February 25, 1998

By Hand

U.S. Department of Energy
Office of General Counsel
GC-52
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Preparation of Report to Congress on Price-Anderson Act, 62 Fed. Reg. 68,272 (Dec. 31, 1997)

Dear Sir:

I am writing on behalf of Kerr-McGee Corporation ("Kerr-McGee") in response to the "Notice of Inquiry" by the Department of Energy ("DOE") seeking comments to assist in the preparation of a report to Congress concerning the continuation or modification of the Price-Anderson Act (the "Act"). These comments will focus solely on question 25 of the notice -- namely, whether the procedures in the Act governing administrative and judicial proceedings should be modified. 62 Fed. Reg. at 68,277. As you will see, we urge the amendment of the Act to implement Congress' goal of assuring a federal forum for any public liability action arising out of a nuclear incident that is presented to any court within the United States, including a tribal court.

In part I of these comments, I will describe the factual circumstances that surround Kerr-McGee's interest in this issue. In part II, I will explain why the Act should be amended so as

to assure a federal forum. In part III, I discuss a suggested amendment of section 2210(n)(2) of the Act.

I.

Kerr-McGee is the former owner and operator of a uranium mill near Shiprock, New Mexico, on land that was leased from the Navajo Tribe. Long after the operations had ceased, certain tribal members filed a complaint in Navajo tribal court seeking damages from the former operators for alleged injuries from "vast quantities" of radioactive and toxic materials that allegedly had been released from the mill.

Kerr-McGee and Cyprus Foote Mineral Company ("Cyprus Foote"), another operator of the mill, jointly filed suit in the United States District Court for the District of New Mexico seeking to enjoin the tribal court from adjudicating the tribal members' action, citing in particular the provisions of the Act in which Congress made clear its intention to make a federal forum available for the resolution of such a "public liability action." 42 U.S.C. § 2210(n)(2); see 42 U.S.C. §§ 2014(hh), 2014(q), 2014 (z). The district court held that Kerr-McGee and Cyprus Foote were required to exhaust tribal remedies before seeking relief in federal court because Congress had not explicitly preempted tribal court authority to apply tribal law to claims of personal injury caused by exposure to nuclear material on Indian reservations. Kerr-McGee Corp. v. Farley, 915 F. Supp. 273 (D.N.M. 1995).

The Court of Appeals affirmed. The court recognized that the Act creates "sweeping" federal jurisdiction over all actions asserting public liability, which "encompasses any legal liability from `nuclear incidents.'" Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1504 (10th

Cir. 1997) (emphasis in original). Nonetheless, although it conceded that there was "some force" to Kerr-McGee's argument that "there exists a jurisdictional prohibition on all forums not mentioned in the 1988 Amendments [to the Act]," id. at 1505, the court concluded that "tribal adjudicatory authority over this nuclear incident is not `patently violative of an express jurisdictional prohibition.'" Id. at 1507, quoting National Farmers Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985). Accordingly, the court held that federal abstention in favor of tribal exhaustion "is appropriate." 115 F.3d at 1508.

In the meantime, the Navajo tribal court issued an order finding that it has jurisdiction over the suit. Farley v. Kerr-McGee, No. SR-CV-103-95 (Navajo D.Ct. June 6, 1996). The tribal court held that the Act does not preempt its authority to adjudicate nuclear tort claims; indeed, it held that the Act does not apply at all to claims of injury from nuclear materials.

Kerr-McGee and Cyprus Foote sought review from the U.S. Supreme Court, but the Court denied the petition for certiorari. 118 S. Ct. 880 (1998). As a result, Kerr-McGee and Cyprus Foote now face the prospect of a lengthy and complex trial in Navajo District Court, followed by a discretionary appeal from an adverse judgment in the Navajo Supreme Court, before they can obtain a hearing in federal court on the merits of their jurisdictional challenge.

II.

The remedial scheme created by Congress in the Act embodies several elements that are irreconcilable with tribal jurisdiction. The cause of action is governed by preemptive federal substantive law, albeit federal law that incorporates aspects of state law. See 42 U.S.C. § 2014(hh); O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1094-1101 (7th Cir. 1994).

Although Congress envisioned that this exclusive federal remedy might be pursued in state as well as in federal court, it provided a defendant with an automatic right of removal to federal court of any action commenced in state court. See 42 U.S.C. § 2210(n)(2). In addition, if the claim is covered by an indemnification agreement with the Nuclear Regulatory Commission or the Department of Energy, the Commission or the Secretary, as appropriate, may "take charge of [the] action," id. § 2210(h), and remove a state action to federal court, id. § 2210(n)(2).

In light of the scope of these adjudicatory provisions, it is inconceivable that Congress intended to allow tribal courts to resolve actions arising out of nuclear incidents. The Price-Anderson Act and its amendments were designed to "remove[] a deterrent to private sector participation in the government's nuclear energy programs" by establishing an integrated adjudicatory system, governed by federal rules, that limits potential liability for nuclear torts. H.R. Rep. no. 100-104, pt. 2, at 5 (1987). See also Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 64 (1978). Thus, by preempting all inconsistent substantive law, the Act ensures that a common, federal standard of care will be applied in all jurisdictions that adjudicate liability for nuclear torts. See, e.g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984); In re TMI Litig. Cases Consol. II, 940 F.2d 832, 858 (3d. Cir. 1991); O'Conner, 13 F.3d at 1104-05. Tribal courts, however, might well seek to apply a standard of care that is significantly different from that established by federal law. And, unlike state court determinations, their decisions would escape Supreme Court review.

The Act also contemplates the consolidation in a single court of all claims arising out of the same nuclear incident. 42 U.S.C. § 2210(n)(3). Congress fully appreciated that, absent consolidation, differences among state laws might result in persons exposed to the same nuclear

incident receiving disparate treatment "simply by reason of an invisible State boundary." S. Rep. No. 89-1605, at 8 (1966), reprinted in 1966 U.S.C.C.A.N. 3201, 3208. If tribal courts were allowed to conduct trials of nuclear tort claims, there would be no mechanism for removal to federal court and consolidation. Indeed, if the case involved a claim covered by an indemnification agreement, the federal government would be deprived of its right to a federal forum.

Finally, the Act, as amended in 1988, bars the award of punitive damages against any entity indemnified by the federal government under the Act. 42 U.S.C. § 2210(s). That same entity, however, could find itself named as a defendant in a nuclear tort case brought in tribal court, and might be forced to defend there against punitive damage claims. The very relief that Congress intended to preclude might thus be resurrected.

In short, the Act "creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action." O'Conner, 13 F.3d at 1101. This scheme clearly precludes tribal court jurisdiction over nuclear litigation.

The federal courts in the Farley litigation have declined to foreclose the exercise of tribal court jurisdiction, however, because certain Supreme Court decisions have suggested that, in the interest of comity, a tribal court should have the first opportunity to determine the scope of its jurisdiction. 115 F.3d at 1507; see National Farmers, 471 U.S. at 856; Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987). The Supreme Court has been careful to point out that tribal exhaustion should not be required "where the action is patently violative of express jurisdictional prohibitions." National Farmers, 471 U.S. at 856 n.21. But the federal courts in Farley have held that this exception does not apply in the context of the public liability actions because the Act does

not provide for exclusive federal jurisdiction. 115 F.3d at 1504-05. (The removal provision is unavailable in this context because it authorizes only removal from state courts.)

We are confident that, at the end of the day, the federal courts will conclude that the tribal court does not have jurisdiction over this dispute. Nonetheless, because exhaustion of tribal remedies is required before the issue will be resolved in federal court, the defendants will be subjected to extensive and ultimately pointless litigation in the tribal system. Moreover, an adverse decision in the tribal court -- although subject to vacatur -- would cause needless concern and encourage even further pointless litigation.

The issue presented by the Farley case has arisen in other cases and is certain to recur. See El Paso Natural Gas Co., v. Neztsosie, __ F.3d ___, No. 96-17121 (9th Cir. Feb. 11, 1998). Thousands of Indians have worked in, or resided near, uranium mines and processing facilities located on or in close proximity to Indian reservations. Moreover, several DOE facilities are near Indian reservations. Many tribal members may thus seek to bring claims in tribal courts similar to the claims in Farley against NRC licensees or DOE contractors. The situation thus cries out for Congressional repair.

III.

The problem exposed by the Farley case for DOE contractors and other nuclear operators can be corrected by a slight modification of the language in the provision of the Act providing for federal jurisdiction. 42 U.S.C. § 2210(n)(2). The provision could be amended to provide for exclusive federal jurisdiction, which of course would serve to bar litigation in either

state or tribal courts. A less sweeping change would be simply to modify the removal provision so as to assure the availability of a federal forum.

The relevant passage of section 2210(n)(2) might be amended to provide:

> Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any court (including a tribal court) within the geographical limits of the United States (including any such action pending on the date of the enactment of [this amendment]) shall be removed or transferred to the United States district court having venue under this subsection. . . .

This revision would allow the removal of a "public liability action" from either state or tribal court, thereby assuring the availability of a federal forum.

We are not aware of any existing provision of federal law that authorizes removal of an action from a tribal court to a federal court. But there appears to be no bar to such a provision. Congress clearly has the general power to legislate in ways that affect or limit tribal jurisdiction. See National Farmers, 471 U.S. at 851 ("the power of the Federal Government over the Indian tribes is plenary"); Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 n.30 (1984) ("it is clear that all aspects of Indian sovereignty are subject to defeasance by Congress"). See also, e.g., Reich v. Mashautucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996).

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In light of the foregoing, we urge DOE to recommend the amendment of section 2210(n)(2) as described here. Please contact me if you would like to discuss this matter further.

Very truly yours,

Richard A. Meserve
Counsel for Kerr-McGee Corporation

bcc: Gregory F. Pilcher, Esq.
Myron Cunningham, Esq.
Peter M. Frank, Esq.
Jon J. Indall, Esq.
Tom Galbraith, Esq.

bbcc:

Mr. Merrill
Mr. Schulder
Ms. Carter