Ahistorical Indians and Reservation Resources

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This Article is an in-depth exploration of the impacts of an Indian tribe deciding to pursue environmentally destructive forms of economic development. The Article makes two principal contributions. First, it establishes the Navajo Nation's decision-making role. Prior mineral resource forms of development may have been formally approved by the tribe, but the agreements did not truly belong to the Navajo Nation. Extensive research into earlier agreements shows the heavy influence of the federal government and mining interests historically. Existing scholarship on reservation environmental harm tends to deflect tribal responsibility, attributing such decisions to outside forces. Without denying the challenges the Navajo Nation is facing, the Article calls for recognition, despite the romanticism that surrounds Indians and the environment, of tribal agency and responsibility for the proposed environmental destruction. Second, the Article argues that environmental organizations that make use of federal environmental review processes are complicit in the systematic denial of Indian sovereignty that federal primacy entails. Although there is a strong theoretical argument that the only limits appropriate for Indian nations are those of nation-states under international law, the Article concludes that the relationship between environmental organizations and Indian nations ought to be guided by international human rights law.

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I. INTRODUCTION

Environmental degradation occurring on Indian reservations cannot be simply written off as yet another example of Indians getting screwed. Instead, some tribes have begun, through their sovereign governments, deliberately seeking out the exploitation of their land and natural resources. By choosing to prioritize economic development over the environment, Indian nations are challenging the instinctive “love” that progressives have

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1 As Sam Deloria explains with his characteristic directness,

We must, of course, hold the government to standards of trusteeship and identify instances in which it shirks its responsibility. But if that analytical role slips into one of invariably passing all the blame to the federal government, the economic system, or the society at large, then Indian self-determination becomes a concept of power without responsibility.


for all things Indian.\(^3\) Forced to choose between attacking the decisions of Indian nations on the one hand and turning a blind eye to harmful environmental policies on the other, progressives are faced with a classic apples-and-oranges dilemma. For their part, Indian governments pursuing economic development through environmental destruction have to grapple not only with non-Indian opponents—a familiar role for tribal governments—but also with tribal members less willing to make such a trade-off or adversely impacted by particular proposed projects.

Things were a lot simpler when Indians could easily and rightly be identified as the good guys and whites as the bad guys on environmental issues.\(^4\) It is still the case, I believe, that such a mental shortcut is largely justified on most issues, from poverty to land rights to recognition of sovereignty, but it is becoming more complicated with regard to the environment. To explain why that is so, it is worth thinking about the broad trends that have defined the relationship between environmental destruction and Indian nations. For much of American history, the relationship was an oppressive one. Whites—whether in the form of the U.S. government, companies, or as individuals—simply took natural resources from Indian tribes or, by subordinating Indian agency, simultaneously exploited both Indian land and tribal members.\(^5\) Later, recognition that tribes should at least formally play a role in approving natural resource use and extraction changed the relationship from oppressive to inequitable. Tribes were compensated for their environmental goods, but Indians received less and lost more than they should have.\(^6\) Bad faith in the form of the failure of the United States to live up to its trust obligations, or a mere pro forma role for tribal leaders in decisions with an environmental impact, led to inequitable compensation for Indian tribes.\(^7\) The relationship between tribes and environmental destruction is now entering the modern period, one in which the terms of such destruction are tribally accepted even if the relationship is not entirely tribally defined. Besides challenging romantic notions of Indians

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\(^3\) The affection progressives have for Indians is perhaps a continuation or the next generation's version of "the fascination of the hippie culture with the red man." Wilcomb E. Washburn, Red Man's Land / White Man's Law: The Past and Present Status of the American Indian 230 (2d ed. 1995). If tribes are successful in pushing their economic development priorities against non-Indian opposition, this may change. Professor Lenora Ledwon argues that "the increasing popularity of all things Indian is in inverse proportion to tribal autonomy." Lenora Ledwon, Native American Life Stories and "Authorship": Legal and Ethical Issues, 9 St. Thomas L. Rev. 69, 77 (1996); see also Stephen D. Osborne, Special Feature, Protecting Tribal Stories: The Perils of Propertization, 28 Am. Indian L. Rev. 203, 204–05 (2003) (noting that "Indians are hot" and that many Indians "view the continuing popularity of all things 'Indian' with more than a little skepticism").

\(^4\) Tellingly, the Diné—the language of the Navajo tribe, who call themselves "Diné," meaning "the people"—word for white people is "Biligaana," which is a shortened version of bildå ahígaan which means "those who we fight." E-mail from Zelma King to Ezra Rosser, Assoc. Professor, Am. Univ. Wash. College of Law (Aug. 13, 2009, 08:55:29 EST) (on file with author).

\(^5\) Jerry C. Straus, Foreword to Peter H. Eichstaedt, If You Poison Us: Uranium and Native Americans, at ix, ix (1994).

\(^6\) Id.

\(^7\) Id.
as the first environmentalists, tribal activities that harm the environment undermine the position of some Indian advocates that Indian policies should not be subject to critique or limitation because of the inherent sovereignty of Indian nations.

This Article makes two principal contributions. First, it establishes that the Navajo Nation freely chose to pursue an environmentally destructive form of economic development. Prior mineral resource-based development may have been formally approved by the Navajo Nation Council, but the agreements did not truly belong to the tribal government. Extensive research into the nature and royalty rates of the extraction agreements made up until the Navajo Nation's coal-fired power plant proposal shows the heavy influence of the federal government and mining interests. Prior scholarship on reservation environmental harm tends to deflect tribal responsibility, attributing such decisions to outside forces. Without denying the challenges the Navajo Nation is facing, the Article calls for recognition, despite the romanticism that surrounds Indians and the environment, of tribal agency and responsibility for the proposed environmental destruction. Second, I argue that environmental organizations that make use of federal environmental review processes are complicit in the systematic denial of Indian sovereignty that federal primacy entails. Although there is a strong theoretical argument that the only limits appropriate for Indian nations are those of nation-states under international law, the Article concludes that the relationship between environmental organizations and Indian nations ought to be guided by international human rights law.

With environmental awareness on the rise and non-Indian governments increasingly voicing concern about various forms of pollution, resolving the apples-and-oranges, incomparable goods problem is becoming an imperative for tribes and environmentalists alike. Instead of disagreement with regard to prioritizing sovereignty or the environment giving way to confrontation and litigation, it is imperative that Indian advocates and environmentalists accept two core principles. First, Indian nations have the right to deviate from non-Indian organizations and governments when it comes to environmental decisions. Simply identifying a group of people, tribal members or not, harmed by a tribe's choices should not be enough to halt projects opposed by environmentalists. Second, the relational aspects of sovereignty limit what Indian nations can and should be able to do as far as environmental destruction that impacts non-Indians. Thinking about tribes as nations under international human rights law arguably provides the best way of recognizing the appropriate bounds on sovereignty when it comes to environmental destruction. While strong environmentalists will reject the first principle and Indian law advocates will be troubled by the second, the two are needed in order to prevent paralysis or backsliding on both fronts. Importantly, a human rights approach is an appropriate guide for environmental organizations and for tribes, regardless of whether the legal structure of environmental permitting remains federally defined.

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8 See infra Part V.B.
Inspired by a reporter’s question of whether it was good that the Navajo Nation is now developing its own coal-fired power plant, this Article explores the evolving relationship between environmental destruction and Indian nations. The Navajo tribe’s experiences with this relationship provide the primary window on this relationship, but other tribes’ histories and decisions are also included. In Part II, the often oppressive, and imposed, forms of environmental destruction of Indian land are presented, with a focus on coal leasing. Part III focuses on the stereotype of Indians as environmentalists and explores how, even after tribes formally regained some measure of decision-making power, inequities in bargaining and outcomes continued to exact forms of environmental injustice upon Native peoples. The Article shifts in Part IV to the current interplay between reservation poverty and environmental harms, focusing on the Desert Rock power plant proposal as an example of tribal acceptance of certain environmental costs in return for needed government revenue and reservation job creation. Three alternatives regarding tribal power—federal primacy, cooperative agreements, and nation-state treatment—are then explored. In Part V, I argue that the participation of environmental organizations in federally defined environmental oversight processes of reservation development reflects a denial of tribal sovereignty by such organizations. The Article concludes that treating Indian nations as subject to international human rights law provides the best way of respecting Indian sovereignty while also putting an outer limit on sovereignty when it comes to the environment.

II. OPPRESSION AND EXPLOITATION

The Manhattan Project and America’s nuclear weapons program left its mark on the Navajo Nation. While shocking in its lasting impact on Diné workers and families, the effects of unprotected uranium mining are but reflections of a larger pattern of oppressive natural resource extraction.\(^9\)

\(^9\) The focus on the Navajo Nation is not entirely coincidental. I grew up in part on the Navajo Nation and my tie to—and understanding of—the Navajo Nation is stronger than to other tribes. The same is true of my personal interests. As Professor Frank Pommersheim notes, “This notion of homeland [tied to the austere beauty of the prairie and the land] is not, of course, unique to Indians alone, and despite the obvious irony, it is valued by many non-Indians, including non-Indian residents of the reservation.” Frank Pommersheim, The Reservation as Place: A South Dakota Essay, 34 S.D. L. REV. 246, 251 (1989).

\(^{10}\) The first paragraph of Jerry C. Straus’s foreword to Peter H. Eichstaedt’s If You Poison Us: Uranium and Native Americans attests to the larger pattern of oppression:

The history of our nation’s relations with American Indians is one of ignorance, indifference, exploitation, and broken promises. When land occupied by the Indians was needed by settlers, or for some other public purpose, it was seized and the Indians herded onto apparently barren reservations. Then, when these reservation lands turned out to be rich in minerals and other resources, they were leased to mining companies, ranchers, and others, with little or no regard for the rights of the native inhabitants, their livelihood, or the long-term effects on the land. Often, only token payments were made for these extractive uses and sometimes none at all because the secretary of the interior, the designated federal trustee, failed to ensure payment.
As one former worker noted, Navajo miners were treated as "expendable," were not informed of the dangers involved, and suffered grave health consequences. Another ex-miner wondered why they were never warned of known health risks and asked, "Are we disposable to the government?" Apparently so. As the New York Times reported, "Of all the chapters of the cold war and its aftermath in the United States, there are none, perhaps, quite as chilling as what happened to a generation of Navajo men and their families." Even long after the more than one thousand mines closed or were abandoned, Navajos inhaled radioactive dust blown off of open-air uranium piles, drank contaminated water, and even slept on floors constructed of waste material.

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11 Timothy Benally, Sr., Navajo Uranium Miners Fight for Compensation, IN MOTION MAG., Sept. 20, 1999, http://www.inmotionmagazine.com/miners.html (last visited Apr. 18, 2010). A study conducted long after the mines closed found "excess mortality for lung cancer, pneumoconioses and other respiratory diseases, and tuberculosis for Navajo uranium miners." Robert J. Roscoe et al., Mortality Among Navajo Uranium Miners, 85 AM. J. PUB. HEALTH 535, 539 (1995). For example, lung cancer or various forms of fibrosis killed 133 of the 150 Navajo uranium miners who worked at Kerr-McGee's Shiprock uranium mine until 1970. Saleem H. Ali, Mining, the Environment, and Indigenous Development Conflicts, at xx (2003); see also Jessica Barkas Threet, Testing the Bomb: Disparate Impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan, 13 U. Balt. J. Envtl. L. 29, 32 (2005) ("Driven by poverty, and ignorant of the risks to their health, tribal members made up the majority of the miner population. They have been stricken with lung cancer and other ailments from working in the midst of uranium dust and radon gas, often with little or no filtration systems." (footnote omitted)).


13 Keith Schneider, A Valley of Death for the Navajo Uranium Miners, N.Y. TIMES, May 3, 1993, at A1 ("The Government promised good wages but, Federal records show, did nothing to warn the men of the excessive levels of radiation in the uranium mines."). For a brief overview of uranium mining and its consequences for Navajo miners, see Doug Brugge & Rob Goble, A Documentary History of Uranium Mining and the Navajo People, in THE NAVAJO PEOPLE AND URANIUM MINING 25 (Doug Brugge et al. eds., 2006). For a more complete account, see Eichstaedt, supra note 5.

14 Doug Brugge et al., "So A Lot of the Navajo Ladies Became Widows," in THE NAVAJO PEOPLE AND URANIUM MINING, supra note 13, at xv, xv (noting additionally that there the Navajo Nation had four uranium mills).

15 Judy Pasternak, Blighted Homeland: A Peril that Dwelt Among the Navajos, L.A. TIMES, Nov. 19, 2006, at 1, available at 2006 WLNR 20073872 (providing the first in a four-part series published by the Los Angeles Times looking at the effects of uranium mining on the Navajo reservation). A photo of a Hogan, the traditional Navajo house, with a contaminated foundation is included in the most recent Navajo Nation five-year contamination plan as an example of the legacy of uranium mining. U.S. ENVTL. PROT. AGENCY, HEALTH AND ENVIRONMENTAL IMPACTS OF URANIUM CONTAMINATION IN THE NAVAJO NATION: FIVE-YEAR PLAN 2 (2008), available at
On April 19, 2005, the Navajo Nation Council passed the Diné Natural Resources Protection Act, forbidding uranium mining “within Navajo Indian Country.” Signed into law ten days later by Navajo President Joe Shirley, Jr., the Act declared that uranium mining was antithetical to Navajo Fundamental Law regarding protection of the Nation’s natural resources and to the teachings of medicine peoples regarding “harmony and balance in life and a healthy environment.” The Act was also a condemnation of the “social, cultural, natural resource, and economic damage to the Navajo Nation from past uranium mining.” Though the actions of the tribe were in opposition to the energy strategy of then-President George W. Bush, those opposed to nuclear energy and uranium mining celebrated the tribe’s uranium ban. With mining companies attempting to set up shop on the borders of the reservation, it is too early for the tribe to declare victory. But it is remarkable that, at least for now, “the Saudi Arabia of uranium,” the Navajo Nation, is foregoing uranium-based jobs and royalties.

http://www.epa.gov/region09/superfund/navajo-nation/pdf/NN-5-Year-Plan-June-12.pdf; see also JAMES M. GRIALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY 62–69 (2008) (describing the problem of leaking uranium tailings near Church Rock, New Mexico, and subsequent proposals to further develop mining in the area); Bill Donovan, Navajos Lack Cash to Study Tainted Homes, ARIZ. REPUBLIC, Apr. 26, 1985, at B1 (reporting on the lack of funding to evaluate homes “that may have been built out of abandoned uranium-mill tailings,” and on a United States Department of Housing and Urban Development decision to reverse, once the problem’s large extent was known, a decision to provide emergency funding to relocate people whose homes were radioactive).

19 Navajo Nation Council Res. CAP-18-05 § 3.
At the same time that the tribe is fighting to prevent uranium mining, the Navajo Nation is plowing ahead with a plan to build a new coal-fired power plant. The proposed Desert Rock power plant would be a mine-mouth “clean coal” power plant built on the Navajo Nation, just south of two existing Four Corners area power plants. Backing the plant are Diné Power Authority, an entity of the Navajo Nation, and the tribe’s partner, Sithe Energy, an off-reservation energy company eighty-percent owned by the Blackstone group, a large, publicly traded New York equity company. As a mine-mouth plant, Desert Rock would be built right next to a reservation open-pit mine and the tribe would receive over fifty million dollars annually in taxes and in royalty payments for the extracted coal. Additionally, under the agreement with Sithe Global, which is providing the start-up capital, the tribe has an option to purchase a share in the power plant itself.

In the 2008 State of the Navajo Nation Address, Navajo Nation President Joe Shirley, Jr. highlighted Desert Rock’s significance: “[I]t was envisioned as a way to make use of our abundant resource of coal, and bring economic prosperity to our people.... [T]his Project remains the most important economic, environmental, and energy challenge that the Navajo Nation has ever undertaken.” The proposal is not without controversy:

The State of New Mexico, a number of Navajo and non-Navajo environmental organizations, and even a Facebook group are united in opposition to the power plant.29 The project’s future is uncertain, according to the Navajo Nation President, “because of the enviros ... the doomsday advocates ... [who] worry more about the ferrets, the squirrels, and the frogs, and the spotted owl, rather than the endangered Navajo people.”30

That President Shirley and the Navajo Nation Council have taken such strong stances on Desert Rock and on uranium mining attests to the relatively empowered sovereignty now enjoyed by the Navajo Nation. Though not necessarily incompatible positions,31 the very fact that the tribe decided to aggressively go forward with one type of mining and energy development while spurning another highlights the impact of tribal decision making on American energy and environmental policy. The views of the Navajo Nation and non-Indian governments and organizations will inevitably conflict at times and, given the linkages between the tribe and non-Indians as well as the spillover effects of tribal choices, it is important to establish ex ante principals for resolving such conflicts. Historically, potential conflict was avoided by simply imposing non-Indian natural resource policies and environmental choices upon tribes, an imposition that, while straightforward in application, ignored or undermined tribal rights to self-determination.32

The “permanent home” of the Diné was formally recognized by the United States through an 1868 treaty.33 “Diné” can be translated literally from the Navajo/Diné language as “the people” and commonly is not used as a term for “government,” which is instead called “the tribe” or the Navajo Nation.34 Originally the Diné occupied territory defined by four sacred mountains (Mt. Blanca to the East, Mt. Taylor to the South, San Francisco Peaks to the West, and Mt. Hesperus to the North),35 but following contact

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29 See infra notes 372-75 and accompanying text.
30 Webcast: Conference on Indian Nations and Institution Building, held by the American University Washington College of Law (Feb. 16, 2009), available at http://media.wcl.american.edu/Mediasite/Viewer/?peid=2fa4fb3ac5d594d5655262249a950f4bb (quoting Joe Shirley, Jr., President, Navajo Nation, from minutes 45:45-47:20 in the webcast). For a representative example of President Shirley’s support of Desert Rock, see Letter from Joe Shirley, Jr., President, Navajo Nation, to Gerardo C. Rios, Chief, Air Permits Office, U.S. Envtl. Prot. Agency (Sept. 10, 2004) (on file with author) (“The Office of the President and Vice President of the Navajo Nation fully support the Desert Rock project.”).
31 Navajo opposition to uranium seems to be based primarily on the health effects experienced by miners and not on ideological opposition to nuclear power. See infra notes 430-45 and accompanying text.
32 See EICHSTAEDT, supra note 5, at 14.
33 Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667 [hereinafter 1868 Treaty].
35 The importance of place to the Diné comes across from the Gary Witherspoon’s description:

Navajoland is the Holy Land of the Navajo people. It is circumscribed by sacred mountains, and is described as being beautiful. Essential parts, as well as the land itself, are called mother. For a Navajo, there is no safer, more secure, and more wonderful
with non-Indians, their recognized land holdings have shrunk. Nevertheless, now roughly the size of West Virginia, the Navajo Nation spans parts of Arizona, Utah, and New Mexico, and contained within its borders are Chaco Canyon, Monument Valley, and Canyon de Chelly. It is a “beautiful, austere, and varied country,” with a population of more than 180,000, of whom only three percent are non-Indian. An independent nation whose sovereignty is recognized by the U.S. government, the Navajo Nation has the most land of any tribe, and also the largest government bureaucracy. From the capitol of

place to be than close to Earth Mother within the boundaries of the sacred mountains, which represent parts of her body. . . .

Some non-Navajo have seen Navajoland as a bleak, lonely, and forbidding place. On the contrary, Navajoland is thought by its people to be as sacred and secure as motherhood itself.

GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 68 (1975); see also OFFICE OF GEN. COUNSEL, supra note 34, at 4 (noting the relationship between the Diné creation story and “[the] land between these four mountains [that] is the area the Navajo calls home”).

36 OFFICE OF GEN. COUNSEL, supra note 34, at 8, 10.

37 The land base of the Navajo Nation consists not only of land included in the 1868 treaty but also land subsequently added by various acts of Congress, judicial opinions, and a long series of executive orders. J. LEE CORRELL & ALFRED DEHIYA, ANATOMY OF THE NAVAJO INDIAN RESERVATION: HOW IT GREW (rev. ed. 1978).

The need for Navajos to have more land in order to survive was colorfully described in an 1879 letter written by John C. Pyle, an Indian agent:

The Navajo would not exchange his desert home for the most favored spot elsewhere and if the Reservation is found to be too limited for his necessities, why not give him more desert? But I suppose it would be worse than folly to ask for more territory for any tribe, however deserving, from a Government that does not secure to the Indian the peaceful possession of lands already guaranteed to him by solemn treaty stipulation.

DANE COOLIDGE & MARY ROBERTS COOLIDGE, THE NAVAJO INDIANS 247 (1930) (quoting from John C. Pyle’s 1879 letter to the Bureau of Indian Affairs at Washington).

The Navajo Nation has also used primarily mining revenues to purchase additional land. See OFFICE OF GENERAL COUNSEL, supra note 34, at 10. One particular tribal purchase, that of Big Boquillas Ranch, would ultimately lead then-Tribal Chairman (the title was subsequently changed to Navajo Nation President) Peter MacDonald to be thrown out of office and imprisoned for accepting bribes connected to the land deal. See United States v. Brown, 763 F. Supp. 1518, 1520-24 (D. Ariz. 1991) (containing a brief overview of the nature of the bribery), aff'd, 979 F.2d 1380 (9th Cir. 1992); Navajo Nation v. MacDonald, 885 P.2d 1104, 1109, 1113 (1994) (affirming liability in a civil suit following the criminal conviction of defendants on 14 counts). For Peter MacDonald’s side of the story, see PETER MACDONALD, THE LAST WARRIOR: PETER MACDONALD AND THE NAVAJO NATION 278-341 (1993). The Navajo Nation recently announced plans to build a $200 million, 85-megawatt wind farm on the Big Boquillas Ranch. Cyndy Cole, NAVAJO WIND FARM SET, ARIZ. DAILY SUN, Dec. 28, 2009, http://azdailysun.com/news/local/article_0a9abe65-e473-50dc-aa78-46f44b6b9210.html (last visited Apr. 18, 2010).


39 NAVAJO NATION, History Page, http://www.navajo.org/history.htm (last visited Apr. 18, 2010) (prudly proclaiming that “NAVAJO government has evolved into the largest and most sophisticated form of American Indian government”); see also ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS & NATIONAL PARKS 186 (1998) (“The continued vitality of the NAVAJO language, survival of traditional culture, and rich legends combine with a sense of place to
Window Rock, Arizona, Navajo Nation President Joe Shirley, Jr. governs, along with the Navajo Nation Council and Navajo Nation Supreme Court, in much the same way, and must confront similar challenges, as do those who work out of Washington, D.C.

It has not always been this way. The United States signed two treaties with the Navajo tribe, one in 1849 and the second in 1868. The Treaty at Fort Sumner in 1868 marked the end of a particularly bad period for the Diné. After an 1864 military defeat at Canyon de Chelly at the hands of Kit Carson, Navajos were rounded up and forced on what became known as the Navajo Long Walk to Fort Sumner and the surrounding Bosque Redondo reservation where they were held captive. They were only allowed to escape the bad conditions that characterized their captivity and return to a diminished version—no longer extending to the four sacred mountains—of their homeland with the signing of the Treaty at Fort Sumner. By the treaty, the reservation was "set apart for the use and occupation of the Navajo tribe" and was established as "their permanent home." Although treaty ratification is an inherent recognition of tribal sovereignty, in practice the United States, until recently, treated the Navajo reservation as an area whose natural resources could be extracted or developed with only a limited say from a government representing the Diné. The results were unjust and arguably tragic: The Diné suffered a range of environmental harms without benefiting as they should have, and the Navajo Nation's ability to protect its citizens and afford them opportunities was significantly undermined for more than a century.

produce a tribal sovereignty beyond rhetoric. Navajos own and control their homeland.” (emphasis added)).

40 Harrison Lapahie, Jr., Window Rock, http://www.lapahie.com/Window_Rock_Capitol.cfm (last visited Apr. 18, 2010); Navajo Nation Office of the President & Vice President, President of the Navajo Nation, http://www.opvp.org/content.asp?CustComKey=39998&CategoryKey=39999 &pn=Page&DomName=opvp.org (last visited Apr. 18, 2010).


Some Diné, including members of my step-mother’s family, avoided capture by hiding in the mountains and canyons in northern parts of Diné territory. Though they could only come out of hiding and reunite with those at Fort Sumner following the treaty signing, those who avoided the long walk played an important role in revitalizing the tribe’s economy after 1868.

43 Of the more than eight thousand Navajos "detained at Bosque Redondo" in 1864, two thousand died by 1868. OFFICE OF GENERAL COUNSEL, supra note 34, at 7–8.

44 1868 Treaty, supra note 33, arts. II, XXIII, 15 Stat. at 668, 671. Author’s note: Navajo is usually spelled with a j, but sometimes is spelled with an h; both spellings refer to the same tribe.

45 The U.S. Congress formally ended the practice of making Indian treaties in 1871, though this attempt by Congress to limit the government’s Indian treaty-making powers is arguably unconstitutional. See David P. Currie, Indian Treaties, 10 GREEN BAG 2D 445, 445, 449–51 (2007).

46 GRIJALVA, supra note 15, at 77 (describing the detrimental approach to natural resource extraction experienced by tribes generally).
The United States and non-Indian business interests were determined to extract natural resources located on reservations, including the Navajo. Poor soil quality and infrequent rain limited the agricultural potential of the land, diminishing the impact of land greed on the Navajo Nation relative to many other tribes. Non-Indians, with the important exception of Indian traders and church groups, did not particularly push to live on the Navajo reservation. But though not wanting to live in Navajo country, non-Indians did and do covet the natural resource holdings of the tribe.

According to Professor James M. Grijalva, whose work on environmental justice informs much of this Article, business and governmental interests jointly sought Indian natural resources:

The federal government also induced non-Indian natural resource development companies to locate in Indian country in the mid-1900s. As trustee, the federal government was legally obligated to manage tribal resources for the benefit of the tribes, but on occasion its zeal for revenue and the political connections of non-Indian companies led to below market lease and royalty payments. Prospects for increased profit margins, possible insulation from state taxation, and comparatively weak federal regulation helped spur strip and pit mines, clear-cut timber harvests, and power plants.

As Robert H. Keller and Michael F. Turek explain, "Anglo-Americans once considered the Southwest the most inhospitable and uninhabitable quadrant of the United States, a perception that perhaps explains the large size of the Navajo Reservation." Keller & Turek, supra note 39, at 188; see also J.W. Hoover, Navajo Land Problems, 13 ECON. GEOGRAPHY 281, 284 (1937) ("From the standpoint of utilization, the Navajo country is marginal land.").

In particular, the Navajo Nation did not suffer from allotment the way other tribes did, even though it was contemplated in the 1868 treaty. See 1868 Treaty, supra note 33, art. V, 15 Stat. at 668. Devised as a strategy to turn reservation Indians into yeoman farmers and to turn over surplus land to non-Indians, allotment lasted from 1881 to 1934 and resulted in tribal land loss without noticeable economic gains. See Judith V. Royster, The Legacy of Allotment, 27 ARIZ. ST. L.J. 1, 6 (1995). The leading article on the lasting effects of allotment is Royster, supra.

The limited agricultural utility of the reservation means that the on-reservation Dine population vastly exceeds the number of people—estimated at 35,000—who could be supported at a subsistence level through agriculture. Kent Gilbreath, Red Capitalism: An Analysis of the Navajo Economy 4 (1973).

The Treaty of September 9, 1849, authorized trading posts among the Navajo. 1849 Treaty, supra note 41, art. VIII, 9 Stat. at 975. Trading posts were and are an important part of reservation life:

The Reservation trading post became one of the most necessary and influential institutions of the Reservation system. The Navajo Reservation was so vast and so isolated that until the early 1930s, government officials had very little contact with the Indians, leaving the trader as the most important, often the only white man in the native community.

Jesse L. Nusbaum, Introduction to Elizabeth Compton Hegemann, Navajo Trading Days, at vii, ix (1963) (providing a first-person account of trading post life); see also Frances Gillmor & Louisa Wade Wetherill, Traders to the Navajos: The Story of the Wetherills of Kayenta (1934) (providing a narrative of a trader family on the reservation). In 1968, Southwestern Indian Development, Inc., under the leadership of future Navajo President Peterson Zah, published a highly critical report on trading post operators, their pricing policies, and the Bureau of Indian Affairs' lack of oversight:

The institution of the trading post, admittedly, has played an essential part in the development of modern Indian society in its role as mediator between the Navajo and Anglo world, yet this does not give them the unquestioned "right" to exploit and dominate to the fullest extent those very people who provided their livelihood.
A. Black Mesa Coal

In 1909, "[a] rapid reconnaissance was made by wagon" of the coal beds of Black Mesa by M.R. Campbell and H.E. Gregory. While acknowledging the "fragmentary" nature of their data, they reported that "there is considerable coal in this field" and that it was of good quality. They also reported that a small mine, producing 2500 tons annually "to supply fuel for the Indian school," was already in operation at Keams Canyon. The ability of turn-of-the-century explorers to locate the coal field owed itself in part to the relative shallowness, as little as six meters in depth, of the "overburden" separating the buried coal from the surface. Black Mesa is located in northern Arizona and includes contested portions of the Navajo and Hopi reservations. Later surveys would confirm the existence of a considerable amount—400 million tons—of strippable coal at Black Mesa. But coal

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The land upon which their trading posts or other businesses sit, as well as the land held by many religious organizations, is often an island of fee land surrounded by trust land. These islands of non-Indian fee land create special problems for tribes seeking to regulate conduct within their reservation, and the Supreme Court has blocked various assertions of tribal sovereignty over these businesses. See Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (preventing the Navajo Nation from assessing a hotel occupancy tax on a non-Indian hotel located on the Navajo Nation despite significant ties between the business and the tribe).

50 KELLER & TUREK, supra note 39, at 186 ("Once considered marginal terrain, Navajo land contains coal, oil, and gas, plus 500,000 acres of timber."). What is true for the Navajo Nation also holds for Indian landholdings in general. Russel Lawrence Barsh, Indian Resources and the National Economy: Business Cycles and Policy Cycles, in NATIVE AMERICANS AND PUBLIC POLICY 193, 215 (Fremont J. Lyden & Lyman H. Legters eds., 1992) (noting the relative richness of Indian-held oil, coal, and uranium natural resources); see also Carol A. Markstrom & Perry H. Charley, Psychological Effects of Technological/Human-Caused Environmental Disasters: Examination of the Navajo People and Uranium, in THE NAVAJO PEOPLE AND URANIUM MINING, supra note 13, at 89, 103 (referring to natural resource extraction as a form of colonialism and noting that "[t]he irony is that these lands were not known to be resource-rich at the time reservation lands were allotted to tribes. Indeed, in many cases, seemingly the least inhabitable lands were designated for reservations" (emphasis added)).


52 Id.

53 Id. at 236.


55 Known as the 1882 Executive Order Area or Joint Use Area, the conflict over which tribe and whose tribal members were entitled to live in the area evolved into the multigenerational Navajo-Hopi land dispute. For an overview of the history and legal cases involved in the dispute, see Eric Cheyfitz, Theory and Practice: The Case of the Navajo-Hopi Land Dispute, 10 AM. U. J. GENDER SOC. POL'Y & L. 619, 623–30 (2002), see also DAVID M. BRUGGE, THE NAVAJO-HOPI LAND DISPUTE: AN AMERICAN TRAGEDY 2, 3, 47, 55, 62–63 (1994) (providing a history of the dispute).

development on the Navajo reservation was slow for almost fifty years. In the 1930s, small-scale, cottage-industry-type family truck mines, employing between seven and nine men, emerged across the Navajo Nation. This gave way to more formal commercial explorations only in the 1950s. The first large lease, finalized in 1957, was between the Navajo tribe and Utah Construction and Mining Company for 24,320 acres in the eastern part of the reservation. Large lease agreements signed in 1964 with Pittsburg & Midway Coal Mining Company for 11,157 acres near Window Rock, Arizona, and with Peabody Coal Company for 24,858 acres on Black Mesa, symbolize the “unprecedentedly intense commercial interest” of the early 1960s in Hopi and Navajo coal. By 1971, Black Mesa alone was annually producing over one million tons of coal.

The development of Black Mesa has not been without controversy. Winona LaDuke has called Black Mesa “the mother of all ecologically destructive mining complexes.” In 1971, the Sierra Club and other environmental groups purchased full-page protest ads in papers such as the New York Times. The headline: “Like Ripping Apart St. Peter’s, In Order to Sell the Marble.” The body of the ad was similarly strong, noting that instead of being near the growing cities of California and Las Vegas, the mining and associated power plants were being “put... elsewhere, where no one will complain,” where they will face “[n]o ‘important’ opposition.” Though framed as the destruction of sacred Hopi and Navajo sites, the environmental groups dedicated the bulk of the ad’s discussion of the harms to Indians to publicizing Hopi resistance to mining on Black Mesa.

58 Morton, supra note 56, at 7–9. This is not to say that coal exploitation only began in the last century. PHILIP RENO, MOTHER EARTH, FATHER SKY, AND ECONOMIC DEVELOPMENT: NAVAJO RESOURCES AND THEIR USE 106 (1981) (“Remains of ancient campsites indicate that coal was burned one thousand years ago by Indian people . . . .”). Between 1300 and 1600 A.D., Black Mesa “production may have totaled 100,000 tons.” DONALD L. BAARS, NAVAJO COUNTRY: A GEOLOGY AND NATURAL HISTORY OF THE FOUR CORNERS REGION 171 (1995).
59 Morton, supra note 56, at 8.
60 See id. at 9–10.
61 Id. at 56.
63 Black Mesa Def. Fund et al., “..... Like Ripping Apart St. Peter’s, In Order to Sell the Marble,” N.Y. TIMES, May 20, 1971, at 31 (paid advertisement).
64 Id.
65 Id. In 1974, Reid Chambers and Monroe Price wrote of the “considerable controversy” surrounding “the development of immense fossil-fuel power plants and the strip mining of coal for these plants . . . . designed to meet the needs of Tucson, Phoenix, Los Angeles, Albuquerque, and other southwestern metropolises.” Reid Peyton Chambers & Monroe E. Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 STAN. L. REV. 1061, 1066 (1974); see also Floyd Harvey Dove, Groundwater in the Navajo Sandstone: A Subset of “Simulation of the Effects of Coal-Fired Power Developments in the Four Corners Region” 1 (Nov. 21, 1973) (unpublished Ph.D dissertation, University of Arizona) (on file with Pence Law Library, American University) (“Economic progress may cause change in the immediate environment but may also accelerate environmental change in areas remote from the central core of economic activity. Such is the case . . . in the Southwest portion of the United States.”).
66 Black Mesa Def. Fund et al., supra note 63.