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ENVIRONMENTAL LAW: URANIUM MINING ON THE NAVAJO RESERVATION

Becky J. Miles Viers

A nation within a nation, the Navajo Reservation occupies 12.5 million acres[1] and spreads across three state boundary lines into Arizona, New Mexico, and Utah.[2] Rich in uranium necessary to the economy of the surrounding United States,[3] the Navajo Reservation is thus open to the evils of exploitation. The problem is highlighted in this passage from a report by the Commission on Civil Rights:

> If the tribe foregoes opportunities for mineral exploitation, it foregoes the chance for immediate income. Yet, it must have this income to operate that which, because of the reservation's general underdevelopment coupled with other historical factors, is a welfare economy. Exploitation of these resources, however, is a short term answer because of the depletion factor. The reservation's mineral resources are given a predicted maximum depletion span of 35 years. The pertinent questions are what kind of life and what kind of land will be left after these resources have been exploited.[4]

If exploitation of uranium is permitted and left uncontrolled on the Navajo Reservation, the harsh effects of it could be devastating. Radon, an inert radioactive gas, is produced during uranium mining. Upon exposure to the atmosphere, this gas decays into a series of radioactive isotopes.[5] Along with immediate danger to the environment, through these atmospheric pollutants, uranium mining could possibly result in the destruction of the surface lands around the mines. Presently most uranium mining is conducted underground, but as with coal, as the demand for uranium increases, surface mining may become more commonplace. In the past, such surface mining has been conducted with little or no regard for the continued productivity of the land.[6]

1. U.S. COMM'N ON CIVIL RIGHTS REPORT, "The Navajo Nation: An American Colony." Pub. L. No. 85-315 (1975) at 20 [hereinafter cited as U.S. COMM'N ON CIVIL RIGHTS REPORT].
2. *Id.* at 7.
3. *Id.* at 20.
4. *Id.* at 24.
5. Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977).
6. United States v. Richardson, 559 F.2d 290 (9th Cir. 1979). This case involved the

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The uranium mining processes on the reservation, if left unsupervised, may leave scars not only on the land but upon the people themselves. The relationship of the Navajo people to their land is much stronger than most Anglo-Americans comprehend.[7] The livelihood of the Navajo is centered around cattle and sheep.[8] Without the necessary grazing lands, these sources of food supply would diminish or possibly disappear. The exploitation of minerals unnecessarily destroys a lot of the required grazing area.

The mining operations are not of themselves the sole cause of the dilemma facing the Navajo Nation. Both coal and uranium are necessary resources for the continued economic growth of the United States. The royalties returned to the Navajos from these mining operations are essential to their existence on the reservation.[9] In time, however, the royalties from the mining operations will become less as the minerals themselves are drained from the land. The Indians will not only be left with land worthless for grazing their food supplying livestock, but with land also worthless as a source of income from royalties.[10]

The answer to this complex problem cannot be found in the elimination of the mining leases. Rather, environmental protection laws must be implemented to insure the continued existence

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use of blasting and bulldozing in the exploration and prospecting of claims on National Forest lands. The court held that such uses were destructive to surface resources and were not a reasonable method of exposing and prospecting claims. In footnote 5, page 294, the court noted the quoted testimony by Bureau of Land Management Director Woozley to the Committee on Interior and Insular Affairs concerning Senate Bill 1713: "Under present uses, I feel very definitely that some people are taking advantage of using the surface rights for purposes not incident actually to mining. . . .

"I think your bulldozer examples out in New Mexico and probably in Arizona and Colorado and Wyoming, in the exploration for uranium, is one very good example."

7. Goodman & Thompson, *The Hopi-Navajo Land Disputes,* 3 AM. INDIAN L. REV. 397, 412 (1975). "To the Indian, and more particularly to the Navajo, land represents something which is sacred—something which does not have a value in terms of dollars and cents." Statement by Otto L. Bendheim, M.D., Hearings before Comm. on Interior & Insular Affairs. S. Rep., 92d Cong., 2d Sess., 233-27 (1972).

8. *Id.* at 410. This article directly indicates not only that livestock is important for the supply of food, but that it is also the Navajo's "concept of wealth and poverty." To deprive the Navajos of the land needed for livestock herd growth is to deprive them of both a food supply and an economic status, a capitalistic concept fundamental to American society.

9. U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 1, at 24.

10. Goodman & Thompson, *The Hopi-Navajo Land Disputes,* 3 AM. INDIAN L. REV. 397, 410-15 (1975). The surface land used by the Navajo for cattle and sheep grazing is already overburdened. To reduce the surface area by destructive mining is to reduce the size of the herds.

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of the grazing lands of the Navajo Nation even after the raw mineral wealth has been depleted.

The relationships between the Navajo Nation, the federal government, individual tribal members, and the mineral leasee make environmental protection on reservation lands even more complex than similar protection on non-Indian lands. While state environmental protection laws add yet another facet to analysis of this problem, they will not be considered in this discussion. Instead, the emphasis will be on the tripod of tribal, federal, and individual tribal member concerns. Each leg of this tripod has a distinct and separate interest in any uranium mining permit granted on Navajo Nation land. The Navajo Tribe has mining permit guidelines set under its Tribal Code to protect its interests.[11] In a broader scope, the federal government has enacted environmental protection legislation, as well as mining regulations, to safeguard federal interests in environmental control. Only the individual tribal member is without recourse against violations by uranium miners. Federal legislation and the Navajo Code *appear* to contain sufficient safeguards of the interests of the Navajo Nation. Closer scrutiny, however, makes it apparent that these protected interests are not necessarily the same as those of individual tribal members. It is also apparent that some action other than that presently in force is required to protect these individual interests.

Navajo Tribal Council Mining Lease Approval as Environmental Protection

In order to obtain a mining lease, the prospective contractor must first gain approval by the Tribal Office of Energy Resources. From this office, the lease application goes to the following: the chairman of the Tribal Council, the Branch of Realty, the general superintendent, the area director, and finally to the Secretary of the Interior.[12] The exact number of offices

11. Navajo Tribal Code tit. 18 (1977) [hereinafter cited as N.T.C.].

12. *Id.* § 801:

"(a) Mining leases, including the conversion of an assignment of a mining permit to a lease, shall originate with the Office of Energy Resources. Upon obtaining approval from the office, the leases shall be forwarded to the office of the Chairman of the Tribal Council.

"(b) Upon obtaining approval of the office of the Chairman, the leases shall be forwarded to the Branch of Realty.

"(c) Upon obtaining clearance from the Branch of Realty, the leases shall be forwarded through the office of the General Superintendent to the Area Director for ap-

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that must approve the lease depends directly on the area of land to be covered in the mining permit. With so many tribal and governmental departments required to approve a mining lease, obviously each lease is scrutinized carefully. Such a complex process of tribal investigation into each lease would appear to be in keeping with concern for the individual Navajo's interests.

However, this bureaucratic approval of leases from the tribal agencies to the Secretary of the Interior involves several major obstacles to protection of the Navajo environment. The first such obstacle is in the Tribal Council approval stage. The Tribal Council, organized in 1938, was fashioned after the Anglo model of government.[13] The Anglo-American concept of a centralized governing body is alien to the Navajo tradition.[14] When the Tribal Council approves a lease for mining purposes, it does so under the authority given it by a congressional act, not necessarily by authority given it by tribal members.

Furthermore, individual tribal members have no available remedy from outside courts in cancelling leases that have been approved by the Tribal Council. The concepts of tribal immunity[15] and indispensable parties[16] work together to eliminate the handling of such suits by federal courts. If individual members wish to bring suit to cancel any lease which is a danger to their environment, they must join the Tribal Council, and due to the immunity of the council from such suit, this is impossible. The individual Navajo is forced to deal with a tribal governmental system which is Anglo in nature and which may not reflect the traditional values and concerns. If a conflict arises between the individual Navajo and the Tribal Council, there is no available judicial forum in which to raise this challenge.

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proval.

"(d) Upon approval by the Area Director the leases shall be returned to the Branch of Realty for final disposition."

§ 802: "Mining leases . . . for tracts not less than 40 acres . . . shall be negotiated through the Advisory Committee of the Tribal Council and the Area Director, subject to approval of the Secretary of the Interior or his authorized representative; . . ."

13. U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 1, at 17-19.

14. *Id.*

15. Cherokee Nation v. Oklahoma, 461 F.2d 674, 681 (10th Cir. 1972). The tribe may not be sued by the tribal members without its consent. The concept here is in direct relation to that of the sovereign immunity of the United States.

16. Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974). The tribe is considered an indispensable party under Federal Rule 19(B), in any action requesting cancellation of a lease approved by the tribe.

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Another factor in the evaluation of Tribal Council approval involves the Bureau of Indian Affairs (BIA), The Advisory Committee sets the agenda for the Tribal Council, including in this agenda BIA proposals for mining leases.[17] These BIA-approved leases are often not in the best interests of the tribe, or are not carried to completion by the leasee.[18] However, any changes in the leases made by the council, such as requirements for stronger environmental protections, must be returned to the BIA for approval and could thereby be delayed for a burdensome amount of time.[19]

Perhaps the most significant drawback to the effectiveness of the plan is that the Tribal Council is protecting its tribal interest by this mine lease approval procedure and not the individual interests of tribal members. Even on the face of the Tribal Code, it appears that the primary tribal interest is the short-term interest in providing immediate income from the much needed uranium royalties rather than the long-term interest of sufficient environmental protection which would require reclamation efforts by the leasee to insure productivity of the land when the minerals are gone.[20] Both interests are vital to survival of the tribe, but only the latter will allow survival for more than thirty years. As well, only the latter will insure survival of the Navajo's traditional livestock-based lifestyle.

Federal Legislation for Environmental Protection

This bureaucratic string of approvals is not the sole safeguard of the reservation's interests. The federal government, in its concern for national environmental protection, has included the Indian nations under its National Environmental Policy Act (NEPA). NEPA requires federal agencies to consider the effect on the environment together with economic and technical factors

17. 18 N.T.C. tit. 18, § 802 (1977).

18. U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 1, at 30.

19. *Id.* at 8-11.

20. 18 N.T.C. tit. 18, § 803 (1977). The term for a lease for a uranium mine is limited to two years and continues as long as uranium is produced in paying quantities. Other leases have a term of ten years. Navajo Tribal Code tit. 18, § 1202 (1977). This section regulates coal production, concerning itself with royalties as well as lease control. No similar sample lease is provided in the Code for uranium mining. This is indicative of two problems. First, that uranium mining is not as closely supervised as is coal mining, and second, that uranium mining environmental control is not specifically detailed in the Navajo Tribal Code. However, royalty payment of uranium mine leases is codified at 18 N.T.C. § 852.

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in their decision making.[21] Whenever an agency proposes a major action that will affect the environment, an Environmental Impact Statement (EIS) must be prepared to determine the effects of the action on the people, the wildlife, and the land in the vicinity of the action. The decision-making body must then take into consideration this EIS before making final determination of the project presented for its approval.[22]

In *Davis v. Morton*,[23] non-Indian plaintiffs sought cancellation of a mining lease for its failure to meet NEPA requirements. The Tenth Circuit agreed that the mining leases enacted on reservation property fell within NEPA. This 1972 decision determined that NEPA requirements applied to the actions of the Secretary of the Interior in approving mining leases on Indian reservations.[24] Therefore, an EIS must be prepared before any uranium leases are presented to the secretary, and the EIS must be considered by the secretary as part of his final determination as to authorization of the lease.

Enforcement of NEPA, however, has certain drawbacks relative to the Navajo people and their land. Actions brought to protect the environment as a result of the enactment of NEPA are generally initiated by persons outside the reservation boundaries.[25] This leads to interference from people alien to the economic concerns of the Navajo. Both economic and environmental interests must be protected or the Navajo Nation could possibly lose much needed royalty income by cancellation of leases in order to protect the environment. The alternative of stricter enforcement of environmental protection regulations is often overlooked by outsiders.

In addition to outsiders, Navajo tribal members also have taken the initiative to enforce the NEPA. In a suit subsequent to

21. National Environmental Policy Act, 42 U.S.C. § 4332 (1979).

22. *Id.* at § 4332(C).

23. 469 F.2d 593 (10th Cir. 1972).

24. *Id.* at 596-98.

25. *See* Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), and Cady v. Morton, 527 F.2d 786 (9th Cir. 1975). The tribes have entered into some actions to enforce NEPA, but they are not an indispensable party where enforcement of NEPA is the purpose of the suit. "Dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resource on Indian lands. NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. We find nothing in NEPA which excepts Indian lands from national environmental policy." Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977).

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Davis v. Morton concerning the same lease, individual tribal members sought the identical remedy of cancellation on the same basis as in *Davis* and were denied relief.[26] Relief was denied, first, because the question of violations of NEPA had been rendered moot by the earlier *Davis* decision. Second, and more devastating to the cause of the tribal members, was the requirement that the Tribal Council be joined as an indispensable party without which the court could not continue. Immunity doctrines would not permit this joinder and the tribal members were left without judicial recourse.[27]

The Tenth Circuit has not always determined the Tribal Council to be an indispensable party in actions initiated by tribal members. In *Manygoats v. Kleppe*, a 1977 case, the court found joinder of the Tribal Council to be necessary, but continued determination of the issues without joinder as authorized under Federal Code of Civil Procedure Rule 19.[28] In *Manygoats*, tribal members did not seek the cancellation of a lease, but rather enjoinment of performance until there was compliance with NEPA. The court reaffirmed its earlier decision that cancellation of a mining lease is impossible without joinder of the council but found enjoinment of performance to be a permissible remedy available without joinder. The decision in *Manygoats* at last opened the door for tribal members to request, individually, environmental protection under NEPA.

However, the fact remains that although federal environmental laws may be available for implementation by the Navajo people as individuals, these laws are designed to protect federal interests, not Indian interests. An individual Navajo, such as Manygoats, may demand the issuance of an EIS, but the contents of that EIS are not at the discretion of that individual.[29]

NEPA provides the guidelines for compiling an EIS.[30] The Secretary of the Interior is one of the agents whose guidance

26. Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974).

27. *See also* Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975).

28. 558 F.2d 556 (10th Cir. 1977).

29. The NEPA regulations will only be effective for use by the individual Indians when they are permitted enjoinment of a mining lease. Where the individuals have been permitted to bring the suit without joinder of the tribe only to demand an EIS, an important link is missing. That link is the ability of the Indian to bypass the tribe and attack the leasee for noncompliance with what that individual or group of individuals may feel is a fundamental environmental need.

30. NEPA, 42 U.S.C. § 4332(C) (1979).

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should be sought in preparing an EIS.[31] In this sense, the secretary acts in a dual capacity. He acts "in a quasi-judicial capacity in acting upon the recommendations of the superintendent and the actions of the tribal council regarding these leases,"[32] as well as acting in an advisory capacity for preparing an EIS. The secretary may act to protect the economic interests of the tribe, or the environmental interests directed to him under the NEPA. Any conflict in these interests places the secretary in a discretionary position.[33] When one adds to this conflict the Secretary of the Interior's duty to protect the interest of a nation fraught with energy problems of its own, it becomes apparent that the pleas of one individual tribal member for grazing land may well go unheeded even if included in an EIS.

A second important aspect in considering NEPA as a feasible means of protecting Navajo interests is that the EIS required by the court in *Manygoats* did not include evaluation of protection of the surface from uranium mining processes.[34] The court reasoned that the mining of uranium is primarily conducted underground.[35] This unquestionably does not take into consideration future depletion of the uranium to the point that extraction of the lesser quality minerals will necessitate surface mining. Also, it ignores the damage that is done to the surface of any mining area where strict environmental protection is not implemented.[36]

One other possible safeguard initiated by federal legislation deserves analysis. This is the Omnibus Tribal Leasing Act of 1969,[37] and policy statements by the secretary in regard to this Act.[38] The Act was implemented to protect environmental stand-

31. *Id.*

32. F. COHEN, FEDERAL INDIAN LAW 104 (1942).

33. Manygoats v. Kleppe, 558 F.2d 556, 558 (1977): "the duties and responsibilities of the Secretary may conflict with the interests of the Tribe. The Secretary must act in accord with obligations imposed by NEPA. In acting upon the Navajo-Exxon agreement the Secretary, to further the national objectives declared by NEPA, must have and consider an EIS. The national interest is not necessarily coincidental with the interest of the Tribe. . . ."

34. *Id.* at 560. The court recognized the EIS did not extensively cover the surface mining environmental dangers, but excused this deletion. The court earlier in its decision discussed the regulatory controls which would govern any surface mining, thus apparently shifting the burden of control of surface destruction from the EIS to mining regulations. *Id.* at 559.

35. *Id.*

36. See note 6 *supra*.

37. 25 U.S.C. § 396(a) (1979).

38. 25 C.F.R. § 177.1 (1979).

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ards in mining processes upon reservation lands. The policy statements require a plan for reconstruction to be provided before any mining operation begins.[39] This Act is not substantive and procedural as is NEPA, however. It merely provides guidelines for the Bureau of Indian Affairs in its decision making as to approval of mining permits.[40] In addition, the Act pertains primarily to reclamation procedures for surface mining. Since most uranium fields begin as underground operations, the Omnibus Act would not be applicable to the original lease.[41]

The Omnibus Act is barred from being a workable alternative for protection of the environment for a second reason. The policy statements accompanying the Act require a plan for reclamation to be accompanied with at least a $2,000 bond by the contractor.[42] Failure to comply with the plan may subject the leasee to cancellation of his lease and forfeiture of the bond.[43] This $2,000 is a minute amount in comparison to the possible tremendous cost of reclamation.

An Alternative to the Present Plans

Examination of tribal and federal legislative methods of safeguarding Navajo Reservation lands from irreparable damage from uranium mine development leads to a determination that no plan thus far enacted has been completely successful as far as the interests of individual Navajo ranchers are concerned.

A possibility for protecting reclamation interests and providing environmental protection of Navajo lands has been suggested by the tribe itself and could possibly provide the best alternative to exploitation. This suggestion by the tribe would include the for-

39. *Id.* "Interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment—land, water, and air—and to avoid, minimize, or correct hazards to the public health and safety."

40. Anderson, *Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners*, 35 MONTANA L. REV. 209, 216-20 (1974).

41. Similar problems exist in other legislation passed by Congress such as the Surface Control and Mining Reclamation Act of 1977, 30 U.S.C. § 1300, or the Mineral Leasing Act, 30 U.S.C. § 187, which direct coverage of surface mining reclamation to coal mining. In particular, *see* 30 U.S.C. § 1201: "Congress finds and declares that . . . (i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analysis are needed to serve as a basis for effective and reasonable regulation of such operations; . . ."

42. 25 C.F.R. § 177.8 (1979).

43. *Id.* at § 177.10.

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mation of a partnership or joint venture with the uranium field developers and the Navajo Nation itself.[44] The obvious deterrent to this simple and feasible alternative is that such self-determination by the Navajo Tribe has not yet been achieved in the area of mineral development.

Conclusion

Numerous actions have been taken to assure environmental protection of surface lands on the Navajo Reservation, while providing needed uranium resources to the United States and mineral royalties to the Navajo Nation. However, these steps have not been totally effective in assuring the individual tribal members the continued productivity of their grazing lands after depletion of the mineral.

The provisions provided in the Navajo Code are not necessarily reflective of the desires of the Navajo tribal members. Yet royalty payments for uranium mining are necessary for survival of the tribe under present conditions, but such survival appears to be limited to the amounts of the minable minerals themselves.

Environmental protection through enforcement of NEPA removes the determination of the effectiveness of these measures from the tribe and places it with the Secretary of the Interior, who acts not only to protect the Navajos' interests but the interests of the United States as well. The Omnibus Mining Lease Act protects reclamation interests, but often only to a limit of $2,000 and does little to eliminate the environmental dangers from mining uranium. The tribe's proposal for partnership agreements with the uranium developers is perhaps the only feasible protective device. If the tribe is making more than a mere royalty from the reservation's uranium deposits, it is more reasonable to believe that the tribe can afford to concern itself with reconstruction of the land in order to provide the environment necessary for the Navajo traditional form of life to continue.

44. U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 1, at 132-33. Recommendation of the Commission, which was made aware of the difficulty between the need for environmental control and continued royalties from uranium mining: "The Department of the Interior should adopt a policy in favor of joint enterprises—on a 50-50 basis—between the tribe and corporations wishing to conduct business on the reservation."

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