders on a new definition of environmental racism.

Safety was the number one prevailing demand of the Tribe in this project. Safety is the reason we decided to pursue the project. Don Hancock, (an avowed opponent of the project interviewed for the study, naturally), was asked by the Governor's Science Advisor at a State of New Mexico public hearing (yes, there were hearings and meetings) on October 24, 1995, "Is dry storage of spent fuel safe?" Hancock's answer, without edification or caveat, was a simple "yes."

"Potential harm to communities that accept facilities such as an MRS (sic-the acronym MRS went out with DOE's sponsorship three years ago) can be mitigated by retaining the primacy of technical and safety criteria in the selection process rather than using cost as the sole or even primary criterion," states Sachs. Thank you, we agree one hundred percent.

We hired independent experts in the fields of nuclear storage and transportation, people with no ties to, or interests in, the utility industry. A tribal member who is a civil engineer returned to the Reservation as another check and balance for the Tribe's interests. Legal experts, financial advisors and even "Wall Street" expertise were all retained to represent the Tribe's interests. The integrity and safety of the project, with all of its complex issues, was not jeopardized in any way. This was our mandate to the professionals we retained to represent us in areas where we did not possess the necessary expertise or credentials to represent ourselves.

From drafting the RFP, to interviewing and selecting the engineering and environmental firms, to consultations with the Nuclear Regulatory Commission, the Tribe was involved in every aspect of planning and negotiating the ownership and operation of such a facility. Using our sovereign status to cut corners or relax safety standards was never even a remote possibility, as careful investigation into the project would have revealed. While we had our differences with the utility consortium, the issue of complete compliance with all existing and future NRC licensing, inspection, rules, regulations, policies and procedures was never an issue between us. A private project does not mean one that is unregulated or unsupervised.

Our project provides a temporary solution to a national problem. Imagine how many environmental experts would be inconvenienced by shutting off their computers due to lack of electricity. If nuclear power plants are decommissioned because they can't store fuel, have these "experts" already built the solar power plants to accommodate peoples' needs? We Indians don't intend to wait around for the government to fix all our problems-we've got a lot of experience holding our breath for that.

No. Nuclear waste is purely a political football. We saw a need for industry and government alike and looked to solve it. At a profit, of

course. Still the private venture would have cost much less, not because of shortcuts (there would be none), but because government projects tend to be bloated. We helped set an economic standard for this type of project—a market standard that responsible policymakers looking at cost efficiencies would want to use in constructing a government project.

It is apparent the federal government cannot meet its deadlines for interim or permanent storage, and we saw a lot of financial, educational, employment, training, manufacturing, housing and infrastructure opportunities from capitalizing on this delay.

When Mr. Sachs brings up the notion that New Mexico has done its "fair share" in the nuclear business, this has nothing to do with the Mescalero Apache Tribe. Perhaps the State doesn't consider these other projects a burden but rather the State "shares" in tremendous economic benefits from such nuclear-related projects. Politicians on both sides of the aisle lobby to keep Los Alamos and Sandia labs and Kirtland Air Force Base alive without a peep about where their nuclear waste is headed. Besides, what economic benefit does the Mescalero Apache Tribe derive from these projects? Our share is zero, while those surrounding communities enjoy tremendous economic growth and soaring property values. It was Senator Jeff Bingaman who halted the compensation plan DOE would have given the state and local governments from the MRS if it had moved forward as a federal project. "Harms without compensation" complaints should be taken up with him. Nobody bothered to ask about the State's benefit package the Tribe intended to put into place as part of our private initiative.

As for New Mexico not creating nuclear waste because we have no commercial utility reactors, we still benefit from electricity supplied by out-of-state nuclear utilities through the grid. In fact, Public Service Company of New Mexico is a part owner of the Palo Verde Nuclear Plant in Arizona.

We could go on and on, tit-for-tat, with so many of the flawed assumptions made in this "study." The bottom line is nobody tried to force this project down our throats. We contribute millions into the state and local coffers by the economic development we have pursued over the years. Because we choose to protect our sovereignty and become more self-sufficient, we could be viewed as "uppity,"

Truth is, the state and federal governments tend to recognize tribal sovereignty only when it best suits them. Mr. Sachs as much as says so in the subheading "Exceptions to the Rule—When Paternalism May be Justified . . .". We have had to fight for everything we've got, amid broken promises, legal battles, and being "should upon" as Ram Dass puts it, by those for or against us. Even our efforts to pursue "nice" projects like hotels or the successful Ski Apache that our neighbors base their economy on, are confronted with challenges. We get upset when

outsiders lie to us as they did when they promised our people a Chernobyl-like nuclear meltdown. And we get upset when outsiders try to use us as either "enemies" or "underdogs" to meet their political agendas.

Paternalism is alive and well, decades after the White man took over our ancestral lands. We got a little piece of land that is still in jeopardy of being chipped away by threats to our sovereignty. The Mescalero Apaches are a proud and accomplished Tribe-and until people have taken an impartial view from the walk in our moccasins-it would seem we will never have the equality reserved for other U.S. citizens.

President Chino was re-elected to his post by a wide margin in November 1995. His opponent in the presidential race, Fred Peso, characterized the elections as fair.