

# UNDERGROUND STORAGE TANKS AND OPEN DUMPS ON INDIAN RESERVATIONS

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## OVERSIGHT HEARING BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS OF THE COMMITTEE ON NATURAL RESOURCES HOUSE OF REPRESENTATIVES ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

ABANDONED AND LEAKING UNDERGROUND STORAGE TANKS AND  
OPEN DUMP SITES ON INDIAN RESERVATIONS

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HEARING HELD IN WASHINGTON, DC  
OCTOBER 14, 1993

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# **ABANDONED AND LEAKING UNDERGROUND STORAGE TANKS AND OPEN DUMP SITES ON INDIAN RESERVATIONS**

**THURSDAY, OCTOBER 14, 1993**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON NATURAL RESOURCES,  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:00 a.m. in Room 2325, Rayburn House Office Building, Hon. Eni F.H. Faleomavaega [member of the subcommittee] presiding.

Mr. FALEOMAVAEGA [presiding]. The committee will come to order.

Chairman Richardson will be coming in a while. He is having a meeting right now with the leadership of the House.

## **STATEMENT OF HON. ENI F.H. FALEOMAVAEGA**

Mr. FALEOMAVAEGA. Today, we will be hearing testimony on two pervasive environmental problems in Indian country, abandoned and leaking underground storage tanks and open dump sites.

There are over 650 open dump sites on Indian lands. All but two of these sites do not comply with current Federal standards. In April 1994, when the new EPA regulations governing Federal landfills go into effect, only one of these sites will be in compliance with the new regulations. It is estimated that it will cost over \$130 million to effectively close these sites or bring them into compliance.

Over the 5-year period of 1985 through 1990, EPA has expended just over \$2 million on Indian lands under RCRA. These funds must address the hazardous and solid waste problems of over 500 Indian tribes and approximately 53 million acres of land.

We can't allow the Federal Government to continue to stand idly by while Indian tribes' precious resources are being contaminated. Indian tribes are facing a wide variety of environmental problems ranging from leaking underground storage tanks to pesticides leaching into groundwater supplies from contaminated uranium mill tailings to open dumps on the reservations. We are specifically looking into the two most disturbing environmental problems facing Indian tribes today, although these and other issues warrant hearings as well.

We will hear testimony from tribal witnesses about the environmental hazards caused by leaking underground storage tanks and their frustration in seeking Federal assistance in their attempts to clean up these facilities. They will testify about the failure of the

BIA, the IHS, and the EPA to accept responsibility to assist the tribes in the cleanup of these facilities. Although the Bureau of Indian Affairs is the principal land manager of Indian lands and the Secretary of the Interior must approve all leases of Indian lands, the Bureau of Indian Affairs does little to afford protection to Indian lands.

The Environmental Protection Agency is charged with regulating all underground storage tanks and provides assistance to the States to address problems related to underground storage tanks. However, EPA provides no assistance to Indian tribes to address the problems of leaking underground storage tanks. The Indian Health Service is responsible for related health care of Indians and provides technical assistance to tribes as needed.

Today, we will hear from each of the three Federal agencies about their current efforts to address these issues, where they feel they need assistance, and how well the three agencies communicate and coordinate their activities.

The scope of the problems with abandoned underground storage tanks as well as open dump sites needs to be determined. Tribes and the Federal Government do not appear to have reliable data as to how many underground storage tanks exist or how many open dumps are located on Indian lands. We do not know what other associated problems exist such as groundwater contamination from leaking underground storage tanks or leachate from open dumps.

Numbers need to be developed on dump sites on Indian lands including those officially operated sites, those sites which are neighborhood dumping areas, and those sites where individuals illegally dump their trash.

We will also hear from the State of New Mexico which has entered into a unique agreement with the Pueblo of Pojoaque to address the cleanup of underground storage tanks. I am greatly encouraged by the spirit of cooperation between the State of New Mexico and tribes to address a common problem. I look forward to hearing from the State representative and the tribes about how that situation is working out.

In the interim, Chairman Richardson has introduced H.R. 1267, which is currently before the House Energy and Commerce Committee and, if enacted, will provide that Indian tribes be treated as States under the Resource Conservation and Recovery Act. Enactment of this legislation along with a clear understanding of who is responsible for these problems will go a long way to ensuring that underground storage tanks and open dump sites on Indian lands are cleaned up.

[Background on this hearing follows:]

**BACKGROUND FOR THE OCTOBER 14TH OVERSIGHT HEARING  
ON ABANDONED AND LEAKING UNDERGROUND STORAGE TANKS  
AND OPEN DUMPS ON INDIAN LANDS**

The hearing will focus on two major problems for Indian tribes under the RCRA; abandoned and leaking underground storage tanks and open dumps sites on Indian reservations.

**History**

Over the many years that States have received assistance from the Environmental Protection Agency (EPA), states have developed comprehensive environmental protection programs and have developed the regulatory capacity to directly administer federally-delegated programs under the Safe Drinking Water Act, the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act (RCRA). Over this same period of time, Indian tribes were not eligible to receive assistance from the EPA to develop environmental protection programs on their reservations and to build tribal environmental regulatory capacities. Over the last several years Congress has amended the Safe Drinking Water Act, the Clean Air Act, and the Clean Water Act to treat Indian tribes as states. This process allows Indian tribes to receive program funds from the EPA to operate federally delegated environmental programs under the Safe Drinking Water Act, the Clean Air Act and the Clean Water Act. It allows Indian tribes to assume primary planning, implementation, and enforcement responsibilities under these environmental statutes. Congress has yet to amend the Resource Conservation and Recovery Act to allow Indian tribes to be treated as states. Under the provisions of RCRA, Indian tribes are treated as municipalities. Therefore, Indian tribes are precluded from receiving any program funds under RCRA and are unable to use other sources of funding from EPA to carry out activities which would fall under the provisions of RCRA. There has been very little assistance to Indian tribes to address problems related to RCRA. It has been reported that for the period of 1985 through 1990 EPA has expended the following amounts on Indian lands under RCRA:

1985	-	\$ 175,400
1986	-	\$ 51,500
1987	-	\$ 69,500
1988	-	\$ 162,500
1989	-	\$ 519,000
1990	-	\$1,125,500

Total RCRA Expenditures 1985 - 1990 .....\$2,003,400

Because of the lack of Federal assistance to Indian tribes to address problems under RCRA, there are increasing numbers of serious environmental problems on Indian reservations. Without Federal assistance, most Indian tribes do not have the necessary

resources in place to combat these growing environmental concerns.

### Liability Questions

Indian tribes have looked to the Federal government to assist them in the development of tribal environmental protection programs. The Federal agencies which have the most significant role in tribal environmental issues are the Environmental Protection Agency, the Bureau of Indian Affairs, and the Indian Health Service. Each of these agencies has a role in carrying out the trust responsibilities to Indian tribes. The Bureau of Indian Affairs is the principle agency involved in the management of Indian lands. The Secretary of the Interior must approve any lease agreement involving Indian trust lands. In addition, Bureau of Indian Affairs is also responsible for certain business permits and licenses as well as conducting Environmental Impact Statements or Environmental Assessments under NEPA. The Indian Health Services is responsible for the construction of wastewater treatment facilities and sanitary landfills on Indian lands. The Indian Health Service also is authorized to provide technical and financial assistance to Indian tribes for the continuing operation of wastewater treatment facilities. The EPA has the responsibility to regulate environmental quality on Indian lands and to provide financial and technical assistance to Indian tribes pursuant appropriate environmental statutes. All of these responsibilities are based on the underlying trust responsibility of the Federal government to Indian tribes as recognized in treaties and in statute.

The question of which Federal agency is responsible, and liable, for the clean up of open dump sites on the Pine Ridge Indian Reservation in South Dakota was raised in the case, *Blue Legs v. Bureau of Indian Affairs, et al.*, 867 F.2d. 1094 (8th Cir. 1989). This case was a private citizen suit to enforce the Solid Waste Disposal Act against the Indian tribe, the EPA, the BIA and the IHS. In deciding this case, the 8th Circuit Court of Appeals held that since Indian tribes are treated as municipalities under RCRA, Congress specifically intended to waive the Indian tribe's sovereign immunity with respect to the violations of the Act. The Court held the Indian tribe, the Bureau of Indian Affairs and the Indian Health Service all partially liable for cleaning up the dump sites on the Pine Ridge Indian Reservation. The Court based its decision to impose liability on the BIA and the IHS on the Federal trust responsibility to Indian tribes. The Court based its determination in part on the authority vested in the BIA and the IHS through the Snyder Act 25 U.S.C. Section 13. In addition, the Court cited the fact that both the Bureau of Indian Affairs and the Indian Health Service had contracted with the Indian tribe to haul their waste to the tribal landfills.

### Solid Waste Disposal

Since the decision in *Blue Legs*, the Federal government has done very little to address environmental problems related to open dumps. Currently, neither the BIA nor the IHS view their responsibilities as requiring them to provide financial assistance to Indian tribes to clean up open dumps or facilities which are out of compliance. The EPA has

stated that they are unable to provide assistance to Indian tribes under the provisions of RCRA without statutory amendments. Indian tribes are faced with finding alternative resources to address these serious environmental problems.

There are over 650 open dumps located on Indian reservations. It has been estimated that it will cost over \$130 million to bring these solid waste facilities into compliance with existing Federal standards. It has been estimated by the Indian Health Service that when the new regulations governing Federal landfills go into effect only one landfill located on Indian lands will be in compliance. These regulations will become effective on April 9, 1994.

#### **Leaking Underground Storage Tanks**

There are many Indian tribes who are now faced with the prospect of identifying and cleaning up abandoned or leaking underground storage tanks on their lands. Because Indian tribes are treated as municipalities under the RCRA, they are not eligible for funds to clean up these leaking underground storage tanks. Because States do not have jurisdiction over Indian reservations, States will not provide financial assistance for the clean up of these tanks from the State trust funds. These trust funds are initially capitalized through Federal and State contributions. The State then assesses fees to gas stations and others to provide continuing revenues for these trust funds. Neither the BIA nor the IHS provide any financial assistance to Indian tribes to clean up leaking underground storage tanks. Several Indian tribes have reported that the EPA has taken the position that the Indian tribe, as the owner of the land, is responsible for the leaking underground storage tanks on the reservation. This interpretation does not properly consider the roles of the Federal government as trustee over Indian lands. In fact, the Secretary of the Interior through the Bureau of the Indian Affairs, is directly responsible for the approval of any lease of Indian land. As part of the standard BIA lease agreement, there are provisions requiring surety and performance bonds as well as other types of security to ensure that the lands are returned to their original condition. Finally, the BIA is the responsible agency for developing environmental assessments and environmental impact statements for Indian lands. Yet in most instances the BIA has failed to enforce these provisions and therefore tribal lands are not protected from leaking underground storage tanks.

Mr. FALEOMAVAEGA. At this time I would like to enter into the record the prepared statement of the subcommittee's ranking minority member, Hon. Craig Thomas of Wyoming.

[Prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF HON. CRAIG THOMAS OF WYOMING

Thank you Mr. Chairman.

I think that it is important that we have taken up this issue at this time. Open dumps and leaking storage facilities on Indian lands are not only simply an eyesore, but a source of possible contagion and toxic or other dangerous substances. They threaten the land, the water, and the people which surround them.

The Chairman will recall that we saw such a site when we visited the Wind River Indian Reservation in my home state of Wyoming in April of this year. An unmonitored open pit, it contained the smoldering remains of garbage, appliances, and even animal carcasses.

While I believe that we need to explore ways to remedy this problem, I am also concerned about the imposition on the tribes of unfunded federal mandates. For example, the EPA has promulgated regulations requiring tribes to undergo expensive clean-up operations, but provides no mechanism by which the tribes can finance those operations. Of course, this is nothing new—the federal government is continually imposing similar unfunded mandates on cities and states all over the country. However, these mandates are particularly onerous on the tribes, which are significantly poorer than, and have few of the revenue raising capabilities of, most municipalities or county or state governments.

I look forward to the testimony today, and hope that we will move towards addressing this problem in the near future.

Thank you Mr. Chairman.

Mr. FALEOMAVAEGA. I would ask all witnesses to summarize their statements. The statements, of course, will be made part of the record, and it will be open for 2 weeks. At this time I ask unanimous consent that the background be made part of the record.

We have as our first panel this morning, our lead witnesses, Mr. David Ziegele, director of the Office of Underground Storage Tanks, the U.S. Environmental Protection Agency, who is accompanied by Mr. Bruce Weddle; Mr. Patrick Hayes from the Bureau of Indian Affairs, the Department of the Interior, who is accompanied by Mr. George Farris; and Mr. Gary Hartz, director, Division of Environmental Health, Office of Environmental Health and Engineering, Indian Health Service, accompanied by Captain Rick Barrar, the Deputy Chief of Sanitation Facilities Construction, and Commander Tom Crowe, chief, Environmental Health Services.

We have a number of witnesses this morning. So, could we have you gentlemen please come before the panel at this time?

Mr. Ziegele, I think you have the opener this morning. Welcome to the committee.

I welcome all of you gentlemen before the subcommittee this morning. Without objection, your statements will be made a part of the record, and we would like to give this opportunity now to Mr. Ziegele for his testimony.

PANEL CONSISTING OF DAVID W. ZIEGELE, DIRECTOR, OFFICE OF UNDERGROUND STORAGE TANKS, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY BRUCE R. WEDDLE, DIRECTOR, MUNICIPAL AND INDUSTRIAL SOLID WASTE DIVISION, OFFICE OF SOLID WASTE; PATRICK HAYES, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY GEORGE FARRIS, CHIEF, DIVISION OF ENVIRONMENTAL SERVICES; AND, GARY J. HARTZ, DIRECTOR, DIVISION OF ENVIRONMENTAL HEALTH, OFFICE OF ENVIRONMENTAL HEALTH AND ENGINEERING, INDIAN HEALTH SERVICE, ACCOMPANIED BY CAPT. RICK BARRAR, DEPUTY CHIEF, SANITATION FACILITIES CONSTRUCTION, AND COMMANDER TOM CROWE, CHIEF, ENVIRONMENTAL HEALTH SERVICES

#### STATEMENT OF DAVID W. ZIEGELE

Mr. ZIEGELE. Thank you, sir. Good morning.

I am David Ziegele, director of the Office of Underground Storage Tanks of the U.S. EPA. With me is Bruce R. Weddle, acting director of the Office of Solid Waste at EPA.

I will first discuss the underground storage tank program on Indian reservations and will then focus on open dumps on Indian reservations.

Of the 5 million underground tanks nationwide, approximately 1.4 million are regulated under the Resource Conservation and Recovery Act, or RCRA. Of these, approximately 5,000 tanks are on Indian lands, and there are another approximately 2,000 underground tanks on Indian lands that are inactive or closed. Because of this huge universe of regulated tanks, EPA and, in fact, the Congress chose to have the program implemented mainly by the States and local agencies, except for Indian lands, where EPA is the implementing agency.

The Leaking Underground Storage Tank Trust Fund, or LUST Trust Fund, provides the major source of funds for the part of the program addressing leaking tanks, both for EPA and State programs. RCRA defines Indian tribes as municipalities and not States, and therefore tribes are not eligible to receive LUST Trust Fund monies directly.

RCRA also places responsibility for paying for cleanups on the person responsible for the leak, and the LUST Trust Fund can only be used for cleanups under very limited circumstances.

Also, it is worth pointing out that grantees under the LUST Trust Fund, including tribes if they were eligible, could not use the LUST Trust Fund to clean up leaks where that grantee is the owner or operator.

EPA regions have the lead in carrying out the program on Indian lands, and we give them flexibility in how they carry that out. My written testimony includes several examples of the approaches regions have used to carry out the program on Indian lands.

There is tremendous variation among tribal nations in the approach that they would like EPA to take in working with them on underground tanks, and this presents one of several challenges we face in carrying out the program. Some tribes prefer to try to run

their own program. Others prefer to rely on EPA or reach an agreement with a State for program implementation or cleanup of particular sites.

Another challenge is that abandoned tanks continue to pose potential environmental threats both on Indian lands as well as other parts of the country. Significant costs are involved in cleaning up sites and also upgrading or replacing tanks, which all owners have to do by 1998.

Also, regarding helping tribes set up their own regulatory programs, frequently the small number of tanks on a given reservation makes it difficult to have a financially self-sustaining program.

Turning to open dumps on Indian reservations, on October 9, 1991, EPA issued criteria to assure that all municipal solid waste placed in landfills was disposed of in an environmentally safe manner. These criteria include location restrictions, operating requirements, design provisions to prevent groundwater contamination, groundwater monitoring and corrective action requirements, and closure, post-closure, and financial assurance requirements.

For the closure requirements, proper closure of municipal solid waste landfills is necessary to prevent future public health and environmental problems. The criteria require that the site owner or operator install a final cover system designed to minimize infiltration and erosion. The cost to put a final cover on a landfill will vary from site to site, but for a landfill that would be typical of many open dumps on Indian lands, the cost would be approximately \$50,000.

The criteria do not apply to landfills that stopped receiving waste before October 9, 1991. Landfills that received waste after October 9, 1991, but stopped receiving waste before the effective date are only required to comply with the final cover requirements. The effective date for tribal landfills is based on the volume of waste received and it ranges from October 1993, this month of this year, for the largest landfills to October 1995 for the smallest landfills located in dry areas of the country.

RCRA requires States to develop and implement permit programs to ensure that municipal solid waste landfills comply with the revised Federal landfill criteria. While the statute does not address implementation on Indian lands, EPA's policy is to view the tribes as the key implementers of the program on tribal lands. EPA's role is limited to developing regulations and to approving adequate municipal solid waste landfill permit programs.

EPA does not permit or inspect municipal solid waste landfills. In fact, the statute precludes EPA enforcement of landfill criteria except in those cases where EPA has formally deemed the State or tribal program to be inadequate.

During the last few years, EPA has worked with tribes on a variety of projects related to waste management, all designed to meet tribal needs and RCRA program objectives. The written testimony describes several of these efforts.

In conclusion, EPA is committed to protecting human health and the environment on tribal lands. We will continue to work with tribes by providing technical assistance, training, and, in the case of underground tanks, direct implementation activities on Indian lands.

For landfills, our goal is to enable tribes to make informed decisions concerning the kinds and level of environmental protection programs necessary for their circumstances. For underground tanks, we are committed to supporting tribally administered programs that can be operated with their own authorities and funding, working with tribal consortia and serving as a facilitator for development of tribal-State agreements as appropriate.

This concludes my testimony. Mr. Weddle and I would be happy to answer any questions you or other members of the committee have. Thank you.

Mr. FALEOMAVAEGA. Thank you, Mr. Ziegele.

[Prepared statement of Mr. Ziegele follows:]

**STATEMENT OF  
DAVID W. ZIEGELE  
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
OF THE  
COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES**

**OCTOBER 14, 1993**

Good morning, Mr. Chairman and members of the Subcommittee. I am David Ziegele, Director of the Office of Underground Storage Tanks of the U.S. Environmental Protection Agency (EPA). With me is Bruce R. Weddle, Director of EPA's Municipal and Industrial Solid Waste Division of the Office of Solid Waste. I will first be discussing the underground storage tank program on Indian reservations and will then focus on open dumps on Indian reservations.

**LEAKING UNDERGROUND STORAGE TANKS**

**Background**

As the result of increasing evidence of environmental and public health problems caused by leaking underground storage tanks, Congress enacted Subtitle I of the Resource Conservation and Recovery Act in 1984. This legislation gives EPA authority to regulate certain petroleum and hazardous substance tanks, but excludes a variety of tanks, such as heating oil tanks. Of the more than 5 million underground storage tanks (USTs) nationwide, approximately 1.4 million fall within the EPA's regulated universe. Of those, approximately 4875 are found on Indian

reservations. In addition, approximately 1800 tanks on Indian reservations have been closed or have become inactive in the past five years.

Given the extremely large size of the regulated universe, EPA realized that it could not effectively implement the program directly. The Agency decided that it would rely upon and help build state capacity to implement the UST program, except for tanks on Indian reservations which remain under EPA jurisdiction. When it enacted the legislation, Congress established a series of requirements that owners and operators had to fulfill. These included registering tanks, taking steps to prevent and detect releases, reporting and cleaning up releases, upgrading existing tanks, closing tanks properly, and obtaining financial assurance to ensure that owners and operators are able to pay the costs of corrective action and compensate third parties for injuries or damages resulting from the release of petroleum from USTs. I will focus today primarily on those requirements related to leaking underground storage tanks, with an emphasis on how the requirements are being implemented on Indian lands.

All states and territories have ongoing underground storage tank programs. In recent years, the state workload has increased, as the number of confirmed releases from leaking tanks has risen dramatically and now amounts to over 226,000 sites. States identify approximately 50,000 new releases each year. Responsible parties are taking the lead in cleaning up the sites in approximately 95 percent of the cases. Of the 226,000 releases, remediation activity has begun at approximately 175,000 sites. Of those, remediation has been completed at

approximately 80,000 sites. In comparison, we know of approximately 530 leaking sites on Indian reservations. Cleanups have been initiated at approximately 385 sites of which about 130 have been cleaned up.

**Leaking Underground Storage Tank Trust Fund**

In recognition of the need to provide a stronger funding base for the cleanup portion of the program, Congress created the Leaking Underground Storage Tank (LUST) Trust Fund in 1986. The LUST Trust Fund provides money for EPA to help administer the program. More importantly, it provides funds for states to implement the cleanup program, take enforcement actions for leaking tanks, and, in the face of an imminent threat to public health or the environment, take the lead for cleanups when a responsible party cannot be found or is incapable of remediating the site. The vast majority, approximately 85 percent, of the LUST funds are awarded to states under formal cooperative agreements. As you know, Indian tribes are defined as municipalities--not states--by the Resource Conservation and Recovery Act (RCRA) and thus are not eligible to receive LUST Trust Fund monies directly.

It also is important to note that persons responsible for leaks are not eligible grantees under the LUST Trust Fund. Further, where the Trust Fund is used, EPA or the state is obliged to pursue recovery of costs from the liable tank owner or operator if the responsible party is deemed financially capable of paying for the cleanup. While states receive the vast majority of LUST funds, they cannot use

the funds to pay for cleanups where they are the responsible party. For example, if there was a leak at a state department of transportation facility, the state would have to use its own funds, rather than the LUST Trust Fund, to clean up that site.

In the authorizing legislation, Congress established that the responsibility for cleaning up a site rests with the owner or operator of the UST. This requirement can cause confusion and problems that are relevant to leaking underground storage tanks on Indian reservations. A landowner, for example, who leases the property on which an underground storage tank is located also may be a potentially responsible party if a leak occurs. This is due in part to the fact that tanks may be considered to be fixtures of real property. Thus, the property owner also may be considered to be the tank owner. In practice, the determination of tank ownership, and thus the potential liability, is very case-specific and can depend on a variety of factors.

Cleanups can be expensive. If only soil has been polluted by a leak, the cost ranges from \$10,000 to \$125,000. If groundwater has been polluted, however, the range is much higher--\$100,000 to \$1 million. Realizing that tank owners and operators would find it difficult to meet the financial responsibility requirements and to pay for cleaning up leaks, many states have established state financial assurance funds.

Forty-three states have legislation for state financial assurance funds, although funds vary in their nature, scope and coverage. Since states do not have jurisdiction over tanks on Indian reservations, many state funds do not pay for

cleanups on Indian reservations. In a few minutes, I will discuss jurisdictional issues related to state fund coverage of tanks on Indian lands. Some states, however, are making progress in extending coverage to tanks on Indian reservations. EPA is actively working with some states to expand coverage to tribes, in part because EPA does not have the authority to create a federal fund for tanks on Indian lands.

#### Role of EPA Regions

The vast majority, approximately 98 percent, of tanks on Indian lands are found in five EPA regions--5, 6, 8, 9, and 10. These regions generally encompass the upper-Midwest, Southwest, Rocky Mountain and Western portions of the country. EPA implements the UST program on Indian reservations out of the regional offices. EPA devotes the equivalent of 6 full-time staff to carry out the Indian portion of the program. In addition, Congress has been appropriating \$500,000 of extramural funds annually, which EPA divides among the five regions. The regions spend these funds for a variety of activities, including providing technical support and hiring contractors to enhance implementation of the UST program on Indian reservations. In FY 1994, we anticipate that five additional work years from contractors will supplement the efforts of EPA staff. Further, in recent years, the regions also have supported the program with about \$125,000 of additional regional funds annually.

As we do with state programs, we have given the regions flexibility in how they implement the Indian program, and they have adopted approaches that are best suited to each region and particular tribal needs. A brief review of these approaches will illustrate how the regions have developed programs that are tailored to the particular UST problems encountered on Indian lands in each region. Region 10 (Seattle), for example, has developed a strong working relationship with the Indian Health Service (IHS). Through an interagency agreement with IHS, Region 10 utilizes a field representative, called a "circuit rider," to go to the reservations, provide technical assistance and outreach to tribes on leaking underground storage tanks, identify abandoned tanks, and help tank owners and operators come into compliance with EPA's regulations. The circuit rider began half time in January, 1990 and is now full time.

Region 5 (Chicago) and Region 9 (San Francisco) are working more directly with individual tribes. Region 5 has entered into an interagency agreement with the Bureau of Indian Affairs to provide funds to the Minnesota Chippewa to develop an underground storage tank program focusing on leaking tanks. Region 5 also has funded the University of Wisconsin Stevens-Point to provide technical assistance to tribes in Wisconsin.

Region 9 has worked closely with and provided financial support to the Navajo Nation to establish an UST program. The Navajo Nation has more USTs than any other tribal nation in the country. This effort has funded one person full time in the Navajo Nation EPA since 1991. Region 9 also has used a circuit rider

since FY 1992. In addition, the region is using regional resources to secure technical expertise in reviewing site assessments and corrective action plans on Indian reservations.

Region 8 (Denver) does a considerable amount of the UST work on reservations with its own staff. It also arranges for tribal members to receive training on UST issues. In addition, when the tribes and the states can reach mutual agreement to work together, Region 8 provides support to the state UST programs to work with tribes on site-specific corrective action problems.

Region 6 (Dallas) has within its boundaries some 68 federally-recognized Indian tribes. The extent and diversity of the tribal presence in the region has led region 6 actively to encourage and assist in the development of tribal consortia. The region started to lay the groundwork for an Indian operated UST program with 19 pueblos in New Mexico. Through the consortium and EPA, owners and operators have registered tanks and received technical assistance on removals, closures, and corrective actions.

As I mentioned earlier, Mr. Chairman, Indian tribes often do not have easy access to state financial assurance funds, since the states do not have jurisdiction over the tanks on the reservations. The inability to participate in state funds has presented problems in terms of tribes coming into compliance with the financial responsibility regulations and for obtaining financial assistance for conducting cleanups. Several state funds, however, will cover tanks on Indian reservations if the tanks are in substantial compliance with state regulations. Verifying

compliance may involve the tribe allowing state inspectors access to the tanks, which in some cases raises significant jurisdictional issues between the tribal governments and states. Some states are beginning to develop agreements with specific tribal governments to attempt to deal with these problems.

### **Major Challenges**

While changes in state financial assurance funds will help somewhat, there are still major challenges facing the UST program on Indian lands. First, while there are not a particularly large number of tanks, the tanks are distributed over millions of acres on many different reservations. While EPA's resources may compare favorably to those of some small state programs, the states are more compact, and state staff find it much easier than do EPA regions to keep in close contact with tank owners and operators. For example, a state inspector may have two sites across the street from each other. An EPA employee, in contrast, may need to travel four hours or more between two sites on the same Indian reservation.

Second, there is tremendous variation among the tribal nations in the way in which they want to deal with underground storage tanks. The Navajo Nation is interested in running its own program. Others want to rely on EPA, and some have reached an agreement with states for program implementation. This diversity is a constant challenge to EPA as the Agency wants to use those approaches that are most beneficial to the tribal nations.

The third issue is abandoned tanks. While it is impossible to provide an exact number, it is likely that hundreds of abandoned tanks exist on Indian reservations. Some percentage of these probably have leaked, and will require that corrective actions be taken once the release is discovered. In many of these cases, the responsible parties are not obvious. Even when responsible parties can be identified, they may not be financially able to complete the cleanup.

Fourth, there are significant costs involved in cleaning up sites and upgrading or replacing tanks, requirements which all tank owners must meet by 1998 to keep their tanks in operation. Even when state funds might be available to help with cleanups, most do not provide funds for tank upgrades or replacements. Thus, there are significant financial issues for all tank owners and operators including those on Indian reservations.

Finally, there also are significant costs involved in running an UST program. The small number of tanks on most reservations precludes a self-sustaining program. Sources of financial support need to be found for those tribal governments that have the desire and capability to administer their own UST program.

These appear to us to be the most significant challenges facing the implementation of the UST program on Indian reservations nationally. Others may have additions to this list, and certainly there are other challenges of more localized significance. While we are making progress in carrying out the UST program on Indian lands, we are also well aware of the work that remains to be done.

**OPEN DUMPS ON INDIAN RESERVATIONS****Municipal Solid Waste Landfill Criteria**

On October 9, 1991, EPA issued criteria governing the disposal of municipal solid waste (MSW) in landfills. These criteria, which appear in 40 CFR Part 258, assure that all MSW is disposed of in an environmentally safe manner. The criteria include restrictions that ensure landfills are not located in environmentally sensitive areas (such as wetlands) nor sited in a location that could compromise the integrity of the landfill unit (such as seismic and fault areas). Operating requirements are included to ensure that landfills are managed in a manner that is protective of landfill workers and residents living adjacent to landfills. These requirements include monitoring to detect the buildup of landfill gas and the placement of daily cover material to control disease vectors, fires, odors, blowing litter, and scavenging. The criteria include design provisions that prevent ground-water contamination by providing a barrier against the migration of leachate from the landfill unit. Ground-water monitoring and corrective action requirements are included to detect any releases from the landfill unit and to ensure that such releases will be cleaned up. The criteria's closure and post-closure care requirements are important provisions that prevent infiltration of precipitation into the landfill and ensure that any releases that occur after closure are detected and remedied appropriately. Finally, the criteria include financial assurance requirements to ensure that sufficient money will be available to pay for proper closure, post-closure care, and corrective action (if needed).

**Implementation Dates**

The MSW landfill criteria do not apply to landfills that stopped receiving waste before October 9, 1991. Landfills that received waste after October 9, 1991, but stopped receiving waste before the rule's effective date are only required to comply with the final cover requirements of the landfill criteria. The effective date for tribal landfills that receive more than 100 tons per day (TPD) is October 9, 1993. The effective date for tribes with landfills receiving 100 TPD or less is April 9, 1994. If a tribe owns and operates a very small landfill (i.e., less than 20 TPD) that is located in an area with less than 25 inches of rain per year, its effective date is October 9, 1995.

If a tribe does not wish to upgrade its current landfill to meet the Part 258 requirements, the tribe must cease receipt of waste by the applicable effective date. Of equal importance is that the tribe must complete cover installation at the landfill by October 9, 1994, or for the very small landfills, by October 9, 1996. These rules are the same for non-tribal landfills as well.

**Closure Requirements**

Proper closure of MSW landfills is necessary to prevent future public health or environmental problems. Under the requirements of the Part 258 landfill criteria, the site owner/operator must install a final cover system that is designed to minimize infiltration and erosion. The final cover must consist of at least two portions: (1) an infiltration layer composed of a minimum of 18 inches of earthen

material that has a permeability less than or equal to the permeability of any bottom liner system or natural subsoils. (However, it must have a minimal permeability of no greater than  $1 \times 10^{-5}$  cm/sec.) and (2) an erosion layer, consisting of a minimum of six inches of earthen material capable of sustaining native plant growth, to prevent the disintegration of the infiltration layer.

The Agency understands that many of the landfills on Indian lands do not include liners; rather, the waste was placed directly on the existing subsoils. Therefore, the Agency suspects that a typical open dump on Indian lands will require the minimum 18 inches of earthen material compacted to a permeability of no greater than  $1 \times 10^{-5}$  cm/sec and an overlying erosion layer to sustain vegetative growth.

#### **Cost Of Final Cover**

The cost to install a final cover will vary considerably from site to site. Site size, location, design and cover material availability will affect site closure costs. The Agency's Subtitle D Landfill Cost Model estimates that the cost of closure of a 10 TPD MSWLF unit (serving a population of approximately 5,000) requiring the minimum cover design of 18 inches of  $1 \times 10^{-5}$  cm/sec earthen material overlain by six inches of soil to support vegetative growth is approximately \$235,000. This assumes a coverage area of approximately 4 acres. These costs include the design and installation of a soil/vegetative cover, which is what would be expected at many of the tribal open dumps.

The cost of applying final cover on a one-acre landfill, which may be typical of many open dumps on Indian lands, will be approximately \$50,000.

#### **Cost To Open A New Landfill**

Rather than close its landfill, a tribe may decide to operate its own landfill in compliance with the Part 258 requirements. For smaller landfills, the disposal cost per ton could be prohibitive. For example, for a lined landfill of less than 10 tons per day, the disposal cost would be greater than \$100 per ton. The major cost components include the installation of a composite liner and cover system and ground-water monitoring for a 20-year active life and a 40-year post-closure care period. By contrast, where tribes are able to take advantage of a regional landfill, the disposal costs per ton will decrease significantly. For example, the same design landfill accepting 25 tons per day, would cost approximately \$70 per ton, and a 75 ton per day landfill would cost about \$45 per ton.

Where a tribe's landfill is located in an arid area, the cost would be less due to the savings associated with design changes. In this case, for a landfill of less than 10 tons per day, the cost per ton would be approximately \$70 per ton, assuming an in-situ soil liner. By contrast, a regional facility, which also may be able to take advantage of a minimal liner and cover design due to dry local conditions, would be much more economical. For example, the cost per ton at a 25 ton per day landfill will decrease to approximately \$45, and the cost of a 75 ton per day site would be approximately \$30 per ton.

In developing the original Part 258 MSW landfill requirements, the Agency recognized the cost impact that the landfill criteria could have on smaller landfills located in dry locations. As a result, the Agency included in the original Part 258 MSW landfill criteria an exemption from ground-water monitoring for very small landfills located in arid areas. Recently, however, the U.S. Court of Appeals removed that exemption, thereby requiring all landfills, regardless of size or location, to comply with the ground-water monitoring requirements. In response to the Court's decision, the Agency is investigating alternative ground-water monitoring requirements that could ultimately decrease costs for these small landfills. In recognition of the burden this decision places on small landfills and because this investigation will take some time, the Agency decided to extend the effective date for these sites for two years (until October 9, 1995).

Clearly, these numbers show that regional solutions are the most cost-effective approach to waste management in rural areas, including tribal lands. The Agency believes that regionalization of solid waste management employing larger, better located, designed, and operated landfills, is preferable to continued use of small, poorly planned facilities that may pose health and environmental threats to their communities.

#### Implementation Responsibilities

The Resource Conservation and Recovery Act (RCRA) of 1976 as amended by the 1984 Hazardous and Solid Waste Amendments (HSWA) requires

States to develop and implement permit programs to ensure that municipal solid waste landfills (MSWLFs) comply with the revised Federal Landfill Criteria. The statute, as written by Congress, expressly delineates States as the implementors of the Federal Criteria. While the statute does not address implementation on Indian lands, EPA's policy is to view the tribes as the key implementors of the program on tribal lands.

EPA's role is limited to developing regulations and to approving adequate MSWLF permit programs. EPA does not permit or inspect MSW landfills. Further, the statute precludes EPA enforcement of the Landfill Criteria except in those cases where EPA has formally deemed the State/tribal program to be inadequate. As a result, the Criteria were designed to be self-implementing. However, a citizen may sue in Federal court under the RCRA statute to ensure compliance with the Federal Criteria. Therefore, enforcement by States/tribes and citizen suits are the main mechanisms for ensuring compliance with the Federal Criteria.

Though RCRA mandated that States seek approval of their permit programs, it was silent on Indian tribes. EPA believes there is sufficient authority to approve tribal permit programs. Many tribes do not have landfills or environmental codes and thus will not desire to seek approval. However, several tribes have submitted draft applications for permit program approval. EPA believes that up to 21 tribes may seek approval of their MSWLF permit programs in the near future. As tribes continue to develop infrastructure to support their environmental programs, including the promulgation of environmental codes, this number could grow. As

with States, EPA will review tribal application submittals and approve programs that ensure compliance with the Federal Criteria.

#### **Implementation Assistance To Tribes**

In the last few years, EPA staff in Headquarters and throughout the Regions have worked with the tribes on a variety of projects related to waste management--all designed to meet tribal needs and RCRA program objectives. I would like to describe several of them to you.

- o In 1991, we supported the Eastern Band of Cherokee Indians in planning and implementing the first National Tribal Conference on Environmental Management. The conference, supported as well by BIA, IHS and HUD, attracted over 400 participants with 90 tribes represented. Planning for a second conference, scheduled for May 1994, is underway.

- o In 1992, EPA's Office of Solid Waste initiated the Solid Waste Circuit Rider program in an effort to provide hands-on, technical assistance and training to tribes on solid waste management issues. This team of RCRA-trained Senior Environmental Employees work for EPA through a grant to the National Council of Senior Citizens and are directed and monitored by EPA Regional Staff. Currently, Regions 4, 6, 7, 9 and 10 have circuit riders. They have been instrumental in our efforts to raise tribal understanding of solid waste management issues, particularly the impact of the new landfill

regulations. Circuit riders also work with the tribes to develop codes, ordinances and solid waste management infrastructures, important first steps in building tribal capability to manage environmental programs.

- o EPA Region 10, with funding assistance from Headquarters, developed the Solid Waste Network, an alliance of federal and private sector advisors to aid tribes in their efforts to manage solid waste. One of the network's first projects was assisting the Confederated Tribes of Umatilla Indian Reservation in developing a solid waste management plan, a necessary first step in exploring alternatives to the tribes' current waste disposal system.

- o EPA also sponsored tribal meetings in Regions 5, 6, 9 and 10. These meetings provided tribes a unique opportunity to speak with one another on issues of mutual concern. We were able to provide extensive training on the new landfill criteria and a forum to listen to and respond to tribal-specific/regional issues. BIA, IHS and HUD have participated in the meetings as well; we have plans to continue these meetings throughout FY 1994.

- o The Agency also provides resources to the tribes through the multi-media/General Assistance Program, designed to build tribal capacity and management capability to implement environmental programs administered by EPA.

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- o EPA and ACTION have developed a joint, 2-year pilot project that places VISTA volunteers in Alaska to assist the villagers with solid waste management issues. The first 5 volunteers, recruited by ACTION and selected by EPA, will undergo an extensive week-long training in early November and will be on-site shortly thereafter. We are considering the possibility of duplicating this project in Indian country in the lower 48 once the pilot is over.
  
- o And, EPA recently awarded a grant to the National Tribal Environmental Council for the development of a tribal peer match program and one to Americans For Indian Opportunity for the development and implementation of IndianNet, a tribal communications network.

### Conclusion

EPA will continue to work with tribes by providing technical assistance and training to enable them to make informed decisions concerning the kinds and level of environmental protection programs that will be necessary to protect human health and the environment.

I believe that accomplishments like those reflected earlier in my testimony reflect EPA's continuing commitment to assist tribes in achieving a fully acceptable level of environmental protection. In doing so, we will continue to strive to

empower Native Americans to achieve the autonomy they seek and their rightful place as the environmental managers of their lands.

Mr. Chairman, this concludes my testimony. Mr. Weddle and I will be happy to answer any questions you or other members of the Subcommittee may have.

Mr. FALEOMAVEGA. Mr. Hayes, our good friend from the Bureau of Indian Affairs, Department of the Interior.

#### STATEMENT OF PATRICK HAYES

Mr. HAYES. Thank you, and good morning, Mr. Chairman.

I am pleased to be here this morning to participate in your oversight hearing on leaking and abandoned underground storage tanks and the closure of open dumps on Indian reservations. As you have noted, I am accompanied today by Mr. George Farris, who heads up the BIA'S Environmental Services Office.

We appreciate the fact that you have called this hearing so that the many problems associated with this issue can be surfaced, discussed, and resolved. Before a solution can be reached, there needs to be a full and complete description of the problems and situation across Indian country.

There is significant complexity to these issues and resolution is going to require close cooperation among the many players. There are many entities that have a responsibility for these issues. There are at least four Federal agencies who share some responsibility plus the tribes themselves. And at times individual Indians need to share responsibilities here, as does the Congress.

We all have a particular and unique charge when it comes to protecting the tribal land base, its resources, its environment, and most importantly, the health of all reservation residents. We also need to concern ourselves with the welfare of off-reservation surrounding communities.

I would like to focus for a moment on underground storage tanks (UST). We view as our responsibility those underground storage tanks which we own, operate, or otherwise control. We believe that we have a very limited responsibility for tanks which are owned and operated either by tribes or by individuals. Within the Department of the Interior, the Office of Construction Management has primary responsibility for the operation of the UST program. The Bureau of Indian Affairs (BIA) participates on an as needed or when requested basis for program operation.

Cooperation and participation between our offices, not only here in Washington, but more importantly, at our field locations, has been satisfactory. At locations where UST problems have occurred, we have seen BIA staff providing assistance as appropriate.

Within the current program there are 603 USTs in the inventory. There have been 83 tanks removed, which leaves 520 tanks on the active inventory. The balance of these tanks are located all across Indian country, with the larger number of them located within our Aberdeen area, which encompasses the States of North and South Dakota and Nebraska. Many of these tanks contain fuel oil used for heating buildings, and thus are not regulated under the Resource Conservation and Recovery Act (RCRA).

The inventory contains a great deal of information about the tanks from location to age to contents, et cetera. There is an ongoing program to measure tank tightness, and where problems have been detected the problem will get fixed either through repair or removal, and possibly replacement.

One final note relative to USTs is that the Environmental Protection Agency (EPA) has overall responsibility for the regulatory

and enforcement aspects of the UST program. If a State has assumed primacy for the program, which they are permitted to do, then the BIA is obligated to follow the regulations of the governmental entity which has primacy for the program.

I would like to now turn to the solid waste issue. Over the last three or four years, solid waste became a hot topic across Indian country. Tribe after tribe was being approached for the purpose of siting a commercial solid waste facility on their lands. Many tribes undertook to give serious consideration to these proposals. All, with one exception, were abandoned over time.

The one exception has been the Campo Indian Tribe in Southern California who has cleared every hurdle and addressed every concern at the local level, the State level, and the Federal level. They have a facility which will become operational in the near future, assuming the legal challenges are met.

There seems now to be a slacking off of interest in solid waste sites on reservations. I would suppose there are many reasons for this, among them are the costs associated with a successful proposal, the impacts on the environment which need to be mitigated, and the negativity surrounding these proposals from not only tribal members but also the local community.

In terms of our current program, we have categorized solid waste sites according to ownership and usage:

First, those that are owned and operated by the BIA. There is no doubt that we have a responsibility to ensure compliance with appropriate regulatory guidelines.

Second, those that are tribally-owned and -operated but to which we have been a contributor. It is probable that we share responsibility for ensuring regulatory compliance.

The final category are those that are tribally-owned and -operated and for which there has been no Federal involvement.

There are about 50 sites that fall within the first category and the BIA is actively involved in bringing those sites either into compliance or closing them. The direction that almost all are going is toward closure. To date, 24 have been closed.

We have instructed our field offices that they need to stop accepting wastes at our landfills in accordance with the regulatory guidance from EPA. The current date that we are working with is April 9, 1994.

For those locations which are tribally-owned and -operated but to which the BIA is a contributor, we have been assisting the tribes in the closure of these landfills, resources permitting. During Fiscal Year 1993, assistance was provided to about 20 tribes in this regard.

For those locations to which the BIA was not a contributor, we will provide whatever technical assistance we can and will assist according to resource availability. Those resources will be made available after we have taken care of those circumstances where we know that we have a responsibility. We do not believe that we have a responsibility where we are not an owner, operator, or contributor, and it is a far stretch of the trust responsibility doctrine to say there is a general trust responsibility in this circumstance.

In regard to solid waste and all other environmental concerns on Indian reservations, we have entered into an Memorandum of Understanding (MOU) with the Indian Health Service (IHS), Housing and Urban Development (HUD), and the EPA. The purpose of the MOU was to delineate areas of responsibility among the signatory Federal agencies. We hope to prevent overlap of services and to make it easier to determine areas of responsibility. The MOU also calls for periodic meetings between representatives from the agencies to discuss issues of mutual concern.

And finally, Mr. Chairman, I would like to report that we have efforts underway to ensure that we have personnel at each of our area offices whose sole focus is environmental matters. At some of our areas, at the present time, environmental issues are assigned to individuals as a second or sometimes even third additional duty. We want to rectify that problem by providing resources to each area office so that they can focus on environmental issues.

Mr. Chairman, that concludes my summary statement. Mr. Farris and I are available to answer any questions you may have.

Mr. FALEOMAVAEGA. Thank you, Mr. Hayes.

[Prepared statement of Mr. Hayes follows:]

STATEMENT OF MR. PATRICK HAYES, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE NATURAL RESOURCES SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, OVERSIGHT HEARING ON LEAKING AND ABANDONED UNDERGROUND STORAGE TANKS ON INDIAN RESERVATIONS AND THE EFFECTIVE CLOSURE OF OPEN DUMPS ON INDIAN RESERVATIONS.

October 14, 1993

Mr. Chairman, and Members of the Committee, I am here to discuss the problems associated with leaking and abandoned underground storage tanks (USTs) and the effective closure of open dumps on Indian reservations. This hearing provides an opportunity to describe the complex problems that exist on Indian lands and to discuss the efforts of the Bureau of Indian Affairs (BIA), other Federal agencies, and the tribes to find solutions. We hope this hearing will lead to a better understanding of the unique situation on Indian lands and foster a closer cooperation among the Congress, Indian tribes, and Federal agencies charged with protecting human health and the environment on Indian lands.

Under the current situation, we are responsible for underground tanks that are owned and operated by the BIA. The BIA is not responsible for USTs owned and operated by the tribes or individual tribal members. However, tribes do ask for assistance on an infrequent basis in correcting certain problems associated with their USTs. A recent example is the Pueblo of Sandia which has a leaking underground tank at its gas station. The BIA's Albuquerque Area Office hydrologists provided technical assistance by surveillance of the site and reviewing reports prepared by consultants hired by the Tribe. Contact will be maintained with the consultants and recommendations will be made to the tribe on the appropriate action the BIA believes is necessary at this site.

Of the 603 tanks originally in BIA inventory, 83 have been pulled, leaving 520 tanks in place. Of this number, 197 are located in the Aberdeen Area. Approximately half (97) of the Aberdeen Area tanks contain fuel oil used for heating buildings and are not regulated under the Resource Conservation and Recovery Act (RCRA) (90 Stat. 2795; 42 U.S.C. 6901). However, if any of these tanks are found to be leaking, they will be removed.

At present, BIA, in conjunction with the Office of Construction Management, has implemented a program of tank tightness testing with remedial action being taken on those tanks whose integrity has been breached. At some locations, tanks are being pulled without testing and are being replaced with alternative systems. In looking at alternative systems, BIA will only go to aboveground storage tanks as a last resort.

It is important to note that while the Environmental Protection Agency (EPA) is responsible overall for the regulation, development and enforcement of the UST program, many states have "primacy" and may have more stringent regulations than EPA. Under Federal Facilities Compliance Act (106 Stat. 1505; 42 U.S.C. 6901) provisions, the BIA is required to comply with the regulations of the Federal or state agency that has primacy for the program.

BIA has classified three categories of solid waste sites on Indian lands, (1) sites owned and operated by the BIA; (2) sites tribally-owned and -operated but which BIA or other Federal agencies have contributed to in past years; and (3) sites tribally-owned and -operated where there has been no Federal involvement.

We have identified approximately 50 BIA-owned and -operated sites within the exterior boundaries of Indian reservations, most of which are on the Navajo

Reservation. Sites that have been actively accepting solid waste since October 9, 1991, have for the most part been operated as "community open pits". To date, 24 of these sites have been closed by BIA and the remaining sites are scheduled for closure before the new solid waste regulations become effective.

These actions are in accordance with BIA's plan, to stop accepting wastes in these landfills by October 9, 1993; to begin disposing of solid waste in compliant landfills; and, to cover the remaining landfills in conformance with RCRA regulations.

In those cases where BIA or another Federal agency has contributed to a tribally-owned and -operated site, BIA has assisted the tribes in the closure of those landfills. This may be in the form of technical assistance from BIA agency, Area Office or Central Office professional staff, or in the form of limited funding from the BIA's Waste Management Program. During FY 1993, BIA provided funding to approximately 20 tribes to assist them in the closure of solid waste dumps on their reservations. Technical assistance was provided to tribes such as the Pueblo of Laguna, which are in the process of using its own construction company to close the dumps on its reservation.

For the tribally-owned and -operated sites for which neither the BIA nor any other Federal agency have had involvement, the BIA will continue to provide technical assistance for closure and suggest alternatives to existing solid waste practices.

We would point out that BIA has no existing authority to grant licenses, permits, or regulate the operation and maintenance of tribal solid waste facilities. In addition, BIA does not operate, supervise or otherwise control tribally-owned and -operated

sites. However, the BIA, at the tribe's request, provides technical assistance and short-term equipment loans, when available, for tribal use at their landfills. The BIA encourages tribes to seek funding for their solid waste management programs from other agencies that are appropriated funds on a yearly basis to support these activities. These agencies include Housing and Urban Development (HUD) for construction and closure, Indian Health Service (IHS) for establishment of transfer stations and landfill construction, EPA for establishment of solid waste management plans and programs, and the Administration for Native Americans for cleanup of sites associated with Department of Defense activities. These programs are funded on a priority basis determined by the tribes and agencies involved. In addition, environmental personnel from both the central office and the area offices travel to the reservations to inspect proposed or existing solid waste landfills and make recommendations on actions required under Subtitle D of the RCRA.

Under the RCRA, Federal agencies, states, tribes, local governments, and businesses are only liable for waste facilities they operate, manage or contribute to. It is BIA's position that we have no trust responsibility to the tribes operating their own facilities to either assure compliance with the Act or to clean up the problems associated with a tribe's non-compliance.

In order to better serve the needs of the tribes and to eliminate duplication of services, a Memorandum of Understanding (MOU) was signed in April 1991 by the IHS, EPA, HUD and BIA. This MOU defines each agency's responsibility relative to solid wastes and other environmental issues. It is designed to help ensure a more coordinated effort in dealing with issues such as solid waste and help avoid duplication of limited resources among the four agencies involved.

In an effort to upgrade the BIA's Waste Management Program and provide a more efficient use of limited resources, we are in the process of filling an Environmental Scientist position in each of the twelve Area Offices. These positions will bring technical expertise to the area level and will enable BIA to better coordinate our Waste Management Program. This will also provide better surveys of sites, help prioritize the actions to be taken and assist the BIA in being more responsive to emergencies that may arise on reservations. In addition, a top priority of the Environmental Scientists will be to train area, agency and tribal personnel.

This concludes my statement. I would be happy to answer any questions you may have.

Mr. FALCOMVAEGA. Also, we have this morning Dr. Gary Hartz, representing the Indian Health Service of HHS, Division of Environmental Health, Office of Environmental Health and Engineering.

Dr. Hartz.

Dr. HARTZ. Thank you, sir.

#### STATEMENT OF GARY J. HARTZ

Dr. HARTZ. I am pleased to have the opportunity to represent the Indian Health Service on these items of considerable concern to us as well as the Indian people.

As you noted earlier, I am accompanied by Captain Barrar and Commander Crowe.

The Indian Health Service's goal is to raise the health status of the Indian people to the highest possible level. Within that we have a threefold mission that I just want to touch on briefly because of what we are planning to address in the hearing today I think kind of folds into that particular mission.

The first being to provide or assure the availability of the highest quality, comprehensive health services that we can to the Indian people. And the word "comprehensive" is what I will touch on as it relates to environmental health, and then a little bit later, more specifically, the Sanitation Facilities Construction Program, of which the Congress has been instrumental in laying out some guidelines as to how we address sanitation facilities, of which solid waste is a portion.

Secondly in that mission is to provide increasing opportunities for Indians to administer their programs, and of that construction program they are currently involved in in excess of 60 percent of that particular program in carrying out the appropriations that are running on an annual basis plus contributions in excess of \$100 million.

So there is a significant involvement in the program with the constituency that is going to benefit from the appropriations from you folks.

Third, we serve as health advocates for the Indian people, and that is really the role we play as it relates to the underground storage tank activities. Where we provide technical assistance and consultative environmental services regarding the potential for public health hazards or environmental hazards.

And that is about the extent of the role we play. We will provide that kind of technical assistance as requested.

Getting back to the comprehensiveness of the program and the sanitation facilities that I referred to earlier, back in 1988, with the amendments to the Indian Health Care Improvement Act, we were instructed—even though we had identified the deficiencies of sanitation facilities throughout Indian country over a long period of time—Congress wanted to formalize that process and have us identify not only the universe of deficiencies but also to submit, come up with a 10-year plan of how that would be addressed. That includes water, sewer, solid waste, and the establishment and equipping of operation and maintenance organizations.

Within that universe of \$1.7 billion, the total for solid waste amounts to right at around \$134 million. The 10-year plan, which

is to address the most economically and engineeringly feasible projects of that within 10 years, totals approximately \$635 million, but 15 percent of that, around \$107 million, in that 10-year plan is tied to solid waste related activities that need to be addressed.

Generally those solid waste projects do not get funded as well as water and sewer because they just don't rank out as high as others do. When you look at the needs within Indian country, and I have identified that \$1.7 billion, over \$900 million of it is to address water. But \$650 million of it is to address sewer deficiencies.

So, in relative terms, the solid waste issue as identified out there is not as substantial in terms of the sanitation facilities.

And finally, in commenting on that issue, when you look at the deficiencies that Congress has identified—that we were to identify these projects in—there are five levels of deficiency. The Congress as well as the tribes and the IHS by prioritizing the projects has given a higher priority to the water and sewer projects, even considering that in the last two years we have funded projects totaling approximately \$5 million to address solid waste concerns throughout Indian country, and that is just the money that has been appropriated to the Indian Health Service. That doesn't include the money that has come from States, from tribes, the combining of money with our colleagues that are here at the table this morning and others. But that is the part that has been appropriated to us, sir.

And that summarizes my comments and we are available to respond to questions.

[Prepared statement of Dr. Hartz follows:]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

STATEMENT OF

MR. GARY J. HARTZ, DIRECTOR

DIVISION OF ENVIRONMENTAL HEALTH

OFFICE OF ENVIRONMENTAL HEALTH AND ENGINEERING

INDIAN HEALTH SERVICE

BEFORE THE

SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

COMMITTEE ON NATURAL RESOURCES

OCTOBER 14, 1993

TESTIMONY OF DIRECTOR, DIVISION OF ENVIRONMENTAL HEALTH  
OFFICE OF ENVIRONMENTAL HEALTH AND ENGINEERING  
INDIAN HEALTH SERVICE

Mr. Chairman and Members of the Committee:

I am Gary Hartz, Director, Division of Environmental Health accompanied by Mr. Thomas Crow, Chief of the Environmental Health Services Branch and Mr. Richard Barror, Deputy Chief of the Sanitation Facilities Construction Branch. We are pleased to be here today to discuss with you Indian Health Service activities relative to the closure of open dumps and the problems of leaking and abandoned underground storage tanks on Indian reservations.

The goal of the IHS is to raise the health status of more than 1.3 million American Indian and Alaska Native (AI/AN) people to the highest possible level. In order to achieve this, the IHS has a threefold mission: 1) to provide or assure the availability of high quality, comprehensive, and accessible health services; 2) to provide increasing opportunities for Indians to administer their own programs; and 3) to serve as a health advocate for Indian people. As part of this mission, the IHS is committed to promoting a healthy environment including the construction of essential sanitation facilities, as well as advocating for proper public health practices and assisting in the resolution of environmentally-related health concerns. In FY 1992 the IHS assisted in the provision of essential sanitation facilities to over 4,700 Indian homes and provided over 158,000 environmental health services to Indian homes and communities.

The availability of sanitation facilities and improved housing is widely credited with significantly contributing to the remarkable improvements in the health status of the American Indians and Alaska Natives since 1955 when environmentally related disease death rates ranged from about 3 to 7 times the U.S. All Races rates. Since the passage of the Indian Sanitation Facilities Act, Public Law (P.L.) 86-121, in 1959, more than 117,000 new and renovated (AI/AN) housing units and 69,000 existing (AI/AN) housing units have received sanitation facilities. These services have included the construction of systems to provide safe individual and community drinking water, as well as sewage and solid waste collection and disposal facilities. During this period, Congress has appropriated more than \$1.1 billion to the IHS for this purpose. These environmental services, along with the improved availability of health care services, have yielded the following health improvements since 1972-74:

- 1) The infant mortality rate for American Indian and Alaska Natives decreased 50 percent.
- 2) The age-adjusted tuberculosis death rate for American Indian and Alaska Natives dropped 74 percent.
- 3) The age-adjusted injury death rate dropped from 216.0 to 93.1 in 1987-89, a decrease of 57 percent.

- 4) The age-adjusted gastrointestinal death rate decreased 80 percent.

Because of higher public health priority on water supply and sewage disposal problems throughout Indian country, only a small percentage of the \$1.1 billion has been spent by the IHS on the development of solid waste collection and disposal facilities. This priority, consistent with tribal desires and legislative mandates, has been reflected in expenditures over the years which have been directed primarily to water and sewer projects.

Public Law 86-121

The provision of sanitation facilities to safe, adequate housing has enhanced and extended the lives of tens of thousands of American Indians and Alaska Natives. The primary authority for the IHS to provide necessary sanitation facilities and services is section 7 of the Transfer Act (as amended by the Indian Sanitation Facilities Act), which authorizes the IHS "to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities, including domestic and community water supplies and facilities, drainage facilities, and sewage and waste disposal facilities, together with necessary appurtenances and fixtures, for Indian homes, communities and lands;."

Indian Health Care Amendments of 1988

The Indian Health Care Amendments of 1988, P.L. 100-713, reaffirmed the primary authority and responsibility of the IHS to provide the necessary sanitation facilities and services as provided in section 7 of the Indian Sanitation Facilities Act, P.L. 86-121.

In section 302(g)(4) of the Indian Health Care Improvement Act, P.L. 94-437, Congress identifies five sanitation deficiency levels (Level I - Level V) for Indian homes and communities with Level V being the most serious deficiency level. Level V is defined as an Indian tribe or community that lacks a safe water supply and a sewage disposal system; Level IV is defined as an Indian tribe or community that lacks either a safe water supply system or a sewage disposal system. The lack of a solid waste disposal facility is identified as a Level III deficiency. Systems with Level II and Level I deficiencies comply with all laws, but need capital improvements or have deficiencies related to routine repair and replacement.

Section 302(c) of P.L. 94-437 required the IHS to develop and begin implementing a 10-year plan to remedy these sanitation deficiencies in Indian country. The 10-year plan was included in the Second Annual Report to Congress on Sanitation Facilities Deficiencies for Indian Homes and Communities dated March, 1990, and revised in the fourth annual report dated February 1992.

Priority for funding in the 10-year plan is determined in large part by the health effect and the potential for reducing health care costs by preventive health measures. This approach is supported by subsection 302(a)(3) of P.L. 94-437. Funding required to correct solid waste deficiencies are included in the 10-year plan, however, based on health considerations, projects to provide water supply and sewage disposal facilities generally have higher priority for IHS Indian sanitation facilities construction funds than solid waste disposal facilities.

#### Current Funding for Solid Waste Facilities

During the past two fiscal years approximately \$160 million (FY 1992 - \$75 million and FY 1993 - \$85 million) have been appropriated for the construction of sanitation facilities. We currently estimate that approximately \$5 million of the \$160 million will be utilized for solid waste management facilities.

#### Estimated Costs for Solid Waste Facilities

The IHS is also required to provide an annual report to Congress which includes a list of proposed sanitation facilities construction projects, and an estimate of the cost to correct solid waste deficiencies eligible for funding under the sanitation facilities construction program.

Our most recent estimate for these solid waste deficiencies is approximately \$134 million. Approximately \$57 million of the \$134 million is to address solid waste deficiencies in the State of Alaska. The estimate includes solid waste collection and disposal facilities and closure of tribally owned existing sites.

Current cost estimates for correcting solid waste deficiencies have been included in approximately 500 proposed construction projects to serve approximately 125,000 Indian and Alaska Native homes located on over 100 reservations plus 175 communities in Oklahoma and Alaska.

The actual cost to correct the deficiencies may differ substantially from our current estimate because: (1) experience with estimating costs for complying with new EPA solid waste regulations is limited, (2) most estimates are not based on detailed engineering studies, and (3) the costs for the various options to correct solid waste disposal deficiencies may vary substantially.

#### Technical Assistance - Solid Waste Management

Pursuant to the Transfer Act of 1954, which transferred the responsibility for Indian health care from the Department of Interior to the Department of Health and Human Services, the IHS is also authorized to provide technical assistance and consultative environmental health services to Indian tribes. The

IHS maintains a comprehensive environmental health program for American Indians and Alaska Natives utilizing this authority. The IHS may carry out the program directly with Area and field office environmental health professionals or a tribe may take responsibility for program implementation under the Indian Education and Self-Determination Act. Technical assistance relative to solid waste management may include: (1) surveys of solid waste disposal sites, (2) assistance with development of tribal codes and ordinances, (3) assistance with development and/or review of management plans, (4) assistance with community education campaigns, (5) training of solid waste program managers and other workers, (6) assistance with identifying funding sources and (7) assistance with evaluating and identifying solutions for operational problems. Assistance is obtained through the IHS Area or field offices. The availability of this assistance is based on current workload and priorities established for the total environmental health program. The IHS environmental health staff includes approximately 475 engineers, sanitarians, environmental health technicians, engineering aids, injury prevention specialists etc.

#### Solid Waste Disposal Sites

As part of its program of technical assistance IHS maintains a list of solid waste disposal sites located on Indian land which may warrant periodic surveillance by IHS environmental health staff to adequately advise tribal officials of potential health

effects. The list includes a total of approximately 600 sites, of which approximately 175 are in Alaska and approximately 100 are on the Navajo Reservation. This listing is not a complete inventory of solid waste disposal sites but includes those active reservation sites associated with domestic solid waste systems and may include additional locations identified by IHS where there is potential for adverse health effects associated with solid waste disposal. Proposed projects to correct sanitation deficiencies of tribally owned domestic solid waste disposal sites on this list and tribally owned previously used domestic solid waste disposal sites are included in the Indian Health Service list of needed sanitation facilities construction projects.

#### Underground Storage Tanks

Indian Health Service activities related to underground storage tanks consist of providing technical assistance and consultative environmental health services to Indian tribes regarding the potential for a public health or an environmental health hazard. We have received very few requests from tribes for technical assistance with underground storage tank problems.

This concludes my opening statement. I will be happy to respond to any questions.

Mr. FALCOMAVAEGA. Thank you very much.

I have some questions here that I will, in a formal sense, raise at a later point. I want to make sure you gentlemen representing the three primary agencies dealing with Indian overall needs and this Committee are in agreement. Concerning the issue that we are discussing this morning, I have at least the perspective that we are talking about Federal legislation.

Of course, Mr. ZIEGELE, EPA being the lead agency on environmental issues, do I get the impression that maybe the Congress has been somewhat deficient in its efforts to address this issue legislatively, whereby EPA seems to say that we don't hold responsibility for some of these issues that we are discussing this morning?

Is it because of the lack of statutory authority that you have, or is it by some point in time maybe we failed on our part to provide legislatively to give you that authority to address these issues forthrightly?

Mr. ZIEGELE. For several issues that have been raised, we are limited by legislative authority. Our lawyers have advised us that we don't have clear authority now to provide LUST trust fund funding to tribes to run regulatory programs in the leaking underground storage tanks area.

Mr. FALCOMAVAEGA. Have you responded in writing to the committee telling us exactly where you lack the authority to address these issues specifically?

Mr. ZIEGELE. No. That has not been requested.

Mr. FALCOMAVAEGA. Can you provide that for the record?

Mr. ZIEGELE. I will.

Mr. FALCOMAVAEGA. I think that will be very helpful.

[The information follows:]

The Leaking Underground Storage Tank (LUST) Trust Fund was authorized as part of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-449). It provides funds for the Environmental Protection Agency (EPA) to implement the LUST program. In addition, it authorizes the Administrator of EPA to enter into cooperative agreements and make grants to states to carry out LUST Trust Fund-eligible activities including administrative, enforcement, and direct cleanup activities (Section 9003(h)(7) of the Solid Waste Disposal Act (SWDA) as amended). The enabling legislation gives EPA authority to give grants only to states. It does not give the Agency the authority to make grants to any other entities including municipalities and nonprofit organizations. Indian tribes are defined as municipalities under Section 1004(13) of the SWDA as amended.

EPA can use LUST Trust Fund monies when there is a release that threatens public health and the environment and to the site meets the conditions specified in Section 9003(h)(2) of SWDA as amended. It is important to note, however, that even in such cases, the law requires that the Agency pursue cost recovery (Section 9003(h)(6) of the SWDA as amended). If EPA used LUST Trust Fund monies for a federal-lead cleanup of a release from a tribally-owned tank, EPA would be required to pursue cost recovery from the tribe as the owner of the tank.

Mr. ZIEGELE. I wanted to point out we are working with the Appropriations Committees to try to clarify our authorities to give demonstration grants under 8001 of RCRA. So we are making progress in that direction. I will be happy to respond for the record.

Mr. FALCOMAVAEGA. Well, I think it would also be helpful if the authorizing committee also has some understanding of what the Appropriations Committee is up to these days. We seem to have some problems with our appropriator friends. But it would be helpful.

Mr. ZIEGELE. I would be happy to do that. I would also like to add that on uses that we can make of the Leaking Underground Storage Tank Trust Fund, it is clear to us and we have been told by several staff members and Members of Congress that it was intended to be used to cleanup tanks only when we cannot find a responsible party or when that person is unable or unwilling to do the cleanup.

It was not intended to clean up tanks where an owner or operator can be identified and has the wherewithal to pay for the cleanup. That is a limitation in our authorities as far as making funds available to tank owners on Indian lands and non-Indian lands to actually do cleanups.

Mr. FALEOMAVAEGA. Why do you suppose you were given that limited authority, perhaps? Is there any understanding why you can take a half step and all of a sudden you have to come back again and regroup or just say simply you can't do it?

Mr. ZIEGELE. Well, I believe the main reason is that the philosophy underlying this portion of the Resource Conservation and Recovery Act is the polluter shall pay. I believe the Congress did not intend to provide Federal funds to conduct cleanups unless there was no viable party to do the cleanup.

Mr. FALEOMAVAEGA. It seems that the Federal Government is passing the buck to the State and local government agencies to be responsible for that cleanup.

Mr. ZIEGELE. Well, actually, roughly 97 percent of the 225,000 leaking tanks that we have found are being cleaned up by responsible parties. There are many States who have chosen on their own to step in and start cleanup funds using State money that provides some money to owners and operators to help with cleanups. But there are also several States that have chosen not to do that.

There is no Federal program for doing that, and that is what would be needed, I believe, to address the concerns the chairman raised earlier.

Mr. FALEOMAVAEGA. We have had these constant problems with our friends from the States just simply saying, "Listen. This is not our responsibility. These reservations are the responsibility of the Federal Government." So we are going back again.

So, the tribes are caught in this constant hassle between State and Federal levels saying "We are not responsible." Where does that leave the tribes?

Mr. ZIEGELE. There are several States who have agreed that they would pay for cleanups on tribal lands if the tanks are in compliance with State law. That, of course, does raise some jurisdiction questions with many tribes in many States.

There are a good handful of States who actually are paying for cleanups on tribal lands. There are more who would be willing to do it but problems have arisen where the tribe does not want to acknowledge that the State has any jurisdiction over tanks on its tribal lands.

Mr. FALEOMAVAEGA. What is your total budget allocation for doing the work that you are doing now dealing with underground storage tanks and problems? Who is cleaning this environmentally?

Mr. ZIEGELE. For Indian lands?

Mr. FALEOMAVAEGA. No, nationally.

Mr. ZIEGELE. It is approximately \$75 million out of the Leaking Underground Storage Tank Trust Fund, and then approximately additional \$9 million to \$10 million of general appropriation.

There are restrictions on use of the Leaking Underground Storage Tank Trust Fund, so we have two separate appropriations, one for leaking tanks—

Mr. FALEOMAVAEGA. So, from the Federal arm giving you that responsibility of over \$75 million to do the cleanup process, what would you estimate the cost or the value, damage that the polluters or those who are responsible have done to hurt the environment as far as Indian lands are concerned? Have there been any estimates taken in that area?

Mr. ZIEGELE. Estimates as far as environmental damage?

Mr. FALEOMAVAEGA. Yes.

Mr. ZIEGELE. There have been no estimates. I can tell you what it costs to remediate a site, to clean it up, but that doesn't get at what the damages are.

The average cost is approximately \$100,000 to \$125,000 per site. That can go as high as \$1 million if there is extensive groundwater contamination. It is extremely expensive to cleanup a tank once it has leaked, which is why we have focused a lot on preventing leaks where we can do that.

Mr. FALEOMAVAEGA. I see.

Mr. ZIEGELE. It is a very expensive program.

Mr. FALEOMAVAEGA. Our friends from the Department of the Interior, can you give us some specific measurements in terms of the areas, perhaps, statutorily that you lack or you don't have the authority to deal with this issue?

Do you feel that you currently have the sufficient statutory language to give you the authority to do what you should be doing as the lead agency for Indian tribes?

Mr. HAYES. Mr. Chairman, I believe that statutory authority already exists. Insofar as the Department of the Interior and the Bureau of Indian Affairs are concerned, we are essentially a secondary player when it comes to dealing with these issues. The primary agencies that have the expertise are who we look to and are where the statutory authority needs to be directed, to ensure that they have the authority to address these issues on Indian lands.

As the chair is aware, the Department of the Interior has extensive involvement on Indian lands, primarily through our oversight responsibilities and trust responsibilities. We deal with all the leases and other types of entrance documents that people enter into with tribes and individual Indians.

Mr. FALEOMAVAEGA. In that process, or at least part of your responsibility then in conducting these negotiations or leases between the tribes and the private sector corporations that want to use or for whatever purposes, do you feel that you have done it well enough that these lands are protected environmentally as part of the negotiations? Is the BIA doing this consciously or does it seem perhaps at times it was an oversight?

The point I am making here is that we are getting complaints from the tribes that nothing seems to be done about the real serious environmental problems affecting these underground storage tanks.

What I am saying is, are you consciously doing this to make sure that Indian lands that are being leased are protected in that sense? If they pollute the land, then they should fix it up and clean it up.

Has that always been the policy or is it something that we have just now become conscious of as far as being the lead agency for the Indian tribes when you negotiate these lease agreements with companies and other sort?

Mr. HAYES. Mr. Chairman, I would venture to say that over the years and in recent years, there have been an increased sensitivity to environmental issues. The review and oversight that the Bureau of Indian Affairs provides relative to leasing documents has often-times been lacking in a lot of respects.

But as I mentioned, I believe that there is a greater sensitivity to the issue in the recent years and our field staff are paying more and more attention to it. We have always had the obligation to address the National Environmental Policy Act (NEPA) in regard to these issues. We have had to ensure NEPA compliance and that has been done to a large extent dependent upon the capabilities of the local staff.

Mr. FALCOMA. I am sorry. I want to certainly recognize my good friend and colleague from the State of Arizona, Congresswoman English.

Did you wish to have an opening statement?

Ms. ENGLISH. I would like to enter my statement in the record. I won't take the time to read it right now. But I do have questions when it is appropriate.

Mr. FALCOMA. Without objection, the statement will be made part of the record.

If you like, Congresswoman, I would be more than happy to have you entertain your questions.

Ms. ENGLISH. Thank you.

I would like to ask any of you that might have the information a little bit about the number of problems we are talking about and how they got there in the first place. I believe that a lot of the problems in Arizona have to do with lack of proper staffing to even know that problems exist so could you tell me how many problem sites we are talking about? How many underground storage tanks and open dumps or hazardous waste sites are there?

There are a variety of environmental problems that I believe EPA is partially responsible for. I need to get a handle on the quantity that we are talking about on reservation lands.

Mr. ZIEGELE. Certainly. Out of the approximately 5,000 tanks on Indian lands, underground storage tanks that we regulate, we have had 530 confirmed releases, meaning that contamination has been found around the underground tank. That is roughly proportional to the rate of leakage that we are finding in the tank population nationwide.

So it is a fairly high number. That is a large number of leaks, but we're finding it consistent with other tanks as well.

I should point out that 130 of those releases have had the cleanups done, completed. So it is not as if all 530 have active cleanups going on right now. Some are done.

The problems are caused because until recently underground storage tanks were bare steel and they corroded over time, causing

releases. Also, there are releases from piping and releases caused by overflow or spilling. So that gives an approximate figure as far as the problem of leaking tanks on Indian lands.

Ms. ENGLISH. Those were the number of tanks that you are currently monitoring. How many tanks aren't being monitored?

Mr. ZIEGELE. Well, at this point those are the number of tanks that we have found to be leaking, so those sites are being addressed. There are a total of roughly 5,000 active tanks on Indian lands, and there are requirements for leak detection, which means active monitoring to find leaks when they are occurring. That deadline has been phased in based on the age of the tank.

As of December, all tank owners and operators have to be doing leak detection. And we have an enforcement program on Indian lands to do inspection and follow up when that work is not being done.

Ms. ENGLISH. Does anyone else want to add to that?

Mr. HAYES. Ms. English, I would like to add something to that. I had indicated in my earlier testimony that the Bureau of Indian Affairs through our Office of Construction Management has performed an inventory of underground storage tanks which are owned or operated by the Bureau of Indian Affairs, and in that inventory there were 603; 83 have been removed, leaving 520 tanks on the active inventory. Now those are just tanks that are owned and operated by the Bureau of Indian Affairs.

There is an indeterminate number of tanks which are owned and operated by Indian tribes themselves and other individual Indian people on reservations, and I don't have a number for that. I am only aware of the number that we are responsible for.

Ms. ENGLISH. Are you gentlemen then talking about two different sets of tanks here or are they overlapping numbers?

Mr. ZIEGELE. I believe that the tanks that are owned and operated by Federal agencies on Indian lands are included in our inventory of approximately 5,000 active tanks. That number doesn't distinguish between tribally owned, Indian owned, non-Indian owned, and I am presuming that it includes the Federally owned tanks as well.

Ms. ENGLISH. Is there an estimation of the cost of cleanup for that number of tanks?

Mr. ZIEGELE. We have done an estimate. The average cost, as I mentioned earlier, to clean up a leaking underground storage tank site is approximately \$125,000 per site, although it can be up as high as a million dollars per site if there is extensive groundwater contamination.

We did an estimate for this hearing, and it is just an estimate, of the cost to clean up the releases that have not yet been cleaned up and projecting out the number of tanks that could leak based on what we know from the larger tank population. That estimate runs from \$100 million up to well over \$200 million for the entire cleanup bill. Again, it is a rough approximation.

Ms. ENGLISH. Thank you. And my last question is, how many of these tanks were initially part of the military and if the military's cleanup is different than EPA or BIA?

Mr. ZIEGELE. I am not aware of how many of the tanks that I have referred to were initially put in or managed by the military.

Ms. ENGLISH. Okay.

Mr. ZIEGELE. I can try to find that out and submit it for the record.

Ms. ENGLISH. I would be interested.

[The information follows:]

The Agency has been notified of 16 military tanks on Indian lands. There are four active Coast Guard tanks, three active Army tanks, and nine closed Army tanks. The Agency has not received any reports of releases from any of these tanks.

Mr. HAYES. We don't have that information either, Ms. English. Most of our tanks, or a large number of our tanks are at our agency locations where they are used for heating.

Ms. ENGLISH. Okay.

Mr. HAYES. I am not aware of any of them being associated with military activity.

Mr. FALEOMAVAEGA. Would the gentlelady yield?

Ms. ENGLISH. Okay.

Mr. FALEOMAVAEGA. The information we received states DOI is able to identify 520 tanks and EPA has come up with a figure of 4,875. Where are we in this?

Mr. ZIEGELE. What Mr. Hayes was referring to was the number of tanks that are owned by BIA. What I was talking about was the total number of tanks that we regulate that are on Indian reservations. And so his number was a subset of ours. But we are talking about two different things: those that are owned and operated by the Government and those that are simply on the reservation or Indian land.

I wanted to point out just to clarify, Ms. English, that many of the tanks that Mr. Hayes was referring to are heating oil tanks not covered by the Federal law, so they would not be included in our inventory even though they are being managed by the Government.

Ms. ENGLISH. That gets back—I am sorry to keep——

Mr. FALEOMAVAEGA. No. Please.

Ms. ENGLISH. I am trying to get a handle on numbers here. That gets back to my original question.

How many of the tanks are you monitoring? And maybe the question should have been how many tanks are you regulating and how many tanks aren't being regulated? There must be more than 5,000 tanks total.

Mr. ZIEGELE. There definitely are more than 5,000 tanks, but because we don't regulate them, we have no authority to ask people to tell us where they are. We have approximately 5,000 active underground storage tanks regulated by the Resource Conservation and Recovery Act, and there are some additional, roughly 2,000 that are regulated that have been closed.

I couldn't give you an estimate of how many heating oil tanks, for instance, there are or how many small tanks on farms, which also are exempt from the Resource Conservation and Recovery Act.

Ms. ENGLISH. Are those tanks exempt off reservation?

Mr. ZIEGELE. Yes. It is by statute.

Ms. ENGLISH. Okay. Thank you.

Mr. FALEOMAVAEGA. Thank you.

Ms. English, I have to testify right now before another subcommittee on another issue, and I really appreciate your taking over the chair at this point. I just have one question for Dr. Hartz.

Have we had any serious health problems dealing with Native Americans on the reservations affecting their health and lives with reference to the leakages of the storage tanks, or anything that has affected their overall health conditions—deaths, subject to any chronic illnesses, anything of the sort? Have you any data?

If we are talking about over 5,000 tanks, I daresay that there must be some real serious problems with this—contamination of the water as a result of leakages, the problems that we have had I think in New Mexico—was it New Mexico or in Arizona that had these deaths mysteriously coming out?

Is there any connection with this, because of the contaminated water or problems with the leakages of these underground tanks?

Dr. HARTZ. Whenever there is an unknown cause associated with an illness or a death, one often takes a look at what environmentally might be the reason for that. If the physicians can't identify what it is, it has to come from the environment. That is a little tongue in cheek there, sir.

Mr. FALEOMAVAEGA. That was a pun, right.

Dr. HARTZ. But, we are aware of allegations that have been made and presumptions that maybe water, contaminated water was related to an illness, but I am currently not aware of any deaths that have occurred related to underground storage tanks.

We are available to provide technical assistance and get involved, and we are aware of some sites where underground storage tanks have been leaking. We are aware of the fact that there is—you know, cleanup has taken place, and the monitoring that goes on.

If you determine that there is a leaking storage tank there is monitoring that does take place of any groundwater that might be potentially contaminated to assure that that is not incorporated into the domestic water supply.

As I sit here, sir, I am not immediately aware of any case where that has created any significant problems with health.

Mr. FALEOMAVAEGA. I will definitely come back.

Dr. HARTZ. If any do come up I would very much like to know, because those are the kind of things that we do need to be aware of to follow up on. You know, that is a part of our job.

Mr. FALEOMAVAEGA. All right, my friend, I have got to go testify. I will be right back. Would you take the chair?

Oh. Here comes the chairman. Gentlemen, here comes the real investigator here.

Mr. RICHARDSON. The chair recognizes the gentlelady from Arizona.

Ms. ENGLISH. I have asked my questions. I think we are ready for the second panel, Mr. Chairman.

Mr. RICHARDSON. I would like to ask a few questions before proceeding to the next panel. We have received testimony raising several concerns regarding EPA's current policy on underground storage tanks on Indian lands. Tribes have indicated the EPA will only expend funds to clean up underground storage tanks in "time critical" situations.

Now, isn't EPA responsible for cleaning up all leaking or abandoned storage tanks on Indian lands? Can we deal with this problem administratively or is the only option legislative?

Mr. ZIEGELE. Mr. Chairman, EPA is not responsible for cleaning up all underground storage tanks on Indian lands. We are responsible for regulating underground storage tanks. By the statute, we are responsible for finding owners and operators, responsible parties who must be directed to clean up those leaks.

If those responsible parties are unable or unwilling to do that, we can and have conducted Federal-led cleanups, but we are then required to attempt to recover the costs that we incurred out of the Leaking Underground Storage Tank Trust Fund for addressing the site.

Mr. RICHARDSON. All right. Well, if you don't have responsibility, who does?

Mr. ZIEGELE. For cleaning up the sites?

Mr. RICHARDSON. Right.

Mr. ZIEGELE. It is the owner and operator under the Resource Conservation and Recovery Act. It is the person who owns the tank or had control of it and operated it.

Mr. RICHARDSON. But your definition of owner has been an issue because your definition of owner precludes Indian tribes from getting any assistance. Isn't that right?

Mr. ZIEGELE. Frequently the definition of owner, as it is applied on a case-by-case basis could mean that the tribe is the owner of the tank. It is not because of that that they would not get assistance, it is that they are responsible under the law for undertaking the cleanup and the law does not give us authority to provide financial assistance.

Mr. RICHARDSON. Now, what about the issue of liability? Is the tribe liable?

Mr. ZIEGELE. If it is determined that the tribe is the owner or the operator of the tank, they would be liable for the cleanup as well as potentially for third party damages.

Mr. RICHARDSON. See, what we need to do is find a way to give the tribes assistance, and not make them liable. My question to you is, can you do it administratively?

Mr. ZIEGELE. One thing I would point out is that if there is a case where there is no owner or operator, and there is an imminent danger, we do have funds to begin the cleanup. I want to make sure you understand that we would not allow a threatening situation to occur on Indian reservations because of the statutory limitations that I raised earlier.

However, on the question of giving Federal funds to tribes in order to do cleanups, that would require an amendment to the Resource Conservation and Recovery Act. We have no authority to use EPA funds to do any cleanups where there is a viable responsible party. What you are talking about would be a new program and a new use of Federal funds.

Mr. RICHARDSON. All right. So we have to amend the RCRA law.

Mr. ZIEGELE. It would require that.

Mr. RICHARDSON. The amendment would deal with the liability issue and enable tribes to get assistance; in other words, make them eligible for assistance like anybody else?

Mr. ZIEGELE. No. It would make them eligible for assistance but in a way that others are not. No one else can get Federal money

to do cleanups of underground storage tanks where there is a viable responsible party.

Many tank owners in many States have benefited from State programs that use State tank fees or gasoline taxes to make money available to help with cleanup and meet our program's financial responsibility requirements. Many States have not done that, and there is no Federal program for that. That is what would be required in order to really help.

Mr. RICHARDSON. Okay. So we don't have any national underground storage tank policy for Indian tribes. We just kind of hope they get better, or what do we do?

Mr. ZIEGELE. Our policy is tied to our authority. First, it is EPA's job to help ensure public health and environmental protection from underground storage tanks on Indian lands. We will work with tribes to help them develop their own capability to regulate underground tanks, and we are doing that.

We will help them with technical assistance. We will directly implement the program where that is what works best for them and us. And we will help facilitate State and tribal arrangements and agreements if that is the best way to provide that protection.

There is no policy to provide Federal funding to clean up tribally owned tanks, because, Mr. Chairman, as I said, we have no authority to do that.

Mr. RICHARDSON. Right. Okay, now one of my Pueblos in New Mexico, Sandia Pueblo, my understanding is they have asked you for assistance to clean up leaking underground storage tanks and you said you can't help them. The same with Pojoaque Pueblo. You know, these are very provincial issues to most everyone here, but not to me.

What happened here? Could you tell us?

Mr. ZIEGELE. I do not have all the facts at hand, but my current understanding of the situation is that there was a service station on tribal land. It was operated for approximately 30 years by several lessees. I believe it was in 1991 when the facility was turned back over to the tribe and the lease ended.

The tribe then undertook to close the underground storage tanks that were at the facility and they found that there had been contamination of the site.

The tribe began an investigation. They also, some during that period, notified EPA of the problem. The EPA directed the tribe to continue with the site investigation and they have done so.

Also, during the course of this the tribe, at our request supplied a list of the lessees, so we could investigate them as potentially responsible parties and consider enforcement actions against past operators of the tank. We got that after several months and right now our Region VI office in Dallas is looking into the matter.

As of this point, they have tried to contact two of the lessees and they have been unable to do so because it has been quite a while since these people operated the facility.

On the issue of financial assistance, we unfortunately have limited authorities as I mentioned earlier—if there are viable owners and operators we can't provide Federal funds to clean up a release unless there is an imminent and substantial hazard, and there is not, from the information that we have on the site.

Mr. RICHARDSON. Well, you may hear differently from the Pueblos shortly.

I have more questions, but I would like to recognize the gentlelady from Arizona.

Ms. ENGLISH. I asked most of my questions but your questions prompted one more.

In Arizona, I was in the legislature around the time underground storage tanks became an issue with the EPA, and we devised a funding mechanism for small businesses, small service stations and businesses, that didn't have the type of funding a large business might have to do cleanup. I can't recall at this point where that funding came from, but it was set aside by the State.

Does BIA or can EPA put together a similar program for tribal lands much like a State would put together for businesses within the State to help in the cleanup?

Mr. ZIEGELE. Under EPA's current authority, we could not use Federal funds for that purpose. But 43 States are somewhere in the process of developing funds similar to Arizona's, so there are many models that could be adopted if the Federal government was given the authority to do that. That is something that EPA would assist BIA and others in looking into. EPA could not establish such a program now under our current authorities.

Ms. ENGLISH. Would BIA have the authority to do that at this point?

Mr. HAYES. I am not sure whether or not we would have the authority, Ms. English. I think that we would be willing to work with EPA and the tribes through discussion on this issue. If that is the appropriate way, then the authority could be established for the agency which is the appropriate one.

Ms. ENGLISH. Okay. Thank you.

Mr. RICHARDSON. Mr. Hayes, I am a little bit surprised by what you just said. Are you basically also saying that the BIA would have no trust responsibility for Indian tribes regarding assuring compliance with RCRA or to address any violations of the Act? I mean are you basically saying that you don't have authority over these facilities that are located on trust land?

Mr. HAYES. Mr. Chairman, I am not saying that entirely the way you categorize it. What I am saying is that we do have some oversight responsibilities by virtue of the fact that we are the trustee. We are involved in the review, periodic review of leases to assure compliance of the terms of the lease, and we endeavor to do that as our resources permit. There is, however, no free-floating general trust responsibility in this regard. I don't think it rises to the level of a trust responsibility. That is the distinction that I think we need to make.

Mr. RICHARDSON. But doesn't the Secretary of the Interior have to approve any lease on trust land?

Mr. HAYES. That is correct.

Mr. RICHARDSON. Well, so isn't that substantial leverage or involvement? In other words, what is the Secretary's power if there is an environmental problem on Indian land?

Mr. HAYES. The Secretary has no trust responsibility for the operation of these leases. The Secretary has the trust responsibility and the obligation to review lease proposals and to approve them

should the parties come to some agreement on it and it is consistent with what the trustee feels is appropriate in terms of compensation and safeguards to the tribe or the individual owner.

But we have no trust responsibility for that operation or operational aspect of it.

Mr. RICHARDSON. All right. Now, there is a little discrepancy here that has been pointed out to me. EPA is telling us that there are 4,875 tanks on Indian lands. Now you are telling us, Mr. Hayes, that there are 520 underground storage tanks in the BIA inventory.

What is the difference there?

Mr. HAYES. The 520 there that I referenced, Mr. Chairman, are those tanks that are under our ownership, operation, and control. The numbers referenced by the EPA include the numbers that I referenced, the 520. They also include tanks which are owned and operated by tribes, by individuals, either Indian or non-Indian. Those that I am talking about are just those owned by the Bureau of Indian Affairs.

Mr. RICHARDSON. Now, let me just give you an example, again, on the Navajo reservation. They have some open pits which remain as remnants from some of the old abandoned uranium mines. A lot of these pits have become dumping grounds for all kinds of—even radiation, but a lot of hazards that are included in the definition of illegal dumping.

Now, does EPA have any authority to clean up such a dump? I mean there is one in Shiprock, New Mexico, that I have seen. Can you logistically clean that up?

This is uranium and it is an abandoned mine. It has all kinds of contaminated materials even radiation. Now can you clean that up?

Mr. ZIEGELE. Mr. Weddle?

Mr. WEDDLE. The way the statute is set up the Federal Government is not in an operating mode, does not have, per se, cleanup authority to deal with situations whether they are on Indian land or whether they are on private land. The Federal role is one of setting national standards, and those standards would include standards for cleanup.

But the implementation of those standards rest with Indian tribes, States, local governments, owners, and operators.

EPA does not have authority to go in and clean up individual situations other than, perhaps, under the Superfund program should the site you are talking about be ranked high enough to warrant special attention under that program.

Mr. RICHARDSON. How many of these underground storage tanks, Mr. Hayes, has the Secretary required proof of financial responsibility of the operator?

Mr. HAYES. Of the tanks that we are responsible for?

Mr. RICHARDSON. Right. In other words—

Mr. HAYES. We are fully responsible for those.

Mr. RICHARDSON. Okay. So you—

Mr. HAYES. Yes.

Mr. RICHARDSON. Those are the BIA?

Mr. HAYES. Our Office of Construction Management has the program.

Mr. RICHARDSON. Now, do you routinely require the posting of bonds or security to ensure any kind of remedial action in the event of an accident or leak?

Mr. HAYES. Are you speaking in terms of just the general leasing authority?

Mr. RICHARDSON. I mean what do you do? What are your procedures in the event of a leak? Is there any process that you go through? Do you require any bonding or any posting of any security?

Mr. HAYES. During the course of the lease negotiations, the Bureau of Indian Affairs is often involved with the potential lessee and the tribe, or the individual in many cases, we become aware of the purposes of the lease, and there is provision in our leasing regulations to require bonding of the lessees.

Oftentimes the bonding is required primarily for performance purposes, to assure that the lessee does what he or she says they are going to do on that land and to assure the payment of the annual rental of the property. In some cases there has been a requirement that bonding be provided to assure environmental compliance at the conclusion of the lease.

I am not aware of situations or locations where that has not been required, but the general authority is there and it is between the parties to the lease and the Secretary's representative, in most cases the superintendent, as to the level of the bonding requirement and whether or not bonding is going to be required at all.

Mr. RICHARDSON. Could you provide a list to this committee of a breakdown of the number of underground storage tanks on Indian land and a listing of any type of security that ensures the financial responsibility of an operator?

Mr. HAYES. We would need to work with the people from EPA to determine what they have in terms of their list. Our list is, as I have mentioned, Mr. Chairman, the listing of those tanks which the Bureau of Indian affairs owns and operates and thus is responsible for.

[EDITOR'S NOTE.—the information was not received at the time of printing.]

Mr. RICHARDSON. Now, let me conclude with a question to my friend from the Indian Health Service. Do you have any kind of solid waste management plan for all Indian tribes? Have you prescribed that? Have you tried to develop a systematic solid waste management plan for all tribes at the IHS?

Dr. HARTZ. The idea of a solid waste management plan is absolutely paramount in order to address this problem, and that is something that we have been working on with our staff over the years, as one of the many things we do in dealing with everything from bubonic plague to constructing water and sewer facilities.

The plan is something that needs to be done in cooperation with the tribes. It is not something that the Federal Government, I believe, should do in a vacuum. And there are a number of places where actually EPA is assisting in that process as well and providing money to do solid waste management plans.

We, sir, are doing some. The answer, do we have them done for all tribes, they are not done for every tribe. It is a comprehensive program in developing a plan that entails the passing of codes and

ordinances by the tribal government. It needs to be more than just bringing in a bulldozer and closing out a site. There needs to be—

Mr. RICHARDSON. How many tribes, in your estimation, have a solid waste management plan?

Dr. HARTZ. Rather than to speculate at this time I would rather provide that for the record.

Mr. RICHARDSON. Well, all right. Give me an idea. Most? Hardly any? None? Some?

Dr. HARTZ. Approximately half.

Mr. RICHARDSON. Half.

Dr. HARTZ. In varying stages, because one—I need to qualify that a little bit. Because under the previous regs, almost all of them had a plan as to how they were going to deal with it. But under the current ones it is quite different.

Mr. RICHARDSON. How much would it cost to pay the annual operations for the BIA, IHS, and tribal sanitary facilities nationally?

Dr. HARTZ. The cost to deal with—you are talking comprehensive facilities now, water, sewer, solid waste, the whole shooting match.

Mr. RICHARDSON. Right. How much would it cost?

Dr. HARTZ. Our estimate on that runs somewhere between a \$100 million and \$120 million annually would be required to pay that bill.

Mr. RICHARDSON. Annually?

Dr. HARTZ. Annually. You are talking of a recurring cost for the—

Mr. RICHARDSON. Yes.

Dr. HARTZ. Yes. Yes, sir.

Mr. RICHARDSON. Well, let me just make a concluding statement.

Dr. HARTZ. May I qualify that a little bit?

Mr. RICHARDSON. Sure.

Dr. HARTZ. Because that is really what we are looking at from the standpoint of tribal utilities. I would have to go to the Bureau to add a number in there and a more specific number for IHS.

I am talking about the operation of the utilities that are out there today, the tribal utilities.

Mr. RICHARDSON. I understand.

Mr. Hayes, would you agree with that estimate?

Mr. HAYES. I think it is pretty fair, yes.

Mr. RICHARDSON. You know, gentlemen from the executive branch, and those of us here in the Congress, we have no policy. This is what it seems to me is evident in this hearing. And we need to develop some very, very specific legislation about responsibilities, about resources, because we simply have no policy.

I mean we have a jumble of different legal interpretations and everybody is evading the problem. I suspect we are here in the Congress too. None of these tanks are getting cleaned up and they are hazardous.

The gentlelady from Arizona.

Ms. ENGLISH. Thank you again, Mr. Chairman.

I would like to strongly urge a solid waste policy, also. Arizona was the last of the States in the Southwest and in the West to adopt a policy.

Arizona's regulations were very lax, and we found ourselves becoming a dumping ground for all the other States, including New Mexico, California, and Nevada. Because there are so few regulations, there were all kinds of things coming into Arizona. Businesses were looking to develop various sites for various kinds of waste. And only after we developed a policy did we start to minimize that transportation of waste across borders.

What has happened is, Indian lands are becoming the dumping grounds because they are less regulated than the States. States have now adopted higher standards than are required by EPA, and reservations now have lesser standards, so they become very attractive to those businesses or municipalities that need a dumping ground. This is viewed as a fiscal opportunity for the tribes to generate money by developing a variety of sites on tribal lands.

Tribes who don't have the sophistication to develop a comprehensive plan really need the assistance of you folks to put together plans to protect their lands. Tribes have been caught unaware because they need economic development and the lack of opportunities forces tribes to accept and develop dumping grounds, and that is ludicrous. That is what happened in Arizona.

The only way we can overcome that is by offering assistance to help tribes develop the same regulations we would want on nontribal lands. Tribes don't have the same financial resources to develop those plans, and it will take a concerted effort by everyone at that table to help develop those proposals for solid waste. And that is all kinds of waste. It isn't just underground storage tanks. It is hazardous waste.

There was recently a proposal to have an asbestos dump on Navajo land and it would have generated a lot of money. The reason that was proposed for Navajo land was because there was no place else to put it because State regulation was too tough.

I think tribal lands deserve better. I think the Indian people deserve better. I think it is time that we pull together and offer the same assistance available to Indian tribes so they can develop these kinds of plans.

Having gone through this exact thing myself at the State legislature, in fact I chaired the committee that did it and was hated by everybody, I know how critical it is to act immediately. It is so important that I would assist in developing those kinds of plans for the tribes.

So I got that off my chest. Thank you.

Mr. RICHARDSON. The gentleman from American Samoa.

Mr. FALEOMAVEGA. Thank you, Mr. Chairman. I had raised the question earlier, Mr. Chairman, with our friends, the panel, because it seems that nowadays it is always the bottom line consideration from our friends downtown is the cost. There have been some estimates made, and this is only about two years ago, that if our country was to seriously consider doing a cleanup of this country with its environmental problems that we are now faced with it should well be at least well over \$100 billion to clean up our environment, and I want to raise this question with our friends from the EPA and DOI.

If by way of allocations of your budgets given is there any earmarks given to address this very serious problem on Indian lands

as far as storage tanks, landfills, dump sites? What kind of resources are you really making available to address this very issue that our friend from Arizona has just addressed? That is one question.

Secondly, what measurement do you consider now of this issue? Is it serious? Are we overreaching ourselves in saying that it is not as serious as you may project it to be with some 4,800 tanks? If you could also help me.

How big are these storage tanks? Our friends here from Indian Health Service say that it is no problem. We have had no Indian deaths. Healthwise that it is no problem.

But I am still a little puzzled by all this and I wanted to ask our friends from EPA if they could address that question.

Mr. ZIEGELE. On the question of resources going toward the problem, a vast majority of our resources are going toward running a regulatory program. Relatively little is going toward actually cleaning up sites. As I mentioned earlier, it is because of limits on our authority and because of success in finding responsible parties to conduct cleanups.

As far as the money that would be needed, I would also point out that in addition to remediating leaking underground storage tanks, there is a need to consider the other costs of compliance with regulatory programs.

By 1998, all regulated tanks must be removed, replaced, or upgraded to resist corrosion and meet other requirements, which could involve substantial compliance costs to owners on Indian reservations, including tribes that own tanks. So there is a legitimate policy issue as to whether there should be a role for the Federal Government in helping pay for not just cleanups on Indian lands but also other costs of being in compliance.

I mentioned earlier we have no authority now to address that. It is a legitimate policy question.

Mr. FALEOMAVAEGA. Mr. Hayes.

Mr. HAYES. In terms of the amount of monies that have been identified to deal with underground storage tanks, as I indicated earlier, that is a program run by our Office of Construction Management, and I regret that I don't have the dollar figure that they devote to dealing with this issue. I would be happy to obtain that figure and provide it to the committee.

In terms of our program, the program that Mr. Farris and I are responsible for, we have had in Fiscal Year 1993 a little over \$3 million—3.2 million I believe is the figure—that has been made available to Indian tribes to deal with not only solid waste issues, but hazardous waste issues. We provide monies to address sites where hazardous waste is the issue and concern.

In Fiscal Year 1994, we are projecting a budget of about \$4 million to deal with those same activities that I just mentioned, and again for Fiscal Year 1994 I can provide it to you from the Office of Construction Management but I don't have that dollar figure available.

Mr. WEDDLE. I might add for landfills at EPA the total budget that I have to deal with all municipal solid waste for the entire country—recycling, procurement, landfilling, incineration—is less than \$8 million. That also includes regional money. Our budget for

working on Indian country problems has ranged from \$1 million to \$3 million per year for hazardous waste as well as nonhazardous waste issues.

Mr. FALEOMAVAEGA. Is this because there is some policy consideration on the part of the Congress that perhaps reflected there is no serious issue with underground storage tanks?

You know, the bottom line these days is the budget gives you the sense of priority on the part of our Federal policymakers. So, if you see a \$1 million allocation for this program, as an example, it just tells you what kind of priority that we perhaps here in the Federal Government have for this issue. Am I wrong in this assessment?

Mr. WEDDLE. Well, clearly, if you look at our statute and what the Congress is directing us to do, the emphasis is on hazardous waste rather than nonhazardous waste and municipal waste.

On the other hand, given the numbers I gave you, it shows that EPA is committed to the problems on Indian lands with the resources we have available, and a substantial percentage of the resources that we have in dealing with municipal solid waste are focused on the problems on Indian lands.

That is not to say it is a huge amount of money, but it is a commitment on our part.

Mr. ZIEGELE. Sir, I didn't intend to evade your question about resources going toward the problem. I did want to answer the question. We have budgeted 2½ work-years for the program on Indian lands for this fiscal year. However, we are actually putting in closer to 6 work-years nationwide for the program.

In addition, there is a half million dollars of contract money available to the regions each year and the regions themselves have put in an additional half million dollars over the past 4 years.

Mr. FALEOMAVAEGA. Mr. Hayes, as the lead agency on dealing with Indian issues in the Federal Government, do you feel that currently the Bureau of Indian Affairs has sufficient statutory authority as well as resources to address this issue?

Where are we on a scale from 1 to 10—1 being the worst and 10 being the best? Do you feel that you need more help from us statutorily or do you feel that the way things are now it is perfect, you don't touch it, don't rock the boat?

Mr. HAYES. I wouldn't say that things are perfect. There is always room for improvement in about anything you do.

Mr. FALEOMAVAEGA. I like that.

Mr. HAYES. However, I believe that authority exists. We have adequate authority to review lease documents, lease proposals, and things of that nature. We also utilize NEPA to some extent—well, to a large extent—to help us make information available not only to ourselves but also to the decision-makers as they decide about lease proposals, not only from the environmental perspective, but also the effects upon tribal members and the surrounding communities, depending upon the scope of the NEPA activity. So, in response to your first question, I would say that we have adequate authority.

In response to your question about resources, there is a fairly significant unmet need in Indian country. The decisions that are made about fiscal resources being made available are made at levels within the Bureau of Indian Affairs, within the Department of

the Interior, and OMB, and eventually gets sent to the Congress as a part of the President's budget package, and there are competing demands for those resources.

The decision-makers at the offices that I mentioned attempt to give the best consideration they can to environmental concerns. As a result we have about \$4 million in our program, owing to where we fit on the range of importance in terms of the range of competing demands for that very small resource.

The other agencies at the table go through that same process. They need to prioritize their programs in terms of the competing interest for that same dollar.

Mr. FALEOMAVAEGA. Maybe I am not getting—I think we have identified 520 tanks. Can you tell us, Mr. Hayes, right now as far as the BIA is concerned do you have the resources? Do you have a definite timetable you are going to meet to fix leaks of any nature?

I know you have got competing, what you call, you know, other interests involved, but I just wanted to—if you can pinpoint it exactly, tell us, do you or do you not have the means to control this issue, the 520 tanks that I think are on Indian reservations right now?

Mr. HAYES. The 520 tanks are undergoing testing. They undergo regular and periodic testing.

Mr. FALEOMAVAEGA. Yes.

Mr. HAYES. We do not pull a tank out if there is not a problem associated with it. As long as it is an operable and operating, safe tank it remains where it is.

Mr. FALEOMAVAEGA. So there is no maintenance? You wait until it leaks and then you fix it?

Mr. HAYES. No. No. I didn't say that. We do the testing, and if the tests indicate that we have a problem with a particular tank, then we will either repair it if it is easily reparable or we will pull it and replace it.

Mr. FALEOMAVAEGA. Okay. Mr. Chairman, thank you.

Mr. RICHARDSON. I think the gentlelady from Arizona had a follow-up.

Ms. ENGLISH. I do. Thank you.

Just a real quick question. One of the biggest loopholes we found in developing plans, a hazardous waste and a solid waste plan for Arizona was in lack of clarity or the vagueness of the definition of recycle. You prompted that question.

Has EPA taken a look at what recycling really is? And has it been clarified or defined with a little more strict regulation?

Mr. WEDDLE. I believe you are talking about the definition of hazardous waste recycling, and there is a major effort underway right now involving State and local governments, the private sector and a host of other parties. I think that effort is going to continue to go on for sometime since this is a very complicated and a lot of economic ramifications of how that definition plays itself out. So it has not been totally clarified now and in terms of what it eventually is going to look at as we fix some of the problems with our current definition.

Ms. ENGLISH. Thank you.

Mr. RICHARDSON. We have been joined by the distinguished ranking minority member from Wyoming, and like myself, I want to tell my colleague I came in after having had my seventh meeting and I was a little confused when I started asking questions, and I wanted to know if the gentleman wanted to say anything or ask a question.

Mr. THOMAS. I have been in a grazing fee hearing, so I am fairly close cropped, as you can imagine.

In risk of being repetitive, and you could give me a very short answer. Mr. Hayes, number one, do most of the tribes have an EPA group of their own environmental group on the reservation?

Mr. HAYES. Could I ask Mr. Farris to respond to that? He is the chief of our Environmental Services Office.

Mr. THOMAS. Okay. Sure.

Mr. FARRIS. That is something that is getting quite a bit of recognition among Indian tribes at the present time. I don't have any hard numbers. I will say probably half or a little bit less than half have their own environmental programs, but it is something that is gaining momentum in Indian country.

Mr. THOMAS. But the BIA isn't familiar with how many there are?

Mr. FARRIS. No. I don't have any numbers on how many tribes have their own environmental programs and how many individuals they have on those programs and what disciplines they have; no.

Mr. THOMAS. Then just one final question and then I will—because I didn't hear you. But who do you feel is the agency in charge of this issue?

Mr. FARRIS. In charge of?

Mr. THOMAS. The issue of open dumps or underground leakage.

Mr. FARRIS. Well, I think EPA has the regulatory activity, and BIA has a general trust relationship, and IHS has the—

Mr. THOMAS. So nobody is in charge.

Mr. FARRIS. Well, there is a—

Mr. THOMAS. Sorry. I think I get the picture. Thank you.

Mr. RICHARDSON. Gentlemen, thank you very much for appearing today, and we appreciate your patience and your questions.

We need to develop a policy. I want you to look at a bill that I have introduced, one that deals with an Assistant Secretary for Indian Lands, that we believe should be a Native American Assistant Secretary for Indian Lands, that we are trying to attach through the Government Operations Committee, because I think it makes sense. We have no policy. We have a lot of Indian lands, especially in the West, and we know EPA is kind of resisting a little bit, but we hope to nudge you in the right direction. I think this would give more proper focus to this issue.

I also have a bill which I think most everyone in our subcommittee has cosponsored, which makes the States and tribes treated equally under RCRA; in other words, so that they have the same eligibility, and I assume you will support that.

You want to go on the record supporting it? Instead of nodding? Nods are not reflected in the official record.

Mr. WEDDLE. Actually, I believe we are on the record of requesting such legislation, particularly with regard to solid waste and hazardous waste.

Mr. RICHARDSON. And the legislation establishing an Assistant Secretary for Indian Lands, Mr. Ziegele, do you support this proposal?

Mr. ZIEGELE. I couldn't comment on the proposal to create an Assistant Secretary position for Indian lands.

Mr. RICHARDSON. Okay. Well, we will be in touch on that.

All right. Thank you all very much.

We will now move on to our second and final panel. We will have representing the Pueblo of Pojoaque, Kevin Gover, of Gover, Stetson and Williams, Albuquerque, New Mexico. We will also have Ms. Sadie Hoskie, director, Environmental Protection Administration, Navajo Nation, Window Rock, Arizona; Mr. Frank Ducheneaux, on behalf of the Leech Lake Tribal Council, Cass Lake, Minnesota; Mr. David Coss, director, Environmental Protection Division, New Mexico Environment Department; the Honorable Frank Paisano, Tribal Councilman, Pueblo of Sandia in New Mexico, who is accompanied by Ms. Stephanie Poston, Tribal Planner.

Please step up to the podium. We welcome all of you.

I understand Mr. Coss is accompanied by Mr. James Bearzi, the chief of the Underground Storage Tank Bureau.

Welcome, ladies and gentlemen. I will ask members of the panel to please observe our 5-minute rule. We will insert your statements fully in the record.

We will start with Mr. Gover, representing Governor Viarrial of the Pueblo of Pojoaque.

**PANEL CONSISTING OF KEVIN GOVER, ON BEHALF OF HON. JACOB VIARRIAL, GOVERNOR, PUEBLO OF POJOAQUE, SANTA FE, NM; HON. FRANK M. PAISANO, TRIBAL COUNCILMAN, PUEBLO OF SANDIA, BERNALILLO, NEW MEXICO, ACCOMPANIED BY STEPHANIE POSTON, TRIBAL PLANNER; DAVID COSS, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, NEW MEXICO ENVIRONMENT DEPARTMENT, ACCOMPANIED BY JAMES BEARZI, CHIEF, UNDERGROUND STORAGE TANK BUREAU; SADIE HOSKIE, DIRECTOR, ENVIRONMENTAL PROTECTION ADMINISTRATION, NAVAJO NATION, WINDOW ROCK, AZ; AND FRANKLIN DUCHENEUX, ON BEHALF OF THE LEECH LAKE TRIBAL COUNCIL, CASS LAKE, MN**

#### **STATEMENT OF KEVIN GOVER**

Mr. GOVER. Thank you, Mr. Chairman. I will depart completely from the written statement that Governor Viarrial has submitted. His father, by the way, is quite ill, and he sends his regrets that he is unable to be here.

I think Mr. Bearzi and the New Mexico Environment Department representatives will discuss the particulars of the cooperative agreement between the State and the Pueblo of Pojoaque. I just want to address a few of the things that we were hearing from the earlier panel.

First of all, the UST Bureau from EPA is claiming they have no statutory authority to expend Federal funds for the cleanup of underground storage tanks on Indian reservations, and that is simply

untrue. The problem is that they have established their own internal policy, an administrative decision—it is not even a regulation—it is a policy, that says they will not spend their Leaking Underground Storage Tank Trust Fund money unless it is a life-threatening situation, in essence.

Now, that is not required by the statute. The authority exists in the statute for them to spend the money on the kind of cleanups that are needed at Pojoaque and at Sandia. They just choose not to do so. And so while we certainly support the amendments to RCRA that will require them to spend that money out there, the fact is they have the authority now.

The fact is that under subtitle D of RCRA, the solid waste provisions, they are now going to issue a reg on how tribes are going to be treated as States under subtitle D. Apparently they believe that under subtitle I they cannot do the same thing, and there is simply no basis in the statute for that distinction. They have the authority. They just choose not to exercise it.

The second, you heard a lot of conversation about whether or not there is sufficient resources in these agencies to do the needed cleanups. The answer is absolutely not. There simply are no resources.

The Bureau doesn't have enough money, neither does the IHS, to go out there and do the cleanups on the open dumps on the reservations that are necessary. Nowhere near it. They don't even make requests for that sort of money. And so for them to sit here and talk about competing priorities, the answer was no. It was that simple.

EPA does not have money to do open dump cleanups. That much was true. But there is an enormous Leaking Underground Storage Tank Trust Fund, none of which is being expended on Indian lands, and he was sitting here telling you that they don't have any resources. The fact is they do.

There is an enormous appropriation that goes into that trust fund, but it is all distributed to the States and the tribes don't get any of it.

And in that connection, in addition to supporting the chairman's bill that would amend RCRA to treat tribes as States, there are two other needed pieces of legislation that the committee ought to consider. The first is Senator McCain's bill which would address the problem of open dumps on Indian lands.

It would establish a moratorium against enforcement of the open dumping provision so that the tribes, and by the way, the United States, don't end up in dozens and dozens of lawsuits, which they will lose, and be held liable under RCRA, so long as the tribe is implementing a program to address this open dumping problem and to start the cleanup process. Second, it would provide some funds—which is the bottom-line problem out there—to do some of those cleanups.

The other piece of legislation that I would suggest the committee consider is one that would establish a separate Leaking Underground Storage Tank Trust Fund for the tribes. I don't believe this has to be new money at all. I think it can come out of money that is already being appropriated to EPA. They just need to be knocked in the head and told to spend it on the reservations.

The one thing that did not come up in the whole conversation is that both of these agencies are claiming the authority to regulate solid waste and underground storage tanks on the reservations, but neither of them wants the responsibility for the cleanups. So they are going to be out there trying to bust the tribes, make the tribes pay for it with their meager resources, but those agencies claim no responsibility, not even the authority to go do the cleanups themselves. So the tribes are getting whipsawed out there and that is what that whole conversation was about, Mr. Chairman.

[Prepared statement of Gov. Viarrial follows:]

TESTIMONY OF GOVERNOR JACOB VIARRIAL, PUEBLO OF POJOAQUE,  
BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
COMMITTEE ON NATURAL RESOURCES, UNITED STATES HOUSE OF REPRESENTATIVES  
OCTOBER 14, 1993

My name is Jacob Viarrial, and I am the Governor of Pojoaque Pueblo, a federally recognized Indian tribe whose reservation is located north of Santa Fe, New Mexico. I am here today to testify about Pojoaque's experiences in dealing with underground storage tank leaks on the Pojoaque Reservation, and I will explain why the present federal regulatory scheme under RCRA is inadequate and needs to be revised.

On October 22, 1990, the Pueblo of Pojoaque received a request from the New Mexico Environmental Improvement Division ("EID") for access to real property located on the Pojoaque Reservation for the purpose of installing groundwater monitoring wells. EID had learned that an underground storage tank ("UST") leak had occurred on private land located on the Reservation, and it wished to perform an investigation to determine the extent of groundwater contamination. The UST leak occurred on property located on Highway 285, where two businesses are located.

On December 13, 1990, the Pojoaque Tribal Council granted EID's request for access and authorized EID to enter the Pueblo, install monitoring wells, and perform an investigation of the UST leak. The EID investigation revealed petroleum hydrocarbon contamination exceeding the New Mexico water quality standards set forth in its UST regulations. Consequently, on July 31, 1991, EID requested permission to enter the

Reservation again so that it could install groundwater wells and sample various groundwater and soil samples on or near the property.

Pojoaque was, of course, very concerned that the groundwater contamination be investigated and remediated. However, it was also concerned about the fact that, under federal law, states have no authority to regulate environmental matters on Indian lands. Washington Dept. of Ecology v. United States EPA, 752 F.2d 1495 (9th Cir. 1985); EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984 (states have no environmental regulatory authority over reservation lands). Hence, Pojoaque wanted to ensure whatever was done on the Reservation, that Pojoaque protected its sovereignty and that it did not allow the state to assert jurisdiction on the Reservation that is not authorized by law.

Because states have no authority to regulate UST's on Indian reservations, it was up to the federal government, specifically the EPA, to do so. Washington Dept. of Ecology v. United States EPA, 752 F.2d 1495 (9th Cir. 1985). It was our understanding that EPA Region VI was pursuing the possibility of establishing tribal UST programs but that, because of the small number of USTs located on each New Mexico Pueblo, Region VI desired to establish a UST program through a consortium of Pueblos. The tribal UST program proposed by Region VI has never materialized. We were told that this was because no funding was ever made available to sustain the program. As result, Pojoaque was left in a quandary: the state of New Mexico had no authority to regulate USTs on the reservation, and the federal government, although it was supposed to regulate USTs on Indian lands,

simply did not do so. At that point, Pojoaque and New Mexico EID came up with a possible solution to the problem--a Joint Powers Agreement ("JPA") between the Pueblo and the State.

The JPA has not yet been executed, but it is in the final stages of negotiation and will likely be executed in the near future. Under the JPA, the Pueblo will designate the New Mexico EID to act as the Pueblo's agent for the enforcement of the Pueblo's UST laws and regulations.<sup>1</sup> Notably, the JPA makes it clear that neither the state nor the Pueblo waive their sovereign immunity, nor shall the JPA be construed to be a concession of any jurisdictional claims on the part of either the Pueblo or the State.

Although the JPA will provide an important tool and allow USTs to be regulated on the Reservation, it is not, in itself, sufficient. Although the state has informed the Pueblo that it "may" be willing to spend state Leaking Underground Storage Tank Trust Fund ("LUSTTF") monies to aid in the clean-up of UST leaks on the Reservation, the JPA does not obligate the state to spend any of its LUSTTF monies. Hence, the Pueblo is not guaranteed that monies will be available to clean up UST leaks. As far as federal monies are concerned, EPA has taken the position that it does not have the authority to enter into cooperative agreements with tribes with respect to LUSTTF monies, and that, therefore, EPA cannot give LUSTTF monies to tribes. The end result is that, even with the JPA, the Pueblo may be left without any access to LUSTTF monies and will be forced to pay for UST clean up costs by itself.

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<sup>1</sup> The Pueblo will soon adopt UST regulations that are equivalent to the state's UST regulations.

EPA, of course, has the authority to spend its own monies to remediate UST leaks on reservations, thereby avoiding the need of entering into a formal LUSTTF cooperative agreement with a tribe. However, EPA does not so, based on its policy of not spending clean-up monies on Indian lands except in very exceptional, "time critical" situations.<sup>2</sup> The practical reality, therefore, is that EPA makes no effort to clean up UST leaks on Indian lands, as they do not meet the "time critical" criteria. The JPA will help alleviate this problem, but, as noted above, the JPA will not assure that, in the event that clean-up of a UST is required, Pojoaque will be granted access to the New Mexico LUSTTF monies.

For these reasons, we urge this subcommittee to amend the Resource Conservation and Recovery Act ("RCRA") so that (1) tribes may be treated as states and (2) tribes are provided direct access to the Leaking Underground Storage Tank Trust Fund. Although we believe tribes and states can benefit from cooperative agreements with regard to UST program implementation, and that such agreements should be encouraged, these agreements will likely not be sufficient. States are not required to give LUSTTF funds to tribes, and there is no way to insure that tribes receive their fair share other than through Congressional action.

Further, as a more fundamental objection to the current way that EPA administers UST programs, tribes are sovereign entities, and the federal government, which owes a duty of trust to Indian lands, should recognize

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<sup>2</sup> Office of Solid Waste and Emergency Response Directive 9610.9, titled "Final Interim Guidance for Conducting Federal Corrective Actions on Indian Lands."

this fact and provide tribes access to IUSTTF monies directly. Tribes, consequently, should not have to negotiate with states to receive IUSTTF monies, as the federal government is obligated to deal with each tribe on a government-to-government basis.

Indian tribes' inability to obtain access to IUSTTF monies is especially unfair given that Indian tribes have been held liable under RCRA for clean up costs. Blue Legs v. United States Environmental Protection Agency, 668 F. Supp. 1329 (D.S.D. 1987). It is inequitable to hold tribes liable under RCRA for clean-up costs on the one hand and, on the other hand not provide tribes with any funds or technical assistance to administer UST programs on their reservations. EPA provides states with enormous sums of money to administer UST programs. Tribes have received virtually no funds, and it is unfair to hold them liable as if they had the same technical and financial assistance as states.

In conclusion, I believe everyone on this committee agrees with me when I say that environmental dangers on Indian reservations, especially UST leaks, have largely been ignored by the federal government. This cannot continue, as inaction threatens the safety of both Indians and non-Indians on and near the reservations. It is time, therefore, for Congress to take action. We urge Congress to amend RCRA so that Indian tribes can be treated as states. This would allow tribes to take over primary responsibility for enforcing UST programs on the reservations, and, just as important, it would make tribes eligible to receive financial and technical assistance from the EPA. We also urge Congress to take action to require EPA to live up to its obligations under RCRA and actively to administer UST programs on

Indian lands, rather than ignoring UST problems on reservations except in exceptional "time critical" circumstances. UST leaks on Indian reservations are, unfortunately, an ever growing problem, and the federal government, as the trustee of Indian lands, has both the moral and legal obligation to ensure that these leaks are cleaned up as soon as possible.

I would be happy to answer any questions you might have.

Mr. RICHARDSON. Mr. Paisano.

**STATEMENT OF HON. FRANK M. PAISANO**

Mr. PAISANO. Mr. Chairman, members of the committee, my name is Frank Paisano. I am here as a council member for the Pueblo of Sandia, a Federally-recognized Indian tribe whose reservation is located north of Albuquerque, New Mexico.

I am here to testify about Sandia's experience in dealing with both the Bureau of Indian Affairs and the U.S. Environmental Protection Agency with respect to an underground storage tank leak on the Sandia reservation.

Sandia has been very disappointed in the lack of response by these agencies, especially the EPA, and we urge members of this subcommittee to introduce legislation that will assure that UST leaks on the Indian lands are cleaned up effectively and promptly.

Specifically, we request that the Resource Conservation and Recovery Act be amended so that tribes may be treated by EPA as States, that EPA be explicitly authorized to enter into cooperative agreements with the tribes to give them Leaking Underground Storage Tank Fund monies, and that EPA will be directed to clean up all the UST leaks on the Indian lands promptly.

Finally, because the UST leaks on the Sandia Indian Reservation should be remediated as soon as possible and Sandia cannot afford to wait until RCRA is formally amended, we request that the members of this committee support our request to the EPA for \$100,000 to conduct a demonstration project on leaking UST cleanups and establishment for tribal UST enforcement capabilities.

Let me give you a brief background as to Sandia's UST leak and its dealings with the BIA and EPA. In 1961, Sandia leased land to a non-Indian for a term of 25 years. The lease was approved by the Bureau of Indian Affairs.

The lessee installed USTs and used the land to operate a gas station. The lessee subsequently assigned its lease and the assignee later assigned the lease to another assignee. To the best of our knowledge, all monies continued to be used on the land to operate a gas station and to store petroleum in the USTs. Sandia had no involvement whatsoever in the operation of the stations or the tanks, or in the profit derived therefrom.

In 1991, the then-current lessee vacated the land and Sandia hired a contractor to remove the USTs. In accordance with the Federal environmental regulations, the consultant performed tests after the USTs were removed to determine whether there had been any leaks. Unfortunately, contamination had occurred.

Sandia then hired a consultant to begin cleanup measures. A preliminary study was completed and sent to EPA and BIA in late 1991. The study concluded that a cleanup would cost approximately \$250,000—\$250,000 would be required. Sandia sent letters to BIA and EPA requesting that both agencies (1) provide cleanup funds to Sandia or (2) aid Sandia in its efforts to locate and file legal actions against the lessees who caused the UST leaks.

In 1993, Sandia hired a second environmental consultant, Dames & Moore, to complete a hydrogeologic investigation report. The report concluded that there was a significant amount of benzene contamination from the UST leaks and that this contamination was

spreading. Dames & Moore concluded that a fairly extensive reclamation plan was needed.

However, as the result of a very recent visit to the site and consultation with BIA technical staff, Dames & Moore now concludes that a less intrusive and less expensive remediation plan is appropriate. However, even the less expensive remediation plan will cost a minimum of \$40,000.

The response of the EPA has been to do virtually nothing. With respect to pursuing actions against Sandia's former lessee, EPA headquarters told our attorneys in Washington that Region VI was ready, willing, and able to pursue actions against the former lessees, and that all Region VI needed was a list of those lessees.

Sandia promptly provided this list to Region VI. However, to the best of Sandia's knowledge, EPA has made no efforts whatsoever to locate the lessees and seek cleanup costs from them.

Further, EPA has constantly refused to provide any cleanup or funds for technical assistance to Sandia. Through a series of letters, EPA has contended that (1) it is not authorized to spend any Leaking Underground Storage Tank funds on Indian lands; (2) it is not allowed to spend other funds it administers to clean up UST leaks on Indian lands except in time critical conditions; and (3) Sandia is the owner of the USTs and thus subject to liability under RCRA, and that EPA therefore is not required to provide cleanup funds to Sandia.

We believe that Region VI's positions are not supported by law and that EPA's unwillingness to take action to clean up the UST leaks on the Sandia reservation is inexcusable.

Ms. POSTON. I am going to go ahead and finish reading for Councilman Paisano, Mr. Chairman.

Mr. Chairman, Sandia has responded diligently and effectively to the UST leak on the reservation. We have done so despite receiving no meaningful assistance from EPA. Meanwhile, EPA threatens us with liability even though we had nothing to do with the operation of the tanks.

In short, EPA claims complete authority over tribes having underground storage tanks on their lands, but rejects any obligation to these tribes. If Sandia's experience is any example there are dozens, if not hundreds, of leaking USTs on Indian lands that will not be addressed by EPA until Congress forces EPA to do so.

We would be happy to answer any questions.

Mr. RICHARDSON. Thank you very much.

[Prepared statement of Ms. Poston follows.]

TESTIMONY OF STEPHINE POSTON,  
PUEBLO OF SANDIA TRIBAL PLANNER  
BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
COMMITTEE ON NATURAL RESOURCES, UNITED STATES HOUSE OF REPRESENTATIVES  
OCTOBER 14, 1993

Mr. Chairman and members of the Committee, my name is Stephine Poston, and I am the tribal planner for the Pueblo of Sandia ("Sandia"), a federally recognized Indian tribe whose reservation is located north of Albuquerque, New Mexico. I am here to testify about Sandia's experience in dealing with both the Bureau of Indian Affairs ("BIA") and the United States Environmental Protection Agency ("EPA") with respect to an underground storage tank ("UST") leak on the Sandia Reservation. Sandia has been very disappointed in the lack of response by these agencies, especially the EPA, and we urge members of this subcommittee to introduce legislation that will assure that UST leaks on Indian lands are cleaned up effectively and promptly.

Specifically, we request that the Resource Conservation and Recovery Act ("RCRA") be amended so that tribes may be treated by EPA as states, that EPA be explicitly authorized to enter into cooperative agreements with tribes to give them Leaking Underground Storage Tank Trust Fund ("LUSTTF") monies, and that EPA be directed to clean up all UST leaks on Indian lands promptly, rather than pursuant to its internal policy of cleaning up UST leaks on Indian lands only in "time critical" situations. Finally, because the UST leaks on the Sandia Reservation should be remediated as soon as possible and Sandia cannot afford to wait until RCRA is formally amended,

we request that the members of this Committee support our request to EPA for \$100,000 to conduct a demonstration project on leaking UST clean-ups and establishment of tribal UST enforcement capabilities.

Let me give you a brief background as to Sandia's UST leak and its dealings with the BIA and EPA. In 1961, Sandia leased land to a non-Indian for a term of twenty-five years. The lease was approved by the Bureau of Indian Affairs ("BIA"). The lessee installed USTs and used the land to operate a gas station. The lessee subsequently assigned its lease, and the assignee later assigned the lease to another assignee. To the best of our knowledge, all assignees continued to use the land to operate a gas station and to store petroleum in the USTs. Sandia had no involvement whatsoever in the operation of the stations or the tanks, or in the profit derived therefrom. In 1991 the then-current lessee vacated the land, and Sandia hired a contractor to remove the USTs. In accordance with federal environmental regulations, the consultant performed tests after the USTs were removed to determine whether there had been any leaks. Unfortunately, contamination had occurred. Sandia then hired a consultant to begin clean up measures. A preliminary study was completed and sent to the EPA and BIA in late 1991. The study concluded that a clean-up costing approximately \$250,000 would be required. Sandia sent letters to BIA and EPA, requesting that both agencies either (1) provide clean-up funds to Sandia or (2) aid Sandia in its efforts to locate, and file legal actions against, the lessees who caused the UST leaks.

In 1993, Sandia hired a second environmental consultant, Dames & Moore, to complete a hydrogeologic investigation report. That report

concluded that there was a significant amount of benzene contamination from the UST leak and that this contamination was spreading. Dames & Moore concluded that a fairly extensive reclamation plan was needed. However, as the result of a very recent visit to the site and consultation with BIA technical staff, Dames & Moore now concludes that a less intrusive and less expensive remediation plan is appropriate. However, even the less expensive remediation plan will cost a minimum of \$40,000.

The response of the EPA has been to do virtually nothing. With respect to pursuing actions against Sandia's former lessees, EPA Headquarters told our attorneys in Washington that Region VI was ready, willing, and able to pursue actions against the former lessees, and that all Region VI needed was a list of those lessees. Sandia promptly provided this list to Region VI. However, to the best of Sandia's knowledge, EPA has made no efforts whatsoever to locate the former lessees and seek clean up costs from them. Further, EPA has consistently refused to provide any clean-up funds or technical assistance to Sandia. Through a series of letters, EPA has contended that (1) it is not authorized to spend any Leaking Underground Storage Tank Trust Funds ("LUSTTF") on Indian lands; (2) it is not allowed to spend other funds it administers to clean up UST leaks on Indian lands except in "time critical" situations;<sup>1</sup> and (3) Sandia is the "owner" of the USTs, and thus subject to liability under RCRA, and that EPA, therefore, is not required to provide clean-up funds to Sandia. We believe that Region

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<sup>1</sup> The Term "time critical" is defined to mean an immediate or near-term (within six months) substantial threat to human health or the environment. See EPA Office of Solid Waste and Emergency Response ("OSWER") Directive 9610.9.

VI's positions are not supported by law and that EPA's unwillingness to take action to clean up the UST leaks on the Sandia Reservation is inexcusable.

First, EPA Region VI's position that Sandia is not eligible to receive any monies from the Leaking Underground Storage Tank Trust Fund ("LUSTTF") is incorrect. Region VI contends that, because Indian tribes are treated as "municipalities" under RCRA, they are not eligible to enter into cooperative agreements with EPA to receive LUSTTF monies. However, this is an unnecessarily narrow reading of RCRA. In Washington Dep't of Ecology v. U.S. EPA, 752 F.2d 1465 (9th Cir. 1985), the Ninth Circuit ruled that the EPA, when administering environmental statutes on Indian reservations, has substantial discretion, and that these statutes must be read in light of the federal government's duty to promote tribal self-government. Id. at 1471. Hence, even if an environmental statute does not explicitly allow EPA to delegate some responsibilities to Indian tribes, EPA is authorized to do so, if this is consistent with the promotion of tribal self governance. Id. at 1472. See also Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (EPA allowed to delegate authority to Indian tribes under the Clean Air Act, although the Clean Air Act did not explicitly allow EPA to do so). Moreover, EPA's own Office of Solid Waste and Emergency Response ("OSWER") has drafted a rule allowing tribes to be treated as states with respect to RCRA.<sup>2</sup> In that Draft Directive, OSWER encourages EPA Regional offices to enter into tribal-state agreements to implement UST programs, and notes that program development has already begun in Region 9 with the Navajo Nation. RCRA does

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<sup>2</sup> Draft OSWER Directive 9610.15.

not expressly authorize EPA to enter into such agreements with tribes. However, OSWER obviously recognizes that federal case law grants EPA substantial discretion with respect to how it administers RCRA on reservations. Region VI's contention that it has no authority to spend LUSTTF monies on Indian lands, therefore, is not the law. To the extent that there is any confusion on this issue, we request this Committee to support legislation that amends RCRA and makes it absolutely clear that EPA is authorized to provide LUSTTF funds directly to tribes.

Second, EPA's "time critical" policy with respect to the clean up of UST leaks on Indian lands has no basis in law. RCRA makes it clear that EPA has the responsibility of administering UST programs on Indian lands. In fact, OSWER Draft Directive 9610.15 states that when "it is not possible for the tribe to develop a self sustained [UST] program or to negotiate a tribal-state agreement, the Region will continue to be responsible for program implementation." (Emphasis added). EPA's "time-critical" policy, however, completely ignores EPA's obligation to administer UST programs on Indian lands and instead directs EPA Regional offices to act only in extremely exceptional circumstances. Thus, the vast majority of UST leaks on Indian lands (which do not meet the "time critical" criteria) are left untreated. This is a far cry from EPA's obligation under RCRA to administer comprehensive UST programs on reservations. EPA's "time critical " policy, therefore, must be changed. We urge this subcommittee to support legislation that effectively overrules EPA's "time critical" policy with respect to Indian lands and requires EPA to administer full-scale, comprehensive UST programs on Indian reservations, which includes the

obligation to clean-up all UST leaks.

Finally, we believe that Region has taken the position that Sandia is an "owner" of the UST's solely as a pretext for avoiding any responsibility for rendering any financial or technical assistance to Sandia. Although Sandia owns the land where the USTs were located, Sandia never owned the USTs themselves during the times that the USTs were in operation. Further, Sandia had no control over, or any participation in, the maintenance of the USTs or the storage or dispensing of the petroleum. The term "owner" in RCRA is defined as follows: "any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances." 42 U.S.C. §6991 (3)(A) (underlining added). Mere ownership of land where the USTs are located, absent any ownership or control over the USTs themselves, does not make the land owner liable under RCRA. Rather, the "owner" must own the USTs and use them for the storage, use, or dispensing of regulated substances. At the point when the USTs may have become Pueblo property by virtue of the expiration of the leases in question, the tanks were not "used for the storage, use, or dispensing of regulated substances." EPA's contention that Sandia is an "owner" of the USTs, therefore, is not accurate. In fact, if being a landowner, in itself, is enough to be an "owner" of a UST, then the federal government itself would be liable in every case where a UST leak occurs on Indian lands, since it holds such lands in trust. This could not have been the intent of Congress. To the extent that there is any ambiguity on this matter, we urge this Committee to support amendments to RCRA that make it clear that Indian tribes do not become "owners" of USTs, and thus subject to RCRA liability for clean-up

costs, unless the tribes have control over, or participate in, the maintenance or operation of the USTs.

EPA's refusal to provide any financial or technical assistance to Sandia is inexcusable, given that states have received enormous sums from EPA over the past decades to implement UST programs. To add insult to injury, EPA further contends that the tribes are subject to liability under RCRA. This is grossly unfair. If tribes are to be held liable under RCRA, they should, at the very least, like states, receive sufficient financial and technical assistance so that they have a realistic opportunity to address UST problems in an adequate manner.

As you know, many federal environmental statutes, such as the Clean Air Act, 42 U.S.C. § 7474 (1988), the Clean Water Act, 33 U.S.C. §1377 (1988), and the Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1988), have been amended to allow Indian tribes to be treated as states. This allows tribes to take over primary responsibility for enforcing the various environmental statutes, issuing permits, etc. Moreover, if a tribe is treated as a state, the tribe is eligible to receive financial and technical assistance from the EPA to carry out the regulatory and enforcement functions required by the environmental statutes. The most direct way of helping to assure that tribes are provided with sufficient financial and technical assistance to deal with UST problems is to amend RCRA to allow tribes to be treated as states.

With respect to BIA's role in this case, our attorneys have sent several letters to the Albuquerque Area Director, seeking clean-up funds and assistance in pursuing actions against Sandia's former lessees. The

Albuquerque Area office has done little to aid Sandia, and it has refused to say what the BIA intends to do, if anything. Also, our attorneys contacted George Farris, the Director of Environmental Services at BIA's central office in Washington, D.C. Mr. Farris has been more responsive than the Albuquerque Area office; he came to the Sandia Reservation on September 22, 1993, inspected the UST site, and offered technical advice on how to clean up the leak. We very much appreciate this help. However, we are disappointed that, until Mr. Farris' recent visit, the Albuquerque Area Office had ignored our requests for assistance, even though, as far as we knew (based on the results of the initial investigation performed by Sandia's first environmental consultant), the UST leak was spreading and was going to require extensive, expensive remediation efforts.

We believe that the BIA, the agency primarily responsible for carrying out the federal government's trust responsibility to Indian tribes, is obligated to assist Sandia in its clean-up efforts. In addition to the general trust obligations owed to Sandia by the federal government, the Snyder Act, 25 U.S.C. § 13, imposes "affirmative obligations on BIA to relieve distress and conserve Indian health." Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989). Moreover, if Sandia is liable under RCRA as an "owner" of the USTs merely because it owns the land where the USTs were located, the BIA is also liable for the same reason. For all these reasons, BIA must play a more active role in responding to UST leaks on Indian lands.

As far as the interplay between EPA and BIA is concerned, we believe that EPA, because of its obvious expertise in environmental matters and its

direct statutory obligations under RCRA, is the federal agency primarily responsible for aiding Indian tribes in cleaning up UST leaks. This is especially true given that BIA, unlike EPA, does not have any funds appropriated for clean-up of UST leaks. However, as trustee of Indian lands, the BIA is also responsible, and it should be required to provide assistance to tribes. BIA needs funds to accomplish this task, however, and we therefore urge this Committee to support legislation that would authorize monies to be appropriated to the BIA for the express purpose of assisting tribes in cleaning up UST leaks on Indian lands.

In conclusion, we would like to emphasize that UST leaks on Indian reservations pose the same environmental threats on reservations that they do off-reservation, and it is unjust, as well as environmentally irresponsible, to ignore these threats. It is irresponsible because, as every member of this Committee is well aware, Indian tribes are among the poorest areas in the country; few if any tribes have the financial or technical capability to clean up UST leaks on their own. Hence, it is critical that tribes be provided access to LUST Trust Fund monies, as well as other financial and technical assistance. It is unjust not to provide such assistance to tribes. UST leaks cannot be allowed to remain untreated and allowed to spread, while at the same time the EPA and Congress provide millions of dollars per year to states to clean up UST leaks off the reservations. Moreover, UST leaks often contaminate groundwater supplies off the reservation, thus making this a problem that everyone, both Indians and non-Indians, must address. It is imperative, therefore, that mechanisms be put in place to allow tribes to clean up UST leaks as soon as

possible. We therefore urge this Committee to support legislation that would accomplish the following: (1) amend RCRA so that tribes are authorized to be treated as states, thus explicitly allowing them to receive financial and technical assistance from the EPA; (2) clarify RCRA so that EPA is explicitly authorized to enter into cooperative agreements with tribes to give them Leaking Underground Storage Tank Trust Fund monies; (3) amend RCRA to make it clear that, unless a tribe is treated as a state, receives LUSTTF monies, and is administering its own UST program on the reservation, EPA is required to clean up all UST leaks on Indian lands in a prompt manner, thus overruling EPA's internal policy of spending money to clean up UST leaks on Indian lands only in "time critical" situations; (4) amend RCRA to make it clear that Indian tribes are not "owners" of USTs within the meaning of RCRA unless tribes have control over or participate in the use, storage, or dispensing of the petroleum or other regulated substances; and (5) that BIA be appropriated funds to carry out its trust responsibilities over Indian lands and provide useful, prompt assistance to tribes in their clean-up efforts.

Finally, because the UST leaks on the Sandia Reservation should be remediated as soon as possible and Sandia cannot afford to wait until RCRA is formally amended, we request that the members of this Committee support our request for \$100,000 from EPA so that Sandia can remediate the UST leak on the Reservation.

Mr. Chairman, Sandia has responded diligently and effectively to the UST leak on our reservation. We have done so despite receiving no meaningful assistance from EPA. Meanwhile, EPA subtly threatens us with

liability even though we had nothing to do with the operation of the tanks. In short, EPA claims complete authority over tribes having USTs on their lands, but rejects any obligation to these tribes. If Sandia's experience is any example, there are dozens if not hundreds of leaking USTs on Indian lands that will not be addressed by EPA until Congress forces EPA to do so. I would be happy to answer any questions you might have.

Mr. RICHARDSON. Mr. Coss.

### STATEMENT OF DAVID COSS

Mr. COSS. Thank you, Mr. Chairman.

My name is David Coss. I am director of the Environmental Protection Division at the New Mexico Environment Department.

Secretary Espinosa asked me to apologize for not being able to be here in person, but to assure you that our Department wants to cooperate in every way possible in these matters.

I sure do appreciate the opportunity to be here with many of my neighbors from New Mexico to speak to these important environmental issues. Although the jurisdictions are very different, we are all neighbors in New Mexico and problems with underground storage tanks and solid waste dumps affect all of us across these lines.

I think it is safe to say that for the part of the State of New Mexico and Native American governments in New Mexico our goals are the same, and that is to see that violations of underground storage tank regulations and solid waste disposal regulations are controlled, and that existing contaminated sites are restored in accordance with the national standards.

We see some issues from a State perspective that we think are important to discuss. The first is jurisdiction. The State of New Mexico generally has no jurisdiction on tribal lands, so we need agreements, government-to-government agreements between our State government and the Native American governments.

The second issue is procedural. We need to carefully lay out when we enter into these agreements who is responsible for carrying out specific tasks under these agreements.

And third, and perhaps very importantly, is resources. There needs to be adequate resources for the tribal governments to address these problems. The State of New Mexico is looking at various ways that we can use our resources of the State to address these problems, but the resource issue is a very critical one. The State of New Mexico is very keen that the tribes be provided adequate resources and that we don't be pushed into any type of situation where we are in competition with our neighbors for resources.

With regard to leaking underground storage tanks, these are an extremely large water quality problem in New Mexico affecting groundwater. That is the second leading cause of groundwater contamination in New Mexico, and groundwater in New Mexico is our primary source of drinking water.

New Mexico has become, or is a national trendsetter in dealing with underground storage tanks. Our State program was the second to be approved by the Environmental Protection Agency under RCRA subtitle I. In addition, the State of New Mexico has enacted the Groundwater Protection Act and it provides approximately \$11 million a year for the cleanup and control of leaking underground storage tanks.

However, New Mexico is not authorized under its EPA approval or under the State law to operate the State program, the Groundwater Protection Act, on Indian lands, and what we see happening in New Mexico at this point in time is when lessees of underground storage tank facilities break their lease they leave the Native

American governments stuck with this liability with no real good way to take care of it.

Mr. RICHARDSON. Mr. Coss, let me apologize to you. I have to run and make this vote.

Let me just announce that Mr. Faleomavaega is on his way back and he will chair in my absence. And we will have additional questions for the record for all of you.

We will recess for about 5 minutes while Mr. Faleomavaega makes his way back to the hearing.

Excuse me.

[Recess].

Mr. FALEOMAVAEGA. The hearing will come to order.

I first would like to offer my personal and special welcome to a very dear friend who has joined us on the panel this morning, Mr. Frank Ducheneaux. I would like to make it known for the record that this gentleman has done a fantastic job as he had served previously not only as staff director but as staff counsel for this committee in dealing with Native American affairs. And I want to note that for the record and welcome him personally.

We will continue with Mr. Coss' testimony.

Mr. Coss, please proceed.

Mr. COSS. Thank you, Mr. Chairman.

I was about to describe what we think is going to be a landmark agreement in New Mexico between the State of New Mexico Environment Department and the Pueblo of Pojoaque regarding an underground storage tank cleanup. We think this is a mechanism that we need to have because we haven't been able to find any other way to address cleanup of this particular underground storage tank problem.

Under this proposed joint powers agreement, the Pueblo of Pojoaque will enact underground storage tank rules no less stringent than the State of New Mexico's. It will do this under its own sovereignty, not under any authorization from RCRA.

The two governments then will name joint personnel to regulate and enforce the Pueblo's underground storage tank rules, and then when the Pueblo is essentially consistent with the New Mexico requirements under the Groundwater Protection Act the Groundwater Protection Act fund can be used to fund cleanups on Pueblo lands.

We find that this is at least one viable way of addressing the fact that the Indian tribes have fallen through the cracks on RCRA and are not being provided resources adequate to the task from the Federal level.

We are very proud of this agreement and are very anxious to enter into it. We need to point out that this is an agreement between the State of New Mexico and the Pueblo of Pojoaque and is in no way covered by RCRA.

Turning over to another important environmental issue, that is, solid waste and open dumping, again the State does not have jurisdiction to enforce our programs or our regulations under State law on Indian lands, but we are very busy in the planning and executing of solutions to solid waste problems in New Mexico that do involve government-to-government cooperation in New Mexico.

Some examples of what we have been doing in New Mexico as early as 1986, we entered into a joint powers agreement with Santa Clara Pueblo for the investigation and enforcement of solid waste rules on those tribal lands. We are in negotiations now with the Pueblo of Nambe and many other local governments in northern New Mexico on a regional landfill that would be on or near the Pueblo of Nambe.

Several agreements have been entered into between the New Mexico county governments and Indian Health Service to help fund the joint construction of solid waste transfer stations in New Mexico, and in the last session of the New Mexico legislature, \$250,000 was appropriated to the Environment Department to assist Eight Northern Pueblos in New Mexico with establishing solid waste and water quality programs.

So we are very active in this area. We see that there is a strong need and will continue to be a strong need for the State government to act in partnership with tribal governments in New Mexico to address these problems. We find that resources are a problem and we are trying to address these as best as we can at a State level.

We would think it is important, if the Congress is looking at amending RCRA, that they recognize the resources issue, and that the States not be put into a position of needing to compete with tribal governments for resources and, that they recognize that we have attempted and are, we believe, in New Mexico establishing very strong and positive government-to-government relations and that any amendments to the Act recognize these and encourage these kinds of agreements and relationships between our State government and the tribal governments in New Mexico.

Thank you very much, Mr. Chairman.

[Prepared statement of Mr. Coss follows:]

**STATEMENT OF DAVID COSS  
DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION  
NEW MEXICO ENVIRONMENT DEPARTMENT  
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
OCTOBER 14, 1993**

Good morning, Mr. Chairman and distinguished members of the committee. I am David Coss, Director of the Environmental Protection Division of the New Mexico Environment Department. Our Secretary of Environment, Judith M. Espinosa, regrets that she is unable to attend today's hearing. She asked me to send her best regards and to assure you that we will assist your efforts in every way possible.

I appreciate the opportunity to appear before you this morning to discuss two issues which are of critical importance to the citizens of New Mexico in general, and residents of tribal and pueblo lands in particular: leaking underground storage tanks on Indian lands and open dumping of solid waste on Indian lands.

Before addressing the details of those issues, let me briefly describe the organization and mission of the New Mexico Environment Department. We became a separate cabinet agency in 1991, having previously been a division of the Health and Environment Department. Our mission is to preserve, protect, and perpetuate New Mexico's environment for present and future generations. We have 551 employees dedicated to this task.

The goal of my division, the Environmental Protection Division, is to ensure protection and enhancement of the state's natural environment, public health, and safety, through the administration of programs for management of solid and special waste, air quality, underground storage tanks, and occupational health and safety.

We are pleased to participate in these proceedings. The issues being discussed are important to the health and safety of individuals who reside on Indian lands and beyond reservation and pueblo boundaries. It is in our best interests, as the state government, to work with the governments of the tribes and pueblos in our state to solve problems which are not constrained by lines on a map.

We recognize the pivotal role of environmental protection in Native American culture and tradition. In fact, American society in general owes a great deal to Native American communities when it comes to living in harmony with nature, and undoubtedly there is much more we can learn. In that respect, cooperation between our governments is beneficial.

There are 23 federally recognized tribes and pueblos with

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lands in New Mexico. The Navajo Nation is only partly in New Mexico. Approximately 105,000 enrolled tribal members (approximately 6.5% of the state's population) live within the state's borders; approximately half are members of the Navajo Nation. Indian lands encompass approximately 12,200 square miles, which is roughly 10% of the total land area of New Mexico. Although tribes and pueblos are distinct political entities, they are also part of New Mexico, and their communities are part of all New Mexican communities.

Increased awareness of environmental problems prompted Congress to pass a host of laws designed to protect the environment. The National Environmental Policy Act, Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act ("RCRA") have all set environmental quality standards and have created mechanisms for delivery of regulatory programs. It is important to note that recent amendments to environmental legislation have treated Indian tribes as states for purposes of implementing some federal regulations under the Clean Air and Clean Water Acts, but not under RCRA.

There are several core issues, from the State's perspective, related to the topics of today's hearing. I believe it is safe to say that the goal of all parties concerned with the issues of open dumping of solid waste and leaking underground storage tanks is to see that violations cease and that existing sites are restored in accordance with national standards. How New Mexico can be involved in this process is a subject we are prepared to discuss in greater detail with the appropriate officials of tribal or pueblo and federal governments.

Three basic issues of concern are obvious. If the New Mexico Environment Department is to be involved in a substantial way, these issues should be addressed early on in the discussions:

1. Jurisdictional - Regulatory jurisdiction on Indian lands currently resides with the tribes or pueblos and the federal government. In order for the state to play a significant role, formal agreements between the state and individual Native American governments will have to be negotiated. An agreement currently being negotiated between New Mexico and the Pojoaque Pueblo on UST issues is an example of how by working together, both parties can

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come up with creative solutions to overcoming legal and regulatory obstacles to comprehensive environmental protection.

2. Procedural - Any joint agreement needs to delineate specific responsibilities of each party involved in planning, implementing, and enforcing solutions to existing problems, as well as the role each party might play in future prevention and enforcement. As will be discussed later, the State-Pojoaque agreement does just this.

3. Resources - Joint agreements must also specify the funding source for required investments, personnel costs, and operations and maintenance costs. Any major effort on the State's part, particularly in the solid waste arena, would require additional staff and funding. Federal funding directed toward Native American governments must not be provided through decreases in federal funding to the State.

Underground storage tanks ("UST's") are critical to fuel distribution in New Mexico and on Indian lands. Most UST's in New Mexico contain gasoline or other motor fuels; those on Indian lands are no exception. Most of the UST's on Indian lands are owned by non-tribal members. Over 100 such UST's at 59 facilities have been registered with the State; no doubt many more exist.

Leaking UST's pose a grave threat to the environment in New Mexico. Over 90% of New Mexicans, including tribal members, rely on ground water for their drinking water, and leaking UST's are the second most frequent cause of ground water contamination in New Mexico. Drinking water supplies in many New Mexico communities have been shut down because of gasoline contamination emanating from UST's. This is the main reason why New Mexico has implemented a vigorous UST regulatory program.

New Mexico's UST program is a national trendsetter. New Mexico was the second state in the country to receive approval from the U.S. Environmental Protection Agency ("EPA") to implement the federal UST program under RCRA Subtitle I. It is fully staffed with personnel extensively trained in the technical aspects of cleanup, leak detection and operation of UST's. It leads the nation in leak detection compliance rates, has the first and only UST field citation program in the country, and is a

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leader in recovering federal Leaking Underground Storage Tank Trust Funds from responsible parties.

Under New Mexico's UST program, almost any UST owner or operator, including municipalities, can receive state assistance in cleanup. New Mexico receives some federal funding each year to finance cleanup on high priority sites, that is, those sites where a severe impact to human health and safety is present. Because this federal funding is inadequate and the costs of cleanup and complying with federal financial responsibility regulations put businesses in serious financial jeopardy, our Legislature has enacted a law in 1990 that provides over \$11 million per year to reimburse almost any tank owner for their costs of cleanup, provided the owner is in compliance with the New Mexico's UST Regulations. The law also authorizes the State to "take the lead" on the most serious contamination incidents. For these and other reasons our state cleanup fund is one of the strongest in the country.

One of the major barriers at the federal level in implementing the federal UST program on Indian lands is that RCRA recognizes tribes as municipalities, not states. The federal program can only be delegated to states. Thus tribal entities are not authorized to implement the federal program at all. Because New Mexico's program approval stipulates that the State is not authorized to operate the state or federal UST Program on Indian lands, many leaks go unabated for lack of a regulatory program and financing. EPA has jurisdiction over UST's on Indian lands; as a practical matter EPA has a poor record of response to UST leaks on Indian lands in New Mexico. It is clear that leaving such authority with EPA creates disfunction.

Most of the UST's on Indian lands are owned or operated by non-tribal members under lease arrangements. When a leak from a UST occurs, it is not uncommon for the lessee to abandon the property and the lease. Depending on the operating arrangements at each site, all fixtures, including UST's, may revert to the lessor, in this case the tribe or pueblo. As owner the tribe or pueblo may be liable for cleanup under the federal UST program. Cleanup of leaks from UST's commonly exceeds \$100,000 per release. Yet Native American governments are not authorized to implement the federal UST program nor receive assistance because they are

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considered municipalities. Funding is crucial to environmental protection and cleanup. I emphasize that federal funds directed toward Native American governments should not come at the expense of existing state funding levels.

The challenge is to develop a mechanism for tribes and pueblos to participate in New Mexico's UST program and especially the state cleanup fund, notwithstanding the contradictions of federal and state Indian law. Toward this end, New Mexico is negotiating a landmark agreement with the Pojoaque Pueblo that would create and implement such a mechanism. The State has broad authority to enter into joint powers agreements and contracts with Native American governments to effectuate environmental protection and cleanup. Briefly, the Pueblo will enact UST rules and regulations no less stringent than New Mexico's. The Pueblo will do this under its own sovereignty; it will not be implementing the federal program under EPA. The two governments will name joint personnel of both the Pueblo and the Environment Department to regulate and enforce the Pueblo's UST regulations. The State will be able to verify compliance and oversee cleanup at sites contaminated by leaking UST's on Pueblo land without operating the federal program; the Department will contemporaneously be assisting the Pueblo in implementation of its own UST program. All monies expended by the State will be from state funds; federal funds will not be involved.

This agreement is critical to cleanup and environmental protection at several leaking UST sites on Pojoaque Pueblo lands. In the absence of the agreement, affected tank owners are not eligible to access the state fund. One site warrants special discussion. The Roadrunner Cafe is on a private enclave surrounded by Pueblo land. Because of a contaminated drinking water supply well on-site, it has been investigated with federal Leaking Underground Storage Tank Trust Funds administered by the State. The Department's understanding is that this property may be purchased by the Pueblo in the near future. In the absence of an agreement, the State would have to cease the expenditure of federal funds for any cleanup, and would not be able to use the state fund to reimburse the Pueblo for cleanup. Clearly, an agreement between the Pueblo and the State is in the best interests of all parties, including EPA, since EPA cannot provide adequate oversight of the cleanup.

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In another prominent case on the Sandia Pueblo north of and adjacent to the City of Albuquerque, a leak from a UST has contaminated ground water. The pollution may have already migrated into the Albuquerque city limits. This site was leased to a non-tribal member who broke the lease. The Pueblo is left with the task and financial burden of cleaning up the leak without federal or state help. Many other examples can be cited of UST's on tribal lands "falling through the cracks" of the federal and state regulatory framework. The Department believes that agreements such as the one being negotiated with the Pojoaque Pueblo are a way of overcoming the situation without changing existing legislation.

Regarding open dumping of solid waste, the Department is tasked to develop and enforce environmental regulations in accordance with federal law, as well as New Mexico's own Solid Waste Act of 1990, but the state has no regulatory jurisdiction on Indian lands. While informal cooperation and mutual assistance are fairly easy to accomplish, comprehensive planning, implementation, and enforcement of environmental regulations requires a complex process of government-to-government consensus-building.

An example of such agreements is the joint powers agreement between the State and the Pueblo of Santa Clara in effect since 1986. Under the agreement, the Pueblo and State share responsibility for investigation and enforcement activities related to illegal disposal of solid wastes on Pueblo land adjacent to the community of Española.

Representatives of our Department have met with Pueblo and federal officials on a number of occasions in recent months to discuss potential cooperative efforts, including:

1. The siting of a regional solid waste facility on or near Nambe Pueblo, which would address regional solid waste concerns, as well as provide local economic development opportunities;
2. Participation of the Eight Northern Pueblos in New Mexico's North-Central Region Planning Group discussions

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of alternative solid waste management systems;

3. Solid waste management technical and educational assistance for several pueblos and tribes, including the Jicarilla Apache tribe, Navajo Nation, Zuni Pueblo, and the Eight Northern Pueblos; and
4. Joint construction of solid waste transfer stations by several New Mexico county governments and the Indian Health Service which will serve both Indian and non-Indian communities.

The Department's Solid Waste Management Plan lists as one of its primary goals the creation of solid waste districts to improve solid waste management planning and implementation. Participation of New Mexico tribes and pueblos in this process is advantageous for all parties. Development and implementation of joint powers agreements involving tribal, state, county, and municipal governments, leading to an integrated regional approach for the handling of solid wastes, and possibly other environmental programs, is a top priority for the Department.

As a means of providing appropriate focus on these relationships, the Department has sought and received an EPA grant to fund a full-time employee to act as liaison to tribal governments. This position will facilitate consummation of cooperative agreements and dialogue on other environmental issues of mutual concern.

The New Mexico Legislature appropriated \$250,000 to the Department to fund a solid waste management training program for Native American governments. A primary goal of the program is to provide training for representatives of each of the Eight Northern Pueblos on the content and compliance features of federal and state environmental protection laws and to establish a base of knowledge which will equip tribes and pueblos to develop comprehensive solid waste management and surface water protection programs.

In conclusion, I want to emphasize that the State of New Mexico Environment Department recognizes the critical need of addressing the problems of solid waste management and leaking

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underground storage tanks on Indian lands, both for the well-being of Native Americans, as well as non-Indian citizens living on and near Indian lands.

The State recognizes the sovereignty of Indian tribes and pueblos, and the fact that any significant state involvement in solving existing or future problems of this nature will require execution of agreements between the State and the affected tribe or pueblo. Any new federal legislation should account for and encourage such agreements.

I cannot overemphasize the fact that the State honestly desires a high level of cooperation with Indian tribes and pueblos in addressing solid waste management and other environmental issues. The New Mexico Environment Department is ready to address the problems we have discussed here today, and any other environmental concerns that affect both sides of the political boundaries between us.

Thank you Mr. Chairman, and ladies and gentlemen of the Subcommittee for your interest. I will be happy to answer any questions the Chairman or members of the Subcommittee may have.

Mr. FALEOMAVAEGA. Thank you, Mr. Coss.

For the record, how many tribes are there in New Mexico?

Mr. COSS. I believe there are 23 tribes in New Mexico.

Mr. FALEOMAVAEGA. Twenty-three. What is the size of the Indian reservations in the State of New Mexico? Is that a sizable number?

Mr. COSS. It is very sizable. It is approximately 10 to 11 percent of the land area within the State of New Mexico is covered by Indian lands.

Mr. FALEOMAVAEGA. And the population of Native Americans?

Mr. COSS. I believe in New Mexico it is around 105,000.

Mr. FALEOMAVAEGA. I see. Do they participate fully in local and Federal elections like anybody else?

Mr. COSS. Yes, Mr. Chairman.

Mr. FALEOMAVAEGA. I see. Would it be safe to say that they will make a difference in the election process in the State of New Mexico?

Mr. COSS. It's very safe to say that, Mr. Chairman.

Mr. FALEOMAVAEGA. Okay. You have heard what was stated earlier by Mr. Gover, and I am sorry that he is not here. I would have loved to ask him some more questions. But I guess he had a plane to catch.

He, in my humble opinion, stated some very interesting observations about what he said as compared to what was stated earlier by our friends from EPA and DOI. Do you agree with Mr. Gover or are you in agreement more or less with our friends from the Federal agencies about addressing this overall issue?

Mr. COSS. Mr. Chairman, I hate to answer this in the way that I am in agreement with both, but I would like to say that it is not being adequately addressed from the Federal level and that is why we needed to have this agreement with the Pueblo of Pojoaque, for example.

Because we are experiencing pollution. The pollution is not going to stay within any one boundary and we needed to address it. We found it wasn't being addressed.

Mr. FALEOMAVAEGA. How many of these underground storage tanks are located in New Mexico? Have you had any identification with that?

Mr. COSS. Mr. Chairman, I would like to have Mr. Bearzi from the Underground Storage Tank Bureau answer that one.

Mr. FALEOMAVAEGA. Please.

Mr. BEARZI. Mr. Chairman, there are about 12,000 underground storage tanks in New Mexico.

Mr. FALEOMAVAEGA. Twelve thousand?

Mr. BEARZI. Twelve thousand on about 3,000 facilities, owned by about 2,000 operators.

Mr. FALEOMAVAEGA. I can't believe this. Our friends from EPA say nationally there are only 4,800 tanks.

Mr. BEARZI. On Indian lands.

Mr. FALEOMAVAEGA. No. No, he said this was nationally. What we were able to identify within DOI was about 520.

Mr. BEARZI. My understanding of the national numbers is there are over 100,000 underground storage tanks nationally.

Mr. FALEOMAVAEGA. Please go on.

Mr. BEARZI. On Indian lands we have about 150 tanks registered with the State of New Mexico on Indian lands. We estimate that there are at least three to four times that that exist just in the State of New Mexico and probably between a third and a half of those are on the Navajo Nation alone.

Mr. FALCOMA. Do you feel that New Mexico could be the prime State or the lead State they could give as an example of how well that you have worked successfully with the tribal organizations in addressing this issue? Are you quite comfortable, Mr. Coss, that your agency has done very well compared to other States in dealing with and addressing this issue with Native American tribes?

Mr. COSS. Mr. Chairman, I am very comfortable in saying that we are working very hard with it and we think that we have reached an agreement in this case with Pojoaque that it can serve as a good model. The agreement has not been formally signed. However, we believe it will work quite well, and we think that we are going to be a leader in this area.

Mr. FALCOMA. We will now proceed with Ms. Hoskie and then Mr. Ducheneaux.

Mr. COSS, please stick around. We may still want to ask you some questions later.

Ms. Hoskie, please.

#### STATEMENT OF SADIE HOSKIE

Ms. HOSKIE. Thank you for the opportunity to present the Navajo Nation's concerns on these two very important environmental problems that we face at the nation. The Navajo Nation, I believe, is the only tribe in the country to receive a small grant from EPA to begin to address this problem of underground storage tanks, and by small, I mean very small. We have a \$50,000 grant from EPA's UST funds. And it took us a very long time to get that, AND a very big fight to get that, and a continuous one to keep it.

This apparently is supposed to cover the 17.5 million acres of land we have, and we have surveyed a very small portion of that land for underground storage tanks. If you are familiar with the Navajo Nation, we are split into 5 different agencies geographically, and we have inventoried two of those agencies and we have identified 640-some tanks which constitute in terms of sites about 316 sites, and there are about 2 to 3 tanks per site.

And this just began a year ago, and the small grant allows us to fund 1 person, and a very overworked person at that. She probably does the work of about 3 to 4 people.

With this grant, what it allows us to do is to do an inventory of the whole Navajo Nation. It also allows us to maintain a field presence when underground storage tanks are being pulled by contractors at these sites to ensure that when there is a leaking tank that it gets cleaned up.

Out of these numbers, we have found that about 40 of them are leaking and are at various stages of being cleaned up, and in some cases not being cleaned up because of all of the problems that you have heard from previous testimony that there just are not any

funds allocated or available to Indian tribes to help with the clean-up of these leaking underground tanks that threaten our groundwater.

I am going to deviate from my written statement quite extensively and hit on some of the problems that have been identified and maybe expand on some that have not been raised.

In terms of the EPA's comments that their inventory has about 5,000-some tanks nationally, I would dispute that number quite seriously because, like I said, we are the only tribe that has done some limited surveying on our own. I don't believe there has been any effort on the part of EPA to go out and do an inventory on any other reservation.

Mr. FALCOMA. For that matter, the BIA may not have made an honest effort in identifying how many tanks there are on the reservations. Am I correct in saying that?

Ms. HOSKIE. That is very correct.

So I think that is one area where we definitely need to get some assistance from the Federal agencies. We need more funds to help staff people on the reservation who will actually carry out the inventory that needs to be done.

EPA has mentioned several times that the polluter pays is basically their stance. That is the position. The owner/operator pays for the cleanup of the tanks.

As we have experienced with the Navajo Nation's environmental programs, there is a lot of work that needs to be established, an environmental infrastructure which means development of codes and regulations, it means staffing, it means equipment to be able to make those assessments before you can even begin to go after PRPs, which in a lot of cases includes the Federal Government, includes the BIA.

We are attempting to do this in a couple of our programs, the Superfund program, and we are having a great deal of difficulty doing that. So for EPA to say that it is the polluter, the PRP, or the owner/operator of the tank to pay for the cleanup is not as easy as it sounds.

And coupled with that, the abandonment of leases, which is also what we are experiencing on the Navajo Nation, a lot of times it goes back to the BIA. BIA was the negotiator, the manager, the overseer of these sites, and they, to my knowledge, don't have any active bonding or active financial mechanism governing these sites.

In most cases there wasn't one. It was waived or it was released when the business decided to leave the reservation. So we are left with virtually no money, no financial mechanism to help pay for the cleanup that reverts back to the tribal government.

To the Navajo Nation government's credit, we have put forth some of our own money to supplement and in some cases to take up the responsibility of developing regulations like we have done in solid waste. We have our own approved solid waste code and regulations. That was done fully by tribal resources. We are attempting to do that in the underground storage tank program as well.

The other issue that I would like to discuss a little bit is Mr. Coss' remarks about the State's involvement in this program. They have the State Assurance Fund to help pay for cleanup of leaking

underground storage tanks, which I think for the most part comes from assessing tank fees and taxes.

And in our case I know that tank fees were assessed on tanks that are on the Navajo Nation, collected by the State, but the tribe has no access to those funds. The tribe, to my knowledge, has not used—none of those funds have been made available to the Navajo Nation to clean up the leaking underground storage tanks on the New Mexico side.

Arizona has also collected fees and taxes on tanks that are on the Navajo Nation on the Arizona side, but to their credit they refunded those monies, but not—it would have been nice to make those available to the nation to begin our own cleanup fund, but it was refunded back to the operators.

So there is, I think, a lot of opportunity there for the Navajo Nation to begin its own cleanup fund. But because of the system being the way that it is, it is very difficult to do. There has been no assistance from EPA to help us develop such a fund, which, as I have mentioned before, takes a lot of staff time, accounting systems, and anytime you plan on going after PRPs or making people pay for cleanup, you have got to document your time to the minute, that you have actually spent that time cost recovering all of those funds.

I would also support comments made by Mr. Gover that EPA does have a mechanism in place as we speak to help fund the cleanup of these underground storage tanks. They do have a Federal trust fund managed by them for cleanup of tanks on Federal lands.

The problem is their criteria that they have which says that only in an imminent danger situation will they access those funds. I believe that they need to expand that fund to include tanks on reservations that are leaking, and furthermore, to seek input from tribal governments on what they mean by imminent danger.

I think that tribal governments have the capability to assess potential situations that pose a threat to our members and nonmembers living on the reservation and that that ought to be quite seriously taken into consideration.

I am not sure about the amount of the fund. I have been told anywhere from \$150,000 to \$5 million. I would like to find out how much is actually in that fund and to ask for your support to help make this available to Indian tribes to help fund cleanup.

We continue to have a very difficult time in dealing with the BIA on lease requirements, as I mentioned. That needs to be straightened out, and we would ask for the support of the Congress to help ensure that the BIA meets its responsibility, whether as a trustee or whether as an owner/operator of these sites, before they decided to turn them over to the tribe.

It is really unrealistic that the Navajo Nation will be able to meet financial responsibility requirements due to the unique status of the land. We believe that if the land status is the determining factor for whether someone is responsible for that, that would also tie in the BIA and the Federal Government as our trustee.

There are some deadlines coming up regarding USTs. By 1998, all tanks have to prove that they meet the requirements of EPA. Without any additional funds and resources we will have a very difficult time meeting a lot of those requirements.

What we are finding in a lot of our remote reservation areas is that the gas station owner serves a very critical community service to the people out there, and with the large costs that will be associated with these compliance with Federal regulations, Federal UST regulations, we are concerned that these small gas stations will go out of business, and we are already experiencing that today. They just simply can't afford to upgrade their system or they simply can't afford to pay the liability costs.

And the community has asked our tribal government to make sure that they stay in business because that is their only source of gasoline, the only source of food supplies, especially with the upcoming winter. We are faced with that critical issue right now. And these are the trading posts out in the remote areas.

Let me switch now to the open dump sites on the Navajo Nation, the solid waste issue. In addition to the UST problem, I believe solid waste is probably our biggest environmental problem right now that we face on the nation. We are trying to negotiate with BIA and IHS to initiate an MOA among the three—those two Federal agencies and ourselves, so that we can have a policy of closing the most—the sites that pose a potential greater threat to public health and welfare out in the communities, rather than having each Federal agency say, as you have heard BIA say this morning, that we will close our own dumps first.

What we would like, what we are trying to get them to do is recognize the Navajo Nation as a comprehensive piece of land and that we as the Environment Department should be able to determine which sites we believe need to be closed first.

And also another very important consideration that we are trying to get them to understand is that you can't close a community dump site regardless of whether it is illegal and it should be closed until there is an alternative in place for the community to use, and that requires the construction of either a landfill or the construction of a transfer station. And we are not having a whole lot of success with that.

We believe that makes the most sense. We have inventoried the dump sites. We also have a problem with what constitutes a dump site. Does each family-owned small pit constitute a dump site or do we look at the larger ones that exist in our larger growth centers, our larger communities? And that is something that we have been grappling with.

As I mentioned, we do have our regulations approved by the Navajo Nation Council, but that doesn't take care of the lack of our infrastructure—the lack of a landfill, the lack of transfer stations out in the communities. Again, that takes funds.

IHS has been willing to help build transfer stations on the nation. We have had some support from county governments to help with the O and M costs. Right now the O and M costs constitutes large transportation costs because they are hauled off the reservation to a certified landfill.

I could go on and on about our solid waste problems, but I think those cover our biggest concerns. As I have said, the Navajo Nation is willing to put forth its own resources, but I think it is only fair to ask the Federal agencies who have a responsibility to meet us

halfway, to help us resolve some of these problems that face our Navajo people and threaten the health and safety of our people.

And lastly, I would just like to say that the Navajo Nation supports Congressman Richardson's bill, H.R. 1267, that would grant treatment as a State status to Indian tribes for the purposes of RCRA, and we urge the subcommittee to move this bill through Congress immediately.

Thank you very much.

[Prepared statement of Ms. Hoskie follows:]

**THE  
NAVAJO  
NATION**

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**PETERSON ZAH  
PRESIDENT**

**MARSHALL PLUMMER  
VICE PRESIDENT**

**Testimony of the Navajo Nation  
Before the  
Subcommittee on Native American Affairs  
Regarding  
Abandoned and Leaking Underground Storage Tanks  
and  
Open Dump Sites on Indian Lands**

**October 14, 1993**

**THE  
NAVAJO  
NATION**

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**Testimony of the Navajo Nation  
Before the  
Subcommittee on Native American Affairs  
Regarding  
Abandoned and Leaking Underground Storage Tanks and  
Open Dump Sites on Indian Lands**

**October 14, 1993**

Introduction

Mr. Chairman and members of the Committee, my name is Sadie Hoskie, Director of the Navajo Environmental Protection Administration. I appreciate the opportunity to provide the Navajo Nation's concerns on abandoned and leaking underground storage tanks and open dump sites on Indian lands. This is of utmost importance to the Navajo Nation because we have one of the highest, if not the highest, number of abandoned underground storage tank sites and open dump sites on Indian lands. We commend the Subcommittee for holding this hearing and addressing these critical issues.

The Navajo Nation

The Navajo Nation is the largest and most populous Indian tribe in America with over 219,000 members. The Navajo reservation encompasses almost one-third of all Indian lands in the lower-48 states, with jurisdiction over 17.5 million acres (as large as the state of West Virginia). Most Navajo people live in remote areas throughout the entire reservation. Three quarters of Navajo communities are without complying solid waste facilities (Indian Health Standards (IHS), 1992).

Within the context of our Navajo values, the Navajo Nation is committed to protect, preserve and enhance our people's public health, welfare and environment. The Navajo Nation, through its Navajo Environmental Protection Administration (Navajo EPA), administers several programs in waste management through federal environmental laws such as the Clean Water Act, Clean Air Act and Comprehensive Environmental Response, Compensation and Liability Act (Superfund). The Resource Conservation and Recovery Act does not recognize tribal sovereignty. This Act must be changed so that Indian tribes can begin to fully address all environmental issues. Without adequate resources, technical infrastructure and authorized funding

mechanisms, the Navajo Nation cannot fully implement these and other environmental programs.

#### **Scope of the UST Problem**

The Navajo Nation has the highest number of USTs of any Indian tribe in the United States. Yet, except for a small pilot U. S. EPA grant that funds one staff member to administer the Navajo EPA UST program, no other funds are available for monitoring and enforcement to expand the program or to clean up UST sites. The Navajo Nation a pilot UST program in October 1991 with a grant from U.S. EPA, Region IX to 1) inventory UST sites on the Navajo reservation, 2) oversee closure of sites, 3) install and inspect all USTs and, 4) conduct community education and public relations regarding UST regulations. The ultimate purpose of cleaning up the leaking underground storage tanks is to protect ground water for the Navajo people. We are attempting to do this without adequate personnel or resources.

Approximately 316 documented UST sites, with an average of three tanks per site, are listed on the U.S. EPA inventory of official sites on the Navajo reservation. Approximately forty (40) sites are considered active, or in the process of being upgraded or cleaned up. In addition, at least 110 abandoned UST sites have been discovered, but are not a part of the inventory. Eighty-nine (89) of these abandoned UST sites are part of the Navajo Economic Development business site leasing system and an additional 20 were discovered in a limited survey by the Navajo EPA in July 1993. Although, the survey was limited to two of the five Navajo agencies, an unknown number of abandoned sites may still be added to the official U. S. EPA inventory. At this time, it is not known whether any of the abandoned tanks are leaking; however, they all must be removed, at which time contamination can be determined. In 1992, owners/operators on the Navajo Nation removed 65 tanks at 21 sites. Since then, an additional 41 tanks have been removed at 15 sites.

The U. S. EPA, Region IX, and the Navajo EPA are working together to inventory and regulate the 316 documented sites and add the 110 abandoned sites to the inventory. In addressing UST issues, the Navajo Nation is primarily concerned with financial responsibility requirements, the determination of responsibility for cleanup and the loss of service needs of the community.

#### **Financial Responsibility Requirements**

As a result of our insufficient financial resources, many sites have been abandoned without any environmental cleanup activity. The Navajo Nation and petroleum marketers who operate leases on tribal lands do not qualify for state assurance funds in the three adjoining states of New Mexico, Arizona and Utah. Most stations are leased from the Navajo Nation because Indian trust lands are involved. Banks state they are unable to provide insurance or loans because the value of

property cannot be determined. No tribal taxes exist that would fund general cleanup operations. Instead, small owners/operators must rely entirely on their own resources for compliance requirements.

The BIA signs off on all leases for the Navajo Nation. Often, environmental considerations are not balanced with economic needs. Even as the Navajo Nation strives to enforce vague BIA lease requirements prior to the transfer of sites, more business site leases are being added to the inventory which are not in compliance and eventually are abandoned. Until those sites are brought into compliance, the Navajo Nation, the BIA and other unidentified parties are potentially liable for non-compliance with federal regulations. This poses a crisis situation for the Navajo Nation since a large percentage of all business site leases on the Navajo reservation involve USTs. It is unknown at this time whether any of these abandoned sites have leaking tanks or whether these sites are a high priority for cleanup due to safety or environmental reasons. Although a few of these sites have been identified, no investigations have been initiated to determine the responsible owner/operator of all sites.

At the present time, the state of Arizona provides refunds to owners/operators for gas taxes and tank fees on Indian lands. Although the state of New Mexico has been collecting tank fees and gasoline taxes on USTs located within the boundaries of the Navajo Nation, as well as other Indian tribes in New Mexico, the state has not refunded any fees to the owners/operators. The Navajo Nation prefers that the revenue be redistributed, not to the station owners and operators, but to the tribes for purposes of cleanup.

#### **Determination of Responsibility for Cleanup**

Financial responsibility studies conducted by the U.S. EPA indicate that approximately 41 percent of all small service stations will go out of business because they cannot meet financial responsibility requirements. On the Navajo Nation, the attrition rate for small owners/operators will be much higher than the anticipated 41 percent. At this time, it is unrealistic that the Navajo Nation will be able to meet financial responsibility requirements due to the unique land status and subsequent loan, taxation and leasing concerns. Such a high attrition rate may cause these businesses to cease operation without cleanup of contaminated sites. The Navajo Nation supports the U.S. EPA's proposal to amend financial responsibility requirements to extend the compliance date until December 31, 1998 (current deadline is February 18, 1994) for Indian tribes, rural communities and small businesses.

According to UST regulations under Subtitle I of RCRA, all stations must be brought into compliance by 1998. Owners and operators on Indian lands do not have access to loans, insurance, state tank fee and taxation funds, and other methods of financial assurance to meet UST requirements. Navajo lands are held in trust and cannot be used as collateral, therefore it is difficult for business site lease holders to

obtain financial assurance. Many owners/operators are doing minimal maintenance on their systems or opting out of their leases altogether. Although the Navajo Nation's Division of Economic Development is trying to stop the exodus, the Navajo Nation has difficulty controlling the situation because the BIA leasing requirements do not directly address USTs or cleanup of sites. If Navajo EPA, with the assistance of U.S. EPA, were authorized to enforce UST regulations on Indian lands, then owners/operators would be held accountable for cleanup of sites instead of abandoning them, which is now the practice.

The Navajo Nation can ill afford, however, to enforce compliance at the expense of owners/operators abandoning their sites. These operating sites serve a vital function because traditional Navajos depend on these businesses (trading posts or gas station/stores) for basic services. Many of these small businesses do not make a profit; yet, without them people have to travel many miles to get basic supplies and goods. If these businesses are closed down, the Navajo communities will suffer as a result. Not only will the sites be abandoned without cleanup, the loss of these businesses will be a great hardship on the Navajo people. Financial resources for owners/operators, as stated before, is needed in order to cleanup their sites and continue providing necessary services to the Navajo people.

At many of these small businesses, lease holders are attempting to install above ground storage tanks in hopes of avoiding strict and expensive UST regulations. Many of these tanks are substandard and pose an environmental risk to the isolated communities. It is unrealistic in most cases to pursue former lease holders to clean up these sites. Nevertheless, the health and safety of the Navajo people is of paramount importance and it is the obligation of the federal government, as trustee, to assist the Navajo Nation in assessing these sites and complying with federal regulations.

#### **Tribal Treatment as States Under RCRA**

Underground storage tanks regulations do not recognize tribal governments, except as municipalities, yet Indian tribes are not afforded the benefit from state funding, taxes, or any other state benefits. The Navajo Nation recommends that RCRA be reauthorized to grant "Treatment as State" (TAS) status to Indian tribes. RCRA is the last remaining environmental statute that does not grant treatment as state status to Indian tribes. With TAS, tribes can address numerous concerns, particularly the lack of accessibility to funding. TAS status would give the Navajo Nation direct access to the federal Leaking Underground Storage Tank (LUST) Trust funds and the authority to assess tank fees and gasoline taxes. TAS would also pave the way for the Navajo Nation to develop their current program, including a certification program for contractors, a permitting system, Navajo cleanup criteria, and other regulatory functions that are currently under the authority of the U.S. EPA.

## **OPEN DUMP SITES ON THE NAVAJO NATION**

As the Subcommittee is aware, open dumping is a significant environmental problem on reservation lands. It is well understood that Indian tribes lack the financial resources to operate solid waste facilities in compliance with federal standards. RCRA governs the regulation of solid waste, hazardous waste and toxic substances and petroleum products stored in underground tanks (42 U.S.C.6901-6992k). As noted under the prior section on TAS status for Indian tribes, RCRA does not contain any tribal-specific provisions.

### **Scope of the Problem**

It has been estimated that 130 to 1000 small open sites are scattered throughout the Navajo reservation (the exact number has not yet been determined). These open dumps are not only in violation of existing federal laws and regulations, but pose a threat to the health and welfare of Navajo people as well as the environment. The Navajo Nation is in the process of trying to remedy this situation, but suffers from a lack of adequate resources to insure that all open dumps are closed and covered in accordance with federal regulations.

The Navajo Nation has taken a number of steps to ensure that solid waste facilities existing on the Navajo reservation comply with RCRA and 40 CFR Part 258. The Navajo Nation enacted and adopted, by authority of the Navajo Nation Council, a solid waste code (Solid Waste Code pursuant to Resolution CO-58-90 of October, 1990) and promulgated regulations equivalent to, and in some cases, more stringent than the new federal standards. In developing the code and regulations, the Navajo Nation has conducted a series of public hearings and worked closely with the EPA Region IX Solid Waste Program.

The Navajo Nation is in the process of submitting its solid waste management regulations to the U. S. EPA for final program approval. The Navajo Nation has established a solid waste management program (SWMP) that assist chapters in developing alternative waste management systems. In addition, the SWMP is conducting an inventory to determine how many dump sites actually exist on the reservation. Due to the magnitude of this project, the inventorying of sites is taking longer than originally expected.

Solid waste has grown exponentially from a small back yard family dumping site to a large community dump, numbering from ten to twenty sites per each of the 110 chapters on the Navajo Nation. In addition, dump sites have been developed in areas throughout the Navajo Nation to serve both commercial generators and private households. Many of these dump sites were developed by federal government agencies to serve their facilities and often were not properly managed or maintained. Under the current federal statutory criteria, there is not a single complying solid waste

disposal landfill within the Navajo Nation. Open burning was, and still is, a common method of volume reduction at these sites.

The Navajo Nation has recognized the environmental impact created from unregulated solid waste disposal and other forms of inadequate waste disposal which cause imminent health hazards. These problems threaten our environment and diminish the quality of air, land and water. This cannot be left unresolved.

The Navajo Nation faces the following problems:

1. Lack of approved landfills that result in improper disposal of solid waste;
2. Lack of transfer stations in some areas that cause residents to travel inordinate distances to dispose of waste properly;
3. Possibility of increased numbers of illegal dump sites, if alternative methods for solid waste disposal are not installed in place of closed dump sites.
4. Inadequate resources and funding for closing illegal dump sites, establishing transfer stations and constructing sanitary landfills.
5. Difficulty in acquiring land for establishing regional landfills and transfer stations.

Although the Nation is working hard to comply with 40 CFR Part 258, we are experiencing difficulty in doing so. Not only are there countless family dumps, local community dumps and chapters have created dump sites in a number of locations throughout the reservation. Moreover, IHS and BIA constructed some sites for their solid waste needs and in some cases, transferred the responsibility to chapters for operation and maintenance.

The Navajo Nation is aware that the U.S. EPA recently promulgated a new rule that will extend the Municipal Solid Waste Landfill (MSWLF) criteria deadline from October 9, 1993 to April 9, 1993 and a two year extension for facilities that accept less than 20 tons per day. This will give the Navajo Nation extra time needed to ensure that dump sites existing on the Navajo reservation comply with the requirements of 40 CFR Part 258. However, the 110 chapters are limited by the lack of resources to properly acquire funds for actual construction, caretaker salary and operations/maintenance costs and other conflicts due to land acquisition and surveys.

#### The Navajo Nation's Efforts to Address the Solid Waste Problem

In the long-term the Navajo Nation is considering the construction of three

regional landfills. Because of the new groundwater monitoring requirements for very small landfill facilities, the Navajo Nation will have to reassess solid waste management alternatives. It takes funding and time, however, to establish a regulatory program, acquire land to site a regional landfill, coordinate design and engineering, establish an operation and maintenance entity, and obtain financing and insurance. The Navajo Nation is also negotiating with IHS and BIA to develop a tri-party Memoranda of Agreement (MOA) to coordinate efforts of the three entities on providing alternative waste systems and closing existing solid waste facilities.

Given this, the Navajo Nation is concentrating its energy and limited resources on the development and construction of transfer stations and other alternative waste management systems. Even these are costly and time consuming given the size, road conditions and geography of the Navajo reservation (110 chapters covering an area of 25,000 square miles). The Navajo Nation is working with IHS and local county governments on cooperative agreements to build and maintain transfer stations. It takes time to process these agreements, particularly because of the multiple jurisdictions involved. Indian tribes, unlike states, are not eligible for the financial assurance exemption under 40 CFR Part 258. Until regional landfills are in place within the Navajo Nation, the Nation will have to transport its solid waste to state permitted off-reservation locations such as Cortez, Colorado and Flagstaff, Arizona. In some situations, the nearest complying regional landfill is 160 miles from a chapter and this adds substantially to transportation costs. Chapters are not financially capable to accept these responsibilities without proper funding.

#### Illegal Dumping

To exemplify one situation, the Navajo Agricultural Products Industry (NAPI), a tribal enterprise, faces a dilemma of illegal dumping of solid waste on Navajo Nation trust land. The Navajo Nation does not have certified or licensed solid waste facilities within or near the boundaries of NAPI property. During the spring of 1993, Navajo EPA inspected NAPI's removal of all underground fuel tanks for above ground storage. NAPI is keeping better records of fuel usage for farm vehicles and large heavy equipment and tractors. To avoid any further illegal dumping, NAPI is requesting construction of two large solid waste sites. If constructed, the facilities would be available for solid waste generated from several other Housing Authority projects on NAPI.

#### Recommendations

As mentioned before, RCRA is the last remaining environmental statute that does not grant state status to Indian tribes for the purpose of enforcement of this Act. Although Indian tribes are sovereign governments and federal policy encourages tribes to seek self-determination, Congress has thus far failed to recognize the right of Indian tribes under SWDA to govern the disposal of garbage on their own lands, especially

when solid waste poses a threat to the health and environment of Indian people. The Navajo Nation supports Congressman Richardson's bill, H.R. 1267, that would grant "Treatment as State" status to Indian tribes for purposes of RCRA. We support this bill because it would authorize Indian tribes to assume primary enforcement responsibility for programs and projects and to receive direct funding allocations. We urge Congressman Richardson, and this Subcommittee to move the bill through Congress immediately.

Funds must be authorized for operation and maintenance of waste management systems, education, training, program development, development of solid waste codes and regulations or enforcement. In the past, the BIA built and operated dump sites on Indian lands to accommodate solid waste by their entities and IHS facilities. To now assume the responsibility, the Navajo Nation, like other tribes, will need sufficient start-up funds to develop and maintain solid waste management systems.

The bottom line is that the Navajo Nation, and most Indian tribes, simply do not have the funding required to construct and maintain landfills; to purchase equipment; or to employ the trained labor force necessary for proper solid waste management operations.

The Navajo Nation has the sovereign authority to protect its resources and regulate environmental programs. The Navajo Nation needs to take the lead role for all construction for sanitary landfills, the closing and covering of all open dump sites excluding BIA inactive dump sites and transfer stations. The Navajo Nation is the best authority on the geography of its own lands and sites, understands the severity of the problem and where cleanup activity needs to be concentrated and what the funding priorities should be. In the past, BIA and IHS have taken the lead to implement solid waste management activities for the Navajo Nation. We feel that we are technically sophisticated to promulgate our own solid waste regulations and enforcement authority. We have a responsibility for the welfare and protection of our lands and our people - no responsibility could be more important.

#### Conclusion

The Navajo Nation appreciates the opportunity to comment on these critical issues. We urge this Subcommittee to draft in legislation that Indian tribes will have the primary authority to regulate its UST and solid waste programs and provide for statutory authorization for funding. The Navajo Nation looks forward to working with the Subcommittee on these important matters.

Mr. FALEOMAVAEGA. Thank you, Ms. Hoskie.

I sympathize with the Navajo Nation to the extent that it is bad enough already for some of our tribes to deal with just one State, but I believe you cut across several States. You have to deal with the State of Utah. You have to deal with the State of New Mexico. Colorado also, as well as Arizona?

Ms. HOSKIE. No, just Arizona.

Mr. FALEOMAVAEGA. Just Arizona. And so you have to deal with three separate State jurisdictions in some of the issues that you have to address.

Ms. HOSKIE. Right.

Mr. FALEOMAVAEGA. Mr. Ducheneaux?

#### STATEMENT OF FRANKLIN DUCHENEAX

Mr. DUCHENEAX. Thank you, Mr. Chairman.

First, let me thank you for your kind words. For the record, my name is Frank Ducheneaux, and I would like to express the appreciation of our chairman, Alfred Pemberton, of the Leech Lake/Chippewa Tribe of Minnesota for the opportunity to have their views presented here. I know you are very pressed for time, so I am going to just take a little time here.

First, let me say that on behalf of the Leech Lake Band and all of my other clients, we would like to say amen to what Mr. Gover presented to the committee. I think he was very right on on every point with respect to EPA and BIA.

I am going to take a few seconds on three points the Leech Lake Band wanted me to bring to your attention. One relates to the open dump issue. The Leech Lake Band acquired, in 1978, a private landfill that was going to close because of permit violations. They felt they had to in order to ensure that there was a site for waste disposal. This was at a time when Federal regulations were not as strict in terms of operation, closure and post-closure maintenance, and they felt they could deal with it.

Subsequent to that, of course, the standards became very much more restrictive and strict and the cost of complying much higher. The landfill is now going to be closed and they simply don't have the funds to pay for the closure and post-closure maintenance, which will run on the order of \$800,000. They simply don't have that, and hope that the subcommittee in whatever it does will ensure that there is a policy as the Federal witnesses were asked to formulate which will deal with that problem.

On the issue of underground storage tanks they wanted me to bring one issue to your attention—it was mentioned briefly in some of the other testimony—and that involves the responsibility of the States with respect to tanks on Indian lands. Right now, as you heard from Mr. Gover, any Federal funding for this purpose does not go to the tribes, it goes to the States and the States have that responsibility.

However, the State of Minnesota has attempted to coerce the tribes in making available funds to deal with the problem on the reservation by requiring the tribe to submit to the State's civil jurisdiction. You have been on the committee long enough to know that the tribes are not going to do that. Yet, those do need those

kind of funds not only to deal with tanks that may be in violation, may be leaking, but also just to simply identify those.

So we would like to urge the subcommittee to either ensure through amendments to RCRA that there is a direct funding for the problem on the reservations or at least to ensure that the States are not put in this coercive position.

With respect to EPA administration, they wanted me to bring to your attention their feeling that even though there has been improvement in EPA in terms of their attention to Indian problems, they still feel that there is not enough tribal input into the policy-making levels of EPA. EPA currently provides for State operating committees but not for the tribes. They would at least like to see EPA required to establish tribal operation committees for that kind of consultation.

Particularly, we would like to support—and I would like to for all of my clients—the legislation pending in the Government Operations Committee which would establish a Department of the Environment. The McCain amendment to that legislation, which would establish an Assistant Secretary for tribal lands, I think is very important, and I think some of the Committee members mentioned that this morning.

Just to comment a little bit on some of the testimony you heard from the Federal witnesses, I was very disappointed to hear my good friend Pat Hayes indicate that it was the position of the Department and the administration that there is no general trust responsibility to deal with these kinds of problems. I think maybe Pat is not speaking his own heart and mind on that but reflecting the attitude of the bean counters in OMB and the Department on this issue in terms of dollars and strict legality. We would hope that at least the subcommittee would recognize and advocate a general trust responsibility of ensuring the livability of the reservations, and as long as you have open dumps and leaking storage tanks, Superfund sites that exist and are not being dealt with, you are not dealing with your trust responsibility.

In that respect, I would like to mention briefly the *Blue Legs* case, the Federal District Court case out of South Dakota about 8 years ago where members of the tribe involved sued the tribe, sued EPA, BIA, and IHS over an open dump site. In that case the Federal District Court not only found that BIA and IHS had a joint responsibility with the tribe to pay for the cost of cleanup, but they also found that the United States had a trust responsibility. Now that case wasn't appealed on that issue, so it is still there, that there is some kind of trust responsibility.

And like Ms. Hoskie, I would like to, on behalf of my clients, support early action on H.R. 1267, particularly with respect to State status for tribes.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Ducheneaux follows:]

STATEMENT OF FRANKLIN DUCHENEAUX  
ON BEHALF OF THE LEECH LAKE TRIBAL COUNCIL  
BEFORE THE  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
OF THE  
HOUSE COMMITTEE ON NATURAL RESOURCES

October 14, 1993

Mr. Chairman, my name is Frank Ducheneaux. On behalf of the Leech Lake Band of Chippewa Indians of Minnesota, I would like to thank you for this opportunity to present their testimony at this oversight hearing on open dumps and underground storage tanks on Indian reservations.

**LEECH LAKE LANDFILL**

For some time the Leech Lake Band has been struggling with the financial burden of closure and post-closure monitoring of a reservation landfill pursuant to Federal requirements of the Solid Waste Disposal Act.

The Band testified before the Senate Indian Affairs Committee on this problem in 1991. In addition, the Chairman of the Band testified before the House Subcommittee on Interior Appropriations this year on the funding needed to meet the Federal standards. Since then, absolutely no progress has been made regarding the closure of that open dump.

Leech Lake purchased the landfill in question in 1978 with the financial and technical assistance of the Minnesota Pollution Control Agency, EPA, BIA and IHS. This private landfill was facing closure for permit violations. Leech Lake was concerned that closure would have left the Band and surrounding non-Indian communities without a solid waste disposal facility.

When the Band assumed ownership and operation of the landfill, they were confident that they could operate, maintain and close the facility consistent with existing Federal guidelines. However, as you know, Federal standards have become much more stringent and costly. Like many other rural communities, Leech Lake was forced to close its landfill and transport waste generated on the reservation to off-reservation, regional disposal sites.

While the cost of properly disposing of reservation solid waste has tripled, we are also faced with the cost of closure and post-closure monitoring and maintenance of the existing landfill site in accordance with Federal standards. Our staff has estimated that this cost would be from \$800,000 to \$1,000,000.

Mr. Chairman, Leech Lake and the reservation residents are facing a potential environmental hazard. If the landfill is not properly closed, it is possible that leaching will contaminate the

underlying aquifer. One study has shown that 376 people obtain drinking water from that aquifer. It is possible that this site could become a superfund site. We believe that the only reason it does not qualify is because of its rural location.

#### **UNDERGROUND STORAGE TANKS**

The State of Minnesota has assumed responsibility for the underground storage tanks program within its geographical boundaries. However, the State's pollution control agency does not provide any services on the eleven Indian reservations within the State's boundaries. This situation has developed as a result of the refusal of the tribes to allow the State to assert civil jurisdiction within the reservations.

The State simply does not have civil regulatory jurisdiction within the reservations. In an attempt to coerce the tribes to give it that jurisdiction, the State is withholding these services and is risking the environmental integrity of the water system of the entire state to impose its jurisdiction over our lands. The Leech Lake Band believe that it is highly unethical for Minnesota to withhold these service on jurisdictional grounds. Since tribes are unable to apply for and receive direct Federal funding for the underground storage tanks program, they must either submit to the State's coercion on jurisdiction or risk contamination from leaking storage tanks.

Mr. Chairman, Leech Lake has only limited information about the number of abandoned underground storage tanks within the reservation boundaries and there is currently no effort underway by the State to supplement the preliminary information in that respect. These services do not exist within the reservation at this time. The only viable option is to seek direct funding. The Leech Lake Band strongly urges this Subcommittee to support and enact amendments to RCRA that would allow tribes to be eligible for direct Federal funding.

#### **Policy Making within EPA**

Currently, Indian tribes are not included in the development and implementation of EPA policy and rule making affecting tribes. While State governmental issues are represented by a State operations committee, this committee is not able to adequately address the environmental concerns of Indian country. In fact, in many ways, the interests of this committee run contrary to those of the tribes. There is no one within the EPA committee structure to speak for Indian tribes. Yet, tribes are not exempt from the growing complexity of environmental problems.

To promote environmental equity, tribes must receive equivalent technical and financial assistance and have a voice in EPA policy-making. The development of a tribal operations

committee would begin the process of making a commitment to tribal needs within the EPA budget, planning, and program development areas.

On behalf of the Leech Lake Band, I urge you to require EPA to form a tribal operations committee as the first step necessary to address the environmental concerns of tribes. In addition to a tribal operations committee, EPA needs to establish an Indian desk or Office of Indian programs which has direct access to the Office of the Administrator. This office should have a budget that allows it to begin to assess the far-reaching needs of Indian country, and should have open communications with tribes and a staff which has direct experience in Indian country.

In this respect, the Leech Lake Band strongly supports the provisions of the pending Senate bill to establish a Department of Environmental Protection which provides for an Assistant Secretary for Indian programs.

In summary, there has been a lack of administrative and financial support from EPA. The EPA Region V staff knows of the burdens tribes face, and many within EPA know of the financial restraints which exist in Indian country. The funding decisions which will make it possible for the needs of the tribes to be more fully addressed must come from Washington .

#### Clean Water Act

A pending amendment to the Clean Water Act would authorize the EPA Administrator to treat tribes as states. Tribes may be funded for all Clean Water Act activities, but EPA has never made a full commitment for these activities. EPA currently allocates approximately one-tenth of one percent of its funding for tribes. To receive some sort of parity, tribes have demonstrated that they would need five percent of the total EPA budget to address their current needs. The funding which is allocated should not be based solely on population, but should also consider the environment which is being detrimentally impacted.

The Leech Lake Band believes that treatment as a state has not always worked well for tribes. The policy has sometimes been a hinderance to the development of a cooperative working relationship between the tribes and EPA. EPA is not following the Indian policy that it adopted in 1984. EPA has not communicated with tribes when policies are drafted that will effect tribes. Communication between tribes and EPA is minimal. Again, an Indian Administrator and an adequate budget for Indian programs would greatly improve the current situation.

Mr. Chairman, this concludes my statement and I would be happy to respond to any questions the members of the Subcommittee may have.

Mr. FALEOMAVAEGA. Thank you very much.

Without objection, all the statements of the members of the panel will be inserted and made part of the record.

I don't want to sound repetitious, but basically it seems that we have come about to a complete circle now in terms of what our friends from the Federal agencies have stated and what other members of the Indian community have shared with the committee this afternoon, and I will say it is very disappointing.

I am just sorry that our friends from the Federal agencies left earlier. We would have wanted them to stick around and be asked some more questions as far as this issue is concerned.

Ms. Poston, as a tribal planner, and I assume that you are a tribal planner for the Pueblo tribe.

Ms. POSTON. That is correct.

Mr. FALEOMAVAEGA. What has been your experience in dealing with both the BIA as well as the EPA in dealing with this storage tank issue?

Ms. POSTON. As far as the BIA was concerned, we had several—a lot of correspondence took place before Mr. Farris from D.C. finally went to go look at the site, and before then we had gotten hardly any reaction from BIA.

As far as EPA was concerned, same thing there. A lot of correspondence and telling us that we were the responsible party since it was on our lands.

Mr. FALEOMAVAEGA. Am I correct that our friends, Mr. Coss, is the lead agency representing the State of New Mexico? Do you, in any way, work closely with the Pueblo tribe in conducting these lease agreements with these operators that provide for these tanks or dump sites, or is this exclusively done by the tribal organization? Can you clarify that?

Mr. COSS. Yes, Mr. Chairman. On tribal lands that would be done exclusively by the tribe. The State of New Mexico wouldn't be involved in that.

Mr. FALEOMAVAEGA. I see. Ms. Poston, from your experience, have you had assistance from the BIA in dealing with these lease agreements, especially with reference to the environmental questions? Have they been helpful to you in the past or is this just simply a confirmation of what Mr. Gover said earlier?

Ms. POSTON. The statements that Mr. Gover made earlier are true, and it has been tough trying to deal with our lessees or even trying to track them down, which were the people that initially put those tanks there.

Mr. FALEOMAVAEGA. Now, I know our good friend from the EPA made a very classic statement: the polluters pay. But I hear a very contrary statement. That they just simply pack up their things and leave and the poor tribes are left holding the bag.

Has this been your experience, Ms. Hoskie, in dealing with the Navajo Nation? Have there been corrective actions taken? I mean have you taken them to court? Have they been cooperative or do they just simply pack up and leave?

Ms. HOSKIE. Yes, they simply packed and left, and the BIA sometimes has released the—what little financial mechanism, bonding they might have done, if they were doing the right thing. They have released that also.

Like I said, to pursue a potential responsible party, you need to have all kinds of documentation, and without a staff you can't do that, can't present your case.

Mr. FALCOMAVAEGA. It is going to be my recommendation to Chairman Richardson that some of the recommendations and suggestions that you have offered, and members of the panel, will definitely and seriously be looked at to be incorporated in the bill that Chairman Richardson has earlier introduced in the Congress.

I am troubled by all this simply for the fact that we seem to have two levels of communication here. We get one from the Federal agencies saying an entirely different list of accomplishments and the great things that they are doing, and then hearing from the grassroots where things are directly right there, the front line. This is not only absurd but very ludicrous. I mean I just can't believe this.

Mr. Ducheneaux, you have been here long enough to know that this is a constant problem that we have had from our friends downtown.

I don't want to sound confrontational. I am trying to find a medium where by there is some sense of cooperation and a willingness to work with our friends from downtown and to resolve the very serious problems affecting the lives of Indian people in these reservations.

I want to leave with that note and I want to thank all of you for testifying this afternoon.

The hearing is adjourned.

[Whereupon, at 12:51 p.m., the subcommittee was adjourned.]

# APPENDIX

OCTOBER 14, 1993

## ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

TESTIMONY FOR HEARINGS BY THE HOUSE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

October 20, 1993

Mr. Chairman,

The Confederated Salish and Kootenai Tribes of the Flathead Nation appreciate the Committee's invitation to provide testimony in regard to the need for corrective action and preventive measures to be applied to abandoned underground storage tanks (USTs), leaking USTs, and open dumps.

All of the above exist on the Flathead Reservation. While the federal government has legislated against each of these conditions, there has not been adequate financial and technical assistance for implementation of corrective or preventive programs aboard reservations. Nor has there been an adequate enforcement effort applied by EPA to these problems. EPA's own regulations, though promulgated in 1988 after most other environmental statutes began to recognize Tribal authorities, actually seem to preclude Tribal administration of UST programs on Reservation lands, and specifically require EPA to administer them instead. The result is problematic since EPA is not equipped to handle the on-the-ground scrutiny such enforcement entails.

The root of much of the problem can be traced to the Resources Conservation and Recovery Act's (RCRA) treatment of tribes as "municipalities" (42 U.S.C. 6903). Such treatment is contrary to this nation's policy of tribal self-determination and government-to-government relations. Tribes should be afforded similar treatment as states as occurs with nearly all other federal environmental statutes.

### Open Dumps

The Confederated Salish and Kootenai Tribes effort to address open dumps is nothing new. There has always been concern about increased exposure to disease vectors and injury hazards. Now, in addition to these, comes the direct threat of the hantavirus and its tie to rodent harborages. This is an immediate health concern and has placed a new sense of urgency for action on this subject. The priorities of disease prevention will hopefully align with those driven by compliance with the oncoming RCRA regulatory changes.

The Tribal Natural Resources Department has done a preliminary inventory and assessment of the sites within the boundaries of the reservation, and is preparing a plan to take the appropriate corrective action. At least 29 small dump sites are known to exist, with contents ranging from automobiles and appliances to household garbage and construction debris. Of these, 15 lie on the banks of the Flathead River, 7 on other waterways and the remaining 7 in areas which could contribute to ground water contamination as quickly as to surface waters. They are located on tribal land and non-Indian fee land alike, and most are located along steep bluffs which will make removal or closure extraordinarily difficult and very expensive. Approximately half appear to contain household waste which could place them under a more stringent April 9, 1994 regulatory deadline. Some of the household garbage, especially new garbage, makes these dumps a higher

priority for closure as they tend to attract rodents, and tend to be located closer to housing and work areas.

There is both knowledge and ability on the part of the Tribes to address the problems. The asset missing in the plan is funding. To date, the Tribes have received \$15,000 from EPA to devise a plan for closure of these dumps. However, it is not known where funds for closure operations, estimated at \$400,000, may be procured. Money to assist the Tribes in actual closure of open dumps has not been provided despite the 1989 Blue Legs decision in 1989 which clearly placed a burden on the BIA and the Indian Health Service to take a much more active role in controlling the problem. Of course, the Blue Legs decision also stands for the proposition that Tribes themselves can be held responsible, in part, for cleaning up open dumps under their control. This decision while environmentally sound establishes a potential for significant liability on tribal governments who have limited financial resources. Substantial funds are immediately required to protect the health of everyone who lives on or around the Flathead Reservation.

#### Underground Storage Tanks

EPA's Underground Storage Tank program does not affect Tribes the authority to implement a federal UST Management Program. Federal regulations provide, "EPA will administer the UST program on Indian lands except where Congress has clearly expressed an intention to grant a state authority to regulate petroleum and hazardous substance USTs on Indian lands...." (40 CFR 281.12). There is no intent expressed by Congress for authorizing states to administer a UST program on Indian reservations, and should not be. EPA has fallen far short of its obligation and responsibility to regulate UST's on Indian lands. Through federal funding, EPA has enabled the establishment of Montana's UST program, yet has failed to adequately administer or fund a tribal program on the Flathead Reservation.

Currently, the State of Montana is regulating USTs within the exterior boundary of the Reservation on non-Indian fee lands only, composing less than half of the land area. This has been an issue of contention between the Tribes and the State in the past. At one point, the state prohibited heating oil distributors from filling heating fuel tanks servicing tribal buildings unless they obtained a state permit. Some tribal buildings went without heat for several days in cold weather as a result. Currently, there is an interim agreement between the state and the Flathead Nation, an agreement based on the efforts of the Tribes to develop and maintain a UST management program which is currently attempting to provide technical assistance to tank owners. An unfunded program, the capability is limited to monitoring actions taken to known USTs.

We are also concerned with how the the \$500 million Leaking UST (LUST) Trust Fund established in 1988 is administered. Opportunities to access these financial resources are often tied to state trust funds and state regulations. As discussed above, under those conditions, Tribes would be forced to accept State jurisdiction on Indian lands, a condition that is not acceptable to the Tribes or permissible under federal regulations.

On the Flathead Reservation, there are approximately 35 operational underground storage tanks subject to RCRA regulation, which are Indian owned

or located on Indian owned land. None of these are known to be leaking, but not all have met the new regulations for leak detection. It is estimated that there are from six to twelve abandoned USTs which are no longer in service, but have not been through closure procedures. Some of these are suspected tanks which have yet to be located. The same type of resources discussed above for IUSTs are needed to address abandoned tanks and tanks which require proper closure.

In summary, the fundamental problems are inadequate federal law which treats tribes unfairly and inconsistently with states, and a severe lack of funding to address illegal dumps and leaking underground storage tanks. We applaud this committee's interest in listening to our concerns on this issue and encourage the Congress to take action to bring RCRA into conformity with all other federal environmental regulatory schemes which recognize tribal governments proper role in administering environmental programs on Indian lands. The failure of the federal government to adequately fund these programs on Indian lands while at the same time, providing for state programs needs to be corrected. Thank you for the opportunity to submit testimony on these matters.



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