



Herman G. Honanie
CHAIRMAN

Alfred Lomahquahu, Jr.
VICE-CHAIRMAN

Senate Committee on Indian Affairs on Friday, April 22, 2016, for an Oversight Hearing
regarding "Examining EPA's Unacceptable Response to Indian Tribes."

Written Testimony of Chairman Herman G. Honanie, Hopi Tribe, Arizona

The United States has a special trust relationship with federally recognized Indian tribes, including the Hopi Tribe. The Hopi Tribe has occupied what is now the Hopi Reservation in Arizona since time immemorial and has had a long and peaceful relationship with the United States. The United States officially recognizes the Hopi Tribe, acknowledging that the Hopi Tribe is entitled to "the immunities and privileges available to federally recognized Indian tribes by virtue of [its] government-to-government relationship with the United States" 80 Fed. Reg. 1,943 (Jan. 14, 2015). However, recently there have been several missed opportunities for the EPA, working with other federal agencies, to fully embrace the trust obligations of the United States to the Hopi Tribe. We have some current examples to share with the Committee summarized below. Additionally, with regard to proposed and future regulation of coal fired power plants in Indian Country, we submit that the United States, as part of its trust responsibilities to Tribes, make sure to off-set adverse economic impacts on Tribes, so that Tribes to not end up bearing a disproportionate burden.

The Hopi Tribe respectfully requests that this committee review the mandatory trust obligations of the United States under applicable statutes in the environmental and public health areas because the federal courts have been reluctant to adequately enforce

these obligations unless they are enumerated by statute. We believe that the federal trust obligations to tribes are falling through the cracks as a result, particularly when EPA and other federal agencies are involved, and the tribes have inadequate means to enforce these obligations. Several specific examples involving the Hopi Tribe are set out below.

Navajo Generating Station

The Navajo Generating Station (“NGS”) is a coal-fired power plant located near Page, Arizona on the Navajo Reservation. It is unique as a “mine-mouth” power plant. NGS exclusively uses coal from the Kayenta Mine Complex (“KMC”), which is located on the Navajo and Hopi reservations, and KMC’s only customer is NGS. KMC is geographically isolated, and currently there is no way to sell coal mined there to any other potential purchaser. NGS and KMC were designed by the United States as a single integrated system. The U.S. Bureau of Reclamation owns a 24.3% interest in NGS, and, as such, is the largest NGS shareholder. The U.S. Department of Interior, the U.S. Department of Energy, and the U.S. EPA have formed a Federal Agency Work Group for NGS.

Activities related to NGS are responsible for a major portion of the revenues of the Hopi Tribe’s government. The Hopi Tribe annually receives approximately \$13 million in coal royalties and bonus payments, \$1.6 million in water fees, and hundreds of thousands of dollars in scholarship funds related to KMC and NGS. The Hopi Tribe uses the NGS coal revenues for the provision of basic services and other essential government functions such as health care, education, housing, law enforcement, and social services. These services are crucial, but without any replacement of the lost revenues, the Hopi Tribe’s government will not be able to provide them.

The Hopi Tribe has communities challenged by poverty. Nearly fifty percent of the people and fifty-four percent of the children living on the Hopi Reservation are living below the poverty level by federal standards. This is more than twice that of Arizona as a whole. The

average annual income on the Reservation is half that of the population elsewhere in Arizona. Of the employment that is available on the Reservation, NGS and KMC are responsible for fifty to seventy percent of it—an estimated 1,400 to 1,900 Hopi jobs.

Despite the economic importance to the Hopi Tribe, the United States recently decided to shut down one or more of the three units at NGS rather than investing in standard pollution control devices known as Selective Catalytic Reduction Equipment (“SCRs”). EPA determined in February, 2013, that SCRs were the Best Available Retrofit Technology (“BART”) for NGS, and installation at NGS would be affordable and cost-effective. Proposed Rule, 78 Fed. Reg. 8,274 (Feb. 5, 2013). EPA also recognized that early plant retirement would be the only option that would seriously harm the Hopi Tribe’s economy.

After publication of the Proposed Rule, a number of stakeholders, including the U.S. Bureau of Reclamation, formed a “Technical Work Group” (the “TWG”). EPA was also involved with the TWG to a lesser extent. The Hopi Tribe was intentionally excluded from the TWG by the United States and the other TWG members. From at least March through July, 2013, the TWG met pursuant to a confidentiality and non-disclosure agreement.

The result of these negotiations was the TWG Agreement, which set forth a proposal for an alternate scenario to reduce emissions from NGS. The United States signed the TWG Agreement, which imposes specific requirements on the United States to support the TWG Proposal. The TWG Proposal included shutting down one of three units at NGS by 2019 and permanent cessation of conventional coal-fired generation by the end of 2044. 79 Fed. Reg. 46,514 (Aug. 8, 2014). In other words, under the TWG Proposal negotiated and agreed to by the United States, NGS will be closed partially by 2019 and completely by 2044. Coal sales and royalties, water fees, and economic conditions on the Hopi Reservation will follow suit. The day the TWG Proposal was submitted to EPA was the first time that the Hopi Tribe learned of the

existence of the TWG. EPA adopted the TWG Proposal. Supplemental Proposed Rule, 78 Fed. Reg. 8,274 (Oct. 22, 2013).

After publication of the Supplemental Proposed Rule, the Hopi Tribe, including the Chairman, Council members, and Tribal members participated in meetings with the United States to voice their concerns about the economic effects of this decision on the Tribe and to request additional information that would help the Tribe further understand how the Supplemental Proposed Rule would impact the Tribe, its members, its lands and how its trustee, the United States, was planning to address this impact. At this point, however, the United States had already signed the TWG Agreement and the Hopi Tribe's opportunity for early meaningful consultation was lost. Even though it recognized that the Hopi Tribe would be severely adversely impacted financially, the United States failed even to analyze or address those impacts. The United States, the Hopi Tribe's trustee, has failed to put a plan in place to address the loss of revenues and resulting impacts to the Hopi Tribe. On August 8, 2014, EPA issued the Final Rule, largely adopting the TWG Proposal. Final Rule, 79 Fed. Reg. 46,514 (Aug. 8, 2014).

A review shows that multiple generating stations in Indian Country have been forced into closure by EPA. Indian Tribes are disproportionately impacted by these closures. A number of tribe's economies are dependent on these plants, and there is inadequate mitigation being provided to these tribes. As appropriate, we can share this additional information with the Committee in a follow-up meeting. The Hopi Tribe has engaged in extensive discussions and negotiations with the United States concerning ways to offset the economic impact that EPA's rule will have on the Hopi Tribe but no resolution has been reached to date. EPA should be required to review its enforcement initiatives to determine whether EPA is acting in accordance with its trustee duties.

Tuba City Open Dump Superfund Site, Upper Moenkopi Village, Arizona

The Tuba City Open Dump (“TCOD”) lies south of Highway 160, south and east of Tuba City, Arizona and adjacent to the Upper Moenkopi Village of the Tribe. The TCOD was operated as an unregulated open-burn dump by the United States Bureau of Indian Affairs (“BIA”) from the late 1950s until 1997. The TCOD was not approved or permitted as a solid waste disposal facility under any provision of the Resource Conservation and Recovery Act (“RCRA”).

The TCOD was largely operated as an unregulated cut-and-fill trench type dump. BIA periodically excavated trenches for waste deposition. The trenches were filled with waste, burned, and periodically covered with soil by BIA. Dumping was largely uncontrolled and unsupervised by the BIA. The cycle of opening trenches, depositing wastes, burning the waste, and covering the waste continued until 1997, when the TCOD was closed by the BIA.

The TCOD occupies approximately 30 acres, and is comprised of an “old cell” and a “new cell.” The old cell comprises approximately 10 acres, while the new cell, developed in the late 1980’s, comprises approximately 20 acres. BIA covered the waste in the new cell and constructed a fence around that cell. More recently, in 2009, BIA constructed a fence around the old cell.

The TCOD was used by both the BIA and the Indian Health Services and may have been used by other departments of the United States government and their contractors. There is information developed by the BIA that wastes from a nearby uranium processing mill (operated by Rare Metals at the direction of the Department of Energy) were deposited in the TCOD. Recently, grinding balls of the type used at the processing mill was found in the old cell. Further, there were numerous reports of “marbles” matching the description of the mill grinding balls being found in the TCOD.

The Hopi Tribe has conducted initial environmental studies and investigations at and near the TCOD. Consultants were retained by the Hopi Tribe, and monitoring wells were installed in the area of the TCOD to assess potential groundwater impacts in and around the TCOD. The studies and investigations led to the discovery of constituents above drinking water regulations in several monitoring wells immediately down gradient from the TCOD old cell. Among these constituents are total dissolved solids, arsenic, selenium, uranium, radium 226/228, nitrate, sulfates and chloride.

Studies have identified saturated waste in the deeper trenched areas of the old cell of TCOD that are believed to be in direct contact with the groundwater. The plume of contaminants under and surrounding the TCOD is currently adversely impacting the groundwater aquifer, which is an extremely valuable Hopi Tribe resource.

Several years ago BIA signed an administrative order on consent with the EPA to conduct a remedial investigation and feasibility study ("RI/FS") at the TCOD under the Superfund Program. The RI/FS has been ongoing for the last several years. Even though the Hopi Tribe requested an opportunity to be a party to the administrative order, the United States declined that request but agreed to consult with the Tribe in the administrative process and before any decisions were made. While the Tribe remains engaged in the regulatory process with EPA and BIA in their actions and activities at the TCOD to complete the RI/FS, the Tribe has become increasingly concerned that the Tribe's requirements for the cleanup will not be treated as Applicable or Relevant and Appropriate Requirements ("ARARs") in the remedy selection process. Hopi Tribe officials have sent letters and meetings have been held with EPA Region 9 on this issue. Nonetheless, to date EPA has not provided a commitment that the Tribe's requirements will be treated as ARARs. See attached correspondence.

EPA has an opportunity to treat the Hopi Tribe as a co-sovereign with respect to the RI/FS process and remediation of the TCOD. The Hopi Tribe remains hopeful that EPA will

properly treat the Hopi Tribe's remedial requirements as ARARs and fulfill its trust obligations to the Hopi Tribe by remediating the contamination caused by the United States' actions at TCOD in accordance with Hopi Tribe requirements and in a manner acceptable to the Hopi Tribe.

Hopi Arsenic Mitigation Plan ("HAMP")

As trustee, the United States has exercised control over the Hopi Tribe's water supplies that were reserved to the Hopi Tribe pursuant to the Winters Doctrine when its reservation was established. In particular, the United States has designed, installed, constructed, and maintained drinking water systems on the Hopi Reservation, including those at the villages of Mishongnovi, Sipaulovi, Shungopavi, and the communities of Polacca and Keams Canyon. The United States selected and hired the contractors to construct the wells, listed itself as the "owner" of the wells in official paperwork, and designated itself as the record keeper for those wells.

Effective January 23, 2006, EPA lowered the maximum contaminant level ("MCL") for arsenic in drinking water to 10 micrograms per liter ($\mu\text{g/L}$). *Id.* ¶ 16 (citing 40 C.F.R. § 141.6(j)); 40 C.F.R. § 141.62(b)(16). Certain of the water supply systems designed and installed by the United States have consistently contained arsenic at levels exceeding this level, and range from approximately twice the limit to almost five times the limit. Arsenic harms the central and peripheral nervous systems and the heart and blood vessels. It causes serious skin problems. Prolonged exposure causes bladder, lung and skin cancer, and may cause kidney and liver cancer. Water with arsenic levels over the MCL has been found by the United States to be unfit for human consumption, but, for people living in the affected villages on the Hopi Reservation, there is no other source of drinking water currently available.

The Hopi Tribe requested that the United States address the elevated arsenic levels in the drinking water systems, including filing an action in the Court of Federal Claims. The Court recognized that the "central legal question in th[at] case" was "the precise scope of the federal

government's duties as trustee with respect to Indian trusts." The Court also recognized that the United States' trust duties are determined by "closely examining the statutes that impose them," and that "the federal government's trust duties are ultimately determined by Congress." The Court of Federal Claims found that it did not have jurisdiction under the Indian Tucker Act to hear the Hopi Tribe's claim, and the Federal Circuit affirmed.

The Hopi Tribe continues to work with the United States to further the Hopi Arsenic Mitigation Plan ("HAMP"). However, this process has been very slow, and, meanwhile, the drinking water systems at the Hopi Tribe continue to contain elevated arsenic concentrations. The Hopi Tribe is requesting that this committee review the handling of this matter by the United States. While EPA and the Indian Health Services have been instrumental in the initial funding and planning for the HAMP, the funding for the pipelines to connect the replacement water wells to the Hopi Villages has not yet been identified and made available.

In closing, we hope these examples are helpful to the Committee in its evaluation of how the United States can better fulfill its Trust obligations to Indian Tribes in the environmental and public health areas. Specifically, with regard to current and future economic impacts of regulation of coal fired power plants in Indian Country, we recommend that Committee review the United States' commitment to off-setting adverse economic impacts on Tribes, many of which cannot afford further adverse economic impacts. Thank you for the opportunity to provide testimony.

Congress of the United States
Washington, DC 20515

May 11, 2012

Honorable Ken Salazar
Secretary
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Honorable Lisa Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Secretary Salazar and Administrator Jackson:

We understand that a contaminated groundwater plume emanating from the Tuba City open dump on the Navajo and Hopi reservations poses an immediate threat to critical drinking-water supplies used by both tribes. We are also aware that the Department of the Interior (through the Bureau of Indian Affairs) and the Environmental Protection Agency are currently working on a Remedial Investigation/Feasibility Study (RI/FS) for the site. The plume's migration, however, may be outpacing your efforts. To stave off irreversible contamination of these drinking-water supplies, we encourage you, in coordination with the tribes, to immediately develop and implement a plume containment-and-control strategy. Such a strategy would go a long way toward preventing further degradation of critical resources, while BIA and EPA finalize the RI/FS and identify a long-term solution.

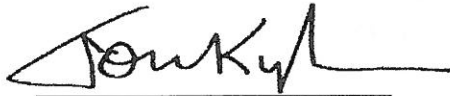
By way of background, it is our understanding that the BIA operated the Tuba City Open Dump from the 1950s until it stopped receiving waste in October 1997. We have also been informed that when in operation, it was an unlined, unpermitted, and unregulated facility. In all, the dump is approximately 30 acres in size, 28 acres of which are located on the Hopi Reservation, within view of the Hopi Village of Upper Moenkopi and the Navajo Nation's Tuba City Chapter.

We have also been informed that monitoring wells located adjacent to the dump indicate that contaminated groundwater is migrating from the site toward drinking-water wells; purportedly placing the plume within 3,000 feet of drinking-water wells serving the Village of Upper Moenkopi. Based on the information we received, these contaminants may include uranium, sulfates, and chloride, with uranium levels approximately seven times higher than the maximum contaminant levels allowed by the EPA. In light of the foregoing, we request that your respective agencies prioritize completion of the RI/FS, and that you urgently pursue a course of action aimed at containing and controlling the plume.

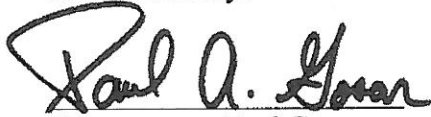
Thank you for your time and immediate attention to this important issue. As always, we ask that this matter be handled in strict accordance with the existing agency rules,

regulations, and ethical guidelines. Please do not hesitate to contact our offices with questions, and let us know if we can be of further assistance in this matter.

Sincerely,



Senator Jon Kyl



Congressman Paul Gosar



Senator John McCain



Congressman Trent Franks



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

JUN 19 2012

OFFICE OF THE
REGIONAL ADMINISTRATOR

The Honorable Paul Gosar
U.S. House of Representatives
504 Cannon House Office Building
Washington, DC 20515

Dear Congressman Gosar:


Thank you for your letter of May 11, 2012 to EPA Administrator Lisa Jackson regarding the Tuba City Dump (Dump), located on the Navajo Nation and Hopi Tribe reservations. The Administrator has requested our Regional Office in San Francisco to respond. Your letter expresses concerns that groundwater contamination from the Dump is posing an imminent threat of contaminating the drinking water sources in Moenkopi, and suggests that EPA strongly consider taking immediate action to contain groundwater, before completion of the Superfund remedial investigation and feasibility study (RI/FS) being performed by the Bureau of Indian Affairs (BIA) with EPA oversight under an enforceable agreement.

EPA shares your interest in ensuring that the limited drinking water available for the Navajo Nation and Hopi Tribe in this area remains safe and that the regulatory process to select appropriate cleanup actions takes place expeditiously. The remedial investigation currently being conducted is necessary to fully ascertain any potential risks from the Dump to the supply wells, and will be performed on a schedule that will ensure ongoing protection of the water supply. The feasibility study will evaluate specific detailed alternatives for cleanup of groundwater, the dump material, or both, to ensure that any remedy selected is the best alternative. EPA believes that existing studies and information do not support the need for a groundwater response action before this work is completed.

The fieldwork to complete the remedial investigation is beginning this month. The critical information from these field efforts will be available within the next six months. The Record of Decision is anticipated by early 2014. EPA is continuing to monitor the water from the supply wells and surrounding monitoring well network, and will reconsider taking earlier action should new information indicate it is necessary to protect drinking water. We are committed to continuing to work closely with the Navajo Nation and Hopi Tribe throughout the RI/FS and remedy selection process.

If you have questions or need any additional information, please have your staff contact my Congressional Liaison, Brent Maier, who can be reached at (415) 947-4256.

Sincerely,

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Jared Blumenfeld



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

JUN 19 2012

OFFICE OF THE
REGIONAL ADMINISTRATOR

The Honorable Trent Franks
U.S. House of Representatives
1237 Longworth House Office Building
Washington, DC 20515

Dear Congressman Franks:

Thank you for your letter of May 11, 2012 to EPA Administrator Lisa Jackson regarding the Tuba City Dump (Dump), located on the Navajo Nation and Hopi Tribe reservations. The Administrator has requested our Regional Office in San Francisco to respond. Your letter expresses concerns that groundwater contamination from the Dump is posing an imminent threat of contaminating the drinking water sources in Moenkopi, and suggests that EPA strongly consider taking immediate action to contain groundwater, before completion of the Superfund remedial investigation and feasibility study (RI/FS) being performed by the Bureau of Indian Affairs (BIA) with EPA oversight under an enforceable agreement.

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REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

JUN 19 2012

OFFICE OF THE
REGIONAL ADMINISTRATOR

The Honorable John McCain
United States Senate
241 Senate Russell Office Building
Washington, DC 20510

Dear Senator McCain:

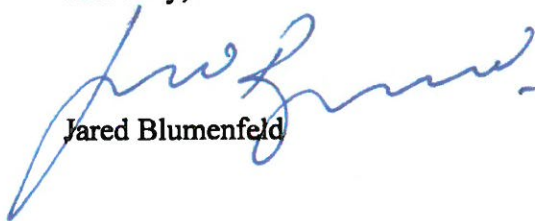
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

JUN 19 2012

OFFICE OF THE
REGIONAL ADMINISTRATOR

The Honorable Jon Kyl
United States Senate
730 Senate Hart Office Building
Washington, DC 20510

Dear Senator Kyl:

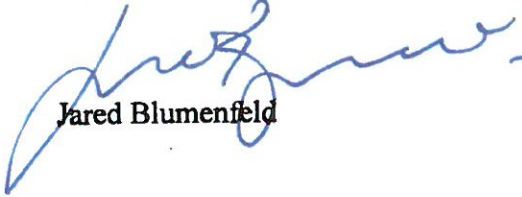
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