

NOTE

IN SEARCH OF A REMEDY TO THE NUCLEAR STORAGE CONUNDRUM: *WESTERN SHOSHONE NATIONAL COUNCIL V. UNITED STATES*

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I. INTRODUCTION

Few laws cause as much public outcry as those involving disposal of radioactive nuclear waste. This case note discusses the recent United States District Court of Nevada decision in *Western Shoshone National Council v. United States*.¹ Specifically, the note analyzes the Shoshone Indian Tribe's (Shoshone or Western Shoshone Nation) claim that an 1863 Treaty with the Western Shoshone, The Treaty of Ruby Valley—which provides the land of the Shoshone tribe shall not be obstructed by the United States except in agreed upon circumstances²—prohibits the creation of a high level nuclear waste repository on Yucca Mountain. Moreover, this note will examine a brief history of the Yucca Mountain selection process and fairness of the selection process.

The United States and the Western Shoshone Nation, a recognized Native American tribe, agreed to the Treaty of Ruby Valley to resolve recurrent attacks on United States citizens, trains, mail, and telegraph lines.³ To end these hostilities, the United States agreed to pay the Shoshone \$5,000 annually for twenty years⁴ and to use the tribal lands only for specific uses. These uses

1. *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040 (D. Nev. 2005).

2. Treaty With the Western Shoshoni, W. Shoshone-U.S., Oct. 1, 1863, 18 Stat. 689.

3. *Id.* at Art. 1.

4. *Treaty With the Western Shoshoni*, at Art. 7.

included the establishment of mines, ranches, settlements, and military posts.⁵ The establishment of a nuclear waste dump, in a treaty dating to the nineteenth century, quite clearly was not specified as a use for the land.⁶ Covering a vast swath of land in central Nevada, the home to the Shoshone is also the location of Yucca Mountain.

II. CASE OVERVIEW

A. *Statement of Relevant Facts*

The Western Shoshone Nation brought its action in the Federal District Court of Nevada asserting the plan to dispose of nuclear waste at Yucca Mountain violated the 1863 Treaty of Ruby Valley.⁷ The Shoshone made four claims: (1) a writ of prohibition should be granted, preventing the United States from authorizing or approving any action allowing for a nuclear repository or construction of a rail line for transportation of nuclear waste to be built at Yucca Mountain; (2) the United States should be permanently enjoined from constructing a repository or rail line to transport nuclear waste to Yucca Mountain; (3) declaratory judgment should be issued, because the plan to dispose of nuclear waste at Yucca Mountain violated the treaty of Ruby Valley; and (4) the court should “set aside and hold unenforceable the past approvals, permits, and activities at Yucca Mountain.”⁸

The United States moved to dismiss the Complaint, asserting that: (1) the court had no jurisdiction due to a lack of standing; (2) there had been no waiver of sovereign immunity; (3) the claim was not ripe; (4) the court had no jurisdiction over issues falling within the Nuclear Waste Policy Act of 1982 (NWPA) guidelines;⁹ and (5) the Shoshone had no enforceable rights under the Treaty of Ruby Valley.¹⁰

B. *Context of the Dispute*

Spent nuclear fuel and high-level radioactive waste have accumulated since the 1940's, as a result of commercial power production and defense activities.¹¹ Over one hundred interim storage locations for this waste are located around the

5. Complaint at 16, *Western Shoshone Nat'l Council v. United States*, 2005 WL 60790 (D. Nev. 2005) (No. CV-S-05-0290-PMP-LRL).

6. *Id.* at 19.

7. *Western Shoshone Nat'l Council*, 408 F. Supp. 2d at 1046.

8. *Id.*

9. Nuclear Waste Policy Act, 42 U.S.C. § 10101 (2000).

10. *Western Shoshone Nat'l Council*, 408 F. Supp. 2d at 1046; *see also* *United States v. Dann*, 470 U.S. 39 (1985) (Supreme Court found previous \$26,000,000 appropriation to an interest bearing account, affirmed in the prior Indian Court of Claims case *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl. 1979), extinguished aboriginal title of the Western Shoshone to large areas of the Western United States; money remains uncollected by the tribe). The Western Shoshone challenge the assertion of the United States regarding ownership of the land, and maintains the United States has encroached upon the area in question. Moreover, they assert that title is irrelevant since the Treaty in question “contains restrictive covenants that run with the land regardless of who holds title” *Western Shoshone Nat'l Council*, 408 F. Supp. 2d at 1046.

11. Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 40 C.F.R. pt. 197 (2001).

United States, and over 161 million people reside within seventy-five miles of a storage facility.¹² With the potential danger of a nuclear accident, Congress created the NWPA to consolidate and safeguard waste. The NWPA sought a depository for spent nuclear fuel in deep geological repositories that can be left undisturbed for thousands of years. Based on worldwide consensus that the best and safest long-term solution for dealing with high-level radioactive waste is geological isolation,¹³ the NWPA established an office in the Department of Energy (DOE) to develop the plans for a repository that are paid for by a fee on nuclear-generated electricity.¹⁴ Originally given the job of selecting, designing, and operating the national repository by Congress, DOE lowered its list of acceptable sites from nine in 1983 to three by 1984.¹⁵ The NWPA¹⁶ originally called for each site nominated to have an environmental assessment performed, in addition to a review of the general health and safety standards by the Environmental Protection Agency (EPA),¹⁷ but both time and cost constraints narrowed the site analysis to only Yucca Mountain.¹⁸

President Reagan had approved three sites recommended by the DOE Secretary for further evaluation. The three sites were Deaf Smith County, Texas; Hanford, Washington; and Yucca Mountain, Nevada.¹⁹ But with the passage of the Nuclear Waste Policy Amendments Act (Amendments Act)²⁰ in 1987, all investigation into other potential sites along with the DOE Secretary's authority to investigate further sites for a second repository were extinguished.²¹ The exclusive focus of the nuclear waste repository program became Yucca Mountain in 1987.²² As currently designed, Yucca Mountain will hold 70,000 metric tons of radioactive waste. This is a cause for concern based on estimates that 105,000 metric tons of nuclear waste will accumulate by the year 2035.²³ Further, the Energy Policy Act of 1992 assigned both the EPA and the Nuclear Regulatory Commission (NRC) the same objective that the Amendments Act earlier conferred on the DOE: focus all regulatory attention with respect to a nuclear repository on Yucca Mountain.²⁴

On July 23, 2002, President George W. Bush took the final step in authorizing a Senate and House of Representatives resolution approving Yucca Mountain, Nevada as the spot for a nuclear repository over the objection of,

12. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004).

13. BOARD OF RADIOACTIVE WASTE MGMT., NATIONAL RESEARCH COUNCIL, *RETHINKING HIGH-LEVEL RADIOACTIVE WASTE DISPOSAL: A POSITION STATEMENT OF THE Bd. ON RADIOACTIVE WASTE MGMT.* (1990).

14. MARK HOLT, CONGRESSIONAL RESEARCH SERV. *BRIEF FOR CONGRESS, CIVILIAN NUCLEAR WASTE DISPOSAL* (Aug. 2, 2005).

15. Nuclear Waste Policy Amendments Act, Pub. L. No. 1330-227, §§ 5001-5065, 101 Stat. 1330 (1987) (codified in scattered sections of 42 U.S.C.).

16. Nuclear Waste Policy Act § 10139(a)(1)(B).

17. *Id.* § 10132(b)(1)(D).

18. Nuclear Waste Policy Amendments Act §§ 5001-5065.

19. *Nevada v. Watkins*, 939 F.2d 710, 713 (9th Cir. 1991).

20. Nuclear Waste Policy Amendments Act of 1987, 42 U.S.C. 10172 (2000).

21. *Nevada*, 939 F. 2d 710 at 713.

22. *Id.*

23. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004).

24. 42 U.S.C. § 10141 (2000).

among others, the Governor of Nevada.²⁵ Authorization thus occurred four years after the NWPA's original goal for loading waste into the repository.²⁶ With the President's approval, the DOE must now prepare its application for a license to construct the repository. After the President's approval, the DOE is expected to seek approval from the NRC, which will then take the final step to decide whether to issue a license for the Yucca Mountain repository.²⁷

Even with the signing of the Senate and House resolutions, roadblocks and delays have continued to plague the project. Claims of falsified safety reports,²⁸ the EPA's reversal of its regulations pertaining to the 10,000-year compliance period,²⁹ and flawed humidity measurements resulting in work shut-downs³⁰ have all contributed to the opening date of the facility being pushed to 2012.³¹ Because the timeline has substantially departed from the original 1998 date, over twenty nuclear utility cases are pending, alleging the DOE breached its contract by failing to remove spent nuclear fuel rods by January 31, 1998, as designated under the NWPA.³² Additionally, concerns over terrorist attacks on stored spent fuel rods have intensified the controversy.³³

C. Rationale and Holding

The Nevada District Court held for the United States on all claims. The Shoshone had pointed to five statutes that they asserted provided the court with jurisdiction.³⁴ The court reasoned the cited statutes either: (a) created jurisdiction but did not waive the United States' sovereign immunity; or (b) did not grant consent to sue but rather authorized an additional remedy where jurisdiction already existed.

The Shoshone argued that the Administrative Procedure Act (APA)³⁵ was an explicit waiver of sovereign immunity. The United States District Court of Nevada also found for the United States on this issue, holding that the APA's waiver of sovereign immunity is applicable only if another statute specifically allows for agency review.³⁶ The court reasoned that final agency action had not

25. H.R.J. Res. 87, 107th Cong., 116 Stat 735 (2002).

26. HOLT, *supra* note 14.

27. *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1045 (D. Nev. 2005); *Public Health and Environmental Radiation Protection Standards for Yucca Mountain*, 40 C.F.R. pt. 197 (2001).

28. Doug Abrahms, *E-mail Shows Yucca Data Could be False*, RENO GAZETTE-J., Apr. 1, 2005, available at <http://www.rgj.com/news/stories/html/2005/04/01/96097.php>.

29. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004).

30. Keith Rogers, *Yucca Feeling Heat on Humidity*, LAS VEGAS REV.-J., Feb. 23, 2006, available at http://www.reviewjournal.com/lvrj_home/2006/Feb-23-Thu-2006/news/6030840.html.

31. HOLT, *supra* note 14.

32. *More Utility Damage Claims Expected*, NUCLEARFUEL 8 (Jan. 20, 2003).

33. HOLT, *supra* note 14.

34. 28 U.S.C. §§ 1331, 1353, 1362, 2201, 2202 (2000).

35. 5 U.S.C. § 702 (2000).

36. *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1049 (D. Nev. 2005). There are two avenues for redress: (1) as provided in the NWPA, the Court of Appeals has exclusive jurisdiction over any civil action regarding repositories for disposal of high-level radioactive waste and spent nuclear fuel (42 U.S.C. § 10139(a) (2000)); and (2) judicial review after a final agency action, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) ("When judicial review of agency action is sought, not pursuant to

occurred because the DOE still had to apply for and obtain a license from the NRC, and complete its report on transporting waste to Yucca Mountain.³⁷

Finally, the Shoshone Tribe asserted that their status as a sovereign entity, now and at the time of signing the Treaty of Ruby Valley, nullified the requirement to identify an explicit waiver of the United States' sovereign immunity. The court again sided with the United States, mandating that the Shoshone must show an explicit waiver of sovereign immunity from the United States.³⁸

The court also denied a Request for Reconsideration of Court's Grant of Motion to Dismiss by the Plaintiff's.³⁹ The court maintained that while the Shoshone may have the ability to enforce the Treaty of Ruby Valley in federal court, they must still establish both subject matter jurisdiction and a waiver of sovereign immunity.⁴⁰ Concluding, the court maintained that the Shoshone tribe may, at some point, attempt to enforce its alleged treaty rights but only if a substantive statute specifically authorizing judicial review or a "final" agency action is found.

III. ANALYSIS

A. *Relevant Statutory Requirements and Case Law*

The APA provides recourse for a person suffering a legal wrong due to an agency action, and that relief should not be denied because the United States is party to the action.⁴¹ Judicial review is limited under the APA to: (1) review that is explicitly authorized in a substantive statute; or (2) a final agency action where no other adequate remedy is available from the court.⁴²

NWPA section 10139 is a substantive statute that gives exclusive and original jurisdiction over civil actions to the Courts of Appeals.⁴³ Thus, the first avenue for judicial review under the APA is not applicable to the Shoshone's district court case, which leaves the second "final agency action" route as the only means of recourse.

The requirement for a final agency action is based on the doctrine of ripeness, which is designed to prevent the courts from adjudicating abstract disagreements while protecting administrative agencies from judicial interference until the decision has been formalized and its effects felt in a tangible way.⁴⁴ Under this theory, final agency action of the NRC, by granting a

specific authorization in substantive statute, but only under general review provisions of the Administrative Procedure Act as person suffering legal wrong because of challenged agency action or adversely affected or aggrieved by that action, the 'agency action' must be final agency action.").

37. *Western Shoshone Nat'l Council*, 408 F. Supp. at 1050.

38. *Id.* at 1051.

39. *Western Shoshone Nat'l Council*, 408 F. Supp. 2d at 1052.

40. *Id.*

41. 5 U.S.C. § 702 (2000).

42. *Id.* § 704 (2000).

43. 42 U.S.C. § 10139 (2000).

44. *National Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 807 (2003) (citing *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)).

license to the DOE, has not occurred and the DOE's interim steps do not harm the Shoshone as no nuclear waste is being stored at Yucca Mountain.⁴⁵

B. Is the Case Ripe and Does it Matter?

Where an issue is not yet "fit" for judicial review, the court must weigh the benefits of postponing review against the hardship suffered by the petitioner as a result of such delay.⁴⁶ Here the court was adamant that the finality requirement of the APA does not allow for review until a license is provided to the DOE from the NRC, as cases should be limited to "concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental actions."⁴⁷ The benefit of waiting until the "final agency review" is that unneeded litigation may ensue if in fact no final agency action is taken, *i.e.*, if Yucca Mountain is never licensed as a nuclear repository. This benefit must outweigh the hardship the Shoshone suffer due to the delay, namely the continued construction of the repository without the nuclear waste destined for the site.

In theory, the NRC might not grant a license to the DOE and Yucca Mountain would never become a nuclear repository. But costs of the Yucca Mountain project have already exceeded \$59 billion, with the 2005 DOE budget for the repository standing at \$880 million for the year.⁴⁸ Because of the high political costs, the money already invested, and the work already done to the mountain, any thought that the project license will be rejected seems to run counter to political reality. Congress and the President have demonstrated a unified political intent to continue with the construction of a nuclear waste repository at Yucca Mountain, with the only question being how long both Congress and the federal agencies will have to wait in order to overcome any hurdles set by judicial decisions.⁴⁹

While the United States District Court of Appeals of the District of Columbia deemed the EPA's 10,000-year compliance period for Yucca Mountain too short, the court also acknowledged that Congress could authorize the EPA and NRC to ignore these governing standards.⁵⁰ The practical reality remains: any petitioner may win the battle in court . . . only to lose the war.⁵¹

1. Will Final Agency Action Provide the Shoshone with their Day in Court?

Given this apparent political reality, whether a final agency action would grant the Shoshone Nation its day in court appears irrelevant. Assuming that the

45. *Western Shoshone Nat'l Council*, 408 F. Supp. at 1050.

46. *Nuclear Energy Inst. v. EPA*, 373 F.2d 1251, 1313 (D.C. Cir. 2004).

47. *Western Shoshone Nat'l Council*, 408 F. Supp. 2d at 1050.

48. Office of Mgmt. and Budget, Department of Energy, <http://www.whitehouse.gov/omb/budget/fy2005/energy.html>.

49. Beko Reblitz-Richardson, *D.C. Circuit Rejects EPA's Proposed Standards and Extends Timeline for Yucca Mountain Nuclear Waste Repository*, 32 *ECOLOGICAL L.Q.*, 743, 747 (2005).

50. *Nuclear Energy Inst.*, 373 F.3d at 1273 ("it is up to Congress—not EPA and not this court—to authorize departures from the prevailing statutory scheme"). Note that the Energy Policy Act of 1992 requires the EPA to create standards that are consistent with the findings and recommendations of the National Academy of Sciences, Energy Policy Act § 801(a)(1) (2000).

51. *Nuclear Energy Inst.*, 373 F.3d at 1292.

Treaty of Ruby Valley does in fact prohibit the United States from building a nuclear repository on Yucca Mountain, the court could grant a permanent injunction following final agency action, but Congress and the President appear intent to override a decision by the court.

While monetary numbers may define Congressional action, the United States Supreme Court has previously maintained that the laws of the United States should prevail over economic concerns. To be certain, there is authority for projects that have large amounts of capital already invested being drawn to a halt, as nothing provides federal courts with the ability to weigh loss of funds spent on a project versus the item in question.⁵² In the well-known *Tennessee Valley Authority* case, construction on the Tellico dam that was eighty percent complete halted after it was discovered that the snail darter would be rendered extinct as a result of the total destruction of the snail darter's habitat in violation of the Endangered Species Act (ESA).⁵³ Even after the Supreme Court enjoined the project and mandated the Act be construed literally and harshly as the statute dictated,⁵⁴ Congress amended the Endangered Species Act to allow for a special committee to exempt agency action where appropriate one month after the decision.⁵⁵ The Supreme Court's interpretation of the ESA as the "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"⁵⁶ proved to be merely a road bump for Congressional action.

Although the Tellico Dam did not receive such an exemption, Tennessee Sen. Howard Baker did obtain an exemption through Congress and Tellico dam eventually was built and became operational. Similar to the ESA, Congress has expressed its purpose in passing the NWSA as a response pressing demand for a solution to the waste disposal problem.⁵⁷ The importance of a nuclear repository and final agency action was not lost on the Ninth Circuit Court of Appeals fifteen years ago,⁵⁸ where a plain reading of the legislation was held to preclude judicial review of the project.⁵⁹

Consequently, the Shoshone face a potential Catch-22—a win in the courtroom will not likely win the war, as Congress has shown great resolve in overcoming obstacles in the way of a national high-level nuclear waste repository.⁶⁰ Furthermore, "[i]n the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom."⁶¹ With Congress showing great resolve and

52. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

53. *Id.* at 162.

54. *Tennessee Valley Authority*, 437 U.S. at 178.

55. 16 U.S.C. § 1536(e) (2000).

56. *Tennessee Valley Authority*, 437 U.S. at 176.

57. H.R. REP. NO. 491, 97th Cong., 2d Sess., Pt. 1, at 29 (1982).

58. *Nevada v. Watkins*, 939 F.2d 710 (9th Cir. 1991).

59. *Id.*; see 42 U.S.C. §§ 10132(d), 10139(a)(1)(A).

60. Beko Reblitz-Richardson, *D.C. Circuit Rejects EPA's Proposed Standards and Extends Timeline for Yucca Mountain Nuclear Waste Repository*, 32 *ECOLOGY L.Q.*, 743, 747 (2005).

61. *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1051 (D. Nev. 2005); see also *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

the courts supporting redress outside the courtroom, the Shoshone may well be fighting a losing battle.

C. Did the Shoshone Tribe Get a Fair Deal?

Neither the Shoshone nor the State of Nevada has been successful in warding off the construction of the Yucca Mountain repository. The State of Nevada has also pleaded for a stop to the construction, stating that any decision to forge ahead with “this transparently flawed project in the face of Nevada’s strong, long-standing, consistent, ubiquitous, and scientifically based opposition would” result in extreme damage to the economy and environment of Nevada.⁶²

The Shoshone have also voiced concern to the NRC that, among other things, the Tribe’s trust land is directly in the path of future radioactive groundwater contamination and construction may adversely affect their drinking water.⁶³ Contamination is a possibility, as the final agency action entitled *Public Health and Environmental Radiation Protection Standards for Yucca Mountain* calls for a disposal system that has a design that permits a small release of radioactive fuel into the environment.⁶⁴ While designed to allow a small release, the agency action notes a principal concern is the possibility of larger accidental releases due to unintended events or a failure of engineered barriers.⁶⁵ Additionally, an original consideration in siting the nuclear waste facility was its substantial distance from any national parks.⁶⁶ Yucca Mountain’s location two miles outside Death Valley National Park was apparently not a roadblock.

Concerning the Shoshone Tribe, the question arises as to whether facilities, such as the Yucca Mountain repository, are intentionally placed in minority communities. Numerous studies have demonstrated that poor and underprivileged communities are disproportionately exposed to pollution.⁶⁷ Yucca Mountain though, does not appear to be one of those instances.⁶⁸

62. STATE OF NEVADA, REPORT ON IMPACTS OF THE PROPOSED YUCCA MOUNTAIN HIGH-LEVEL NUCLEAR WASTE REPOSITORY PROGRAM 185 (Feb. 2002).

63. Letter from Barbara Durham, Tribal Administrator, Timbisha Shoshone Tribe, to Chief Rules Review and Directives Branch, Nuclear Regulatory Commission (May 21, 2002) (on file with author).

64. Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 40 C.F.R. pt. 197 (2001).

65. *Id.*

66. Bruce Blanchard, United States Dept. of Energy, United States Dept. of Interior, Comment on Draft Environmental Assessments (Apr. 8, 1985).

67. Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1125 (1994).

68. The environmental impacts of a nuclear waste facility on the Native American tribes near Yucca Mountain were assessed in the OFFICE OF CIVILIAN RADIOACTIVE MGMT., UNITED STATES DEPT. OF ENERGY, ENVIRONMENTAL IMPACT STATEMENT FOR A GEOLOGICAL REPOSITORY FOR THE DISPOSAL OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE AT YUCCA MOUNTAIN, NYE COUNTY, NV, DOE/EIS-0250 (2002). The study focused on Native American tribes in the Yucca Mountain vicinity and how construction of the repository would affect cultural resources, socioeconomic concerns, and environmental justice. Such studies are required in most developments affecting Native American country where federal action is involved. National Environmental Policy Act, 42 U.S.C. § 4321 (2000). However, the statute is procedural only and meant to ensure the government is aware of the environmental problems associated with the proposed plan. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 249 (1989). There is an expectation the agency will take these considerations into account upon the final determination. *Id.*

Ironically, while the Shoshone look for any avenue in which to stop the construction of a nuclear repository, other Native American tribes have unsuccessfully attempted to lure a nuclear storage site to their land. Citing the potential economic benefits of the repository, the Skull Valley Goshutes applied for a grant to study the siting of a temporary nuclear storage facility in Utah in 1992.⁶⁹ After the federal government provided the initial “Phase I” grant, and subsequently a “Phase II” grant, elected officials in Utah guaranteed, “they’ll never get a permit to move waste over our borders.”⁷⁰ The Governor of Utah Mike Leavitt criticized the federal government for, “using a grant to entice poor, rural counties to consider being a home to waste.”⁷¹ The Skull Valley Goshutes took offense at Governor Leavitt’s remarks, describing them as racist and suggesting that tribal leaders could not make intelligent decisions about such a project.⁷² If the Supreme Court decisions from little more than ninety years ago are any indication, this reaction from the tribal leaders is not unfounded.⁷³

Although a history of oppression by the courts and legislature towards Native Americans is rarely denied, there has been no indication publicly from the Shoshone that it is at work in this case. Rather, comments to proposed rulemaking have focused on shortcomings in the DOE consultation with the Tribal governments.⁷⁴ At issue specifically is the failure to give sufficient funds to address the complex environmental and cultural issues associated with the shipment of radioactive waste.⁷⁵ With little apparent ground gained, Shoshone frustration with the DOE’s handling of the situation has surfaced in their complaint that the Environmental Impact Statement (EIS) provided by the DOE inadequately addressed Shoshone comments to the final EIS.⁷⁶ With frustration mounting, only time, and a final agency action, will tell if the courts will provide the Shoshone with a remedy.

IV. SHOSHONE ALTERNATIVES

A. *The Court of Human Rights*

While the DOE has issued a revised schedule to submit a license application to the NRC by June 30, 2008, the Shoshone have sought an alternative means for resolving the issue by bringing their grievance to the

69. Giancarlo Panagia, *Tot Capita Tot Sententiae: An Extension or Misapplication of Rawlsian Justice*, 110 PENN ST. L. REV. 283, 301 (2005).

70. RadWaste: American Indians Take Center Stage in Debate, GREENWIRE, Aug. 13, 1993.

71. Utah: Indians Take Money for RadWaste Study; State Wary, GREENWIRE, Feb. 1, 1993.

72. Jim Woolf, E. Utah Goshutes Seek Funds for N-Dump Study, SALT LAKE TRIB., Aug. 12, 1993.

73. See *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (Indians are “an ignorant and dependent race”); *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (“The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.”).

74. Letter from Bill Helmer to United States Regulatory Comm’n Sec. (Mar. 22, 2000).

75. *Id.*

76. Letter from Barbara Durham to United States Regulatory Comm’n Chief Rules Review and Directives Branch (May, 21, 2002).

United Nations Committee for the Elimination of Racial Discrimination.⁷⁷ Any sanctions levied by this Committee are largely unenforceable against the United States government, which leaves the tribe still searching for answers.⁷⁸ Two potential alternatives exist for the Shoshone: the court's failure to address the fiduciary relationship between the United States and Native American tribes, and conflicts presented by the Endangered Species Act of 1973;⁷⁹ and more specifically the EIS required by the National Environmental Policy Act (NEPA).⁸⁰

B. *The Trust Relationship*

The district court of Nevada's analysis of the Shoshone's rights under the Treaty of Ruby Valley may have failed to give appropriate consideration to the fiduciary relationship between the United States and Native American tribes.⁸¹ Citing *Edye v. Robertson*,⁸² Judge Pro appeared to suggest the option for the Shoshone to begin a war, if judicial recourse is not available in this instance.⁸³ Not mentioned is the unique trust relationship between the United States and Native American tribes that requires, among other things, to construe all treaties liberally in favor of Indians.⁸⁴

*Minnesota v. Mille Lacs Band of Chippewa Indians*⁸⁵ provides analogous law on interpretation of Native American treaties. Similar to the current predicament, the Mille Lacs Band sought declaratory and injunctive relief with respect to certain rights maintained under a treaty dating back to 1837 with the United States. In an opinion delivered by Justice O' Connor, the majority held

77. U.N. Comm. For the Elimination of Racial Discrimination, Feb. 20-Mar. 10, 2006, Early Warning and Urgent Action Procedure, U.N. 68th Sess. (Mar. 10, 2006). The United Nations Committee for the Elimination of Racial Discrimination is the acting body charged with investigating alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* Basic Documents in International Law 311 (Ian Brownlie ed., 4th Ed. Clarendon Press 1995). While the United States is a signatory, the United States Senate declared the treaty non-self-executing, which may limit its effectiveness. *See* 140 Cong. Rec. 14,326 (1994).

78. No international court currently may enforce rules found in international instruments or international customary law unless the country against whom the complaint is brought consents to the suit. Statute of the International Court of Justice, art. 36, *in* Basic Documents in International Law 447 (Ian Brownlie ed., 4th ed. Clarendon Press 1995). Consequently, while the International Court of Justice at the Hague could adjudicate a matter involving the United States (as a member of the United Nations), there is little chance the United States would consent to the action.

79. 16 U.S.C. 1531 (2000).

80. National Environmental Policy Act, 42 U.S.C. § 4321 (2000).

81. Judge Pro's language, "[i]n the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom," is more consistent with an arms-length deal associated with an international treaty. *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, (D. Nev. 2005). Native American treaties, as noted *infra*, are provided a different analysis.

82. *Edye v. Robertson*, 112 U.S. 580 (1884).

83. "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* at 598.

84. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943).

85. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

that no relinquishment of the usufructuary rights obtained in the 1837 Treaty occurred because of later treaties or an Executive Order fifteen years later. Noting the well-established rule that grants Indian treaties the effect to which Indians themselves would have understood them, the Court found the absence of clear evidence to abrogate the Treaty meant the rights sought were still available.⁸⁶

As in *Mille Lacs Band of Chippewa Indians*, the Treaty of Ruby Valley still may provide enforceable rights to the Shoshone. Treaties negotiated in the eighteenth, nineteenth, or early twentieth century remain in force absent later congressional action abrogating certain provisions, and serve as a source of judicially enforceable property rights.⁸⁷ The Supreme Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribes includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.⁸⁸ The District Court of Nevada's apparent failure to examine law in this area may provide the Shoshone with an avenue for redress, albeit monetary.

C. NEPA, the EIS, and the Endangered Species Act of 1973

1. Ash Meadows National Wildlife Refuge

The Ash Meadows National Wildlife Refuge, located twenty-four miles south of Yucca Mountain, is home to at least twenty-four plants and animals found nowhere else in the world.⁸⁹ Of greatest concern is the Devil's Hole Pupfish, one of four endangered fish species located at the Refuge, which maintains only one natural habitat—Devil's Hole, a limestone cave situated on the refuge.⁹⁰

By proclamation in 1952, President Harry S. Truman designated Devil's Hole as a national monument.⁹¹ The importance of the area is not lost on the United States government, which brought suit for a declaration of rights as to the

86. *Id.*

87. *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980); *see also McClanahan v. State Tax Comm. of Ariz.*, 411 U.S. 164 (1973). Here, the Supreme Court held that Arizona state individual income tax was unlawful as applied to Navajo Indians living on reservation with respect to income derived completely from reservation sources. In the decision, the Court relies heavily on an 1868 Treaty between the United States and Navajo Nation, to which the court opined, "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions," but rather as a fiduciary relationship that is extremely deferential to the tribe. *Id.* at 174.

88. *United States v. Mitchell*, 463 U.S. 206, 226 (1983).

89. The number of endemic plant and animal species was confirmed by the U.S. Fish and Wildlife Service homepage for Ash Meadows Nat'l Wildlife Refuge, <http://www.fws.gov/desertcomplex/ashmeadows/>.

90. The fish has been listed as endangered since 1967. Native Fish and Wildlife—Endangered Species, 32 Fed. Reg. 4001 (Mar. 11, 1967). The species total population fluctuates during any given year from 127 to 553 individuals. Don W. Sada, Fish and Wildlife Service, *Recovery Plan for the Endangered and Threatened Species of Ash Meadows*, Nev., Sept. 28, 1990.

91. Addition of Devil's Hole, Nev., to Death Valley Nat'l Monument—Cal. and Nev., 17 Fed. Reg. 16 (Jan. 23, 1952).

underground waters appurtenant to Devil's Hole in 1976.⁹² Concerned about dropping water levels in Devil's Hole, the government prayed, and obtained, injunctive relief from local residents whose water usage had depleted the water level of the cavern and consequently endangered the fish in Devil's Hole.⁹³ Ironically, the area the United States sued to protect now may be in danger from the decision to store nuclear waste at the Yucca Mountain site near Ash Meadows.⁹⁴

2. Shoshone Claim Under the Endangered Species Act of 1973

The creation of the Endangered Species Act of 1973 (the Act) resulted from previously ineffective endangered species conservation programs.⁹⁵ The Act provides sanctions for violations, including suits to enjoin the federal government from violating the Act.⁹⁶ Of particular concern in this instance are sections 7 and 9 of the Act.⁹⁷ The failure of the EIS to address the potential effects of siting on the endangered species at Ash Meadows, namely the Devil's Hole pupfish, may yet create a viable injunctive relief option for the Shoshone and the state of Nevada.

The purpose of an EIS⁹⁸ is to detail the potential beneficial and adverse environmental effects of the proposed action and alternatives to the action.⁹⁹ The Yucca Mountain analysis contains a plethora of information on potential issues revolving around the construction of a repository, but limits the application of the Act to the desert tortoise.¹⁰⁰ The lack of scrutiny provided to the Ash Meadows area is due to it being outside the "regional biological resources"¹⁰¹ area that must be considered.¹⁰² Herein lies the problem, as the

92. *Cappaert v. United States*, 426 U.S. 128 (1976). The water local residents were using came from an underground basin or aquifer that also served as the source of water in Devil's Hole.

93. *Id.*

94. The United States Fish and Wildlife Service identified 21,760 acres in 1980 where groundwater changes affect the water in Devil's Hole. This essential habitat encompasses the vicinity of Yucca Mountain. See Appx. A(1) Don W. Sada, Fish and Wildlife Service, *Recovery Plan for the Endangered and Threatened Species of Ash Meadows*, Nevada, Sept. 28, 1990.

95. Endangered Species Preservation Act of 1966, Pub. Law 89-669, 80 Stat. 926; Endangered Species Conservation Act of 1969, Pub. Law 91-135, 83 Stat. 275.

96. 16 U.S.C. 1540(g) (2000).

97. Section 7 requires federal agencies to, *inter alia*, conserve protected species or ensure—through consultation with various agencies and the preparation of a "biological assessment"—that the project would not jeopardize the continued existence of a species. See 16 U.S.C. § 1536 (2000). The "taking" provision of § 9 makes it unlawful to "take" any listed species of fish or wildlife within the United States. 16 U.S.C. § 1538 (2000); "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1538(19).

98. A supplement to the final EIS is due in 2007. The DOE announced its intention to prepare a supplement in October of 2006, citing the continued development of the repository design and associated plans. Notice of Intent, *Supplement to the Final Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, NV*, 71 Fed. Reg. 198 (Oct. 13, 2006).

99. Environmental Impact Statement, Purpose and Need for Agency Action 1-1.

100. *Id.* at 11-16.

101. It is interesting to note that the biological resources area is, "roughly equivalent to the analyzed land withdrawal area of about . . . 230 square miles," yet the Ash Meadows Refuge, which is located 24 miles from the site, is given little review. See Environmental Impact Statement, 3-70.

EIS maintains that the “groundwater flowing beneath Yucca Mountain does not contribute to the groundwater beneath the area of Ash Meadows,” yet in the same paragraph notes the changing slope of the water table could affect the groundwater in the future.¹⁰³ Perhaps more ominously, “the groundwater flow system of the Death Valley region is very complex,” and “there are differences of opinion among experts relating to interpreting available data and describing certain aspects of the Yucca Mountain groundwater system.”¹⁰⁴ To be sure, the geological barriers to contamination of the groundwater system are less than certain.¹⁰⁵

Recalling the intent of the Act, to insure that any action is not likely to jeopardize the continued existence of any endangered species, the problems presented by the EIS become apparent. The failure of the EIS to further account for the potential impacts on the Devil’s Hole pupfish from groundwater contamination, or to report on other potential affects to the Ash Meadows Refuge presents a viable issue that should be addressed.¹⁰⁶ It could be asserted that by defaulting the affirmative duty of all federal agencies to insure by the best scientific and commercial data available that the critical habitat of the Devil’s Hole pupfish and other endangered species at Ash Meadows are safe, a violation of sections 7 and 9 results.¹⁰⁷

D. Final Result of Shoshone Action under Fiduciary Relationship or the Act

The Act brings the Shoshone full circle, as any suit must wait until the final agency action as provided for in the APA.¹⁰⁸ Moreover, review of alleged violations of the Act occurs under the arbitrary and capricious standard set out in the APA, which gives great deference to the agency’s decision-making authority.¹⁰⁹

102. *Id.* at 3-74.

103. Environmental Impact Statement at 3-48.

104. *Id.* at 3-40.

105. See Robert J. Cynkar, *Dumping on Federalism*, 75 U. COLO. L. REV. 1261 (Fall 2004). Cynkar is a partner at the firm representing the State of Nevada in its litigation over the repository. Regarding the groundwater at Yucca Mountain he notes: “[i]t had become apparent that Yucca’s geology was incapable of serving as the primary isolation barrier because groundwater flow through the site was far faster than expected. Absent near-perfect performance by man-made barriers, the fast flowing groundwater was likely to carry radioactive particles so quickly that radiological emission standards could never be met. . . . Far from permanently isolating waste, Yucca Mountain’s geology would allow groundwater to carry radionuclides into the water table far sooner than required to prevent contamination of the human environment.” *Id.* at 1273.

106. Congress has amended the Act multiple times since its inception, including the change in § 7 from “to insure that actions . . . do not jeopardize” to “to insure that any action . . . is not likely to jeopardize” (emphasis added). The United States Third Circuit Court of Appeals has noted the amendments, but suggests nothing in the amendments history suggests an intent to deflate the prioritization of the Act. See *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, fn 13 (3rd Cir. 1997).

107. See generally *Enos v. Marsh* 769 F.2d 1363 (9th Cir. 1985); *House v. U.S. Forest Service* 974 F. Supp. 1022 (E.D. Ky. 1997).

108. For a well-written article that suggests a solution for how the agency action may already be final, see Tyson R. Smith, *Alternatives, Adoption, and Administrative Hearings: Keys to Performing Environmental Reviews for Yucca Mountain*, 23 PACE ENVTL. L. REV. 465 (Summer 2006).

109. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989); *Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121 (9th Cir. 1997).

The trust doctrine may enlarge obligations of the Bureau of Indian Affairs beyond that required by an administrative law analysis. Action that might well be considered within an agency's discretion because it is not "arbitrary and capricious" as stated in the APA, may nevertheless be held to violate the Secretary of the Interior's trust responsibilities to tribes.¹¹⁰ As a result, the trust doctrine may prove to be a smoother path to the courtroom due to the lesser standard of review, yet will likely provide redress only in monetary measures.

IV. CONCLUSION

In *Nuclear Energy Institute v. EPA*, the court cautioned that the large risk that comes along with nuclear waste required Congress—not the EPA and not the court—to authorize departures from the prevailing scheme.¹¹¹ With the power to pass legislation that may stop the Yucca Mountain nuclear depository from being built, Congress may be the proper forum for the Shoshone tribe. Unfortunately, for the tribe it may be a losing battle.

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110. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). (*rev'd on other grounds*).

111. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1273 (D.C. Cir. 2004).

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