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A SOVEREIGNTY OF CONVENIENCE: NATIVE AMERICAN SOVEREIGNTY AND THE UNITED STATES GOVERNMENT'S PLAN FOR RADIOACTIVE WASTE ON INDIAN LAND

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I will be speaking about the United States government's plan to store high-level radioactive waste on Indian lands. I am going to give a little bit of history first and then discuss my suggestions for a resolution. To get to the history; treaties between European nations and later the United States have a justifiably bad image. They are nothing more than a thin cover for the theft of all but 2 1/2 percent of the land mass of the United States from indigenous people. In many, if not most cases, treaties written and mutually agreed to were later ignored and superseded by unilateral federal action, with or without the consent of the American Indian nations affected.[1]

The abrogation of these treaties continues to this day, so it is important in considering the questions of Native American sovereignty today to put it in the context of past legal precedent.[2] The basis of the United States' assertion of federal supremacy in land rights over Indian nations is traced to the Supreme Court's adoption of the "doctrine of discovery" in the *Johnson v. McIntosh* decision in 1823.[3] The decision involved the dispute of two non-Indian parties, one of whom had purchased land directly from the Illinois and Piankeshaw Nations, while the other purchased land from the federal government that overlapped with the first claim. In the opinion written by Chief Justice Marshall, the Court ruled that

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[1] *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, CAL. L. REV. 601, 604 (1975).

[2] *See generally*, Wilkinson & Volkman, *supra* note 1, at 601.

[3] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

the person who made the later purchase from the federal government had precedence.[4] This was due, according to the Court, to the inheritance by the United States of the European legal principal that "discovery in the Americas gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession."[5] Under this doctrine, Indian peoples were considered to have the right of occupancy and could negotiate with European powers for the terms by which they conveyed their soil to the discoverer, "but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it."[6]

The underpinnings of this "doctrine of discovery" have been somewhat obscured, but are actually religious in origin, beginning with a series of edicts from Roman Catholic Popes and European Monarchs.[7] In 1455, Nicholas V issued a papal bull granting the Portuguese government the power to "invade, search out and capture, vanquish and subdue all Saracens and pagans whatsoever, and other enemies, to put them in perpetual slavery, and to take all their possessions and property."[8] A similar authority was later given to Spain after Columbus discovered the New World, as long as the lands involved were not previously possessed by any Christian owner.[9] Virtually identical language was established by the English Monarch, King Henry VII of England for the Cabot voyage, because at the time it was accepted as fundamental law that Christendom and all Christians were in a state of perpetual war with the infidels and, therefore, had the right to take their lands.[10]

Justice Marshall alluded more than once to the religious basis of the "doctrine of discovery." "The potentates of the old world

[4] *Id.* at 587-90.
[5] *Id.* at 573.
[6] *Id.* at 574.
[7] *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 42-43 (1993).
[8] Stephen T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery,* Johnson v. McIntosh, *and Plenary Power,* 20 N. Y. U. REV. L. & SOC. CHANGE 303, 310 (1993).
[9] *Id.* at 310.
[10] *Id.* at 311.

found no difficulty in convincing themselves that they had made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence."[11] The unlimited independence he referred to was that of the Europeans to do whatever they chose with the land.

So this is the basis of Federal Indian Law, as it is called, and it is the basis by which the United States has seen fit to do whatever it chooses with Indian lands, notwithstanding treaties. The Indian Nation's sovereignty has been limited to the right to occupy their lands until the United States government wanted them, and then trying to negotiate the best terms for transfer of the lands that they could. The steady westward conquest of native nations by Euro-Americans led to a dwindling of their size and number, while a series of court decisions and Congressional Acts reduced the rights of these nations to govern their own affairs. Treaties, once signed, were violated at will by the United States government and its citizens, often without even bothering to cover their tracks by forcing a new treaty onto the Indian nation in question.[12]

In fact, the United States government discovered in the 1950's, when the Indian Claims Commission completed a survey, that legal title to more than 35 percent of the continental United States still remained in the hands of native nations. The United States government had not bothered to get all the treaties signed that it needed to get title to the lands they had already taken.

In addition to war, disease and the starvation brought about by being forced to survive on sometimes marginal lands, Indian nations also faced the systematic attempt by American society to extinguish their religious and cultural identities and their languages. The forced boarding school education system for Native American children was the equivalent of cultural rape, all done for the supposed benefit of the so-called "uncivilized" people.

By the 1920's, a committee of one hundred individuals was selected by the Secretary of the Interior to study the "Indian problem," as they put it. Because the existence of Indian peoples constituted an "intolerable financial burden" on the United States, the Committee recommended dissolving all native nations and ab-

[11] Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 573 (1823).
[12] *See, e.g.*, Lone Wolf v. Hitchcock, 87 U.S. 553 (1903).

sorbing their populations as rapidly as possible, provided the timing and methods be "imposed by humane considerations."[13] Had not the mineral industry and a private think tank intervened, this probably would have been the end of federal recognition of Indian nations altogether. A 1928 study by Lewis Meriam and his associates at the Institute for Governmental Research[14] concluded that, if properly organized along the lines of the Navajo Grand Council (which had been hand-picked a couple of years before by the Bureau of Indian Affairs to facilitate mining leases on Dine lands), tribal governments would be useful in maintaining access to large tracts of Western lands for mining interests. The mining companies preferred this to breaking up the land into allotment tracts and opening the reservations up to private land speculation.

The mining operations had the added advantage of helping the United States government recover the costs associated with its support of the Native peoples. The American business and financial community supported the conclusions of the Meriam Report.

In due time, Congress passed the Indian Reorganization Act of 1934[15] ("IRA") whereby the Bureau of Indian Affairs was to draw up charters or constitutions for the remaining landed tribes, to reorganize them using a corporate board or village council type of government structure and to change the system by which they select their leaders to majority vote election instead of the usual consensus process. Through the threat of termination and sometimes by fraud, the Bureau of Indian Affairs systematically established these IRA councils, so that today the great majority of Native American governments are organized in this fashion. Despite these changes, many tribes still were terminated in the fifties and sixties.[16]

During this period, at the dawn of the nuclear age, the remaining Indian nations had three very special commodities needed by

[13] Rebecca L. Robbins, *Subordination: The Past, Present and Future of American Indian Governance, in* THE STATE OF NATIVE AMERICA (M. Annette Jaimes ed., 1992).

[14] INSTITUTE FOR GOV'T RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION *passim* (1928) *reprinted in part* DOCUMENTS OF UNITED STATES INDIAN POLICY 219-21 (Francis P. Prucha ed., 2d ed. 1990) (detailing objectives for working with Indian tribes).

[15] Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1988)) (establishing constitutions for Indian Tribes in order to facilitate regulations).

[16] *See* Harvey D. Rosenthal, *Indian Claims and the American Conscience, in* IRREDEEMABLE AMERICA—THE INDIANS' ESTATE AND LAND CLAIMS 35, 54-55 (Imre Sutton ed., 1985).

the atom bomb makers and, later, by the nuclear power industries: 1) large deposits of uranium ore on Dine, Pueblo and Lakota lands; 2) large tracts of virtually uninhabited land in which to test weapons and do research; and 3) human populations without political clout on which to do radiation experimentation. The federal government used all three, to the health and environmental destruction of the native peoples involved.

Uranium mining has polluted the surface and ground water of the four corners area of Arizona, Colorado, New Mexico, and Utah, where Pueblos, Hopis and Dine dwell, perhaps irreparably, due to the inattention of mining companies to the stabilization of their tailings piles. In addition, the practices used in many of the underground mines included lack of ventilation and failure to supply the miners with respirators. For example, the Shiprock facility in New Mexico, during its eighteen years of operation, had an estimated 150 Dine miners. By 1980, 134 of these miners had experienced respiratory ailments and cancers related to uranium mining, thirty eight dying from it. This is just one of the better documented examples. The extensive uranium mining operations throughout Dine land have made radiation-related illness the greatest health concern of the Navajo nation.[17]

Unfortunately, the disastrously high unemployment rates on these reservations encouraged tribes to enter into these mining agreements. In the case of the Laguna Pueblo in New Mexico, the tribe felt they had a favorable relationship established with the Anaconda Corporation, leasing 7,000 acres to them, with Pueblo members constituting ninety three percent of the miners employed. With twenty-five percent unemployment on the reservation, compared to an average on Indian reservations of fifty percent, they felt they had a relatively prosperous arrangement.

However, by 1981, after twenty years of operation, Anaconda shut down, leaving a large hole in the ground with piles of unattended radioactive slag, and threw all the miners out of work. Trained as miners, these workers had the choice of either following the mining industry somewhere else or going on the public dole, both to the detriment of maintaining a sustainable community on the Laguna Pueblo.

[17] Jeff Barker, *Navajos Fear Radioactive "Playground," Demand Cleanup of Old Mine Sites*, ARIZONA REPUBLIC (Phoenix), November 5, 1993, at B1.

In addition to unemployment, the strip mining operation had contaminated the Laguna water supply, and community centers and roads were built with dangerously radioactive mill tailings. The cost of repairing even the worst of this damage will far exceed any tribal revenues that were obtained by the lease agreement.[18]

These are just a couple of examples. I could go on, but unfortunately I do not have time. The Nevada test site is located on Western Shoshone land; the land for the Los Alamos labs was confiscated from the San Ildefonso Pueblo; the Hanford nuclear weapons production facility was located right next to the Yakima Nation in Washington State, and many Yakima have worked there and suffered both from the releases off site and from the radiation exposure on site. Athabaskan natives were given doses of radioactive iodine and told that it was vitamin supplements, and their thyroids were studied as part of a program to see how cold weather peoples reacted to radioactivity. Radioactive materials were purposely spread in Point Hope, Alaska, without telling the local Inuit that this was done. Many Inuit people knew that something was wrong, because there were many deformities and cancers in the area, among animals and people. However, this was not officially revealed until last year, through a Freedom of Information Act request.

This brings us to the present moment. After this entire litany that I have recited for you, the United States government has now discovered a new useful commodity belonging to the Native American community. That commodity is Indian national sovereignty. It is ironic that after denying sovereignty for so long, all of a sudden the United States government, through its Department of Energy, is touting the sovereignty of Native American tribes. Why is that? It is because they could not find anyone else to take their high level radioactive waste from nuclear power plants. They sat down with their public relations people and put on a very slick campaign. Offering sweet talk and sweeter money deals, U.S. Department of Energy ("DOE") Nuclear Waste Negotiator David Leroy was able to convince seventeen tribal councils and four non-Indian county governments to take $100,000 grants to study the

[18] Winona LaDuke & Ward Churchill, *Native North America: The Political Economy of Radioactive Colonialism*, *in* THE STATE OF NATIVE AMERICA (M. Annette Jaimes ed., 1992).

possibility of becoming a volunteer host for a "Monitored Retrievable Storage" ("MRS") facility.

The Waste Negotiator was fond of quoting the famous Duwamish leader Seattle and praising Native Americans as "natural earth stewards." Approaching tribal organizations such as the National Congress of American Indians ("NCAI") and the Council of Energy Resource Tribes ("CERT"), the U.S. DOE sponsored "educational" workshops and gave out millions of dollars in grants. Both NCAI and CERT still depend on DOE funding.

Applicants for funding were told the MRS was to be a temporary facility, used for no more than fifty years, until a permanent waste repository could be built. These grants were to be followed with Phase II study grants of $1.3 million, culminating in an unspecified (but rumored to be very large) amount to be offered to the governmental body brave or foolish enough to take the waste.

The non-Indian Phase I grantees were quickly eliminated, due to threats and recall elections from angry constituents, or a governor's veto. This left only the Native American tribal councils.

Given the financial state of much of Indian Country, it is significant that only seventeen tribal governments, out of nearly 560 federally recognized tribes, decided to apply for the money. Also significant was the fact that the tribes accepting these grants had virtually no experience dealing with radiation. Soon, their leaders were under siege from angry tribal members.

In January 1992, Grace Thorpe was enjoying a comfortable retirement, volunteering for her tribe, the Sac and Fox Nation of Oklahoma, as a Health Commissioner and part-time tribal judge. She was retired, that is, until she discovered that her tribe was one of the seventeen applying for funding through the United States government's MRS nuclear waste program. She researched the issue, discovered that her initial reaction to oppose the program was warranted, and set about successfully challenging the grant at a special meeting of the Sac and Fox Tribe. Tribal members voted by a margin of seventy to five to return their $100,000 grant.

Suddenly, she found herself swept up into a new unpaid "career," speaking throughout the country against the United States government's MRS scheme. Thorpe, a daughter of legendary athlete, Jim Thorpe, was not unfamiliar with political action. She participated in the occupation of Alcatraz during the 1970's. As

an aide to former Senator James Abourezk, she helped shepherd legislation through Congress that allows Indian Nations a first chance at surplus federal lands—an extremely important provision that has allowed tribes to increase their land bases.

In her travels, she discovered that Native American activists throughout the country had awakened to this plan for nuclear waste storage. They too, were able to reverse their tribal governments position on accepting radioactive waste. Together with other Native American environmental activists, Thorpe formed the National Environmental Coalition of Native Americans ("NECONA") in March of 1993. As of today, through efforts of NECONA, only four tribal councils are still considering taking an MRS radioactive waste dump.

In June of 1993, NECONA, under Grace Thorpe's leadership, made an alliance with Nuclear-Free America to promote the declaration of Nuclear Free Zones ("NFZs") on Native American lands. The Nuclear Free Indian Lands Project, through letter and personal contact, has succeeded in encouraging the formation of six new NFZs since that time.[19] The newly declared Nuclear Free Nations joined the Flathead Nation of Salish and Kootenai, which has been an NFZ since 1984.

Even more significantly, Thorpe and Margret Carde of Concerned Citizens for Nuclear Safety in Santa Fe, New Mexico, convinced Senator Jeff Bingaman to introduce a successful amendment cutting all funding for MRS study grants. By the beginning of 1994, the MRS program was on the ropes. All but four tribal governments had withdrawn or been removed from the MRS list, and federal funding was far from certain. But, as often seems to happen, before environmental activists could finish off the MRS program, it changed form.

Northern States Power was desperate. The Minnesota-based utility was facing a court ordered requirement to move their irradiated fuel or shut down the Prairie Island nuclear power plant. In March of this year, they announced a private deal they, and a new consortium of over thirty nuclear utilities, were working out with the Mescalero Apache Nation. Under the plan, the Mes-

[19] The total number of Native American Nuclear Free Zones has since grown to 13. *Nuclear Land Rush Threatens Indian Country*, THE NEW ABOLITIONIST (Nuclear Free America, Baltimore, Md.), Fall 1994, at 1.

caleros would take their high-level radioactive waste at a new, privately run, MRS.

Many obstacles remain for a private MRS proposal. There is currently no procedure for siting a private nuclear waste facility of the size and type envisioned. Even if such a procedure could be worked out with the United States Nuclear Regulatory Commission, it would involve time consuming hearings and court challenges, as well as growing opposition among the general public of New Mexico.

Although Native American sovereignty in this matter may keep the state or its citizens from legally stopping the proposed waste dump, it is far from clear that the Mescaleros support it. The government of Tribal Chairman Wendell Chino has not lost an election in over forty years, yet it continues to delay holding a vote on the matter. Meanwhile, nuclear waste opponents such as Rafina Laws and the Geronimo family continue to organize opposition.

I believe that the wisdom of the Mescalero people is such that they will eventually reject the lure of short term profit over long term destruction of their land. What remains for us to ponder is why our society continues to produce such materials at all. If we have no way of safely disposing of them, should we not cease making them? Even more shameful to consider is why we would allow our government to try to foist our nastiest, most long-lived wastes onto a group of people who have already suffered tremendously because of our greed and intolerance. Now is the time for us to stop this insidious program and re-evaluate our choice of energy sources. With proper planning and a decent human value system, we can avoid the need for further attempts to dump our deadly problems on others.