

## Mescalero Revisited



by Conrad L. Huygen

### Prologue

Environs first visited the Mescalero Apache in a December 1994 article entitled “Clouded Vision: The Mescalero Apache and the Nuclear Legacy.”<sup>1</sup> That article described the tribe’s symbolic metaphor of the universe, the *nda?i bijuul sia?*,<sup>2</sup> as “a simple circle bisected on both the vertical and horizontal axes—the epitome of balance. It resembles the cross hairs used to give Hiroshima one last look before she disappeared from the map. It is ground zero—beginning and end.”<sup>3</sup>

Like the Mescalero metaphor itself, the journal has returned to the basin and range land of south central New Mexico to reassess the tribe’s dilemma over whether it should host the first privately owned and operated monitored retrievable storage (MRS) nuclear waste facility ever to be located on indigenous ground.<sup>4</sup> This article, unlike its predecessor, focuses solely on the environmental justice concerns that shroud the proposal to arrive at a surprising (and troubling) conclusion.

### I. Sermon on the Mount

Actor Steven Seagal recently proved that life, once again, imitates art—or “B” movies, as the case may be. In June 1995, the aikido master participated in a rally held in tiny Ruidoso, a scenic town nestled in the mountains of south central New Mexico.<sup>5</sup> The purpose of the rally was to protest the proposed voluntary siting of a monitored retrievable storage (MRS) nuclear waste facility on the reservation lands of Ruidoso’s native neighbors, the Mescalero Apache.<sup>6</sup> Seagal, perhaps reliving his role as an eco-avenger in the movie “On Deadly Ground,” boldly accused the Mescalero tribal council of selling out their ancestors and future generations alike.<sup>7</sup> Firmly in the spotlight, he drew upon mystic Hollywood powers and dramatically declared, “I see death, sickness, suffering.”<sup>8</sup>

*At first blush, the juxtaposition of spent nuclear fuel rods, a people of color, endemic poverty, powerful utilities, and the lure of millions of dollars appear to have all the trappings of contravening notions of “environmental justice.”*

Although his “vision” is more script than substance, Mr. Seagal is not alone in his sincerity or his beliefs. At first blush, the juxtaposition of spent nuclear fuel rods, a people of color, endemic poverty, powerful utilities, and the lure of millions of dollars

appear to have all the trappings of contravening notions of "environmental justice." However, when compared to the tale of Kettleman City, the heroic Central Valley town that captured the essence of environmental justice,<sup>9</sup> the convoluted events unfolding on the Mescalero Reservation simply do not measure up. The Mescalero dilemma turns intuitive theories of environmental justice upside-down and sets the stage for an exploration of what is and what is not an environmental *injustice*.

#### A. "I know it when I see it..."<sup>10</sup>

Environmental justice, because it has no generally accepted meaning, is a contentious and elusive concept. In many ways, it is like Justice Stewart's definition of obscenity in *Jacobellis v. Ohio*;<sup>11</sup> we cannot discern its exact bounds, but we know it when we see it.<sup>12</sup> Or do we? With regards to the Mescaleros, there has been a rush to conclude that the proposed MRS project is a prime example of an environmental injustice.<sup>13</sup> Yet without an analytical framework in which to arrange them, these conclusions lack foundation.

The question of quantifying environmental justice hinges upon finding that analytical framework. Astonishingly, no state or Federal court has ever defined what exactly (or even roughly) environmental justice means — only one has even mentioned the phrase in passing.<sup>14</sup> The lone source of guidance that has the color of law is President Clinton's Executive Order No. 12898.<sup>15</sup> That order directs Federal agencies to make environmental justice part of their overall mission by addressing any "disproportionately high and adverse human health or environmental effects [that their] programs, policies, and activities [have] on minority populations and low-income populations..."<sup>16</sup> Because this order is the only federally sanctioned definition of environmental justice, it is an appropriate starting point for any legal discussion of the subject.

#### B. Incomplete Order

Executive Order No. 12898 identifies two distinct environmental justice constituent categories. The first consists of activities that cause adverse effects to human health and the environment.<sup>17</sup> An analysis of the Mescalero predicament should, accordingly, begin with an accurate assessment of the risk MRS presents and the role it plays in our nuclear waste policy. Clinton's mandate next focuses on minority and low-income populations.<sup>18</sup> This second prong invites a look into the unique history and circumstances of the Mescalero Apache minus the common misperceptions and preconceived notions that non-Native Americans so dearly hold. The first half of this article addresses each of these topics in turn.

President Clinton, however, left a few things out of his executive order. Although EO 12898 identifies the twin components of environmental justice, it does nothing in the way of integrating them. This synthesis is the crux of a comprehensive "EJ"

theory; its absence is analogous to leaving the parsing of a homicide as simply the killing of a human being.<sup>19</sup> Just as murder is distinguished from self-defense, environmental injustices need to be differentiated from legitimate economic pursuits. Only by adding the elements of risk disclosure, compensation distribution, and group power interrelationships can we accurately delineate the bounds of this nebulous theory.<sup>20</sup> As discussed in the paper's second half, these added criteria help illustrate why the Mescalero's pursuit of a private MRS is *not* a product of environmental injustice.

## II. Our Nuclear Legacy

Assessing the role that environmental justice plays on the Mescalero Reservation requires an accurate portrait of the hazard involved: monitored retrievable storage. A comprehensive risk assessment includes not only a picture of MRS, but also an appraisal of how waste storage stems from the United States' misguided nuclear energy policy. Only by understanding the events that have led to the desperate need for an MRS site can one make sense of the relationship between the Mescaleros and the nation's ever-growing mountain of high-level nuclear waste.

### A. Ground Zero

Ironically conforming to the Apache philosophy of *nda?i bijuul sia?* (life's living circle),<sup>21</sup> the atomic age burst into existence only forty miles east of the Mescalero Reservation.<sup>22</sup> Fallout from that first detonation undoubtedly drifted silently into the lungs of unknowing tribal members. Every facet of nuclear fission has conformed to a debtor's mindset: short-term gains today exchanged for compound consequences tomorrow. The United States built an entire nuclear industry without knowing what to do with its radioactive by-products.<sup>23</sup>

With absolutely no high level nuclear waste program to speak of, the nation's 109 reactors have simply stacked spent nuclear fuel rods in pools of circulating water located within each facility.<sup>24</sup> Not surprisingly, after forty years of continuous use, these pools have filled to the point where many plants now claim they will soon have to shut down due to lack of waste storage space.<sup>25</sup> By 2010, nearly half of the country's reactors could be forced off-line.<sup>26</sup>

### B. Monitored Retrievable Storage

Congress only recently addressed long-term storage concerns with the Nuclear Waste Policy Act of 1982 (NWPA).<sup>27</sup> Our government declared it would construct a permanent burial site and assume responsibility for the nation's high-level radioactive waste by 1998.<sup>28</sup> Congress amended NWPA in 1987 to designate Yucca Mountain, 90 miles northwest of Las Vegas, as the repository's location.<sup>29</sup> Yucca Mountain, however, is a fiasco — the only thing buried there is \$2 billion worth of geologic tests.<sup>30</sup> The site

will not be operational until 2010 at the earliest;<sup>31</sup> new theories about a possible chain reaction nuclear explosion resulting from corroding burial casks may keep Yucca Mountain from ever opening.<sup>32</sup>

Without a permanent burial site on the horizon, utilities are desperate to find an interim solution to their storage problems. Several nuclear plants have resorted to building on-site "dry storage" facilities in order to stay operational.<sup>33</sup> Unlike internal storage pools, dry storage involves older, less volatile fuel rods that can be air-cooled because they are "stable" at 400 degrees Fahrenheit.<sup>34</sup> The technique involves sealing spent radioactive material in large concrete and metal canisters along with an anti-

***Monitored retrievable storage is the perfect answer to the nuclear utilities' bottom-line prayers...[t]he critical question for any prospective MRS host community revolves around calculating the risk that large-scale dry storage presents***

corrosive inert gas, such as helium.<sup>35</sup> These units are then placed on concrete pads outside their respective reactors where technicians periodically monitor them.<sup>36</sup> The problem with these cask collections, officially known as "independent spent fuel storage installations" (ISFSIs),<sup>37</sup> is that they will collectively cost \$4 billion more than would a single, centralized dry storage plant.<sup>38</sup>

Monitored retrievable storage is the perfect answer to the nuclear utilities'

bottom-line prayers. As outlined in NWP, MRS is 10-15,000 tons worth of "temporary" dry storage that is both federally owned and operated;<sup>39</sup> it is essentially a national ISFSI with the added steps of long-range transportation and spent fuel repackaging.<sup>40</sup> The critical question for any prospective MRS host community revolves around calculating the risk that large-scale dry storage presents.

### C. Risk Assessment

Science and public opinion diverge precipitously on the issue of what threat nuclear waste poses to human health and the environment.<sup>41</sup> Nuclear fission and its radioactive by-products occupy a special place in the American psyche — they forever live next to the hideous flash that erased Hiroshima from the face of the Earth. Through film and photos of the A-bomb's aftermath, the world learned first-hand that radioactivity kills in a slow and painful manner; the fear of a nuclear holocaust will live on as long as the images remain.<sup>42</sup>

Not surprisingly, a 1990 poll of the general population ranked nuclear power plant accidents and nuclear waste storage among the country's top environmental concerns.<sup>43</sup> The Environmental Protection Agency, in direct contrast, does not share the public's perceptions. EPA sees air pollution, non-point water contamination, and ozone

depletion as more imminent threats.<sup>44</sup> The agency's science advisory board did not even mention nuclear waste as a top concern.<sup>45</sup>

The above poll suggests that the public does not differentiate core reactions from spent fuel dry storage. Core reactions involve the carefully controlled splitting of atoms to create just enough heat to keep hungry steam turbines churning.<sup>46</sup> Both Chernobyl and Three Mile Island illustrate that nuclear fission can go horribly wrong, making public skepticism well warranted.<sup>47</sup> It does not require an overly paranoid mind to imagine that small-scale incidents have gone unreported wherever there's a reactor. Dry storage, however, does not pose the risk of a core reaction melt-down.

The primary danger associated with dry storage centers around radiation leaks.<sup>48</sup> Seasonal fluctuations associated with outdoor on-site locations present the possibility of canister cracks and fissures.<sup>49</sup> If a canister seal breaks and the enclosed rods start to corrode, there's a chance that very fine, highly radioactive dust could blow onto the immediate storage area and beyond.<sup>50</sup> While this threat should not be ignored, it is important to realize that (1) to date there have been no publicly reported dry storage leak incidents at the nation's seven existing ISFSIs, and (2) competent cask monitoring and maintenance can catch and contain leaks before rod corrosion has a chance to begin.<sup>51</sup>

In short, MRS is not the irrational monster we imagine when we hear the word "nuclear."<sup>52</sup> The bottom line for any potential host community is that the risks inherent to monitored retrievable storage are quantitatively lower than those of a reactor. The Nuclear Regulatory Commission projects that dry storage can safely and effectively handle the nation's waste problem for at least the next one hundred years.<sup>53</sup> We should be wary of nuclear waste, but probably not to the extent reflected in our collective public opinion.

### **III. The Mescalero Apache**

The second step in determining whether an environmental injustice is about to take place on the Mescalero Reservation requires an exploration of the tribe itself. An accurate depiction of the Mescaleros is more than mere demographics — it involves acquiring an intimate knowledge of the tribe's economic circumstances, their political traditions, and how they have adapted to being treated as foreigners in an Anglo-dominated America enchanted by its own misguided myths.

#### **A. The People's Choice**

The Mescaleros initially became interested in radioactive waste storage in 1991 when the Federal government, through the now-defunct Office of the Nuclear Waste Negotiator, solicited municipalities and tribes nationwide to host an MRS facility.<sup>54</sup> The

Mescaleros stood head and shoulders above all other contenders as they pursued the project with unparalleled vigor.<sup>55</sup> Even after prospects dimmed over the possibility of a Federal facility, the tribe continued direct negotiations with 33 utilities (led by Northern States Power of Minnesota) regarding a private installation.<sup>56</sup>

In January 1995, the Mescalero tribal council subjected final contract negotiations to a tribal referendum.<sup>57</sup> Strong opposition to the project won the day as MRS went down to defeat, 490 to 362.<sup>58</sup> Undaunted, tribal President Wendell Chino accepted his people's decision by holding another vote only six weeks later.<sup>59</sup> In what seemed an unusual turn of events, the Mescaleros resoundingly approved MRS 593 to 372 on this second showing.<sup>60</sup> Why in the world would a Native American tribe *want* to host thousands of tons of spent nuclear fuel rods? This question makes sense to most everyone who is not a Mescalero; it is the product of a holy stereotype that mainstream America worships as true.

### B. Anglo Myths

"The earth," as Jack Kerouac put it, "is an Indian thing."<sup>61</sup> Anglos, unable to find a spiritual connection to the natural world, have latched on to an ecological visionquest rooted in tribal past. We've turned Native American culture into a grounding rod for our collective technological and industrial guilt.<sup>62</sup>

The "Keep America Beautiful" television commercial campaign of the 1970s was one manifestation of this erroneous myth. The scene: a Cherokee brave, dressed in traditional garb, travels from city to town to country all across America. He quietly observes the fruits of modern living only to find that litter and old tires pave his journey. The camera zooms in for a close-up of the man's face — a silent tear runs down his weathered cheek. Fade to black...<sup>63</sup>

***The Mescalero's determination to host an MRS facility begins to make sense when viewed in a broad historical context; it is a choice ostensibly rooted in tradition***

While these wonderfully powerful images hopefully made us think about our consumption and disposal of consumables, they were also tacitly racist. The "Keep America Beautiful" commercials adopted a one-size-fits-all mentality without acknowledging the nuances that distinguish the several hundred tribes spread throughout the nation. The images also promoted a belief that Indians are not yet part of the 20th Century. We have romanticized indigenous cultures in a manner that threatens to stifle development on reservations and perpetuate the poverty that permeates them.<sup>64</sup>

Although revering Native cultures is far better than reviling them,<sup>65</sup> each tribe must make its own decisions as to how and when it develops economically. The

Mescalero's determination to host an MRS facility begins to make sense when viewed in a broad historical context; it is a choice ostensibly rooted in tradition.

### C. Traditional Mescalero Power Structure

As rootless as modern Americans are, our hometown remains an important facet of our identity. One of the questions we ask others when we first meet them is, "Where are you from?" Traditional Mescaleros, while still valuing place, associated their identity more with that of their group leader.<sup>66</sup> Instead of asking where you were from, Mescaleros would first ask, "Which leader do you follow?"<sup>67</sup> Small groups of about 175 Apache centered their social, economic, and political organization around a central leader, or *nant?a*.<sup>68</sup> The *nant?a*, in turn, had a reciprocal duty to better the means of his people.<sup>69</sup>

One tribesman put it this way, "Only the leader has a swivel in his neck, so he can turn; the others have a stiff neck, so he guides them, commands them. Pretty soon they're able to turn too."<sup>70</sup> The *nant?a* influenced their group members, but they did not use force as an internal police power.<sup>71</sup> A leader instead had to be a "good thinking man" and a "good talker."<sup>72</sup> Yet even if a leader was able to mediate an agreement or broker a general consensus, members of the band were always free to act on their own.<sup>73</sup>

This distinctive dispersal of power made it wonderfully difficult for successive Euroamerican powers to effectively control the Mescalero — the tribe has never formally "surrendered."<sup>74</sup> Even though the Federal government imposed a centralized power structure when it relegated the tribe to their 460,000 acre reservation in 1873,<sup>75</sup> the notion of the *nant?a* is still very much alive.

### D. "A modern good thinking man"

Every two years for the past three decades, Wendell Chino has been reelected as the voice of the Mescalero Apache.<sup>76</sup> Although having a "president" is a Western construct antithetical to the traditional dispersal of power, Mr. Chino has skillfully wielded his influence in the *nant?a* spirit. He has turned a political structure arguably designed to keep Native Americans under the Federal government's thumb into an effective platform of development.<sup>77</sup>

President Chino's success as a "good thinking man" stems from his invocation of a very traditional theme: industriousness.<sup>78</sup> During his tenure, Mr. Chino has helped transform a legacy of poverty and neglect into one of relative profit through a series of savvy business transactions. Through his leadership, the 3200 member tribe today runs a ski resort, a casino, a luxury hotel, a sawmill, and (ironically) a plant that makes canisters for low-level radioactive waste.<sup>79</sup> As Mr. Chino is fond of saying, "the

Navajos make rugs, the Pueblos make pots, the Mescaleros make money."<sup>80</sup>

Despite the fact that the Mescaleros have bettered their economic standing, they still face an unemployment rate of over 30%.<sup>81</sup> In addition, the median reservation

***A savvy tribe comfortable with business dealings that wants to host a stable, temporary nuclear waste depot in exchange for millions of dollars does not appear to need the type of protection envisioned by EO 12898***

family income of \$13,900 continues to lag behind New Mexico's state average.<sup>82</sup> Mr. Chino and the tribal council are ever-vigilant for business ventures that will inject both capital and jobs into the tribe's economy.<sup>83</sup>

MRS facility during the second referendum. Even though the tribe's decision on this particular occasion may make historical sense, that revelation alone does not provide a benchmark for defining environmental justice on a more general level — the equation is not yet complete.

With this background in mind, it is not entirely surprising that a majority of Mescaleros followed the advice of their *nant?a* and voted in favor of hosting an

#### **IV. Redefining Environmental Justice (Adding the Missing Pieces)**

On its face, locating an MRS facility on the Mescalero Reservation violates the precepts of environmental justice as spelled out in Executive Order No. 12898.<sup>84</sup> A low-income minority population is about to be exposed to a known human health and environmental risk. However, an assessment of both the risk and the population (as outlined above) reveals that the President's order is incomplete. A savvy tribe comfortable with business dealings that wants to host a stable, temporary nuclear waste depot in exchange for millions of dollars does not appear to need the type of protection envisioned by EO 12898.

Perhaps the best gauge to judge whether the Mescalero dilemma qualifies as an environmental injustice lies 800 hundred miles west of the reservation in the small town of Kettleman City, California. Toughened by the parched heat of the San Joaquin Valley, Kettleman City epitomizes the inspiring ideal of the environmental justice movement.<sup>85</sup> Holding the Mescalero Apache next to the residents of Kettleman City reveals that the tribe is NOT about to suffer an environmental injustice; this comparison also identifies the additional elements required to make such a claim.



### A. Kettleman City Blues

A few miles outside of Kettleman City is the largest toxic waste dump west of Louisiana.<sup>86</sup> In 1988, the site operator, Chemical Waste Management, wanted to add an incinerator to the facility so that it could annually burn over 100,000 tons of poisons.<sup>87</sup> Chem Waste, the good corporate citizen, happily complied with the law and made known its intentions by publishing notice in the paper of general circulation, by sending letters to its immediate neighbors, and by posting the same on their property.<sup>88</sup> The funny thing is that the newspaper, which originates from the opposite end of Kings County, is printed in English—Kettleman City is predominantly Spanish-speaking.<sup>89</sup> In addition, Chem Waste's only directly-notified neighbors just happened to be oil companies and large agribusinesses.<sup>90</sup>

The residents of the town only found out about the proposed incinerator through a series of events that would make Mrs. Palsgraf blush:<sup>91</sup> On the eve of a hearing scheduled in town, a Kings County sheriff called Greenpeace San Francisco to see if the group was going to organize a protest against the project — he wanted to know how many deputies to schedule for overtime.<sup>92</sup> Greenpeace, in turn, called a contact in Kettleman City, Esperanza Maya.<sup>93</sup> She had not heard of such a meeting, much less the proposed incinerator.<sup>94</sup> Although Maya could gather only a handful of neighbors to attend that particular meeting, the sunlight of truth was dawning on the town.<sup>95</sup>

Kettleman City residents immediately made it clear that they wanted to participate in the siting process, yet neither county nor company raised a helpful finger. The 1000-page Environmental Impact Report, for example, was printed only in English; Spanish-speakers had to make do with a 5-page summary of the project.<sup>96</sup> When permitting issues came to a vote both before the Planning Commission and the County Board of Supervisors, the outcome was always the same — the collective voice of Kettleman City shouted, "NO"; the county nodded its approval.<sup>97</sup> The fact that Kings County receives 7 million dollars in tax revenue from the waste site, and that the incinerator was projected to double that figure, helps explain how democracy works in this part of the Central Valley.<sup>98</sup>

The only thing that stopped Chem Waste from steam rolling through the permitting process were several procedural defects in the project's EIR.<sup>99</sup> Under pressure from all quarters, Chem Waste decided not to amend the defective document, thereby halting the project. The people of Kettleman City staved off the incinerator by garnering both local and national support and focusing a righteous spotlight on a truly villainous company.<sup>100</sup> As Luke Cole (the attorney who helped the community litigate the matter) points out, stopping environmental injustice is ultimately a political process.<sup>101</sup>

## B. A Tale of Two Toxins, Two Towns

Like distant cousins, the Mescalero Reservation shares many commonalities with Kettleman City. Both are low-income communities of color where English is in many cases not the mother tongue.<sup>102</sup> Both dealt with corporate entities that have a history of targeting minority populations.<sup>103</sup> Both involved political decisions influenced by millions of dollars.<sup>104</sup> Both entailed known risks to human health and the environment.<sup>105</sup> A closer look into these facial similarities, however, reveals that the two localities occupy opposite ends of the environmental justice continuum.

### 1. Risk Assessment

Perhaps the most fundamental difference between the Mescalero and Kettleman City scenarios is the nature of the environmental hazard involved. MRS is a stable and temporary above-ground operation that incrementally (albeit slowly) becomes less dangerous over time.<sup>106</sup> This type of facility is a "closed system"; once the protective casks are sealed, nothing is added and nothing is taken away.<sup>107</sup> Toxic incinerators, on the other hand, actively process and inject emissions directly into the air that their host communities breathe.<sup>108</sup>

East Liverpool, Ohio, which hosts an incinerator similar to the one Chem Waste had planned for Kettleman City, illustrates why residents went up in arms when they caught wind of the project. The East Liverpool facility (also operated by Chem Waste!) spews vaporized lead, mercury, and 3000 other compounds into the environment.<sup>109</sup> EPA estimates that this facility has increased the town's cancer risk by over one thousand times.<sup>110</sup> In addition to the emissions threat, five thousand truckloads of chemical poison converge on East Liverpool each year.<sup>111</sup> This twisted pilgrimage mathematically increases the chances of surface spills due to traffic accidents.<sup>112</sup>

The potential for error during incineration exists every step of the way; toxic air emissions conspicuously rank among EPA's top environmental concerns.<sup>113</sup> MRS, as discussed above, suffers more from guilt by nuclear association than from scientific risk. Although putting MRS and incinerators in the same matrix is comparing nuclear apples to toxic oranges, monitored retrievable storage is undoubtedly the lesser of these two evils.

### 2. Silence v. Cacophony

Disclosure is the other side of the risk assessment coin. The Mescaleros were subjected to a public relations campaign of Orwellian proportions.<sup>114</sup> Although well-oiled, well-funded, and one-sided, the issues raised by the tribal council became subject to public debate — the Mescaleros at least knew who most of the players were and where they were coming from. The council's unabashed support for MRS also had the effect of gaining plenty of national attention and attracting opposition from both on and

off the reservation.<sup>115</sup> Like any convoluted political decision, the tribe had to sort through variations of the truth, but at least theirs was a frontal assault.

Chem Waste, on the other hand, lived up to the letter of the law, but otherwise went out of its way to keep the people of Kettleman City in the dark. Incredibly, many of the town's residents didn't even know of the original Class I facility, much less the incinerator planned to go along with it.<sup>116</sup> The clandestine nature of Chem Waste's actions reveals a blatant disregard for the community's concerns or input. This *de facto* undisclosed targeting, quite unlike the Mescalero media blitz, amounted to a toxic mugging rather than a fair and open fight.

### 3. Political Representation

Another key difference between the two communities was the adequacy of political representation. Unlike the Chicanos of Kettleman City, the Mescaleros didn't have to battle an all-white county board of supervisors<sup>117</sup> — they reported directly to a council of tribal members who actually lived in the community. In addition, their president (their *nant'a*) put the MRS proposal to a vote even though the tribe's constitution did not require it.<sup>118</sup> The fact that the first referendum was overturned so quickly by a second invites some level of investigation into the elections process, but unsubstantiated allegations of voter fraud cannot erase the fact that the tribe clearly spoke on the issue.<sup>119</sup>

Kettleman City literally had no say in the proposed incinerator. The Planning Commission actually tried to relegate the town's Chicano community to the back of its hearing chambers during a scheduled meeting on the issue.<sup>120</sup> In like fashion, the County Board of Supervisors was not acting with "a swivel in its neck" when it approved Chem Waste's project 3 votes to 1.<sup>121</sup> Kings County had lived up to its name by catering to only an elite few. The transformation of an unremarkable town into a broad-based coalition of a people united in a common cause is what makes the story of Kettleman City so inspiring. County and company began listening because many voices became a chorus of one.<sup>122</sup>

### 4. Compensation Distribution

The most controversial aspect within both of these communities was, and continues to be, the amount of compensation involved and how it should be distributed.<sup>123</sup> If negotiations are successful, the Mescaleros could receive as much as 25 million dollars a year that will go directly into the tribe's coffers.<sup>124</sup> In addition, MRS will provide several hundred jobs for unemployed tribal members.<sup>125</sup> Over the projected forty-year life of the contract, that translates into a lot of capital, construction projects, and personal savings — a veritable pot of gold in an area where economic rainbows are few and far between.

As noted above, the existing Class I Kettleman City site generates a comparatively paltry 7 million dollars annually for the Kings County general fund.<sup>126</sup> This money is in turn distributed to communities throughout the county, with only a small percentage actually coming back to Kettleman City.<sup>127</sup> This inequitable distribution, concentrated mostly within the faraway county seat of Hanford,<sup>128</sup> makes the Board of Supervisors something of a toxic pimp. The Mescalero Reservation and Kettleman City are, it turns out, separated by much more than mere geography.

### C. A New Definition

***Environmental injustices are not simply a matter of health risks juxtaposed with poor communities of color. The Mescalero-Kettleman City contrast reveals that the concept also involves the interactions of community, corporation, and government.***

The differences between these California and New Mexico case studies can serve to refine what “environmental justice” means in the American lexicography. Like so many phrases, environmental justice runs the risk of becoming a meaningless platitude if used indiscriminately.<sup>129</sup> Environmental injustices are not simply a matter of health risks juxtaposed with poor communities of color. The Mescalero-Kettleman City contrast reveals that the concept also involves the

interactions of community, corporation, and government. By adding elements of accurate risk disclosure, fair compensation distribution, and group power allocation, we can distinguish people who are truly suffering from environmental injustices from those who are not.

This relational thesis rests on a simple premise: companies that handle America’s mountains of toxic waste will target those areas in which they will encounter the least resistance for the lowest cost. The California Waste Management Board (at taxpayer expense) actually identified the ideal target area as being rural, poor, undereducated, communities of less than 25,000 people which are dependent on an extractive economy such as agriculture, mining, or timber.<sup>130</sup> From an economic standpoint, places like the Mescalero Reservation and Kettleman City attract companies like Northern States Power and Chem Waste like moths to a flame.<sup>131</sup>

Although we cannot blame waste handlers for seeking cost effectiveness, we must hold them accountable for the *way* they go about being “efficient.” Minimal compliance with ineffective notice requirements is a far cry from open, informed discussion of what risks a particular hazard presents. At the same time, environmental justice must not focus solely on identifying “bad” actors — it should also involve telling who is

truly a "victim." Autonomous communities do not need the same level of protection as areas that exist as smaller parts of larger jurisdictions.

*Therefore, integrating the foundational elements identified by Executive Order No. 12898 with the relational factors flushed out by the Mescalero-Kettleman City contrast, true "environmental injustices" exist only when there is*

- (1) *an undisclosed targeting of*
- (2) *under-represented communities of color or low-income for*
- (3) *the unconscionably under-compensated hosting of*
- (4) *inaccurately assessed and/or under-disclosed health / environmental risks.*

***Until our fundamental attitude about how Native American tribes fit into the national mosaic changes, the Mescalero dilemma will repeat itself time and again.***

Mapping the interplay between these four elements demands the kind of broad-based attention that EO 12898 originally mandated for federal agencies' policies toward hazardous wastes and minority populations. President Clinton should take appropriate action and issue a more comprehensive order that integrates all of the requisite elements into a sharper tool for discovering when governmental and corporate actions constitute environmental injustices.

Identifying environmental injustice, however, is merely the threshold. Because the solutions to such transgressions are at their heart political,<sup>132</sup> the proper role for environmental justice is one of legal catalyst. Community self-determination should be the theory's ultimate goal, as was the case in Kettleman City. Yet like any catalyst, inappropriate actions taken in the name of "justice" may serve only to slow the natural processes of change within political groups by unnecessarily altering delicate internal power balances. Environmental justice must ultimately be tailored to meet the individual needs of a community, not the other way around.

## V. Conclusion

The complexities surrounding the Mescalero's choice to host an MRS facility, while far from creating an environmental injustice, debunk two prevalent mainstream American myths. The first is that not every phase of nuclear fission carries with it, as Steven Seagal put it, death, sickness, and suffering. MRS, while not the sweetheart utilities would paint it as being, is certainly not an atomic demon. It is a low-risk, passive storage technique that is being successfully operated on a small-scale throughout the country. The second myth is that Native Americans should serve as the stan-

dard-bearers of living lightly on the land. Each tribe has its own unique history and modern circumstances. To the Mescaleros, the land itself plays a secondary role to the tribal leaders and their fiduciary duty to the people's economic welfare; we should respect their decision even if we do not agree with it.

In a larger context, the Mescalero scenario illustrates why sorting through environmental justice problems necessitates a careful case-by-case analysis. This analysis need not be like Justice Stewart's intuitive recognition of obscenity; it should instead involve a methodical piecing of the puzzle into its four most basic elements. Knee-jerk, intuitive judgements regarding environmental justice issues can lead to incorrect conclusions. Incorrect conclusions, in turn, can lead to misguided actions — such as delivering nonsensical visions from a mountaintop in New Mexico, or worse — deciding the fate of a people in the name of saving them.

### Epilogue

But what about the Mescaleros as a PEOPLE and not a conduit to a THEORY? Although the events on the reservation arguably do not reflect a case of environmental injustice, that doesn't mean theirs is a just situation. There is something morally wrong about giving the Mescalero Apache the choice between continued poverty and money-coated nuclear waste. The truth, however, is that no one is going to do anything to improve conditions on the reservation but the Mescaleros themselves.

*Keep in mind the Mescalero metaphor of the universe, the nda?i bijuul sia?: It seeks order out of chaos. The Mescaleros have waited long enough to see what an "enlightened" America will do for them — they have decided to keep their economy moving via MRS because that's the most viable option before them. Until our fundamental attitude about how Native American tribes fit into the national mosaic changes, the Mescalero dilemma will repeat itself time and again. But tomorrow the hazard will be more dangerous, the disclosure less forthright, the compensation less generous, and the tribe less savvy.*



*About the Author: Conrad Huygen is a 3L at King Hall and participated in the law school's student-run seminar on environmental justice. He is a Geography graduate of Humboldt State University.*

## NOTES

- <sup>1</sup> Conrad L. Huygen, *The Mescalero Apache and the Nuclear Legacy*, 18 *Environs* 1 (1994).
- <sup>2</sup> Claire R. Farrer, *Living Life's Circle: Mescalero Cosmvision* 264 (1991). Note that the "ʔ" in "ndaʔi bijuul siaʔ" is representative of the Apache's glottal stop and has no English equivalent.
- <sup>3</sup> Huygen, *supra* note 1, at 6.
- <sup>4</sup> Robert Bryce, *Nuclear Wastes's Last Stand: Apache Land*, *The Christian Science Monitor*, Sept. 2, 1994, at 6.
- <sup>5</sup> Michael Satchell, *Dances With Nuclear Waste*, *U.S. News & World Report*, Jan. 8, 1996, at 29.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> See generally Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 *Maryland J. Contemp. Legal Issues* 67 (1993)(recounting the incredible tale of a people who said NO).
- <sup>10</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964)(J. Stewart, concurring).
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.*
- <sup>13</sup> See generally Huygen, *supra* note 1.
- <sup>14</sup> *Schartiger v. Land Use Corp.*, 420 S.E.2d 883 (W.Va.1991). Note that *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir.1996) also used the phrase "environmental justice," but it did so only in the context of a quote by EPA.
- <sup>15</sup> 59 Fed. Reg. 7629 (Feb. 11, 1994).
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *Black's Law Dictionary* 734 (6th ed. 1990).
- <sup>20</sup> See *infra* Section IV.
- <sup>21</sup> Farrer, *supra* note 2.
- <sup>22</sup> Bryce, *supra* note 4, at 6.
- <sup>23</sup> Telephone Interview with Dan Hancock, Southwest Research & Information Center (Nov. 21, 1994). This policy is a bit like Frank Lloyd Wright designing and constructing Falling Water without a bathroom!
- <sup>24</sup> Tom Bearden on MacNeil/Lehrer Newshour (PBS television broadcast, Aug.30, 1994).
- <sup>25</sup> *Id.*
- <sup>26</sup> Testimony before the Senate Committee on Energy & Natural Resources (Mar. 2, 1995)(statement of Hazel O'Leary, Secretary of Energy).
- <sup>27</sup> 42 U.S.C. §§ 10101, et seq. (1988).
- <sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Ed Smeloff, *Nuclear Waste to Be Stored at Seco for Years*, Sacramento Bee, Apr. 2, 1995, at Forum 6.

<sup>31</sup> *Id.*

<sup>32</sup> William J. Broad, *Scientists Fear Atomic Explosion of Buried Waste*, New York Times, Mar. 5, 1995, at 1.

<sup>33</sup> O'Leary, *supra* note 26.

<sup>34</sup> Telephone Interview with Mary Olson, Staff Biologist, Nuclear Information & Resource Service (Apr. 6, 1995).

<sup>35</sup> *Id.*

<sup>36</sup> Jeffrey Williams, *Monitored Retrievable Storage Facility*, Transactions of the American Nuclear Society, Nov. 1991, at 154.

<sup>37</sup> 10 C.F.R. §§ 72.0 - .240 (1995).

<sup>38</sup> Bryce, *supra* note 4, at 6.

<sup>39</sup> Williams, *supra* note 36.

<sup>40</sup> *Id.*

<sup>41</sup> See generally Paul Slovic, et al., *Perceived Risk, Trust, and the Politics of Nuclear Waste*, Science, Dec. 13, 1991, at 1603. (analyzing public opinion polls regarding nuclear waste).

<sup>42</sup> *Id.* Our apprehension of radiation has manifested itself in such mundane things as genetically mutated comic book characters who secure super-human powers from sub-atomic exposure; nuclear power is the Pandora's box of modern America.

<sup>43</sup> See Robert Percival et al., Environmental Regulation 662 (1992).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See generally Steve Kroft on *Sixty Minutes* (CBS television broadcast, Apr. 28, 1996) (exploring the tenth anniversary of the Chernobyl disaster).

<sup>47</sup> *Id.*

<sup>48</sup> Interview with Olson, *supra* note 34.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Williams, *supra* note 36.

<sup>52</sup> See Slovic, *supra* note 41.

<sup>53</sup> Smeloff, *supra* note 30, at Forum 6.

<sup>54</sup> David H. Leroy, *Office of the US Nuclear Waste Negotiator*, Transactions of the American Nuclear Society, Nov. 1991, at 154.

<sup>55</sup> Luther J. Carter, *The Mescalero Option*, The Bulletin of the Atomic Scientists, Sept./Oct. 1994, at 11.

<sup>56</sup> *Id.*

<sup>57</sup> George Graham, *Apaches Vote to Store Nuclear Waste*, Financial Times, Mar. 13, 1995, at 4.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*



<sup>60</sup> *Id.*

<sup>61</sup> Michael White, *Safe in Heaven Dead: Interviews with Jack Kerouac* (1990). Kerouac himself was part Iroquois.

<sup>62</sup> *See generally* James Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. Colo. L. Rev. 901 (1992) (discussing how we deal with our environmental sins through Native American tribes).

<sup>63</sup> Who was the man behind the image? Mr. Iron Eyes Cody.

<sup>64</sup> Huffman, *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> Harry Basehart, *Mescalero Apache Subsistence Patterns and Socio-Political Organization* 142 (1974).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 144.

<sup>69</sup> *Id.* at 143.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 145.

<sup>72</sup> *Id.* at 146.

<sup>73</sup> *Id.* at 147.

<sup>74</sup> Farrer, *supra* note 2, at 226. Note that Geronimo and the Chiricahua Apache did surrender a number of times during the sporadic Indian wars of the 1880s—some Chiricahua now reside on the Mescalero Reservation.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 133.

<sup>77</sup> Carter, *supra* note 55, at 11.

<sup>78</sup> *Id.*

<sup>79</sup> Basehart, *supra* note 66, at 146.

<sup>80</sup> Carter, *supra* note 55, at 11.

<sup>81</sup> Bryce, *supra* note 4, at 6.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> E.O. 12898, *supra* note 15.

<sup>85</sup> *See generally* Cole, *supra* note 9.

<sup>86</sup> *Id.* at 68.

<sup>87</sup> *Id.* at 69.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 68. (95% of Kettleman City is Chicano, 75% speak Spanish at home, and fully 40% speak *only* Spanish.)

<sup>90</sup> *Id.*

<sup>91</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928).

<sup>92</sup> Cole, *supra* note 9, at 69.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 74.

<sup>97</sup> See generally *id.*

<sup>98</sup> *Id.* at 76.

<sup>99</sup> *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 ELR 20357 (1991 WL 332756).

<sup>100</sup> Cole, *supra* note 9, at 71.

<sup>101</sup> *Id.* at 77.

<sup>102</sup> See generally Farrer, *supra* note 2; Cole *supra* note 9.

<sup>103</sup> See generally Tom Meersman, *NSP, Dakota tribe reach deal*, Star Tribune, Jan. 26, 1996, at 1A; Cole, *supra* note 9.

<sup>104</sup> See *infra* Section II; Cole, *supra* note 9.

<sup>105</sup> *Id.*

<sup>106</sup> See generally Williams, *supra* note 36.

<sup>107</sup> See *infra* Section II.

<sup>108</sup> See generally L.J. Davis, *Where are you Al?*, Mother Jones, Nov. 1, 1993, at 44 (wonderful accounting of Chem Waste's debacle in East Liverpool, Ohio).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Percival, *supra* note 43.

<sup>114</sup> Telephone Interview with Rufina Laws, Mescalero Apache Indian Tribe (Nov. 19, 1994).

<sup>115</sup> *Id.*

<sup>116</sup> Cole, *supra* note 9, at 69.

<sup>117</sup> *Id.* at 77.

<sup>118</sup> Mescalero Apache Tribal Constitution, art.XIV.

<sup>119</sup> Interview with Laws, *supra* note 114.

<sup>120</sup> Cole, *supra* note 9, at 75.

<sup>121</sup> *Id.* at 77.

<sup>122</sup> *Id.* at 67. Quite literally the people repeated the chant from the farmworkers' movement, "el pueblo unido jamas sera vencido," meaning "the people united shall never be defeated."

<sup>123</sup> I say "controversial" because not everyone (Paul Littlepage, for example) believes that risking a community's health should be for sale. This issue is beyond the scope of this paper; even if risks shouldn't be bought and sold, the fact is that they *are*.

<sup>124</sup> Satchell, *supra* note 5, at 29.

<sup>125</sup> *Id.*

<sup>126</sup> Cole, *supra* note 9, at 76.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> For example, does anyone really know what the word "infrastructure" encompasses any more?

<sup>130</sup> Cole, *supra* note 9, at 70.

<sup>131</sup> Edward Helmore, *Indians Fall Out Over Reservation Nuclear Waste*, *The Observer*, June 2, 1996, at 15. Northern States Power, while infamous for its role in spearheading the utilities' charge on to the Mescalero Reservation, is looking elsewhere to dump its waste. British Nuclear Fuels, however, is gladly stepping into NSP's still-warm shoes. The Mescaleros will never be wanting for potential clients.

<sup>132</sup> Cole, *supra* note 9, at 77.

