

**TO: Executive Director  
Office of the Legal Advisor  
United States Department of State  
Room 5519  
2201 C. Street NW.  
Washington, D.C.  
20520**

**NOTICE OF INTENT TO SUBMIT  
A CLAIM TO ARBITRATION  
UNDER SECTION B, CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

The disputing investor, James Russell Baird, hereby serves a notice of intention to submit a claim to arbitration, under the provisions of Articles 1116 and 1119 of the North American Free Trade Agreement.

**Name and Address of Disputing Investor**

JAMES RUSSELL BAIRD  
6025 Monashee Way  
Nanaimo, British Columbia  
Canada V9T 6A4

**PROVISIONS WHICH HAVE BEEN BREACHED**

The Investor alleges that the Government of the United States has breached its obligations under Section A of Chapter 11 of the NAFTA, including the following provisions:

- i) Article 1102 (National Treatment)
- ii) Article 1103 (Most Favoured Nation Treatment)
- iii) Article 1104 (the Better of National and Most Favoured Nation Treatment)
- iv) Article 1105 (Treatment in Accordance with International Law)
- v) Article 1106 (Performance Requirements); and
- vi) Article 1110 (Expropriation and Compensation).

The relevant provisions of the NAFTA are:

***Article 1102: National Treatment***

***1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.***

***2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.***

...

***Article 1103: Most -Favored-Nation Treatment***

***1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.***

***2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.***

***Article 1104: Standard of Treatment***

***Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.***

***Article 1105: Minimum Standard of Treatment***

***1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.***

...

***Article 1106: Performance Requirements***

***1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a nonParty in its territory:***

***(a) to export a given level or percentage of goods or services;***

***(b) to achieve a given level or percentage of domestic content;***

***(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;***

***(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;***

***(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;***

***(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or***

***(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market***

...

***Article 1110: Expropriation and Compensation***

***1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:***

***(a) for a public purpose;***

***(b) on a non-discriminatory basis;***

*(c) in accordance with due process of law and Article 1105(1); and*

*(d) on payment of compensation in accordance with paragraphs 2 through 6.*

...

## **FACTUAL BASIS FOR THE CLAIM**

1. The Investor is a citizen of the Province of British Columbia in Canada. The Investor is an inventor and businessman who holds patents in Canada and the United States, and held a New Zealand patent, for a method for the disposal of nuclear and toxic waste comprising the placing of waste materials into waste repositories radiating from an access tunnel constructed into a subtending tectonic plate adjacent or as near as possible a subduction zone. The waste materials descend within the tectonic plate into the mantle of the Earth.
2. The Investment, United States Patent Number 5,022,788, dated June 11, 1991 is owned and controlled by the Investor. Acting on his own behalf, the Investor was seeking to establish, expand, manage, sell or otherwise dispose of the Investment, until the actions of the United States, as described below, were imposed and deleteriously impacted upon the Investors ability to use, enjoy or dispose of the Investment.
3. Subduction zones are usually associated with deep trenches in the ocean. The Investment would dispose of waste beneath the seabed ("sub-seabed disposal"). In 1993, the Contracting Parties to the London Convention, the United Nations treaty that regulates the dumping of wastes at sea, banned the dumping of all radioactive wastes from ships, aircraft, platforms and other man-made structures at sea. The status of sub-seabed disposal was ambiguous until 1996 when the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, (the Protocol) extended the definition of "dumping" to include "any deliberate disposal or storage of wastes or other matter in the sea-bed and the subsoil thereof." Definition, 7. of Article 1 of the Protocol states: "Sea" means all marine waters other than the internal waters of States, as well as the seabed and the subsoil thereof; it does not include sub-seabed repositories accessed only from land."
4. Radioactive waste is produced in the U.S. by a number of sources. The largest quantities -- in terms of both radioactivity and volume -- are generated by the commercial nuclear power and military nuclear weapons production industries, and by nuclear fuel cycle activities to support these industries such as uranium mining and processing. Radioactive wastes require isolation from the human environment -- for hundreds of thousands, if not millions, of years. Since this is a time period longer than all of recorded history, the problem of waste disposal

- presents an enormous challenge. Radioactive wastes are regulated under the Atomic Energy Act by the Nuclear Regulatory Commission (NRC) for commercial sources, and by the Department of Energy (DOE) for military sources.
5. With the end of the Cold War, the United States and Russia dramatically reduced their arsenals of nuclear weapons. As a result, each side has accumulated large stockpiles of plutonium, one of the principal materials used in nuclear warheads. The U.S. has declared a holding of approximately 50 metric tons of weapons-usable plutonium excess to military needs. Even greater levels are believed to exist in Russia. Safe, secure and verifiable management of weapons-usable highly enriched uranium and plutonium from the disassembly of nuclear weapons is a significant challenge. Global stockpiles of these materials pose a danger to national and international security if they are not managed and disposed of in a manner that precludes their reuse in weapons.
  6. The method embodied in the investment would comply fully with all applicable Canadian and American health and safety regulations. Disposal of nuclear waste in a subduction zone by means of an access tunnel constructed from land is not currently – nor has it ever been – proscribed by the London Dumping Convention (LDC). The Investor attempted to establish and expand his business and/or sell or otherwise dispose of the Investment in the U.S. in reliance upon the fact that:
    - a. the statutory definition of “dumping” has always excluded repositories accessed from land from regulation;
    - b. best science would be used to find a safe and permanent repository for nuclear waste;
    - c. national and international security interests require that materials from disassembled nuclear weapons and processed spent fuel have to be managed and disposed of in a manner that precludes their reuse in weapons;
    - d. the Congressional Research Service acknowledges disposal in deep ocean trenches (subduction zones) is a primary long-term disposal alternative to geologic repositories.
    - e. Subduction zones are the only Earthly environment in which nuclear weapons material can be both sequestered and rendered irretrievable.
  7. Sub-seabed disposal of nuclear waste is widely regarded within the scientific community as an important and environmentally sound means of eliminating nuclear waste. The Nuclear Energy Agency of the Organization for Economic Co-operation and Development concluded a 1988 report titled, *Feasibility of Disposal of High-Level Radioactive Waste Into the Seabed*, by stating, “seabed disposal has

- the capability of meeting relevant safety criteria and should therefore be considered as a potentially viable option for the safe disposal of high-level and other long-live radioactive waste.” The Congressional Research Services report, *Civilian Nuclear Waste Disposal*, acknowledges, “Among the primary long-term disposal alternatives to geologic repositories are disposal in deep ocean trenches and transport into space, neither of which is currently being studied by DOE”. Deep ocean trenches are created by the process of subduction when one oceanic tectonic plate passes beneath another plate and descends into the Earth’s mantle.
8. Despite the numerous salutary security and environmental benefits associated with the use of subduction zones for the disposal of nuclear waste and weapons materials, Congress and the Department of Energy (“DOE”) have adopted a long-standing discriminatory policy in opposition to Sub-seabed disposal -- a category in which they have consistently and arbitrarily lumped the Investment -- for political (as opposed to legitimate, scientific) reasons. Congress has enforced this discriminatory policy through such acts as proposing legislation in the House and the Senate that would: (1) prohibit the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste and (2) bar any funding for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste.
  9. Since 1995 Congress has taken the following steps which constitute an effective ban on sub-seabed disposal of nuclear waste, including the promulgation of bills:
    - a. S.1271 Nuclear Waste Policy Act of 1995 (Introduced in the Senate)  
SEC. 508. SUBSEABED AND OCEAN WATER DISPOSAL
      - `Notwithstanding any other provision of law--
      - `(1) the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste is prohibited; and
      - `(2) no funds shall be obligated for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste;
    - b. H.R.1020, Nuclear Waste Policy Act of 1995 (Reported in the House)  
SEC. 509. SUBSEABED OR OCEAN WATER DISPOSAL.
      - `Notwithstanding any other provision of law--
      - `(1) the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste is prohibited; and
      - `(2) no funds shall be obligated for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste;
    - c. H.R.1270 Nuclear Waste Policy Act of 1997 (Reported in the House)  
SEC. 509. SUBSEABED OR OCEAN WATER DISPOSAL.

`Notwithstanding any other provision of law--

`(1) the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste is prohibited; and

`(2) no funds shall be obligated for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste;

d. H.R. 45 Nuclear Waste Policy Act of 1999 (Reported in the House)

`SEC.408.. *SUBSEABED OR OCEAN WATER DISPOSAL.*

`Notwithstanding any other provision of law--

`(1) the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste is prohibited; and

`(2) no funds shall be obligated for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste; and

e. S.608 Nuclear Waste Policy Act of 1999 (Introduced in the Senate)

`SEC. 509. *SUBSEABED OR OCEAN WATER DISPOSAL.*

`Notwithstanding any other provision of law--

`(1) the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste is prohibited; and

`(2) no funds shall be obligated for any activity relating to the subseabed or ocean water disposal of spent nuclear fuel or high-level radioactive waste .

having the effect of permanently memorializing a de facto ban on sub-seabed disposal of nuclear waste even though such a ban is not based on sound science.

10. Such opposition has also been demonstrated by the DOE in its 1995 elimination of Seabed Disposal from its screening process to determine reasonable alternatives for long-term storage and disposition of weapons-usable fissile materials, on the grounds that, “compliance with ES&H regulations are unlikely. Because of increasing concerns about pollution of marine environments (and the related food chain) with radioactive materials, the US EPA has not issued in recent years any permits for ocean dumping or dispersal of radioactive materials. This is consistent with US law which implements the “Convention on the prevention of Marine Pollution by Dumping of Wastes and other Matter”, generally known as the London Dumping Convention, enacted in 1975 and amended in 1980 and 1993” (regardless of the safety and security elements embodied in the Investment or whether any legislative authority ever existed upon which such an elimination could be based).

11. December 14, 2001, DOE took further steps to frustrate the Investor’s ability to establish a business in the United Sates by adopting final rule10 CFR 963, *Yucca*

*Mountain Site Suitability Guidelines for evaluating the Yucca Mountain site in Nevada for suitability as a site for a permanent high-level waste repository.* This rule retroactively changed the existing rule, 10 CFR 960 -- that imposed separate performance requirements for each of the barriers between the radioactive waste and the environment including separate requirements for geologic characteristics of the natural barriers surrounding the engineered repository -- which had been used for 17 years of site characterization and evaluation, after it had become apparent Yucca Mountain cannot be shown to be capable of long-term geologic isolation of high-level radioactive waste during the regulatory period of 10,000 years, which in itself is an arbitrary time frame.

12. The DOE's arbitrary and illegitimate rule change enabled the Secretary of Energy to recommend Yucca Mountain as qualified for application for a construction authorization for a repository, which the Secretary did and the President accepted February 15, 2002.
13. Under this arbitrary and illegitimate policy, Congress and the DOE have discriminated against the Investor and the Investment in order to buttress the DOE's domestic efforts to deal with the problems of nuclear waste and excess weapons materials and Congress' 1987 decision to amend the Nuclear Waste Policy Act to preclude the DOE from considering any other candidate site than Yucca Mountain, Nevada for a permanent high-level waste repository.
14. These arbitrary and discriminatory actions have seriously impacted upon the ability of the Investor to establish and expand his business in the United States and or sell or otherwise dispose of the Investment, in addition to causing the Investor to absorb tens of thousands of dollars of losses. These losses included; legal fees, and out-of-pocket expenses and 13 years of lost management time.
15. These arbitrary and discriminatory actions have been undertaken in the absence of any valid regulatory or statutory authority, as evidenced in the fact that Congress has repeatedly tried to implement regulatory changes in order to successfully ban sub-seabed disposal of nuclear waste. None of the measures taken to implement this policy have been subjected to the kind of public notice and comment procedures that are the hallmark of United States federal administrative law and is contrary to the letter and the spirit of the statutes under which these agencies are permitted to regulate. Moreover, these actions have never been submitted to the notice and publication requirements contained within NAFTA Article 718,3 and have been pursued without affording due process rights to affected businesses such as the Investor.
16. DOE has attempted to justify an effective ban on all Sub-seabed disposal of weapons material as being necessary, "because of increasing concerns about pollution of marine environments." Nuclear materials would never come in contact with seawater as a consequence of disposition by means of an embodiment of the Investment. There is a body of scientific evidence that finds



sub-seabed disposal, in general, can be performed without effecting the marine environment. DOE has persisted without regard to the Investor's repeated protests that the Investment is not a "sub-seabed" disposal scheme, as defined by the LDC. DOE has persisted without regard to the scientific evidence.

17. The regulatory measures are disguised restrictions on trade and investment that are not the least trade-restrictive approach and violate Article 1105;
18. The regulatory measures discriminate against the Investor and the Investment.
19. The measures taken by Congress and the DOE are unfair and inequitable. The measures:
  - a. are not based on credible scientific evidence;
  - b. penalize and ban one method of disposing of nuclear waste because of pressure from the environmental and nuclear industry lobbies and to bolster questionable decisions previously made by Congress;
  - c. failed to consider the positive aspects of disposal of nuclear waste and weapons materials in subduction zones;
  - d. result from the failure or delay in enacting appropriate and/or enforcing legislation to eliminate nuclear waste and excess weapons material; and
  - e. failed to take proper consideration of the legitimate interest of the Investor.
20. The measures go far beyond what is necessary to protect any legitimate public interest.
21. The measures taken by Congress and the DOE will end the Investor's US' business. This constitutes a substantial interference and taking of the Investment. The measures are both directly and indirectly tantamount to a creeping expropriation.
22. As of the date hereof, the United States has not offered compensation for the expropriation.
23. The actions of the DOE and Congress have led potential U.S. investors to conclude that they could not profit from the investment.
24. Remarkably, Congress and the DOE have taken these steps to prohibit sub-seabed disposal of nuclear weapons material even as the vulnerability of the United States to loose weapons material was increasingly being recognized.

25. Because of the imposition of these measure, the Investor and its Investment have suffered considerable losses in terms of development costs.
26. The DOE and Congress have developed their measures in secret and have refused to acknowledge that their policies (as expressed in these measures) were not supported in either domestic or international law.
27. The DOE and Congress failed to undertake any of the necessary steps under either the United States Administrative Procedure Act, 5 U.S.C. §553, or international law, to properly consult the Investor or provide the Investor with a meaningful opportunity to work with the DOE and Congress to find a way to realize their legitimate regulatory goals without unnecessarily destroying the business of the Investor.
28. The ultimate impact of these measures will be nothing short of an absolute ban on the Investment in the United States. These measures accordingly breach the NAFTA in the following ways:
  - a. The Investor will be accorded less favorable treatment than that which is accorded to his competitors from the United States or other countries operating in like circumstances with the Investor. These competitors are attempting to market nuclear waste disposal services in the United States. For example, the DOE has arbitrarily chosen to revise the rules for Yucca Mountain even though the environmental risks of that approach are higher than for the implementation of the embodiment of the Investment. There is no legitimate reason why the DOE should eliminate a process, the Investment, that would eliminate plutonium in favor of one, MOX, that does not. There is no legitimate reason for the NRC to rule that an above-ground spent fuel storage facility on the Skull Valley Band of Goshutes reservation near Toole, Utah, would be safe and meet regulatory requirements yet the DOE claims sub-seabed disposal would not. There is not reason for the DOE to reject any option for the elimination of plutonium besides MOX simply because that is the preferred alternative of the Russians. Such arbitrary conduct is contrary to NAFTA Articles 1102, 1103 & 1104;
  - b. The United States has violated the international law principles of transparency, good faith and proportionality in its treatment of the Investment. Such conduct constitutes an unreasonable, unjustified and arbitrary interference with the Investor's ability to establish, expand, manage, conduct or operate the Investment, which the United States has agreed to provide foreign investors in addition to whatever treatment is required under international law. Such treatment is required to be provided to the Investor under NAFTA Articles 1105 and 1103;

- c. The measures have been applied to the Investment in an arbitrary and capricious manner, without sufficient notice or consultation, and in a manner that is substantively unfair and inequitable. Such treatment is contrary to the “fair and equitable” standard of treatment that the US has agreed to provide to foreign investments and which is required under customary international law. Such treatment is required to be provided to the Investment under NAFTA Articles 1105 and 1103;
  - d. The US has agreed to be bound by international treaty obligations that reflect the international law principles of national treatment and most-favored-nation treatment, such as the World Trade Organization Agreement on Sanitary and Phytosanitary Measures. These “WTO” obligations require the USA to base its proposed measures on sound science, and to ensure that they are no more trade-restrictive than necessary to achieve a legitimate regulatory goal. When a NAFTA Party fails to honor its international law obligations in a manner that breaches a standard of “fair and equitable treatment,” and such failure has a direct impact upon a NAFTA investment in its territory, that Party breaches the NAFTA Article 1105 obligation to treat NAFTA investments in accordance with international law. Such treatment is required to be provided to the Investment under NAFTA Article 1105.
  - e. When a NAFTA Party imposes or enforces a preference to goods produced or services provided in its territory, in connection with the conduct or operation of an investment of an Investor of a Party in its territory, that Party breaches its NAFTA Article 1106 obligation. By Banning the Investment the United States Government imposes a preference for the substitute services provided by the DOE.
29. Implementation of these measures has and will continue to result in considerable losses and harm to the Investor, including – but not limited to – the following:
- a. the loss to the Investor of the market for high-level waste disposal services in the United States;
  - b. loss of revenues from the sale or licensing of the Investment;
  - c. loss of return to the Investor on capital investments made in developing the Investment;
  - d. the loss to the Investor of the Investment.
  - e. loss of potential investment capital.

## ISSUES

1. Has the imposition of these measures had the effect of according less favorable treatment to the Investor or its Investment than that which is accorded to investors or investments from the United States or from other countries, in breach of Articles 1102, 1103 or 1104 of the NAFTA?
2. Does the DOE's continued treatment of the Investment fall below the standards required under international law, including the "fair and equitable treatment" standard, in breach of NAFTA Article 1105, as affected by the application of NAFTA Article 1103 and the principle of MFN treatment reflected in NAFTA Article 102(1)?
3. Has the DOE taken measures inconsistent with the obligations of the United States under Article 1106 of the NAFTA?
4. Has the DOE taken measures inconsistent with the obligations of the United States under Article 1110 of the NAFTA?
5. If the answer to any of the above questions is yes, what is the quantum of compensation that should be paid to the Investor as a result of the inconsistency of the measures with the US's obligations under the NAFTA?

## RELIEF SOUGHT AND DAMAGES CLAIMED

The Investor claims damages for the following:

1. Damages as compensation for the damages caused by, or arising out of, the U.S. measures that are inconsistent with its obligations contained within Part A of NAFTA Chapter 11 for not less than the following:

a. Minimum Standard of Treatment	US\$ 660,000,000
b. National Treatment	US\$ 660,000,000
c. Most Favoured Nation Treatment	US\$ 660,000,000
d. Performance Requirements	US\$ 5,800,000,000
e. Expropriation	US\$ 5,800,000,000
2. Costs associated with these proceedings, including all professional fees and disbursements;
3. Pre-award and post-award interest at a rate to be fixed by the Tribunal;
4. Tax consequences of the award to maintain the integrity of the award; and
5. Such further relief that counsel may advise and that a NAFTA Tribunal may deem appropriate.

DATE OF ISSUE: MARCH 15, 2002

James Russell Baird  
6025 Monashee Way  
Nanaimo, BC V9T 6A4

---

**J. R. BAIRD**  
Investor