

## **Tar Creek**

### **The Quapaw Tribe, the EPA, and Tribal Self-Determination, 1980–2010**

*Raymond Anthony Nolan*

**D**uring most of the twentieth century in northeastern Oklahoma, the center of the American lead belt, children played on piles of toxic dirt in their schoolyards and backyards. Toxic dust polluted the air, and sinkholes opened in the towns without any warning. Due to the toxicity of the land, which was contaminated with the remnants of the once profitable mining industry, the federal government eventually moved the residents. Once these mines had been exhausted of their ore, the mining companies withdrew from them, and they sat vacant, filling with water. Toxic metals infused the water, which leached to the surface and into surrounding aquifers and lakes. A team from Environmental Protection Agency (EPA) Region 6 began cleaning Quapaw land in 1981 through the removal of polluted soil.<sup>1</sup> Eventually, the Quapaw Tribe Oklahoma Environmental Department would play a small role in the process, but the EPA never recognized its ability to take the lead on cleaning Quapaw land, despite the EPA's belief in tribal self-determination, which is the ability of a tribe to run its own affairs and is also known as sovereignty.<sup>2</sup> The federal government has maintained during the self-determination era, from 1970 to the present, that tribes can forge their own path, yet the EPA did not recognize the self-determination of the Quapaw Tribe. The necessity of this study lies in the reality that scholars have covered the Quapaw only minimally, as no histories of the modern Quapaw Tribe exist. Furthermore, scholars have barely analyzed the EPA vis-à-vis the Native peoples. All

that exists in the literature so far is the notion that the EPA has worked as a benevolent intermediary in tribal affairs, which the evidence in the present study contradicts.<sup>3</sup>

As a result, scholars have not adequately demonstrated that the EPA often interprets federal law to the detriment of Native nations. When dealing with tribes, the EPA ultimately decides how to apply the Clean Water Act (CWA, 1972), the Safe Drinking Water Act (SDWA, 1974), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 1980), also known as Superfund.<sup>4</sup> The EPA sets the scientific parameters to which tribes must acquiesce. In the case of the Tar Creek Superfund, EPA Region 6 did not permit the Quapaw Tribe to take the lead on cleaning its own land, despite the fact that federal courts have empowered the EPA in electing to defer leadership in such cases. This is somewhat surprising, given that the EPA began operations on December 2, 1970, at the dawn of the self-determination era and became a primary partner with tribes.<sup>5</sup> The EPA's Indian Work Group released a statement in 1983: "It would recognize tribal governments as the primary parties for policy formulation and implementation on Indian lands, consistent with agency standards and regulations. The Agency is prepared to work directly with Indian Tribal Governments on a one-to-one basis, rather than as subdivisions of other governments."<sup>6</sup> In 2000 President Bill Clinton reiterated this policy across the federal government with Executive Order No. 13,175, which stated that "the United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."<sup>7</sup> In 2010 former EPA administrator Lisa Jackson established the Office of International and Tribal Affairs to ensure that "we approach our relationship with the sovereign tribal nations within our own country in the same way we approach our relationship with sovereign nations beyond US borders."<sup>8</sup>

The concepts of the federal-tribal trust relationship and self-determination are at the center of the issue. The Supreme Court with Chief Justice John Marshall, who served in this position from 1801 to 1835, established the initial grounds of the federal-tribal trust relationship. The court first bypassed tribal self-determination in *Fletcher v. Peck* (1810) when it did not consider the Cherokees the rightful owners of their land in Georgia. The majority opinion ruled that Georgia could sell land within its limits as long as the state constitution permitted such sale.<sup>9</sup> The court maintained a lack of respect for tribal ownership of land in *Johnson v. McIntosh* (1823) when it ruled that Native Americans could not hold title to land in the United States. Marshall argued that Joshua Johnson's initial purchase of land from the Piankeshaw Tribe in 1775 was not legal. On the other hand, William McIntosh's 1818 purchase from the federal government was legal in comparison.<sup>10</sup> However, in response to powerful states' rights arguments from Georgia, Marshall's opinion eventually evolved on this subject eight years later.



In *Cherokee Nation v. Georgia* (1831) Marshall opined that the Cherokee Nation did not need to abide by the laws of Georgia. However, the Court also ruled that the Cherokee Nation did not wholly constitute a foreign nation, despite its treaties with the federal government. Marshall wrote that the Cherokee Nation was one of many "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."<sup>11</sup> The Court's decision was a double-edged sword. On the one hand, it diminished the power of tribes to act as foreign nations. On the other, it also stipulated that it was the responsibility of the federal government to enforce laws in the protection of Native Americans—and specifically to protect Native peoples from arbitrary state laws.<sup>12</sup>

The Court, under Marshall's leadership, further outlined the federal-tribal trust relationship in *Worcester v. Georgia* (1832) when it ordered the state to release two missionaries who had broken state law by entering Cherokee land, because the federal government, per the Constitution, possessed exclusive authority over tribal affairs.<sup>13</sup>

As for self-determination, the Lakota historian and activist Vine Deloria Jr. defines tribal sovereignty as the ability to "determine one's own course of action with respect to other nations [both Indian and other]."<sup>14</sup> Fred Hoxie and other scholars have echoed Deloria's definition. Hoxie writes that "Indian peoples have exhibited a continuous allegiance to their territories and to the goal of governing their homelands without interference."<sup>15</sup> The National Congress of American Indians describes the essence of tribal sovereignty as "the ability to govern and to protect the health, safety, and welfare of tribal citizens within tribal territory."<sup>16</sup> Notwithstanding, historians of Europe and Asia, as well as Native journalist Dina Gilio-Whitaker, deem the term "sovereignty" as inappropriate in reference to tribes so as to not conflate it with the use that European historians employ when referring to state sovereignty. Moreover, since European nations have historically not recognized tribal sovereignty, "self-determination" is the term that more appropriately applies to Native Americans' abilities of self-governance outside of a colonizing power.<sup>17</sup>

Three pieces of legislation are at the heart of the self-determination era: The Indian Civil Rights Act of 1968, the Indian Education Act of 1972, and the Indian Self-Determination and Education Assistance Act of 1975.<sup>18</sup> The Indian Civil Rights Act negated Public Law 280, which granted states the legal authority to prosecute criminal offenses on tribal land.<sup>19</sup> The Indian Education Act provided vocational training for teachers, fellowships for Indian students, and basic research for Indian education. Lastly, the Indian Self-Determination and Education Assistance Act allowed tribes to approve the administration of programs on tribal lands by the Bureau of Indian Affairs (BIA). Additionally, the law gave the tribes the power to contract with the BIA

in the administration of assistance programs, which contrasts with the BIA's past practices of administering these without tribal consent.<sup>20</sup>

Also critical to this study is an examination of the EPA's ability to judge tribal affairs. Two court decisions granted the EPA the power to carry out the mission of environmental protection as defined by the laws passed by Congress. These cases enable the EPA to recognize tribal self-determination. In the case of the Tar Creek Superfund, these cases provided the EPA with legal authority in allowing the Quapaw Tribe the lead in cleaning the region, which the EPA decided against. The most important case was *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984). This case proved pivotal because the Supreme Court allowed the EPA to issue permits allowing corporations to fix only one air-polluting source as long as the total air pollution from the factory had not increased, even though there were more sources of the pollution. The Supreme Court's decision granting the EPA these new allowances became known as the "bubble concept." The case stemmed from the Court of Appeals for the District of Columbia and its findings that the EPA had misconstrued Congress's intent in the amendments to the Clean Air Act of 1977. The Supreme Court overturned the lower court decision, holding that where Congress had left a "hole" in the legislation, the federal agency in charge could use its expertise to render a judgment.<sup>21</sup> As such, the Court deemed the EPA the expert on environmental legislation.

The U.S. Court of Appeals for the Ninth Circuit applied the same rationale in *State of Washington, Department of Ecology v. United States Environmental Protection Agency* (1985) when it decided that Washington could have control over all the federal hazardous waste programs in the state but that it could not regulate such programs on tribal reservations. Lawyers representing Washington argued that the Resource Conservation and Recovery Act (RCRA) of 1976 allowed states to develop their own hazardous waste programs. The Ninth Circuit countered that while RCRA was not ambiguous in this regard, federal agencies had the ability to interpret federal statutes. By leaving a gap in the statute, Congress gave the EPA the ability to render judgments as necessary.<sup>22</sup>

At the Tar Creek site, the EPA only allowed the Quapaw Environmental Department to be involved in the cleaning process to the extent that Congress defined roles for Native tribes in CERCLA, although, as demonstrated, the EPA clearly possessed the authority to go further.<sup>23</sup> Congress has not amended CERCLA to include a provision for "treatment-as-a-state" status, unlike the Safe Drinking Water Act. When the EPA approves a "treatment-as-a-state" application, the tribal environmental department can operate a program independently of the federal government in a similar allowance afforded to a state, but the tribe must follow EPA interpretations of federal law.<sup>24</sup> It should



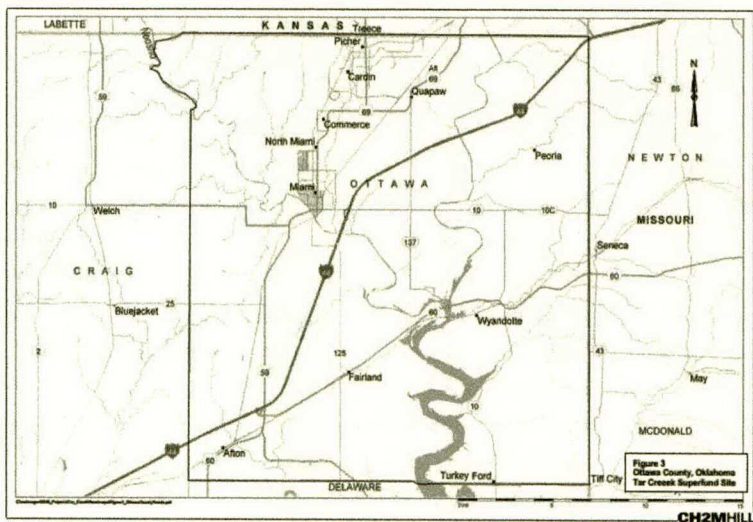


Figure 1. Ottawa County, Oklahoma. CH2M Hill, contract no. 68-W6-0036, "Five Year Review Report: Third Five Year Review Report for the Tar Creek Superfund Site, Ottawa County, OK," September 2005, 93.

be clear, though, that the courts have provided the EPA the leeway to interpret federal legislation, and this provides the EPA the authority to have permitted the Quapaw Tribe to take the lead in cleaning the region. Instead, the EPA Region 6 officials limited the Quapaw Tribe's involvement in the Tar Creek Superfund to what was designated as investigations and feasibility studies, not actual removal of toxic soil, termed "remediation," nor authorship of standards for clean land.<sup>25</sup>

## BACKGROUND TO THE SITE

The Tar Creek Superfund site encompasses the surrounding residential, commercial, and industrial areas in the towns of Picher, Quapaw, Commerce, Cardin, and Miami, all in Ottawa County of northeastern Oklahoma. Approximately 19,500 people lived near the mines before the federal government began relocating residents. Tar Creek flows through the center of the site and releases into the Neosho River, located south of the site, which ultimately discharges into Grand Lake in southern Ottawa County. Mine waste seeped into the ground, polluting the Boone and Roubidoux Aquifers in the area. The Boone Aquifer supplied private wells with water, and the Roubidoux Aquifer provided drinking water for the local towns.<sup>26</sup>

The legacy of mining in the region began when the federal allotment of reservations in 1887 disposed the Quapaws. Allotment involved the federal government's parceling of Native land for farming by individual Native Americans and their families.<sup>27</sup> In 1893 Congress

proposed two-hundred-acre allotments for each enrolled member of the Quapaws.<sup>28</sup> By the end of 1894, 234 Quapaws had received 240 total acres in allotments.<sup>29</sup>

It did not take the federal government long to force the Quapaws into signing mining leases. As settlers from the east coming to Oklahoma, the Quapaws needed avenues for profit, and mining was a natural step, as mining was successful throughout the United States.<sup>30</sup> The Quapaws signed the first leases on September 23, 1895, which stated that the Quapaws were incompetent and could not improve their allotments. The BIA justified allowing non-Quapaws to mine the land because it assumed the Quapaws would not take care of the land in a way deemed useful by the federal government.<sup>31</sup> During the early years of the mines, many wealthier Quapaws accepted the arrival of the mining corporations, as it brought them more wealth, but the Interior Department restricted leases.<sup>32</sup>

After World War II the federal government encouraged mining development in other countries, and thus the mines in Oklahoma became less lucrative. Consequently, mining companies operating on Quapaw land slowed production, which resulted in lower royalty payments to Quapaws. During 1956 just 31 Quapaw mineral leases out of 172 tracts, which covered 16,054 acres, were producing ore. By 1957 the mining companies had virtually abandoned the Quapaw lands.<sup>33</sup> Oklahoma as a whole saw a considerable decline in lead mining between 1948 and 1957. The average lead concentrate per year between 1948 and 1952 was 23,979 tons. Conversely, mining companies extracted only 10,198 tons of lead concentrate in 1957.<sup>34</sup>

In the 1960s the federal government began to address the pollution caused by mining. In 1966 the United States Bureau of Mines (USBM) completed the first phase of a nationwide study of the reclamation and restoration problems, or the cleaning of land, posed by surface mining. The USBM also studied acid mine draining, which was its primary concern, and planned to find ways to treat acid water from the mines. However, pollution was not a major priority, as only a single paragraph of a twenty-seven-page summary published by the USBM in 1966 was devoted to the subject. Other concerns, such as stockpiling uranium for military use, were higher on the USBM's agenda.<sup>35</sup>

Mining companies polluted immensely on Quapaw land, producing more than five hundred million tons of waste in the areas of Oklahoma, Kansas, and Missouri. Although companies removed more than 75 percent of mining waste, more than one hundred million tons of chat, or dry waste, still remained in the area by the 1980s.<sup>36</sup> The mining companies left tailings, another form of dry waste, in unlined flotation ponds near the surface, where the chemicals seeped into the ground.<sup>37</sup> During the early to mid-twentieth century, the mines often had problems with flooding, which mining companies usually drained



with pumps. When the mines ceased operations, the companies left underground cavities of one hundred thousand acre-feet. In addition, exploratory holes, which are used to locate ore, would fill with water. In the Picher field alone, mining companies left approximately one hundred thousand such exploratory holes. On the Oklahoma side of the field, there were 1,064 mine shafts, and the companies had abandoned numerous wells by the 1980s.<sup>38</sup>

The mining companies had pumped significant amounts of water out of the ground in order to mine the underground rock formation, leaving the ground open to pollution. Once the companies ended their mining, they filled the mines with sulfide materials that had been oxidized through air exposure. These metallic sulfide materials leached into the ground and lowered the pH in the groundwater. By 1979 acidic water had discharged from several locations in the abandoned mines into the groundwater, which now contained lead, zinc, and cadmium, each dangerous for humans. Further, wind spread dust from the chat piles throughout the region. Once precipitation made contact with the chat, more poisonous metals leached into the ground.<sup>39</sup> When mining companies left, the tribe had to clean up the mess.

### CLEANING THE REGION

In 1980 Oklahoma governor Frank Keating formed the Tar Creek Task Force in response to the discovery of a large ditch, seventy-five feet wide and deep, that had formed southwest of the town of Picher. The task force was comprised of twenty-four local, state, and federal agencies charged with investigating the effects of acid that had drained into water sources in northeastern Oklahoma. Based upon the findings of Keating's task force, the situation was dire, and the EPA placed the Tar Creek site on the National Priority List on July 27, 1981. The EPA uses the National Priority List to identify sites that need cleaning with the money from the massive federal fund appropriated under CERCLA.<sup>40</sup>

The cleaning of a Superfund site, both then and now, involves several steps, all of which need explaining in order to fully understand the ways that the EPA attempted to clean this area. First, the EPA conducts a Remedial Investigation and Feasibility Study (RI/FS). Typical remedial investigations include data collection and site characterization, which are often performed in unison with the feasibility study, defining possible remedies. The remedial investigation also involves sampling and monitoring. The next step is to propose a remedy and to present a plan to the public. Finally, the EPA reviews public comments and consults with the state on the plan. The final recommendation is presented in a Record of Decision (ROD) detailing all the facts of the proposed process. The EPA often divides a complex remedial action into smaller phases, called Operable Units (OU).<sup>41</sup>

The EPA signed a cooperative agreement with the Oklahoma State Department of Health on June 16, 1982, to clean Tar Creek, but the EPA left the Quapaw Tribe out of the agreement.<sup>42</sup> The EPA began the restoration of Operable Unit 1 (OU 1) on June 6, 1984, which included water diversion, the sealing of wells, and the monitoring of groundwater and surface water.<sup>43</sup> The ROD for OU 1 addressed the poisoning of Tar Creek by acidic water from the mines and the downward migration of acidic water from the Boone Aquifer to the Roubidoux Aquifer that had occurred through wells connecting the two aquifers. The EPA sealed sixty-six abandoned wells, which stopped the transfer of acid water to the Roubidoux Aquifer. All told, the EPA sealed eighty-three wells.<sup>44</sup> The state of Oklahoma had completed the ROD for OU 1 by 1986, and the EPA continued to monitor the groundwater in compliance with this ROD. By 1991 the EPA had no further plans for Tar Creek, and the Quapaw Tribe did not participate in remedial or feasibility studies during that year.<sup>45</sup>

The EPA tasked contractors to conduct its first five-year review in 1994, still without requesting assistance from the tribe. The contractors tested for lead, arsenic, cadmium, and zinc at busy areas such as parks and schools. The EPA also sampled soil in residential areas beginning on March 21, 1996. Shortly after, the EPA found that the wind blowing the soil, as opposed to chat, had contaminated residences and thus began soil remediation in these areas in September 1996.<sup>46</sup> The EPA installed four new monitoring wells in 1997 and yet another in 2000 to monitor the Roubidoux Aquifer. The scope of ROD OU 2 included the removal of soil from and backfilling of residential yards. The Army Corps of Engineers remediated thirteen hundred yards of soil from January 1998 until July 2000 and then hired private contractors to finish the work.<sup>47</sup>

In September 1998, in the middle of the remediation process, the EPA entered into a cooperative agreement with the Inter-Tribal Environmental Council of Oklahoma (ITEC) and the Quapaw Tribe with the goal of enhancing tribal involvement in the Superfund. Initially, the ITEC would conduct remediation studies for two industrial properties owned by the Quapaws and provide technical support, training, and a variety of environmental services for the member tribes.<sup>48</sup> The EPA awarded "approximately \$122,000" to the ITEC for the program, as well as "assistance funding" to the Quapaw Tribe. In early 1999 the EPA awarded the ITEC and the Quapaw Tribe an undisclosed amount of money in order to conduct a remedial investigation and feasibility study on the mining waste polluting Beaver Creek, which flowed through Quapaw ceremonial grounds.<sup>49</sup> The tribe complained that once the plan was drafted, the EPA withdrew the funds, thereby limiting the tribe's ability to even help with remedial investigations.<sup>50</sup> Later in 1999 the EPA awarded approximately \$36,000 to the ITEC and



another undisclosed amount of funds to the Quapaw Tribe. In 1999 the EPA also awarded Oklahoma \$150,000 to address tailings at the site, including restriction of chat usage and dust suppression, in addition to erosion control.<sup>51</sup> Although the EPA had awarded money to the Quapaw Tribe, it was not for the purpose of operating its own soil remediation. Because CERCLA did not require the EPA to recognize tribal self-determination, the EPA only allowed the Quapaw Environmental Department to study the region. The EPA alone had final responsibility for remediation of tribal land under CERCLA, despite the fact that it had authority to involve the Quapaw Tribe more in the process.<sup>52</sup>

In the early 2000s the Quapaw Tribe left the ITEC and founded its own environmental department. The EPA then awarded \$1,981,667 to the Quapaw Tribal Environmental Office Superfund Management Assistance Program in order to ensure the tribe's "meaningful and substantial involvement" in the Superfund process, but this did not result in meaningful involvement. Besides the Quapaw Tribe's assistance with residential remediation in OU 2, the tribe was involved in the remedial activity OU 4, initiated in 2003 in accordance with the ROD. Quapaw officials hired consultants who could assist in understanding CERCLA-related activities and aid tribal environmental staff to review the technical documents related to OU 2, OU 4, and later OU 5 of 2006. The consultants were retained to map landownership on the reservation, ensuring that the EPA properly identified property rights.<sup>53</sup> Even with all these developments, the EPA still did not consign the project to the tribe.

In 2000 the EPA ruled that the Tar Creek Superfund site was too polluted to be completely cleaned. Prior to the ruling, the Oklahoma Water Resources Board (OWRB) concluded that impacts from pollution to Tar Creek were irreversible. As a result, the OWRB designated Tar Creek a secondary recreation water body and lowered fishing status to "habitat-limited." Secondary recreation denotes that human ingestion is limited. The EPA agreed with the OWRB's assessment of Tar Creek and decided that in order to decontaminate Tar Creek, it would have to drain the federal Superfund coffer.<sup>54</sup> In other words, it was impossible to meet the water quality standards for surface water in Tar Creek.<sup>55</sup> This is despite the fact that the Superfund account for the entire EPA was valued at \$1.7 billion annually until 1995, when the taxes on corporations producing chemicals and oil expired. The Quapaw Tribe had no say in these rulings.<sup>56</sup>

In 2002 the Quapaw Tribe turned to the state of Oklahoma for help. Due to the federal trust relationship, states are not permitted to operate programs on tribal land, but the tribe looked for help wherever it could find it. The Oklahoma Department of Environmental Quality (ODEQ) conducted a study of the fish in the Neosho and Spring Rivers in 2002 and 2003, respectively. The tribes in the region asked for the testing because traditional customs involved eating whole

local fish. ODEQ found that fish from the rivers were safe for consumption, concluding that skinless fish filets could be consumed at a rate of up to six eight-ounce meals per month, but bones from fish, whether whole-eviscerated or whole-uneviscerated, were not safe.<sup>57</sup> Oddly, in 2002 the EPA judged fish samples taken from the Roubidoux Aquifer to be safe for human consumption, although five wells of the twenty-one sampled failed the secondary drinking water standard for iron, and one of the five failed the secondary standard for sulfate. Secondary standards were not based in health science but rather on aesthetics, taste, and odor.<sup>58</sup> As water quality and fish consumption became issues of survival in northeastern Oklahoma, the Quapaw Tribe continued to make requests to the federal government and even turned to the state of Oklahoma for judgments supporting tribal needs.

The Quapaw Tribe questioned the EPA's work, especially at the Roubidoux Aquifer. The EPA reported that it performed floodplain sampling between Commerce and Miami, Oklahoma, but the Quapaw Tribe argued that the EPA did not perform any such sampling.<sup>59</sup> As of 2005, when the EPA conducted its third five-year review, acidic water was detected at several Roubidoux wells. The EPA argued that the effectiveness of the well-plugging program could not yet be determined, but neither the EPA nor the ODEQ found drinking water that failed to meet the standards of the Safe Drinking Water Act.<sup>60</sup>

In 2003 the objective of OU 4 was to perform a remedial investigation and feasibility study in regard to chat piles and mining waste in nonresidential areas surrounding the Tar Creek site. In 2006 the aims of OU 5 in 2006 were to treat the pollution of the Spring and Neosho Rivers.<sup>61</sup> Despite these efforts, the severity of the pollution caused the residents to move. The Water Resources Development Act of 2007 allocated \$30 million to the EPA for the agency to implement a plan to remove residents from the Tar Creek Superfund area. The EPA recommended only the removal of the residents who were under the greatest threats of chemical exposure. The EPA predicted the human removal to last thirty years.<sup>62</sup> In 2005, before the passage of the Water Resource Development Act, Oklahoma spent \$3 million to relocate a total of fifty-two families with children under six years of age. That year, the initial round of buyouts compensated \$54,029 per home, or \$37 per square foot. Three years later, the second group of buyouts compensated \$65,624 per home, or \$52 per square foot. The relocation trust presented 878 buyout offers, with 51 being rejected. Before the buyouts, Picher had a population of 1,640 residents, the town of Cardin had 150 residents, and the former town of Hockerville had no residents. The federal buyout of homes and businesses around the Tar Creek Superfund had almost been completed by the end of 2010. Initial projections estimated the buyout to cost between \$55 million and \$60 million, but it ended up totaling \$46 million.<sup>63</sup>



## THE TRIBAL VIEWPOINT

On June 29, 2004, Tim Kent, the Quapaw environmental director, told investigators at CH2M Hill, the firm with which the EPA had contracted to finish the third five-year review, that he would have liked the tribe to have more control of the resources for cleaning the site. As part of the review, investigators at CH2M Hill acquired opinions about the process from Kent and other local leaders. Kent stated that the tribe was developing water quality standards of its own, suggesting that the tribe had the ability to carry out its own environmental recovery plan. CH2M Hill asked Kent for his overall impression of the work done at the site since the completion of the second five-year review. Kent replied that he was dissatisfied that OU 1 had not worked; worse, it seemed the EPA had given up on it. He thought that existing technologies could be used to finish OU 1. He also suspected that water from mines might be migrating into the Roubidoux Aquifer through other means than through faulty well casings.<sup>64</sup> In other words, Kent questioned if the EPA had complete control of the situation.

Regarding the soil remediation efforts, Kent remarked that he was pleased. If there was a problem with soil remediation, it occurred at Beaver Creek, where there was too much water runoff, in his opinion. He informed the EPA about the issue, but as of 2005, it seemed the EPA was still looking into it.<sup>65</sup>

Regarding OU 4, Kent stated that he believed it was too narrow in scope. He did not like the fact that the remedial investigation and feasibility study addressed only chat piles, leaving other issues unresolved, such as the sediment problem. The tribe asked the EPA to assign another operable unit to deal with the sediment problem at the site, which the EPA declined to do.<sup>66</sup>

Regarding the remedial operations, Kent applauded the outcomes, because the lead levels in the blood of local children tested lower, which Kent attributed to the remediation project. Even so, Kent was concerned about the buyout program because of the potential for infringement on the federal trust responsibility. Furthermore, Kent wanted notice whenever work was conducted on tribal land. Kent believed that CERCLA allowed greater involvement by tribes, not less, and argued that the tribe should have complete control of the Superfund process.<sup>67</sup> However, the EPA declined Kent's request, citing that it did not need to surpass the regulations of CERCLA, which did not include a "treatment-as-a-state" provision for tribes to take over site evaluation and planning.<sup>68</sup>

## THE TRIBE SUES THE EPA

The Quapaw Tribe sued the EPA on May 5, 2004, due to its "intermittent, delayed, stalled and ill-defined" attempts at cleaning the region,

an effort by the tribe to exert its self-determination on the Tar Creek Superfund site.<sup>69</sup> The tribe sued under a CERCLA provision that allows a natural resource trustee to sue because of Natural Resource Damages (NRDs). The tribe's case, *The Quapaw Tribe of Oklahoma et al. v. Blue Tee Corp. et al.* (2008), which ascended to the Tenth Circuit Court of Appeals, originated against seven mining companies. Later on, the tribe filed an amended suit against the federal government. Leadership from the tribe believed that danger from lead exposure and chat piles had existed since the 1930s and that the EPA should have acted much earlier to clean the region. The EPA, instead, did not begin soil remediation until 1996, even though Tar Creek was added to the National Priority List in 1981. The EPA also did not investigate the chat piles and tailing ponds until two decades after initial discovery. Furthermore, the tribe criticized the EPA for waiting until 1994 to issue its first five-year review. Responding to Quapaw complaints, the EPA argued that since Tar Creek was a complex site, it had multiple operable units, which take years to remedy.<sup>70</sup>

The Tenth Circuit Court did not rule in favor of the Quapaw Tribe. First, there was a technicality. The tribe could not file suit for natural resource damages until remediation efforts at a Superfund site were completed.<sup>71</sup> The court decided that while claims for losses were allowed under CERCLA, it could not grant the tribe a financial settlement, as there was no precedent for such action against the EPA under this law. In *New Mexico v. General Electric* (2006), the court found that if preemptive money was allowed for recovery, then a remediation job might not be finished, since money provided for remediation and recovery might be used for another purpose. The Quapaw Tribe had hoped to receive money for damages and for loss of use in the interim, as the claim did not interfere with the EPA's ongoing work at the Superfund site.<sup>72</sup>

Ultimately, the Tenth Circuit Court did not agree with the Quapaw Tribe's argument that the EPA was not "diligently proceeding" to clean the area, despite the fact that there was no defined time frame for the EPA to complete the remedial investigation and feasibility study for OU 5. The tribe cited the RCRA's "diligently proceeding" provision, because RCRA allowed a citizen to bring suit. The problem for the court was rooted in the fact that RCRA and CERCLA were not similar enough in the most relevant ways, so the court did not deem it a sufficient parallel example. Furthermore, RCRA did not define "diligently proceeding." The court interpreted that the law intended to provide federal agencies the ability to make professional judgments in terms of professional analysis without interference from the courts. For the court, there was simply no way to judge the value of a claim until the EPA had completed full remediation. The mere fact that chat removal could take thirty years did not equate to the EPA acting without diligence. The EPA's assessment of the risks to humans from chat pile pollution and mining waste differed from the tribe's findings. This did not



mean the EPA was acting without diligence, especially given the fact that the EPA had started the process of moving families to other locations.<sup>73</sup> In the end, the Quapaw Tribe tried to define appropriate remediation methods, but the Tenth Circuit Court disagreed. Instead, the tribe was left to allow the EPA to clean tribal land in its own manner.

## CONCLUSION

Mining companies had polluted Quapaw land for the majority of the twentieth century, yet the tribe did not control its own destiny in regard to cleaning the region. The EPA offered the Quapaw Environmental Department opportunities to perform remedial investigations and feasibility studies, spending nearly \$2 million in that effort, but the department was not allowed to clean the area itself. According to Ursula Lennox, the remedial project manager for the Tar Creek Superfund site: "The EPA's mission is to protect human health and the environment, and the funds designated for this project enables this mission to be accomplished. Congress has given the EPA the authority to clean up uncontrolled or abandoned hazardous waste sites, but, to ensure that the tribes, public, and communities are engaged in this effort, various grants and tools are awarded and used."<sup>74</sup> Tribal environmental director Tim Kent requested that the Quapaw Tribe lead the cleaning process for the region, but the EPA was not willing to let the Quapaw Environmental Department take the lead.<sup>75</sup> Court decisions such as *Chevron v. USA Inc. v. Natural Resources Council* (1984) and *State of Washington, Department of Ecology v. United States Environmental Protection Agency* (1985) clearly gave the EPA the authority to transfer leadership to the Quapaw Tribe on site remediation and other processes. Furthermore, Congress affords the EPA a great amount of leeway in regard to interpreting federal legislation. Also, the EPA has been known to lobby for legislation and initiatives it finds important; thus, if there are questions from Congress about tribal participation, the EPA will push for its agenda.<sup>76</sup> Ultimately, the EPA could have given the Quapaw Tribe more control over the Tar Creek Superfund site.

## AUTHOR BIOGRAPHY

**Raymond Anthony Nolan** holds a PhD in American history from Kansas State University (2015). He teaches at Colby Community College and Colby High School in Colby, Kansas.

## NOTES

1 EPA Region 6 covers Oklahoma, Texas, New Mexico, Arkansas, and Louisiana. Environmental Protection Agency, "EPA Region 6,"

EPA.gov, accessed July 6, 2016, <https://www.epa.gov/aboutepa/epa-region-6-south-central>.

- 2 Dina Gilio-Whitaker, "Indian Self-Determination and Sovereignty," *Indian Country Today*, accessed October 1, 2015, <http://indiancountrytodaymedia.network.com/opinion/indian-self-determination-and-sovereignty-147025>. Gilio-Whitaker argues convincingly that the term "sovereignty" is not appropriate to refer to tribal self-determination. She explains that sovereignty refers to the ability of European states with hierarchical structures to rule their nations.
- 3 For histories of the Quapaws, see W. David Baird, *The Quapaw Indians: A History of the Downstream People* (Norman: University of Oklahoma Press, 1980); Larry G. Johnson, *Tar Creek: A History of the Quapaw Indians, the World's Largest Lead and Zinc Discovery, and the Tar Creek Superfund Site* (Mustang, Okla.: Tate, 2008); and Vern E. Thompson, "A History of the Quapaws," *Chronicles of Oklahoma* 33 (Autumn 1955). The leading scholarship on the subject of the EPA and tribal self-determination comes from anthropologist Darren Ranco in his unpublished dissertation, "Environmental Risk and Politics in Eastern Maine: The Penobscot Nation and the Environmental Protection Agency" (PhD diss., Harvard University, 2000). In it, he details the proceedings in the late 1990s between the Penobscots of Maine and the EPA to set dioxin standards for the Penobscot River. Ranco argued that the EPA had the authority to recognize tribal determination. Former EPA official Dan McGovern framed the EPA as a benign middleman in *The Campo Indian Landfill War: The Fight for Gold in California's Garbage* (Norman: University of Oklahoma Press, 1995), which detailed the attempts by the Campos of San Diego County in the early 1990s to build a waste dump east of San Diego. McGovern cast the EPA as an arbitrator in a discussion between two parties of equal status but still did not recognize the tribe's right to self-determination. Marjane Ambler, in *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence: University Press of Kansas, 1990), argues that the EPA was a partner with tribes that worked within the guidelines that Congress set forth for tribes. A similar discussion of cooperation between the EPA and tribes comes from LaDonna Harris, Stephen M. Sachs, and Barbara Morris in their chapter, "Honoring Indian Nations' Sovereignty: Building Government to Government Relations between Tribal Governments and Federal, State, and Local Governments," in *Re-Creating the Circle: The Renewal of American Indian Self-Determination*, ed. Harris, Sachs, and Morris (Albuquerque: University of New Mexico Press, 2011). They explained the EPA's efforts through its Indian Work Group in 1983 to recognize tribes as independent nations that could be partners with the EPA to protect the environment. Further, through the provision in the Water Quality Act of 1987 that treats tribes like states for purposes of setting water quality standards, the EPA had become a model of how the federal government should act toward tribes.
- 4 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 et seq. (1972); Safe Drinking Water Act, 42 U.S.C. § 300 et seq. (1974); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq. (1980).
- 5 EPA, "The Guardian: Origins of the EPA," EPA.gov, Spring 1992, accessed October 4, 2015, <http://www2.epa.gov/aboutepa/guardian-origins-epa>.



- 6 Harris, Sachs, and Morris, "Honoring Indian Nations' Sovereignty," 125–26.
- 7 Exec. Order No. 13,175, November 6, 2000, accessed August 14, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.
- 8 Dave Ryan, "EPA Announces the New Office of International and Tribal Affairs," accessed September 13, 2015, <http://yosemite.epa.gov/opa/admpress.nsf/df3c84313061411f8525740a0057efe1/59b590ea7955e143852576e8006137f71opendocument>.
- 9 Fletcher v. Peck, 10 U.S. 87 (1810); Sydney Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994), 28–29; Alex McBride, "Landmark Cases: Fletcher v. Peck (1810)," PBS, *The Supreme Court*, accessed April 2, 2015, [http://www.pbs.org/wnet/supremecourt/capitalism/landmark\\_fletcher.html](http://www.pbs.org/wnet/supremecourt/capitalism/landmark_fletcher.html).
- 10 Johnson v. McIntosh, 21 U.S. 543 (1823); Vine Deloria Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 4.
- 11 Harring, *Crow Dog's Case*, 30–31; Cherokee Nation v. Georgia, 30 U.S. 15–17 (1831).
- 12 Harring, *Crow Dog's Case*, 30–31.
- 13 Worcester v. Georgia, 31 U.S. 561 (1832); Harring, *Crow Dog's Case*, 32–33.
- 14 Vine Deloria Jr., "Self-Determination and the Concept of Sovereignty," in *Economic Development and American Indian Reservations*, ed. Roxanne Dunbar Ortiz (Albuquerque: University of New Mexico Indian Studies, 1979), 22.
- 15 Dave Edmonds, Fred Hoxie, and Neal Salisbury, *The People: A History of Native America* (New York: Houghton Mifflin, 2007), ix.
- 16 National Congress of American Indians, "An Introduction to Indian Nations in the United States," accessed May 19, 2014, [http://www.ncai.org/about-tribes/Indians\\_101.pdf](http://www.ncai.org/about-tribes/Indians_101.pdf).
- 17 Gilio-Whitaker, "Indian Self-Determination"; David Graff (associate professor of history, Kansas State University), in discussion with the author, October 19, 2015.
- 18 Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. (1968); Indian Education Act, 86 Stat. 334 (1972); Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 et seq. (1975).
- 19 Pub. L. No. 280, 18 U.S.C. § 1162 (1953).
- 20 Deloria and Lytle, *American Indians*, 22–24.
- 21 Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
- 22 State of Washington, Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (1985); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (1976).
- 23 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq. (1980). The act was known as Superfund due to the massive amount of money earmarked by the government to clean sites.
- 24 40 C.F.R. § 147.2912, 2902.
- 25 It should be noted that the EPA is a large agency with many employees. For the sake of simplicity, "EPA" represents "EPA Region 6" throughout the rest of the article.

- 26 CH2M Hill, contract no. 68-W6-0036, "Five Year Review Report: Third Five Year Review Report for the Tar Creek Superfund Site, Ottawa County, OK," September 2005, 5, US EPA, *Tar Creek Superfund Site: Tri-State Mining District—Chat Mining Waste* (Washington, D.C.: GPO, 2007), 1.
- 27 Indian General Allotment Act, 25 U.S.C. § 331 (1887).
- 28 Allotment of Lands to Certain Indian Tribes, H.R. 10,223, H.R. Rep. No. 2,256, at 1 (January 17, 1893).
- 29 Baird, *The Quapaw Indians*, 141–42.
- 30 Kenneth S. Johnson, "Mining and Minerals," Oklahoma Historical Society, 2009, accessed October 22, 2017, <http://www.okhistory.org/publications/entry.php?entry=M1041>.
- 31 Mining Lease, James A. Newman, Quapaw, September 23, 1895; Mining Lease, Alphonsus Vallier, Quapaw, September 23, 1895; Mining Lease, Annie E. Dardenne, September 23, 1895; Mining Lease, Ettie Hammitt, September 23, 1895; all in RG 75, Miami Agency, Records Relating to Leasing and Productions, Mining Leases, 1892–98, box 1, National Archives, Fort Worth, Texas.
- 32 Baird, *The Quapaw Indians*, 203; *Further Extending the Period of Restrictions on Lands of the Quapaw Indians, Oklahoma and for Other Purposes*, S. 887, S. Rep. No. 91-793, at 3 (April 23, 1970).
- 33 A. M. Gibson, "Leasing of Quapaw Mineral Lands," *Chronicles of Oklahoma* 39 (1957): 346.
- 34 Peter Grandone, William E. Ham, and Lavenia M. Edwards, "The Mineral Industry of Oklahoma," in *Minerals Year Book 1957*, by the Bureau of Mines (Washington, D.C.: GPO, 1959), 871.
- 35 Warren E. Morrison, *Minerals Yearbook 1966: Metals, Minerals, and Fuel* (Washington, D.C.: GPO, 1967), 1-II:22–24.
- 36 US EPA, *Tar Creek Superfund Site*, 1.
- 37 The Quapaw Tribe of Oklahoma et al. v. Blue Tee Corp et al., Case 03-CV-0846-CVE-PJC, at 2 (2008).
- 38 CH2M Hill, "Third Five Year Review," 6.
- 39 Myron O. Knudson, *Five Year Review, Tar Creek Superfund Site, Ottawa County, OK, Region 6, US EPA* (Washington, D.C.: GPO, 2000), iii; Frank Keating, "Tar Creek Superfund Task Force: Report of the Natural Resource Damages Subcommittee; Alternatives for Assessing Injuries to Natural Resources at the Tar Creek Superfund Site," July 21, 2000, 4.
- 40 Knudson, *Five Year Review*, 4.
- 41 *Blue Tee Corp.*, at 2–3.
- 42 Knudson, *Five Year Review*, iv.
- 43 *Blue Tee Corp.*, at 4.
- 44 Knudson, *Five Year Review*, iv.
- 45 *Blue Tee Corp.*, at 5.
- 46 Ibid.
- 47 CH2M Hill, "Third Five Year Review," 33.
- 48 Knudson, *Five Year Review*, 28; Ursula Lennox, Remedial Project Manager, Tar Creek Superfund, email to the author, October 19, 2011.
- 49 Knudson, *Five Year Review*, 28.
- 50 *Blue Tee Corp.*, at 6.
- 51 Knudson, *Five Year Review*, 28.
- 52 See Lennox, email, October 19, 2011; 42 U.S.C. § 9626 (1988).
- 53 Lennox, email, October 19, 2011.



- 54 For the OWRB's assessment of Tar Creek, see Knudson, *Five Year Review*, vi–viii.
- 55 CH2M Hill, "Third Five Year Review," 31.
- 56 Earl Blumenauer, "Superfund," Earl Blumenauer, Representing Oregon's Third District, accessed August 4, 2013, [http://blumenauer.house.gov/index.php?option=com\\_content&view=article&id=1664](http://blumenauer.house.gov/index.php?option=com_content&view=article&id=1664).
- 57 CH2M Hill, "Third Five Year Review," C.
- 58 CH2M Hill, "Third Five Year Review," x.
- 59 *Blue Tee Corp.*, at 7.
- 60 CH2M Hill, "Third Five Year Review," C.
- 61 Samuel Coleman, "Superfund Explanation of Significant Differences for Record of Decision: Tar Creek Superfund Site Operable Unit 4, Ottawa County, Oklahoma, April 2010," 7; *Blue Tee Corp.*, at 8.
- 62 Coleman, "Superfund Explanation."
- 63 Omer Gillham, "Bargain Buyout," *Tulsa World*, December 19, 2010.
- 64 CH2M Hill, "Third Five Year Review," Attachment 2, Kent Interview Form, 3, 1.
- 65 *Ibid.*
- 66 *Ibid.*
- 67 *Ibid.*, 1–3.
- 68 42 U.S.C. § 9626 (1988); Lennox, email, October 19, 2011.
- 69 *Blue Tee Corp.*, at 9.
- 70 *Ibid.*
- 71 CERCLA, 42 U.S.C. § 9613 (1980).
- 72 *New Mexico v. General Electric Company*, 467 F.3d 1223 (2006).
- 73 *Blue Tee Corp.*, at 29–30.
- 74 Lennox, email, October 19, 2011.
- 75 42 U.S.C. § 9626 (1988).
- 76 Timothy Cama, "EPA Accused of Improper Lobbying for Water Rule," *The Hill*, May 19, 2015, accessed October 7, 2015, <http://thehill.com/policy/energy-environment/242472-epa-accused-of-improper-lobbying-for-water-rule>. The EPA has been known to lobby for causes, as have other federal agencies.

Copyright of Wicazo Sa Review is the property of University of Minnesota Press and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.