AHISTORICAL INDIANS AND RESERVATION RESOURCES

BY

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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.[1] Instead, some tribes have begun, through their sovereign governments, deliberately seeking out the exploitation of their land and natural resources.[2] By choosing to prioritize economic development over the environment, Indian nations are challenging the instinctive "love" that progressives have for all things Indian.[3] Forced to choose between

[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.

Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191, 195 (Kenneth R. Philp ed., 1995) [hereinafter INDIAN SELF-RULE].

[2] *See* Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development*, 12 LEWIS & CLARK L. REV. 1065, 1066 (2008) (describing natural resource development as a major source of economic development on many Indian tribes' reservations).

[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 "[t]he increasing popularity of all

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 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

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 bił dà ahiigaani 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.*

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,[8] 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.

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.[9] In Part

8 *See infra* Part V.B.

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).

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.[10] As one former worker noted, Navajo miners were treated as "expendable," were not informed of the dangers involved, and suffered grave health consequences.[11] Another ex-miner wondered

[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.

Straus, *supra* note 5, at ix.

[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

why they were never warned of known health risks and asked, "Are we disposable to the government?"[12] 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."[13] Even long after the more than one thousand mines closed or were abandoned,[14] Navajos inhaled radioactive dust blown off of open-air uranium piles, drank contaminated water, and even slept on floors constructed of waste material.[15]

On April 19, 2005, the Navajo Nation Council passed the Diné Natural Resources Protection Act,[16] forbidding uranium mining "within Navajo Indian Country."[17] 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

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)).

12 MEMORIES COME TO US IN THE RAIN AND THE WIND: ORAL HISTORIES AND PHOTOGRAPHS OF NAVAJO URANIUM MINERS & THEIR FAMILIES 8 (3d ed. 2000) (quoting Floyd Frank of Oakspring, Arizona). A suit by former miners alleging that the United States negligently regulated uranium mining given its awareness of the health risks was dismissed because of the national security imperative associated with such uranium mining. Begay v. United States, 591 F. Supp. 991, 1011–13 (D. Ariz. 1984) (providing a history of the health studies conducted). The United States Supreme Court later held that given the national interests at stake, the tribal court exhaustion rule did not apply in a suit against a uranium mining company by Navajos living near an open pit mine who used polluted waters for a number of things, including drinking. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 477, 486–88 (1999).

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* http://www.epa.gov/region09/superfund/navajo-nation/pdf/NN-5-Year-Plan-June-12.pdf; *see also* JAMES M. GRIJALVA, 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).

16 Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, §§ 1301–1303 (West 2005).

17 Navajo Nation Council Res. CAP-18-05 (2005), *available at* http://www.navajocourts.org/Resolutions/CAP-18-05.pdf; *see also* NAVAJO NATION CODE ANN. tit. 18, § 1303 (West 2005).

environment."[18] The Act was also a condemnation of the "social, cultural, natural resource, and economic damage to the Navajo Nation from past uranium mining."[19] 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.[20] With mining companies attempting to set up shop on the borders of the reservation, it is too early for the tribe to declare victory.[21] But it is remarkable that, at least for now, "the Saudi Arabia of uranium,"[22] the Navajo Nation, is foregoing uranium-based jobs and royalties.

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.[23] 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.[24] 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

18 Navajo Nation Council Res. CAP-18-05 § 1301. "Diné Bi Beenahaz'áanii — the Foundation of the Diné, Diné Law, and Diné Government" became law on November 13, 2002. *See* Navajo Nation Council Res. CN-69-02 (2002), *available at* http://www.navajocourts.org/Resolutions/ CN-69-02Dine.pdf (codified at NAVAJO NATION CODE ANN. tit. 1, §§ 201–206 (West 2005)). The codification of Navajo customary law into Navajo Fundamental Law is analyzed in Kenneth Bobroff, Diné Bi Beenahaz'áanii*: Codifying Indigenous Consuetudinary Law in the 21st Century*, TRIBAL L.J., 2004–2005, http://tlj.unm.edu/tribal-law-journal/articles/volume_5/_dine_ bi_beenahazaanii__codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php (last visited Apr. 18, 2010).

19 Navajo Nation Council Res. CAP-18-05 § 3.

20 For more on the history of uranium mining on the reservation and the relationship between the ban and the Bush Administration's energy policies, see Bradford D. Cooley, Note, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 393–97 (2006).

21 In 2006, the United States Nuclear Regulatory Commission denied a petition to reconsider the final environmental impact statement approving Hydro Resources Inc.'s proposed uranium mines bordering the reservation at Church Rock and Crownpoint in light of the Diné Natural Resources Protection Act. Hydro Resources, Inc., 64 N.R.C. 417 (2006); *see also* Cindy Yurth, *New Life for the Yellow Ore?*, NAVAJO TIMES (Window Rock, Ariz.), Mar. 19, 2009, http://navajotimes.com/news/2009/0309/031909uranium.php (last visited Apr. 18, 2010) (discussing the uranium claims that surround the Navajo Nation).

22 Judy Pasternak, *Blighted Homeland: Mining Firms Again Eyeing Navajo Land*, L.A. TIMES, Nov. 22, 2006, http://articles.latimes.com/2006/nov/22/nation/na-navajo22 (last visited Apr. 18, 2010) (internal quotation marks omitted) (quoting Mark Pelizza, Vice President of Uranium Resources Inc.).

23 *See* Press Release, U.S. Envtl. Prot. Agency, EPA Issues Air Permit for Desert Rock Energy Facility (July 31, 2008), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/8331e0972492f17c85257497005a37fb!OpenDocument (last visited Apr. 18, 2010).

24 For overviews of the Desert Rock proposal, see *id.* (describing the project); San Juan Citizens Alliance, Desert Rock Power Plant, http://www.sanjuancitizens.org/air/ desertrock.shtml (last visited Apr. 18, 2010) (same); Sithe Global, Desert Rock Energy Project, http://www.sitheglobal.com/projects/desertrock.cfm (last visited Apr. 18, 2010) (same).

Given the costs of transporting coal, "[m]ine-mouth conversions to electricity or 'clean' synthetic fuels appear to be practical means of employing [western coal] as their low energy-to-weight ratios usually prohibit long-distance transportation." Donald W. Clements, *Recent Trends in the Geography of Coal*, 67 ANNALS ASS'N AM. GEOGRAPHERS 109, 119 (1977).

New York equity company.[25] 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.[26] 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.[27]

In the 2008 State of the Navajo Nation Address, Navajo Nation President Joe Shirley, Jr. highlighted Desert Rock's significance: "[It] 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."[28] 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

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[25] The Blackstone Group purchased its 80% ownership stake in Sithe Global in 2005, after the Desert Rock proposal had begun. Press Release, Sithe Global, Blackstone Capital Partners, Together with Bruce Wrobel and Management, Acquires a Majority Interest in Sithe Global Power, a Leading Power Development Company (Oct. 5, 2005), *available at* http://www.sithe global.com/press/BlackstonePressRelease.pdf. Blackstone is owned by Stephen A. Schwarzman, number 53 on the Forbes list of the 400 richest people in America in 2008. Stephen A. Schwarzman Profile, Forbes, http://people.forbes.com/profile/stephen-a-schwarzman/78312 (last visited Apr. 18, 2010). His total compensation in 2008 was over $1.3 billion. *Id.*; *see also Blackstone's Chief Received $350 Million in Pay in 2007*, N.Y. TIMES, Mar. 13, 2008, at C2 (noting that amount does not include $4.77 billion in stock received when Blackstone went public, $1.2 billion of which immediately vested).

[26] Desert Rock Energy Co., Navajo Nation, http://www.desertrockenergyproject.com/navajo_ nation.htm (last visited Apr. 18, 2010).

[27] The Navajo Nation would have the option of obtaining an ownership stake of "25% outright, up to an aggregate of 49% depending on extent of other equity investment." Letter from Joe Shirley, Jr., President, Navajo Nation, to Stephen L. Johnson, Adm'r, U.S. Envtl. Prot. Agency 2 (Sept. 20, 2007), available at http://navajo-nsn.gov/News%20Releases/George%20 Hardeen/July08/State%20of%20the%20Navajo%20Nation%20Address%20%20July%2021%202008.pdf.

[28] Joe Shirley, Jr., President, Navajo Nation, State of the Navajo Nation Address at the 21st Navajo Nation Council 5 (July 21, 2008), *available at* http://opvp.org/cms/kunde/rts/opvporg/ docs/817209846-07-25-2008-17-00-46.pdf.

[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=2fa4f3dacd5948d585262246a90504bb (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.

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 with non-Indians, their recognized land holdings have shrunk.[36] 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.[37] It is a "beautiful, austere, and varied country," with a population of

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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].

34 OFFICE OF GEN. COUNSEL, U.S. COMM'N ON CIVIL RIGHTS, DEMOGRAPHIC AND SOCIO-ECONOMIC CHARACTERISTICS OF THE NAVAJO 4 (1973).

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 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 "[t]he 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).

more than 180,000, of whom only three percent are non-Indian.[38] 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.[39] From the capitol of Window Rock, Arizona, Navajo Nation President Joe Shirley, Jr. governs, along with the Navajo Nation Council and Navajo Nation Supreme Court,[40] 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.[41] 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.[42] They were only allowed to escape the bad conditions that characterized

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-aa78-464f4b6b9210.html (last visited Apr. 18, 2010).

38 RICHARD WHITE, THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS 225 (1983) (describing the reservation); Div. of Econ. Dev., Navajo Nation, An Overview of the Navajo Nation—Demographics, http://www.navajobusiness.com/fastFacts/demographics.htm (last visited Apr. 18, 2010) (providing population figures).

39 Navajo Nation, History Page, http://www.navajo.org/history.htm (last visited Apr. 18, 2010) (proudly 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 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=33998&CategoryKey=33999&pn=Page&DomName=opvp.org (last visited Apr. 18, 2010).

41 Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, Sept. 9, 1849, 9 Stat. 974 [hereinafter 1849 Treaty]; 1868 Treaty, *supra* note 33.

42 For more on the Navajo Long Walk, see generally L.R. BAILEY, THE LONG WALK: A HISTORY OF THE NAVAJO WARS, 1846–68 (1964); THE DINÉ OF THE E. REGION OF THE NAVAJO RESERVATION, ORAL HISTORY STORIES OF THE LONG WALK: HWÉELDI BAA HANÉ (1991).

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. PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 57 (2002).

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.[43] By the treaty, the reservation was "set apart for the use and occupation of the Navajo tribe" and was established as "their permanent home."[44] 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.[45] 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.[46]

The United States and non-Indian business interests were determined to extract natural resources located on reservations, including the Navajo.[47] Poor soil quality and infrequent rain limited the agricultural potential of the land, diminishing the impact white land greed had on the Navajo Nation relative to many other tribes.[48] Non-Indians, with the important exception of Indian traders and

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[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).

[47] 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.

Id.

[48] 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 Diné 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).

church groups, did not particularly push to live on the Navajo reservation.[49] But though not wanting to live in Navajo country, non-Indians did and do covet the natural resource holdings of the tribe.[50]

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.[51] 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.[52] They also reported that a small mine, producing 2500 tons annually "to supply fuel for the Indian school," was already in

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[49] 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 Navaho 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, NAVAHO 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 Affair's 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.

SW. INDIAN DEV., INC., TRADERS ON THE NAVAJO RESERVATION: DRAFT REPORT 26 (1970) (on file with Rogers College of Law Library, University of Arizona).

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)).

[51] M.R. Campbell & H.E. Gregory, *The Black Mesa Coal Field, Arizona*, *in* CONTRIBUTIONS TO ECONOMIC GEOLOGY (SHORT PAPERS AND PRELIMINARY REPORTS): PART II.—MINERAL FUELS 229, 229 (U.S. Geological Survey, Bulletin 431, 1909).

[52] *Id.*

operation at Keams Canyon.[53] 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.[54] Black Mesa is located in northern Arizona and includes contested portions of the Navajo and Hopi reservations.[55] Later surveys would confirm the existence of a considerable amount—400 million tons—of strippable coal at Black Mesa.[56] But coal 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.[57] This gave way to more formal commercial explorations only in the 1950s.[58] 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.[59] 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.[60] By 1971, Black Mesa alone was annually producing over one million tons of coal.[61]

The development of Black Mesa has not been without controversy. Winona LaDuke has called Black Mesa "the mother of all ecologically destructive mining complexes."[62] In 1971, the Sierra Club and other environmental groups purchased full-page protest ads in papers such as the *New York Times*.[63] The headline: "Like Ripping Apart St. Peter's, In Order to Sell the Marble."[64] The body of the ad was

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53 *Id.* at 236.

54 Mark Schoepfle et al., *Navajo Attitudes Toward Development and Change: A Unified Ethnographic and Survey Approach to an Understanding of Their Future*, 86 AM. ANTHROPOLOGIST 885, 885 (1984).

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).

56 Brian Jackson Morton, Coal Leasing in the Fourth World: Hopi and Navajo Coal Leasing, 1954–1977, at 1 (May 17, 1985) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with Boise State University Library) (citing U.S. DEP'T OF THE INTERIOR, SOUTHWEST ENERGY STUDY: REPORT OF THE COAL RESOURCES WORK GROUP app. J (1972)).

57 COLLEEN O'NEILL, WORKING THE NAVAJO WAY: LABOR AND CULTURE IN THE TWENTIETH CENTURY 30–54 (2005) (describing the development and characteristics of truck mines of the 1930s).

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.

62 WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING 35 (2005).

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.*

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."[65] 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.[66] But before discussing Hopi resistance and the Navajo experience, it is important to set the stage with the development of oil leasing, which preceded the rise of coal.

B. Oil and the Formation of the Navajo Nation Council

The Navajo Nation Council owes its existence to the discovery of oil on the Navajo reservation in 1922.[67] By the time coal leases were being worked out for Black Mesa, the Navajo council was firmly in place and the tribe did not suffer the same division between traditionalists and the tribal council as the Hopi tribe.[68] Today, the Navajo Nation Council concerns itself with all aspects of tribal governance; "[i]n its infancy, however, the group was associated almost exclusively with oil development."[69] The first meeting was held on July 7, 1923, and immediately the council approved a fast track oil leasing arrangement.[70] This single-minded focus was deliberate: The Navajo Nation Council "was organized by the Bureau of Indian Affairs in order to produce a 'legitimate' body of Navajo who could lease Navajo lands to oil companies for drilling."[71] According to Ward

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.

67 CAROL J. MCCABE & HESTER LEWIS, U.S. COMM'N ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY 17 (1975); RENO, *supra* note 58, at 123 (noting that oil was first found near Hogback in 1922).

68 *See infra* notes 123–24 and accompanying text.

69 KATHLEEN P. CHAMBERLAIN, UNDER SACRED GROUND: A HISTORY OF NAVAJO OIL 1922–1982, at 29 (2000).

70 *Id.* at 29–30. The approval of the leases came only after two similarly purposed prior Bureau of Indian Affairs–directed gatherings of Navajo men voted to reject the lease; the first such group voted 75 to zero against the proposed mining lease. JERRY MANDER, IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS 278 (1991).

71 WITHERSPOON, *supra* note 35, at 69; *see also* MCCABE & LEWIS, *supra* note 67, at 17 (noting that the tribal council was "created in part so that oil companies would have some legitimate representatives of the Navajos through whom they could lease reservation lands on which oil had been discovered"). "[T]he urge to establish a puppet government as a medium for control of the Tribe" had been around since internment at Fort Sumner, but that first attempt failed. ROBERT W. YOUNG, A POLITICAL HISTORY OF THE NAVAJO TRIBE 36 (1978). The Washington Office of the Bureau of Indian Affairs in 1915, upon hearing word from an agent based on the reservation that a council might be forming (the

Churchill, this handpicked council marked the start of tribal self-governance.[72] The tribal council's role, in the words of the first council's chairman, Jake Morgan, "is like an inner part of a sandwich. It comes between the Navajo tribe and the United States government."[73]

Professor Kathleen Chamberlain's excellent history of Navajo oil development powerfully documents the ties between oil companies, non-Indian governments, and Navajo leaders.[74] Some Navajos had misgivings about the effect drilling would have on the earth,[75] but Chee Dodge, the first person selected to be tribal chairman, assured former New Mexico territorial governor Herbert J. Hagerman that the Navajos, accustomed to being under the U.S. government "for years and years," wanted "to do what the government says" regarding oil development.[76] This, despite the fact that high production nationwide at the time Navajo land was to be opened up meant that the auctions held were arguably "against the welfare of the Indian owners."[77] Significantly, on the question of whether to distribute the oil funds on a per capita basis to individual members or to have the tribal government hold and control the funds, the council decided not to go

agent ended up being proven wrong), wrote the agent that "so long as the council can be used and controlled . . . it should be of great benefit to the Indians." LAWRENCE C. KELLY, THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY: 1900–1935, at 49 (1968) (internal quotation marks omitted). The effort to form a new council in 1923 was sparked by the decision of Navajos called to a March 1922 gathering to not approve new leases. *See id.* at 52.

What was true of the formation of the Navajo Tribal Council holds for other tribes as well: During the New Deal, "tribal councils were organized largely to 'rubberstamp' the [Bureau of Indian Affair's] approval of mineral leasing on the reservation." Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 301 (1996).

72 Ward Churchill, *American Indian Self-Governance: Fact, Fantasy, and Prospects for the Future*, *in* AMERICAN INDIAN POLICY: SELF-GOVERNANCE AND ECONOMIC DEVELOPMENT 37, 41 (Lyman H. Legters & Fremont J. Lyden eds., 1994) [hereinafter AMERICAN INDIAN POLICY]. Given that the University of Colorado fired Ward Churchill on what the university claims are academic misconduct grounds, in citing his work it is perhaps important to also include the citations tied to that controversy. *See* REPORT OF THE INVESTIGATIVE COMMITTEE OF THE STANDING COMMITTEE ON RESEARCH MISCONDUCT AT THE UNIVERSITY OF COLORADO AT BOULDER CONCERNING ALLEGATIONS OF ACADEMIC MISCONDUCT AGAINST PROFESSOR WARD CHURCHILL 3, 94 (2006), *available at* http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf; WARD CHURCHILL, SUMMARY OF THE FALLACIES IN THE UNIVERSITY OF COLORADO INVESTIGATIVE COMMITTEE REPORT OF MAY 9, 2006 (2006), *available at* http://wardchurchill.net/files/ churchill052006.doc; Eric Cheyfitz, *Framing Ward Churchill: The Political Construction of Research Misconduct*, WORKS & DAYS, 2008–09, at 231 (providing a strong defense of Churchill and a critique of the committee's report); *see also* John P. LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, WICAZO SA REV., Spring 1999, at 251, 251–52 (1999) (providing a critique of Churchill's scholarship that pre-dated the Investigative Committee's report and was used by the committee); Scott Jaschik, *Ward Churchill Fired*, INSIDE HIGHER ED, July 25, 2007, http://www.insidehighered.com/news/2007/07/25/churchill (last visited Apr. 18, 2010) (providing an overview of the allegations and events).

73 GEORGE A. BOYCE, WHEN NAVAJOS HAD TOO MANY SHEEP: THE 1940S, at 89 (1974) (quoting Jake Morgan).

74 *See generally* CHAMBERLAIN, *supra* note 69.

75 *Id.* at 30.

76 *Id.* (internal quotation marks omitted).

77 *Id.* at 32.

the per capita route.[78] Though with time oil was largely replaced by other natural resources, relegating funds to the tribe "served as the financial core of the future Navajo Nation government," and is an important legacy of the oil development of the 1920s.[79]

At the peak in the late 1950s, royalties associated with oil leasing totaled $27.7 million and represented ninety percent of the tribal budget.[80] Royalty money allowed the tribe "to generate even more improvements and achieve quasi-autonomy."[81] In 1955, a "rich find," the Aneth Strip in southern Utah, occurred.[82] "Aneth meant oil—Big oil!"[83] According to the Bureau of Indian Affairs (BIA), the Navajo Nation's auction of rights to the land the following year was the biggest sale in BIA's history up to that time.[84] But despite the size of the Aneth oil field and the high quality of Hogback and Rattlesnake crude, the tribe's return on its oil was just "one-eighth (or one-sixth) of the assessed value of the oil produced."[85] Diné living in southern Utah benefitted very little from the Aneth Strip's oil wealth, despite congressional acts requiring that Utah use 37.5% of *its* royalties to improve

[78] *Id.* at 36. Chamberlain subsequently describes this as a "far-sighted choice." *Id.* at 84. The ability of tribes to make per capita payments of funds held in trust by the Secretary of the Interior was reaffirmed by Congress in 1983. Pub. L. No 98-64, 97 Stat. 365 (1983). As early as a 1968, a *Harvard Law Review* note highlighted distribution of tribal resources to individuals as "a particularly divisive issue." Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1827 (1968). More recently, gaming has exacerbated the challenges inherent in per capita payments, and membership issues come to the fore when per capita distributions become as significant as they can be with a successful casino. Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 422 (1997) ("Tribal membership often becomes an issue. Not surprisingly, everyone wants a part of the jackpot of Indian gaming."). Such payments have inspired some to call for limits on tribal sovereignty. *E.g.*, Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793, 801–30 (2006) (arguing that tribal authority over membership should be limited to protect tribal members from being wronged by tribal disenrollment decisions often driven by per capita payments). *Contra* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 958–66 (2002) (defending tribal sovereign authority over membership).

[79] CHAMBERLAIN, *supra* note 69, at 36.

[80] Morton, *supra* note 56, at 272 (basing amounts on figures from 1958 and noting that the peak in oil revenues to the tribe occurred in 1957). The actual royalty amount may be higher. *See* Robert S. McPherson & David A. Wolff, *Poverty, Politics, and Petroleum: The Utah Navajo and the Aneth Oil Field*, 21 AM. INDIAN Q. 451, 454 (1997) (giving a figure of $34.5 million in royalties from the Aneth oil field alone in 1956).

[81] CHAMBERLAIN, *supra* note 69, at 93 (stating Navajos established a college scholarship program and provided money for the needy, irrigation and soil conservation projects, and renovation of chapter houses).

[82] RENO, *supra* note 58, at 124.

[83] BAARS, *supra* note 58, at 162.

[84] McPherson & Wolff, *supra* note 80, at 454.

[85] Barsh, *supra* note 50, at 211 (providing a percentage based on the period from 1880–1970). Oil companies argued that they should not have to pay more for the higher quality of Hogback and Rattlesnake crude because, they claimed, "the high quality was a curse, not a blessing" because "high gas content made the petroleum more volatile." CHAMBERLAIN, *supra* note 69, at 54; *see also* MICHAEL JOSEPH FRANCISCONI, KINSHIP, CAPITALISM, CHANGE: THE INFORMAL ECONOMY OF THE NAVAJO, 1868–1995, at 70 (1998) (reporting that for the over $2 billion exported from the Navajo Nation by 1978, the tribe had received only $300 million).

the welfare of area Navajos.[86] But they remained poor, with neither the state of Utah, which squandered money that should have gone towards area Navajos, nor the tribe, which used royalty money for the general tribal budget, seeming to do much for those in the area.[87]

In 1977, southern Utah Diné rebelled, setting up roadblocks and "shut[ting] down operations" at the Aneth oil field.[88] The unrest began initially with forty to fifty Diné seizing control of a pumping unit, but the "occupying force" eventually "swelled to one thousand" people.[89] The Coalition for Navajo Liberation, a grass roots organization supporting the people of the Aneth region prior to the occupation, provided the institutional support for the protestors.[90] The occupation was sparked by a shooting—an oil worker "shot at" a Diné sheepherder on horseback, a story confirmed by empty shell casings on the scene—but ended up being an expression of frustration directed at the oil companies and local governments.[91] Though a compromise was eventually reached, addressing many of the protestor concerns and ending the oil field takeover, tensions remained high: The next year residents threw rocks at oil employees working to identify new well sites.[92]

The occupation of the Aneth oil fields was but a local, dramatic example of a generalizable truth regarding oil on the reservation and the Diné: "[T]he underground wealth of their land has not meant a better or easier life."[93] From the first approval of oil leases, the tribe has had an uneasy relationship with oil extraction; the Aneth occupation was not the first rebellion against oil company operations on the reservation. Chamberlain reports that in 1933, "Navajos passed a resolution to cancel all oil or gas leases, even those extended by council in 1926 and renewed in 1931."[94] Such a quick reversal is impressive considering that the

86 In 1933 Congress expanded the reservation, adding the Aneth strip/extension to the existing reservation and providing for the 37.5% dedication of royalties. Act of Mar. 1, 1933, 72 Pub. L. No. 403-160, 47 Stat. 1418 (1933). Because the dedication requirement of the 1933 Act was not actually leading to money reaching area Navajos, Congress confirmed the requirement in a 1968 amendment to the Act. Act of May 17, 1968, 90 Pub. L. No. 306, 82 Stat. 121 (1968).

87 Richard J. Ansson, Jr., Comment, *Protecting Profits Derived from Tribal Resources: Why the State of Utah Should Not Have the Power to Tax Non-Indian Oil and Gas Lessees on the Navajo Nation's Aneth Extension:* Texaco, Exxon, and Union Oil v. San Juan County School District—*A Case Study*, 21 AM. INDIAN L. REV. 329, 345 (1997) (noting that an audit in 1992 found that of $61 million that should have been in a royalty-based trust fund from payments from 1960–1990, only $9.5 million could be properly accounted for and "the state confessed that it had recklessly squandered $51.5 million"); McPherson & Wolff, *supra* note 80, at 460–61.

88 CHAMBERLAIN, *supra* note 69, at 111.

89 *Id.*; McPherson & Wolff, *supra* note 80, at 458–60 (discussing the first moments of the occupation).

90 McPherson & Wolff, *supra* note 80, at 463.

91 *Id.* at 460 (internal quotation marks omitted).

92 *Id.* at 464. Prior to the occupation, the *Navajo Times* had reported similar rock throwing by residents. CHAMBERLAIN, *supra* note 69, at 112.

93 RENO, *supra* note 58, at 126 (internal quotation marks omitted) (describing this as the complaint of Aneth occupiers).

94 CHAMBERLAIN, *supra* note 69, at 65 (stating the resolution failed to have effect because the council's ability to cancel such leases depended on the companies being in breach of contract).

council was formed in part to approve such leases.[95] The reversal also reflects the practical limits on the supposed authority of tribes during this period.[96] Laying blame squarely on the federal government, Chamberlain argues that "from 1923 forward, the Interior Department repeatedly failed to maximize revenues."[97] Ultimately the history of oil leasing on the Navajo Nation, though both commencing and peaking earlier, mirrors that of Black Mesa coal leases.[98]

C. Hopi Resistance

Opposition to the Black Mesa mining made public a long-standing power struggle between the traditional form of Hopi governance and the centralized tribal council that had approved the leases.[99] In 1934 Congress passed the Indian Reorganization Act (IRA).[100] The brainchild of Associate Solicitor of Indian Affairs Felix Cohen and Commissioner John Collier, the IRA on its face officially ended the disastrous allotment policy and offered tribes a structure for once again having their governance rights recognized.[101] The IRA had a centralized, corporate, secular vision of tribal governance, and tribal approval was required before an IRA government was established.[102] The Diné voted against the IRA, but it was approved—part of what Professor Charles F. Wilkinson considers Collier's "biggest error"—by one third of the eligible Hopi voters.[103] The Kikmongwi, the traditional religious leaders of the various Hopi villages, mostly opposed the change to a centralized government, and the majority of Hopi chose to not vote in the BIA election that put in place a new tribal IRA constitution.[104] By replacing separate Kikmongwi village-based leadership with a centralized government, the IRA facilitated greater access to natural resources on Hopi land,[105] but not without

95 The council may have been dissatisfied that one of the promises made in return for approving the leases—that they "would receive government aid in securing new lands"—had not been kept. KELLY, *supra* note 71, at 69. Despite its democratic and institutional failings, the tribal council "was not simply a 'yes-man's' organization." *Id.* at 194.

96 Writing of reorganization-era mineral leasing, Professor Judith Royster explains, "[T]ribes had more authority over resource development on paper than in practice." Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1074 (2008).

97 CHAMBERLAIN, *supra* note 69, at 113.

98 *See* FRANCISCONI, *supra* note 85, at 69 ("Oil had a history similar to coal.").

99 Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 467–69 (1996).

100 Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

101 *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 104 (1993) (listing features of the Indian Reorganization Act).

102 *See id.*

103 *See* Wilkinson, *supra* note 99, at 457–58.

104 *Id.* at 458.

105 *Id.* ("The 1936 election was a watershed event. The creation of a Tribal Council eliminated the impediments to mineral leasing that had previously flowed from village autonomy and a lack of any written governmental structure. Most basically, there was now one official body to sign a lease."). Mining companies were the beneficiaries of this change. *See* SUZANNE GORDON, BLACK MESA: THE ANGEL OF DEATH 22 (1973) (reporting that, after being asked how the company could ignore the true

cost: The tribal council was seen as the "white man's government,"[106] as an "imposed" secular and central authority,[107] and as such it lacked legitimacy.[108]

In their resistance to mining on Black Mesa, Hopi traditionalists would challenge a federal judge's characterization of the tribe as "a timid and inoffensive people, peaceable with outsiders."[109] The Hopi Tribal Council's lease with Peabody was orchestrated by a non-Indian attorney ostensibly representing the tribe but who had close, ongoing ties to Peabody, an obvious conflict of interest, the details of which were uncovered by Professor Wilkinson.[110] The Kikmongwis' protest eventually entered the court system, but the United States Court of Appeals for the Ninth Circuit treated their objections as if they were simply those of "62 dissident traditional Hopis."[111] In resting its dismissal of the case on the sovereign immunity of the tribal council, the court was equally dismissive of the Kikmongwis' challenge to the tribal council's legitimacy and its power to enter into such an important lease.[112]

The lease signed by the Hopi Tribal Council in 1966 was an oppressive one. It contemplated a thirty-five-year lease with no "reopener, a standard provision allowing renegotiation after an agreed period, usually ten years."[113] As a result, until it was renegotiated by Reid Chambers in 1987, the Hopi Tribe was receiving far less than even coal leases on public land produce.[114] Additionally, the Hopi were not protected from, nor adequately compensated for, the water use—three million gallons per day—needed to connect the mine with an associated power plant by coal slurry.[115] The power struggle between the Hopi Tribal Council and the

Hopi leadership, a Peabody public relations vice president, William L. Stockton, "commented that it would be too difficult for Peabody to go to every village chief and get his permission to lease the land. Peabody needed a quick, easy way of securing leases, and the Tribal Council, created by the Department of the Interior, was a convenient solution").

106 Wilkinson, *supra* note 99, at 459 (internal quotation marks omitted).

107 Pat Sekaquaptewa, Dir., Native Nations Law & Policy Inst., Univ. of Cal.–L.A., Statement at the Meeting of the National Congress of American Indians (Nov. 17, 2006), *in Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 121 (2007).

108 *See, e.g.*, GORDON, *supra* note 105, at 17 ("Hopi leaders and a great majority of the tribe have boycotted the Tribal Council, which has brought not democracy, but rather great divisions in the tribe between 'Progressives,' who favor the white man's ways, and the 'Traditionals,' who prefer the old ways.").

109 Healing v. Jones, 210 F. Supp. 125, 134 (D. Ariz. 1962) (dividing the mineral rights to the contested portions of the 1882 Executive Order area equally between the Hopi and Navajo tribes). For more on the maneuverings of the Navajo and Hopi attorneys that led up to *Healing v. Jones*, see JOHN REDHOUSE, GEOPOLITICS OF THE NAVAJO HOPI 'LAND DISPUTE' (1985), http://www.angelfire.com/art/hoganview/Geopol.htm (last visited Apr. 18, 2010).

110 Wilkinson, *supra* note 99, at 459–67, 469–72.

111 Lomayaktewa v. Hathaway, 520 F.2d 1324, 1327 (9th Cir. 1975).

112 *Lomayaktewa*, 520 F.2d at 1326. The court took the position of energy companies who explained Hopi opposition as "dissidents spurred on by outside agitators." GORDON, *supra* note 105, at 19 (quoting David Fogarty, Vice President of Southern California Edison, as saying "in any organized society there is always one sector that's unhappy with the leadership, elected or appointed, or however they got there" (internal quotation marks omitted)).

113 Wilkinson, *supra* note 99, at 471.

114 *Id.* at 471, 480.

115 Katosha Belvin Nakai, *When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?*, 35 ARIZ. ST. L.J. 1283, 1290 (2003) (giving water usage amounts); Wilkinson,

traditional Kikmongwi form of Hopi governance drew attention to the lack of meaningful Hopi approval or involvement in the original lease.[116] Together, Peabody and the United States were intent on getting Hopi coal and they did, using formal approval to mask the oppressive nature of the lease in terms of both process and compensation.[117] The initial lease for mining on Black Mesa was approved by the United States Department of the Interior "[w]ithout even consulting the tribes,"[118] a tellingly open claim by the Interior Department to Black Mesa coal that "was still subject to the joint concurrence of the Navajo and Hopi tribal councils."[119]

D. Navajo Experience

The Navajo Nation, perhaps because Black Mesa makes up a relatively smaller portion of the entire reservation compared to the Hopi or perhaps because the Navajo Nation Council enjoyed greater legitimacy, did not experience the same internal upheavals as a result of the leasing of Black Mesa. In her study of Black Mesa mining operations, Suzanne Gordon quotes Peter McDonald, former chairman of the Navajo Nation Council, as saying, "Strip mining doesn't really bother me . . . because, first of all, any resource that is on the reservation under the ground is for the Navajo to utilize."[120] Gordon went on to note that McDonald, unlike fifty-three families that had to be relocated, could tolerate the mine because of the geographical distance between the mine—it was "not in his backyard"—and Window Rock.[121] Black Mesa transitioned from a traditional rural, extended-family, herding-and-farming community located a great distance from formal sector

supra note 99, at 480 (comparing the water usage rates under the original lease, $1.67 per acre-foot, and the second lease, $300 per acre-foot). The coal slurry "is approximately 275 miles in extent" and moves "at a velocity of about 5 miles per hour." Dove, *supra* note 65, at 43 (citing BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, ENVIRONMENTAL STATEMENT, NAVAJO PROJECT 87 (1972)). The slurry is "the only one of its kind in the United States." ALI, *supra* note 11, at 106. In order to supply the necessary water, six Peabody wells ranging from 3535 to 3737 feet deep pump Black Mesa groundwater. Dove, *supra* note 65, at 44. The annual water use stands at "1.3 billion gallons of pristine water." LADUKE, *supra* note 62, at 38. As Philip Reno describes, "the water as well as the coal is being mined and shipped away." RENO, *supra* note 58, at 59; *see also* NANCY GREIG, SECONDARY BUSINESS AND JOB DEVELOPMENT RELATED TO THE COAL GASIFICATION PLANTS AND THE NAVAJO INDIAN IRRIGATION PROJECT 101 (1974) (on file with U.C. Berkeley Library) (noting that water used by coal companies ends up polluting other waterways). The coal slurry was supplemented in 1974 by a dedicated train line running from Black Mesa to another power plant, Navajo Generating Station, near Page, Arizona. RENO, *supra* note 58, at 108.

116 Brian Jackson Morton argues that resolving the power struggle in their favor and consolidating authority explains the tribal council's decision to approve the lease more so than the council's desire to respond to reservation poverty. Morton, *supra* note 56, at 283.

117 *See* GORDON, *supra* note 105, at 14.

118 *Id.*

119 REDHOUSE, *supra* note 109.

120 GORDON, *supra* note 105, at 72 (internal quotation marks omitted).

121 *Id.* Navajos in the areas affected by mining had to be relocated, an effort that, according to one study, required "the conceptual gap between Navajo perceptions and conventional economic development formulations" to be bridged. Schoepfle et al., *supra* note 54, at 888.

employment to an area that by 1985 had staved off depopulation in large part because of mining.[122]

The difference between the vocal Hopi resistance and the somewhat more muted Navajo reaction to the initial Black Mesa lease arguably reflects the different position of the tribal council in the two tribes.[123] Though tribes are subject to limits on their sovereignty, the central Navajo government plays a more important and expanded decision-making role with regard to the direction of the tribe than was the case in prior generations.[124] Traditionally the tribe was organized according to extended family groupings, but though the clan system continues to have an important place in Diné society and in Navajo private law, the Navajo government has taken on many Anglo traits.[125] During the New Deal, the Navajo people voted against having their government formed according to Washington's prescribed corporate structure, so unlike the Hopi they never approved an IRA constitution.[126] Nevertheless, their chosen form of governance has tended to centralize authority in Window Rock.

Efforts to decentralize and devolve government authority to local chapters more reflective of "tribal federalism" and the tribe's form of dispersed governance precontact have met with only limited success.[127] Such a concentration of authority

122 David F. Aberle, *Education, Work, Gender, and Residence: Black Mesa Navajos in the 1960s*, 45 J. ANTHROPOLOGICAL RES. 405, 426 (1989). Robert Begay, writing in 2001, reported that 700 Navajos were employed by Peabody on Black Mesa. Robert Begay, *Doo Dilzin Da: Abuse of the Natural World*, 25 AM. INDIAN Q. 21, 22 (2001).

123 This is not to imply that there were not many of the same problems of a "heavy hand of government oppression" in pushing the leases on the Navajo Nation. REDHOUSE, *supra* note 109 (noting that the then-attorney for the tribe complained in 1965 to the press of "a not-too-subtle implied threat on the Navajo Tribe that they had better do what [Secretary of the Interior] Udall wishes" (internal quotation marks omitted)).

124 Though the nature of the tribal council's formation might suggest otherwise, "it would be inaccurate to say that the current Navajo Nation government is simply a rubber stamp for the federal government or other outsiders bent on access to Navajo resources. The council is an integral and highly active part of public life on the Navajo Nation." JOHN W. SHERRY, LAND, WIND, AND HARD WORDS: A STORY OF NAVAJO ACTIVISM 22 (2002); *see also* MANDER, *supra* note 70, at 279 (crediting Peter MacDonald's tenure as Tribal Chairman with making the Council cease to be a "rubber stamp for the BIA").

The nature and extent of the Navajo Nation's sovereign powers reflect the Supreme Court's Indian law jurisprudence, a jurisprudence that recently has harmed the tribe in numerous ways by severely limiting tribal authority over non-Indians. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1195 (2005) ("The Supreme Court's decisions that divest tribes of categories of jurisdiction over non-members are doing the most mischief."). Professor Sarah Krakoff has written an excellent article exploring the role of the Supreme Court decisions on Navajo sovereignty; she singles out for special condemnation the Court's limitations on tribal jurisdiction. *See id.*

125 REDHOUSE, *supra* note 109. Navajo society was traditionally organized as a matriarchy, with women controlling land and property and in which it was not uncommon for a woman to have multiple husbands. *See* RUTH M. UNDERHILL, THE NAVAJOS 8, 43, 48 (1967); WITHERSPOON, *supra* note 35, at 42–43, 74–75. The Anglo influence and assumption that tribes should have male leadership has broken down parts of this matriarchy, with men assuming the political leadership roles. DINE POLICY INST., NAVAJO NATION CONSTITUTIONAL FEASIBILITY AND GOVERNMENT REFORM PROJECT 56 (2008).

126 CHAMBERLAIN, *supra* note 69, at 76 ("On June 15, 1935, Navajos rejected IRA by 7,679 to 8,197, a very close vote.").

127 The Navajo Nation Local Governance Act, NAVAJO NATION CODE ANN. tit. 26, §§ 1–3, 101–103, 1001–1004, 2001–2005 (West 2005), aimed "to recognize governance at the local level." *Id.* § 1(B)(1).

is not entirely a matter of changing internal norms; rather, it reflects the heavy historical and logistical hand that outside influences have had on Navajo self-governance. External and logistical forces involving the relationship between tribes and the United States propel tribes to centralize authority even if traditionally tribal governance was more local.[128] (The challenges the Hopi Kikmongwi village leaders have had getting their authority recognized by the United States attests to this.)[129] Logistically, for ease of administration and perhaps for equal treatment reasons, the U.S. government, reflecting the same general cultural bias, has long sought to treat tribes as if they were interchangeable.[130] This manifests itself in one-size-fits-all approaches as well as a related indifference to cultural distinctions across, and within, tribes that might suggest alternative, individualized, policy approaches.[131] For a tribe attempting to get particular issues resolved, not only would it be counterproductive to have more than one voice on tribal matters, but also the United States may be unwilling to listen to more than one centralized tribal government.[132]

The Navajo Nation Council wanted to allow "chapters greater autonomy in governmental decision-making." Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 163 (2002). Yet, more than 10 years after the Local Governance Act was passed, only 10 chapters had completed the steps necessary to be certified to take on Local Governance Act authority. Div. of Cmty. Dev., Navajo Nation, Certified Chapters, http://www.nndcd.org/content.asp?CustComKey=292717&CategoryKey=295197&pn=Page&DomName=nndcd.org (last visited Apr. 18, 2010).

128 *See* DUANE CHAMPAGNE, SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS 335 (2007) ("Native political arrangements are decentralized, egalitarian, and negotiated, while colonial tribal governments and Western political forms are hierarchical, centralize power and decision making, and are geared for greater political competitiveness.").

129 *Lomayaktewa*, 520 F.2d 1324, 1325, 1327 (9th Cir. 1975).

130 Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 325 (1994) ("Second, American culture tends to essentialize vastly diverse Native American cultures, treating them all as uniformly 'Indian.'"). Professor Saikrishna Prakash argues convincingly that the Court ought to recognize tribal differences rather than treat all tribes as synonymous with one another. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1070–72 (2004). Greater contextualism, according to Professor Robert Clinton, may also prevent larger tribes from seeing their rights diminished by the workings of "unrealistic claims by tribes on heavily allotted reservations" and federal Indian law's universalist logic. Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 596–97 (1985); *see also* Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141, 141 (2006), *available at* http://www.harvardlawreview.org/media/pdf/rosser.pdf (arguing that this same phenomenon of wrongly ignoring tribal differences extends to Indian law academics).

131 As Director of the Smithsonian's National Museum of the American Indian, and former Assistant Secretary for Indian Affairs in the U.S. Department of the Interior, Kevin Gover notes,

> At some point, the Montana tribes or the Alaska tribes may choose to pursue their own interests without regard to whether the tribes of other states receive the same consideration. Indian policy-making necessarily becomes more complex at that point, but it also becomes more sensible when it is customized to meet the particular circumstances of each tribe.

Kevin Gover, *Federal Indian Policy in the Twenty-First Century*, *in* AMERICAN INDIAN NATIONS: YESTERDAY, TODAY, AND TOMORROW 187, 206 (George Horse Capture et al. eds., 2007) [hereinafter AMERICAN INDIAN NATIONS].

132 *See, e.g.*, Wilkinson, *supra* note 99, at 458.

When convenient, the United States has shown its willingness, as in the Hopi case, to use multiple sites or possibilities of legitimate tribal governance as a way to recognize only those leaders supportive of U.S. policies.[133] Similarly, when internal tribal dissent or disagreements between traditional and modern tribal authorities cause reservation instability or seem to threaten U.S. interests, the United States shows little toleration.[134] The message—replicate our strong central authority, particularly executive authority—has not been lost on the Navajo Nation. The Navajo Nation consists of 110 chapters, and while these chapters, each with its own chapterhouse, are local governments with some local control, there has been a rise in the importance of the central tribal bureaucracy.[135] Such centralization reflects the need—acknowledged as early as 1920 by tribal leaders—for a single tribal voice when dealing with BIA and other parts of the U.S. government, especially when it comes to natural resources.[136]

The Navajo Nation Council's 1964 initial Black Mesa lease arguably is not as oppressive as the lease signed by the Hopi. Even if the Navajo Nation received the same royalty rights as the Hopi—something not in fact true[137]—the approval by the tribally accepted government perhaps saves this lease from an "oppressive" characterization.[138] But just barely, or at least that is the on-reservation view according to the United States Commission on Civil Rights's 1975 report, *The Navajo Nation: An American Colony*.[139] The Commission quoted Navajo Nation President Peter MacDonald's take on the coal leases: "Well, we, the Navajos did not have an opportunity to even discuss the pros and cons of strip mining when it was put to us, that we leased the coal to the companies and that they were going to mine it, surface mining or strip mining."[140] Without the opportunity to discuss mining, much less engage in meaningful debate about leasing, the Commission's summary of development at the time as "no more than exploitation, with profits

133 *Lomayaktewa*, 520 F.2d at 1327.

134 *Id.*

135 Navajo Nation, History Page, http://www.navajo.org/history.htm (last visited Apr. 18, 2010). The chapter system was created in 1928 to deal with "internal or local issues," with the Council left to address "matters raised by the dominant society." CHAMBERLAIN, *supra* note 69, at 75–76.

136 The relationship between Washington's control over the tribe and a single Navajo leader is highlighted in a 1920 letter noting the need for Washington approval of the form of Navajo governance. Atsidi Nez argued, "All the Navahos in every direction want to have but one boss," but he prefaced his position by saying that a gathering of Navahos would have to "write to Washington, and then Washington can decide whether we can have one boss for all the Navahos or not." Letter from Atsidi Nez to Father Anselm Weber (Dec. 31, 1920), *in* "FOR OUR NAVAJO PEOPLE": DINÉ LETTERS, SPEECHES & PETITIONS, 1900–1960, at 160, 161–62 (Peter Iverson ed., 2002).

137 *See* DAVID E. WILKINS, THE NAVAJO POLITICAL EXPERIENCE 164–65 (rev. ed. 2003).

138 *But see* REDHOUSE, *supra* note 109 (calling the Navajo Tribal Council of 1968 "the puppet council[]"). Perhaps part of the explanation for the difference in Hopi and Navajo reactions can be attributed to geography: Window Rock is several hours away from Black Mesa and governs a more extensive territory than do the Hopis, for whom Black Mesa plays a larger relative role. *See* Wilkinson, *supra* note 99, at 463. An anthropological article on Navajo attitudes regarding development notes, for example, that attitudes are likely to vary across regions and "be formed partly as a result of personal experience . . . . This should be especially true of such disruptive social changes as strip mining." Schoepfle et al., *supra* note 54, at 895.

139 MCCABE & LEWIS, *supra* note 67, at 30.

140 *Id.* (quoting *Testimony: Hearing Before the U.S. Comm'n on Civil Rights* 27 (Oct. 22–24, 1973) (testimony of Peter MacDonald, Chairman, Navajo Tribal Council)).

flowing off the reservation" seems fairly accurate.[141] Scholars who have focused on Navajo resource development tend to agree—laying blame on the federal government, federal attorneys, and BIA—that the leases did not adequately compensate the tribe.[142]

An argument can be made that the leases did reflect market rates, though structural and market forces depressed the amount the Navajo Nation received for its coal. The United States subsidizes coal development of public lands by opening up such land to coal extraction at bargain basement rates.[143] This essentially caps the amount the tribe can demand of coal companies given the ability of companies to choose between tribal and public land leasing.[144] Even though tribes control a disproportionate amount of U.S. coal deposits, their holdings are not enough to counteract the public land subsidies.[145] In his Ph.D. dissertation looking at Navajo and Hopi royalty rates, Brian Jackson Morton rejects the "hypothesis of buyer dominance," pointing to the fact that the tribes received rates above the statutory minimum rate.[146] For those who accept market pricing as the definition of whether the Navajo Nation received adequate compensation, Morton's claim that the leases gave Navajos the "prevailing rates" might seem dispositive.[147] Morton, however, argues that federal coal management shaped "the opportunity set facing the tribes."[148] Federal public land and coal leasing policies controlled supply, ensuring both record profits for coal companies and tribal coal royalties that were small and suboptimal from a tribal perspective.[149]

How should the federal shaping of the "opportunity set" regarding the Navajo Nation's leases be understood? For structuralists with a pro-Indian orientation, the low rates fit squarely into the larger "history of unmitigated malfeasance" on the

141 *Id.* at 7.

142 *See* CHAMBERLAIN, *supra* note 69, at 97 ("Thanks to federal attorneys, who were either incompetent or unconcerned, Navajos did not receive adequate recompense."); DONALD L. FIXICO, THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES 147 (1998) ("Tribes endowed with energy resources are also angered by the lack of proper supervision by [BIA] in protecting Indian interests and by [BIA's] urging of tribes to accept inadequate leases."); FRANCISCONI, *supra* note 85, at 70 (faulting the federal government); WILKINS, *supra* note 137, at 164 (arguing that the discoveries of additional natural resources led mining interests to negotiate "with the tribe, or more accurately, with the BIA" which then lobbied the Tribal Council to act without deliberation in approving the leases).

143 *See* RENO, *supra* note 58, at 113.

144 *Id.* As Professor Michael Joseph Francisconi explains, "The federal government was not in business to make a profit, and therefore leased lands below market prices." FRANCISCONI, *supra* note 85, at 68 (identifying this as the most important way in which the U.S. government controlled "[t]he supply side of Diné resources"). Russel Lawrence Barsh argues that with companies getting the same effective discount rate until the 1970s for Indian lands as public lands for the sake of national development, the lease discounting served as "a confiscatory transfer from the poorest few to the many." Barsh, *supra* note 50, at 213.

145 *See* Morton, *supra* note 56, at 118–19.

146 *Id. But see* ALI, *supra* note 11, at 82 (arguing that the leases "gave unprecedented concessions to the coal company," with coal royalty rates 20% of the federal royalty rate at the time and "'laughable'" water use rates (quoting Wilkinson, *supra* note 99, at 471)).

147 Morton, *supra* note 56, at 115.

148 *Id.* at 294.

149 *Id.* at 198–99; RENO, *supra* note 58, at 114 ("[I]n 1975 the rate of profit for coal mining was the highest of any industry in the United States—running at 20 percent of equity in 1974.").

part of non-Indians.[150] The Commission on Civil Rights's general conclusion in 1975 regarding development was that "the federal government, faced with several alternatives, has consistently opted for the one of least benefit to the Navajo people and their land and the one most likely to perpetuate a welfare existence on the reservation."[151] The Commission's conclusion seems to reflect Sam Deloria's criticism of the scholarly "tendency to find a devil to blame" in the Indian resource development policies of the 1960s.[152] But even taking into account Deloria's concern, whether or not there were sinister motives does not change the fact that federal policies and market choices diminished Navajo returns on their coal.[153] Cheap public land, limited competition in bidding on Indian leases, a preference for leasing to non-Indian businesses, and a concentration of power in a few oligarchic firms combined to keep royalty rates low.[154] As a result, the Navajo Nation, having been "led into these prejudicial agreements by the federal government," was "not getting a fair return on its energy resource leases."[155] Under the first lease the tribe was compensated at a royalty rate of 37.5 cents per extracted ton, or about two percent of gross proceeds.[156] The rate was "artificially low," even when compared with coal leases in the third world.[157]

In 1987, the Navajo Nation and Peabody Coal amended the royalty rate associated with Black Mesa leases.[158] The agreement that was reached did not reflect the value of the coal extracted and instead exploited the bargaining position of the Navajo Nation,[159] with the full knowledge of the Secretary of the Interior, who was charged with signing off on the agreement.[160] In 1985, Peabody Coal, aware that an Interior Department determination that the appropriate rate should be increased ten times from that of the initial lease, from 2% to 20%, decided to lobby the Secretary of the Interior David Hodel to delay release of this tribally supportive determination.[161] Stanley Hulet, a personal friend of Secretary Hodel, was paid $13,000 for a thirty-minute ex parte meeting with the Secretary, after which Hodel intervened on behalf of Peabody and "derailed the lease adjustment" that would

150 Morton, *supra* note 56, at 255 (describing, but not arguing in favor of, this perspective).

151 MCCABE & LEWIS, *supra* note 67, at 25.

152 Deloria, *supra* note 1, at 195.

153 Morton, *supra* note 56, at 256–57.

154 GRIJALVA, *supra* note 15, at 25 ("[F]ederal policies for reservation economic development in the 1950s and 1960s relied almost exclusively on non-Indian exploitation of tribal lands and natural resources."); Morton, *supra* note 56, at 101, 246–47.

155 RENO, *supra* note 58, at 116.

156 United States v. Navajo Nation (*Navajo Nation I*), 537 U.S. 488, 495 (2003).

157 FRANCISCONI, *supra* note 85, at 67.

158 *Navajo Nation I*, 537 U.S. at 493.

159 *See id.* at 496–98 (explaining the allegations that Peabody Coal forced the tribe back to the bargaining table under "severe economic pressure" by delaying the Secretary of the Interior's adjustment of the royalty rate by meeting with him in secret (internal quotation marks omitted) (quoting Navajo Nation v. United States, 263 F.3d 1325, 1328 (Fed. Cir. 2001))).

160 The requirement of a final sign-off by the Secretary of the Interior "traces back to the Nonintercourse Act, first enacted by the first Congress in 1790, and unchanged since 1834. The Nonintercourse Act provides that no lease or other encumbrance of Indian land is valid under United States law without the consent of the federal government." Royster, *supra* note 96, at 1077.

161 *Navajo Nation I*, 537 U.S. at 496–97.

have supported a 20% royalty rate.[162] This forced "the economically desperate Tribe to return to the bargaining table," and ultimately to accept an offer far below what the lease adjustment would have been: The rate slipped from 20% to 12.5%.[163]

In 2003, the U.S. Supreme Court held in *United States v. Navajo Nation* (*Navajo Nation I*) that the Indian Mineral Leasing Act of 1938[164] did not provide the necessary grounds for monetary damages under the Indian Tucker Act.[165] On remand, the United States Court of Appeals for the Federal Circuit found a breach of trust based upon the federal role created by a web of applicable statutes.[166] In 2009, the Supreme Court again heard arguments on the case and, as could be predicted from the oral argument, decided to once again absolve the United States of financial responsibility for breach of trust.[167] After disparagingly introducing the plaintiff as "the Indian Tribe known as the Navajo Nation,"[168] Justice Scalia made sure that this time the court of appeals would not find an alternative ground upon which to find the United States liable by declaring that the "case is at an end."[169] Little solace could be found in Justice Souter's weak—one paragraph—cry in concurrence that he was "not through regretting" that his position "did not carry the day" in *Navajo Nation I*.[170]

But regardless of the Supreme Court's holdings in 2003 and 2009, Justice Souter's dissent in *Navajo Nation I* identifies the exploitative aspects of the government's collusion with Peabody: "The purpose and predictable effect of these actions was to induce the Tribe to take a deep discount in the royalty rate in the face of what the Tribe feared would otherwise be prolonged revenue loss and uncertainty."[171] Professor Royster rightly labels this an "egregious case," yet the Supreme Court twice immunized the U.S. government for the "overt breach of a common-law trustee's duties."[172] Thus, despite the coal being worth far more than

162 *Id.* at 520 (Souter, J., dissenting); Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 311–12 (2005) (explaining the details of Stanley Hulett's meeting with Secretary Hodel).

163 United States v. Navajo Nation (*Navajo Nation II*), 129 S. Ct. 1547, 1553 (2009). For more on the facts surrounding the royalty rates and the origins of the litigation, see Bill Donovan, *Case Closed: U.S. Supreme Court Kills Bid to Hold Interior Accountable for Coal Royalty Deceit*, NAVAJO TIMES (Window Rock, Ariz.), Apr. 9, 2009, http://navajotimes.com/news/2009/ 0409/040909coal.php (last visited Apr. 18, 2010).

164 25 U.S.C. §§ 396a–396g (2006).

165 28 U.S.C. § 1505 (2006); *Navajo Nation I*, 537 U.S. at 511, 514.

166 Navajo Nation v. United States, 501 F.3d 1327, 1348–49 (Fed. Cir. 2007), *rev'd*, 129 S. Ct. 1547 (2009).

167 *Navajo Nation II*, 129 S. Ct. at 1551. During oral argument, Justice Ginsburg was particularly quick to indicate that she felt *Navajo Nation I* was determinative. Adam Liptak, *On Return, Ginsburg Is Quick to Question*, N.Y. TIMES, Feb. 24, 2009, at A12; *see also* Posting of Matthew L.M. Fletcher to Turtle Talk, Commentary on the Navajo Nation Oral Argument, http://turtletalk.wordpress.com/2009/02/24/commentary-on-the-navajo-nation-oral-argument (Feb. 24, 2009, 09:40) (last visited Apr. 18, 2010) (noting that the oral arguments "did not go very well" for the tribe).

168 *Navajo Nation II*, 129 S. Ct. at 1551.

169 *Id.* at 1558.

170 *Id.* at 1558 (Souter, J., concurring).

171 *Navajo Nation I*, 537 U.S. 488, 520 (2003) (Souter, J., dissenting).

172 Royster, *supra* note 96, at 1085; *Navajo Nation II*, 129 S. Ct. at 1551.

the agreed-upon rate according to United States's own experts,[173] Peabody and the United States together used the tribe's dependant position and lack of information to push through and approve a lease amendment known to be exploitative.[174]

Getting a fair price for coal would be a challenge for the Navajo Nation even in the absence of the federal policies or practices—from subsidized public land to trust violations—of the last fifty years that have favored mining companies.[175] Navajo coal is valuable coal. Changes in federal law in 1969 to 1970 that limited the desirability and utility of high-sulfur coal typical of Appalachia or the East helped make Navajo low-sulfur coal more desirable to the energy industry.[176] Environmental regulations thus favor western coal, which "averages less than one percent sulfur by weight compared to five percent for Illinois coal," making it "less of a pollutant when burned."[177] Moreover, strip mining enjoys technological advantages over shaft mining that allow greater efficiency in extraction.[178] Balancing out these advantages were severe constraints on tribal leaders. Economic development through natural resource development will be discussed in more detail later in this Article, but suffice it to say that the possibility that mining might relieve some of the poverty on the reservation undercuts the tribe's position in negotiations.[179] Tribal leaders are in a bad position to hold out too long since mining royalties are a critical source of funding for Navajo government administration and social services.[180] In his study of the Navajo economy, Professor Michael Joseph Francisconi likens the tribe's reliance on money from mining royalties to "self cannibalization."[181]

While a generalization, it is fair to say that mining companies have had "easy access" to Indian coal, and the U.S. government has encouraged mineral leasing by

173 *See* Brief for Respondent at 12, *Navajo Nation II*, 129 S. Ct. 1547 (No. 07-1410), *available at* http://www.narf.org/sct/usvnavajonation/brief_for_respondent.pdf (presenting the conclusions of Dr. Rai who, based in part on Bureau of Mines's studies, "*rejected* the notion that the customary 12½% rate for *federal* coal should be adopted" because the contract did not include a bonus to reflect the "extraordinary value of the tribal coal").

174 The Secretary of the Interior can take a more protective and paternalistic approach: In 1976, the Secretary refused to approve the Burnham mine lease until the original agreement was renegotiated with improved terms for the Navajo Nation. ALI, *supra* note 11, at 65.

175 FRANCISCONI, *supra* note 85, at 67–69 (describing the history of coal extraction on Navajo land); RENO, *supra* note 58, at 113.

176 GRIJALVA, *supra* note 15, at 112 (arguing that emissions limitations and "new strip mining technologies" under the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006), together contributed to making the mining industry focus its attention on Indian coal around 1976); *see* Clements, *supra* note 24, at 114.

177 Jeff Radford, *Stripmining Arid Navajo Lands in the US: Threats to Health and Heritage*, 11 AMBIO 9, 10 (1982).

178 FIXICO, *supra* note 142, at 150 ("In the West, draglines can strip-mine 100 tons of coal per man-day of labor, more than eight times the rate from the deep Appalachian shaft mines.").

179 *See infra* Part III; *see, e.g.*, W. Roger Buffalohead, *Self-Rule in the Past and Future: An Overview*, *in* INDIAN SELF-RULE, *supra* note 1, at 265, 272–73 ("It was not Collier but later commissioners of Indian affairs and reservation Indian leaders looking for a quick fix to economic poverty who brought uranium mines and polluting coal development and many other economic enterprises to Indian reservations."); Morton, *supra* note 56, at 269 ("Enduring poverty formed the context of the tribe's coal leasing in general.").

180 FRANCISCONI, *supra* note 85, at 67–69. The tribe employs the majority of the wage earners on the reservation. *Id.* at 68.

181 *Id.* at 74.

tribes.[182] The shenanigans—really the wrongful actions of the federal government and Peabody Coal—surrounding the Navajo Nation's renegotiations of the royalty rate in the mid-80s suggests that Peter MacDonald was being optimistic when, in 1976, he used the past tense regarding the nature of exploitation of Navajo natural resources: "Until quite recently, mineral development on Indian lands was by industry with the assistance of the federal government. Industry selected the area to be developed and the federal government dictated the terms, conditions and procedures of the proposed development. This arrangement left the Indians with little or no control."[183] Though Navajo coal is "a highly demanded, limited, and exhaustible resource," to date the Navajo Nation has at best exercised partial control over the exploitation of coal on the reservation.[184]

III. ROMANTICISM AND TRIBAL CHOICE

Natural resource exploitation on reservations is antithetical to the stereotype of Indians as environmental stewards. With the publication, in print and as a public service television commercial in 1971 to 1972 of a stoic Indian crying because of pollution, "Indian and environmental concern became synonymous, and public discussion turned to whether America might somehow tap native wisdom in solving the environmental problems facing Mother Earth."[185] The notion that Indians are by definition also environmentalists pervades popular culture and is thought by many academics to have explanatory power when considering reservation development.[186] This mental shortcut raises the challenge of any other stereotype—namely that although the romantic notion of tribes as environmental

182 FIXICO, *supra* note 142, at 151 ("The Department of the Interior could persuade tribal officials to lease land to companies, thereby easing the exploitation of Indian lands.").

183 Peter MacDonald, *An Indian View of Minerals Development on Indian Lands*, *in* INST. ON INDIAN LAND DEV., OIL, GAS, COAL AND OTHER MINERALS 1-1, 1-3 (1976), *quoted in* Morton, *supra* note 56, at 189. In his autobiography, MacDonald was more direct, describing the mid-70s leases as forms of environmental and financial "rape," and linking these leases to the formation of the Council of Energy Resource Tribes. MACDONALD, *supra* note 37, at 229.

184 GREIG, *supra* note 115, at 5. The Supreme Court acknowledged, but did not find dispositive with regard to damages for breach of trust, the pervasive federal control over Navajo coal in *Navajo Nation II*. 129 S. Ct. 1547, 1557–58 (2009).

185 GRIJALVA, *supra* note 15, at 19–20; *see also* POLLUTION: KEEP AMERICA BEAUTIFUL—CANOE (Ad Council 1971), http://www.aef.com/misc_video/adcouncil/indian_in_canoe_60.mpg. The Keep America Beautiful and Ad Council advertisement won multiple awards, and Iron Eyes Cody, the actor, eventually was honored with a Hollywood Walk of Fame star. AD COUNCIL, POLLUTION PREVENTION: KEEP AMERICA BEAUTIFUL—IRON EYES CODY (1961–1983) (2003), http://www.aef.com/exhibits/social_responsibility/ad_council/2278 (last visited Apr. 18, 2010). The ad "appeared widely in print and on television" and was so successful because it "cleverly manipulated ideas deeply engrained in the national consciousness." SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY 15 (1999). Robert Yazzie, former Chief Justice of the Navajo Nation, criticizes the ad as "totally false because it is based on the stereotyping of Indians as being 'stoic' and without emotions." Robert Yazzie, *Air, Light/Fire, Water and Earth/Pollen: Sacred Elements that Sustain Life*, 18 J. ENVTL. L. & LITIG. 191, 191 (2003).

186 Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 345, 354 (1993) ("Although Indian communities, like all others, have difficult decisions to make about their development, there is good reason to believe that if Indians are permitted to chart their own future they will continue to serve not only themselves, but also the global environment.").

stewards does not hold for all tribes or for all points in time, the stereotype nevertheless is grounded on some element of truth.[187]

Professor Frank Pommersheim's aptly titled *The Reservation as Place* illustrates the challenge of simultaneously accepting *and* rejecting the stereotypes of Indians as environmentalists.[188] In it, Professor Pommersheim first unequivocally states, "Land is inherent to Indian people; they often cannot conceive of life without it. They are part of it and it is part of them; it is their Mother. Nor is this just a romantic commonplace."[189] But, after saying that the relationship that many have with reservation land has changed, Pommersheim cautions against the "disturbing utopic visions that endlessly romanticize the people and the land."[190] Similarly, Armstrong Wiggins, a lawyer with the Indian Law Resource Center, argues that "sustainable development is part of the cultural and religious heritage of most Indian peoples," but adds that it is "a mistake, however, to take too romantic a view."[191] Professor Robert Laurence goes further, arguing that "romanticizing 'Indianness' can come very close to condescension and insult."[192]

What is the stereotype? Born out of the idea that Indians are somehow different and less civilized, the stereotype is at once a description of Indians and also, by contrast, of non-Indians. In the early 1970s, Indians were popularly thought of "as the continent's first conservationists."[193] The romantic conception of Indians preceded the birth of the environmental movement; as early as the 1830s Indians were thought of romantically as "children of Nature," unburdened by the troubles of civilized society.[194] In *American Indians & National Parks*, Robert H. Keller and Michael F. Turek provide a nice summary of the stereotype, namely that "Indians had always lived in harmony with nature, revered Mother Earth as sacred, and offered a special wisdom to non-Indians."[195] More subtle versions of the stereotype assume, for

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187 Robert H. Keller and Michael F. Turek note the dangers of the generalizing nature of stereotypes:

> [T]he "Indian as Environmentalist" evokes powerful reactions. Like most stereotypes, its shard of truth can cause more harm than good. Indians who ride motorcycles instead of ponies, who fish with nylon gillnets instead of wooden weirs, who clear-cut tribal forests rather than seek visions . . . find that non-Indians, including environmentalists, can react with dismay, anger, and disbelief. The ecological mandate freezes Indians as an idea and artifact, a static and quaint people who have few economic needs.

KELLER & TUREK, *supra* note 39, at 178.

188 Pommersheim, *supra* note 9, at 246.

189 *Id.* at 350.

190 *Id.* at 368.

191 Wiggins, *supra* note 186, at 348.

192 Robert Laurence, *A Memorandum to the Class, in Which the Teacher Is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law* Should *Be*, 46 ARK. L. REV. 1, 2 (1993).

193 GRIJALVA, *supra* note 15, at 19; *see also* RENO, *supra* note 58, at 3 ("Indians have . . . been called the first American ecologists . . . ."); Jace Weaver, *Introduction: Notes from a Miner's Canary*, *in* DEFENDING MOTHER EARTH: NATIVE AMERICAN PERSPECTIVES ON ENVIRONMENTAL JUSTICE 1, 4 (Jace Weaver ed., 1996) (noting that "worshipful Whites" saw Indians as "the first environmentalists").

194 MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 11–12 (1999) (internal quotation marks omitted).

195 KELLER & TUREK, *supra* note 39, at 177. They add that the thought behind such a stereotype is that "unless people heed the Indian, Western civilization may destroy the planet." *Id.* at 178.

example, that Indians will necessarily reach better decisions than non-Indians or always favor preserving the environment over economic development.[196]

There is *some* truth to the stereotype. As Donald Fixico observes, "the 'Mother Earth' concept is one of the few universal concepts among American Indians."[197] The "Indian 'heritage' of 'environmental sensitivity'" positively has facilitated tribal takeover of environmental protection responsibilities, while also legitimizing arguably racist U.S. environmental policies.[198] Simply rejecting the stereotype risks ignoring the truths it contains. Professor Rebecca Tsosie argues that "[t]he cultural connections between Native peoples and the land" should not be dismissed "as a 'romanticized' notion that is of limited utility in a modern era."[199] And studies confirming or making note of the central place of nature and land in Indian belief and value systems are ubiquitous.[200] What is required is to reject the stereotypes and the "environmental myths" surrounding Indians without "suppressing their historical associations with the land."[201]

Given that the stereotype on its face seems a positive one, why must it be rejected? The answer is that the stereotype is too readily accepted as truth both when it is deployed to explain environmentally protective decisions and when it is used to block a tribe's decision to participate in or cause environmental harms. The stereotype confines Indians to an ahistorical moment and potentially deprives tribes of their sovereignty. It is ahistorical because, while it is surely true that some tribes balanced concerns for the environment with economic development differently than

196 *See, e.g.*, Collins & Hall, *supra* note 130, at 326 ("Many environmentalists homogenize and romanticize all Native Americans as environmentalists who desire to keep their land free of all economic development."); Wiggins, *supra* note 186, at 354 ("Although Indian communities, like all others, have difficult decisions to make about their development, there is good reason to believe that if Indians are permitted to chart their own future they will continue to serve not only themselves, but also the global environment."); Carl H. Johnson, Note, *Balancing Species Protection with Tribal Sovereignty: What Does the Tribal Rights–Endangered Species Order Accomplish?*, 83 MINN. L. REV. 523, 558 (1998) (arguing that because of their values, "tribes are more motivated to protect habitat" than non-Indians).

197 FIXICO, *supra* note 142, at 145. This holds true for traditional Navajos. Begay, *supra* note 122, at 24.

198 VALERIE L. KULETZ, THE TAINTED DESERT: ENVIRONMENTAL RUIN IN THE AMERICAN WEST 97 (1998) (discussing the U.S. Nuclear Negotiator and U.S. environmental policy).

199 Rebecca Tsosie, *How the Land Was Taken: The Legacy of the Lewis and Clark Expedition for Native Nations*, *in* AMERICAN INDIAN NATIONS, *supra* note 131, at 246; *see also* Sarah Krakoff, *American Indians, Climate Change and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 868 (2008) ("American Indian people are not hard-wired to be any closer to nature or more environmentally sensitive than non-Indian people. But their traditional religious and cultural systems of meaning revolve around the earth and its values, and these long-held beliefs have influenced how American Indians view and interact with the land and the natural world.").

200 John P. LaVelle, *Rescuing* Paha Sapa*: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 96 (2001) ("Many commentators have noted the high solicitude for conservational values and ecological balance manifested in traditional American Indian tribal societies."). For more on traditional Indian environmental beliefs and relations with the land, see Tsosie, *supra* note 71, at 272–87.

201 KELLER & TUREK, *supra* note 39, at 240; *see also* LaVelle, *supra* note 200, at 96, 98 (arguing that "one should avoid endorsing conventional stereotypes about Indians and the environment" but also "recognize that environmental stewardship and reverence for nature are *central*, *pervasive*, and *normal* attributes of tribal societies").

non-Indians, it is impossible to reduce the history of every, or even any, tribe so neatly in this way.[202] It is also ahistorical because in order to accept the stereotype, the pretension that Indian societies are static and have not always changed with time must also be accepted.[203] The stereotype is "dehumanizing" and "masks cultural diversity."[204] It operates independent of reality, such that a "romantic conception of what 'Indians' should be is frequently inconsistent with what 'Indians' actually are today."[205] The stereotype of Indians as nature's protectors should be corrected, according to Professors Robert Cooter and Wolfgang Fikentscher, because it is "misleading."[206]

With regard to development, "misleading" is an understatement. The stereotype is not neutral with regard to the tradeoffs between the environment and industry; as a consequence, the construction "Indian = environmentalist" lends itself to manipulation.[207] Those who want to derail particular environmentally destructive development on reservations embrace the stereotype and claim that what is being proposed is not keeping with tribal values.[208] It is worth quoting at length Nancy B. Collins and Andrea Hall's powerful rejection of such use of the stereotype in their article, *Nuclear Waste in Indian Country*:

> Environmentalists, in pursuit of "Indian's best interests" may engage in stereotypical thinking, characterized by romanticism, which effectively deprives Native Americans of the right to make their own decisions about accepting waste on their lands. It is important to break down this malignant romanticism into its major component stereotypes so that we recognize them and strip them from our law and policy. Some of these stereotypes include viewing "real Indians" as historical, primitive, unsophisticated, and rapidly on their way to extinction; essentializing the hundreds of Indian tribes into one group; assigning Indians the role of guardian of our environment as well as theirs; failing to recognize Native American tribes as modern, twentieth century sovereign nations within the United States; and viewing Indians as dependent and in need of our protection and guidance.[209]

Though Collins and Hall focus on tribal acceptance of waste products, the above critique holds for other tribally accepted and environmentally destructive

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202 Conceits that rely upon "ahistorical" ideas of Indians as people who live in an eden-esque state of nature are not limited to the area of Indians and the environment. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1620–21 (2001) (disproving the idea underlying allotment that Indian societies did not recognize property rights in individuals).

203 TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS, at xiv (1995) ("American Indian institutions were far from static but evolved in response to environmental and market conditions. . . . Indians readily adapted their institutions to meet changing economic and environmental conditions even before contact with Europeans.").

204 KRECH, *supra* note 185, at 26–27.

205 Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUST. 379, 379–80 (2002) (focusing on conceptions of environmentalists).

206 Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 47 (2008).

207 For an extended discussion of Indians as environmentalists, see FIXICO, *supra* note 142, at 205–18.

208 Collins & Hall, *supra* note 130, at 326.

209 *Id.* at 325.

choices. The challenge such choices present is that they do not necessarily fit within the Indian as victim paradigm. Separating good from bad and right from wrong is easy when tribes are suffering from the policies or practices of non-Indians, without tribal involvement, that reflect environmental racism or environmental injustice.[210] It is much harder to know if environmental racism or injustice is involved when a tribe itself makes "an affirmative and informed decision to undertake an environmentally controversial project."[211] But the full meaning of sovereignty is such that it cannot be the case that tribal choices depend on "satisfying the emotional needs of a romantic tradition."[212]

A. Environmental Justice

The environmental justice movement provides some perspective on how harms suffered by and caused by tribes should be viewed.[213] Reports documenting the disproportionate environmental risks suffered by minority groups as a result of siting choices that concentrated industry, waste, and other harmful activities in minority communities led to recognition of environmental justice issues.[214] With race, for example, being "the most important variable associated with the siting of hazardous waste facilities nationwide," there was a need to address the problem.[215] In 1991, at the First National People of Color Environmental Leadership Summit, a broad concept of social justice that recognized "both public health and economic opportunity as indispensible aspects of the quality of life" emerged.[216] Those at the summit concluded that "people should not be faced with choosing between an unsafe livelihood and unemployment."[217] In 1994, President Clinton put the imprimatur of the President on the movement when he signed Executive Order

210 Dean Suagee, *Panel I: Tribal People and Environmentalists: Friends of Foes?*, 7 GREAT PLAINS NAT. RESOURCES J. 3, 4 (2002) ("[T]he easy case is dealing with environmental issues that arise outside of the reservation boundaries."); *see also* GRIJALVA, *supra* note 15, at 160 (noting that a proposal by non-Indians to build a landfill over a tribe's objections makes environmental justice issues "more obvious" than when a tribe proposes a landfill).

211 A. Cassidy Sehgal, Note, *Indian Tribal Sovereignty and Waste Disposal Regulation*, 5 FORDHAM ENVTL. L.J. 431, 454 (1994).

212 Deloria, *supra* note 1, at 206; *see also* KELLER & TUREK, *supra* note 39, at 239–40 (arguing that it is "an unjust demand" that Indians not adapt to modern culture without risking the forfeiture of their rights).

213 For a brief history of the environmental justice movement, see GRIJALVA, *supra* note 15, at 4–8. Additionally, EPA's environmental justice history webpage provides a brief, agency-specific history of the implementation of environmental justice efforts. U.S. Envtl. Prot. Agency, Environmental Justice: Basic Information, http://www.epa.gov/oecaerth/basics/ejbackground.html (last visited Apr. 18, 2010).

214 *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983); COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

215 Jeffrey R. Cluett, *Two Sides of the Same Coin: Hazardous Waste Siting on Indian Reservations and in Minority Communities*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 191, 192 (1999) (reciting findings of COMM'N FOR RACIAL JUSTICE, *supra* note 214).

216 GRIJALVA, *supra* note 15, at 5.

217 *Id.*

12,898, which required federal agencies to "make achieving environmental justice" part of their mission.[218]

The primary focus of the environmental justice movement has been to ensure that disadvantaged populations, whether defined along racial or socioeconomic lines, are not "shouldering an unequal share of the burdens of hazardous waste" and other harmful activities.[219] The term "environmental racism" conjures up images of whites deliberately targeting minority communities, but siting decisions can have a disparate impact even where overt racism is hard to identify or prove.[220] Though one may not find a Bull Connor equivalent in the site decisions of environmentally harmful activities, "[w]ell-meaning environmentalists and worried citizens of affluent communities" opposed to facilities in their communities may have a similar effect: the concentration of harmful activities in minority communities.[221] Lack of political power and limited ability to effectively participate in decision making may explain in part disadvantaged populations' excess exposure to nearby hazardous facilities.[222] Cheap land can play a role, as can the hope among members of the affected community that any new facility would also mean new job opportunities.[223] Ultimately, as Professor Alice Kaswan argues, "unequal distributions are of concern regardless of whether they were determined by discriminatory processes or ostensibly neutral market factors."[224]

Wholesale application of the environmental justice paradigm when considering Indian experiences, even if capturing tribal distributional burdens, fails to take sovereignty into account. Scholars often describe the history, including recent history, of Indian-white relations as one characterized by "exploitation of Indian people and their lands."[225] Such a history would seem to lend itself to an environmental justice approach. Indeed, the *New York Times* ad against Black Mesa coal mining discussed earlier and critiques of the targeting of Indian reservations by the hazardous waste industry both seem in line with this justice-centered approach.[226] But Indian environmental issues often receive only passing asides in

218 Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (2006).

219 Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 396 (1991). How much is being shouldered is contextual. A sewage treatment plant in a poor neighborhood that serves an entire city is a localized form of environmental injustice; a community bearing "the burden of an environmental problem that belongs to the entire nation" is a more national form. *See* Collins & Hall, *supra* note 130, at 269 (discussing the storing of nuclear waste on Indian reservations).

220 After discussing the challenges of finding deliberate environmental racism, Rachel Godsil ends her section on the definition by simply concluding, "[B]ecause hazardous waste sites must go *somewhere*, they are frequently placed in poor, minority communities." Godsil, *supra* note 219, at 400.

221 *Id.* at 396.

222 Joshua Glasgow, *Not in Anybody's Backyard?: The Non-Distributive Problem with Environmental Justice*, 13 BUFF. ENVTL. L.J. 69, 89–97 (2005) (arguing that political, educational, and informational limits among poor communities prevent them from imposing not-in-my-backyard-type costs upon developers pursuing environmentally harmful activities, making such communities more attractive to those developers). Media indifference to environmental problems in minority communities is arguably another contributing factor. Cluett, *supra* note 215, at 196.

223 *See* Collins & Hall, *supra* note 130, at 304.

224 Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1044 (2003) (describing the distributive environmental justice claim). Professor Kaswan's thesis is that "distributional injustice is a matter of concern regardless of its cause." *Id.* at 1050.

225 FIXICO, *supra* note 142, at xvi.

226 *See supra* notes 63–66 and accompanying text; Cluett, *supra* note 215, at 197–98.

articles on environmental justice[227] and, by treating Indians as equivalent to any other minority group when looking at environmental racism, their unique sovereign rights are largely ignored.[228] The marginal place of Indians in the environmental movement generally[229] thus far has largely carried over to the environmental justice approach.[230] As Professor Robert A. Williams, Jr. explains, "Indian values and belief systems are not reflected in or accepted by our environmental law. . . . [I]n Indian visions of environmental justice, all land is sacred, but that does not mean that tribal lands should never be used by the people."[231]

Environmental paternalism might be appropriate—and has been called for—when distributional justice is taken to be the sum total of environmental justice. Accepting the need for environmental paternalism requires that the group being "protected" be seen as unable to protect themselves.[232] Only when it is accepted that tribes are doing something "wrong" when they decide to prioritize economic growth, or that tribes are powerless to resist the interest of harmful industries, can a case for paternalism be made.[233] Consider for example the following quotes from two leading scholars:

> Examples of outsiders to be opposed might be the corporate disposers of nuclear and other toxic waste who want to dump in South Dakota and Indian country . . . .[234]

> Unfortunately, the cultural meaning of Mother Earth to many tribes becomes less important as their people seek sufficient education, well-paying jobs, modern health services, updated housing, and adequate food supplies.[235]

The first quote assumes that Indian tribes should never agree to accept nuclear or toxic waste in return for payments that would alleviate reservation poverty. There is nothing wrong with that position, but its paternalism is self-evident.[236] The

227 Most articles focus on environmental justice theory and not on providing examples—so they should not necessarily be faulted for not discussing Indian environmental justice issues—yet the absence of Indian examples is striking. *See, e.g.*, Kaswan, *supra* note 224 (containing a 118-page article without any discussion of Indian environmental justice issues).

228 *See* Cluett, *supra* note 215, at 197 ("American Indians are rarely treated as a separate group for the purposes of examining environmental racism.").

229 Wiggins, *supra* note 186, at 349.

230 A notable counter-example is Professor James Grijalva's 2008 book, *Closing the Circle: Environmental Justice in Indian Country*. GRIJALVA, *supra* note 15.

231 Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994).

232 *See* Cluett, *supra* note 215, at 201–02 (describing the paternalistic position of Eleanor Metzger).

233 Members of Congress share the idea that industry might need to be controlled because of the possibility "that tribal communities are being exploited by an unprincipled industry that takes advantage of poor communities." Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 260 (1993). Tribes that decide to pursue harm-causing projects "face economic paternalism from those who believe . . . that Tribes are simply incapable of making proper and intelligent decisions." Walker et al., *supra* note 205, at 390.

234 Pommersheim, *supra* note 9, at 364.

235 FIXICO, *supra* note 142, at 190.

236 The paternalism of the original quote comes across when seen alongside the practice of tribes to "seek . . . out" hazardous waste sites, even though such siting "generally seem[s] forced upon communities." Cluett, *supra* note 215, at 201.

same is true of the second quote: The word "unfortunately" only makes sense if well-paying jobs and adequate food supplies are not thought of as rightly being significant enough to alter the cultural meaning of Mother Earth.

Avoiding environmental paternalism requires expanding the understanding of environmental justice to include respect for sovereignty when it comes to Indians.[237] And, according to Professor Williams, environmentalists find it "difficult" to deal with tribal governments who are willing to entertain environmentally harmful siting proposals.[238] Yet there is some agreement among scholars and government officials that "addressing environmental justice in Indian country require[s] creative solutions utilizing tribes' governmental status."[239] Once tribal sovereignty is acknowledged to play a role in environmental justice, things get a lot more complicated: Indians must be distinguished from all other disadvantaged groups facing environmental injustice,[240] Indian rights to self-(re)definition must be respected,[241] and arguably Indian environmental perspectives should be incorporated to a greater extent into general environmental law.[242] This is

237 "Indians" here refers to the collective rights of Indians as peoples, not Indians as individuals. The United States and other countries oppose the term "peoples" in relation to indigenous peoples and have sought "to delete the letter 's' from the term 'indigenous peoples.'" Dean B. Suagee, Recent Development, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365, 376 (1997). Oren Lyons, a traditional chief of the Onondaga Nation, Iroquois Confederacy, explains, "When you say *peoples*, then we have to be recognized as separate nations and sovereigns. Consequently, they still refuse to add *s* to *people*." Oren Lyons, *Law, Principle, and Reality*, 20 N.Y.U. REV. L. & SOC. CHANGE 209, 210 (1993). The issue took center stage at the 1993 United Nations World Conference on Human Rights and was dubbed "the battle of the 's'" by the Canadian press. Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, 7 HARV. HUM. RTS. J. 33, 51 (1994) (internal quotation marks omitted) (quoting Canadian Press, *Battle of the 's,'* MONTREAL GAZETTE, June 23, 1993, at A12). For more on collective group rights of indigenous peoples and how these rights relate to U.S. history and political structure, see generally Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990).

238 *See* Williams, *supra* note 231, at 1154.

239 GRIJALVA, *supra* note 15, at 9 (describing the EPA position); *see also* Collins & Hall, *supra* note 130, at 313 ("In order to understand the position of Native Americans in environmental law, the twin issues of racism and sovereignty must be understood."); Walker et al., *supra* note 205, at 395 ("If Tribes are to achieve environmental justice within Indian country . . . it is absolutely imperative that environmental justice issues affecting Tribes be viewed against the backdrop of tribal sovereignty . . . .").

240 GRIJALVA, *supra* note 15, at 4 (making this claim based on tribal sovereignty and the close connections of Indians with the natural environment); Catherine A. O'Neill, *Environmental Justice in the Tribal Context: A Madness to EPA's Method*, 38 ENVTL. L. 495, 508 (2008) (arguing that Indians cannot be treated as any other "subpopulation" for environmental justice purposes because of tribal sovereignty and their government-to-government relationship with the United States (internal quotation marks omitted)).

241 *See, e.g.*, Oren Lyons et al., *Traditionalism and the Reassertion of Indianness*, *in* INDIAN SELF-RULE, *supra* note 1, at 243, 244 ("We will determine what our culture is. It has been pointed out that culture constantly changes. It is not the same today as it was a hundred years ago. We are still a vital, active Indian society. We are not going to be put in a museum or accept your interpretations of our culture.").

242 For more on what environmental law stands to gain from Indian perspectives, see GRIJALVA, *supra* note 15, at x–xi ("Tribes . . . bring a measure of human humility and respect for the natural world modern American environmental law seemingly lacks but, I think, desperately needs."); *id.* at 11 ("[W]estern environmental law as implemented by federal and state agencies is generally unable to

not to suggest that the tensions between environmental justice as distributional justice and a broader understanding of environmental justice simply disappear. In the preface to his book on environmental justice in Indian country, Professor James Grijalva writes that "[o]ne of the main premises of this book is that tribes' absence from the national dialogue and implementation of federal environmental programs is largely responsible for creating environmental injustice in Indian country, the concept that some minority communities suffer disproportionately higher environmental risks than many white communities."[243] Professor Grijalva's premise challenges tribal and environmental advocates because it asserts that tribes should play an expanded role while seeming to accept that results should be judged based on whether Indians bear a disproportionate burden. It is the potential conflict between distributional justice and sovereignty-informed environmental justice that animates tribally embraced projects or harms.

B. Contracts of Adhesion and Tribal Lands

Should tribal contracts or lease agreements with environmentally harmful industries be considered contracts of adhesion, as is true of Indian treaties? Or when a tribe decides to accept a payment, whether in the form of royalties, taxes, or jobs, in return for suffering environmental harm, does it do so "freely" and out of its own powers of self-determination? On the one hand, without having an adequate amount of freedom to walk away from environmentally harmful projects, the "choice" to accept such projects is arguably merely the illusion of choice, and the formal acceptance through contract hides the true tribal position. On the other hand, the presence of constraints or tribal needs alone preceding contract approval should not automatically taint all such agreements as adhesional.

Treaties between Indians and the United States have been likened to contracts of adhesion and have been interpreted in that way by the Supreme Court.[244] Recognizing the "power disparity" between Indians and the U.S. government in drafting treaties, the Court, starting with Chief Justice John Marshall, has consistently viewed treaties as "agreement[s] in which the negotiation process had not been one of arm's-length bargaining between equal adversaries."[245] In order to partially offset the adhesional aspects of the treaty negotiation process, the Court created a set of rules, or "canons of construction," liberally favoring Indians, to be

account for Indian visions of environmental justice that include the physical, social and spiritual relations affected by various land development uses.").

243 *Id.* at xi.

244 Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617–18 (1975).

245 Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 401 (1993). Professor Frickey goes on to highlight the limitations of a contract of adhesion approach as compared to a sovereignty approach when interpreting Marshall's opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Frickey, *supra*, at 406–07 (focusing on timing of the *Worcester* decision, which predates the development of the adhesion contract approach in contract law).

used when interpreting treaty ambiguities.[246] Importantly, the canons of construction inform treaty interpretation, but they do not invalidate treaty terms—whatever the failings or imbalances in the negotiations, the treaties are still valid instruments.[247] The United States stopped making treaties with Indians in 1871, and since then what used to be accomplished through treaty has been in part accomplished by agreement and contract between Indian tribes and non-Indian governments.[248]

Power disparities between Indians and non-Indian interests did not go away with the end of treaty making; what changed was the form of the relationship and, to some degree, the contracting parties. The contracts of adhesion interpretative lens used for treaties fits imperfectly with contracts for environmentally hazardous or destructive activities—whether for the storage of nuclear waste or the mining of coal—between tribes and companies or between tribes and non-Indian governments. Dramatic proof that formal contracts are little more than adhesion contracts can be seen in a 1948 Associated Press photograph.[249] The "photograph captured Fort Berthold Chairman George Gillette weeping as Interior Secretary J.A. Krug signed the *contract* to acquire land that was home to 80% of the reservation's population to build a reservoir."[250] The resulting dam had "devastating effects" on the tribes affected and "almost totally destroyed" their way of life.[251] This was accomplished by a government-to-government *contract* and not by a treaty; yet, unequal bargaining positions make this supposed agreement akin to an adhesion contract.

Some of the commentary on reservation mineral leases blurs the line between non-Indian governments and non-Indian corporate interests, between power and economics, treating them alike as powers that disadvantaged tribes are forced to

246 For more on the development of the Indian canons of construction, see Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 117–20 (2008).

247 *See id.* at 120. Courts have resolved treaties between Indians and non-Indian governments "'as the Indians would have understood them.'" *See id.* at 117 (quoting United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938)).

248 Congress, in 1871, passed legislation providing "[t]hat hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)). The Act reflected anger in the House of Representatives about not being involved in the treaty process; therefore, "abandonment of treatymaking was a matter of internal congressional politics." Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 441 (2005). Negotiated agreements approved by Congress and signed by the President replaced treaties. *Id.*

249 The photograph was taken by William Chaplis on May 20, 1948, and can be seen at http://www.newberry.org/lewisandclark/newnation/ranchers/flooding.asp. *See also* PAUL VANDEVELDER, SAVAGES AND SCOUNDRELS: THE UNTOLD STORY OF AMERICA'S ROAD TO EMPIRE THROUGH INDIAN TERRITORY 113 (2009) (reprinting, on the preceding, unnumbered page, the photograph, and describing tribal chairman George Gillette as being "[o]vercome by grief" as "the formal takings act that allowed Congress to 'condemn' 156,000 acres of the tribes' ancestral homelands" was signed).

250 Bethany R. Berger, *Williams v. Lee* and the Debate over Indian Equality 12 (2010) (unpublished manuscript, on file with author) (emphasis added). Thanks to Professor Berger for locating the photo and for providing the history of the photo.

251 Mandan, Hidatsa & Arikara Nation, History: Other History, http://www.mhanation.com/main/history/history_garrison_dam.html (last visited Apr. 18, 2010).

accept. Professor Donald Fixico's thesis in *The Invasion of Indian Country in the Twentieth Century* is that the continued exploitation of tribal natural resources by American capitalism has forced Indian leaders "to adopt modern corporate strategies to ensure the survival of their nations and people."[252] Similarly, Nancy Collins and Andrea Hall write, "[T]he federal government may force tribes, by the power of law *or economics*, to accept nuclear waste."[253] According to this perspective, the subordinate position of tribes forces acceptance of environmental costs in return for compensation. Compensation, while it may "ameliorat[e] the unfair consequences of siting," also "can be seen as deliberately exploiting the special status of these land-rich, economically poor, and isolated sovereigns in order to secure a dumping ground where the community is in a poor position to object to the infusion of economic incentives."[254] Viewed this way, businesses with undesirable characteristics have the incentive to seek out "vulnerable" communities—whether Indian or with other disadvantaged groups—that have little choice but to accept payments for environmental harms.[255]

The problem with this perspective is that it denies the agency of affected communities and tribes by falsely equating economic need with deterministic outcomes. Considering the probusiness orientation of the U.S. government and its failures to live up to its trust duty to tribes, it may be fair to blur the line between government and corporate contracts with Indian nations.[256] But simply because a community is hurting economically does not mean that when it agrees to allow harmful projects it does so "unwillingly," as one commentator has suggested.[257] Why is this important? Large multinational corporations bring to negotiations not only their own resources but knowledge of the tribal position. Tribal governments are heavily dependent upon both royalty receipts and U.S. government

252 FIXICO, *supra* note 142, at ix–x.

253 Collins & Hall, *supra* note 130, at 314 (emphasis added).

254 *Id.* at 320.

255 ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE AT TWENTY: 1987–2007: GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES 155 (2007), *available at* http://www.ucc.org/assets/pdfs/toxic20.pdf. A series of influential environmental justice articles by Professor Vicki Been uses the term "locally undesirable land uses" (LULUs for short); much of the thinking about environmental justice is framed in terms of LULUs. *See* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994) (discussing studies that demonstrate links between LULUs and socioeconomic characteristics); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001–03 (1993) (discussing the siting of LULUs in poor or minority neighborhoods). However, here the choice to describe this in terms of "undesirable characteristics" instead of LULUs is deliberate; some harmful activities may have little local effects while still being undesirable, and will only be accepted with compensation. *See, e.g.*, Howard A. Latin, *Environmental Deregulation and Consumer Decisionmaking Under Uncertainty*, 6 HARV. ENVTL. L. REV. 187, 197–98 (1982) (discussing environmental consequences that "occur at times and places far removed from the locus of consumer choice" (footnotes omitted)).

256 The success of the ex parte communications between a Peabody lobbyist and Secretary Hodel attests to both the private-public linkages and the failure of the government to live up to the trust relationship. *See supra* notes 158–63 and accompanying text.

257 Cluett, *supra* note 215, at 203 ("[R]esidents of minority and economically crippled communities, presented with promises of money and jobs, unwillingly receive hazardous waste facilities.").

assistance.[258] For the Navajo Nation, "[c]hronic unemployment and an extremely low per capita income level . . . would seem to make the people of this area receptive to any form of industrialization, including mining."[259] Companies engaged in harm-causing activities thus enter into negotiations from a position of strength, but acknowledging that economic conditions may favor accepting compensation for environmental harms does not mean that tribes are powerless to resist corporate interests or that they will never reject harm-causing proposals.[260] As Navajo Nation President Joe Shirley, Jr. explains, "The Navajo Nation is part of the modern economy. We do not oppose creating jobs, but there are lines we will not cross in order to make money."[261]

Elsewhere I have argued that the United States bears some responsibility for establishing the conditions in which tribes operate and which contribute to tribal acceptance of harm-causing contracts such as those with extractive industrial interests.[262] The bureaucratic management of tribal land that I highlighted there is just one aspect of a larger program of separating Indians from their land and resources.[263] The conflict between Indians and non-Indians has been seen by some

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258 *See* Morton, *supra* note 56, at 104 (citing Lorraine Turner Ruffing, *The Navajo Nation: A History of Dependence and Underdevelopment*, REV. RADICAL POL. ECON., Summer 1979, at 25, 31–32, for the proposition that the Navajo Nation's dependence upon royalty payments is one reason for the "relatively low . . . bargaining power" of the tribe); *see also* Barsh, *supra* note 50, at 217 ("Even if Indian tribes were guaranteed absolute freedom of choice in land development, their dependence on government aid and capital would continue to influence planning.").

It is beyond the scope of this Article to define or defend an accounting of what counts as U.S. government aid to tribes. For the purposes of this Article, it is enough to say that if the United States ceased providing tribes with funding, government services would suffer markedly for many tribes. Some U.S. government funding goes directly to tribal administrative agencies that have taken over work previously performed by BIA (similar to federal block grants to states), some funding is used to meet obligations that the United States agreed to through treaty, and some funding flows directly to individual tribal members as part of the government's welfare obligations to all citizens, regardless of Indian or non-Indian status. *See generally* Deloria, *supra* note 1, at 194–200 (discussing reservation welfare programs); Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 HARV. BLACKLETTER L.J. 211, 211–12 (2002) (arguing that the U.S. government has treaty-based obligations to provide reservation housing).

259 Radford, *supra* note 177, at 12.

260 *See* Williams, *supra* note 231, at 1153–54 (arguing that given high unemployment rates Indians will consider siting a hazardous waste dump on an unused area, but would not even think about such a dump if it were placed "where important spiritual, social, or physical values of the tribe are implicated").

261 Declaration of Joe Shirley, President of the Navajo Nation, at 3, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2006) (Nos. CV 05-1824-PCT-PCR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT-JAT).

262 Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 265–66 (2005) (looking at the causes and solutions to reservation poverty from the perspectives of neoclassical economics and new institutional economics).

263 The dual—United States and tribal—control over trust land protects the integrity of the tribal land base, a goal that almost everyone working on behalf of tribes supports and that reflects the failure of allotment. *See id.* at 262–65. The problem comes when U.S. and tribal governments, together or independently, manage the trust land poorly and in ways that reduce the value of the land. Even those less supportive of tribal trust land who have done studies indicating that the trust status of reservation land reduces land output acknowledge that such cost "does not necessarily imply that trust constraints

scholars as fundamentally about control over resources and land, not about cultural conflict.[264] While land is no longer simply taken, there has developed "a system of routine economic supervision, purportedly protective, that favors certain patterns of resource exploitation."[265] Managing reservation land as if it were public land, the United States discouraged some forms of investment and encouraged others.[266] As Professor Robert L. Bee argues, "[p]olicy ad-hoccery" may itself lead to "exploitation of Indian resources," even if the intent of U.S. government agencies was entirely for the good of tribes rather than responding to corporate interests.[267] But regardless of motivation, the United States "encouraged industry to exploit Indian country's wealth of natural resources," even where not supported by tribes or tribal members.[268]

To illustrate the tremendous impact of federal resource management, it is worth exploring both the tribal effort to block further development of the San Francisco Peaks and the imposition of mandatory livestock reduction by Washington in the 1930s. Though somewhat removed from the U.S. government's encouragement of leasing for natural resource extraction, the two controversies illustrate the importance of tribal control over tribal resources. They also have had and will continue to have an impact on the forms of economic opportunities available to the Navajo Nation and to tribal members.

1. San Francisco Peaks

The tension between Indian interests and industrial interests is currently playing out dramatically in the courts in a case involving the San Francisco Peaks, one of the traditional four sacred mountains of the Diné.[269] The Peaks have spiritual significance for many tribes, not just the Diné, but the land itself is off-reservation federal forest land.[270] The United States Forest Service granted a special use permit to a ski resort, and in 2002 Snowbowl Ski Area sought permission to expand the

should be lifted." Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427, 449 (1992).

264 Joe De La Cruz et al., *What Indians Should Want: Advice to the President*, *in* INDIAN SELF-RULE, *supra* note 1, at 311, 319 (including, according to Philip S. Deloria, "the relationship of Indians to the economy" as part of the true conflict).

265 Barsh, *supra* note 50, at 195.

266 *Id.* at 195–98, 217.

267 Robert L. Bee, *Riding the Paper Tiger*, *in* STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY 139, 140 (George Pierre Castile & Robert L. Bee eds., 1992).

268 GRIJALVA, *supra* note 15, at 175; *see* MCCABE & LEWIS, *supra* note 67, at 22–24 (comparing the status of the Navajo reservation to an underdeveloped nation in the grip of a colonial system). The Canadian government shares in this, promoting "industry and enterprises center[ed] on natural resource extraction" as the means of generating jobs and government revenue on indigenous land. Taiaiake Alfred, *Sovereignty*, *in* SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION 33, 45 (Joanne Barker ed., 2005).

269 For up-to-date information on the dispute as well as a collection of the documents related to the case, see Save the Peaks Coal., Protect and Respect the Mountain and Our Children!, http://www.savethepeaks.org (last visited Apr. 18, 2010).

270 Petition for a Writ of Certiorari at 3–6, Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009) (No. 08-846); *see also* Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden under RFRA*, 36 ECOLOGY L.Q. 259, 295–96 (2009) (describing the importance of the Peaks in the beliefs of Navajos and Hopis).

resort and to spray the ski areas with artificial snow.[271] Even before the Forest Service approved the project, tribes for whom the Peaks are sacred objected, claiming that their religious rights were being violated.[272] To produce the artificial snow, the resort was going to spray up to 1.5 million gallons of treated sewage water a day onto the mountain as snow.[273] The Ninth Circuit highlighted the lower court's findings that "highly variable snowfall" had resulted in operating losses for the owners of the ski resort[274] and that artificial snow was "needed to maintain the viability of the Snowbowl."[275] For the tribes, this would be a form of desecration because it is quite literally the spraying of feces and dead bodies onto the sacred Peaks—feces because of the use of toilet wastewater, and dead bodies because of run-off from funeral parlors.[276] Such treatment of a place of religious significance is, according to the plaintiffs, a substantial burden on the free exercise of religion and a violation of the Religious Freedom and Restoration Act of 1993 (RFRA).[277]

The Ninth Circuit ruled in favor of the Forest Service and Snowbowl, characterizing the claim as being based upon "diminishment of spiritual fulfillment," which it held did not amount to a substantial burden.[278] The appeals court majority focused on the relatively small amount of land impacted—one percent of the Peaks—by the ski area and applied a restrictive reading of RFRA's requirements.[279] Additionally, the majority seemed to find comfort in Arizona's classification of the treated sewage water that would be used as being of an A+ grade, the highest mark possible under state law, signaling that it is suitable for irrigation of school grounds and crops.[280] Not discussed by the majority is that Arizona's approval of similar treated waste for school grounds places students playing sports in the unenviable position of having to choose whether or not to dive

271 Petition for a Writ of Certiorari, *supra* note 270, at 3.

272 *Id.*

273 *Id.*

274 Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1065 (9th Cir. 2008).

275 *Id.* (internal quotation marks omitted) (quoting Navajo Nation v. U.S. Forest Serv., 208 F. Supp. 2d 866, 907 (D. Ariz. 2006)).

276 *Id.* Though the toilet wastewater complaint is straightforward, it might appear to require a little creativity to connect sewage with dead bodies; but according to the Navajo Nation President, the connection is a significant one:

> Practitioners of the Navajo religion are not concerned with what the scientists say about the quality of reclaimed wastewater. Some of this water has come into contact with death and sickness at, for example, hospitals and mortuaries. It does not matter what kind of treatment is provided, this water will compromise and contaminate the sacred Mountain that was established by the Holy People.

Declaration of Joe Shirley, President of the Navajo Nation, *supra* note 261, at 2. The dissent seemed to agree, quoting Larry Foster, a Diné training to be a medicine man, at length for a description of the harm associated with sewage water, with Foster twice referring to "mortuaries or hospitals." *Navajo Nation*, 535 F.3d at 1103 (Fletcher, J., dissenting) (internal quotation marks omitted).

277 42 U.S.C. §§ 2000bb to -4 (2006); *Navajo Nation*, 535 F.3d at 1067.

278 *Navajo Nation*, 535 F.3d at 1070.

279 *Id.* (discussing amount of land impacted); *id.* at 1089 (Fletcher, J., dissenting) (criticizing the majority's "restrictive definition of 'substantial burden'"); Brief of *Amici Curiae* Religious Liberty Law Scholars in Support of Petition for a Writ of Certiorari at 4–7, Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009) (No. 08-846).

280 *Navajo Nation*, 535 F.3d at 1065.

for the ball or to let it get away so as to avoid excessive contact with grass that when wet smells of human waste.[281] In dissent, Judge William Fletcher noted that the Forest Service's environmental impact assessment failed "to discuss either the health risks resulting from ingestion of the treated sewage effluent or the likelihood that humans—either adults or children—will in fact ingest the artificial snow."[282] Moreover, the current owner of the ski resort purchased it in 1992 "with full knowledge of weather conditions in northern Arizona."[283] After an extended critique of the majority's treatment of RFRA, Judge Fletcher ends the dissent by highlighting the irony of the court protecting everyone's recreational interest in "'public park land'" to justify "spraying treated sewage effluent on the holiest of the Indians' holy mountains," when that land was originally taken by force from Indians.[284] Despite the strength of the dissent[285]and the importance of the case to the tribes involved, the Supreme Court decided *against* hearing arguments on the matter.[286] Sewage effluent, after all, was not being sprayed on the National Cathedral or a Judeo-Christian sacred site.[287]

2. Livestock Reduction

Diné who were alive in the 1930s still remember with anger the forced stock reductions of that period.[288] Sheep play a defining role in Navajo life: Herd size and social position are correlated, extended family life revolves around sheep, and the inheritance of grazing rights from generation to generation is often hotly

281 Based on a personal experience of the author playing seventh-grade soccer on fields irrigated with such water in Kayenta, Arizona.

282 *Navajo Nation*, 535 F.3d at 1111 (Fletcher, J., dissenting).

283 *Id.* at 1082.

284 *Id.* at 1113 (quoting *id.* at 1063 (majority opinion)). Professor Kristen A. Carpenter, who has done a series of articles on the religious rights of non-Indian owners, tellingly begins one article on sacred site jurisprudence by calling attention to the fact that "through varied means of acquisition, non-Indian governments, entities, and individuals have come to own Indian sacred sites." Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 983 (2006); *see also* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1063 (2005) (discussing the special problem American Indians face in practicing religious and cultural activities on land owned by the federal government); Kristen A. Carpenter, Sonia K. Katval & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024–25 (2009) (focusing on protecting indigenous cultural rights through property interests).

285 *But see* Knapp, *supra* note 270, at 306–11 (offering a critique of Justice Fletcher's approach to the case).

286 Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009); *see also* GRIJALVA, *supra* note 15, at 172 ("[T]he Court's modern role is not to seek justice delayed for Indian people, but rather to ensure those who benefit from a nation built on land and natural resources acquired from Tribes by force, threats, artifice and fraud continue to do so.").

287 The amicus certiorari petition brief submitted by the National Congress of American Indians draws parallels between how Indians view the San Francisco Peaks and the importance for non-Indians of sacred sites around the world, and asks, "If Mount Calvary, the Holy Mosque in Mecca, or the Wailing Wall were located on public lands in the United States, would they be denied protection under RFRA in the same manner as the San Francisco Peaks?" Brief of *Amici Curiae* National Congress of American Indians et al. in Support of Petitioners at 17, Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (No. 08-846).

288 *See* MARSHA WEISIGER, DREAMING OF SHEEP IN NAVAJO COUNTRY 18 (2009).

contested.[289] Miss Navajo Nation contestants butcher a sheep as part of the pageant, held during the Navajo Nation Fair.[290] Mutton stands operating out of small trailers or in fairgrounds are found in most towns, and the butchering of a sheep is a part of how many celebrate major events such as weddings or large gatherings.[291] If anything, Navajo sheep culture was even stronger in the 1930s. In *The Navajo Indians*, published in 1930, the authors write, "Men, women, and sheep—the three are inseparable in Navajo life."[292] The majority of Diné owned sheep and, together with goats, they were the source of cash.[293] Social status was primarily determined by herd size, with the wealthy raising sheep for sale on the market and the poor having subsistence-level holdings.[294] Sheep simultaneously provided Diné their food and their livelihoods, and after returning from Fort Sumner in 1868, sheep numbers rose such that before the turn of the century Navajos were described as wealthy and self-supporting.[295]

Navajo livestock reduction was instituted in 1933 in an effort to deal with severe overgrazing.[296] Spearheaded by the Commissioner of Indian Affairs John Collier, the program found support in the Roosevelt administration's embrace of a scientific approach to problems.[297] The Navajo Nation Council, recognizing that even if it objected "the government would carry out stock reduction anyway," approved the program in the hope that after doing so the tribe would be granted

289 Gary Witherspoon, *Sheep in Navajo Culture and Social Organization*, 75 AM. ANTHROPOLOGIST 1441, 1443 (1973).

290 Filmmaker Billy Luther, himself the son of the 1966 winner, followed Crystal Frazier as she prepared for and competed in the pageant; the butchering scene in the resulting documentary vividly captures the importance of sheep for the Diné. The author strongly recommends readers interested in the Navajo Nation see, literally see, MISS NAVAJO (World of Wonder Productions 2007). More information is available at World of Wonder Prods., Miss Navajo: A Documentary by Billy Luther, http://www.missnavajomovie.com (last visited Apr. 18, 2010).

291 *See* World of Wonder Prods., *supra* note 290.

292 COOLIDGE & COOLIDGE, *supra* note 37, at 63.

293 Morton, *supra* note 56, at 265.

294 Eric Henderson, *Navajo Livestock Wealth and the Effects of the Stock Reduction Program of the 1930s*, 45 J. ANTHROPOLOGICAL RES. 379, 380–81 (1989).

295 *Id.* at 380 (citing an 1892 account of a Gallup school superintendent).

296 Although containing some statements that are offensive by today's standards—Navajos are described as "superior physically and in other respects" and "[the] sex morals are on a higher plane than with most tribes"—an article entitled *Navajo Land Problems* published in 1937 provides a great window into the thinking at the time as to the origins of, and solutions for, Navajo overgrazing. *See* J.W. Hoover, *Navajo Land Problems*, 13 ECON. GEOGRAPHY 281, 283, 297–98 (1937).

297 Professor Colleen O'Neill explains,

> [T]he advent of a new, reformist administration offered a unique opportunity . . . . The soil experts, climatologists, agricultural economists, and sociologists who descended onto the reservation in the 1930s to preserve Navajo rangelands enjoyed unprecedented political support in Washington and unwavering faith that science would offer an acceptable solution.
>
> These scientists examined all aspects of the Navajos' problem. They tested the soils, studied the climate, and inspected the livestock. They assessed the carrying capacity of reservation land and divided it into eighteen land management districts and calculated how many sheep, goats, and horses each could support.

O'NEILL, *supra* note 57, at 23 (citation omitted).

additional reservation land.[298] The forced culling of Navajo herds affected all livestock, with the reservation's carrying capacity calculated in sheep units; according to the Department of the Interior, the Diné had double the number of sheep units that the land would support (one million compared to 500,000).[299] Navajos were paid for the animals killed, but at below market rates.[300] As a consequence, force rather than consent was used: "Agents went to herds and often shot the animals before the eyes of astonished, grieving families."[301] Some of the animals "were merely shot and left to rot," a level of waste that Navajos "were incapable of understanding."[302] Removal and incarceration awaited those Diné who resisted stock reduction.[303] The supposed scientific necessity of reducing overgrazing—a 1931 Department of the Interior study concluded that every jurisdiction of the Navajo reservation "had more animals than it could conceivably support"[304]—does not compensate for the colonialist nature of the program imposed upon the tribe by the federal government.[305] The Executive Committee of the Navajo Nation Council was even told of the possibility that troops would be called in by Commissioner of Indian Affairs John Collier.[306]

In part by design—the stock reductions were especially targeted to hit those with the largest herds in order to reduce reservation inequality—the stock reductions had dramatic effects on the Navajo economy and on the welfare of Diné families.[307] With their herds halved, for many families government welfare took the

298 David Wilkins, *Governance Within the Navajo Nation: Have Democratic Traditions Taken Hold?*, WICAZO SA REV., Spring 2002, at 91, 105 (2002). The same basic promise—that if the Navajos cooperated they would get more land—had been made to induce the tribal council to approve oil leases in the 1920s. *See supra* note 95.

299 Gary D. Libecap & Ronald N. Johnson, *The Navajo and Too Many Sheep: Overgrazing on the Reservation*, *in* BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE 87, 89 (John Baden & Richard L. Stroup eds., 1981). For an overview of the development of the Navajo sheep economy as well as the range conditions related to Navajo livestock, see RENO, *supra* note 58, at 15–16, 26–45.

300 The government paid families $1 per goat and $2 per sheep; between 1933 and 1934, according to one study, the market price for sheep rose from $2.30 to $3.35. Libecap & Johnson, *supra* note 299, at 89–90.

301 CHAMBERLAIN, *supra* note 69, at 73 (discussing the goat reductions of 1934).

302 KELLY, *supra* note 71, at 162.

303 Robert S. McPherson, *Navajo Livestock Reduction in Southeastern Utah, 1933–46: History Repeats Itself*, 22 AM. INDIAN Q. 1, 7 (1998). Moreover, "[a]s stock reduction became increasingly forced, more violence and longer jail sentences resulted." *Id.* at 12.

304 KELLY, *supra* note 71, at 114.

305 FRANCISCONI, *supra* note 85, at 50. In a 1934 article written by the Department of the Interior's Director of the Soil Erosion Service that uses reservation erosion as an example of a generalized problem, readers are walked through the scientific process of dealing with erosion across the country on a farm-by-farm basis and told that "work is carried out on a strictly cooperative basis with the farmers." H.H. Bennett, *Soil Erosion—A National Menace*, 39 SCI. MONTHLY 385, 400 (1934). Such consideration was not extended on the Navajo reservation, where Navajos were "caught in a catastrophe, largely because they were a colonial appendage of American society." WHITE, *supra* note 38, at 248.

306 YOUNG, *supra* note 71, at 88.

307 For more on the equity goals of stock reduction and how the program changed over time, see WHITE, *supra* note 38, at 265–68 (noting that the goat reduction portion of the program disproportionately affected the poor, and highlighting opposition to early inequities); Henderson, *supra* note 294, at 393–400 (discussing the leveling of wealth); Libecap & Johnson, *supra* note 299, at 89–95

place of prior self-sufficiency and wealth.[308] Although arguably undertaken with good intentions—preventing the negative long-term effects of overgrazing—the program also owed its existence to the construction of the Hoover Dam, which experts feared would get clogged with silt and quickly become "useless" unless erosion from Navajo lands was stopped.[309] The Roosevelt Administration's program of "stock reduction rivaled the Long Walk in its devastating consequences" on the Diné people and on the tribal economy.[310] Professor Robert McPherson explains,

> The livestock reduction of the 1930s was one of two major tragedies in the Navajos' tribal memory. The trauma of the first tragedy, the round up and incarceration of the people at Fort Sumner between 1864–68, has been passed down by word of mouth for generations, as a time of defeat, degradation, and removal at the hands of the white man. The destruction of livestock in the 1930s was, to the Navajo, an economic form of the same thing—defeat, degradation, and removal.[311]

For the Navajo Nation, livestock reduction increased poverty, demonstrated U.S. control over reservation life, and necessitated a move towards other forms of economic growth.[312]

Livestock reduction and the San Francisco Peaks dispute are but examples of the pervasive control that the United States has over Diné life. The Navajo Nation's current inability to protect off-reservation sites that are sacred to the tribe reflects the same power dynamic as the forced livestock reductions of the 1930s. Legal scholars describe the power of the United States over tribes in terms of congressional "plenary power"—Congress's (near) absolute authority over Indian sovereignty—and as these two Navajo experiences show, the power dynamic takes on different forms.[313] Livestock reduction and the Peaks dispute share in the

(highlighting Collier's role in pushing an equity as part of the program and the consequent limits on herd size).

308 CHAMBERLAIN, *supra* note 69, at 73 ("Many Navajos lost their livelihood altogether and were forced to accept government subsidies for the first time."); FRANCISCONI, *supra* note 85, at 58 (noting that stock reduction made supplemental wages and welfare income a necessity for many families); McPherson, *supra* note 303, at 2 (including the "crippling of the relatively self-sufficient Navajo economy" among the effects of stock reduction).

309 Wilkins, *supra* note 298, at 104.

310 CHAMBERLAIN, *supra* note 69, at 83.

311 McPherson, *supra* note 303, at 1.

312 Stock reduction's "economic hardships" were supposed to be offset in part through wage work on New Deal conservation projects, in line with Collier's pledge "to triple Navajo income." WEISIGER, *supra* note 288, at 165. The end result, however, was "the expropriation and absolute impoverishment of many Navajo families." LAWRENCE DAVID WEISS, THE DEVELOPMENT OF CAPITALISM IN THE NAVAJO NATION: A POLITICAL-ECONOMIC HISTORY 98 (1984). For an excellent way to better understand the effects and experience of the livestock reduction policy, see NAVAJO LIVESTOCK REDUCTION: A NATIONAL DISGRACE (1974), a collection of first-hand accounts of Diné herders and politicians looking back on livestock reduction published by the Navajo Community Press.

313 For more on the plenary power over Indians, see Nell Jessup Newton's leading article on the topic. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). The summary of plenary power is captured by Professor Phil Frickey: "By virtue of its plenary power, Congress has run rough-shod over tribal interests." Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 45 (1996).

shaping of Diné life and experiences by the federal government. Non-Indians perhaps cannot fully appreciate the cultural significance of the Peaks to tribal members, but the government's taking of half of the livelihood of most families obviously would have a long-term impact on Diné economic opportunities and wealth.

The outcome of these episodes would have been quite different if the tribe had had meaningful control. Looking just at the Peaks controversy might lead one to focus on the off-reservation status of the sacred site. But, as livestock reduction shows, the on-reservation line is not always sufficient to ensure tribal control over natural resources, whether involving artificial snow, grazing rights, or mineral leases. Another historical moment is illustrative: At one point early in the development of oil leasing on the reservation, the council wanted to go into partnership with an oil company rather than simply sell their oil.[314] The tribe was to put up the land and share in the expenses and profits: "It was a gamble the Tribe was willing to take in the hope of generating more income with which to meet the demands of the Navajo people for a better life in their homeland."[315] The Secretary of the Interior, however, thought it was too big a risk, and as trustee for the tribe he rejected the proposal.[316] Maybe it was too big a risk and maybe the reservation was suffering from overgrazing, but by dictating such matters, the federal government was also defining the terms of economic possibility for the tribe.

Returning now to coal leasing and the question of tribal acceptance, one might conclude that Navajo coal leases were not coerced. Morton writes, "[G]iven the state of the reservation economies and intra- and intertribal factionalism, the tribal councils had good reasons (from their points of view) to approve standard leases."[317] Once the "state of the reservation economies" is seen not as a given, but as a result of governmental policy (such as livestock reduction), the rejection of coercion stands on less solid ground. Without "viable economic alternatives," tribes will be more receptive to environmentally destructive activities,[318] and therefore, U.S. government policies that in the past prevented or presently prevent the development of alternatives should not be separated from the question of coercion or whether the contracts are adhesionary. It is impossible to identify the exact moment when the Navajo Nation escaped from being told what it had to do and from having little choice in what contracts it accepted. As the San Francisco Peaks dispute makes clear, the United States–Navajo Nation power differential has not disappeared. Despite this, it is my position that the Navajo Nation is now entering a period where decisions regarding natural resource exploitation should be treated as "belonging" to the tribe.

314 YOUNG, *supra* note 71, at 152.

315 *Id.*

316 *Id.*

317 Morton, *supra* note 56, at 297.

318 Collins & Hall, *supra* note 130, at 270 (arguing that such alternatives are required if tribes are to properly engage in cost-benefit analysis regarding nuclear waste storage).

IV. ACCEPTANCE AND DEVELOPMENT

The city of San Diego had a problem, too much trash, and a solution, the Campo Band of Indians was willing to accept the trash. The Band, in partnership with Mid-American Waste Systems, Inc., wanted to open a large solid waste landfill on the remote reservation.[319] The tribe's revenue from the twenty-eight million ton capacity landfill was estimated to be $1.6 million a year.[320] The United States Environmental Protection Agency (EPA) approved the landfill in 1995, but a year later the United States Court of Appeals for the District of Columbia reversed, holding that EPA did not have authority to issue the approval.[321]

The attorney for the tribe at the time was Kevin Gover, who would go on to become the Assistant Secretary of the Interior for Indian Affairs from 1997 to 2000, a law professor, and now the director of the Smithsonian's National Museum of the American Indian.[322] A law review article by Jana Walker and Kevin Gover on the proposed landfill unapologetically supports the Campo Band.[323] They argue,

> Under certain circumstances, a solid or hazardous waste disposal project is a viable and appropriate form of industrial development for some Indian tribes. Waste disposal projects are not only extremely profitable, but also require little up-front cash. Moreover, waste disposal projects can provide job opportunities to reduce significant involuntary tribal unemployment. The drawback is, of course, the potential environmental problems.[324]

Potential environmental problems are treated in both the above quote and in the article as being of secondary importance and as something with which only the Campo Band should concern itself.[325] Walker and Gover assert that reservation wealth and job creation should be important elements to consider regarding the viability of disposal projects.[326] Stuttering economic development provided the impetus for this form of growth,[327] and, according to Walker and Gover, writing in 1993, the proposal "instilled a sense of pride and purpose in the Indian

319 Cluett, *supra* note 215, at 199–200.

320 Backcountry Against Dumps v. U.S. Envtl. Prot. Agency, 100 F.3d 147, 149 (D.C. Cir. 1996).

321 *Id.* at 149–50.

322 *Id.* at 147; Smithsonian Institution, Senior Staff Biography: Kevin Gover, Director, National Museum of the American Indian, http://newsdesk.si.edu/admin/bios/gover.htm (last visited Apr. 18, 2010).

323 The authors' footnote acknowledges that the authors were the attorneys for the Campo Band. Walker & Gover, *supra* note 233, at 229.

324 *Id.* at 231–32.

325 This despite the fact that waste companies are attracted to Indian communities in part because of "the prospect of relaxed regulation in Indian Country." Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1484 (1994). Walker and Gover's position rejecting a non-Indian role with regard to tribal environmental matters is shared by others. After identifying sources of law, including some available to non-Indians, Dean B. Saugee's and John P. Lowndes's article on public participation in tribal environmental programs concludes by arguing that tribal courts and tribal officials bear the responsibility for establishing the right procedures and protections, thus implicitly favoring the resolution of all concerns through the tribal system. Dean B. Saugee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 43 (1999).

326 Walker & Gover, *supra* note 233, at 231.

327 *See* Cluett, *supra* note 215, at 200.

community. . . . [T]he Band has changed from a pocket of poverty and hopelessness to a community of Indian people united by a determination to succeed."[328] But the court decision in 1996 blocked the tribe from reaping the expected improvements in education, housing, economic self-sufficiency, and government facilities planned in connection with the landfill.[329]

Campo Band's decision to convert part of the tribe's reservation into a receptacle for San Diego's trash powerfully illustrates the challenge of such a path towards economic development. It goes beyond the scope of this Article to go into the full details of the Campo Band's proposed landfill controversy,[330] but at least according to Walker and Gover's account, the Campo Band "[chose] this form of development" freely and knowingly.[331] As a choice it is not entirely novel: Indian–non-Indian relations have historically been defined by exchanges of land for money or promises.[332] Given the poverty and economic development challenges of many tribes, the basic decision of the Campo Band—acceptance of environmental harm in return for financial reward—is likely to be repeated, with local variation, by other tribes.

Popular stereotypes of gaming tribes aside, most tribes are still struggling economically. "Despite abundant natural resources of land, timber, wildlife, and energy, Indian reservations remain among the most impoverished areas in the United States."[333] The success of Foxwoods and Mohegan Sun, along with media coverage of the large per capita payments made by some tribes, obscure "the overall depressed state of Native American economic development."[334] Reservation unemployment and underemployment has long been common.[335] For many reasons, some of which affect all tribes and some which differ across tribes, poverty is a fact

328 Walker & Gover, *supra* note 233, at 258.

329 Fortunately for the Campo Band, they were able to resolve disputes with the state of California in 1997, and the Golden Acorn Casino opened in 2001. Campo Kumeyaay Nation, Campo Kumeyaay Nation History, http://www.campo-nsn.gov/modernera.html (last visited Apr. 18, 2010).

330 For more on the controversy, see DAN MCGOVERN, THE CAMPO INDIAN LANDFILL WAR: THE FIGHT FOR GOLD IN CALIFORNIA'S GARBAGE (1995).

331 Walker & Gover, *supra* note 233, at 262.

332 Collins & Hall, *supra* note 130, at 270 (focusing on tribal-U.S. relations and nuclear waste siting).

333 ANDERSON, *supra* note 203, at 1; *see also* Walker et al., *supra* note 205, at 384 ("The economic condition and public health status of [American Indians and Alaska Natives] are among the lowest of any ethnic or minority group in the United States.").

334 Joseph P. Kalt & Stephen Cornell, *The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development*, *in* AMERICAN INDIAN POLICY, *supra* note 72, at 121, 126. Backlash against gaming tribes impacts the cultural perception non-Indians have of Indian tribes seeking federal recognition. Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 314 (2006). Professor Bethany Berger argues that protests arise when tribes violate the "racially fixed image" of Indians as "poor, traditional, and close to the earth." Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 651 (2009). For a detailed account of the anti-Indian, anti-casino backlash focused on Connecticut, home of Foxwoods and the Mohegan Sun, see JEFFREY R. DUDAS, THE CULTIVATION OF RESENTMENT: TREATY RIGHTS AND THE NEW RIGHT 95–136 (2008).

335 Aberle, *supra* note 122, at 414.

of reservation life.[336] It is now unfair to say, as one author has, that "[t]he reservation economy *is* the welfare state," but some reservations can seem that way, especially to outsiders.[337] And importantly, "Indians do not want to be poor anymore."[338]

The economic and social payoff for tribes whose environmentally destructive projects go forward can be significant. Successful projects allow tribes to invest in things such as education and government services.[339] Additionally, tribes may need "a viable economic base" in order to defend their sovereignty before the U.S. government.[340] Recognizing that poverty can threaten tribal survival, tribal governments do not merely react to outside economic interests.[341] While Professor Fixico writes that growing natural resource demands "have forced tribal leaders into two arenas—economics and law," such language fails to appreciate the motivating power of poverty.[342] Just like non-Indians, Indian tribes feel the conflict between protecting the environment and economic growth, but when they decide to pursue growth with some sacrifice, that choice should not be dismissed as "capitalistic greed."[343] As Sam Deloria argues, "[W]e cannot help but create confusion in American society if we blame the system for Indian poverty and then denounce opportunities for Indians to get themselves out of poverty."[344] Despite Professor Fixico's concern about "economics and law," most scholars talk about Indian poverty with little focus on economics.[345] Tribes have begun improving

336 For more on the causes of reservation poverty, see Walker et al., *supra* note 205, at 387. Walker et al. explain,

> These reasons include, but are not limited to, lack of money for new projects on Indian lands, as tribal and Indian trust land cannot generally be mortgaged or put up for collateral; the remoteness of most reservations which makes many projects not economically feasible; lack of infrastructure—electricity, communication systems, water, roads, and buildings—conducive to business; lack of skilled laborers and professionals; and the applicability of many federal, as well as tribal, laws to activities in Indian country that may make businesses reluctant to locate there.

Id. Vine Deloria, Jr., writing about allotment, argued, "Indian poverty was deliberately planned and as predictable as the seasons." Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 978 (1996).

337 Buffalohead, *supra* note 179, at 273.

338 Joe De La Cruz et al., *What Indians Should Want: Advice to the President*, *in* INDIAN SELF-RULE, *supra* note 1, at 311, 321.

339 *See* Cluett, *supra* note 215, at 201 ("As host to a uranium mine, Laguna Pueblo has become one of the best-educated tribes, having produced poets, doctors, writers, lawyers and academics.").

340 R. David Edmunds et al., *Tribal Sovereignty: Roots, Expectations, and Limits*, *in* INDIAN SELF-RULE, *supra* note 1, at 289, 290.

341 Collins & Hall, *supra* note 130, at 275.

342 FIXICO, *supra* note 142, at 189.

343 Professor Fixico's treatment of this issue illustrates the difficulties of recognizing agency when tribes are also part of a larger system: "[C]apitalistic greed" is described as inconsistent with Indian values regarding the environment at one point. *Id.* at 189. On the other hand, when describing Indian motivations in more detail, Professor Fixico notes, "The Indians' reaction to the demand for their energy resources is twofold: reluctance to allow the mining operations to continue, on one hand, and a progressive attitude toward increased mining to help develop tribal programs on the other." *Id.* at 144.

344 Deloria, *supra* note 1, at 200.

345 Professor Hertzberg calls economics a "neglected subject," and notes, "We talk about Indian poverty, but there has not been enough analysis of the economic conditions on reservations." Suzan

their economic situation by pursuing opportunities created by "the resource problems of the industrialized, affluent societies" that surround them.[346] Partly this pursuit reflects limited options,[347] but success also reflects advantages that tribes have when pursuing such opportunities.[348]

The Navajo Nation is no different. In *Red Capitalism: An Analysis of the Navajo Economy*, written in 1973, Kent Gilbreath argued that Navajos do not want "to isolate themselves from the surrounding society," but rather "Navajos hope that self-determination will free them to pursue in an individualistic manner their own economic improvement while maintaining their cultural values."[349] The problem is that hope has not turned into reality. In a 1981 introduction focused on Navajo economic development, Al Henderson highlighted the role energy resource development could play in eliminating reservation poverty.[350] But the goal he articulated, "achieving substantial reductions in the social and economic disparities between the Navajo and the rest of the United States," has not been achieved.[351] In 2004, the U.S. per capita income was $30,547 and the unemployment rate was 5.7%; the Navajo Nation's per capita income was $7734, one-fourth that of the United States, and the Navajo Nation unemployment rate of 48% was more than eight times that of the United States.[352] Today the Navajo Nation is hoping that the Desert Rock power plant will help combat unemployment and reservation poverty.

Shown Harjo, Russell Jim, Hazel W. Hertzberg, Joe De La Cruz & Oren Lyons, *Federal Indian Policy Yesterday and Tomorrow*, *in* INDIAN SELF-RULE, *supra* note 1, at 278, 283.

346 RENO, *supra* note 58, at 2 (arguing that because of proximity, Indian tribes share the resource problems, though not the affluence). Though it sounds good to speak in terms of the "need to preserve our ecosystems from contamination so indigenous people can utilize those natural resources," the irony is that surrounding community contamination is what provides the market for on-reservation waste siting. Harjo et al., *supra* note 345, at 281.

347 *See supra* notes 252–60 and accompanying text; *see also* Walker et al., *supra* note 205, at 390 ("Tribes seeking to free themselves from federal dependence and poverty often must consider less desirable forms of economic development that may include potentially polluting industries and locally unwanted land uses ('LULUs').").

348 Professors Joseph Kalt and Stephen Cornell of the Harvard Project on Indian Economic Development explain,

> [S]ome American Indian tribes have enjoyed more extensive, complete, and secure property titles than private companies. That is, in a number of important respects, reservations are more "deregulated"—at least with respect to nontribal governments—than the vast bulk of the rest of the economy. This creates niches in the market that present American Indian tribes with classic opportunities for the exercise of comparative advantage. The question, of course, is how, and how well, tribes can respond to these opportunities.

Kalt & Cornell, *supra* note 334, at 126.

349 GILBREATH, *supra* note 48, at 55.

350 Al Henderson, *Introduction: What Economic Development Means to the Navajo*, *in* RENO, *supra* note 58, at xii, xv.

351 *Id.* at xii.

352 TRIB CHOUDHARY, DIV. OF ECON. DEV., NAVAJO NATION, COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY OF THE NAVAJO NATION 2005–2006, at T 49 tbl.21 (2006).

A. Desert Rock

Navajo Nation President Joe Shirley, Jr. would like to see the Desert Rock power plant operational. Desert Rock would create 400 permanent jobs and "provide more than $50 million annually to the Navajo Nation."[353] Additionally, during the first four year period of the $3.4 billion power plant,[354] more than 2800 workers are expected to put in the more than ten million hours of expected construction work.[355] According to Desert Rock Energy Company, the plant "will support local prosperity" through the relatively high salaries to be paid its employees.[356] Though described in terms of benefits from a power plant, the agreement between the Navajo Nation's Diné Power Authority and finance partner Sithe Global is largely about coal.[357] The power plant would be built next to a coal mine, thus avoiding the transportation issues of the mines on Black Mesa.[358] Two

353 Press Release, Office of the President & Vice President, Navajo Nation, Fluor Corp. Signs Agreement to Build Desert Rock Energy Project, Navajo President Joe Shirley, Jr., Calls It Step to Independence (Sept. 7, 2007), *available at* http://www.navajo.org/News%20Releases/George%20Hardeen/Sept07/Fluor%20Corporation%20selected%20to%20build%20Desert%20Rock%20plant%20for%20Sept.pdf. Fifty-two million dollars annually is the project's revenue benefit to the tribe according to Desert Rock Energy Co., Our Commitment: Environment, http://www.desertrockenergyproject.com/commitment.htm (last visited Apr. 18, 2010).

The power plant may employ some non-Indians with special training or qualifications, but, given the plant's location on a remote part of the reservation and the Navajo Preference in Employment Act (NPEA), NAVAJO NATION CODE ANN. tit. 15, §§ 601–619 (West 2005), a sizable percentage of employees are likely to be Navajo. Sithe Global acknowledges the NPEA would apply and assumes "that 65 to 80 percent of the workforce, or 130 to 160 workers, would be American Indian. Most of them would be Navajo." SITHE GLOBAL POWER LLC, APPLICATION FOR PREVENTION OF SIGNIFICANT DETERIORATION PERMIT FOR THE DESERT ROCK ENERGY FACILITY ADDITIONAL IMPACTS: ENVIRONMENTAL JUSTICE ANALYSIS 30 (2006). Though the NPEA might be vulnerable to legal challenge, a suit by the Equal Employment Opportunity Commission (EEOC) against Peabody Coal for the company's practice of Navajo hiring and promotion preferences on Black Mesa was dismissed by the United States District Court of Arizona in 2006. Equal Employment Opportunity Comm'n v. Peabody W. Coal Co., No. CV 01-01050-PHX-MHM, 2006 WL 2816603, at *17–18 (D. Ariz. Sept. 30, 2006); *see also* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 687–88 (2009) (noting the "perceived vulnerability" of the NPEA); Brendan O'Dell, Special Feature, *Judicial Rewriting of Indian Employment Preferences—A Case Comment:* E.E.O.C. v. Peabody Western Coal Company*, 400 F.3d 774 (9th Cir. 2005)*, 31 AM. INDIAN L. REV. 187, 204–05 (2006) (discussing the treatment by the Ninth Circuit of EEOC's suit prior to final remand).

The Navajo Nation is not the only tribe with laws affording preference for tribal members; for more on Indian preference, see Jerry D. Stubben, *Indian Preference: Racial Discrimination or a Political Right?*, *in* AMERICAN INDIAN POLICY, *supra* note 72, at 103.

354 *Indian Energy Development: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 21 (May 1, 2008) (statement of Steven C. Begay, General Manager, Diné Power Authority, Navajo Nation) [hereinafter *Indian Energy Development Hearing*].

355 Press Release, Office of the President & Vice President, Navajo Nation, *supra* note 353.

356 Desert Rock Energy Co., Jobs and Taxes: Construction Jobs, http://www.desertrockenergyproject.com/jobs_and_taxes.htm (last visited Apr. 18, 2010) (stating that the average salary is projected to be $60,000).

357 For more on Sithe Global, see *supra* notes 24–25 and accompanying text.

358 Off-road mining trucks will bring the coal from an open pit mine to the Desert Rock power plant. STEAG POWER, LLC, APPLICATION FOR PREVENTION OF SIGNIFICANT DETERIORATION PERMIT FOR THE

hundred of the four hundred jobs would be at the mine,[359] not the plant, and over half the projected revenues "are a direct result of the use of Navajo coal."[360]

The agreement with Sithe Global includes an option for the Navajo Nation to buy into the plant itself, though doing so would require either a high capital outlay or the dedication of a significant portion of the coal revenue.[361] Though the mine and associated mine-mouth coal-fired power plant are being developed simultaneously[362]—unless the Navajo Nation decides to purchase equity in the power plant itself—the partnership form merely obscures the fundamental similarity to earlier coal leases. The arrangement is in line with a 1955 recommendation of geologists favoring partnerships rather than leases.[363] In 1974, the U.S. Commission on Civil Rights recorded the belief "that 50-50 partnership arrangements with major firms . . . might help avoid some of the abuses of outside exploitation."[364] More recently, Richard Burnette, former Director of the National Congress of American Indians, urged tribes to "joint venture" their natural resource development.[365]

The tremendous capital requirements of constructing a power plant work against the tribe being able to open a Desert Rock–equivalent power plant without outside backing, in this case from a New York hedge fund.[366] A 1994 survey of tribal leaders reported that ninety-six percent of respondents said their tribe lacked capital, the most commonly agreed upon obstacle to economic development.[367] The Navajo Nation is partnering with Sithe Global—in fact, the Navajo Nation sought

DESERT ROCK ENERGY FACILITY 6-35 (2004); *see also supra* note 115 and accompanying text (discussing Black Mesa's coal slurry and dedicated train that connect power plants with Black Mesa).

359 *Indian Energy Development Hearing*, *supra* note 354, at 23 (prepared statement of Steven C. Begay, General Manager, Diné Power Authority, Navajo Nation).

360 Desert Rock Energy Co., *supra* note 356.

361 The plant will be primarily debt financed, allowing the tribe an option to purchase a 25% equity stake for $250 million. Christopher Helman, *Beyond Casinos*, FORBES, Mar. 16, 2009, at 88, 89. A 49% equity stake costs $400 million. Kathy Helms, *DPA Request Denied: Power Authority Sought $2M for Desert Rock, Transmissions Projects*, GALLUP INDEP. (Gallup, N.M.), Oct. 3, 2005, http://www.gallupindependent.com/2005/oct/100305dpa.html (last visited Apr. 18, 2010). Had the Navajo Nation won its $600 million breach of trust case, United States v. Navajo Nation, 129 S. Ct. 1547 (2009), against the United States, President Shirley's plan was "to use some of the money to buy an equity stake in Desert Rock." Helman, *supra*, at 89. Tellingly, in a press release, the Office of Navajo Nation President & Vice President highlighted the "opportunity for the Navajo Nation to acquire an ownership stake in the project." Press Release, Office of the President & Vice President, Navajo Nation, *supra* note 353.

362 *See* STEAG POWER LLC, *supra* note 358, at 6-35.

363 CHAMBERLAIN, *supra* note 69, at 92.

364 MCCABE & LEWIS, *supra* note 67, at 122–23 (focusing on oil and gas development).

365 *See* Edmunds et al., *supra* note 340, at 292.

366 Helman, *supra* note 361, at 88.

367 Theresa Julnes, *Economic Development as the Foundation for Self-Determination*, *in* AMERICAN INDIAN POLICY, *supra* note 72, at 151, 155. Professor Gavin Clarkson's articles focusing on improving tribal access to capital highlight both the legal barriers to, and possibilities of, improving tribal finance. *See* Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 287–92, 325–26 (2009); Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1082–84 (2007); Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943, 952–58 (2008).

out Sithe Global, rather than the other way around[368]—in part because the tribe is not in a financial position to develop its coal resources on its own.[369] For the mining and energy companies, partnering rather than just leasing has the advantage of protecting against the tribe imposing an excise tax after the royalty agreement is finalized.[370] By reducing the distance between a tribe's regulatory and entrepreneurial sides through the partnership, Sithe Global aligned its development plans with the Navajo Nation's *economic* goals.[371]

Local and global environmental harms accompany Desert Rock's economic promise. For that reason, many national environmental groups oppose the project: Center for Biological Diversity, Environmental Defense Fund, National Parks Conservation Association, Natural Resources Defense Council, and the Sierra Club.[372] They are joined by local groups such as Conservation Voters of New Mexico, Grand Canyon Trust, New Mexico Conference of Churches, New Mexico Citizens Alliance for Responsible Energy and Sustainability, San Juan Citizens Alliance, and Western Resource Advocates.[373] And on the reservation, Diné Citizens Against Ruining our Environment (Diné CARE) and Doodá Desert Rock

368 Helman, *supra* note 361, at 88.

369 As Philip Reno argued in 1981, "Resources still in Navajo hands, primarily coal, should be developed by the Tribe itself *whenever possible*." RENO, *supra* note 58, at 151 (emphasis added).

370 *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The ability of tribes to impose such severance or excise taxes despite an earlier tribal-corporate agreement regarding the royalty rate was affirmed by the Supreme Court in *Merrion*. *Id.* at 133–44. The case involved an Indian Reorganization Act–constituted tribal government whose decision was subject to review by the Secretary of the Interior. Three years later, *Kerr-McGee* extended the *Merrion* decision when the Court affirmed a similar tax by the Navajo Nation, a tribe without the secretarial approval requirement. *Kerr-McGee Corp.*, 471 U.S. at 196–201.

371 According to Philip S. Deloria, the two hats that tribal governments have—that of the regulator and that of the landowner or entrepreneur—make resource development "more complex" on-reservation than off-reservation. Deloria, *supra* note 1, at 196.

372 *See* Letter from Diné Citizens Against Ruining Our Env't et al. to Harrilene Yazzie, NEPA Coordinator, Bureau of Indian Affairs, Navajo Regional Office (Aug. 17, 2007), *available at* http://www.sanjuancitizens.org/air/FINAL%20DREF&20DEIS%20commentletter081707-1.pdf; Ctr.for Biological Diversity, Group Files Appeal on Permit for Desert Rock Plant, http://www.biologicaldiversity.org/news/center/articles/2008/kold-09-02-2008.html (last visited Apr. 18, 2010). More on these groups can be found on their websites. Ctr. for Biological Diversity, Center for Biological Diversity, http://www.biologicaldiversity.org (last visited Apr. 18, 2010); Envtl. Def. Fund, Environmental Defense Fund—Finding the Ways That Work, http://www.edf.org/home.cfm (last visited Apr. 18, 2010); Nat'l Parks Conservation Ass'n, National Parks Conservation Association: Protecting Our National Parks for Future Generations, http://www.npca.org (last visited Apr. 18, 2010); Natural Res. Def. Council, Natural Resources Defense Council: The Earth's Best Defense, http://www.nrdc.org (last visited Apr. 18, 2010); Sierra Club, Sierra Club Home Page: Explore, Enjoy and Protect the Planet, http://www.sierraclub.org (last visited Apr. 18, 2010).

373 More on the groups and their opposition to the project can be found on their websites. Grand Canyon Trust, Plateau-Wide Issues: Air Quality: Our Work with the Western Clean Energy Coalition to Oppose the Desert Rock and Cemex Facilities, http://www.grandcanyontrust.org/plateau/air_actions.php (last visited Apr. 18, 2010); Conservation Voters N.M., CVNM Accomplishments, http://www.cvnm.org/About/Accomplishments.html (last visited Apr. 18, 2010); N.M. Conference of Churches, The Environment, http://www.nmchurches.org/node/6 (last visited Apr. 18, 2010); San Juan Citizens Alliance, San Juan Citizens Alliance, Air: Global Warming: Desert Rock Power Plant, http://www.sanjuancitizens.org/air/desertrock.shtml (last visited Apr. 18, 2010); W. Res. Advocates, New Mexico Coal Plants, http://www.westernresourceadvocates.org/energy/coal/newmexico.php (last visited Apr. 18, 2010).

Power Plant Committee (Doodá Desert Rock) are united against Desert Rock.[374] Doodá Desert Rock even has created a "cause page" with over 1700 members as of April 2010 on Facebook.[375]

The Draft Environmental Impact Statement (DEIS) supports plant construction.[376] Prepared for BIA by URS Corporation, the DEIS largely downplays and hides Desert Rock's harmful environmental effects while playing up the economic benefits of the plant.[377] Additionally, though there were public comment periods preceding and following publication of the DEIS, the document itself is written in such a way that it is a challenge to follow.[378] For example, under "Global Air Quality Impacts," after discussing global warming, although the amount of carbon dioxide (CO_2) plant emissions is acknowledged, the report's coverage of this form of pollution is truncated.[379] According to the San Juan Citizens Alliance public comments regarding the DEIS, it "completely fails to consider the impacts of 12.7 million [tons per year] of CO_2" on world resources and global warming.[380] Instead of such information, in the section on "Global Air

374 More on these groups can be found on their websites. Diné CARE, Welcome to Diné CARE, http://www.creativegeckos.com/dinecare/ (last visited Apr. 18, 2010); Doodá Desert Rock!, Stop the Desert Rock Energy Project, http://www.doodadesertrock.com/ (last visited Apr. 18, 2010). For a detailed account of the struggles of grassroots efforts to protect the environment among Diné civil society, focused on the foundation of Diné CARE and their work to protect against excessive logging on the reservation, see SHERRY, *supra* note 124.

375 *See* Dooda (No) Desert Rock, Hall of Fame: Dooda (No) Desert Rock: Causes.com, http://www.causes.com/causes/75652/hall_of_fame (last visited Apr. 18, 2010).

376 BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, DESERT ROCK ENERGY PROJECT: DRAFT ENVIRONMENTAL IMPACT STATEMENT, at ES-20 to -21 (2007), *available at* http://www.desertrockenergyeis.com/documents/presentations/Executive%20Summary.pdf.

377 BIA takes the lead role preparing environmental impact statements (EISs) for projects with a significant impact on the environment, though other agencies and the governing tribe or tribes can become "cooperating agencies" for the purposes of the EIS. Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 338–39 (1995).

378 Neither the DEIS nor an executive summary of the DEIS was available in Diné, the Navajo language, limiting the participation of those without command of English. Letter from Diné Citizens Against Ruining Our Env't et al. to Harrilene Yazzie, *supra* note 372, at 28. The response to the DEIS authored by Diné CARE and other environmental groups notes, "[T]he DEIS—at two-volumes and 1,600 page[s]—is very much inaccessible to most Navajo community members." *Id.* For the list of the meetings with the public and area officials that preceded publication of the DEIS, see BUREAU OF INDIAN AFFAIRS, *supra* note 376, app. L, *available at* http://www.desertrockenergyeis.com/documents/presentations/Appendix%20L.pdf.

379 BUREAU OF INDIAN AFFAIRS, *supra* note 376, app.K, at K-37.

380 Letter from Mike Eisenfeld, N.M. Staff Organizer, San Juan Citizens Alliance, to Harrilene Yazzie, NEPA Coordinator, Burea of Indian Affairs, Navajo Regional Office 12 (Oct. 4, 2007), *available at* http://www.sanjuancitizens.org/air/DESERT%20ROCK%20DEIS%20Comments%20SJCA%2010-8-2007%20FINAL.pdf; *see also* Letter from Vickie Patton, Deputy Gen. Counsel, Envtl. Defense Fund, to Joseph Lapka, Air Permitting Program, U.S. Envtl. Prot. Agency (July 31, 2008) (on file with author) (arguing CO_2 is subject to EPA regulation when considering Prevention of Significant Deterioration permit applications). The figure given by the plant's developers is 10.9 million tons per year. Desert Rock Energy Co., Desert Rock Energy Project: Carbon Dioxide Facts, http://www.desertrockenergyproject.com/carbon_facts.htm (last visited Apr. 18, 2010). To give some context to these amounts, consider that Yale University was responsible for more than 300,000 tons per year of CO_2 equivalent emissions from 2003 to 2008. YALE OFFICE OF SUSTAINABILITY, YALE

Quality" the DEIS focuses on the plant's "unique and innovative design" that would make it "more efficient, in terms of power output versus fuel combusted, than other coal-fired plants in the region."[381] As the DEIS acknowledges, such efficiency gains merely reflect technological improvements that have occurred since the prior plants were built, but the DEIS seems to suggest that the improvements alone warrant construction of a new coal-fired power plant.[382]

Desert Rock's local environmental impacts are more thoroughly—and probably less controversially—detailed in the DEIS. The proposed location of the power plant is on a remote piece of tribal trust land south of Shiprock and Farmington, New Mexico.[383] The plant itself would be on 592 acres of leased land, with a footprint of 149 acres.[384] Associated transmission lines, water wells, roads, and a coal preparation area require far more land: 4630 acres.[385] The power plant would also require ten to twenty new water wells to supply a whopping 2795 gallons per minute (gpm), though the plans, per an agreement between the Navajo Nation and plant developers, call for an additional water use of 275 gpm to provide for Navajo municipal demand.[386] Desert Rock also involves the development of a new coal strip mine, the "Navajo Mine Extension Project," on existing mineral leased areas.[387] North of the proposal extension lies Navajo Mine, an area leased since the 1960s that provides 8.5 million tons of coal per year to the Four Corners Power Plant.[388] The Navajo Mine Extension Project would provide Desert Rock with 6.25 million tons of coal per year every year for fifty years—the design life of

UNIVERSITY GREENHOUSE GAS EMISSIONS INVENTORY: UPDATE 2003–2008, at 3 (2009), *available at* http://sustainability.yale.edu/sites/default/ files/GHG2008.pdf.

Note: The Environmental Defense Fund Supplemental Comments were contained in an online database, the Initial Prevention of Significant Deterioration Permit for the Desert Rock Energy Facility Docket folder on Regulations.gov, Docket ID: EPA-R09-OAR-2007-1110, http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EPA-R09-OAR-2007-1110 (last visited Apr. 18, 2010). But given the challenges of subsequent researchers finding particular letters from this database, citations are to copies of the letter on file with author.

381 BUREAU OF INDIAN AFFAIRS, *supra* note 376, at 5-12, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%205%20-%20Cumulative%20Impacts,%20Unavoidable%20Adverse%20Effects,%20and%20Irreversible%20and%20Irretrievable%20Commitment%20of%20Resources.pdf.

382 *Id.* at 5-11.

383 *See id.* at 1-1, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%201%20-%20Introduction.pdf.

384 *Id.* at 2-2 tbl.2-1, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%202%20-%20Alternatives.pdf.

385 *See id.* (providing acreage requirements for transmission lines, water wells, the main plant access road, and a coal preparation area); *see also id.* at 2-3 fig.2-1 (providing a planning map with anticipated land use acreage and sites).

386 *See id.* at 2-7 to -8. The DEIS also includes water use figures in acre-feet per year (af/yr) rather than gpm; 4950 af/yr is equivalent to the 3070 gpm planned amount. This does not include the additional 600 af/yr "associated with the expansion of the surface mining operations at the Navajo Mine required to supply coal to the Desert Rock Energy Project." *Id.* at 2-9.

387 *Id.* at 2-15.

388 *Id.* app. D, at D-1, *available at* http://www.desertrockenergyeis.com/documents/presentations/Appendix%20D.pdf.

the plant.[389] Strip mining, which entails first removing all vegetation, will create localized dust clouds and will also leave a scar that the mining company would be required to reclaim.[390] But for the life of Desert Rock, and quite possibly longer, the mine itself would add to the impact of the plant.[391]

While power plant opposition groups like to call attention to the few Diné families who will be directly affected by the plant, the site selected is rural and sparsely populated even by reservation standards.[392] According to the DEIS, the majority of the "area is characterized as occasional low intensity livestock grazing and scattered dwellings, with primitive roads traversing the land."[393] At times the description of the affected land in the DEIS, such as with "primitive roads" above, reflects the cultural, ethnocentric bias in favor of development that has long been used to dispose Indians of their land.[394] When discussing the existing land uses near a proposed water well, the authors of the DEIS seem unaware of the irony and assumptions that underlie the following: "The vacant and undeveloped land within

389 *Id.* (giving the coal consumption figures); *id.* at 2-18, *available at* http://www.desertrock energyeis.com/documents/presentations/Chapter%202%20-%20Alternatives.pdf (giving the plant's design life).

390 *See id.* app. D, at D-11 to -15, *available at* http://www.desertrockenergyeis.com/ documents/presentations/Appendix%20D.pdf.

391 The tribe's experience with Black Mesa reclamation attests to the limits of reclamation. According to Rebecca Reppert, the reclaimed area on Black Mesa had growing grass, "but not much else could be done with that area." Letter from Rebecca Reppert, English Teacher, Red Mesa High Sch., to Robert T. Baker, U.S. Envtl. Prot. Agency (Oct. 24, 2006) (on file with author); *see also* Karyn I. Wendelowski, Comment, *A Matter of Trust: Federal Environmental Responsibilities to Native Americans Under Customary International Law*, 20 AM. INDIAN L. REV. 423, 426 (1995) (arguing that Black Mesa reclamation efforts have been unsuccessful and that Peabody Coal has not taken "its reclamation obligations seriously"). For more on the challenges of reclamation and reclamation funding, see A. Brooke Rubenstein & David Winkowski, Comment, *A Mine Is a Terrible Thing to Waste: Past, Present and Future Reclamation Efforts to Correct the Environmentally Damaging Effects of Coal Mines*, 13 VILL. ENVTL. L.J. 189, 199–204 (2002).

392 *See* Leslie Linthicum, *Proposed Coal-Fueled Plant on Navajo Land Worries Some Nearby Residents*, ALBUQUERQUE J., June 26, 2005, at A1, *available at* 2005 WLNR 10133288 ("The desert floor fans out here like a dinner plate—flat, hot and empty. . . . Even by Navajo reservation standards, this place is empty and remote. A perfect place, some might imagine, to tuck away a new power plant to serve the energy-thirsty Southwest.").

393 BUREAU OF INDIAN AFFAIRS, *supra* note 376, at 3-76, *available at* http://www.desertrock energyeis.com/documents/presentations/Chapter%203%20-%20Affected%20Environment.pdf.

394 In *City of Sherrill, New York v. Oneida Indian Nation of New York* (*City of Sherrill*), 544 U.S. 197 (2005), the Supreme Court held that the Oneida Indian Nation could not unify fee and Indian title within their original reservation through open market purchases. *Id.* at 202–03. The decision was based in part on a development bias: "[T]he properties here involved have greatly increased in value since the Oneidas sold them 200 years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill." *Id.* at 215.

City of Sherrill is but the newest version of a Supreme Court bias that has been around since Chief Justice John Marshall's opinion in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). According to Chief Justice Marshall, "[T]he tribes of Indians inhabiting this country were fierce savages . . . . To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible." *Id.* at 590.

the proposed water well field is permitted for livestock grazing with water tanks and corrals dispersed throughout."[395]

Figure 1

How does such development affect the plant's immediate surroundings? The physical structures, smoke emissions from the plant, and the 135 feet tall transmission towers would be eyesores, a form of visual pollution on the high

[395] BUREAU OF INDIAN AFFAIRS, *supra* note 376, at 3-85, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%203%20-%20Affected%20Environment.pdf.

desert landscape (see Figure 1).[396] Dislocation of some families and reduction of some grazing areas is anticipated as well; the DEIS identifies one residence within a half mile of the plant and 148 residences within a half mile of proposed transmission lines, water wells, and access roads.[397] Finally, although the initial Prevention of Significant Deterioration (PSD) permit application submitted to EPA suggests that any increase in regional haze will likely have other natural causes, plant proponents had to acknowledge in their application that regional haze could increase.[398] For locals already familiar with haze from the area's existing power plants, this impact was known and a source of anger, inflamed by a *Durango Herald* report that "Colleen McKaughan, an air-quality expert with the federal Environmental Protection Agency's Region 9, said the Four Corners region has air so clean that it can absorb additional pollutants without harm."[399]

Believing that the DEIS reflected bias and perhaps too close a relationship between URS Corporation, which prepared the DEIS, and Sithe Global, Diné

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396 *Id.* at 2-7 fig.2-3, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%202%20-%20Alternatives.pdf.

397 *See id.* at 3-79 to -85, *available at* http://www.desertrockenergyeis.com/documents/presentations/Chapter%203%20-%20Affected%20Environment.pdf.

398 STEAG POWER LLC, *supra* note 358, at 6-25 to -32.

399 Chuck Slothower, *Officials Tout N.M.'s Desert Rock: Environmental Impact Minimal from Plant, They Say*, DURANGO HERALD (Durango, Colo.), Sept. 15, 2006, http://archive.durangoherald.com/asp-bin/article_generation.asp?article_type=news&article_path=/news/06/news060915_2.htm (last visited Apr. 18, 2010). The Four Corners Air Quality Task Force felt that the statement "epitomizes our perception of the sensitivity of [EPA] Region 9 personnel to the issues in the Four Corners region." FOUR CORNERS AIR QUALITY TASK FORCE, REPORT OF MITIGATION OPTIONS 228 (2007), *available at* http://www.nmenv.state.nm.us/aqb/4C/Docs/4CAQTF_Report_FINAL.pdf.

Public comments on Desert Rock highlighted the current pollution and haze problems associated with the existing plants. *See, e.g.*, *Proposed Clean Air Act Permit for Prevention of Significant Detioration of the Desert Rock Power Plant: Hearing Before the U.S. Envtl. Prot. Agency* 26 (Oct. 4, 2006, afternoon session) (statement of Anthony Lee) (on file with author) [hereinafter *EPA Hearing I*] ("There's too much smoke in the air, and it looks ugly."); Letter from Rebecca Reppert to Robert T. Baker, *supra* note 391 ("I have seen the band of haze that crosses the desert near the Four Corners. I am against the construction of another coal-fired plant . . . ."); Letter from Dorothy Barber-Redhorse, Resident, Little Water, to Robert T. Baker, U.S. Envtl. Prot. Agency Region 9 (Nov. 13, 2006) (on file with author). Dorothy Barber-Redhorse urged,

> [T]he aesthetic value should be kept as a factor as we see yellow to brown haze across the horizon every day. There are days when the haze is so bad that visibility is probably no more than thirty miles. The day when Four Corners Power Plant went down, the visibility was great.

Id.; *see also Desert Rock Energy Facility Public Comments: Hearing Before the U.S. Envtl. Prot. Agency* 17 (Oct. 3, 2006) (statement of Margie Connolly) (on file with author) [hereinafter *EPA Hearing II*] ("[O]n many days there's this thick, ugly, yellow-brownish haze or smog that comes from the two existing power plants in the San Juan River Valley. Any additional deterioration from a coal-fired power plant is significant and should not be permitted."); Letter from Loretta Annala to Robert Baker, U.S. Envtl. Prot. Agency Region 9 (Nov. 2, 2006) (on file with author) ("Since I moved to this area in 1966, I have observed the thick yellow clouds of pollution from the existing plants cut visibility to a fraction of what it should be."); Letter from Jamie Stephens to Robert Baker, U.S. Envtl. Prot. Agency Region 9 (Sept. 23, 2006) (on file with author) ("Over the last few years, the air quality here has worsened dramatically. At times the mountains we used to see are almost obliterated by a yellow/brown haze . . . . This haze (smog) is a result of the coal-fired power plants we already have in our area.").

Tellingly, haze from Arizona plants burning Black Mesa coal "cut sunlight by 15 percent downwind in Flagstaff, Arizona." KRECH, *supra* note 185, at 215.

CARE and the San Juan Citizens Alliance initiated a Freedom of Information Act[400] claim against BIA.[401] Represented by attorneys from the Western Environmental Law Center and the Energy Mineral Law Center in the Four Corners region, the complaint calls attention to the limited role that BIA had in preparing the DEIS and seeks records of contacts between URS and plant proponents.[402] San Juan Citizens Alliance's position is that the use of URS to prepare the DEIS for BIA "has resulted in a predetermined conclusion" supporting Desert Rock.[403] In their response to the DEIS, they seek a review of the "'third party preparation'" of the DEIS to "determine if URS Corporation and BIA were unduly influenced by Sithe."[404] Certainly Diné Power Authority and Sithe Global could not have hoped for a more supportive review of the plant's environmental impact.

In the waning days of the Bush Administration, EPA approved of Desert Rock—more precisely, it issued Desert Rock a permit to pollute—but the Obama Administration EPA quickly pulled the approval in order to allow itself to "reconsider its actions on several issues" related to Desert Rock.[405] Diné Power Authority (DPA) and Sithe Global seemed to have reached their goal when EPA issued a PSD permit on July 31, 2008.[406] As *Desert Rock Energy Project* noted, the PSD Permit "is the key permit among several regulatory approvals" needed for the development of the power plant.[407] Having been sued by Navajo Nation and Sithe Global for failure to act on the PSD application, the permit was issued in accordance with the consent decree that set July 31st as the deadline for EPA to issue a final permit decision.[408] The press release on the issuance of the PSD permit

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400 5 U.S.C. § 552 (2006).

401 Complaint, Dine Citizens Against Ruining Our Env't v. Bradley, No. 08-CV-350 (D.N.M. Apr. 2, 2008), *available at* http://www.sanjuancitizens.org/air/Filed%20Version%20FOIA%20Complaint%20Doc%201.pdf.

402 *Id.* at 11, 12.

403 Letter from Mike Eisenfeld to Harrilene Yazzie, *supra* note 380, at 35.

404 *Id.* at 31.

405 EPA Region 9's Motion for Voluntary Remand at 1, In re Desert Rock Energy Co., PSD Permit No. AZP 04-01, (Envtl. Appeals Board, U.S. Envtl. Prot. Agency 2009), 2009 WL 3126170, *available at* http://www.epa.gov/region09/air/permit/desert-rock/docs/Desert-Rock-EAB-EPA-Motion-for-Voluntary-Remand.pdf [hereinafter EPA's Motion for Remand]. This Motion for Voluntary Remand to the Environmental Appeals Board is the current form of the Obama Administration's course reversal, though the Desert Rock litigation, appeals, and lobbying will no doubt continue, and therefore, the fate of the proposal is not yet finalized. *See, e.g.*, Desert Rock Energy's Response to EPA Region 9's Motion for Voluntary Remand, *In re* Desert Rock Energy Co., PSD Permit No. AZP 04-01, (Envtl. Appeals Board, U.S. Envtl. Prot. Agency 2009), 2009 WL 3126170, *available at* http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/915881434C6257B5852575D30059CEC0/$File/Motion%20for%20Remand%20...183.pdf.

406 U.S. ENVTL. PROT. AGENCY, PREVENTION OF SIGNIFICANT DETERIORATION PERMIT, PSD PERMIT NO. AZP 04-01 (2008), *available at* http://www.desertrockenergyproject.com/Final%20permit.pdf.

407 *Long Awaited Final Air Permit from the US EPA Issued*, DESERT ROCK ENERGY PROJECT (Desert Rock Energy Co., Houston, Tex.), Sept. 2008, at 1, *available at* http://www.desertrockenergyproject.com/Desert%20Rock%20Newsletter%200808%2015%20final.pdf.

408 *See* Original Complaint, Desert Rock Energy Co., LLC v. EPA, No. H-08-872, 2009 WL 3247312 (S.D. Tex. Sept. 29, 2008), *available at* http://www.sanjuancitizens.org/ air/complaint.pdf. Suit was brought in the name of secondary institutions: Diné Power Authority, an organ of the Navajo

quoted Wayne Nastri, EPA Regional Administrator for Region IX, which includes the Navajo Nation, as saying, "The Desert Rock power plant will be one of the cleanest pulverized coal-burning power plants in the country."[409] When the Obama Administration reversed its PSD permitting approval with its motion for voluntary remand, Desert Rock Energy company, of course, was not happy with the remand decision.[410] But for environmentalists, the voluntary remand signaled that EPA was beginning to "address legal and scientific concerns they contend were overlooked by the Bush [A]dministration."[411] Irony was lost on EPA, which effectively put a roadblock in front of the Navajo Nation's hoped-for power plant with the remand filing on the same day as the Navajo Nation's "Sovereignty Day," created in celebration of the Supreme Court's recognition of the tribe's right to tax energy companies.[412]

The Navajo Nation leadership is "staunchly" supportive of Desert Rock.[413] At the beginning of the project in 2004, President Shirley wrote to EPA, expressing the Navajo Nation's excitement about the project's progress.[414] In 2005, President Shirley again wrote the EPA: "I am writing you to confirm in the strongest possible terms that the Navajo Nation supports the efforts of DPA and Sithe Global Power LLC . . . and needs your dedicated assistance to conclude air permitting activities for the Desert Rock power plant in the very near future."[415] Shirley, citing reservation poverty and unemployment statistics, called on EPA to quickly issue the PSD permit.[416] The letter also called attention to the forced out-migration of Navajos unable to find work on the reservation, a point that President Shirley would return to in subsequent State of the Navajo Nation addresses.[417] Two years

Nation government, and Desert Rock Energy Company, a Sithe Global subsidiary. EPA's Unopposed Motion to Lodge Consent Decree, Desert Rock Energy Co., LLC, 2009 WL 3247312 (S.D. Tex. Sept. 29, 2008), *available at* http://www.sanjuancitizens.org/air/Desert%20Rock%20consent%20decree.pdf.

409 Press Release, U.S. Envtl. Prot. Agency Region 9, EPA Issues Air Permit for Desert Rock Energy Facility (July 31, 2008), http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b7852 5735 900400c31/8331e0972492f17c85257497005a37fb!OpenDocument (last visited Apr. 18, 2010) (internal quotation marks omitted).

410 *EPA Move Chagrins Desert Rock Developers*, COAL TRADER, Apr. 29, 2009, at 4, *available at* 2009 WLNR 9095762.

411 Robin Bravender, *EPA Wants to Review Permits for Navajo Nation Power Plant*, N.Y. TIMES, Apr. 28, 2009, http://www.nytimes.com/gwire/2009/04/28/28greenwire-epa-wants-to-review-permits-for-navajo-nation-10707.html (last visited Apr. 18, 2010)

412 *See* EPA's Motion for Remand, *supra* note 405; Press Release, Joe Shirley, Jr., President, Navajo Nation, President's Statement on Sovereignty Day (Apr. 27, 2009), *available at* http://www.navajo.org/News%20Releases/George%20Hardeen/Apr09/090427pres_President%20Shirley's%20statement%20on%20Sovereignty%20Day.pdf.

413 Press Release, U.S. Envtl. Prot. Agency Region 9, *supra* note 409.

414 Letter from Joe Shirley to Gerardo C. Rios, *supra* note 30.

415 Letter from Joe Shirley, Jr., President, Navajo Nation, to Wayne Nastri, Reg'l Adm'r, U.S. Envtl. Prot. Agency Region 9, at 1 (May 28, 2005) (on file with author).

416 *Id.* at 2.

417 *Id.* ("According to the Navajo Division of Community Development, the stagnation of economic development in Navajo country has forced Navajo families to move to far away cities to find their livelihoods. . . . [W]ithout reducing outmigration, by 2012 more than half of the Navajo people may leave the Navajo reservation."). In his State of the Navajo Nation address, President Shirley has argued that Desert Rock "will allow Navajos to remain in their homeland rather than seek economic opportunity beyond their own borders." Joe Shirley, State of the Navajo Nation Address, *supra* note 28, at 5; *see*

later, when Shirley was still pushing EPA to issue a final PSD permit, he noted that Desert Rock would provide a third of the Navajo Nation government's annual budget and would replace revenues lost with the closing of other plants and mines.[418] The letter concluded by quoting Senator John McCain:

> Each of us shares a strong commitment to promote and defend tribal sovereignty, tribal self-governance, and tribal self-sufficiency. But my friends, these things we hold dear, will wither and die unless they are watered by a strong Reservation economy that produces a decent standard of living for all of our people. Unfortunately, as you well know, economic development success stories in Indian Country are still the exception and not the rule.[419]

The working relationship between the Navajo Nation and EPA was obviously strained by this point—President Shirley was no longer excited about the progress that had been made—and the lost revenue was impacting the tribal budget.[420]

The strongest statement of the Navajo Nation's support for Desert Rock is President Shirley's January 2008 explanation of why the Navajo Nation decided to sue EPA for failure to act on the PSD permit application.[421] The decision to bring suit reflected Shirley's frustration that EPA had not approved "the cleanest coal-fired power plant in the United States" despite the "stringent emission standards imposed" by EPA on the project.[422] The statutory requirement was that EPA act upon a complete application within one year, but the Desert Rock application had been pending for almost three years by the time of President Shirley's explanation.[423] In calculated language, President Shirley wrote:

> EPA's unlawful delay and its failure to issue the final PSD permit are inhibiting the growth and independence of the Navajo Nation, the largest sovereign Indian Nation in the United States. Today, we see prosperity, growth and development all around us, but not within our own borders. Every highway leading off the Nation leads to a flourishing economy, and every highway leading onto the Nation leads to economic

also Joe Shirley, Jr., President, Navajo Nation, State of the Navajo Nation Address at the 21st Navajo Nation Council 2 (Apr. 20, 2009), *available at* http://www.navajo.org/News%20Releases/George%20Hardeen/Apr09/090420pres_STATE%20OF%20NAVAJO%20NATION%20ADDRESS,%20APRIL%2020%202009.pdf ("Desert Rock will bring hundreds of Navajos home to work on the project, and keep hundreds more from leaving to seek employment elsewhere.").

The fear that half the population may have to leave the reservation by 2012 is not a new fear: In the 1940s, with some Navajos reported starving, "it was thought that half of the people must find a living elsewhere." UNDERHILL, *supra* note 125, at 259. But the oil development of the 1960s helped allow Navajos to stay on the reservation and led to a near doubling of the population. *Id.*

418 Letter from Joe Shirley to Stephen L. Johnson, *supra* note 27, at 2.

419 *Id.* at 3 (internal quotation marks omitted).

420 As the general manager of Diné Power Authority noted in his prepared statement to the Senate Committee on Indian Affairs, "[D]elay costs the Navajo Nation approximately $5 million of desperately needed dollars every month." *Indian Energy Development Hearing*, *supra* note 354, at 23 (prepared statement of Steven C. Begay, General Manager, Diné Power Authority, Navajo Nation).

421 Letter from Joe Shirley, Jr., President, Navajo Nation, et al. to Stephen L. Johnson, Adm'r, U.S. Envtl. Prot. Agency 1 (Jan. 17, 2008) (on file with author).

422 *Id.* at 1–2.

423 *See id.* at 1.

> silence. Once construction begins (which cannot start until EPA acts on the PSD permit), Desert Rock will be the largest economic development project in Indian Country in the United States.[424]

The letter continued by driving home the fact that the Navajo Nation Council—which voted sixty-six to seven in favor of the project's lease—stood with President Shirley in supporting Desert Rock.[425]

Navajo government enthusiasm for Desert Rock is not shared by all. New Mexico Governor and 2008 Presidential Candidate Bill Richardson issued a statement in 2007 that said that he was "gravely concerned about the potential environmental impacts" of Desert Rock, adding that he believed the plant "would be a step in the wrong direction."[426] Richardson argued that the plant, which would raise the state's total CO_2 emissions fifteen percent, would make his "aggressive greenhouse gas reduction goals difficult—if not impossible—to meet."[427] And a little over a month before EPA issued the PSD permit, Governor Richardson and his attorney general wrote EPA with "serious concerns about the environmental impacts of constructing Desert Rock in a region already impaired by other large coal-fired power plants."[428] The concerns of the New Mexico Governor's office were also shared by county and city governments in New Mexico and in other states.[429]

The Doodá Desert Rock Power Plant Committee spearheaded local opposition.[430] According to Doodá Desert Rock President Elouise Brown, "Doodá

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424 *Id.* at 2.

425 *Id.* The margin in favor has remained fairly constant: In February 2009, "the council voted 71-to-8 to approve right-of-way legislation for the Desert Rock Energy Project." Press Release, Office of the President & Vice President, Navajo Nation, Navajo President Joe Shirley, Jr., Pleased by Council Vote to Approve Desert Rock Energy Project Right-of-Way Permit (Feb. 28, 2009), *available at* http://www.navajo.org/News%20Releases/George%20Hardeen/Feb09/090228presNavajo%20President%20pleased%20by%20approval%20of%20Desert%20Rock%20permit.pdf.

426 Press Release, Bill Richardson, Governor, N.M., Governor Richardson Issues Statement on Proposed Desert Rock Energy Facility 1 (July 27, 2007), *available at* http://www.sanjuancitizens.org/air/Richardson_pressrelease.pdf. Richardson's public statement preceded—arguably something it should not have—his formal request regarding Desert Rock for government-to-government consultation, a process the state and the tribe had previously agreed to in order to resolve disputes. *See* Letter from Bill Richardson, Governor, New Mexico, to Joe Shirley, Jr., President, Navajo Nation 1 (Aug. 20, 2007) (on file with author).

427 Press Release, Bill Richardson, *supra* note 426, at 2.

428 Letter from Bill Richardson, Governor, N.M., & Gary K. King, Attorney Gen., N.M., to Stephen L. Johnson, Adm'r, U.S. Envtl. Prot. Agency, & Wayne Nastri, Reg'l Adm'r, U.S. Envtl. Prot. Agency Region 9, at 3 (June 19, 2008) (on file with author).

429 *See, e.g.*, Letter from Helen Kalin Klanderud, Mayor, City of Aspen, Colo., to Robert Baker, U.S. Envtl. Prot. Agency 1 (Mar. 20, 2007) (on file with author) (noting that the Aspen City Council was unanimously concerned with the effects of the Desert Rock on Aspen); Letter from Joelle Riddle, Chair, La Plata County Bd. of County Comm'rs, to Deborah Jordan, Dir., Air Div., U.S. Envtl. Prot. Agency Region 9 (July 16, 2008) (on file with author).

430 Although describing resistance to Appalachian, and not Western, reservation strip-mining, an account of the creative work of local opposition groups and lawyers can be found in Dean Hill Rivkin et al., *Strip Mining and Grassroot Resistance in Appalachia: Community Lawyering for Environmental Justice*, 1 L.A. J. PUB. INT. (forthcoming 2010) (manuscript at 14–26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478549 (follow the "One-Click Download" hyperlink).

means 'absolutely no!' in Diné," as in Absolutely No Desert Rock.[431] One thousand five hundred Four Corners residents signed a Doodá Desert Rock petition opposing Desert Rock that was submitted to the BIA Navajo Regional Office.[432] Doodá Desert Rock's focus was on the interests of "the most impacted people [who] still reside within close proximity of the proposed power plant site."[433] Powerful images of the faces and lives of those who would be displaced and those who would be most affected by the plant were captured by photographer Carlin Tapp, invited to take the photos by Doodá Desert Rock that were later exhibited in Santa Fe.[434] In December 2006, protestors prevented surveyors from accessing the proposed site by blocking trucks and later occupying the site.[435] Plant developers obtained a temporary restraining order against the occupiers, but the parties agreed to coexist so long as the site work was allowed to go forward.[436] A permanent "resistance camp" was built on January 20, 2007, on the land of Alice Gilmore,[437] and "day after day" the protestors—Diné and "a coalition of religious and environmental organizations"—"'[sat] vigil'" near the plant site.[438] By July 2007, the vigil was down to "[a] handful of people, mostly Navajo women."[439] But the outrage at the issuance of the PSD permit became celebration when the permit was revoked.[440] In February 2009, following EPA's decision to voluntarily remand the permit, Doodá Desert Rock President Elouise Brown triumphantly asserted, "[T]he Desert Rock power plant is dead!"[441]

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431 Elouise Brown, *Doodá Desert Rock!*, EARTH FIRST! J., Mar.–Apr. 2007, at 14, 14.

432 DOODA (NO) DESERT ROCK POWER PLANT (2005) (on file with author) (petition signed by 1500 Four Corners residents).

433 Letter from Lucy Willie, Member, Doodá Desert Rock Power Plant Comm., et al. to Steven Begay, Gen. Manager, Diné Power Auth., & Bill Skeet, BHP Billiton/BHP Navajo Coal Co. 1 (July 28, 2006) (on file with author). One member even signed the letter and a separate individualized response with a thumbprint. Letter from Louise Benally to Robert Baker, U.S. Envtl. Prot. Agency Region 9 (Oct. 24, 2006) (on file with author).

434 *See* Shannon Shaw, *Documenting Desert Rock*, SANTA FE NEW MEXICAN, July 19, 2006, at C4, *available at* 2006 WLNR 12809289 (describing the origins of the photo exhibit). For the photos of those impacted, a protest in Window Rock, and the resistance camp, see Carlan Tapp, Question of Power, http://www.questionofpower.org/Pages/stories.html (follow the "click to view story" hyperlinks) (last visited Apr. 18, 2010).

435 Lisa Meerts, *Desert Rock Officials Get Court Order to Access Site*, DAILY TIMES (Farmington, N.M.), Dec. 21, 2006, *available at* LEXIS; Lisa Meerts, *Protestors Stop Work on Power Plant*, DAILY TIMES (Farmington, N.M.), Dec. 13, 2006, *available at* LEXIS.

436 Lisa Meerts, *Desert Rock Protesters Reach Agreement*, DAILY TIMES (Farmington, N.M.), Jan. 3, 2007, *available at* LEXIS.

437 For resistance camp construction photographs, see Carlan Tapp, Desert Rock Resistance Camp, http://www.questionofpower.org/qp3/index.html (last visited Apr. 18, 2010).

438 Moises Velasquez-Manoff, *Before Regulation Hits, a Battle Over How to Build New Coal Plants*, CHRISTIAN SCI. MONITOR, Feb. 22, 2007, at 13.

439 Leslie Linthicum, *A Question of Power: Coal-Fired Plant on Navajo Land Called a Cleaner Energy Source, But Critics Say Land, People Will Pay the Price*, ALBUQUERQUE J., July 15, 2007, at B1, *available at* 2007 WLNR 13533062.

440 *See* Cornelia de Bruin, *Breaking News: EPA Issues Desert Rock Air Permit*, DAILY TIMES (Farmington, N.M.), July 31, 2008, *available at* LEXIS (noting intent of both Doodá Desert Rock and Diné CARE to challenge the permit in court).

441 Elouise Brown, Letter to the Editor, *What's Next for Desert Rock?*, DAILY TIMES (Farmington, N.M.), Feb. 11, 2009, *available at* LEXIS.

The challenge of Desert Rock opposition was expressed during a Desert Rock public hearing by a resident of Fort Wingate, New Mexico, who noted that the Navajo are divided on Desert Rock.[442] A less than sympathetic news article in the *Albuquerque Journal* was dismissive of local opposition: "[E]ven on this desert plot, where the nearest neighbors are cattle, sheep and raptors—and where the power plant is a guest of the Navajo tribe—the not-in-my-backyard syndrome has taken hold."[443] Locals directly impacted by a particular development—here, a power plant—are more likely to object, whether the proposal is located on the Navajo Nation or is in Delaware.[444] Those in the immediate area would not like to "see" the plant developed, but as Diné Power Authority argued, "Much of the money can be expected to go toward existing social and health programs for the Navajo people, not just in the chapters surrounding the plant, but across the Navajo reservation."[445] Consequently, local positions may not align fully with the rest of the tribe.

Focusing just on local opposition risks devaluing the challenges that "competing demands of conservation and development" force upon tribal governments.[446] The Navajo Nation can decide to protect some areas more than others without necessarily being blind to environmental concerns. Thus, the Navajo Nation, which "became the first American Indian tribe to authorize their own park system" in order "[t]o protect special places,"[447] can also choose places not to protect. In the San Francisco Peaks case, the Ninth Circuit wrote, "The Navajo believe their role on earth is to take care of the land."[448] But taking care of the land does not mean the power plant opponents are automatically in the right: "[E]ven though all land is sacred, a specific area may be considered as having less sacred

442 *Proposed Clean Air Act Permit for Prevention of Significant Deterioration of the Desert Rock Power Plant: Hearing Before the U.S. Envtl. Prot. Agency* 8 (Oct. 4, 2006, evening session) (statement of Albert Shirley, Office of the Majority Leader, New Mexico House of Representatives) (on file with author) [hereinafter *EPA Hearing III*] ("[Y]ou can't really believe Desert Rock when it tells you that there is no opposition to this project. You can't believe the media when they tell you that all the Navajo people are in opposition to this proposal.").

443 Leslie Linthicum, *Power Struggle*, ALBUQUERQUE J., June 26, 2005, at A1, *available at* 2005 WLNR 10133288.

444 Impacts on grazing rights or hogans might be more likely to raise the objections of educated Navajos "willing to participate in development, but [who] are not happy about an outcome in which the traditional way of life for their parents is sacrificed." Schoepfle et al., *supra* note 54, at 901.

Locals who benefit from the project may strongly support Desert Rock. Clayton Benally, a union engineer from Shiprock, New Mexico, told a Desert Rock panel, "This project would mean that these people would come back home to work here at home, to be part of their families, to watch their children grow, to enjoy all that a family unit has to enjoy. Like I said, I support this project." *EPA Hearing III*, *supra* note 442, at 26 (statement of Clayton Benally); *see also* Facsimile from Lyla Ransdell, Field Representative, Mountain W. Reg'l Council of Carpenters, to Robert Baker, U.S. Envtl. Prot. Agency (Oct. 3, 2006) (on file with author) (letter from a local carpenter's union expressing support for Desert Rock).

445 Letter from Steven C. Begay, Gen. Manager, Diné Power Auth., to Robert Baker, U.S. Envtl. Prot. Agency Region 9, at 2 (Nov. 13, 2006) (on file with author).

446 Linda Kruger & Graciela Etchart, *Forest-Based Economic Development in Native American Lands: Two Case Studies*, *in* AMERICAN INDIAN POLICY, *supra* note 72, at 191, 193.

447 KELLER & TUREK, *supra* note 39, at 186.

448 Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1101 (9th Cir. 2008).

value and development may be pursued on it."[449] It may be that like Black Mesa, the proposed Desert Rock site is far enough from tribal power centers that Navajo Nation leaders believe it appropriate for such harmful development.[450]

Ultimately, Desert Rock detractors, both Navajos and non-Indians, must confront the Navajo Nation's democratically elected leaders who seem to think that the project is in the best interests of the tribe as a whole. President Shirley's reelection occurred in November 2006, well after public hearings and debate about Desert Rock began.[451] Navajos had not reelected an incumbent President in twenty-eight years, something of which President Shirley is very proud.[452] Similarly, an equally supportive council was not voted out of office, though Desert Rock opponents accuse them of "not listening to the people."[453] These results would not be predicted by those myopically paying attention only to the "overwhelming opposition to the project by tribal members in the area," but might if the entire tribe is considered.[454]

The subordinate relationship of the Navajo Nation relative to the U.S. government, operational here in the requirement that the plant is subject to EPA review,[455] puts Desert Rock opponents into an awkward position. With the tribal government firmly behind the plant, opposition groups, both local and national, end up hoping that EPA will act against the interests of the Navajo Nation's government.[456] National environmental organizations seeking to derail Desert Rock largely avoided the issue of sovereignty in their responses, confining the discussion to technical critiques of the proposal and EPA actions.[457] Doing so obscures the choice made by such organizations to accept the appropriateness of the subordinate

449 Kruger & Etchart, *supra* note 446, at 193.

450 Public comments on Desert Rock make a similar point about the Washington, D.C.–Four Corners separation, an accusation rejected by EPA: "We disagree that EPA's PSD permit treats the Four Corners area as a 'sacrifice' zone." U.S. ENVTL. PROT. AGENCY REGION 9, EPA RESPONSES TO PUBLIC COMMENTS ON THE PROPOSED PREVENTION OF SIGNIFICANT DETERIORATION PERMIT FOR THE DESERT ROCK ENERGY FACILITY 152 (2008); *see also* KULETZ, *supra* note 198, at 13 (describing the southwest areas used for nuclear weapon development as "a *landscape of national sacrifice*, an *expendable landscape*").

451 Natasha Kaye Johnson, *Shirley, Shelly Prevail: Incumbent First to Win Back-Back Elections Since 1982*, GALLUP INDEP. (Gallup, N.M.), Nov. 8, 2006, http://www.gallup independent.com/2006/nov/110806nkj_shrlyshlly.html (last visited Apr. 18, 2010).

452 Joe Shirley, Jr., *Native America and the Rule of Law*, 42 U. RICH. L. REV. 59, 60 (2007).

453 *EPA Hearing I*, *supra* note 399, at 89 (statement of Arnold Clifford).

454 *EPA Hearing II*, *supra* note 399, at 72–73 (statement of Steve Cone) (continuing by calling Desert Rock "a classic land grab").

455 *See* Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116, 1119 (9th Cir. 2009) (explaining EPA oversight of facilities on tribal lands under the Clean Air Act).

456 *See, e.g.*, Press Release, Office of the President & Vice President, Navajo Nation, Navajo Nation President Joe Shirley, Jr., Stands with Hopi Tribe in Opposition to Environmental Groups' Interference in Sovereignty 2 (Sept. 30, 2009), *available at* http://www.navajo.org/News%20Releases/George%20Hardeen/Sept09/090930presvajo%20president%20stands%20with%20Hopi%20Tribe%20in%20opposition%20to%20environmental%20groups%20interference%20in%20sovereignty.pdf (opining that, despite "overwhelming support" for the Desert Rock project, the Navajo Nation Council's "greatest opposition comes from environmentalists . . . . [M]any of these people don't know about Navajos, sovereignty or self-determination").

457 *See, e.g.*, Letter from Sanjay Narayan, Staff Attorney, Sierra Club Envtl. Law Program, to Robert Baker, U.S. Envtl. Prot. Agency Region 9 (Nov. 10, 2006) (on file with author) (discussing the permit's failure to meet the best available control technology standard and enforceability issues).

tribal position and to disregard the tribe's democratic decision-making process when the results are not in line with the priorities of these organizations.[458]

Perhaps more tragically, Diné opposed to Desert Rock end up turning to an arm of the U.S. government when they do not accept the path of their own tribal government. After criticizing Desert Rock, an e-mailed public comment to EPA pleaded, "Our leaders in the Navajo Nation government do not seem to listen to our cry for help. Please help our people!"[459] EPA, however, is an imperfect place to turn to, for its role is inherently limited:

> EPA acknowledges that there are supporters and opponents of this proposed project. EPA does not have a position on whether the [Desert Rock Energy Facility] is an appropriate land-use or public policy choice for the Navajo Nation, as the scope of our PSD permitting process is limited to evaluating compliance with PSD permitting requirements.[460]

Rather than focusing, as one participant whose comments at a public hearing were entirely in the Diné language, on "how we, as Navajo people, . . . allow our tribal government to exercise its sovereignty," limited tribal sovereignty externalizes the debate.[461] After criticizing the tribal government, Navajos end up in the ironic, and arguably tragic, position of calling the U.S. government their "last hope."[462]

B. Possible Limits on Tribes

Escaping this form of subordination requires rethinking the processes and limitations that currently define tribal rights to engage in environmentally destructive development. Desert Rock is emblematic of the current state of things; a project, even one fully supported by a tribe's government, must go through EPA's permitting process, during which environmental groups actively lobby against the project.[463] Although by law the U.S. government has a government-to-government relationship with Indian tribes, Indian governments lack the power to set their own terms for reservation environmental protection.[464] The history of the United States is replete with periods of environmental destruction in the name of economic development,[465] yet the Navajo Nation is not allowed to determine its own balance

458 This idea is more fully developed in Part V.A, *supra*.

459 E-mail from Julie Lee to U.S. Envtl. Prot. Agency (Jan. 5, 2007) (on file with author).

460 U.S. ENVTL. PROT. AGENCY REGION 9, *supra* note 450, at 193.

461 *EPA Hearing III*, *supra* note 442, at 20 (statement of Gloria Emerson) (on file with author).

462 *EPA Hearing I*, *supra* note 399, at 40 (statement of Nelson Lee Simms) (focusing on the EPA in particular).

463 *See, e.g.*, Joe Hanel, *EPA to Reconsider Power Plant Permit*, DURANGO HERALD (Durango, Colo.), Sept. 26, 2009, http://durangoherald.com/sections/News/2009/09/26/EPA_to_ reconsider_ power_plant_permit/ (last visited Apr. 18, 2010) (discussing EPA's reconsideration of the permit for the Desert Rock facility, and the responses to EPA's decision to reconsider by both coal power opponents and Navajo leaders).

464 *See* Walker et al., *supra* note 205, at 382, 392–93.

465 *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 406 (1994) (stating that early public land laws that gave "private property rights in water and mineral resources . . . are a major cause of the enormous amount of environmental destruction in the West").

between these competing goods. Instead, the U.S. government and environmental organizations—even on-reservation groups—"respond to Indian proposals for development initiatives or alternative conservation practices that conflict with their own proposals" by relying on a U.S.-centric decision-making process.[466]

Before turning to the approach favored by this Article—that environmental organizations relate to Indian tribes as if the limits on Indian sovereignty regarding development and the environment approximated international human rights limits on nation-states—it is worth considering four alternative answers to the question of appropriate limits. The four alternative approaches for setting the limits of tribal environmental destruction considered are 1) federal primacy, 2) Indian trust doctrine, 3) cooperative regulation, and 4) tribal determination and international sovereignty. For reasons explained in Part IV, an international human rights approach does a better job than any of these alternatives at recognizing tribal sovereignty while not giving tribes a carte blanche. But even though this Article concludes by supporting a human rights approach, each of these alternatives is supported by valuable insights that ought to be incorporated into an environmental regime based on a tribal international human rights order.

1. Federal (Administrative) Primacy

As the Desert Rock controversy shows, federal administrative primacy largely defines the current environmental regulation of reservations. This is not to say that tribes and states play no role, but the regulatory framework is decidedly federal. Thus, Professors Judith Royster and Michael C. Blumm introduce "Environmental Protection" in their textbook, *Native American Natural Resources Law*, by writing, "This section explores the interplay of federal, tribal, and state authority for environmental protection in Indian country. In particular, these materials focus on which of the governments is authorized to carry out *the federal environmental programs* in Indian country."[467] Within this framework, limiting state regulation of the reservations and granting tribes "treat[ment] as states" by EPA is sovereignty enhancing.[468] Tribes and Indian advocates have fought hard to gain this level of tribal control over the environment, which, generally speaking, reflects where tribes are today.[469] Though celebrating these advances with regards to federal recognition of sovereignty, it is important to remember that the overarching structure is federally defined.[470] Tellingly, the environmental provisions of the 2005 Indian

466 Wiggins, *supra* note 186, at 345 (beginning the article by asking how environmentalists should respond to such proposals).

467 JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 217 (2002) (emphasis added).

468 Professor Richard Monette explains that for "tribes, being treated as states meant at least being treated fairly." Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 114 (1996).

469 *Id.* ("[B]eing treated as states meant at least being treated fairly.").

470 Or, as Professor Royster argues, "Tribal control of federal programs is thus better than federal control, but a clear second-best to tribal choices of what programs and development opportunities to pursue." Royster, *supra* note 96, at 1070.

Tribal Energy Development and Self-Determination Act,[471] while placing "greater practical decision-making in the hands of energy tribes," also mirror the existing federal environmental requirements.[472]

Federal primacy, in environmental law and generally, can protect tribes from the states. As the Supreme Court observed in 1886, historically states have been the "deadliest enemies" of Indians, and the federal government has consequently had to play a protective role.[473] Substituting state or local authority for federal oversight undermines the government-to-government relationship that has defined United States–Indian relations since the Trade and Intercourse Act of 1790.[474] The Supreme Court enshrined a uniquely federal-tribal relationship into the common law in *Worcester v. Georgia*,[475] a case dealing with an attempt by Georgia to impose state law upon the Cherokees in the 1830s.[476] Chief Justice John Marshall wrote, "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[477] The idea, Judge William Canby, Jr. explains, was that "[w]hen tribal interests, broadly viewed, were affected, the state was excluded."[478] Professor Robert Clinton's work on the Indian Commerce Clause of the Constitution shows that the framers' original understanding was that states would have no powers over tribes and that federal "power is broad vis-à-vis the states."[479] Not contemplated by the framers, according to Professor Clinton, was the Supreme Court's transformation, beginning at the end of the nineteenth century, of the exclusive federal-tribal relationship of international sovereigns into plenary power over tribes.[480] Though there is no "true

471 Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. No. 109-58, §§ 501–06, 119 Stat. 594, 763–79 (codified in scattered sections of U.S.C.).

472 Royster, *supra* note 96, at 1082, 1090.

473 United States v. Kagama, 118 U.S. 375, 384 (1886).

474 Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790) (current version at 25 U.S.C. § 177 (2006)); *see also* Non-Intercourse Act of 1809, ch. 24, 2 Stat. 528 (repealed 1815). The risks of a diminished federal role are further explored in *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* by Professor Jeff Corntassel and Richard C. Witmer, which focuses on how, "given the devolution of federal powers to states, indigenous nations have become more vulnerable to the jurisdictional claims of local governing bodies, such as state and municipal policymakers." JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 5 (2008).

475 31 U.S. (6 Pet.) 515 (1832).

476 *Id.*

477 *Id.* at 519.

478 William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 6 (1987).

479 Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 133 (2002).

480 *Id.* at 162–235 (detailing the history of the Supreme Court's approval of congressional, colonialist-driven plenary power and creation of judicial plenary power); *see also* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1058 (1995) ("The thesis of this article is that the Supreme Court's rejection in *Cotton Petroleum* of any viable Indian Commerce Clause limitations on state authority represents an historically untenable interpretation of the clause, and therefore, constitutes an exercise of contra-constitutional interpretation.").

constitutional benchmark to orient the federal-tribal discourse on sovereignty," tribes seem to be stuck, at least for now, with the plenary power doctrine.[481]

The heavy hand of the federal government extends to environmental matters and arguably should serve as a check on the role of states. While environmental laws that affirm tribal sovereignty are a factor in preempting state authority, plenary power also plays a role.[482] State assertions of jurisdiction over reservation land and resources arguably undercut tribal sovereignty even when states act seemingly with the best of intentions. The state of New York in 2001 decided to sue General Motors (GM) because of the chemical pollution being discharged by a GM plant located near the St. Regis Mohawk reservation.[483] After noting the history of an exclusive federal-tribal relationship, a law review article on New York's proposal argues that the offer to help "should be viewed with skepticism."[484] The problem with this seemingly supportive stance of the state, according to the article, is that it "extends the reach of states, generally chipping-away at the seemingly ever-dwindling sovereignty of tribal peoples in the United States."[485] According to this perspective, the federal government acts as "a shield against the states' gentleman's sword, such as New York's encroachment upon the federal-tribal relationship," preventing the erosion of tribal sovereignty and authority over the environment.[486] The same perspective can be seen in the decision of the Alaska Inter-Tribal Council and the Yukon River Inter-Tribal Council to oppose transfer of National Pollution Discharge Elimination System primacy, which would transfer permitting authority from EPA to the State of Alaska, because such a transfer would "subvert Tribes legally recognized right to government-to-government consultation."[487] Such a strong

481 FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 39 (1995). Given the diminishment of sovereignty at the hands of Congress and the judiciary, Professor Pommersheim has suggested that it is time "to more fully consider the necessity for an amendment to the United States Constitution that expressly recognizes tribal sovereignty." Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003); *see also* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 295–312 (2009) [hereinafter POMMERSHEIM, BROKEN LANDSCAPE] (discussing the political feasibility of such an amendment). Likewise, Professor Robert Laurence would like "to ratchet the sovereignty doctrine higher now, and then lock it in place by declaring it to be a constitutional doctrine." Laurence, *supra* note 192, at 6.

482 It has been argued that "[m]any federal environmental statutes . . . grant Indian tribes a great deal of sovereignty and in so doing preempt states from applying their laws to Indian tribes." Cluett, *supra* note 215, at 198. But what this description misses—besides the characterization as a "grant" rather than a "recognition" of sovereignty—is that it is sovereignty "coupled with the federal plenary power over Indian affairs [that] explains why state regulatory laws generally never apply to tribes and tribal lands." Walker et al., *supra* note 205, at 383.

483 Peter D. Lepsch, *A Wolf in Sheep's Clothing: Is New York State's Move to Cleanup the Akewsasne Reservation an Endeavor to Assert Authority over Indian Tribes?*, 8 ALB. L. ENVTL. OUTLOOK J. 65, 69 (2002).

484 *Id.* at 70.

485 *Id.* at 107.

486 *Id.*

487 E-mail from Alaska Inter-Tribal Council to Ezra Rosser (July 31, 2009, 20:53) (on file with author); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 21–23 (1999) (exploring the requirement that the federal government consult with tribes on matters affecting them); *see also* Letter from Clarence Alexander, Executive Bd. Chair, Yukon River Inter-Tribal Watershed Council, to Nina Kocourek, Office of Water & Watersheds, U.S. Envtl. Prot. Agency 2 (Aug. 18, 2008) (on file with

enforcement of a state-tribal line may seem out-of-place when states and tribes are in agreement, but it protects tribes when states and tribes disagree and tribes face the insistence that they yield to conflicting state interests.[488]

Federal environmental law also provides space for tribal environmental enforcement and—so long as tribes remain within federally determined parameters—for tribes to make some decisions regarding their level of environmental protection versus development.[489] A classic example is that tribes can reclassify reservation air quality under EPA's PSD regulations, as the Tribal Council of the Northern Cheyenne chose to do in 1976, over the protests of strip-mining coal companies.[490] The Ninth Circuit upheld the reclassification with language indicative of a move towards treating tribes as states by EPA: "[S]tates and Indian tribes occupying federal reservations stand on substantially equal footing," the court stated, adding that it could not find "Congressional intent [in the Clean Air Act] to subordinate the tribes to state decisionmaking."[491] The tribe's PSD air quality reclassification required EPA's approval and the decision had as much to do with the role of EPA as the tribe's actions, but despite such a caveat, the decision "set an enduring legal and political precedent for Indian country environmental law."[492]

Treating tribes as states was the EPA's solution to two related problems: filling the gaps of federalism and determining the extent of tribal powers. The United States is popularly conceived of as having only two levels of government—federal and state—with tribes "effectively neglected, if not completely omitted" from consideration.[493] EPA moved away from the "basic strategy of not mentioning Indian tribes"[494] with its 1984 Policy for the Administration of Environmental

author) ("The state of Alaska has taken a 'hands off' approach to government consultation with the Tribes of Alaska."). One of the fears tribes might have is that a state empowered to implement federal environmental regulatory authority that contained protribal elements—such as a consultation requirement—might deliberately undermine federal objectives the state was tasked with putting into effect. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (exploring state use of federally delegated authority in ways opposed to federal goals).

488 As Professor Grijalva notes, "Opponents of tribal sovereignty sometimes . . . perceive the only appropriate resolution of state objections is forcing differing tribal values to yield." GRIJALVA, *supra* note 15, at 115.

489 The tension between space and control explains one author stating that "[t]he decision to build waste disposal facilities should be left entirely to the tribes themselves," and then continuing in the same paragraph by writing, "Still, the decision to enter the waste management business requires assurance that compliance with environmental laws will be stringent." Sehgal, *supra* note 211, at 433–34.

490 Nance v. EPA, 645 F.2d 701, 704–05 (9th Cir. 1981).

491 *Id.* at 714.

492 James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 214 (2006).

493 Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Indian Nations*, 5 U. PA. J. CONST. L. 318, 318 (2003). Professor Tebben's thesis is that tribes are part of the constitutional structure of the United States, *id.*, something this Article moves away from in Part III. But regardless of how tribes are classified, they should not be simply ignored.

494 William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 816 (2004).

Programs on Indian Reservations.[495] Three years after *Nance v. EPA*, EPA committed to Indian tribes playing a "lead role for matters affecting reservation environments" and taking on responsibilities "under terms similar to those governing delegations to States."[496] While treating tribes as states (TAS) arguably fails to accord tribes their proper due as sovereign nations, under such a policy tribes can establish reservation environmental protection levels. TAS operates under federal guidelines and tribes are not free from EPA involvement, but tribes can do some things under TAS—like set water quality standards that are higher than federal or state standards—that might be surprising.[497]

TAS, even though it is part of federal primacy over reservation environmental regulation, is arguably an attractive option. Professor Lincoln Davies concludes his in-depth study of the Skull Valley Band of Goshute Indians' proposal to store nuclear waste on their reservation by advocating a "mechanism by which tribes can have guaranteed sovereignty equivalent to what we afford states today."[498] Facing an uncertain future and a shrinking tribe, the Goshutes hoped that storing nuclear waste would "revitalize their nation" through project-related jobs and payments.[499] The willingness by some tribes to accept nuclear waste, according to Professor Saleem H. Ali, should not be discounted as merely a sign of desperation; rather, the choice "should be seen as a self-conscious (and, perhaps, misplaced) attempt to invigorate self-determination, absent other avenues to do so."[500] Initial environmental impact statements supported the Goshute proposal.[501] Just as Bill Richardson actively opposed Desert Rock, the governor of Utah played a similar role—going so far as to attempt to create a land moat around the reservation to block transportation routes to the proposed storage facility—in trying to derail to Goshute project.[502] In 2006, Senator Orrin Hatch declared the nuclear storage plan

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495 WILLIAM D. RUCKELSHAUS, U.S. ENVTL. PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 1 (1984), *available at* http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf.

496 *Id.* at 2. The Policy provided for encouraging tribal assumption of regulatory and program management, but with EPA retaining responsibility until tribes were interested in and capable of taking on such a role. *Id.*; *see also* President's Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 568 (July 8, 1970) (arguing that, under the self-determination initiatives Nixon introduced with the speech, "Indian control of Indian programs would always be a wholly voluntary matter"). For more on the 1984 EPA Policy, see Dean B. Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, GREAT PLAINS NAT. RESOURCES J., Fall 2002, at 90, 124–25.

497 City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996). For more on the case and the issue of tribal water quality standards, see Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367 (1997).

498 Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 365 (2009).

499 *Id.* at 334.

500 ALI, *supra* note 11, at 36.

501 Davies, *supra* note 498, at 339–40.

502 *Id.* at 343; *see also* David Rich Lewis, *Skull Valley Goshutes and the Politics of Nuclear Waste: Environment, Identity, and Sovereignty*, *in* NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN 304, 304 (Michael E. Harkin & David Rich Lewis eds., 2007) (highlighting Utah governor Michael Leavitt's vocal opposition to the Goshute plan).

"stone cold dead."[503] In many ways Desert Rock and the Goshute nuclear proposal are analogous examples of tribes considering environmentally harmful forms of economic development. After presenting the Goshute proposal controversies, Professor Davies argues that tribes should have the right to opt into a state-like type of sovereignty.[504]

The attractiveness of federalizing tribal sovereignty is that sovereignty is recognized but is also subject to a natural limit. Professor Davies's solution and EPA's TAS both require that tribes "submit to" aspects of federal law.[505] The thinking behind such a requirement is simple: "because the actions of every sovereign entity in this country can affect the others, there is a need to moderate such [transboundary environmental] harms in an evenhanded and fair way."[506] Certainly the Goshute proposal has externalities affecting those off-reservation (to give just one example, one would predict that land values of parcels near the nuclear storage facility would fall), just as Desert Rock would impose local and global externalities. Under Professor Davies's proposal—which for power plant development is close to the current state of the law under EPA's permitting scheme—the allowed form and degree of tribal environmental destruction for economic gain would be moderated by the federal government, just as the federal government has the same role for states.[507] As Professor Davies acknowledges, this externality solution is above all else a "practical" one, but is it appropriate for the Navajo Nation?[508]

The trouble with federal primacy is found in the moderation's unidirectional nature. Dealing with the externalities of sovereigns is a crucial part of any regime, but leaving the "evenhanded and fair" setting of limits entirely in the federal government's hands is an imperfect solution at best.[509] Besides undermining tribes'

503 Davies, *supra* note 498, at 346 (quoting Press Release, Office of U.S. Senator Orrin G. Hatch, Utahns Deliver Killing Blow to Skull Valley Nuke Waste Plan (Sept. 7, 2006), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.View&PressRelease_id=6bf6bbe-b834-4ebb-a950-19e629e35706 (quoting Senator Hatch)).

504 *Id.* at 374–76. Under this proposal, tribes would decide whether or not to switch to such a position, just as they had decided whether to opt into IRA during the New Deal. A key difference is that under Professor Davies's model, opting in would also protect tribes from Congressional and judicial diminishment of tribal sovereignty. *Id.* at 367.

505 *Id.* at 371.

506 *Id.* at 370.

507 Professor Richard Monette explains that Republican Party objections to federal bureaucracy and preference for local regulation led to the current form of federal primacy with state administration: "The federal government assumed primacy over environmental regulation, but its programs 'devolved' to the states to administer. It is a mistake to believe, however, that the EPA has delegated such programs to the states." Richard Monette, *Environmental Justice and Indian Tribes: The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 721, 735 (1999).

508 Davies, *supra* note 498, at 371–72 ("[S]ome tribes might see that kind of moderation as a dilution of their historical sovereignty—particularly when that sovereignty is couched in terms of the full nation-like sovereignty tribes theoretically enjoy, or even in terms of sovereignty exercised in a way that seeks to minimize federal contact—and therefore might choose not to partake in the tradeoff. Others, of course, may adopt a more practical view . . . .").

509 Professor Judith Royster argues that when it comes to mineral leasing, the Secretary of the Interior cannot "subordinate the best interests of the tribes to public values or the national interest," including environmental interests, because federal statutes governing such leasing impose a fiduciary duty on the Secretary to tribal mineral owners. Royster, *supra* note 377, at 364. This trust obligation

claims to be independent nations with separate sovereign authority,[510] federal primacy in environmental regulation and enforcement fails to take into account other differences between tribes and states. For example, should the Navajo Nation have more rights to pollute the environment than, say, Delaware in order to help bridge the income gap between the reservation and the rest of the United States? Or, to take another example, should EPA public participation practices be required, or should a tribe be able to set different standards for public involvement and forms of acceptable dissent? Federal primacy answers these and all other questions by insisting that standard federal guidelines applicable to states should also apply to Indian nations.

2. Indian Trust Doctrine

The core idea of federal (administrative) primacy, that the United States should determine the extent of permitted environmentally harmful forms of reservation development, also is supported by the Indian trust doctrine. An enhanced version of the Indian trust doctrine when it comes to the environment is presented most fully by Professor Mary Christina Wood over the span of three law review articles.[511] Professor Wood argues that when it comes to development that directly or indirectly impacts the reservation environment or land base, at times the trust doctrine requires federal judges to block tribal council approved projects.[512] By operating independently of statutes or administrative agency practices, the Indian trust doctrine arguably limits reservation development more than does federal administrative primacy.[513] In order to appreciate the potential applicability of the trust doctrine on tribally supported development such as Desert Rock, it is worth exploring Professor Wood's arguments in depth.

may not reach all other agencies when it comes to environmentally harmful mineral development and, as the *Navajo Nation II* case shows, the U.S. government does not always live up to its trust obligations.

510 As Professor Imre Sutton, the scholar who perhaps has done the most work on Indian geography and the nature of reservation land, explains, "[A] reservation provides the base and the locus for the functioning of the tribe as a political or jural entity within its own bounds, but this should not be construed to mean that the reservation is a distinct and separate political unit equivalent to a state, a county, or even a municipality." Imre Sutton, *Sovereign States and the Changing Definition of the Indian Reservation*, 66 GEOGRAPHICAL REV. 281, 287 (1976); *see also* Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 551 (2010) (describing imposition of EPA standards as an "affront to the sovereignty" of some tribes).

511 Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733 (1995) [hereinafter Wood, *Partial Critique*]; *see* Wood, *supra* note 325; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109 [hereinafter Wood, *New Trust Paradigm*].

512 *See* Wood, *New Trust Paradigm*, *supra* note 511, at 143 ("Otherwise, the federal trust obligation essentially collapses into a rule of absolute deference to a tribal council's decision . . . .").

513 *See id.* at 141 ("[T]he government should achieve a degree of protection that is appropriate to protect the tribe's way of life on the reservation, even if this level of protection exceeds what is otherwise mandated by statutory law."); *id.* at 227 ("[C]ourts should enforce the procedural mandate of the trust obligation independent of the statutory procedures called for by NEPA.").

According to the Indian trust doctrine, the United States has a trust relationship with Indian tribes that should guide policy and judicial review.[514] The Supreme Court's rejection of the breach of trust claim in *Navajo Nation I*, upheld in *Navajo Nation II*, suggests that the trust doctrine approach may get only limited support from the courts. In *Navajo Nation I*, the Court acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people."[515] But in *Navajo Nation I* and *II*, the Court ultimately twice forgave the Secretary of the Interior's clear breach of the trust obligation that is supposed to run to Indian tribes.[516] What amounts to judicial skepticism regarding trust doctrine enforceability does not, however, mean that the trust doctrine necessarily has no teeth nor that federal policy should not reflect the doctrine. Were it to be taken more seriously by all branches of the U.S. government than it was in the *Navajo Nation* decisions,[517] the trust doctrine arguably would involve the imposition of an outer limit on tribal development decisions impacting reservation land.

According to Professor Wood, underlying the trust doctrine is protection of the possibility of tribal separatism and the tribal land base.[518] Since development decisions can imperil the land base and consequently tribal separatism, Professor Wood argues that the trust doctrine requires the rejection of certain environmentally harmful forms of development.[519] The conflict between the trust doctrine and self-determination when it comes to development can be seen in Professor Wood's formulation of the doctrine itself. Professor Wood writes, "[T]he core principle of the trust doctrine remains a duty to protect a viable native separatism and tribal sovereignty,"[520] but these are really two principles—separatism and sovereignty—which at times align but at times conflict. Professor Wood resolves these conflicts in favor of the environment, preservation of traditional ways of life, and dissidents, asserting that maintaining viable separatism

514 *See id.* at 111.

515 *Navajo Nation I*, 537 U.S. 488, 506 (2003) (quoting United States v. Mitchell, 463 U.S. 206, 225 (1983)). The Indian trust doctrine is firmly established as a principle of federal Indian law that has been acknowledged repeatedly by the Supreme Court. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.").

516 *See supra* notes 158–74 and accompanying text.

517 The judiciary is not alone in its skepticism regarding the trust doctrine:

> [T]he Department of [the] Interior has begun to distance itself from any notion of a general trust responsibility. In decision-making documents, the Department of the Interior once embraced the trust responsibility, often using it as an alternative basis for a decision in many areas of Indian affairs. In more recent years, Interior has been much more guarded, rarely mentioning the trust responsibility.

Kevin K. Washburn, Remarks at Harvard Law School Panel Discussion (Mar. 20, 2008), *in* Kevin K. Washburn et al., *Paternalism or Protection? Federal Review of Tribal Economic Decisions in Indian Gaming* 2, 3 (Ariz. Legal Studies Working Paper Group, Discussion Paper No. 08-25, 2008), *available at* http://ssrn.com/abstract=1226542 (follow "One-Click Download" hyperlink).

518 Wood, *supra* note 325, at 1496.

519 *See* Wood, *New Trust Paradigm*, *supra* note 511, at 235–36.

520 *Id.* at 113.

can justify overturning development decisions of tribal councils.[521] The trust doctrine, she argues, requires that when the tribal council makes a shortsighted or wrong decision regarding the tradeoff between development and the environment, secretarial approval should be withheld and federal courts should step in to block such development.[522]

In writing that the trust doctrine requires federal review of tribal council decisions,[523] Professor Wood accepts a narrowing of tribal sovereignty as a necessary consequence of the United States' trust obligation to Indians. Though administrative approval regarding tribal land use is vested in the U.S. Department of the Interior for many tribes and land-use decisions, in practice tribal council decisions are treated deferentially and Professor Wood does not view the federal approval process as providing a meaningful check on tribal council decisions.[524] Institutional review of tribal council lease and development decisions would therefore be with the federal judiciary. Federal courts have hesitated to be actively involved in tribal matters, dismissing claims because tribal sovereign immunity prevents an "indispensible party," the tribal government, from being subject to suit.[525] The involvement of a less hesitant judiciary would be driven by the challenges of dissident tribal members opposed to the actions of their own tribal council.[526] For Professor Wood, the trust doctrine requires that non-Indian judges and courts review tribal council decisions and administrative approvals to "ensure the perpetuation of the land base as an attribute of native sovereignty."[527]

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521 *See* Wood, *supra* note 325, at 1558–64 (arguing federal government review of tribal council decisions may be the only way to review environmental impacts that prevent preservation of the traditional way of life).

522 Professor Wood's faith in the trust doctrine and federal oversight is surprising given the *Navajo Nation* facts and record of BIA, which "in balancing its trust responsibilities with Indian self-determination, has both squandered tribal resources and saved tribes from short-sighted expediency and greed." David Rich Lewis, *Still Native: The Significance of Native Americans in the History of the Twentieth-Century American West*, 24 W. HIST. Q. 203, 216 (1993).

523 Wood, *supra* note 325, at 1564.

524 *Id.* at 1480. ("As a practical matter, however, the BIA simply approves transactions that tribal governments support.").

525 *See id.* at 1537–40 (explaining and critiquing the dismissal along "indispensible party" grounds of two such cases). For more on tribal sovereign immunity, see Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982).

In some respects, Professor Woods seems to agree with judicial hesitation. Although the first law review article advocates "aggressive judicial enforcement," Wood, *supra* note 325, at 1569, the subsequent article offers a clarification: "A prudent judicial approach to such conflicts might be to reserve decisions that depart from tribal council prerogatives for those cases presenting extreme circumstances." Wood, *New Trust Paradigm*, *supra* note 511, at 145.

526 Wood, *supra* note 325, at 1480 ("[C]hallenges typically originate from dissenting individuals within the tribe."); *id.* at 1536 ("Given this deference to the tribal council, the only parties who would likely challenge the federal approval decision on trust grounds are individual Indian plaintiffs or groups of tribal members who are opposed to the decision made by the tribal council."); *see also* Louis G. Leonard, III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 674 (1997) ("The Trust Doctrine may be used in this way by tribal members to challenge practices such as the BIA's approval power over land uses . . . .").

527 Wood, *New Trust Paradigm*, *supra* note 511, at 149 ("[A] court should consider the permanency of the land use, its relation to existing and future spacial needs of the tribe, and collateral effects which may further detract from the usable land base.").

Professor Wood argues that there is no inherent contradiction in tribal sovereignty and the simultaneous probability that if federal courts follow her aspirational version of the Indian trust doctrine they will overturn tribal council decisions.[528] The counterargument is acknowledged: "Any judicial invalidation of a transaction initially approved by a tribal government naturally strikes many as an invasion into tribal prerogative. Indeed, some advocate complete control by tribal councils over all tribal lands and resources, without any federal approval role."[529] The question of whether federal courts are the appropriate forum to decide what is beneficial for Indian country is also acknowledged: "Judicial intervention in this context may intrude on the sovereignty of tribes by substituting a court's notion of what is in the best interests of the tribe for a determination made in the first instance by the tribal government itself."[530] But the thrust of Professor Wood's argument is that when it comes to long-term leasing or environmentally harmful development, such decisions cannot be left to tribal governments. Professor Wood argues that tribal councils may not provide dissenters—what under her framework are federal court plaintiffs—"adequate remedy," essentially a challenge aimed at what should be assumed regarding tribal government processes.[531] They also may fail to adequately take into account the position of traditionalists or future generations.[532] Finally, tribal councils, Professor Wood cautions, may be unable to resist powerful non-Indian interests seeking access to tribal resources.[533]

The Indian trust doctrine can prevent non-Indian interests from acquiring access to reservation resources otherwise available with permission of the tribal council. Sovereignty and federal review are not in conflict, Professor Wood argues, because sovereignty absent federal review is impossible: "Self-Determination will prove a hollow concept if industry and the government exploit it to serve the interests of the majority society at the expense of the native nations. Indeed, it will become nothing more than *continued colonialism under the banner of native sovereignty*."[534] Or put differently, "[w]hat often amounts to an automatic deference to tribal councils effectively eliminates any restraint against transfer of

528 Wood, *supra* note 325, at 1562–64.

529 *Id.* at 1551; *see also* Wood, *New Trust Paradigm*, *supra* note 511, at 156–57 ("Second guessing tribal council decisions, even in a broad policy context, may affront contemporary notions of tribal sovereignty.").

530 Wood, *supra* note 325, at 1550; *see also* Wood, *New Trust Paradigm*, *supra* note 511, at 128.

531 Wood, *supra* note 325, at 1540–41 ("[T]he presumption that the tribal government always provides an adequate forum of redress for tribal members may be unwarranted."). Government processes go beyond providing redress, and it similarly has been asserted that the trust responsibility is important based on the argument that "some tribes do not have the institutional and enforcement mechanisms needed to guarantee that tribal resources will be developed responsibly." Andrea S. Miles, Note, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities?*, 30 AM. INDIAN L. REV. 461, 472 (2006).

532 Wood, *New Trust Paradigm*, *supra* note 511, at 143, 167.

533 *Id.* at 143. Tribal councils are not alone in having a limited ability to resist; the same can be true of the federal agencies. *See* Wood, *Partial Critique*, *supra* note 511, at 746 ("These private stake-holders often exert overwhelming pressure on agencies to render decisions favorable to them, and often public or environmental values fall sway to more immediate and quantifiable economic interests.").

534 Wood, *supra* note 325, at 1568–69 (emphasis added); *see also* Leonard, *supra* note 526, at 689 (making a similar argument—that "the federal government is now using the concept of tribal sovereignty as an excuse"—regarding the siting of nuclear waste on Indian reservations).

Indian lands and resources. Taken to its extreme, *this policy may resurrect the specter of Termination under the more palatable banner of Self-Determination*."[535] This is strong language is supported by Professor Wood's position that "tribal councils frequently capitulate to development proposals even when individual tribal members strongly oppose the development for religious and spiritual reasons."[536] Capitulation language echoes the concern tribes are entering into contracts of adhesion, the difference being that while the concern in Part III.B was with unfair contracts, Professor Wood favors a heightened standard of environmental protection for reservation, relative to off-reservation, development.[537] This aspirational version of the trust doctrine requires that the U.S. government "insulate tribal lands from the priorities of the non-Indian market,"[538] based on a "federal fiduciary duty to protect a tribe's territory against market encroachments of the majority society."[539] The argument ultimately is that Indians *are* different and traditional ways of life must be protected from "the development and pollution that now plagues nearly every sector of the majority society."[540]

By elevating the tribal member objections to tribal council actions from internal tribal matters to the level of the trust doctrine enforceable by federal courts, Professor Wood ends up prioritizing the environment and the idea of static reservation ways of life over tribal sovereignty. The argument is made that federal administrative and judicial oversight "does not amount to a *per se* intrusion into the internal affairs of the tribes as long as the federal government directs its authority primarily against the non-Indian entity seeking to do business with the tribe."[541] But this argument does little to address situations, as in the Desert Rock proposal, where a tribe initiates the proposal or where a tribe is working in partnership with a non-Indian entity. Additionally, Professor Wood advocates "a role for the trust doctrine in protecting the more traditional elements of native separatism."[542] But I find the romantic assertion that traditionalists enjoy special priority vis-à-vis (generally speaking, democratically elected) tribal councils that should be protected

535 Wood, *supra* note 325, at 1564 (emphasis added).

536 Wood, *New Trust Paradigm*, *supra* note 511, at 221.

537 Professor Wood writes, "[T]he trust obligation to protect tribal resources should often translate into a higher level of ecological protection than that which might result when solely non-Indian interests are affected." Wood, *Partial Critique*, *supra* note 511, at 745. A heightened reservation standard reflects Professor Wood's disdain for the relationship non-Indian society has with the environment. Professor Wood notes the "ominous horizon of ecological damage that haunts the majority's industrial society," Wood, *supra* note 325, at 1569, and later describes the indigenous model as "the very antithesis of the industrial model," Wood, *New Trust Paradigm*, *supra* note 511, at 153.

Professor Wood is not alone in her disdain for the relationship of non-Indian society to the environment; Professor Rebecca Tsosie begins her article on self-determination and the environment by writing of the United States as "a nation faced with the dismal legacy of overdevelopment." Tsosie, *supra* note 71, at 225.

538 Wood, *New Trust Paradigm*, *supra* note 511, at 163.

539 Wood, *supra* note 325, at 1568.

540 Wood, *Partial Critique*, *supra* note 511, at 740.

541 Wood, *New Trust Paradigm*, *supra* note 511, at 181; *see also* Wood, *supra* note 325, at 1561 ("A negative approval, whether emanating from the BIA or a court reviewing the BIA's decision, represents less of a directive on how the tribe should use its land and more of a restraint on the particular private firm seeking to access the reservation's resources.").

542 Wood, *New Trust Paradigm*, *supra* note 511, at 235.

by the United States government similarly unconvincing.[543] It is true that "tribal council decisions often prompt fierce protests by other tribal members who wish to maintain a more traditional, land-based way of life on their reservation and who may consider such industrial development both a desecration of their lands and a harbinger of cultural extinction."[544] However, that does not mean that Indian trust doctrine enforcement is the best way to deal with such protests.

Though conceptually the trust doctrine could be considered federal primacy's cousin, because of the strength of Professor Wood's arguments, it is worth fully considering her Indian-trust-doctrine-based approach to environmentally harmful activities on reservations. Ultimately, I have no better counterargument than Professor Wood's own summary of the argument against federal enforcement:

> [C]onflict over development is not uncommon in other governments, and the existence of conflict alone may not justify judicial interference. Self-determination can flourish on reservations only if the federal government leaves tribes to set their own priorities. The tribal governments carry the mantle of authority, and while their actions may meet with dissension within the tribe, part of the price of sovereignty may be improper or unwelcome management by tribal governments. Federal intrusion of any kind may be fundamentally incompatible with tribal sovereignty.[545]

The difference is that while Professor Wood finds these reasons not compelling, I do, and as a consequence I do not think the federal government—particularly federal courts—should be in the position of passing judgment on tribal development decisions.

3. Cooperative Regulation

The third alternative approach for setting the limits of tribal environmental destruction is cooperative arrangements between Indian nations and local governments. Pollution is not bound by lines in the map—environmental issues off-reservation impact nearby Indian tribes and vice versa. Projects, whether a power plant or a waste facility, often serve Indian and non-Indian communities,[546] and for tribes the economic gains may be based primarily on off-reservation demand.[547] Overlapping concerns and impacts, such as where there is "mutual interest" in "the same natural resources," seem to call for a cooperative approach to environmental

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543 For more on the stereotyping of Indians as environmentalists, see *supra* Part III.

544 Wood, *New Trust Paradigm*, *supra* note 511, at 143; *see also* Wood, *supra* note 325, at 1562 ("[I]nternal dissension over such offers [as waste facilities] is often muted in the outside policy realm by an overall appearance of tribal willingness created by the tribal government' own sponsorship of the waste proposal."); *id.* at 1567 ("[T]he deep aversion of a significant portion of the native population to industrial development of their lands is largely overlooked in the face of tribal council approvals . . . .").

545 Wood, *supra* note 325, at 1558.

546 *See, e.g.*, Helman, *supra* note 361, at 88 (discussing the Desert Rock power plant).

547 *See id.* (explaining that the initial Desert Rock proposal came at a time of "rampant power plant construction . . . spurred by rolling blackouts across California").

regulation.[548] Scholars have taken note: Cooperative agreements have become a preferred solution for tribal-state conflicts, including environmental ones.[549]

There are practical reasons to support cooperative agreements, and scholarship or case studies on environmentally destructive activities proposed by tribes frequently end with a call for cooperation. An article on indigenous commercial fishing, after a section introducing all the problems, concludes that "[a] plausible approach for addressing these conflicts is the creation of joint agreements between indigenous peoples and state or federal governments, explicitly establishing the parameters of indigenous fishing rights."[550] Jana Walker and Kevin Gover make cooperative agreements the final suggestion for how tribes could improve the "legal infrastructure" to encourage economic development, and their description presents the many positives of such agreements:

> Cooperative agreements can be essential for environmental control because pollution does not respect political boundaries. Neither tribes nor states can effectively regulate regional environmental quality without the cooperation of the other. Joint regulatory programs avoid jurisdictional disputes by allowing the parties to agree on who will regulate a particular activity for a particular period of time. Moreover, cooperative agreements lower intergovernmental tensions that can damage the overall quality of state/tribal relations and also provide greater flexibility for both tribal and state policy-makers in the future. Finally, environmental agreements stretch limited tribal and state funds by reducing administrative and service costs. Given the limited resources of most tribes and the twenty-year head-start on environmental regulation enjoyed by states, cooperative agreements may give tribes the ability to call upon state resources and expertise in creating tribal programs.[551]

These benefits underlie a similar ending to another article: "Given the high mobility of air pollutants and the interdependence of state and tribal jurisdiction, it is imperative for Tribes and States to come together and work cooperatively for environmental protection."[552] Yet another author believes "negotiation may produce a more useful means to build relationships between Indian tribes and federal officials."[553] But will "tribes and states [working] together to achieve compromises acceptable to both sovereigns" really work for nuclear waste?[554] Or for a new coal-fired power plant in the four corners?

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548 Rebecca Tsosie, *Tribal Sovereignty and Intergovernmental Cooperation*, *in* TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 13, 30 (John E. Thorson et al. eds., 2006).

549 The "development of intergovernmental agreements" is identified as a "trend" by a *Harvard Law Review* note exploring the advantages and risks of cooperative agreements. Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 922 (1999).

550 Michael A. Burnett, *The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations*, 19 SUFFOLK TRANSNAT'L L. REV. 389, 421 (1996).

551 Walker & Gover, *supra* note 233, at 250 (calling such agreements a way to avoid litigation and political battles around nuclear waste in Indian country).

552 Kristina M. Reader, Case Note, *Empowering Tribes: The District of Columbia Circuit Upholds Tribal Authority to Regulate Air Quality Throughout the Reservation Lands in* Arizona Public Service Company v. Environmental Protection Agency, 12 VILL. ENVTL. L.J. 295, 329 (2001).

553 Johnson, *supra* note 196, at 528.

554 Collins & Hall, *supra* note 130, at 343.

Cooperative regulation in theory avoids the pitfalls of federal primacy—tribal sovereignty is not diminished when tribes *agree* to share regulatory authority with states or localities—while also directly dealing with cross-border externalities. Cross-deputization agreements have helped tribes police reservations, and these practical agreements to work around Supreme Court limitations on jurisdiction over non-Indians show the potential of cooperative agreements generally.[555] Professor Alex Tallchief Skibine has "advocated a return to a relationship based on consent," with tribal, state, and federal jurisdictional responsibilities established by negotiation.[556] But importantly, Professor Skibine's hope is that the new "treaties, compacts, covenants, or agreements which would outline the elements of the new relationship" would be negotiated between tribes and the United States—period.[557] Cooperative regulation in contrast involves negotiation with all levels of non-Indian government which, given an emphasis on practical local solutions to local problems, means there is "room—abundant room—for tribal negotiations with the states in areas where local concerns control."[558] The "increased cooperation" between tribes and all levels of non-Indian government is described as "a major positive development" by Professor Charles Wilkinson and the American Indian Resources Institute.[559] Similarly, Professor Rebecca Tsosie concludes that with a "foundation of mutual respect and appreciation for the complex issues at stake, Indian nations and states can likely make better decisions about the future than any single judge or court system."[560] After presenting the rise in cooperative agreements and in state laws authorizing negotiation with tribes, Professor Matthew Fletcher writes, "Tribal-state agreements are exercises of sovereignty."[561] But Professor Fletcher's far more interesting claim is that cooperative agreements actually are "a means of earning governmental legitimacy" for tribes, because the signing of such agreements is itself a form of recognizing tribal government legitimacy.[562] But, in my opinion, much depends on the content of the agreements; after all, as Professor Robert Laurence reminds us, "one of the ways for a tribe to *lose* sovereignty is by voluntary surrender of it."[563]

555 Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 20 (2004); Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 584–85 (1987) (using cross-deputization agreements as an example of a pragmatic solution to a local problem that does not deny Indians their sovereignty).

556 Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1156.

557 *Id.* at 1108.

558 P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 382 (1994).

559 CHARLES WILKINSON & THE AM. INDIAN RES. INST., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 48 (2d ed. 2004).

560 Tsosie, *supra* note 548, at 34. But, as Judge Canby notes, even if the importance of tribal-state negotiations increases, court decisions help establish "the legal armament that each side brings to the negotiating table." Canby, *supra* note 478, at 22.

561 Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations* 24 (Mich. State Univ. Coll. of Law Working Paper Group, Research Paper No. 05-03, 2007), *available at* http://ssrn.com/abstract=1007756 (follow "One-Click Download" hyperlink).

562 *Id.* at 26.

563 Laurence, *supra* note 192, at 19 (emphasis added) (discussing the desirability of a new treaty-making era).

Having written about the dangers of uncritical support of cooperative agreements elsewhere, I focus here on the limits of such agreements when facing a particular controversy.[564] Even if cooperative agreements worked ex ante, without endangering tribal sovereignty, cooperative agreements would not likely be a successful mechanism for setting the limits of tribal environmental destruction in the context of a controversial proposal. Ex post—once a viable project is proposed and supported by a tribe—states or localities opposed to the project are not likely to enter into cooperative agreements that would permit the project to go forward.[565] Once the Navajo Nation decided to pursue Desert Rock, a cooperative agreement was not going to resolve the dispute, nor would either the tribe or local non-Indian governments concede regulatory authority to the other side. Cooperative agreements are not the *deus ex machina* of environmental regulatory conflicts and, while they would be "a mainstay of Indian law utopia"[566] and can help set the advance terms of some proposals with cross-border impacts, it is important not to overstate the potential of cooperative agreements.

4. Tribal Determination and International Sovereignty

Unqualified tribal determination of the trade-offs between development and the environment is the fourth alternative approach for setting the limits of tribal environmental destruction. The key feature of this alternative is that tribes *truly control* their environmental protection.[567] This means more than allowing tribes some administrative authority over a range of possibilities set by federal guidelines and historically provided by federal agencies.[568] Under this approach, Indian nations set their own priorities, regulatory methods, and pollution tolerance levels independently, without reliance upon federal enabling statutes or EPA oversight.[569] The long history of federal control of reservation life, continuing in a perhaps muted form through the present self-determination period, makes such a state of

564 *See* Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57 (2006).

565 Moreover, the back and forth between tribes and non-Indian governments over tribally proposed projects may reduce the possibility of future agreements, even on unrelated issues. Professor Philip Frickey gives an example of a negotiation that succeeded because, rather than being about a single controversy, the parties approached the negotiations "with an eye towards accommodating . . . the long-term relationship as well." Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1780–81 (1997). But importantly, the negotiations were between the tribe and the federal government and did not involve state or local governments. *Id.*

566 Laurence, *supra* note 192, at 22.

567 This approach borrows from Professor Robert Porter's definition of indigenous sovereignty as "freedom of a people to choose what their future will be." Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 75 (2002).

568 While laws allowing tribes to take over traditionally federal roles and service provisions are a start, their coverage as far as governance is limited, and more "importantly, they frame the services being carried out first and foremost as federal obligations—not the tribe's." Davies, *supra* note 498, at 367.

569 This is true notwithstanding the conclusion of a 1992 EPA study that "[t]ribal programs could translate traditional cultural and spiritual values into . . . the substantive requirements of pollution permits issued under the modern federal environmental programs." GRIJALVA, *supra* note 15, at 11–12.

"full sovereignty" hard to imagine.[570] Moreover, focus on "the terms of sovereignty" alone risks undermining or diverting attention from claims important to Indian communities, but that do not fit neatly into struggles over jurisdiction.[571] Most articles on Indian issues focus on working within the existing constraints or making minor tweaks to the federally designed system, and consequently some scholars will reject this alternative as unduly utopian.[572]

Tribal determination at its fullest involves removing federal oversight of development on Indian land. In the environmental context, tribal determination would involve movement from federal to tribal primacy:

> [F]ederal policy must recognize that tribal communities are fully capable of evaluating waste project proposals and making good decisions for themselves. . . . Congress must avoid environmental paternalism and instead show its confidence in tribal decision-making. If and when a tribal community decides that it wishes to pursue such a project, Congress should not only accept, but also respect that decision.[573]

As shown in the above quote, project decisions under this alternative are in tribal hands.[574] The law should assume that Indian nations will make good decisions regarding project developments, either because advocates truly believe tribes always will or because tribal sovereignty means tribes should have the space to make decisions non-Indian governments would not support. "Tribes are fully capable of deciding for themselves when projects will or will not serve their best

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570 Sam Deloria highlights the complications associated with "sovereignty":

> [W]e should take the word sovereignty and put it on the shelf for about ten years because it is a very confusing concept to a lot of people. It makes me feel bad to go to a meeting and see some unfortunate person's soul so transfixed by the word sovereignty that they can't think their way through the simplest problems.

Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55, 55 (2002).

571 *See* THOMAS BIOLSI, DEADLIEST ENEMIES: LAW AND THE MAKING OF RACE RELATIONS ON AND OFF ROSEBUD RESERVATION 190 (2001).

572 There are a number of scholarly approaches to federal Indian law, but not surprisingly, most of the approaches identified in a textbook epilogue (placing scholars into "Foundationalist," "Critic," "Pragmatist," or "Tribal Realism" camps) rely heavily upon Supreme Court opinions as an analytical starting point. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 895–99 (2008). "Critic" Professor Robert B. Porter observes,

> Even those who write from what you might call a "pro-Indian perspective" seem resigned to accept the reality that the United States really does have plenary power over the Indian nations, that there exists a federal trust responsibility for Indigenous peoples, and that the Indian nations really are "domestic dependent nations."

Porter, *supra* note 567, at 97.

573 Walker & Gover, *supra* note 233, at 262. The Walker and Gover article at times seems to accept federal primacy. *See id.* at 244 ("By assuming primary responsibility under the federal environmental laws whenever tribal amendments so allow, tribes can establish environmental quality standards suited to local and individual situations, rather than accept EPA's generalized standards that may have little to do with local conditions."). At other points the authors focus on cooperative agreements as a good approach. *See id.* at 250. However, overall the article supports unfettered tribal control. *See id.* at 244

574 *See, e.g.*, Collins & Hall, *supra* note 130, at 317 ("The question for Indian nations is first, who decides? Only after that query is answered in favor of Indian sovereignty can we turn our attention to the second question, what shall be done?").

interests," and therefore, according to this perspective, environmental paternalism, even if motivated by concern for environmental justice, is not appropriate.[575] Such insistence on the ability of tribes to decide for themselves also reflects frustration at non-Indian assumptions of tribal incompetence.[576]

For many readers, the full tribal control approach will evoke arguments that Indian tribes should be considered sovereign nation-states under international law. The approach this Article concludes with, developed in Part V, borrows from international human rights law but should not be confused with full tribal control as nation-states. Aspects of the U.S.-tribal relationship, such as the history of treaty making, reflect recognition of tribes as international actors. But in *Johnson v. M'Intosh*,[577] Chief Justice Marshall accepted the doctrine of discovery, under which the Christian nation that discovered new land not only gained title to that land, but also Indian "rights to complete sovereignty, as independent nations, were necessarily diminished."[578] Chief Justice Marshall later characterized Indian tribes as "domestic dependent nations,"[579] a description that stuck.[580] Though the Supreme Court continues to be comfortable with it, pro-Indian advocates have not quietly accepted diminished tribal sovereignty. For some scholars, discontent is expressed in largely doctrinal terms, often critiquing the Supreme Court's narrowing of tribal jurisdiction over non-Indians or the Court's inconsistency.[581] For others, the way forward cannot be found in U.S. precedent but instead in international law.[582]

An extensive body of scholarship rejecting the "domestic dependent" qualifier asserts that Indian nations should be understood and treated as international

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575 Walker et al., *supra* note 205, at 390; *see also* Walker & Gover, *supra* note 233, at 231 (arguing that the fact that tribes reject most waste industry proposals is itself proof "that tribal governments are fully capable of evaluating waste proposals"). Such insistence in the ability of tribes to decide for themselves also might reflect frustration at non-Indian "ethnocentric if not racist" assumptions of tribal incompetence. GRIJALVA, *supra* note 15, at 155.

576 GRIJALVA, *supra* note 15, at 155–56. Fear among environmentalists that tribal oversight would mean lesser environmental protection than under federal oversight mirrors assumptions made by policymakers that federal management of tribal resources is better than tribal control; yet, given the record of U.S. management, tribes probably "would do no worse" than the United States has historically. Peter C. Maxfield, *Tribal Control of Indian Mineral Development*, 62 OR. L. REV. 49, 71–72 (1983). The Navajo uranium experience and even EPA's seemingly political flip-flop on Desert Rock's PSD permit attest to shortcomings in federal oversight. Although writing about jurisdiction over nonmembers, Professor Robert Clinton's admonition that decolonization of Indian law involves getting rid of the "underlying . . . distrust of tribal governance" applies with regard to environmental regulation as well. Clinton, *supra* note 101, at 152.

577 21 U.S. (8 Wheat.) 543 (1823).

578 *Id.* at 574. The doctrine of discovery "did *not* come from any principle of constitutional law . . . but rather from a doctrine of international law." POMMERSHEIM, BROKEN LANDSCAPE, supra note 481, at 261.

579 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

580 *See*, *e.g.*, Krakoff, *supra* note 124, at 1110.

581 When he was Chief Justice of the Navajo Nation Supreme Court, Robert Yazzie observed that "[t]here are a lot of agonizing law review articles coming out these days about what a mess Indian law happens to be," and continued by suggesting that state and federal judges do not read the articles. Robert Yazzie, *"Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 AM. INDIAN L. REV. 497, 501 (1999).

582 *See, e.g.*, Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 300–01 (1993).

sovereigns. Though a 1961 article declared that "[t]he possibility of the international status of the Indian nations is of little more than academic interest" at the time of the article, many of the debates in the Indian law field revolve around related questions.[583] For example, should plenary power be rejected because of its racist origins and incompatibility with true sovereignty?[584] How should Indian rights as U.S. citizens be impacted by their simultaneous status as tribal members? And should the U.S. government have the power to limit tribal choices regarding on-reservation development or land use? Numerous scholars have answered these questions by drawing upon the international law of states, either analogizing between tribes and nation-states or insisting that Indian nations are equivalent to all other nations and should be treated as such.[585] While one could imagine recognizing tribal determination over project approval without recognizing other aspects of nation-state sovereignty, defining the powers of Indian nations according to international sovereignty standards would involve an expansion of the scope of independent tribal determination.[586]

583 Frank B. Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74, 84 (1961).

584 For a lively scholarly exchange on this question, see Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 ARIZ. L. REV. 413 (1988); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's* Learning to Live with the Plenary Power of Congress over the Indian Nations, 30 ARIZ. L. REV. 439 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; *see also* Clinton, *supra* note 101, at 121 ("Any effort to decolonize federal Indian law, therefore, must begin with a rejection of the plenary power doctrine . . . .").

585 *E.g.*, Barsh, *supra* note 237, at 86 (arguing for the reemergence of indigenous peoples "as subjects of international law"); McSloy, *supra* note 582, at 280 (arguing that the United States should "treat Native nations as nations"); Skibine, *supra* note 556, at 1109 ("International law should be applied to the relationship between the United States and the Indian tribes."). The Executive Director of the Indian Law Resource Center, Robert "Tim" Coulter, explains the basis for thinking of Indians as nation-states: "Many Indian nations clearly have the required elements of nationhood. It has been noted that several Indian nations have more territory, larger populations and probably better governments than some of the nations now sitting in the United Nations." Robert T. Coulter, *Contemporary Indian Sovereignty*, *in* RETHINKING INDIAN LAW 109, 117 (Comm. on Native Am. Struggles, Nat'l Lawyers Guild ed., 1982). Coulter continues, "Thus, viewing Indian sovereignty in terms of international law, contemporary writers have concluded, as John Marshall did in *Cherokee Nation v. Georgia* that at least some Indian nations are, or indeed have the right to be, nation-states within the meaning of international law." *Id.* at 119.

586 The "international" approach is controversial and is not universally accepted by Indian law scholars. Some believe it to be of little practical utility given the improbability that the U.S. government will abandon plenary power and afford tribes nation-state status. In a candid essay on Indian law, Professor Robert Laurence, for example, states, "I see little short-term help—that is to say within the next couple of generations or so—from international law." Laurence, *supra* note 192, at 4. These scholars view such work as unhelpful and fear that such internationally focused scholarship is dangerously utopian, in a way that might inspire a judicial or popular backlash against Indian sovereignty. *See, e.g.*, Suagee, *supra* note 210, at 5 ("[A] gung-ho believer in tribal sovereignty can be just as dangerous as someone who just doesn't understand the concept to begin with."). *But see* S. James Anaya, Keynote Address: Indigenous Peoples and Their Mark on the International Legal System (Mar. 16, 2006), *in* 31 AM. INDIAN L. REV. 257, 257 (2007) ("[W]e are in a time when international law speaks concretely to the issues of Native Americans in this country . . . and it does so not just from the standpoint of theory or proposal by a scholar writing some time ago. It not only speaks to these issues, but it also establishes certain standards of obligation for our government . . . .").

V. ENVIRONMENTALISTS AND TRIBES

The center should not hold. The current federal permitting process requires that Indian nations fend off indirect attacks on their sovereignty by environmental organizations.[587] It also seems to put environmental organizations in the position of having to either give up on their larger environmental goals or participate in the colonialism of federal environmental primacy. The alternative approaches explored so far—federal primacy, Indian trust doctrine, cooperative regulation, and tribal determination as international sovereigns—all contain valuable attributes, but all fall short in some way or another. Federal primacy provides a way of dealing with the externalities of environmentally destructive reservation projects, but only by denying tribes the right to set their own path. Indian trust doctrine does much the same, but instead of decisions being determined by federal agency guidelines, they are made by federal courts. Cooperative regulation recognizes the importance of cross-border relationships and impacts, but has few solutions for situations of necessary conflict. Full tribal determination and international sovereignty allows tribes the greatest freedom to decide for themselves how to balance economic development and the environment, but besides being perhaps overly utopian, it fails to take into account potential local and global externalities of tribal projects. Given the shortcomings of the federal primacy, Indian trust doctrine, cooperative solutions, and nation-state solutions, let me suggest a more radical alternative: international human rights law. Established and emerging international human rights law related to sovereignty, development, and the environment, I believe, contains the promise of resolving the impasse between tribes and environmentalists while avoiding the pitfalls of colonialism inherent in federal primacy.

There are two important limitations to the argument that follows. First, the concern of this Part is the relationship between environmental organizations and Indian nations, not the relationship between the U.S. government and tribes. Why the distinction? The U.S. government's Indian policy is well-established and unlikely to change dramatically for the better.[588] One can believe that the "severe

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[587] *See, e.g.*, *supra* text accompanying notes 455–58 (discussing environmentalists' opposition to Desert Rock as an attack on the Navajo Nation's sovereignty).

[588] Some tribes are arguably enjoying an "Indian renaissance." *See* Joseph Bruchac, *Indian Renaissance*, NAT'L GEOGRAPHIC, Sept. 2004, at 76, 90 ("[The] situation is changing as Indians across the U.S. exert new influence over their lives and their communities."). And policy changes, such as those exemplified in President Richard Nixon's 1970 Special Message to Congress, have played a role in tribal improvements. President's Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 565 (July 8, 1970). These changes came as a result of struggle: BIA, for example, went from making "virtually all decisions for individual tribes," to allowing for greater tribal autonomy as a response "to pressure from younger and more aggressive tribal leaders." Cohen & Mause, *supra* note 78, at 1824. Robert Coulter's description of the importance of struggle also explains the need for such struggle: "The present status of Indian nations is the result of the constant erosion of Indian governmental rights by the courts and by Congress and the steady, persistent efforts of Indian nations to strengthen and maintain their existence and governments." Robert T. Coulter, *Present and Future Status of American Indian Nations and Tribes*, *in* INDIAN SELF-GOVERNANCE: PERSPECTIVES ON THE POLITICAL STATUS OF INDIAN NATIONS IN THE UNITED STATES OF AMERICA 37, 42–43 (Carol J. Minugh et al. eds., 1989). For an enjoyable and eye-opening account of the struggles behind increased tribal independence and the people involved, see generally CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005). But while the "Indian renaissance" is promising, it is not

limitations" the United States places on Indian sovereignty "does not change the fact that natives are still entitled to their full sovereign rights,"[589] without necessarily writing about the need for revolutionary change in federal Indian law.[590] Second, this Part's argument does not explore all the dangers of environmental organizations adopting a human rights approach to tribal authority. Though I believe a human rights approach is promising, this Article should not be the final word on the subject. Hopefully, further scholarship in the area will explore the implications of a relationship between tribes and civic society based on human rights precepts rather than federal supremacy and shed light on possible adverse unintended consequences of the proposal.

This Part's focus is on how environmental organizations respond to Indian nations that reach different conclusions regarding the trade-offs between economic development and the environment. The Part leaves the work of asserting that the U.S. government should take greater account of international human rights regarding indigenous peoples to others and focuses how environmentalists relate to Indian tribes regardless of federal primacy.[591] Progressives who work on environmental matters often instinctively support tribal sovereignty, yet when it matters—when a tribe is proposing an environmentally harmful project—they end up using U.S. government processes to try to block tribes. My argument is that environmental organizations should base their relationships with Indian nations on norms and laws of international human rights regarding indigenous peoples. Doing so might lead environmental organizations not to oppose some projects and, when they do object, to channel their concerns through tribal and perhaps international institutions rather than U.S. processes.

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shared by all tribes, nor, I believe, is it likely to be accompanied by dramatically better federal Indian policies.

589 John Howard Clinebell & Jim Thomson, *Sovereignty and Self Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 714 (1978).

590 For example, Professor James Grijalva's conclusion to his comprehensive study of environmental justice in Indian country, which primarily looked at EPA policy and federal Indian law, explains his book's focus by noting, "We might hope the time comes when the preservation of American indigenous culture needs no federal agency, court or legislative body. Until that day, tribal primacy for federal environmental programs may well be the most effective means for addressing environmental injustice in Indian country." GRIJALVA, *supra* note 15, at 200.

591 The development and significance of international indigenous rights is best understood through the work of Professor S. James Anaya. *E.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004) (the leading book in the field); S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004) (discussing a number of important rights indigenous communities have under international law).

Many other scholars have at different points in their writing also highlighted the significance of international indigenous rights in how the rights of Indians are understood. *See, e.g.*, G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. REV. 811 (2006) (discussing tribal reacquisition of land under the United Nations Draft Declaration on the Rights of Indigenous Peoples); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) (calling for indigenous rights to environmental self-determination based on human rights norms); POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 481, at 259–93.

A. Role of Environmental Organizations

The Hopi Tribal Council voted 12-0 on September 28, 2009, to ban environmental groups such as the Sierra Club and the Natural Resources Defense Council from the Hopi Reservation.[592] Two days later, Navajo President Joe Shirley, Jr. issued a press release saying he stood with the Hopi Tribal Council and described environmental organizations as being "among the greatest threat[s] to tribal sovereignty, tribal self-determination, and our quest for independence."[593] Tribal Counsel for the Hopi Tribe, Scott Canty, accused environmental organizations of wanting to work with tribes "only on terms set by environmental organizations," adding that they "blindly pursue their agenda without any real regard to the sovereignty or legitimate economic interests of the Hopi tribe."[594] Similarly, President Shirley argued that "[e]nvironmentalists are good at identifying problems but poor at identifying feasible solutions," continuing, "Most often they don't try to work with us but against us . . . . They support tribes only when tribes are aligned with their agenda."[595] Coverage of the ban on environmentalists countered the Hopi Tribal Council and Navajo President's position by pointing out that some of the active environmental opposition groups were on-reservation, grassroots organizations.[596] The ban, and the reaction against the ban, reflects the heated nature of the current tribal-environmental debates and the tensions created by the existing structure of reservation environmental regulation.

The insight that seems to be escaping environmental organizations, I argue, is that by using the federal environmental regulatory scheme against tribal projects they are complicit in the subversion of Indian sovereignty. Although non-Indian groups and environmentalists can delay projects on tribal lands by "challenging the adequacy of the EIS in federal court," should they?[597] Even though the federal government and federal Indian law are unlikely to radically change,[598] this does not

592 *Hopi Tribal Council Bans Environmental Groups*, NAVAJO-HOPI OBSERVER, Sept. 29, 2009, http://www.navajohopiobserver.com/main.asp?SectionID=1&subsectionID=1&articleID=11876 (last visited Apr. 18, 2010).

593 Press Release, Office of the President & Vice President, Navajo Nation, *supra* note 456, at 1 (quoting Navajo President Shirley).

594 Carol Berry, *The Green Divide Meets Tribal Politics*, INDIAN COUNTRY TODAY, Oct. 2, 2009, http://www.indiancountrytoday.com/national/63296187.html (last visited Apr. 18, 2010) (quoting Scott Canty, Hopi Tribal Counsel).

595 Press Release, Office of the President & Vice President, Navajo Nation, *supra* note 456, at 2 (quoting Navajo Nation President Shirley).

596 *See, e.g.*, Felicia Fonseca, *Hopi, Navajos Say Environmentalists Not Welcome*, REZNET, Sept. 30, 2009, http://www.reznetnews.org/article/hopi-navajos-say-environmentalists-not-welcome-39650 (last visited Apr. 18, 2010); Mary Annette Pember, *Leaders Disguise a Deep Tribal Dispute*, DAILY YONDER, Oct. 12, 2009, http://www.dailyyonder.com/leaders-disguise-deep-tribal-dispute/2009/10/12/2390 (last visited Apr 18, 2010); Jonathan Thompson, Op-Ed., *Whose Sovereignty Is It?*, HIGH COUNTRY NEWS (Paonia, Colo.), Oct. 27, 2009, http://www.hcn.org/wotr/whose-sovereignty-is-it (last visited Apr. 18, 2010).

597 Royster, *supra* note 377, at 340.

598 Reflecting the field of Indian law's stability, Professor Philip Frickey, perhaps the leading doctrinal scholar of federal Indian law, argues that "the field is structurally immunized against substandard doctrinal reevaluation." Frickey, *supra* note 565, at 1778.

mean environmental organizations that know, or should know, better[599] should not change the nature of their relationship with Indian nations. In the context of Desert Rock, by attempting to stall the project through the EPA permitting process, environmentalists in practice accepted and relied upon federal primacy.[600] By doing so they accepted the colonizing myth that "the United States has the right to boss Indian nations around without their consent. After all, America belongs to the Americans,"[601] or to American environmentalists in this case. Environmental organizations need not conclude that the Navajo Nation is a nation-state under international law—that it is "a sovereign as Bolivia is a sovereign"—to realize that federal primacy does not adequately respect Indian sovereignty.[602]

Environmental organizations ironically recognize indigenous rights to self-determination in other countries to a greater extent than they seem to in the United States. The environmental community has pushed foreign countries, international institutions, and corporations to respect the rights of international indigenous communities.[603] Basing their indigenous environmental policies on the principles of "free, prior, and informed consent" (FPIC) when it comes to indigenous peoples globally, environmental groups recognize indigenous rights to make decisions about development that will affect them and to benefit from development projects that go forward.[604] However, when it comes to Native Americans, environmental organizations take a different tact. Support for Indian nations when they oppose development or seek environmental redress turns into reliance upon federal primacy to block tribes when there is not issue alignment.

This Part explores what it would mean for environmental organizations to treat Indian tribes the way they treat indigenous groups globally. I make two principle arguments in this Part. First, I argue against an international sovereignty approach to indigenous peoples and in favor of international human rights as the basis for the relationship between tribes and environmental organizations. I argue that environmental organizations should replace domestic reliance upon federal primacy over the reservation environment with a modified version of the internationally-used principles of free, prior, and informed consent when it comes to development in Indian country.[605] Second, I discuss the heightened governance

599 Professor Grijalva notes that "environmentalists like most Americans know little of the nuances of federal Indian law and the doctrine of retained tribal sovereignty." GRIJALVA, *supra* note 15, at 198. And Dean Suagee notes, "The Supreme Court doesn't understand Federal Indian law, so why should we expect non-Indian environmental lawyers to do that?" Suagee, *supra* note 210, at 5. But I believe such understanding should be expected of environmentalists working on reservation issues.

600 *See supra* notes 455–58 and accompanying text.

601 Rice, *supra* note 591, at 814.

602 Laurence, *supra* note 192, at 7 (differentiating Santa Clara Pueblo's sovereignty from Bolivia's).

603 *See* S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 BUFF. ENVTL. L.J. 1, 2 (2000) (discussing the important role that international indigenous human rights issues have in the modern environmental movement).

604 *See, e.g.*, Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y (SPECIAL ISSUE) 43, 43, 52 box 1 (2004) (discussing the acceptance of indigenous peoples' rights to FPIC in the international community and listing international environmental organizations that have accepted indigenous peoples' rights to FPIC).

605 The author thanks Professor David Hunter for highlighting FPIC's importance for understanding how environmental organizations relate to indigenous peoples internationally.

responsibilities that tribes might have under a human rights framework. To the degree to which tribes have embraced, or decide to embrace, international human rights when convenient, I argue they must also accept the limitations on sovereignty that comes with such an embrace of the human rights framework. The pressing problems of reservation poverty and global climate change may present a competing goods problem today, but human thriving for Indian nations and all peoples in the long run will require healthy economies and a healthy planet. That environmental organizations should unilaterally lay down the power over reservation development that they have by virtue of federal primacy's colonializing aspects is an important conclusion of this Part, but the focus on how environmental organizations relate to Indian tribes should not be taken to mean that how Indian tribes relate to the environment is of lesser importance.

1. A "Rights" Approach to Indigenous Sovereignty

The environmental problems associated with treating Indian tribes as nation-states under international law caution against internationalizing Indian sovereignty. True, recognizing Indian nations as international equivalents to nation-states would be a rejection of plenary power and federal primacy, but it would also involve wholesale acceptance of the international legal order regarding states and their environmental choices. Indian nation-states would have tremendous freedom to engage in environmentally destructive development. Although institutions such as the United Nations (U.N.) have provided some avenues for the participation of non-governmental organizations in global governance,[606] the continuing structural weakness of international environmental law prevents environmental organizations from being able to block Indian nation-state supported projects as effectively as they can through the current EPA process.[607] Consequently, were Indian tribes to become nation-states under international law, environmental groups would have far fewer outlets to provide meaningful objections. They could lobby the United States to pressure tribes, but the U.S. government would not have the hammer of plenary power or EPA permitting. The only available option might be a local one, supporting tribal members or Indian organizations (such as Doodá Desert Rock) in their efforts against on-reservation projects.

Arguably this is as it should be: The "imperial pretence" that indigenous peoples have less right to sovereignty than European powers would be put aside and Indian nations would be subject to the same limitations as other nation-states.[608] Indians are not to blame if the international community has not succeeded

606 Indigenous people and indigenous non-governmental organizations have gained some right to participate, but as Professor Jeff Corntassel cautions, "an *illusion of inclusion*" does not mean "indigenous voices are truly being heard." Jeff Corntassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, 33 ALTERNATIVES 105, 111 (2008).

607 *See, e.g.*, James Gustave Speth, *International Environmental Law: Can It Deal with the Big Issues?*, 28 VT. L. REV. 779, 793 (2004) (arguing that international environmental law, as it stands today, is unable to effectively address global environmental issues).

608 Alfred, *supra* note 268, at 44 (arguing that Indigenous leaders have the responsibility "to expose" this pretence).

in setting up an adequate scheme for limiting the potential nation-states.[609] In the case of coal, the same government that pulled the Navajo Nation's PSD permit has been unwilling to commit itself to reducing greenhouse gases and has severely dampened the impact of various multinational environmental efforts.[610] Environmentalists may object that these failures are the result of U.S. government policy and not something they should be charged with, but the stalled international order does reflect the environmental movement's inability to garner the necessary political capital, especially in the United States. Just because international environmental law (IEL) would not be able to prevent harmful projects from going forward if tribes are recognized as nation-states does not itself justify denying international status to Indian nations.[611]

Indigenous peoples have struggled to be incorporated into the international environmental legal regime. Reliance on state-centered approaches and treaties between states as the means of developing IEL "did not leave any room" for indigenous environmental concerns.[612] It was not until 1992 and the Rio Declaration on Environment and Development, coming out of the U.N.'s Rio Earth Summit, that the "vital role" of indigenous people and their right to "effective participation" in environmental management was recognized.[613] The U.N. Declaration on the Rights of Indigenous Peoples (the Declaration), adopted by the General Assembly in September 2007, though not environmentally focused, states in Article 29, "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[614] The United States and three other countries did not sign onto the Declaration, but the Declaration remains a "powerful statement" on indigenous

609 The ineffectiveness of international environmental law is closely linked to "the failure of green governance at the international level," according to Yale School of Forestry and Environmental Studies's Dean James Gustave Speth. Speth, *supra* note 607, at 793.

610 Though President George W. Bush's rejection of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, probably symbolizes U.S. resistance to global environmental limits, the son was merely continuing in his father's footsteps. President George H.W. Bush was the "most visible opponent to a legally binding treaty" connected with the 1992 Earth Summit and actively "resisted calls for action" on numerous environmental treaties, ranging from global warming to forest protection. MIGUEL A. SANTOS, LIMITS AND SCOPE OF ENVIRONMENTAL LAW 306 (1995).

611 Although written by my colleague in 1992, Professor David Hunter's observations regarding the limits of international law largely remain true today: "[T]he international legal system, reflecting as it does an archaic acceptance of the nation-state as the root of all power, may be fundamentally incapable of meeting [the] challenges" of global environmental problems. David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 WILLAMETTE L. REV. 547, 548 (1992).

612 Mahnoush H. Arsanjani, *Environmental Rights and Indigenous Wrongs*, 9 ST. THOM. L. REV. 85, 88 (1996).

613 U.N. Conference on Env't & Dev., Rio de Janeiro, June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 22, U.N. Doc. A/CONF.151/5/Rev.1 (June 14, 1992), *reprinted in* 31 I.L.M. 874, 880 (1992) [hereinafter *Rio Declaration*]; *see also* Arsanjani, *supra* note 612, at 90 (labeling Rio's incorporation of indigenous peoples "sympathetic" but "rather superficial").

614 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 29, ¶ 1, U.N. Doc. A/Res/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. The Declaration goes on to say that states shall not store or dispose of "hazardous materials" on the lands of indigenous peoples without their consent. *Id.* art. 1, ¶ 2.

rights supported by most of the world.[615] Yet, indigenous peoples remain on the periphery of international environmental law and, perhaps because their claims to international sovereignty are not taken seriously, they have made few inroads into the IEL canon.[616]

The attraction of international law also comes with a choice between sovereignty and human rights as the proper approach for indigenous advocacy. Professor S. James Anaya's explanation is worth quoting at length:

> The appeal to international law is to its presumptive capacity to exert control over or influence the exercise of power, most significantly the power welded directly by independent states. Indigenous peoples and their advocates have advanced arguments based on what international law is perceived to provide or what it should provide to condition the behavior of states in their relations with indigenous peoples. International law is looked upon as a way of compelling, or at least encouraging, states to act consistently with a catalogue of rights deemed fundamental to the survival of indigenous peoples, including rights over lands and natural resources. Among those who advocate for indigenous rights within the discourse of international law, two, usually complementary, strains of argument emerge.[617]

The argument strains that Professor Anaya identifies are a "state-centered frame" and a "human rights frame."[618] The first strain involves positing "indigenous peoples as states, or something like states, within a perceived post-Westphalian world of separate, mutually exclusive political communities."[619] In other words, the international nation-state approach discussed in Part IV.B.3 of this Article, or a nation-state-like approach of partial recognition of sovereignty.[620] The second strain of argument asserts that indigenous peoples rights are "moral imperatives" supported by "human rights principles that are already part, or becoming part, of international law."[621] Professor Anaya ends up supporting the second strain of international law approaches by indigenous advocates, arguing in

615 Carpenter et al., *supra* note 284, at 1036. As a nonbinding instrument, the Declaration does not impose legal obligations on signatories. Connie K. Chan, Response, *Lisa J. Laplante & Suzanne E. Spears,* Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector, 11 YALE HUM. RTS. & DEV. L.J. 117, 120 (2008).

616 Textbook coverage of indigenous peoples in the IEL field arguably reflects their peripheral status. *See, e.g.*, PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (3d ed. 2009) (including discussion of indigenous peoples in four out of 810 pages); INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Nico Schrijver & Friedl Weiss eds., 2004) (containing four brief mentions and one page with discussion in 698 pages).

617 S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 240 (2005).

618 *Id.* at 241.

619 *Id.*

620 For a brief history of the gains indigenous peoples have made in having their sovereignty recognized in different countries around the world and before international institutions, see U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Indigenous Peoples' Permanent Sovereignty over Natural Resources*, ¶ 17–30, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (*prepared by* Erica-Irene A. Daes) [hereinafter U.N. Comm'n on Human Rights, *Permanent Sovereignty*].

621 Anaya, *supra* note 617, at 241.

favor of the "pragmatic and ethical" realist use of human rights law in a way that incorporates developing standards.[622] What this argument offers is the possibility that the problematic independence of sovereign states need to be fully incorporated into the way environmental groups relate to Indian nations.

Instead of "historical sovereignty" stopping all discussion about the proper balance between economic development and the environment, "the human rights discourse" allows tribes and environmental organizations alike to escape from formalistic ideas of statehood.[623] Indian tribes have a realist's appreciation for the fact that the United States will play a significant role in their development. While it is arguably reasonable that the Navajo Nation, given its population and size, might have a greater claim to more attributes of international sovereignty than a small, heavily allotted tribe, being surrounded by the United States and being dependent on U.S. government funding does limit the Navajo Nation's ability to remove the U.S. role completely.[624] Small, weak nation-states reveal "the myth of sovereign equality" in the international sphere[625] and an *internationally-recognized* Navajo Nation would still be less powerful than the United States, and the relationship would reflect the power differential. This realization suggests another reason, besides improbability of it actually occurring, why internationalization of tribal sovereignty would not end the need for some tribal accommodation of U.S. interests. But should environmental organizations approach to tribally proposed projects be based upon power alone? Put differently, what legal theory besides federal primacy and plenary power should guide environmental organizations as they deal with Indian nations?

The international legal origin of federal Indian law arguably provides the basis for insisting that international human rights ought to inform domestic treatment of Indians. This is Professor Phil Frickey's argument in *Domesticating Federal Indian Law*.[626] U.S. power over Indian tribes was originally based upon international law, but that power was never constitutionalized.[627] Professor Frickey argues that the "backdrop of international law provides the only satisfactory basis for sorting out the existence of an inherent federal power over Indian affairs," and consequently, international human rights norms regarding indigenous peoples are a necessary backdrop for consideration of U.S. power over Indians.[628] Under this theory, international human rights norms regarding indigenous peoples should be considered by courts because federal Indian law links them "directly to the

622 *Id.* at 258.

623 *Id.* at 257 (focusing on Indian advocates and control over reservation resources, not the role of environmental organizations).

624 Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 494 (1999) ("[E]ven if sovereignty might be meaningful for the Navajo, it is more difficult to comprehend the relevance of sovereignty to much smaller nations, some of which number only in the hundreds.").

625 *Id.* at 492.

626 Frickey, *supra* note 313.

627 *See id.* at 31 ("[T]ribal sovereignty is not 'created by and springing from the Constitution,' but rather is an inherent sovereignty that 'existed prior to the Constitution' and is, therefore, not subject to it." (quoting Talton v. Mayes, 163 U.S. 376, 382, 384 (1896)) (footnotes omitted)).

628 *Id.* at 79. International law, to the extent that "the evolving component of it concerning the rights of indigenous peoples" is incorporated, can include international human rights norms regarding indigenous peoples. *Id.* at 37.

Constitution," not because of the independent value of human rights norms.[629] Though Professor Frickey's article centered on how courts should consider U.S. power over Indians, if courts should take into account the backdrop of international human rights under domestic law, arguably so should environmental organizations.[630]

Although Professor Frickey does not go so far as to say that international human rights norms should be applied regardless of the history of federal Indian law, others do. Tim Coulter, Executive Director of the Indian Law Resource Center, an indigenous rights organization with an international focus, supports the development of "a permanent, irreversible and universal consensus about the rights of Indian nations . . . [as] one of the best ways to assure the continued existence and self-government" of Indian peoples.[631] Professors Robert Williams and James Anaya locate an obligation to apply human rights standards to Indians not in the history of federal Indian law, but in international treaties that the United States has signed and in emerging international law regarding indigenous peoples.[632]

The quintessential form of international human rights law involves the protection of the individual from the state—the recognition of the individual's human rights even against the majority or the state. For human rights scholars, it may therefore come as a surprise that the most important human right that indigenous peoples have been recognized to enjoy is the right to collective self-determination. The self-determination norm "arise[s] within international law's modern human rights frame," and derives from established human rights principles and norms.[633] Article 3 of the U.N. Declaration on the Rights of Indigenous Peoples reads, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[634]

Indigenous peoples' collective right to self-determination does not fit neatly into international human rights law's predominant framework of protection of individuals or discrete minorities. It is worth quoting at length a U.N. summary of indigenous peoples' right to self-determination:

> [I]ndigenous peoples, as collectivities, have distinct and unique cultures and world views, and their current needs and aspirations for the future may differ from those of the mainstream population. Their equal worth and dignity can only be assured through the recognition and protection of not only their individual rights, but also their collective

629 *Id.* at 78.

630 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Professor S. James Anaya, makes a shortened version of Professor Frickey's argument: "[C]ontemporary domestic law concerning Native Americans remains frozen in the international law of 200 years ago. . . . So, it makes perfect sense to look to contemporary international norms, to come up with interpretations of domestic federal law doctrine." Anaya, *supra* note 586, at 271–72.

631 Coulter, *supra* note 588, at 48.

632 S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

633 ANAYA, *supra* note 591, at 97.

634 G.A. Res. 61/295, *supra* note 614, art. 3.

> rights as distinct groups. It is when these rights are asserted collectively that they can be realized in a meaningful way.[635]

The summary explains,

> The core international human rights instruments protect the rights of the individual and establish obligations by States to guarantee, protect and respect such rights. The rights related to indigenous peoples seek to protect, in addition to individual rights, their collective rights, because recognition of such rights is necessary to ensure the continuing existence, development and well-being of indigenous peoples as distinct collectivities. Past experience has shown that unless the collective rights of indigenous peoples are respected, there is a risk that such cultures may disappear through forced assimilation into the dominant society.[636]

That self-determination is an important aspect of indigenous peoples' human rights means that not recognizing the collective rights of Indians is a denial of their human rights, even though it would not be for other groups.[637] As the U.S. Supreme Court has acknowledged, the nature of Indian rights is *sui generis*,[638] and this holds true for how indigenous human rights are understood: Treating indigenous peoples as equivalent to individuals with regard to human rights protection is falsely reductive. Moreover, the collective nature of indigenous peoples' human rights includes not only self-determination rights but also land rights. Recognition of indigenous peoples' ownership, use, and control rights over land has been driven by a human rights perspective.[639] As a result of indigenous efforts, "[t]he international legal order has come to recognize indigenous land rights as human rights."[640] Self-determination and land rights are linked: "For many

635 U.N. Dev. Group, Inter-Agency Support Group on Indigenous Issues, *Guidelines on Indigenous Peoples' Issues*, at 4, U.N. Doc. HR/P/PT/16 (2009), *available at* http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf.

636 *Id.* at 15 (endnote omitted).

637 *See* Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675, 696 (2007) ("[I]ndividually-oriented human rights protections run into serious legitimacy issues in the context of indigenous peoples.").

638 *See* Morton v. Mancari, 417 U.S. 535, 554 (1974) (referring to the uniqueness of BIA's relationship with Indians). A note of caution is in order. Late Professor Erik Bluemel observed of the *sui generis* category of indigenous claims or rights that while it "can be a very important, analytically distinct category," the contents of the category is not yet "clearly defined." Erik B. Bluemel, *Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making*, 30 AM. INDIAN L. REV. 55, 71 (2005). Professor Bluemel therefore chose to deemphasize the *sui generis* nature of some indigenous claims in his own analysis. *Id.* Others in contrast seem to fully support the idea of *sui generis* indigenous rights. *See, e.g.*, ANAYA, *supra* note 591, at 142; Tsosie, *supra* note 591, at 1653 ("[I]ndigenous peoples are distinctive and . . . their rights cannot be coextensive with those of any other group.").

639 Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations on Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 141–44 (2007).

640 *Id.* at 144; *see also* Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527, 604 (2002) ("[H]uman rights standards, as set out in treaties, in jurisprudence interpreting those treaties, and in emerging standards, all require that countries recognize and respect indigenous ownership rights, at a minimum, over lands traditionally occupied.").

indigenous peoples, the central focus of the right to self-determination is the right to control access to natural resources."[641]

Environmental organizations' reliance on federal primacy fails to respect the collective human rights of indigenous peoples to self-determination and to control of their land. But why should environmental groups abandon the processes and laws that guide their work nationwide simply because projects are located in Indian Country? Within the Indian law scholarly community there is considerable debate about how much emphasis should be placed on international indigenous rights practice.[642] But the debate within the community is largely about the efficacy of arguments tied to indigenous peoples' rights before the branches of U.S. government, not about the contents of the rights. Were Indian advocates successful in rewriting the terms of the relationship between Indian nations and the United States in a way that rejected the colonizing aspects of the law as it currently exists, environmental organizations would have no choice but to relate to Indian nations in line with the new rules. But as stated previously,[643] I do not believe that a radical change towards a more pro-Indian relationship with the United States is likely in the foreseeable future. And because this Part invites a misreading, it bears repeating that the topic being discussed here is how environmental organizations relate to Indian nations; quite deliberately this Article is not advocating one way or another on the direction or content of a radical change in U.S.-Indian relations.[644]

Given the status of the U.S.-Indian relationship, environmental organizations must choose whether to accept the law—federal primacy—as dictated by the U.S. government or relate to Indian nations as prescribed by the (collective) human rights of indigenous peoples. Ultimately environmental organizations have to decide between accepting processes regarding reservation development that derive from the colonial relationship of federal primacy, or give up some authority in the name of indigenous peoples' human rights. So what decision has been reached? In

641 Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 490 (2007). For more on the legal basis for indigenous peoples' rights to land, natural resources, and development, see ANAYA, *supra* note 591, at 141–50.

642 Questions such as whether Indian advocates arguing before the United States should base their arguments in part on international norms, such as the U.N. Declaration on the Rights of Indigenous Peoples, are divisive. Some believe that, like international human rights, international indigenous rights offers a way to escape the ethnocentrism and limits of federal Indian law; others believe that because the United States is unlikely to respond favorably to international developments, indigenous peoples advocacy is ineffective or, worse, counterproductive. *See, e.g.*, Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 123–25 (1999) (discussing the potential of using international law norms to secure indigenous rights); Pamela Stephens, *Applying Human Rights Norms to Climate Change: The Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49, 80–81 (2010) (describing potential difficulties in using international law in a federal law setting).

643 *See supra* note 586 and accompanying text.

644 Proposing a new direction in U.S.-Indian relations is beyond the scope of this Article. Given the respect I have for scholars and the scholarship of those who would like to undo existing federal Indian law, it was a compliment to be accused by one reader of seeming "to have joined the dark (really, other) side" by urging use of international human rights. But rather than being a broad assertion of the need for the United States to incorporate international human rights into its relationship with Indian nations, the focus here is purposefully limited to how environmental organizations relate to Indian nations and, therefore, the accusation or compliment is unearned. To put it another way, the Article does not pick a side, except when it comes to environmental organizations.

practice, domestically, environmental organizations make use of federal primacy, but when it comes to projects in other parts of the world indigenous peoples' rights are embraced.[645] Domestically, non-Indian environmental organizations channel objections through federal permitting processes in the name of tribal dissenters or the environment itself.[646] In contrast with development proposals that implicate indigenous peoples' interests internationally, environmental organizations insist that states respect the free, prior, and informed consent rights of indigenous communities.

FPIC provides indigenous peoples the opportunity to have a say and play a role in development that affects their communities.[647] "[P]artially derived from the right to self-determination," FPIC is the accepted international standard for indigenous involvement in reviewing project proposals.[648] The first three elements of FPIC are summarized below:

> For consent to be "free," it must be given without coercion, duress, fraud, bribery, or any threat or external manipulation.
>
> For consent to be "prior," it must be given before any significant planning for the proposed activity has been completed, and before each decision-making stage in the proposed activity's planning and implementation at which additional relevant information is available or revised plans are proposed.
>
> For consent to be "informed," it must be given only after the affected indigenous people is provided with all relevant information related to proposed activities in appropriate languages and formats, including information regarding indigenous rights under domestic and international law, the likely and possible consequences of the proposed activities, and alternatives to the proposed activities. All information must be provided free from external manipulation and with sufficient time for review and decision-making in accordance with the laws and customs of the affected indigenous people.[649]

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645 *See, e.g.*, Wiggins, *supra* note 186, at 350–51 (detailing environmentalist support for the Yanomami in Brazil).

646 *See supra* Part IV.A.

647 Although FPIC arguably applies to all communities impacted by development proposals, support for FPIC's requirements is strongest with indigenous peoples because of their uniquely recognized rights. Lisa J. LaPlante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 93 (2008) ("The Declaration on the Rights of Indigenous Peoples . . . constitutes recognition of indigenous peoples' right to FPIC by most members of the international community."); Perrault et al., *supra* note 641, at 478 (noting indigenous people's longstanding relationship with the land). The article refers to prior informed consent (PIC), but as explained later in the article, PIC and FPIC are equivalent. *Id.* at 521–22.

648 Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 576 (2009). For more on the origins and legal basis for FPIC, see *id.* at 576–93.

649 U.N. Dep't of Econ. & Soc. Affairs, Div. for Soc. Policy & Dev., Contribution of the Indian Law Res. Ctr., Workshop on Free, Prior and Informed Consent, Jan. 17–19, 2005, *Indigenous Peoples' Right of Free Prior and Informed Consent with Respect to Indigenous Lands, Territories and Resources*, at 2, U.N. Doc. PFII/2004/WS.2/6; *see also* International Conference on Engaging Communities, Brisbane, Austl., Aug. 15, 2005, *Engaging Indigenous Peoples in Governance Processes: International Legal and Policy Frameworks for Engagement* 10–12 (breaking FPIC into a description of its elements).

FPIC's fourth element, consent, requires greater elaboration. FPIC requires more than "mere consultation."[650] The indeterminate nature of consultation contrasts with the active community participation in decision making that consent entails.[651]

Although consent can be summarized as a community's right to "approve," and implicitly disapprove,[652] proposals, the question of "how to determine or quantify consent" is important.[653] The case can be made that consent should be determined by community referenda, especially when the affected community is a nonindigenous one.[654] The problem with a referenda process when it comes to Indian nations is that the imposition of such a process assumes the absence of an existing governance structure. Although a referenda process *may* be appropriate for some indigenous peoples, with perhaps a few exceptions "[t]he consent process should allow communities, indigenous peoples in particular, to participate through their freely chosen representatives and customary or other institutions."[655] The exceptions might include situations where there is a known break between formally chosen representatives and customary institutions, such as with the Hopi tribe.[656] Otherwise, consent should be determined in a "way agreed upon by the community," with respect given to "the representative(s) chosen by the community as the only legitimate provider(s) of consent."[657] Answering the question of "whether consent is sought from a legitimate authority" is something for the particular tribe to decide, and not the work of outsiders.[658] Though FPIC participation can be associated with "inter- and intra- community issues," consent does not hinge on universal agreement.[659] This means that the presence of internal disagreement within a particular community regarding the decision of tribal representatives or leaders to approve or disapprove a project does not invalidate the decision.[660]

For all its strengths—FPIC certainly represents an improvement on the earlier international norm of not taking indigenous peoples into account—FPIC's imagined community is largely passive. The assumption behind FPIC seems to be

650 McGee, *supra* note 648, at 578.

651 Laplante & Spears, *supra* note 647, at 87. The contrast should not be overstated: Weak versions of what consent requires—"consent may be given through good-faith consultation and participation"—share in consultation's indeterminacy. Donald M. Goldberg & Tracy Badua, *Do People Have Standing? Indigenous Peoples, Global Warming, and Human Rights*, 11 BARRY L. REV. 59, 70 (2008).

652 McGee, *supra* note 648, at 571 (explaining the Environmental Law Institute's definition of FPIC); *see also* Perrault et al., *supra* note 641, at 477 ("[C]ommunities have the right to give or withhold consent at decision-making points during the project cycle.").

653 McGee, *supra* note 648, at 635.

654 *Id.* at 603–26 (providing examples of the history of select referenda on specific projects internationally); *see also* Bluemel, *supra* note 638, at 93–95 (discussing the significance of the undemocratic, unrepresentative aspect of some indigenous groups' leadership). *But see* Perrault et al., *supra* note 641, at 512 (noting that design and process problems can make referenda "vulnerable to manipulation").

655 Laplante & Spears, *supra* note 647, at 96.

656 *See supra* Part II.C.

657 Perrault et al., *supra* note 641, at 522.

658 Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, 19 (2004).

659 Perrault et al., *supra* note 641, at 524.

660 *See id.* at 522 ("Consent does not necessarily mean that every member of affected people(s)/communities must agree . . . .").

that project initiation is something indigenous peoples and communities do not do or are not capable of doing. FPIC accords them the right to participate and even to approve or disapprove projects, with the elements of FPIC designed to protect communities from the harmful effects of such projects and perhaps enable them to benefit in some way. But FPIC does not squarely address what rights indigenous peoples have regarding environmentally destructive forms of development that they propose. Sometimes this may be partly a matter of semantics: Is Desert Rock being proposed by the Navajo Nation with the agreement of their partner, Sithe Global, or is it the reverse? The assumption that indigenous communities are recipients rather than doers, environmental victims rather than environmental harm-causers, arguably goes against the applicability of FPIC when indigenous communities, including Indian nations, are project proponents rather than the impacted community. On the other hand, there would seem to be no proposal that better meets the requirements of FPIC than community or Indian nation proposed projects. In such situations the decision is being made freely, prior to project commencement, with full information, and with the "consent" or approval of the tribe or the chosen representatives of the tribe.

FPIC, although an imperfect mechanism from the standpoint of both indigenous peoples and environmentalists, is the emerging international norm for protecting indigenous peoples' human rights to self-determination and land when it comes to development proposals.[661] The idea that, when it comes to natural resource extraction or other forms of environmentally destructive development, indigenous peoples "may legitimately choose to exercise self-determination and other human rights in ways that are not commensurate with the optimal environmental outcome as perceived by outsiders," is only partly captured by FPIC.[662] The U.N. Commission on Human Rights final report on *Indigenous Peoples' Permanent Sovereignty over Natural Resources* supports a particularly proindigenous peoples' stance regarding the contents of their land rights.[663] Special Rapporteur Erica-Irene A. Daes writes, "*Few if any limitations on indigenous resource rights are appropriate*, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people."[664] The U.N. report probably overstates the rights indigenous peoples ought

661 Fergus MacKay, Coordinator of the Legal and Human Rights Programme at Forest Peoples Programme, observes, "Indigenous peoples' right to [FPIC] is gaining increasing currency in international law, particularly in the jurisprudence of international human rights bodies." MacKay, *supra* note 604, at 43. MacKay goes on to describe the World Bank Group as a "notable exception" to the increasing international acceptance of FPIC. *Id.* But while the Bank favors "consultation," not "consent," even this is somewhat tempered by the Bank's legal department interpretation of "meaningful consultation" as necessarily including the right for consulted communities to say "no" in a way that approaches consent. Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4 SUSTAINABLE DEV. L. & POL'Y 66, 66 (2004).

662 Anaya, *supra* note 603, at 13; *see also* Pommersheim, Broken Landscape, *supra* note 481, at 279 (describing indigenous consultation rights as a "shadow or penumbral" right relative to the right of self-determination).

663 U.N. Comm'n on Human Rights, *Permanent Sovereignty*, *supra* note 620, ¶ 47.

664 *Id.* ¶ 48 (emphasis added). Daes goes on to link indigenous peoples' natural resource rights with rights to self-determination, culture, "and the enjoyment of other human rights" that cannot be realized in situations of extreme poverty. *Id.* ¶ 58.

to have. Put differently, to the question of whether indigenous people have an absolute right "to allow—as well as prohibit—access to natural resources," the answer is no, and should be no.[665] But the report's strong position comes out of the context of states routinely failing to respect basic rights of indigenous peoples' to self-determination and land.[666] FPIC is similarly a product of the existing limited role indigenous communities play in development decisions.[667]

The human rights of indigenous peoples, especially rights to self-determination, have attained the level of acceptance and definition that should guide how environmental organizations relate to Indian nations. One only has to think of the right to health or housing to see that human rights concepts can be nebulous and can reflect (utopian) ideals rather than standards to which actors will be held accountable. The tireless work of indigenous peoples and their advocates, however, has succeeded in bringing not only attention to but also concrete ideas regarding implementation of the rights of indigenous peoples.[668] FPIC is not perfect, but it reflects the growing awareness that indigenous communities have a right to more than token participation; generally speaking they have a right to approve or disapprove projects. Human rights law ultimately holds greater promise for guiding how environmental organizations relate to Indian tribes than does federal primacy.

2. Tribal Acceptance and Responsibility

The wisdom and success of the various Indian policies of the United States can somewhat accurately be summarized by looking only at the amount of say Indian nations had in their implementation.[669] When Indians have more say, the results have been better; when policies are imposed, results have been poor.[670] Tribal acceptance of the human rights framework is a necessary prerequisite before tribes should have to relate to outsiders according to the norms of international indigenous rights versus tribal sovereignty in its current form. This raises two sets of questions regarding the relationship between Indians and environmentalists. First, should Indian nations accept the applicability of international human rights law, since at times it will constrain the powers Indian nations would have as

665 Perrault et al., *supra* note 641, at 490.

666 U.N. Comm'n on Human Rights, *Permanent Sovereignty*, *supra* note 620, ¶¶ 48, 58.

667 Perrault et al., *supra* note 641, at 493–94.

668 *See* G.A. Res. 61/295, *supra* note 614, arts. 3, 8, 10, 11; Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 543–45 (2009) (describing the efforts by indigenous peoples and their advocates leading to the Declaration).

669 A brief history for those not in the Indian law field: The treaty-making period was characterized by Indian participation (albeit under strain and with some duplicity by the other negotiating party), and even centuries later rights originating out of the period are recognized. Allotment, with insignificant Indian participation and implementation imposed, had disastrous results; so too with termination. The Indian Reorganization Act—as well as the later Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h (2006)—provided tribes a choice (singular) but not the opportunity to define their own choice set, and results were mixed. The self-determination period has in contrast recognized the right of Indian nations to a far greater spectrum of choice across more areas of governance, and the policy has had better results.

670 *See* Coulter, *supra* note 668, at 543–45.

nation-states? How would acceptance be manifest and what would acceptance mean for tribal governance? Second, whether tribes accept or reject the human rights framework, in light of indigenous peoples' human rights, should the opposition of environmental organizations to tribal projects still be channeled through U.S. regulatory processes? Even though a change to the overarching relationship between tribes and the U.S. government is deliberately being taken off the table here so that the focus can be on the Indian-nation–environmentalist-organization relationship, a move by tribes or environmental organizations towards a human rights approach could help delegitimize the existing federal framework.[671]

Caution is in order for tribal leaders contemplating acceptance of a human rights approach in their relations with environmental organizations. Given that recognizing indigenous peoples' human rights entails recognizing self-determination rights, why should tribes hesitate to embrace human rights law and norms? In some circumstances tribes may be more limited under international human rights law than they are currently under federal Indian law. This can be seen in *Santa Clara Pueblo v. Martinez*,[672] in which the U.S. Supreme Court allowed a form of tribal gender discrimination despite the Indian Civil Rights Act.[673] The plaintiff in the case was a tribal member challenging the tribe's membership rules on behalf of her child.[674] According to the membership rules, when the father was a tribal member and the mother a non-Indian, the child was considered a tribal member; but, when the mother was a tribal member and the father a non-Indian, the child was not considered a tribal member.[675] Had the Inter-American Court of Human Rights been able to hear the case, would that court have been as deferential as the U.S. Supreme Court to Santa Clara Pueblo's tribal membership rules? Should the U.N. Special Rapporteur on Indigenous Peoples, a post currently held by Professor Anaya and part of the United Nations' human rights regime, ignore gender discrimination in the name of self-determination?

Acceptance of human rights norms arguably would undo important aspects of sovereignty relied upon by tribal governments. Although as discussed previously, the collective nature of indigenous peoples' human rights differs from human rights law's typical dynamic of individual versus the state,[676] there is a limit on how far this contrast should be extended. Suppose a resident of tribally owned housing was evicted to make way for a relative of a tribal council member. Legal aid attorneys representing such a resident today confront the wall of tribal sovereign immunity,

671 Although "skeptics argue that international human rights law is virtually irrelevant in the United States," Professor Tsosie's response echoes the argument of this Part: "It is worth contemplating the possibility of constructing a more just system of domestic law by investigating principles that are emerging through international consensus." Tsosie, *supra* note 591, at 1652.

672 436 U.S. 49 (1978).

673 *See id.* at 51–52 (holding that the Act cannot be read to allow gender discrimination actions against a tribe or its officers).

674 *Id.* at 51.

675 *Id.* For an excellent summary of the case with citations to the extensive scholarly debate related to the case, see Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 810–23 (2007); *see also* Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1 (2009) (focusing on tribe violations of tribal members' international human rights, focusing on the controversial disenrollment of Cherokee Freedmen).

676 *See supra* Part V.A.1.

unless it has been waived with regard to tribal housing programs.[677] But under a human rights framework, a tribe would not be able to so easily dismiss the resident's complaint. The same could be said of tribes that fail to protect due process rights of tribal members or that discriminate, along racial or other lines, against particular member classes. If a tribe accepted the applicability of the human rights approach with regards to the environment, would such acceptance spill over to other aspects of reservation life? Put another way, should acceptance follow the maxim in for a penny, in for a pound? Before tribes accept a human rights framework for their relationship with environmental organizations, the scope and impact of such acceptance must be carefully delineated.

Even if acceptance of a human rights approach could be limited to environmental issues, tribes may lose some of their sovereignty. FPIC, for example, might narrow the sovereignty of the Navajo Nation when it comes to the Navajo government's support of Desert Rock. If the indigenous community being impacted is redefined not as the tribe as a whole, but as the tribal members located closest to the proposed site, then arguably the community's rights were violated.[678] Although copies of the draft environmental impact statement were available at local chapter houses, the draft's complicated format and failure to discuss crucial aspects of the project—especially CO_2 emissions—arguably denied tribal members their right to be informed.[679] Additionally, the unwillingness of both parties to make public the contract between Sithe Global and the Navajo Nation is a clear violation of FPIC.[680] Perhaps more troubling from a protribal sovereignty perspective, if the conception of the community impacted were broadened to include those communities where visibility might be impacted by haze from the plant, then arguably the community would not be limited to the tribe. If participation of all impacted by development, not just the immediate, politically-defined community, became an expectation of international human rights, Indian tribes may be required to permit non-Indians, on and near the reservation, a formal role in tribal decision making and the consent process.[681]

Despite the negative impact that acceptance of international human rights could have on tribal sovereignty, many tribes have in one way or another embraced

677 *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 478–83 (1998) (discussing tribal sovereign immunity).

678 Notably, four of the five chapters near the proposed site passed symbolic resolutions opposing Desert Rock. Tony Barboza, *Pollution for Jobs: A Fair Trade?*, HIGH COUNTRY NEWS (Paonia, Colo.), Sept. 5, 2005, at 4, 4.

679 *See* Perrault et al., *supra* note 641, at 522 (explaining that the information must be both "accessible and understandable").

680 *See id.* ("[P]otentially affected people(s)/communities must be fully informed of their own rights and understand the legal processes guiding implementation of the project.").

681 Reflecting the, at times, one-sided nature of pro-Indian advocacy, Jana L. Walker and Kevin Gover complained that the Campo Band "confronted the bitter reality that Indian people suffer in political fora which often are unresponsive to Indian interests," but did not seem aware of the irony, considering that non-Indians cannot participate in the election of tribal leaders, of highlighting the Campo Band's "extraordinary meansures to address the concerns of the local non-indian population." Walker & Gover, *supra* note 233, at 259. By noting the irony I am in no way suggesting that non-Indians should have the right to vote in tribal elections, but this is another example of how established tribal rights *may* conflict with a human rights approach.

human rights based efforts. Representatives of Indian tribes and tribal advocates participated in the lengthy effort to finalize the Declaration on the Rights of Indigenous Peoples.[682] At various points they worked to have international human rights bodies censure the United States for violations of the rights of Indian tribes and tribal members.[683] Indigenous peoples have also testified before such bodies on their unique connection to the land.[684] The Navajo Nation is no different. For example, in August 2009, Duane H. Yazzie, Chair of the recently formed Navajo Nation Human Rights Commission (NNHRC), traveled to Geneva to address the Expert Mechanism on the Rights of Indigenous Peoples of the U.N. Human Rights Council regarding the implementation of the Declaration on the Rights of Indigenous Peoples.[685] The Navajo Nation Council's Intergovernmental Relations Committee had passed a resolution authorizing the NNHRC "to advocate for special recognition status" for the Navajo Nation, and Duane Yazzie's comments highlighted "Navajo Nation's successes and difficulties in implementing international standards and laws in the United States."[686] When Indian representatives appear before human rights bodies, their position is unidirectional, focusing on U.S. violations of their human rights and not on the possibility of Indian nations being held accountable for violations of tribal members' human rights by those same bodies.[687]

Indian nations' embrace of international human rights law and processes should entail more than just denouncements of U.S. policy regarding the injustices experienced by tribes; with the human rights embrace comes responsibility. Professor Angela Riley argues that "indigenous peoples are taking advantage of the 'human rights culture' to secure their own place in the global community. A theory of good native governance assumes that corresponding duties come along with indigenous peoples' exercise of their rights."[688] Good governance is hard, and for most if not all tribal and non-tribal governments, is a work-in-progress,[689] but drawing upon the international human rights framework implies an obligation on Indian nations to attempt to live up to that same framework. Professor Riley argues convincingly that what counts as good governance for Indian nations does not have

682 *See* Coulter, *supra* note 668, at 543–45 (recounting the origin of the Declaration that began in 1976 and included hundreds of tribal representatives).

683 *See, e.g.*, Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A* Jus Cogens *Strategy After* Lyng v. Northwest Indian Cemetery Protective Association, 42 HASTINGS L.J. 591, 594 (1991) (describing the efforts of tribes to have the Office of American States recognize a U.S. violation of the tribes' human rights).

684 Tsosie, *supra* note 591, at 1666–67.

685 Press Release, Office of Navajo Nation Human Rights Comm'n, NNHRC Addresses Members of the Expert Mechanism on the Implementation of the Declaration on the Rights of Indigenous Peoples (Aug. 11, 2009), *available at* http://www.nnhrc.navajo.org/press releases/2009/aug09/Geneva%20PR.pdf.

686 *Id.*

687 *See, e.g.*, *id.* (noting that Navajo Nation Human Rights Commission Chairperson Duane Yazzie's remarks focused on conditions the U.S. attaches to the right to self-determination).

688 Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1123 (2007) (citations omitted).

689 *See id.* at 1052–53 (discussing international debate over the requirements of good governance).

to reflect non-Indian ideas of good governance.[690] After acknowledging that the United States has played and continues to play a significant role in undermining Indian nations, Professor Riley argues that nevertheless, "Indian tribes in a contemporary world are in a position to more fully consider their obligations to their citizens."[691] The Harvard Project on American Indian Economic Development has done lots of work identifying institutional improvements that would improve tribal governance and help tribes become more responsive to tribal members.[692] Other scholars have recognized the need for "effective" tribal governments[693] and the related importance of "effective [environmental] programs."[694] The challenge when considering changes to improve tribal governance and effectiveness is the tribal specificity involved. So although articles and sample codes have been written for everything from domestic violence to environmental review processes,[695] resolving the obstacles faced by one tribe in effectively serving tribal members may not be what is most needed by another tribe. And what works well for one tribe may not work for others. But for those tribes that use international human rights bodies to air grievances, it would be overly opportunistic to do so without accepting some attendant governance responsibilities to their citizens.

Regardless of the stance of Indian nations regarding the acceptance of the applicability of human rights standards, I believe environmental groups should stop relying upon federal primacy and federal processes to block environmentally destructive forms of development supported by tribal governments. Environmental organizations' disparate treatment of indigenous peoples, depending on whether they are domestic or foreign, highlights both the singularity of federal primacy and the existence of a better model for the relationship between indigenous peoples and environmental organizations. FPIC provides one mechanism for ensuring community involvement does not take away from indigenous peoples' ability to select their own representatives and to allow representatives to speak for them. The objection may be made that if Indian tribes do not accept a human rights framework, why should environmentalists? But such an objection reflects a failure to appreciate the denial of Indian rights inherent in federal primacy. Environmental organizations may fear that allowing development in Indian Country could be used as precedent for the rest of the United States; however, just because a particular level of pollution is allowed on a reservation does not mean that a higher standard

690 *Id.* at 1054–55 (arguing that native governance involves using "indigenous principles of government" rather than requiring that "Indian nations either fully depart from or emulate the developed West").

691 *Id.* at 1107.

692 *See* The Harvard Project on Am. Indian Econ. Dev., Overview of the Harvard Project, http://www.ksg.harvard.edu/hpaied/overview.htm (last visited Apr. 18, 2010). Many of the Project's publications can also be found on its website.

693 Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 51 (2002) (describing making tribal governments effective as "[o]ne of the challenges of the twenty-first century").

694 Suagee, *supra* note 496, at 161 ("[I]f tribes do not want states asserting that they have jurisdiction for environmental regulation in Indian country, *tribes need to have effective programs in place*.").

695 *See* Tribal Court Clearinghouse, Tribal Laws/Codes, http://www.tribal-institute.org/lists/codes.htm (last visited Apr. 18, 2010) (listing various tribal codes).

should not be required elsewhere.[696] Establishing the possibility that on-reservation and off-reservation standards could differ would allow environmental organizations to decide *not* to aggressively assert legal rights through federal processes when it comes to tribal projects.[697] To be clear, there is no legal requirement that environmental organizations separate themselves from federal primacy and its problematic assumption of U.S. superiority and related diminishment of Indian sovereignty. But sometimes the right thing to do is to lay down one's arms.

Recognition of indigenous rights according to international human rights law by environmental organizations would involve a number of changes to the way non-Indian environmental groups interact with Indian nations proposing harmful projects. Such recognition would involve first prioritizing tribal processes of decision making rather than the federal permitting scheme. The next generation of

696 Arguably, Indian tribes have a greater entitlement to pollute than other parts of the United States. Principle 7 of the Rio Declaration on Environment and Development states,

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Rio Declaration, *supra* note 613, princ. 7. The common-but-differentiated-responsibility principle is not fully accepted by the U.S. government, perhaps primarily because it could impose a heavy cost on the world's foremost polluter. *See generally* TUULA HONKONEN, THE COMMON BUT DIFFERENTIATED RESPONSIBILITY PRINCIPLE IN MULTILATERAL ENVIRONMENTAL AGREEMENTS 253–58, 298 (2009) (discussing the reluctance to fully adopt the common-but-differentiated-responsibility principle in developed countries and focusing on the United States's criticism of the Kyoto Protocol). But the principle does suggest that the focus should be on off-reservation projects and that the Navajo Nation—with a per capita income well below the World Bank's line between developing and developed economies—has more right to develop a coal-fired power plant than do other parts of the United States. Yet, while Navajo Nation's Desert Rock proposal was blocked, 36 coal-fired power plants are progressing towards completion in the United States as of June 2009. Powerpoint: Erik Shuster, Office of Sys. Analyses & Planning, Nat'l Energy Tech. Lab., Tracking New Coal-Fired Power Plants 6 tbl.1 (Oct. 8, 2009), *available at* http://www.netl.doe.gov/coal/refshelf/ncp.pdf. In the second quarter of 2009 alone, four plants became operational, and there are an additional 47 plants announced or in early stages of development. *Id.*

In light of the common-but-differentiated-responsibility principle, the Navajo Nation's right to development arguably deserves allowances not shared by the rest of the United States, at least until the income gap closes. Furthermore, an argument can be made that U.S. environmental organizations should get U.S. emissions in order before using a federally defined process of environmental oversight to block the Navajo Nation. The Navajo Nation's per capita income in 2004—the most recent available year—was $7734 annually. CHOUDHARY, *supra* note 352, at T 49 tbl.21. Developed countries, according to the World Bank, have per capita incomes above $11,906 per year. *See* WORLD BANK, WORLD BANK LIST OF ECONOMIES (2009), *available at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS (defining developed as "high income"); The World Bank, Data—Country Statistics, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Apr. 18, 2010). The U.S. per capita income, in contrast, was $26,804 in 2007. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 8 tbl.1 (2008), *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf.

697 The author thanks Professor Patrick Simms for his insight into how the precedent-setting aspects of federal approval can make environmental organizations put aside their hesitation about interfering with tribal sovereignty.

tribal mining legislation notably supports prioritizing tribal processes: Under the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSDA), environmental review would be conducted by tribes, and public comments, including those of environmental groups, "will be reviewed in light of tribal values, priorities, and decisions, rather than filtered through a federal lens."[698] Fear among environmentalists that tribal oversight would mean lesser environmental protection than would be true under federal oversight should not be enough to justify federal primacy. Such fear mirrors assumptions made by policymakers that federal management of tribal resources is better than tribal control;[699] yet, given the record of U.S. management, tribes probably "would do no worse" than the United States has historically on either resource management or environmental protection.[700] The Navajo uranium experience and even the political flip-flop on Desert Rock's PSD permit by EPA after President Obama's election attest to shortcomings in federal oversight. Environmental organizations would likely have less faith in federal permitting if the administration was still Republican. Decolonization of Indian law involves getting rid of the "underlying distrust of tribal governance" in EPA and among environmental organizations.[701]

The Navajo Nation provides avenues for project objections to be raised and it is important that internal dissent not be misused or misrepresented by environmentalists. Nearly every tribal government proposal—just like any U.S. government proposal—will have detractors. But the consequences are particularly acute for tribes, as "the age-old problem of internal disagreement . . . weakens tribal

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698 Royster, *supra* note 96, at 1092. Tribal values would only be prioritized up to a point, because under the statute the Secretary of the Interior retains a right to review tribal environmental determinations. *Id.* at 1095–97. For this reason, the Navajo Nation objected to ITEDSDA as being a reduction of the U.S. trust responsibility without truly turning over authority to Indian nations. *Id.* at 1098–99.

699 *See generally* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 613 (1994) (highlighting that the federal government has decided to let "the appropriate federal agency" regulate until the tribes are prepared to administer the "federal [environmental] standards and programs").

700 Maxfield, *supra* note 576, at 72. In his characteristically strong way of phrasing things, Ward Churchill, responding to the fear of "restoration of native land rights precipitating some sort of 'environmental holocaust,'" points to accounts by "early European invaders" of North America's "pristine wilderness" and writes, "[C]ontrast that reality to what's been done to this continent over the past couple of hundred years . . . and you tell *me* about environmental devastation." WARD CHURCHILL, STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA 420 (1993). As a U.N. report on climate change's effect on indigenous peoples notes, "[T]he United States, with a population of 300 million, makes up only 4 [percent] of the total world population, but accounts for about 25 [percent] of world [greenhouse gas] emissions." U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*, ¶ 17, U.N. Doc. E/C.19/2008/10 (Mar. 20, 2008) (*prepared by* Victoria Tauli-Corpuz & Aqqaluk Lynge), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/ GEN/N08/277/65/PDF/N0827765.pdf?OpenElement.

701 Clinton, *supra* note 101, at 152 (focusing in on the distrust evident in cases involving jurisdiction over non-Indians). Distrust extends beyond Indian environmental programs; the preference of national environmental organizations for national environmental protection is reflected in an "impassioned rhetoric of distrust toward local self-determination," whether exercised by western states or Indian tribes. DANIEL KEMMIS, THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST 158 (2001).

governments and has historically worked against Indian people."[702] Non-Indian governments have undercut tribes by supporting dissenting factions and either signing agreements with them that purport to bind the entire tribe or using trumped-up tribal disagreement as a pretext for ignoring the will of the tribe.[703] Environmental organizations should not do the same. To be concrete, while the few Diné directly affected by Desert Rock are legitimately upset with the leadership of the Navajo Nation, their complaints should not be bootstrapped by environmental organizations or presented as the views of the Navajo people. The fact that "native peoples have not been of one mind on resource issues" should not provide a pretext for attempting to undercut tribal governments.[704] Exploiting dissent in the Navajo Nation fails to respect the will of the people—as expressed in the same way that it is in the United States, through democracy—and denies the majority the right to establish the balance between development and the environment through the political processes and internal tribal mechanisms.

B. The Big Picture and Desert Rock

Let's be clear: The world is in the midst of an environmental crisis that will have far-reaching and global impacts. Environmental organizations and indigenous peoples worldwide will both be called upon to deal with the challenges associated with climate change, resource depletion, and sustainable development.[705] And construction of another coal-fired power plant in the Southwest would not symbolize a new start as much as a continuation of the development and consumption practices that are responsible for global warming. The development of alternative energy sources is required, and Indian tribes have an important role to play in how the United States powers itself and consumes resources.[706]

Indigenous peoples, globally and in the United States, are "among the most vulnerable" to the effects of climate change.[707] In 2007, the Natural Resources Law Center at the University of Colorado Law School published a report entitled *Native*

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702 FIXICO, *supra* note 142, at 181.

703 *See, e.g.*, Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 99–117 (2005) (exploring the nature of the leadership dispute between John Ross and John Ridge in the context of the Treaty of New Echota and the way the United States used the lack of a unified front).

704 KRECH, *supra* note 185, at 227.

705 *See, e.g.*, Tsosie, *supra* note 591, at 1669 ("[I]ndigenous peoples hold particularly relevant knowledge as to how to achieve [sustainability] due to their familiarity with certain environments . . . .").

706 For more on alternative energy development in Indian Country focusing on wind, *see* Patrick M. Garry et al., *Wind Energy in Indian Country: A Study of the Challenges and Opportunities Facing South Dakota Tribes*, 54 S.D. L. REV. 448 (2009); Kathleen R. Unger, *Change Is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L. A.L. REV. 311 (2009); Victoria Sutton, *Wind and Wisdom*, 1 ENVTL. & ENERGY L. & POL'Y J. 345 (2007); Bob Gough, *Panel V: Revitalizing Economies, Preserving Cultures & Protecting the Environment: Striking the Balance in South Dakota and Indian Country*, 7 GREAT PLAINS NAT. RESOURCES J. 67 (2002).

707 JONATHAN M. HANNA, NATURAL RES. LAW CTR., UNIV. OF COLO. LAW SCH., NATIVE COMMUNITIES AND CLIMATE CHANGE: LEGAL AND POLICY APPROACHES FOR PROTECTING TRIBAL LEGAL RIGHTS 31 (2007), *available at* http://www.colorado.edu/Law/centers/nrlc/publications/ClimateChangeReport-FINAL%20_9.16.07_.pdf.

Communities and Climate Change that captures the big picture regarding Indians and their environment.[708] The report goes region by region, exploring how climate change will threaten Indian life ways and in the process covers everything from treaty-based fishing rights to water rights.[709] The report's focus is outward; that is to say, it is largely about how Indians are affected by climate change. Thus, the report notes that tribes "are among the most vulnerable to impact from climate change caused in large part by conventional fossil-fuel-based energy development."[710] The outward focus of this report is shared by nearly all writing on indigenous peoples and climate change and is easily justified. As the U.N. Permanent Forum on Indigenous Issues website states, indigenous peoples have been "among the first to face the direct consequences of climate change."[711] The meeting report from the 2008 Copenhagen Conference on Indigenous Peoples and Climate Change explains further that "while indigenous peoples bear the brunt of the catastrophe of climate change, they have minimal access to resources to cope with the changes."[712] The "survival of indigenous communities worldwide" is threatened by climate change, "even though indigenous peoples contribute the least to greenhouse emissions."[713]

Given these facts, it is no wonder that the *Native Communities and Climate Change* report looked outward, which is where most of the action is and where most of the blame—for lack of a better word—can be found. Picking off the low-hanging fruit first makes sense, and is likely not going to be controversial among fellow Indian law scholars. Nonindigenous peoples and governments *do* make for good bad guys. The report however does include brief acknowledgment that "climate change [will require] tribes to . . . consider the long-term sustainability of [natural resource extraction]."[714] Rhetorically and factually an outward looking analysis makes sense, but there is also the need to engage with Indian complicity in what could be described as the current U.S. indifference to both climate change and intergenerational equity.[715] As Shepard Krech III explains in *The Ecological Indian*,

> [C]ritics who excoriate the larger society as they absolve Indians of all blame sacrifice evidence that in recent years, Indian people have had a mixed relationship to the environment. They victimize Indians when they strip them of all agency in their lives except when their actions fit the image of the Ecological Indian.[716]

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708 *Id.*

709 *See id.* at 5, 8, 23–24.

710 *Id.* at 31.

711 U.N. Permanent Forum on Indigenous Issues, Climate Change and Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/en/climate_change.html (last visited Apr. 18, 2010).

712 Conference on Indigenous Peoples and Climate Change, Copenhagen, Den., Feb. 21–22, 2008, *Meeting Report*, at 3, U.N. Doc. E/C.19/2008/CRP.3 (Mar. 10, 2008), *available at* http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2008_CRP3_en.pdf.

713 U.N. Permanent Forum on Indigenous Issues, *supra* note 711.

714 *See* HANNA, *supra* note 707, at 22.

715 As Dean Speth writes, "If there is one country that bears most responsibility for the lack of progress on international environmental issues, it is the United States." Speth, *supra* note 607, at 790.

716 KRECH, *supra* note 185, at 216; *see also* Deloria, *supra* note 1, at 205–06 ("But many scholars—who note the romantic view of Indians in earlier stages of Euro-American history—have themselves

The *easy* cases that seem to call for scholarly analysis and footnoted anger are those that involve sympathetic tribes suffering as a result of non-Indian actions. The *hard* cases involve tribes imposing harmful externalities on others. A Native Alaskan village "in imminent danger of falling into the sea" because protective sea ice is melting as a result of global warming that decides to sue ExxonMobil is an easy case.[717] As the complaint makes clear, climate change could well force the villagers into environmental exile even though they "have contributed little or nothing to global warming."[718] Let there be no mistake, Desert Rock is a hard case. A nineteen year-old, Orion Yazzie, brought the issues raised by the Navajo Nation's choice to pursue Desert Rock into powerful relief: "Navajo sovereignty is a lot of times brought up during this debate on the power plant . . . but it is a terrible paradox that us Navajo people would be responsible for upsetting numerous other indigenous people's [lifeways] by contributing to global warming."[719]

VI. CONCLUSION

There is no satisfying answer to whether the Navajo Nation should pursue economic development through environmental destruction.[720] But the choice to do so is exactly that—a choice. Given the colonialism of federal Indian law and the determinative role powerful mining interests played in prior natural resource development, choice—not just the appearance of choice—itself is remarkable. Simply saying that Desert Rock is a remnant of a coal past is not responsive enough, partly because the United States continues its coal-fired habit, but mostly because tribal administrative needs and reservation poverty demand more than silence. Unfortunately, that is pretty much all that the Navajo Nation has gotten so far from non-Indians, politicians, and others, regardless of political leanings. Such disinterest in reservation conditions provides excuse, if not full justification, for seeking out coal-fired revenue and employment.[721] It would be great if the U.S. government *permitted* the Navajo Nation to act according to the will of its

been blinded by the same romantic tradition today and deny us our political life and our humanity. . . . We [Indians] have made mistakes, and you [Indian scholars] do us a disservice by almost uniformly shifting the blame elsewhere.").

717 Posting of Mark Walker to Am. Coll. of Envtl. Lawyers, Global Warming Litigation Heating Up—Village of Kivalina Lawsuit, http://www.acoel.org/2008/08/articles/natural-resource-damages/global-warming-litigation-heating-up-village-of-kivalina-lawsuit (Aug. 21, 2008) (last visited Apr. 18, 2010) (quoting Complaint at 2, Native Village of Kivalina, Alaska v. ExxonMobile, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. C 08-1138 SBA)); *see also* Osofsky, *supra* note 637 (discussing the significance of a climate change–based Inuit petition to the Inter-American Commission on Human Rights); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 191–92 (2009) (summarizing the same petition); Tsosie, *supra* note 591, at 1669–74 (summarizing the same petition).

718 Complaint at 46, Native Village of Kivalina, Alaska v. ExxonMobile, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. C 08-1138 SBA). For a brief summary of the case and motivation to sue, see Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. TIMES, Feb. 27, 2008, at A16.

719 *EPA Hearing III*, *supra* note 442, at 57 (statement of Orion Yazzie, resident of Aztec, N.M.).

720 In general, Professor Tsosie notes that "tribal decisions on mining policy are not clearly 'right' or 'wrong.'" Tsosie, *supra* note 71, at 302.

721 *See* SHERRY, *supra* note 124, at 11 (calling attention to the "striking disregard for adverse environmental and social costs on local communities" caused by the Navajo Nation's seizing upon "any economic opportunities" to "support a large bureaucracy and a population that depends on it for jobs").

elected leadership, and though government policy change is improbable, it should be expected that environmental organizations not ignore Indian sovereignty by making use of federal review processes to block tribes.