

## Courting Justice in PNG

MELBOURNE — Thousands of villagers living along the Ok Tedi, a river in western Papua New Guinea, are suing BHP, Australia's biggest company, for \$3 billion, the largest civil claim ever lodged in Australia. The case was quickly thrown into jeopardy, however, by legislation proposed by the Papua New Guinea prime minister to head off the villagers' suit.

The villagers claim that a copper and gold mine managed by BHP has ruined the Ok Tedi river and destroyed their traditional way of life [see "Assault on Papua New Guinea," *Multinational Monitor*, June 1992]. They are demanding \$1.5 billion in compensation and \$1.5 billion in punitive damages. They are also asking the company to build a long-promised tailings dam to hold back the waste and demanding that the area be rehabilitated.

But Kipling Uiari, deputy manager of Ok Tedi Mining, the consortium that owns the mine, says that the villagers are being duped by Australian lawyers who stand to make a lot of money if they win the case.

The case against BHP will be watched closely by other mining interests in Australia and overseas. A consortium of German companies has a 20 percent holding in the Ok Tedi mine, but it has said it wants to reduce its interest.

Rex Dagi, leader of the Miripiki clan, one of 200 clans living along the Ok Tedi, lodged the complaint against BHP on May 3 in Melbourne, site of the company's headquarters. Leaders of the clans have signed over permission to act on their behalf to a law firm in Port Moresby and the Melbourne-based firm of Slater & Gordon. The case is regarded as a "representative action" for about 7,500 villagers. Other writs will follow, according to Nicholas Styant-Browne of Slater & Gordon.

The action may also be broadened to include commercial fishers who operate along the Fly River, downstream of the Ok Tedi. Contamination from the mine threatens their livelihood, says Styant-Browne.

The Ok Tedi is 200 kilometers long. It feeds the Fly River, which empties into the Gulf of Papua. Some scientists believe that the contamination may extend into the Torres Strait, which separates New Guinea and Australia, and as far south as the Great Barrier Reef, although the evidence so far is

inconclusive.

The Miripiki writ claims that since 1984, BHP has polluted the Ok Tedi and its flood plains by discharging refuse, effluent and "poisonous substances" into it. It says that up to 100,000 tons of finely crushed rock are washed down the river each day. The sediment, which contains copper and cadmium, clogs the river.

Dagi claims that the river is "biologically dead." His village, Iogi, has been moved because the people can no longer maintain market gardens near the river. Turtles, crocodiles and fish, especially barramundi, have disappeared. Dagi says the water is no longer drinkable, and the river is too shallow for boats to navigate safely.

BHP has issued a statement saying that the Ok Tedi project operates in compliance with the laws of Papua New Guinea, and that any legal action against the company will be "defended vigorously."

According to Uiari, people in villages along the lower Ok Tedi have been asked to sign complex legal documents that pass control of legal action and any financial awards to the lawyers. "This sort of practice should be exposed, and the people responsible run out of the country," he says.

Dagi says it is insulting to suggest that

the villagers could not understand the documents. Australian lawyers took no part in collecting the signatures of the clan leaders. This was done by Dagi, another villager, a local lawyer from Port Moresby and Dari Gabara, the administrator of the Western Province, where the mine is located.

The government of Papua New Guinea has a strong interest in stifling the suit. It recently increased its shareholding from 20 to 30 per cent, and the mine accounts for about 17 per cent of the country's exports.

Political leaders in Port Moresby have said that closure of the mine would have a disastrous effect, although Dagi says that the villagers do not want the mine closed.

Papua New Guinea Prime Minister Paias Wingti announced weeks after the claim was filed that he was introducing legislation to thwart the suit. The legislation would set up an independent tribunal with exclusive jurisdiction to deal with landowner complaints. Wingti said that the legislation would bring any action against the Ok Tedi mine back into Papua New Guinea.

"We have to make laws that protect the interest of the companies investing in this country as well as our own people ... and our law will take precedence," Reuters quoted Wingti as saying.

— Ian Anderson

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## Montana's Forests Under Fire

A TRIO OF FEDERAL OFFICIALS from Montana are in a bidding war to determine just how many millions of additional acres of national forest land in the state will be opened to timber companies.

When the bidding stops, U.S. taxpayers will be handed the bill. But even without the proposed cutting zone expansion, taxpayers already are paying about \$500 million a year to subsidize industry logging on federal lands.

The current debate is over pristine wildlands deep within national forests. Because these areas are difficult to reach, they have remained particularly precious outposts for several threatened and endangered species, including grizzly bears, bull trout and woodland caribou.

Many of these roadless areas may be sacrificed as environmentalists continue to

focus on the problems triggered by unsustainable logging in the Pacific Northwest. Timber companies are now looking east, to the Northern Rockies, where some of the least disturbed national forests in the continental United States are found.

A bill introduced by Representative Pat Williams, D-Montana, would open millions of acres of wildlands within Montana's national forests to logging. In mid-May, the House passed the Williams plan in a 308 to 111 vote. Many legislators supported the measure to help Williams in a tough re-election campaign this fall.

Representative Carolyn Maloney, D-New York, one of those who spoke against the measure, objected to the environmental damage caused by logging and to taxpayer subsidies for timber company operations in national forests. "The logging that

takes place in these forests not only costs Americans money, but significantly and irrevocably damages these pristine lands that enhance everyone's life, from Manhattan, New York, to Manhattan, Montana," Maloney said.

At press time, the U.S. Senate is on the verge of adopting S. 2137, the Montana National Forest Management Act, sponsored by Senator Max Baucus, D-Montana. This plan would open even more acreage to logging than the House plan. The Senate approved an earlier version of the Baucus bill in 1992, but the revised measure failed to clear Congress. Vice President Al Gore, then a senator, urged his colleagues to stand up to the timber industry.

"Make no mistake about it, there are enormous pressures here in the United States to go onto National Forest Service land and log it even when it should not be logged," Gore said two years ago. "And those pressures are very similar to the kinds of pressures that are leading to unsustainable destruction of forests in other countries."

A third plan, proposed by Senator Conrad Burns, R-Montana, would also allow aggressive logging on national forest lands in the state. It may be used as a bargaining chip when House and Senate negotiators work to craft a measure acceptable to majorities in both bodies.

Timber industry advocates, including Montana's congressional delegation, say that increasing loggers' access to national forests helps create jobs. But protecting these temporary logging jobs requires hundreds of millions of dollars a year in taxpayer support for roads, site preparation and overhead. Congress has failed to stop "below-cost" timber sales, in which the government spends more on roads and other efforts to facilitate logging operations than it receives in revenue from timber companies.

Logging companies are a ready source of cash for re-election campaigns, and a handful of Western Senators are aggressive defenders of the timber companies, whose names include Champion, Plum Creek and Georgia Pacific.

The environmental impact of increased timber cutting on public land in Montana extends far beyond that state's borders. The destruction of more old-growth forests will be irreversible and will be im-

portant precedent for future logging policy on public land in the rest of the country.

The old growth forests in the Northern Rockies have trees which are 400 to 600 years old. If these forests are harvested for timber, there is virtually no possibility that the old forest growths will ever be replaced, since it would take centuries of restraint to regenerate them.

Cutting these remote areas of the national forests will destroy wildlife habitats, cause soil erosion, foul water and increase global warming — all for short-term economic gain. Logging, particularly in the Rockies, creates at best a short-term localized boom that lasts only as long as the trees do, experts say. Then the timber companies and the jobs move on, leaving unemployment and an ecological disaster in their wake.

Thomas Michael Power, chairman of the economics department at the University of Montana at Missoula, says that increased logging is precisely the wrong approach for areas still blessed with great natural beauty. In Montana, which tour guides promote as "the last best place," Power found that many businesses want to relocate near a more pristine environment. Such economic

growth far outstrips any temporary employment gains from logging areas previously off-limits to the timber companies, he concludes.

"The residents of the Northern Rockies do not face a tragic choice that forces them to choose between preserving their natural wildland heritage and impoverishing themselves," Power says. "Protecting wildlands and enhancing their economic well-being are not only compatible objectives, but more importantly, our economic future is tied to protecting the unique qualities of the natural landscape in the Northern Rockies. Continuing gains in employment are associated with protecting landscapes that have been the primary source of vitality in the economies of the Northern Rockies."

Polls in Montana show considerable support for keeping roadless areas roadless. But that view is not heard in Washington as loudly as that of the wealthy corporations that hope to raze much of the last, best old-growth forest found south of the Canadian border.

—Steve Farnsworth and Ned Daly  
*Steve Farnsworth and Ned Daly work with the Washington, D.C.-based Taxpayer Assets Project.*

## Asbestos' Hired Gun

A GROUP OF ASBESTOS CORPORATIONS paid Yale Law Professor Peter Schuck between \$15,000 and \$20,000 to write a paper on asbestos litigation that was eventually published in the Spring 1992 Harvard Journal of Law and Public Policy. The article was titled "The Worst Should Go First: Deferral Registries in Asbestos Litigation."

In a note to the article, Schuck discloses that he "wrote on this subject at the request of the Center for Claims Resolution (CCR), a non-profit claims resolution facility representing twenty companies involved as defendants in the asbestos litigation, and his work was funded by CCR."

In the article, Schuck proposes that courts with large caseloads mandate deferral registries, a proposal Schuck admits "will be controversial." According to the article, "deferral registries are judicially-managed docketing and calendaring systems that alter the priority of trials of

asbestos cases, deferring the claims of unimpaired asbestos claimants and permitting them to return to the active docket only when they develop an actual impairment or when the claims of the already-impaired plaintiffs have been heard."

In a footnote to the article, Schuck reports that "The CCR estimates that over one-half of the current pending claims are unimpaired claims."

In a recent deposition taken in a major asbestos case, Carlough et. al. vs. Amchem et. al., Lawrence Fitzpatrick, president and chief executive officer of CCR, states that Schuck was paid \$325 per hour for an amount totalling "roughly in the \$15,000 to \$20,000 range."

Schuck, in an interview, confirmed Fitzpatrick's figures.

Schuck says that \$325 an hour is not an unusual fee for his work, and that he charged even more than \$325 an hour for legal work he did three years ago for Connecticut's Department of Transport-

tation.

Rarely do articles addressing the subject of ongoing litigation and paid for by corporate defendants find their way into the nation's premiere law reviews.

David Inniss, an editorial assistant at Harvard Law Review says "we don't do anything of that sort."

"We wouldn't accept an article that is funded by corporations or institutions," Inniss says.

Patricia Small, editor-in-chief at the Yale Law Journal, says that she "can't recall" the Journal ever running an article that was paid for by an industry or corporation.

"I would guess that this is an uncommon practice," says Monroe Freedman, a professor of legal ethics at Hofstra University Law School. "But I'm not surprised to hear that it has happened."

Freedman says that the words "funded by," as used in Schuck's explanatory note, "do not ordinarily carry the connotation of \$15,000 or \$20,000."

"There is more of an impression of reimbursement of expenses or something of that sort," Freedman says. "That is why I say that this disclosure is ambiguous."

Schuck says that Freedman's was "an absurd interpretation" of the words "funded by."

"If it had been out-of-pocket expenses, I would have said out-of-pocket expenses," Schuck says.

Margaret Stock, who was the editor at the Harvard Journal of Law and Public Policy at the time, says that she had not been aware of how much money Schuck was being paid for the article, but that this was not an issue in deciding whether to run the article. "We look at what we consider to be merits of the argument, not how the person is making his money," Stock says.

Schuck says he saw nothing wrong with the arrangement with CCR and the Journal of Law and Public Policy and says he was not retained to produce a certain point of view.

"I was hired to write about a particular subject and to produce a report which might or might not be suitable for publication," Schuck says. "I was left completely free to take any position I liked and to either publish it or not publish it as I

wished. I made it very clear at the outset that as a scholar that I did not write anything that was not totally warranted, and that if that helped them, that's fine."

In his deposition, Fitzpatrick reports that Schuck "sent to me some drafts of his article." Fitzpatrick says he made some suggestions and that Schuck "incorporated a few, but certainly not all of my suggested changes."

Schuck confirmed this account, but says that he sent a draft of the paper to others.

Fitzpatrick says that "the CCR feels the asbestos litigation is an important topic that ought to be thought about and written about by respected scholars, and so from time to time we have approached various professors about various aspects of the asbestos litigation."

Schuck says that the practice of being paid to research and write reports that end up in publication is not uncommon.

George Priest, a professor of torts at Yale Law School, says that he runs a Program on Civil Liability at Yale Law School that is funded by corporate foundations, including the Exxon Foundation, the Olin Foundation and some insurance industry money. Priest says that the program gives grants for research that end up as reports that are published. And he questioned how this is different from Schuck taking money from the asbestos companies.

Priest says that in 1992, the Association of Trial Lawyers of America (ATLA) paid him \$3,000 to write an article for its magazine, *Trial*. In the article, Priest argued that the courts had extended liability excessively and the country would be better off if the courts would restrict liability. According to Priest, then-ATLA president George Habush did not like his conclusions, so the article was never published.

"I have gotten grants from a variety of foundations for work that ended up in publication," Priest says. "But I refuse to take money if the donor has anything to say about the contents of the writings. The key question is intellectual independence."

Priest says that he would never pass his writings by his funders for review and

comment. He said that Schuck's passing his asbestos article past his funders "makes it a harder case."

Priest says that some pro-plaintiff law professors write law review articles from research sponsored by trial lawyer-supported foundations, such as the Roscoe Pound Foundation.

But Michael Rustad, a law professor at Suffolk University Law School in Boston, says that "the vast majority of the funding in this field is from corporate foundations," supporting the defendant side. Rustad has done research on punitive damages that has been partially funded by the Pound Foundation and has published law review articles based on that research.

Jonathan Turley, a professor of law at George Washington University's National Law Center, says that by disclosing the financial arrangement Schuck has complied with basic ethical standards.

"In other areas, this type of corporate sponsorship is very common," Turley says. "In the last 10 or 15 years, the degree of corporate sponsorship of legal research has appeared to have increased."

"There is a dangerous liaison that develops between academics and industry in any field, but the most insidious quality to relationships of this type is the ability of corporate interests to essentially purchase legal authority that can be used in court," Turley says. "In many cases the Supreme Court and lower courts have used academic writings as authority for changing the law in a given area. The appearance of compensated scholarship will seriously damage the authority given academic writings and will prove a disservice to both the teaching academy and the legal system as a whole."

But Schuck says that the crucial thing is that the scholar disclose funding sources.

"Some people's work is supported by corporate foundations, or union foundations, plaintiff's trial lawyer foundations, or other research foundations," Schuck says. "In most cases these foundations or funds do not exercise control over the scholars' work. I don't know any self-respecting scholar that would allow himself to be intellectually compromised by the supporter of research."

— Russell Mokhiber