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Retroactive Liability for Clean-up of Hazardous Waste in *Atlas v. United States*: The Nuclear Industry's Failed Attempt to Make the Government Pay

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INTRODUCTION

In recognition of the potential long-term health and environmental hazards connected with mill tailings,[1] the sand-like residue resulting from the production of enriched uranium and thorium, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).[2] Under Title I of UMTRCA the federal government is liable for the stabilization and decommissioning of tailings at sites which were inactive at the time of the statute's enactment.[3] Title II of UMTRCA, however, places responsibility for decontamination, decommissioning, and reclamation on licensees of active facilities.[4] Pursuant to UMTRCA, requirements for stabilization of active sites were established by the Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency (EPA).[5]

Because approximately one ton of uranium ore must be milled to extract a few pounds of uranium that can be used as an energy source, huge piles of unregulated tailings accumulated

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[1] Mill tailings contain various toxic and radioactive elements, including radium, considered to be the greatest threat to public health and safety. Radon gas, a carcinogen, is emitted when radium decays. Tailings will continue to produce radon for up to 100,000 years. Magee, *The Uranium Mill Tailings Radiation Control Act of 1978*, 9 ECOLOGY L.Q. 801 (Summer 1980). The potential health effects from exposure to uranium mill tailings were debated when Congress considered the Uranium Mill Tailings Control Act of 1978. *See* H.R. REP. No. 1480, 95th Cong., 2d Sess., pt. 2, at 25, 26, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7451-53.

[2] Title I is codified at 42 U.S.C.A. §§ 7901-7942 (1982), *amended by* Uranium Mill Tailings Remedial Action Amendments Act of 1988, Pub. L. No. 100-616, 102 Stat. 3192. Title II amended or added sections to 42 U.S.C.A. §§ 2011-2296 (1982 & Supp. IV 1986).

[3] 42 U.S.C.A. §§ 7912-7919.

[4] 42 U.S.C.A. § 2113.

[5] The regulations are found at 40 C.F.R. pt. 92 (1988); 10 C.F.R. pts. 40, 150 (1989).

at milling sites[6] for some thirty years before Congress, and consequently the NRC and the EPA, addressed the problem.[7] Bringing the tailings and mill sites into compliance with the regulations has been an expensive undertaking. In *Atlas v. United States*[8] several corporations who produced uranium and thorium under a contractual procurement program of the Atomic Energy Commission (AEC)[9] sought recovery of those compliance costs from the federal government.[10] Affirming the United States Claims Court's dismissal of the plaintiffs' claims,[11] the United States Court of Appeals for the Federal Circuit rejected arguments for equitable reformation of contract based on mutual mistake,[12] breach of express contract,[13] breach of implied-in-fact contract,[14] and unconstitutional taking under the fifth amendment.[15] This Comment examines each of these arguments and the court's rationale for dismissing all of them.

I. *Atlas Corp. v. United States:* BACKGROUND AND FACTS

In order to procure domestic sources of atomic energy for the military, in the late 1940s the AEC launched a program to encourage private companies to produce uranium and thorium

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[6] H.R. REP. No. 1480, 95th Cong., 2d Sess., pt. 1, at 11, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7433-34.

[7] The uranium milling industry developed in the United States in the late 1940s when the Atomic Energy Commission (AEC), seeking domestic sources of atomic energy for the military, encouraged private companies to contract with the federal government for the production of uranium and thorium. The tailings produced in the milling process were not regulated until the enactment of the Uranium Mill Tailings Radiation Control Act of 1978 [hereinafter cited as UMTRCA].

[8] 15 Cl. Ct. 681 (1988), *aff'd*, 895 F.2d 745 (Fed. Cir. 1990), *cert. denied*, No. 89-1705, ____ U.S. ____, 111 S.Ct. 46 (Oct. 1, 1990).

[9] The AEC was abolished and succeeded by the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA) by Pub. L. 93-438 (Oct. 11, 1974), 88 Stat. 1237, *codified at* 42 U.S.C.A. § 5814. The ERDA was succeeded by the Department of Energy by Pub. L. 95-91 (Aug. 4, 1977), 91 Stat. 565, *codified at* 42 U.S.C.A. § 7151.

[10] *Atlas*, 15 Cl. Ct. 681. In addition to Atlas Corporation, plaintiffs included Kerr-Mcgee Chemical Corporation, Quivira Mining Company, Western Nuclear, Inc., Atlantic Richfield Company, Umetco Minerals Corporation, Union Carbide Corporation, Homestake Mining Company of California, Inc., and Pathfinder Mines Corporation.

[11] The claims court dismissed all the plaintiffs' claims over which it had jurisdiction, and transferred constitutional equal protection and *ex post facto* claims to the United States Disctrict Court for Colorado. *Atlas*, 15 Cl. Ct. at 692.

[12] *Atlas*, 895 F.2d at 750.

[13] *Id.* at 753.

[14] *Id.* at 754.

[15] *Id.* at 756.

for the government. The plaintiffs in *Atlas* had either contracted with the AEC under that program or acquired the rights and duties of corporations that did so, and they held licenses for active mill sites when UMTRCA took effect.[16] In the mid-1960s a commercial market for uranium products began to develop.[17] Consequently, the mill tailings generated by production under the AEC contracts have been commingled with those resulting from private commercial contracts.[18]

The price provisions of the AEC contracts were individually negotiated and thus varied. However, in each case the price provisions represented a fixed price per pound delivered, based on forecasted production costs and reasonable profits.[19] It was not until after the contract period, which extended from 1950 to 1970, that the hazardous nature of the radon gas emissions of mill tailings was discovered and addressed by Congress and federal agencies.[20] Title I of UMTRCA assigned the federal government responsibility for obviating the hazards at milling sites which were inactive in 1978;[21] Title II placed the burden on licensees of active sites.[22] Therefore, subsequent to the expiration of the government contracts, the uranium and thorium producers were subjected to retroactive liability for stabilization of the mill tailings, at considerable expense. The plaintiffs in *Atlas* sought recovery from the federal government only for those costs associated with stabilizing the tailings generated under the AEC contracts, not those resulting from uranium production under commercial contracts.[23]

II. ARGUMENTS RAISED BY THE *Atlas* PLAINTIFFS

A. The Contract Claims

The plaintiffs set forth three distinct theories for recovery of costs from the government under contract law. None proved to be successful.

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[16] *Id.* at 747-748.

[17] *Id.* at 748 (Under the Atomic Energy Acts of 1946 and 1954, only the federal government could own uranium products; but beginning in 1964, producers were permitted to sell their uranium products to private parties.).

[18] *Atlas*, 895 F.2d at 748.

[19] *Atlas*, 15 Cl. Ct. at 685.

[20] *See supra* notes 1-5 and accompanying text.

[21] 42 U.S.C.A., §§ 7912-7919.

[22] 42 U.S.C.A., § 2113.

[23] *Atlas*, 895 F.2d at 748-49.

1. Contract Reformation Under the Doctrine of Mutual Mistake

The plaintiffs alleged that the parties to the uranium and thorium contracts made a mutual mistake regarding the health hazards and necessary disposal of the mill tailings.[24] Under the equitable theory that such a mistake requires reformation of contract, they asserted that the government should pay for the costly stabilization and decommissioning measures taken in response to UMTRCA.[25]

The Federal Circuit Court of Appeals began its analysis with the elements that comprise a claim for mutual mistake. These include:

(1) the parties to the contract were mistaken in their belief regarding a fact;
(2) that mistaken belief constituted a basic assumption underlying the contract;
(3) the mistake had a material effect on the bargain; and
(4) the contract did not put the risk of the mistake on the party seeking reformation.[26]

The court focused on the first element and determined that the plaintiffs' claim for reformation must fail because it alleged no such mistake of fact.[27] There must be an erroneous belief as to an existing fact for a mutual mistake to occur. However, the *Atlas* plaintiffs could not show an erroneous belief as to an existing fact because at the time of the contracts the parties were not aware of the existence of the hazards posed by the mill tailings. Thus the court held that the parties could not have formed a mistaken belief as to those hazards.[28]

Because there was no mutual mistake, the plaintiffs' claim for reformation was properly dismissed. "The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds."[29] Reformation may not be used to enforce terms to

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[24] *Id.* at 749-50.

[25] *Id.* at 750.

[26] Id. *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 151-52, 155 (1981); National Presto Indus. v. United States, 338 F.2d 99, 106-12 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

[27] *Atlas*, 895 F.2d at 750.

[28] *Id.*

[29] American President Lines, Ltd. v. United States, 821 F.2d 1571, 1582 (Fed. Cir. 1987).

which there was no agreement.[30] The AEC could not have agreed to any terms concerning the costs of stabilizing the mill tailings, because neither it, nor any of the plaintiffs, knew of the existence of hazards which would require such measures. Hence, there was no meeting of the minds on that point, and no reformation of the contracts was necessary.[31]

The court in *Atlas* went on to distinguish several cases in which reformation of contract was permitted, noting that in each of them the parties to the contracts (1) recognized the existence of a fact upon which an agreement could be reached, and (2) formed an erroneous belief concerning that fact.[32] For example, in *National Presto Indust., Inc. v. United States*,[33] reformation of contract was allowed. In that case the United States Army contracted with National Presto for the procurement of artillery shells using a new method of production. The parties discussed the possibility of the need for equipment and an additional turning step in the process to shave imperfections in the steel shells.[34] Although National Presto thought the step should be included, the Army decided it would not be necessary, and the parties agreed to proceed without it.[35] As it turned out, they were mistaken, and National Presto incurred difficulties and expenses adding the step to the process after production was under way.[36] In determining that the contract should be reformed so that the government shouldered a portion of the additional costs,[37] the court found that the parties made a mutual mistake regarding the necessity of the turning equipment and procedure, and the time and effort required to discover it.[38]

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[30] 3 CORBIN ON CONTRACTS § 614 at 723 (1960).

[31] *Atlas*, 895 F.2d at 750.

[32] *Id.* at 751. The *Atlas* court briefly discusses *National Presto*, 338 F.2d 99 (mistaken belief that additional equipment would not be needed to perform the contract); and R.M. Hollingshead Corp. v. United States, 111 F. Supp. 285 (Ct. Cl. 1953) (erroneous belief that DDT would remain clear when stored in metal containers). The court also cites Southwest Welding & Mfg. Co. v. United States, 373 F.2d 982 (Ct. Cl. 1967) (mistaken belief as to price of steel); Walsh v. United States, 102 F. Supp. 589, (Ct. Cl. 1952) (erroneous belief as to minimum wage rate); Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (erroneous belief that the Wholesale Price Index would accurately reflect certain contract costs).

[33] 338 F.2d 99 (Ct. Cl. 1964).

[34] *National Presto*, 338 F.2d at 101.

[35] *Id.* at 101-102.

[36] *Id.* at 102.

[37] *Id.* at 112.

[38] *Id.* at 107.

The *Atlas* court was able to distinguish *National Presto* because in that case "[a]lthough the parties did not know of the need for the additional equipment, they clearly recognized that the equipment *might* be needed."[39] In contrast, the parties in *Atlas* did not know that the mill tailings were hazardous, and therefore they did not recognize that costly measures might be needed to abate the problem. Thus, the court held, because the parties did not recognize that fact, they could form no mistaken belief about it.

The claims court in *Atlas* found "[t]here was no mutual mistake, as the existence of the hazard was not knowable at the time of the negotiations."[40] On appeal, the plaintiffs relied on *Aluminum Co. of America v. Essex Group*[41] and argued that reformation can be granted regardless of whether the mistaken facts were knowable when the contracts were negotiated and executed.[42]

In *Aluminum Co.* the parties executed a contract for the production of aluminum.[43] The price provisions were based on an escalation formula tied to the Wholesale Price Index (WPI) to determine Aluminum Co. ("ALCOA")'s non-labor production costs.[44] After the parties had studied the suitability of the WPI as an objective index of those costs, they formed the assumption that it would be an accurate indicator.[45] However, due to the unforeseeable OPEC oil crisis, ALCOA's electricity costs rose much more quickly than did the WPI.[46] ALCOA filed suit against Essex, arguing that the parties were mutually mistaken in their estimate of the suitability of the WPI.[47] The district court found that ALCOA was entitled to reformation of contract.[48] Thus, reformation was granted even though the capacity of the WPI to work as the parties expected was not knowable at the time the aluminum contract was negotiated and executed.

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[39] *Atlas*, 895 F.2d at 751 (citation omitted).

[40] *Atlas*, 15 Cl. Ct. at 687.

[41] 499 F. Supp. 53 (W.D. Pa. 1980).

[42] *Atlas*, 895 F.2d at 751.

[43] Aluminum Co. of America v. Essex Group, 499 F. Supp. 53, 55 (W.D. Pa. 1980).

[44] *Id.* at 56.

[45] *Id.* at 58.

[46] *Id.*

[47] *Id.* at 60.

[48] *Id.* at 57.

The *Atlas* court of appeals rejected the plaintiffs' argument by pointing out the distinction between the existence and the outcome of a fact.[49] It illustrated that distinction with the famous case of *Sherwood v. Walker*,[50] in which the existence of the fact as to whether a certain cow was barren was known; but the outcome, that she was in fact fertile and pregnant, was not known.[51] Thus, in that case, relief was granted because there was a mutual mistake as to the outcome of a fact known to exist. Likewise, in *Aluminum Co.*, the existence of the capacity of the WPI was known at the time the contract was entered, but the outcome was not knowable at that time, and both parties formed a mistaken belief as to that outcome.[52]

Atlas is unlike *Aluminum Co.* and *Sherwood* because the existence of the fact of the hazard posed by the mill tailings was not known when the contracts were entered. Thus, the parties to the contracts in *Atlas* could not have formed any mistaken belief as to the outcome of the hazard because they were unaware of its existence.

The *Atlas* court of appeals concluded that the claims court was correct in ruling that because the hazard associated with the mill tailings was not knowable, there was no mutual mistake concerning that fact. Thus, there could have been no agreement as to the hazard which could be carried out through reformation of contract.[53]

2. Breach of Express Contract

All the plaintiffs except Atlas stated claims for breach of express contract, despite their inability to identify any specific provision that the government breached.[54] They alleged that under the contracts the producers were to be reimbursed for all reasonable costs incurred in the milling of the uranium and thorium and that tailings disposal was a reasonable cost covered by certain contract provisions.[55]

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[49] *Atlas*, 895 F.2d at 751.

[50] 66 Mich. 568, 33 N.W. 919 (1887).

[51] *Atlas*, 895 F.2d at 751, discussing Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887).

[52] *Aluminum Co.* and *Sherwood* are similar to *National Presto, supra* notes 32-38 and accompanying text. (In all three cases, unlike in *Atlas*, the fact at issue was negotiated and discussed in executing the contracts.).

[53] *Atlas*, 895 F.2d at 752.

[54] *Id.* at 752-53.

[55] *Id.* at 753.

The plaintiffs cited *Alvin, Ltd. v. United States Postal Service*[56] for their contention that a specific provision concerning stabilization of mill tailings was not necessary. In that case Alvin leased property to the Postal Service under an agreement which provided that the government would pay the "general real estate taxes" on the land.[57] After Proposition 13 passed, the California Constitution was amended so that the services formerly funded by "general real estate taxes" would in the future be funded by "special assessments," though the total levies basically did not change.[58] The government refused to pay for the special assessments, arguing that the letter of the contract did not require such payment. The *Alvin* court of appeals looked to the intent of the parties and concluded that the government was responsible for the payment of the special assessments because the change in the taxes was in name only, and it was understood by both Alvin and the Postal Service that the government was to pay such taxes, though the specific provision referred only to general real estate taxes.[59]

The court of appeals in *Atlas* distinguished *Alvin*, explaining that in that case the contract contained a provision which could be construed to include the new taxes, while in this case the plaintiffs had failed to point to a provision which could be construed to require the government to pay for stabilization of the tailings.[60] The court rejected the claims for breach of express contract because the plaintiffs failed to allege any provision breached by the government in refusing to pay for stabilization costs; the contracts contained negotiated fixed price provisions; the plaintiffs did not assert that the government had not paid the agreed prices; and the contracts did not contain any provision for stabilization of tailings.[61]

One of the plaintiffs, Western Nuclear, tried another theory for recovery on a claim of breach of express contract. It contended that the government unilaterally modified the contract when it enacted UMTRCA and adopted regulations to enforce the Act.[62] The court of appeals quickly rejected this argument,

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[56] 816 F.2d 1562 (Fed. Cir. 1987).
[57] *Id.* at 1563.
[58] *Id.* at 1563-65.
[59] *Id.* at 1566.
[60] *Atlas*, 895 F.2d at 753.
[61] *Id.*
[62] *Id.* at 754.

as it is barred by the Sovereign Acts Doctrine. Actions taken by the government as a sovereign are entirely separate from actions taken by it as a contractor.[63] When the government acts for the public good, under its sovereign power, those acts cannot be deemed to modify its contracts.[64] Thus, because the government was acting for the public good in passing UMTRCA and its regulations, those acts could not be deemed to modify its contract with Western Nuclear.[65]

3. Breach of Implied-in-Fact Contract

Some of the plaintiffs claimed breach of implied-in-fact contract, under two different theories of intent. Western Nuclear asserted the parties intended that the government would bear the additional costs of any acts it performed as a sovereign, while Homestake and Pathfinder argued the parties intended that the plaintiffs would be compensated for all production costs, including tailings costs.[66]

The court made short work of dismissing these claims. First, an implied-in-fact contract requires a meeting of the minds, though it may be inferred from the parties' conduct as a tacit understanding.[67] Because the costly stabilization of the tailings now necessary was not considered by the parties when they entered the contracts, there could have been no meeting of the

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[63] Jones v. United States, 1 Ct. Cl. 383, 384 (1865) ("The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for [its] acts done in the other.").

[64] Horowitz v. United States, 267 U.S. 458, 461 (1925) ("[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."); *Jones*, 1 Ct. Cl. at 384 ("Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."). *See also* Tony Downs Foods Co. v. United States, 530 F.2d 367, 370-71 (Ct. Cl. 1976) (where excess performance costs resulted from Executive Order, sovereign acts doctrine barred price relief).

[65] *Atlas*, 895 F.2d at 754.

[66] *Atlas*, 895 F.2d at 754.

[67] *See* Baltimore & O.R.R. v. United States, 261 U.S. 592, 597 (1923). ("[A]n agreement 'implied-in-fact,' founded upon a meeting of the minds, . . . although not embodied in an express contract, is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.").

minds on that point.[68] Second, an "implied contract . . . must be entirely unrelated to the express contract. The existence of an express contract precludes the existence of an implied contract dealing with the same subject."[69] The plaintiffs sought to imply a contract for the costs of stabilizing the tailings. But since the express contracts dealt with production costs, the court found that tailings costs were not entirely unrelated to the express contracts. Therefore an implied contract that the plaintiffs were to be compensated for tailings costs was precluded.[70]

B. The Taking Claim

Under UMTRCA, a licensee is responsible for decontamination, decommissioning, and reclamation of the mill and tailings prior to terminating its license.[71] Western Nuclear contended that the cost of compliance with the standards would exceed the value of the mill; thus, the requisite compliance is an unconstitutional taking under the fifth amendment.[72] But the court was unpersuaded by this argument.

The court of appeals began its analysis by observing that the court has limited power to order compensation. That power extends only to economic losses resulting from a government "taking" of private "property" for public use.[73] The court then stated that there is no "set formula" for establishing a taking of property, and that "ad hoc, factual inquiries into the circum-

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[68] *Atlas*, 895 F.2d at 754.

[69] ITT Federal Support Services v. United States, 531 F.2d 522, 528 n.12 (Ct. Cl. 1976) (citations omitted).

[70] *Atlas*, 895 F.2d at 755.

[71] 42 U.S.C.A. § 2113.

[72] *Atlas*, 895 F.2d at 756. The taking clause of the fifth amendment declares, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[73] *Atlas*, 895 F.2d at 756. *See also* United States v. Willow River Power Co., 324 U.S. 499 (1945), which states:

> The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision.

Id. at 502.

stances of each particular case" are necessary.[74] The *Atlas* court of appeals relied on the three factors of "particular significance" described by the United States Supreme Court in *Connolly v. Pension Benefit Guar. Corp.*[75] for determining whether a taking of property has occurred. These include: "(1) the character of the government action; (2) the economic impact of the regulation on the plaintiff; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations."[76] The court in *Atlas* then applied each factor to Western Nuclear's situation and determined that UMTRCA was not a compensable taking.[77]

1. The Character of the Government Action

The government action involved in *Atlas* is the UMTRCA regulatory scheme[78] under which the plaintiffs must spend money to stabilize and decommission the tailings and mills in order to terminate their licenses.[79] The forced expenditure of funds for the stated purposes is neither a physical invasion[80] nor a permanent appropriation of property[81] by the government, but rather is a safeguard for the public against radon emissions by the mill tailings.[82] Congress found that the tailings "may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare" requires their regulation.[83]

Congress may regulate the use of property for public health and safety reasons, pursuant to its police powers,[84] and although

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[74] *Atlas*, 895 F.2d at 757; Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986).

[75] 475 U.S. 211 (1986).

[76] *Atlas* 895 F.2d at 756-757; *Connolly*, 475 U.S. at 224-25; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[77] *Atlas*, 895 F.2d at 758.

[78] *See supra*, notes 4 and 5 and accompanying text.

[79] *Atlas*, 895 F.2d at 757; 42 U.S.C.A. § 2113.

[80] A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124 (citations omitted).

[81] In United States v. Causby, 328 U.S. 256 (1946), the Court found a compensable taking occurred when the government appropriated the airspace above plaintiffs' property and thereby destroyed the use of the farm.

[82] *Atlas*, 895 F.2d at 757.

[83] 42 U.S.C.A. § 7901.

[84] *Atlas*, 15 Cl. Ct. at 689.

a regulation may require private parties to spend money, no unconstitutional taking has occurred.[85] In *Connolly*, the United States Supreme Court indicated that a public program set up to promote the common good, which interferes with private property rights, is not a compensable taking.[86] In that case a federal statute required employers to pay more than their contracts obligated them to pay when withdrawing from a pension plan.[87] The Court found that the requirement was not a taking, because it was for the common good.[88]

Likewise, in *Atlas*, the plaintiffs were required by UMTRCA to pay more than the contract price for clean-up and disposal of the mill tailings. Because Congress was exercising its power to protect the public health, safety and welfare when it enacted UMTRCA,[89] the court found that the requirment was not a compensable taking.[90] Owners have an obligation to use property in a way that does not cause injury to the general public, and the government may enforce that obligation without compensating the private parties affected.[91] Thus, in *Atlas*, the plaintiffs had an obligation to use their property in such a way that the radioactive mill tailings did not injure the public, and Congress has the power to enforce that obligation by requiring stabilization and decommissioning without compensating those affected by the law.

2. The Economic Impact of the UMTRCA Regulatory Scheme

Western Nuclear complained that compliance with the UMTRCA requirements for stabilization and decommissioning of the mill tailings would cost more than the mill was worth.[92] The court of appeals stated that comparing the cost of compliance

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[85] *See, e.g., Connolly*, 475 U.S. at 226 ("[T]he mere fact that the employer must pay money to comply with [an] Act [of Congress] is but a necessary consequence of [the Act's] regulatory scheme.").

[86] *Connolly*, 475 U.S. at 225.

[87] *Id.* at 221.

[88] *Id.* at 225.

[89] 42 U.S.C.A. § 7901.

[90] *Atlas*, 895 F.2d at 757-58.

[91] *E.g.*, Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491-92 (1987); Allied-General Nuclear Services v. United States, 839 F.2d 1572, 1576 (Fed. Cir. 1988).

[92] *Atlas*, 895 F.2d at 758.

with the value of the plaintiff's mill did not indicate the economic impact of the Act.[93]

The claims court in *Atlas* pointed out that UMTRCA's impact on Western Nuclear is no more financially onerous than the impact of other environmental protection measures on other private parties.[94] For example, the Clean Air Act[95] sets national standards for permissible levels of air pollutants, and the fact that the costs of compliance may be so high as to be economically unfeasible is not even a consideration.[96] Hence, Congress has the power to enact statutes with potentially devastating financial effects, and the courts can provide no remedy for an aggrieved party.[97]

The court of appeals determined that Western Nuclear's allegations fell short of showing the kind of economic impact that would support a finding of an unconsitutional taking.[98] Similarly, in *Penn Central Transportation Co. v. New York City*,[99] in which a landmark preservation ordinance was challenged, the United States Supreme Court found that the severity of the impact of the regulation on the property owner's use of the land was insufficient to effect a taking.[100] In that case, Penn Central submitted plans to a city commission for the construction of an office building atop Grand Central Terminal, but was denied permission to go forward.[101] The building had been designated as a city landmark,[102] and thus fell within the development restrictions of the city ordinance. The Court observed that the law did not interfere with the owner's ability to make a profit from its investment in the land.[103] The Terminal could continue to operate as it had for many years, as a railroad terminal with offices and concessions.

In *Atlas*, the court of appeals noted that Western Nuclear had not alleged any government interference with its production

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[93] *Id.*

[94] *Atlas*, 15 Cl. Ct. at 690.

[95] 42 U.S.C.A. §§ 7401-7642 (1982).

[96] Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976).

[97] Lead Industries Assn. v. EPA, 647 F.2d 1130, 1150 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).

[98] *Atlas*, 895 F.2d at 758.

[99] 438 U.S. 104 (1978).

[100] *Id.* at 138.

[101] *Id.* at 116-17.

[102] *Id.* at 115.

[103] *Id.* at 136.

of uranium or its ability to make a profit operating the mill.[104] Thus, as in *Penn Central*, the regulations do not prevent the licensee from continuing in its present use of the property, nor do they make that use unprofitable. Therefore, Western Nuclear had not shown an economic impact requiring compensation under the fifth amendment.

3. Interference with Investment-Backed Expectations

Under the circumstances alleged,[105] the court of appeals concluded that the only expectation Western Nuclear could have had was that it would not be required to spend money to minimize the health and safety hazards presented by the mill tailings.[106] The court went on to declare that expectation an unreasonable commercial one.[107]

While the *Atlas* court did not set out a detailed analysis of this factor, the discussion in *Usery V. Turner Elkhorn Mining Co.*[108] indicates that the *Atlas* court's conclusion was correct. Like *Atlas*, *Usery* involved a statute that operated retrospectively.[109] The law required coal operators to compensate former employees disabled by pneumoconiosis, even if the employees had terminated their connection with the industry prior to the enactment of the statute.[110] The operators challenged the law under the due process clause of the fifth amendment of the United States Constitution.[111] However, the Supreme Court's reasoning in rejecting the argument is applicable to challenges under the fifth amendment's taking clause as well.[112]

The coal operators in *Usery* contended that the statute impermissibly imposed liability on them for past acts that, at the time they were completed, were legal and not known to be

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[104] *Atlas*, 895 F.2d at 758.

[105] *See supra* note 75 and accompanying text.

[106] *Atlas*, 895 F.2d at 758.

[107] *Id.*

[108] 428 U.S. 1 (1976).

[109] Title IV of the Federal Coal Mine Health and Safety Act of 1969, *amended by* Black Lung Benefits Act of 1972, 30 U.S.C.A. §§ 901-945 (1986).

[110] *Usery*, 428 U.S.

[111] The due process clause of the fifth amendment states that "[no person shall] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[112] *See Connolly*, 475 U.S. at 223. ("Although [*Usery v. Turner Elkhorn Mining Co.* was a] due process case[], it would be surprising indeed to discover now that . . . Congress unconstitutionally had taken the assets of the employer[] there involved.").

dangerous.[113] The Court stated that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."[114] The Court justified the statute as a rational measure which served the purpose of allocating costs generated by the dangerous condition to those who had profited from the fruits of the business.[115]

Likewise, in *Atlas*, the effect of UMTRCA regulations is to impose retrospective liability for stabilizing mill tailings, even though much of the residue was produced at a time when it was legal and not known to be dangerous to do so. Thus, the Act may upset the plaintiffs' expectations, but that does not make it unlawful. The tailings have created a dangerous condition because they emit radon gas, and UMTRCA addresses the specific need to minimize that hazard.

The nuclear industry has been highly regulated from its inception under the AEC's procurement program.[116] The *Atlas* court found that because the plaintiff does business in such a regulated field, it cannot now object to continued regulations adopted to achieve the legislative intent of Congress.[117] The *Atlas* plaintiffs had no reasonable expectation that such regulations would not be imposed. Thus, their imposition requires no compensation under the fifth amendment.

CONCLUSION

The plaintiffs in *Atlas v. United States*[118] set forth several good arguments[119] in their attempt to escape the financial burden presented by the UMTRCA regulatory scheme. But the court did not allow any of the plaintiffs' claims to defeat the legislative intent that licensees of uranium and thorium mills be required

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[113] *Usery*, 428 U.S. at 15.

[114] *Id.* at 15-16.

[115] *Id.* at 18-19.

[116] *Atlas*, 895 F.2d at 758.

[117] *Id.* (citing *Connolly*, 475 U.S. at 227 and quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

[118] Atlas Corp. v. The United States, 15 Cl. Ct. 681 (1988), *aff'd*, 895 F.2d 745 (Fed. Cir. 1990), *cert. denied*, No. 89-1705, U.S. , 111 S.Ct. 46 (Oct. 1, 1990).

[119] In addition to the claims discussed in this Comment, Western Nuclear presented equal protection and *ex post facto* claims, which the claims court transferred to the United States District Court for Colorado. *Atlas*, 15 Cl. Ct. at 692.

to clean up the hazardous conditions they created. This decision reaffirms the broad power of Congress to regulate industry for the health, safety and welfare of the general public. Because the court analyzed and rejected such a number of arguments, the decision both demonstrates and strengthens the courts' ability to deny relief to those whom Congress mandates must suffer the consequences of their own actions.

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