

URANIUM MINING AND THE NAVAJO NATION—LEGAL INJUSTICE

ALICE SEGAL*

I. INTRODUCTION

The question this Note attempts to answer is how to best resolve the injustice experienced by the Navajo people resulting from a history of exposure to uranium mining. The Navajo people have been left with unreclaimed radioactive contamination from past uranium mines and are unsuccessfully attempting to prevent more mining from being started in areas that have not yet been cleaned up.¹ The difficulties faced by the Navajo at forcing compensation or preventing future mining leads to the conclusion that the current judicial system and federal agency practices are insufficient to protect them. The Navajo Nation has shown the interest and organization to control uranium mining and prevent it from causing further injury to its people, despite the limitations forced upon it by Congress when federal agencies have failed to provide the necessary protection.² History shows that the Navajo need more sovereign control over the cleanup and regulation of their land in order to address their current uranium mining concerns. This is not a perfect solution because it is possible that a future Congress will take back the authority granted by the current one. However, it is the only effective solution when statutes, federal agencies, and courts have all failed to effectively solve the problem of radioactive contamination.

The history of uranium mining and the Navajo people is one of poor

* J.D., University of Southern California Gould School of Law (2012).

¹ See discussion *infra* Part IV.

² See Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 420–22 (2006); see discussion *infra* Part III.

treatment, illness, inadequate compensation, and inconsistent tribal government authority. In the beginning of the uranium boom, uranium was discovered in the Midwest, with the greatest amount coming from the four corners area of New Mexico, Colorado, Arizona, and Utah, much of which is in the Navajo reservation in the Grants/Gallup area of northern New Mexico.³ The Navajo people and other locals mined this uranium,⁴ and although the federal government was aware of the radioactive danger present in the mines, it consciously avoided informing the miners of the health risks.⁵ The uranium miners were left with exposure-caused illnesses and the Navajo people were left with radioactive material on their land.⁶ Meanwhile, the federal government ineptly provided minimal compensation and reclamation.⁷ There is still waste from the mining industry ("tailings"), people are still getting sick, and the Navajo Nation is the only motivating source behind any compensation.⁸

The Navajo government should be given authority to prevent mining and to regulate cleanup in Navajo land. First, this Note will discuss the history of the Navajo and how changes in U.S. policy have deprived the Nation of sovereignty or any remote power over its own affairs.⁹ Next, this Note will examine the history of uranium mining and the injuries that past mining (with its insufficient protective gear or health warnings) caused to miners as well as the Navajo people living near the mines and mills.¹⁰ This part is followed by an analysis of the federal regulations that are meant to license current mining operations and monitor cleanup of existing radioactive material.¹¹ This Note will then focus on litigation.¹² Uranium miners and their families have attempted to sue the mining companies as well as the government to get compensated for past injuries.¹³ The Navajo people living in the area have also sued over the radioactive material that

³ Jon J. Indall, *A Historical Review of the Relationship Between the Federal Government and the Domestic Uranium Industry, and Current Uranium Activities and Issues in New Mexico*, No. 2 RMMLF-INST Paper No. 16 (2006).

⁴ Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 AM. J. PUB. HEALTH 1410, 1410–11 (Sept. 2002).

⁵ *Id.* at 1413.

⁶ *Id.* at 1411–13.

⁷ *Id.* at 1413–18.

⁸ *Id.* at 1417–18.

⁹ See discussion *infra* Part II.A.

¹⁰ See discussion *infra* Part II.B.

¹¹ See discussion *infra* Part III.

¹² See discussion *infra* Part IV.

¹³ See discussion *infra* Part IV.A.

is still left and to prevent future mining.¹⁴ Finally, this Note discusses the concerns regarding Navajo sovereignty and concludes that the Navajo tribal government is in the best position to protect its people and therefore should have clear authority to do this.¹⁵ As a prelude to the conclusion, there are sections discussing the Navajo government's ban of uranium mining,¹⁶ the ineptitude of current federal agencies to protect the Navajo,¹⁷ and Congress's precedent of granting greater power to the Navajo to compensate for poor federal policies (such as the Indian Child Welfare Act¹⁸).¹⁹ Additionally, this Note discusses the Navajo Nation's actions to protect its people through the laws it passed and the lawsuits it has filed with the help of the U.S. Department of Justice ("DOJ").

II. BACKGROUND: THE HISTORY THAT CREATED THE PROBLEM

The history of Native American sovereignty is a story of continual adjustments to, and inconsistencies in, the authority granted by the United States to Native American governments. These inconsistencies have contributed to periodic increases to individual Native American poverty.²⁰ Also, throughout history, Congress and the courts have limited the Navajo government's ability to pass enforceable regulations to control non-Native Americans whose actions impact the Navajo nation.²¹ The federal government has attempted to create and preserve a trusting relationship with Native American tribes to protect them from state or private interests.²² However, it has failed to protect them, resulting in injuries to the Navajo by private parties.²³ The courts have also used federal statutes to further limit Native American governments.²⁴ Thus, the unequal

¹⁴ See discussion *infra* Part II.V.C.

¹⁵ See discussion *infra* Part V.

¹⁶ See discussion *infra* Part V.

¹⁷ See discussion *infra* Parts III, VII.A.

¹⁸ 25 U.S.C. § 1901 (1978).

¹⁹ See discussion *infra* Part VI.

²⁰ Cooley, *supra* note 2, at 404–05.

²¹ *Id.* at 402. See also *Montana v. United States*, 450 U.S. 544, 559 (1981); *UNC Res. Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981) (holding that the tribal courts or the tribal government do not have authority to pass enforceable regulations to control non-Native American actions).

²² See Cooley, *supra* note 2, at 402–04.

²³ See discussion *infra* Part II.B.

²⁴ See, e.g., *Montana*, 450 U.S. at 544; *Benally*, 518 F. Supp. at 1048–49, 1052.

relationship between the federal and tribal governments has created a permanent disadvantage for Native Americans, preventing them from having legitimate government authority to protect their people against uranium mining.

The history of mining demonstrates the difficulties that the Navajo have faced in overcoming issues with past mining and the ineffectiveness of the different agencies that regulate mining. Federal national security concerns surrounding uranium mining prevent the Navajo from suing the federal government for promoting mining without disclosing the danger.²⁵ Also, the agencies have yet to clean up past mining contamination in the environment,²⁶ and are doing a poor job controlling current mining permits.²⁷ Some of these agencies have interpreted the relevant statutes loosely in order to reduce cleanup costs for the responsible parties.²⁸ Since courts defer to these agencies, people living near the mines are without an effective means of appeal.²⁹ This history of convoluted government intervention, bureaucracy, and development drove the Navajo government to ban uranium mining altogether.

A. THE HISTORY OF NATIVE AMERICAN SOVEREIGNTY: WHEN THE
FEDERAL GOVERNMENT HAS ALL THE POWER

Early on, the U.S. government gave itself authority to determine the very existence and boundaries of the native tribes.³⁰ This was enabled by uneven bargaining power that would continue to be used to limit Navajo authority to protect its people from radioactive exposure.³¹ From the beginning, the U.S. government has had all of the control in creating treaties and determining boundaries with the tribes.³² This complete control resulted in a national tendency for the U.S. courts and agencies to

²⁵ See Brugge & Goble, *supra* note 4, at 1413.

²⁶ U.S. ENVTL. PROT. AGENCY, UNITED NUCLEAR CORPORATION (MCKINLEY COUNTY) NEW MEXICO 1–3 (Jan. 2012).

²⁷ *Peshlakai v. Duncan*, 476 F. Supp. 1247 (D.D.C. 1979); Petition for Writ of Certiorari at 3, *Morris v. Nuclear Regulatory Comm'n*, 131 S. Ct. 602 (2010) (No. 10-368).

²⁸ *Peshlakai*, 476 F. Supp. at 1247; Petition for Writ of Certiorari, *supra* note 27, at 3; U.S. ENVTL. PROT. AGENCY, *supra* note 26.

²⁹ *Peshlakai*, 476 F. Supp. at 1262; Petition for Writ of Certiorari, *supra* note 27, at 3.

³⁰ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW vii–xv (U.S. Gov't Prtg. Off. 1942).

³¹ *Id.*

³² *Id.*

disregard the sovereignty and rights of the independent tribes.³³ For example, a treaty signed between the U.S. government and the Navajo declared that the “United States ‘shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.’”³⁴ Congress has continued exercising complete control over the Navajo Nation, and by interpreting Congress’s legislation, the courts have also limited Navajo independent authority.

1. Congress and Legislation that Changed Native American Authority

Part of the history of the Navajo Nation is the development of the authority to take legal action. This history is one of complete control by the federal government, while tribal governments were at the whim of federal decisions.³⁵ From the beginning, Congress, courts, and federal agencies have been able to adjust tribal government power to match the policies of the United States and ensure that the goals of tribal governments did not conflict with national policy.³⁶ Native Americans, such as the Navajo, have been granted different degrees of power throughout history. Congress has given and taken away authority and sovereign identity depending on Congress’s policy to encourage or discourage the continuation of Native American tribes.³⁷

Congress first dismantled Native American tribes in 1887 by passing the General Allotment Act, which divided reservations.³⁸ Land was given to individual Native Americans to control and do what they wanted with it.³⁹ The purpose of this decision was to encourage assimilation between Native Americans and settlers, but instead it eliminated the identities of sovereign tribes and pushed Native Americans into poverty.⁴⁰ This was part of a recommendation suggested by the U.S. commissioners who had the responsibility of the “direction and management of all Indian

³³ *Id.*

³⁴ *Id.* at 46. (quoting treaty between the United States and the Navajo Tribe, Sept. 9, 1849, Art. IX, 9 Stat. 974).

³⁵ *Id.*

³⁶ *Id.*; accord Cooley, *supra* note 2, at 402.

³⁷ Cooley, *supra* note 2, at 404.

³⁸ General Allotment Act of 1887 (Dawes Act), 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381.

³⁹ COHEN, *supra* note 30, at 7.

⁴⁰ See Cooley, *supra* note 2, at 400–04.

affairs.”⁴¹ Native American management has developed through the Bureau of Indian Affairs, an agency given control over tribes in order to affect changes in U.S. policies toward the tribes.⁴² However, this policy resulted in shrinking reservations and increased poverty.⁴³ The negative impact on the tribes caused President Nixon to terminate the policy in 1970.⁴⁴ Nixon declared that the federal government betrayed the trust of Native American tribes by causing them to crumble and suffer in poverty.⁴⁵ Thus, the government recreated the tribes and helped them utilize federal programs to improve their quality of life.⁴⁶

2. The Marshall Trilogy and Tribal Authority

The courts also reduced the authority and power of tribal governments. This is observed first with the Supreme Court, which in several early cases that have been called the Marshall Trilogy (“Trilogy”), defined the power of Native American tribes.⁴⁷ The Court described the defining characteristics of Native American tribes, which have become legal precedent today, and then proceeded to limit tribal government power.⁴⁸

The Court opined that Native American tribes, while “foreign states, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own,” which “have been uniformly treated as [states] from the settlement of our country” with an “unquestionable . . . right to the lands they occupy,” are, nevertheless, “domestic dependent nations,” occupying “a territory to which we assert a title independent of their will.”⁴⁹

The Trilogy cases established that because Native American nations are not independent governments on their own, they cannot bring lawsuits in U.S. courts and therefore must depend on their trust relationship with the U.S. federal government to protect their interests.⁵⁰ Through this trust

⁴¹ *Id.* at 10.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Cooley, *supra* note 2 at 404–05.

⁴⁵ *Id.* at 404–05.

⁴⁶ *Id.* at 405–06.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 400 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 3, 16, 17 (1831)).

⁵⁰ *Id.*

relationship, the federal government holds land for the tribes and is responsible for protecting them from state or corporate intrusion.⁵¹ The Trilogy cases concluded that Native American nations are their own sovereign entities, but that their power to act is hindered because their authority is still regulated by and under the will of Congress.⁵² The Trilogy did grant some power to the tribes however, by establishing that they are not under the power of the states.⁵³ The Trilogy put the Navajo at the mercy of the federal government: they cannot sue and their land is held in trust at the direction of the federal government, which prevents them from taking the actions they would need to counter unwanted uranium mining.

3. *Montana v. United States*: The Courts Limit Tribal Control over Land

In later cases, the courts have specifically limited the sovereign rights of tribal governments to influence changes affecting tribal land. While the tribes have been given general power to control their land, the courts have changed the definition of tribal land to limit their power over certain areas around their land.⁵⁴ For example, in *Montana v. United States*, the Court held that the Crow Tribe could only regulate or control the actions of non-Native Americans on land on which the tribe exercised “absolute and undisturbed use and occupation[.]”⁵⁵ In *Montana*, despite the appearance that the treaty granted the tribe absolute power, the Court interpreted the treaty to determine that the tribe did not completely control the land and, therefore, that they could not be in command of all non-Native American actions on it.⁵⁶ In this case and subsequent Navajo cases, courts have upheld tribal jurisdiction over land while reducing tribal power by holding that Native Americans do not completely control their land and, therefore, cannot manage the actions of non-Native Americans on their land.

In *Montana*, the Court held that the U.S. government does not routinely give away the riverbeds of navigable waters, which are reserved for the states.⁵⁷ Thus, when the U.S. government made a treaty to give an

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cooley, *supra* note 2, at 407; *accord* *Montana v. United States*, 450 U.S. 544, 559 (1981).

⁵⁵ Cooley, *supra* note 2, at 407 (quoting Treaty with the Crow Indians, U.S.-Crow Indian Nation, art. II, May 7, 1868, 15 Stat. 649); *accord* *Montana*, 450 U.S. at 559 (quoting Treaty with the Crow Indians, U.S.-Crow Indian Nation, art. II, May 7, 1868, 15 Stat. 649).

⁵⁶ Cooley, *supra* note 2, at 407–08.

⁵⁷ *Montana*, 450 U.S. at 551–52.

entire property to the Crow Tribe in 1851, the Court could presume that the government did not intend to give away the riverbed.⁵⁸ The Court decided that “[t]he Crow treaties in this case . . . fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty.”⁵⁹ Despite that this presumption was not clear when the treaty was made, the Crow were found not to have control of the riverbed and, therefore, could not regulate it. Thus, despite the appearance of the treaty to grant complete control, the Crow’s fishing restrictions were not applicable to the non-member fishermen in their water.⁶⁰ The courts have continued to limit the sovereign power given to Native American nations by interpreting congressional statutes to limit tribal authority.⁶¹ *Montana* also leads to the conclusion that the Navajo do not have jurisdiction to regulate mining operations that are not being conducted entirely on Navajo land.

4. The Courts Limit Tribal Control over Non-Native Americans

A number of subsequent cases established that tribes have the power “to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.”⁶² The tribes have been granted a presumed protection of their sovereign existence to control their own land and people, but the courts limited this authority to include only the ability to control their own members.⁶³ The ability of the tribes to reach beyond their controlled land or membership extends tribal authority beyond the “inherent powers of a limited sovereignty,” and this separate power is completely restricted by the acts of Congress and judicial interpretations of these acts.⁶⁴ Courts have further altered the definition of Native American land, which reduces Navajo ability to regulate activities, such as nuclear power, by putting these activities

⁵⁸ *Id.*

⁵⁹ *Id.* at 552.

⁶⁰ *Id.* at 561–65.

⁶¹ See, e.g., *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484 (1999); *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1051–52 (D. Ariz. 1981).

⁶² COHEN, *supra* note 30, at 122.

⁶³ See *id.*

⁶⁴ *Id.*

outside Navajo control despite's the activities' impacts on Navajo land.⁶⁵

The continued limitation of the sovereignty of Native Americans has caused a reduction in the ability of tribal governments like the Navajo Nation to control the actions of non-Native Americans around tribal land, even though the actions of non-Native Americans may negatively affect the people living on a reservation.⁶⁶ The laws have crippled the Navajo government, which cannot stop the actions of non-Native Americans through the tribal courts and cannot sue without the help of the DOJ, putting the community in a form of powerless limbo.⁶⁷ Although the Environmental Protection Agency ("EPA") and DOJ are supportive of the Navajo's actions against mining, a federal agency representing a tribal government that does not have the authority to represent itself could create problems.⁶⁸ Throughout U.S. history, Native Americans have been subjected to the absolute will of Congress through legislation and judicial interpretation of legislation.⁶⁹ These congressional and judicial actions have made it difficult for the Navajo government and individual Native Americans to counter the uranium mining that has been so destructive for Navajo health and preservation of the Navajo culture.⁷⁰

5. The History of Uranium Mining: Unsafe Conditions and Lack of Information

In the early twentieth century, during the early development of the mining industry, the international community became increasingly aware of the danger presented by uranium and radioactive material.⁷¹ Despite the increased information, the Navajo miners were not informed of the dangers of uranium mining nor provided with safety equipment.⁷² In justifying their silence, the federal government cited national security concerns and the need for research to discover the connection between working in the mines and illnesses such as cancer before taking steps that could negatively impact mining operations.⁷³ In the 1930s, "there was no

⁶⁵ *Montana*, 450 U.S. at 552; *Neztsosie*, 526 U.S. at 484.

⁶⁶ See discussion *supra* Part II.A.3.

⁶⁷ See *supra* Part II.A.4.

⁶⁸ See *supra* Part II.A.2.

⁶⁹ See *supra* Parts II.A.1–2.

⁷⁰ See *supra* Parts II.A.2–4.

⁷¹ *Brugge & Globe*, *supra* note 4, at 1410.

⁷² *Id.* at 1411.

⁷³ *Id.* at 1416; *Begay v. United States*, 591 F. Supp. 991, 1011–12 (D. Ariz. 1984), *aff'd*,

scientific doubt that uranium mining was associated with high rates of lung cancer.”⁷⁴ During the 1950s the Public Health Service (“PHS”) researched the extent of the relationship between mining and cancer.⁷⁵ Additionally, the Federal Radiation Council (“FRC”) was not started until 1959, and did not encourage state or federal regulation until the 1960s,⁷⁶ demonstrating a pattern of delay.⁷⁷ The federal government did not regulate ventilation or the exposure of miners to radioactive dust in the mines until 1967.⁷⁸ This delay in implementing regulations and resistance to informing the Navajo miners placed the Navajo in greater danger of radiation exposure and resulted in an increase in cancer among miners and the general Navajo population.

Before standards for radiation levels were set, the PHS researched the relationship between chemicals found in uranium mines and particular health issues.⁷⁹ The time spent confirming this research resulted in the miners’ unnecessary exposure to radioactive material because the research confirmed the connection between uranium mining and health dangers long before protective action was taken.⁸⁰ One of the major controversies surrounding the PHS study—for which the federal government would later be sued—is that the miners being studied to determine the health effects of exposure to uranium were not told that the government knew of health risks associated with uranium mining.⁸¹ The miners were only informed if they had lung cancer, because then their medical care would be transferred to their regular doctors for treatment.⁸² They were never informed of the danger that their occupation was continually presenting to their health or the fact that their cancer was likely caused by their jobs.⁸³

After the PHS concluded its research on the miners in 1959, the government continued to fail to inform the miners of the dangers presented by their work; however, the federal government did ask the

768 F.2d 1059 (9th Cir. 1985).

⁷⁴ Brugge & Globe, *supra* note 4, at 1412.

⁷⁵ *Id.* at 1413.

⁷⁶ Begay, 591 F. Supp. at 1001–04.

⁷⁷ Brugge & Globe, *supra* note 4, at 1415.

⁷⁸ Begay, 591 F. Supp. at 1004; *accord* Brugge & Globe, *supra* note 4, at 1415.

⁷⁹ Brugge & Globe, *supra* note 4, at 1413.

⁸⁰ *Id.* at 1415.

⁸¹ *Id.* at 1413. *See* Begay, 591 F. Supp. at 996–99.

⁸² Begay, 591 F. Supp. at 996.

⁸³ Brugge & Globe, *supra* note 4, at 1413; Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 L. & INEQ. 267, 295 (1994).

states to regulate the uranium mines.⁸⁴ However, these requested regulations were not sufficiently adopted by the states.⁸⁵ This lack of compliance caused the FRC to threaten to have Congress “preempt state regulatory authority over uranium mines” with new federal regulation.⁸⁶ However, preemption was not pursued because the Joint Committee on Atomic Energy (“JCAE”) decided that, “more studies were needed to determine a safe low threshold of ionizing radiation.”⁸⁷ Also, since the Atomic Energy Commission (“AEC”) “did not have regulatory authority over mines located on private land and regulated by the states,” without congressional intervention, their direct regulatory power was limited to milling operations.⁸⁸ State regulations were still not up to proper standards for a safe working environment when the President approved the FRC’s proposed uniform federal radiation standard in 1967, finally taking federal action after nearly forty years of permitting miners to be exposed to known unsafe conditions.⁸⁹ In a hearing held by the JCAE, the commissioner of the AEC defended the previous forty years without federal regulation by claiming that the AEC expected other agencies to act, though he admitted that in hindsight the AEC could have acted quicker and sooner.⁹⁰ Thus, the miners and their families were not sufficiently protected from radiation and were not warned of the risks of uranium mining for decades as a result of federal mismanagement.⁹¹

The federal government’s defense for failing to inform miners was that it needed to protect national security.⁹² If mining and milling stopped because employees realized that their jobs were dangerous, then the production and processing of uranium, considered vital during the Cold War, might stop.⁹³ The U.S. made the conscious decision to continue to endanger this minority for the good of the rest of the country.⁹⁴ As a result the miners did not take precautions to protect themselves and their families from radiation because they were ignorant of the dangers

⁸⁴ Brugge & Globe, *supra* note 4, at 1414.

⁸⁵ *See id.*

⁸⁶ *Begay*, 591 F. Supp. at 1002.

⁸⁷ *Id.* at 1002–03.

⁸⁸ *Id.* at 1003.

⁸⁹ *Id.* at 1004.

⁹⁰ *Id.* at 1005.

⁹¹ Brugge & Globe, *supra* note 4, at 1410.

⁹² *Begay*, 591 F. Supp. at 1011–12; Brugge & Globe, *supra* note 4, at 1416.

⁹³ *See Begay*, 591 F. Supp. at 1011–1012.

⁹⁴ *Id.*

associated with uranium mining.⁹⁵ This lack of awareness is the main reason that the miners were exposed to unnecessarily high levels of radioactive material. The mining and milling processes are inherently dangerous and neither protection nor information was given to the miners to reduce the impact of uranium mining.

The delay in passing regulations to protect and educate the uranium miners caused unnecessary exposure to both the miners and their families.⁹⁶ One Navajo miner interviewed in the film, *The Four Corners, A National Sacrifice Area?*, said, “when I took the job, they didn’t tell me it was dangerous. I used to come home from work covered with uranium dust. It contaminated my children because we did not know it was dangerous. I probably ate it at lunchtime when my hands were grey with dust.”⁹⁷ The miners would bring home their work clothes covered in the radioactive material, which their children would play near and their wives would wash, exposing the entire family to the dangerous material and making them very ill.⁹⁸ The fact that the miners were not informed of the danger meant that they likely did not take the care that they otherwise would have around the dust, making the exposure greater for them and their families.

Beyond the exposure brought home from the mines, the miners were permitted by the mining companies to take the rocks left over from the mining process and use them to build houses. Because the Navajo people were not warned of the danger, they lived (and continue to live) amongst the leftover material, and even built their houses with the contaminants, further exposing them to radioactive material.⁹⁹ The Navajo people more than any other group working on the mines were kept largely unaware because they did not speak English, so they were disconnected from international discussions of the utility and danger of radioactive material.¹⁰⁰ Thus, as the miners were not aware of the risk, they continued to work, breathe poisonous dust, and build their homes near the mines.

⁹⁵ *The Four Corners: A National Sacrifice Area?* (Sacred Land Film Project 1983). Brugge & Globe, *supra* note 4, at 1410.

⁹⁶ See Brugge & Globe, *supra* note 4, at 1411; Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL’Y J. 188, 220 (2009).

⁹⁷ *The Four Corners*, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ See Removal Action Summary: Navajo Nation Radioactive Hogan Sites, Apache County, Arizona and San Juan County, Utah, <http://frontiernet.net/~nnepansp/Aum3.htm> (last visited Feb. 20, 2012).

¹⁰⁰ *The Four Corners*, *supra* note 95.

Over the years, although the process of uranium mining has changed, it is not any less dangerous now than it was before. The different processes are dangerous in distinct ways and the newer methods are meant to remove uranium found in quantities that would normally be too small to be efficiently removed using traditional mining methods. Mining in the past was all deep underground mining with explosives, equipment, and shovels.¹⁰¹ Rocks and dirt would be hauled away from the mines in uncovered trucks and taken to a milling site where the uranium would be removed using a chemical solution.¹⁰² Both mining and milling would then create large piles of radioactive rock and debris.¹⁰³ Uranium milling would also have tailing ponds of the waste containing radioactive material and the strong chemicals used to remove the uranium.¹⁰⁴ The main dangers with this kind of mining are the piles of radioactive materials that are brought up from the mines and left above ground, the dust that is scattered by trucks and trains carrying the material, and the hazardous ponds that surround the milling sites and leak into the ground.

The newer method, In Situ Leach (“ISL”) mining, is equally dangerous but involves pumping a high-pressured water and chemical solution into the ground and then using that solution to bring up uranium in quantities that would have been inefficient with traditional mining.¹⁰⁵ The solution is then sent to be processed to extract the uranium. There are two main risks surrounding this mining process. First, once the chemicals are injected into the soil, it is very difficult to remove them.¹⁰⁶ The process that is used forces radioactive material and other hazardous chemicals into the ground water and the aquifers in the area.¹⁰⁷ The ISL mining performed thus far has been done in areas in which the water quality was

¹⁰¹ TERRASPECTRA GEOMATICS, NORTHERN AUM REGION SCREENING ASSESSMENT REPORT 1 (2006) (Report prepared by TerraSpectra Geomatics for the EPA with the help of the U.S. Army Corps of Engineers and the Navajo Nation), *available at* [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/cf0bac722e32d408882574260073faed/0dd61b78cfe0b33a882573fd006c3e84/\\$FILE/Northern%20Region%20Screening%20Assessment%20Report.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/cf0bac722e32d408882574260073faed/0dd61b78cfe0b33a882573fd006c3e84/$FILE/Northern%20Region%20Screening%20Assessment%20Report.pdf).

¹⁰² *Id.*

¹⁰³ *Id.* at 1–2.

¹⁰⁴ Doug Brugge et al., *The Sequoyah Corporation Fuels Release and the Church Rock Spill: Unpublicized Nuclear Releases in American Indian Communities*, 97 AM. J. PUB. HEALTH 1595, 1597 (2007) (specifically describing the Puerco River spill which was an example of one of these ponds).

¹⁰⁵ Opening Brief for Petitioner at 13–14, *Morris v. U.S. Nuclear Regulatory Comm’n*, 598 F.3d 677 (2010) (No. 07-9505).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

already poor and there were few people in the area that might use the affected aquifers.¹⁰⁸ However, the arguments being presented by environmental groups and the Navajo are that the water quality is much higher and there are a large number of people that will be affected by this pollution.¹⁰⁹

The second serious risk with ISL mining is that although there are high standards of cleanup, these standards are often replaced with more relaxed standards by the Nuclear Regulatory Commission (“NRC”) when companies claim that sufficient cleanup is financially impossible.¹¹⁰ Thus, there has— at best—been successful reclamation of only one ISL mine.¹¹¹ Although the companies have tried to clean the water, this is a difficult process. Thus, the lack of success at cleaning the environment, while not entirely the companies’ fault, exemplifies that ISL mining should not be permitted in areas where a large number of people depend on the nearby underground aquifers. Still, ISL mining should not be banned, as it supports nuclear power, a necessary part of today’s world. However, federal agencies should not permit this mining in an area when there is clear evidence it will cause health problems and will not be sufficiently reclaimed. Continuing to allow ISL mining under these circumstances is evidence of the inadequacies of certain federal agencies, which will be discussed in the next section.

III. REGULATING URANIUM TAILINGS AND RADIOACTIVE WASTE

To address current mining issues, it is necessary to examine the legislation passed concerning uranium mining and the agencies charged with enforcement. This analysis is relevant for both regulation of current mining and cleanup of past mining. Diverse regulations have been passed to control different aspects of uranium mining and the milling process and a number of different agencies are set to enforce these statutes. These agencies often maintain contradicting policies about the proper standards for regulation, which cause them to conflict with each other. Accordingly, the inconsistencies between the agencies reduce efficiency as they end up working against each other in interpreting and enforcing the same mining

¹⁰⁸ *Id.* at 14.

¹⁰⁹ *Id.* at 6–11.

¹¹⁰ *Id.*

¹¹¹ Brief for Petitioner at 18–19, *Morris v. Nuclear Regulatory Comm’n*, 131 S. Ct. 602 (2010) (No. 10-368).

statutes. The clash between the EPA, NRC, and state agencies has shown up a number of times in cases on mining and milling. For example, *Hydro Resources, Inc. v. EPA* was based on a dispute about whether the New Mexico Environmental Department (“NMED”) or the EPA would make a decision about a proposal to use ISL mining.¹¹² The EPA refused to permit the mining while the NMED approved the mining permit.¹¹³ The same location was considered in *Morris v. U.S. Nuclear Regulatory Commission*, and is the subject of a lawsuit by environmental groups and Navajo individuals against the NRC and Hydro Resources, in which the NRC represented the opposite position of the EPA.¹¹⁴

The most prominent and utilized laws are the Clean Water Act (“CWA”), the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), the Uranium Mill Tailings Radiation Control Act (“UMTRCA”), the National Environmental Policy Act (“NEPA”), and the Resource Conservation and Recovery Act (“RCRA”). These laws enable federal and state agencies as well as the courts to control mining in or near Navajo territory. The Navajo people have also cooperated with or litigated against these statutes depending on the political position that the relevant agency (usually the EPA, NRC, or Geological Society) has taken according to its role in the regulatory process.

There are numerous distinctions between these different pieces of legislation that illustrate the impact of each law on uranium mining. CERCLA, UMTRCA, and RCRA focus on cleanup of past contamination. On the other hand, CWA and NEPA regulate current mining permits. The distinctions break down even further between the statutes. A particular relevant distinction between CERCLA and UMTRCA is the type of activity that the legislation controls. As the names indicate, UMTRCA is limited specifically to the cleanup of the tailings that are created by the milling process, not the mining process. CERCLA centers on any contamination, so the standards set in CERCLA are used to regulate the cleanup of the mines. However, CERCLA is excluded from regulating the uranium mills, which are strictly the responsibility of UMTRCA and its higher standards.¹¹⁵

¹¹² *Hydro Res., Inc. v. EPA*, 562 F.3d 1249 (10th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 8826 (2010).

¹¹³ *Id.*

¹¹⁴ *Morris v. U.S. Nuclear Regulatory Comm’n*, 598 F.3d 677 (10th Cir. 2010); *accord Morris v. Nuclear Regulatory Comm’n*, 131 S. Ct. 602 (2010).

¹¹⁵ U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE,

A. CWA

Although the CWA claims to regulate radioactive material and pollutants,¹¹⁶ courts hold that the CWA does not regulate uranium waste.¹¹⁷ Although uranium tailings are hazardous waste, they are not regulated under the CWA or the Clean Air Act.¹¹⁸ In *Train v. Colorado Public Interest Research Group*, the Supreme Court held that the CWA's regulation of pollutants does not include source, byproduct, and special nuclear materials.¹¹⁹ Theoretically, it is possible to use the CWA to give the EPA control over the other chemicals spilled into the environment during mining, but it has never been utilized by the EPA. Thus, the influence of the CWA on the uranium mining operation and cleanup is purely hypothetical and has not been utilized by the EPA to regulate uranium mining or milling.

B. CERCLA

CERCLA was passed to ensure cleanup of contaminated sites around the country and is relevant to uranium mining and milling because it has been applied to the reclamation of a number of sites on Navajo territory, such as the McKinley County site.¹²⁰ The cleanup is performed either by requiring the companies that caused the contamination to clean and purify the land to a reasonable level or, if the companies cannot be found, having the EPA clean up the area and later attempting to get compensation from the companies by suing them. The main aspects of CERCLA are that the agencies that enforce it, mainly the EPA and the U.S. Army Corps of Engineers, respond to the contamination claim by testing the area for dangers.¹²¹ Once the site has been examined, the agency lists the site and ensures that dangerous substances are cleaned up.¹²² These agencies then attempt to hold contaminators liable for the damage and theoretically try

OSWER NO. 9200.4-18, ESTABLISHMENT OF CLEANUP LEVELS FOR CERCLA SITES WITH RADIOACTIVE CONTAMINATION (1997), *available at* <http://www.epa.gov/superfund/health/contaminants/radiation/pdfs/radguide.pdf>.

¹¹⁶ Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1987).

¹¹⁷ *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 1 (1976).

¹¹⁸ 4 William H. Rodgers, Jr., *Rodgers' Environmental Law* § 7:8 at 6-7 (Thomas/West 2011).

¹¹⁹ *Train*, 426 U.S. at 1.

¹²⁰ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604 (2005).

¹²¹ *Id.*

¹²² *Id.* at § 9605.

to make sure that the innocent are compensated for their injuries.¹²³ All of the parties potentially held responsible (owners at the time of the contamination, current owners, operators, and the person that organized for the disposal of the hazardous substance) are jointly and severally liable, making it easier to find someone liable for cleaning up the site and ensuring that those parties somehow pay for the entire cleanup.¹²⁴

The uranium mining cases on Navajo land that have been placed on the National Priorities List and that have begun to be cleaned up are in various states of being reclaimed by the companies found to be responsible. For the site in McKinley County, the EPA is in the process of permitting the mining companies responsible for cleaning the hazardous site to be excused from achieving certain standards of clean-up for some of the chemicals remaining on the site.¹²⁵ The Navajo live on this site (the United Nuclear Corporation (“UNC”) site), which was put on the Superfund Priorities list for cleanup in September 1983.¹²⁶ In July 1983, the company was required to begin cleanup of the contaminated water and the tailings that had been left in the open.¹²⁷ The site is still not completely cleaned, and the company, as of January 2012, is asking the EPA to make exceptions for certain chemicals that cannot be removed from the groundwater to sufficiently meet the EPA standards.¹²⁸ The EPA has reported that the “UNC has evaluated the technical impracticability (TI) of achieving cleanup standards for sulfate, total dissolved solids (TDS) and manganese and recommended that EPA invoke a TI waiver for these constituents.”¹²⁹ The EPA considered the small population living around the contamination and the population’s use of bottled water as its main water resource as reasons to permit the lower standards for contamination cleanup.¹³⁰ Thus, even for the sites that are being cleaned up and are near completion, the EPA is allowing lower standards without acknowledging

¹²³ *Id.* at § 9607–08.

¹²⁴ *Id.*

¹²⁵ See U.S. ENVTL. PROT. AGENCY, *supra* note 26.

¹²⁶ U.S. ENVTL. PROT. AGENCY, SECOND FIVE-YEAR REVIEW FOR THE UNITED NUCLEAR CORPORATION GROUND WATER OPERABLE UNIT (Sept. 2003), *available at* http://www.epa.gov/region6/6sf/newmexico/united_nuclear/nm_united_nuclear_2nd-5yr_review.pdf.

¹²⁷ NPL Site Narrative for United Nuclear Corp., National Priorities List, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/sites/npl/nar766.htm> (last updated Dec. 21, 2011).

¹²⁸ See U.S. ENVTL. PROT. AGENCY, *supra* note 26.

¹²⁹ *Id.* at 2.

¹³⁰ See *id.* at 3; *accord* Collins & Hall, *supra* note 83, at 296.

the illness this has already caused the Navajo and will continue to cause the Navajo without sufficient cleanup.

In addition, none of the Navajo who were affected by the uranium spill were compensated until February 16, 2011, even though compensation is technically a part of CERCLA's requirement.¹³¹ The Navajo Nation finally received a meager \$1.2 million settlement as a result of the efforts of the Navajo Nation's Department of Justice and the U.S. DOJ in filing a claim against Tronox for its participation in past uranium mining.¹³² This new development demonstrates the need for aggressive action from the Navajo government in order to help its people recover from uranium contamination. Even with aggressive action, compensation was long delayed. The Navajo Nation's Department of Justice had to take the helm of compensation recovery for those who were already ill because the EPA instead chose to focus its attention on the Environmental Response and Liability sections of CERCLA.¹³³

C. UMTRCA

UMTRCA is similar to CERCLA because it regulates cleanup, but unique since it also delegates agency authority for new milling regulations. UMTRCA was passed in 1978 to specifically respond to the contamination of uranium mills.¹³⁴ The first part of UMTRCA requires the cleanup of past uranium mills, while the second part concerns regulation by the NRC and EPA.¹³⁵ The EPA sets the standard for UMTRCA that is hopefully consistent with the standards set by the RCRA, and then the NRC enforces the EPA standards. The standards set by the EPA for UMTRCA are supposed to be in accordance with RCRA standards and subsequently enforced by the NRC.¹³⁶ UMTRCA requires the NRC to

¹³¹ Press Release, Navajo Nation Env'tl. Prot. Agency, Office of the Exec. Dir., Navajo Nation Receives \$1.2 Million from Tronox Bankruptcy Settlement for Uranium Clean Up Efforts (Feb. 24, 2011) [hereinafter \$1.2 Million Settlement], *available at* <http://www.navajonationepa.org/poffiles/tronoxsettlementannounce022511.pdf>.

¹³² *Id.*

¹³³ *Id.*; accord U.S. ENVTL. PROT. AGENCY, *supra* note 26.

¹³⁴ U.S. ENVTL. PROT. AGENCY, OSWER NO. 9200.4-18, ESTABLISHMENT OF CLEANUP LEVELS FOR CERCLA SITES WITH RADIOACTIVE CONTAMINATION AT ATTACHMENT B4 (1997), *available at* http://www.epa.gov/radiation/docs/cleanup/rad_arar.pdf.

¹³⁵ U.S. Env'tl. Prot. Agency, Laws We Use: 1978—Uranium Mill Tailings Radiation Control Act, Laws We Use (Summaries), *available at* http://www.epa.gov/rpdweb00/laws/laws_sum.html#umtrca (last updated Feb. 10, 2010).

¹³⁶ *Id.*

regulate the current milling operations that are licensed by the NRC.¹³⁷ A 2003 study conducted by the Navajo Nation Environmental Protection Agency reported that there was ongoing radioactive contamination in the water, soil, and homes in the area.¹³⁸ This demonstrates that the cleanup standards set for UMTRCA have not been met since contaminated materials remain around Navajo homes and more mills are being permitted on top of un-reclaimed past waste.

There are numerous problems with UMTRCA and CERCLA that have prevented this legislation from achieving its original goals. This is partly because not all radioactive waste is classified the same. CERCLA is responsible for regulating cleanup of uranium mines, but maintains low cleanup standards.¹³⁹ Also, it has many higher priority contamination sites to consider compared to some of the mine tailings left on Navajo land.¹⁴⁰ Thus, despite the existence of radioactive material, the limitations on UMTRCA and the lack of priority standing has resulted in CERCLA's inability to completely regulate and enforce the waste cleanup.¹⁴¹

Another concern with UMTRCA is that it grants the NRC authority to regulate uranium milling outside of the normal federal land jurisdiction that NEPA is based on: so the NRC's jurisdiction is not limited by federal land.¹⁴² This illustrates the overarching authority of the NRC and federal government over nuclear material, which the NRC inherited from its predecessor, the AEC.¹⁴³ Through UMTRCA, the NRC is required to consider the environmental impact of all of its permits,¹⁴⁴ and because it is taking federal action (since ISL mining permits are federal actions), it must, according to NEPA, set out these considerations through an Environmental Impact Statement ("EIS"), which will be discussed in the next section.¹⁴⁵ However, these ISL mining permits are often granted too

¹³⁷ *Fact Sheet on Uranium Mill Tailings*, U.S.NRC, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/mill-tailings.html> (last updated Feb. 4, 2011).

¹³⁸ Tsosie, *supra* note 96, at 221.

¹³⁹ See U.S. ENVTL. PROT. AGENCY, OSWER No. 9200.4-18, ESTABLISHMENT OF CLEANUP LEVELS FOR CERCLA SITES WITH RADIOACTIVE CONTAMINATION AT ATTACHMENT B1-B7 (1997), available at http://www.epa.gov/radiation/docs/cleanup/rad_arar.pdf.

¹⁴⁰ Abandoned Uranium Mines (AUMs), Navajo Superfund Program White Paper (April 2000), <http://frontiernet.net/~nnepansp/Aum2.htm>; *accord* Begay v. United States, 591 F. Supp. 991, 1003 (D. Ariz. 1984).

¹⁴¹ *El Paso Nat. Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009).

¹⁴² Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 2021 (2006).

¹⁴³ *Id.* at § 2021(b) (2006).

¹⁴⁴ *Id.* at § 2021-22 (2006).

¹⁴⁵ National Environmental Policy Act, 42 U.S.C. § 4321 (2006).

easily by the NRC, which reduces environmental impact standards that the companies must meet. In numerous cases, the EIS was deemed unnecessary or the company was allowed to use different standards to measure existing environmental conditions for the environment, which is necessary to establish a baseline.¹⁴⁶ Through the reduced requirements, the NRC follows the procedural requirements set forth by UMTRCA. However, substantively, the NRC makes decisions that are inconsistent with Congress's intentions and overly harm the environment.¹⁴⁷

D. NEPA

NEPA requires federal agencies to consider the environmental impact of their actions.¹⁴⁸ According to NEPA, specific projects that require federal agency permits, approval, and assistance are considered federal actions, thus requiring EIS consideration.¹⁴⁹ This normally excludes action on state or private property, which is controlled by state equivalents of NEPA.¹⁵⁰ NEPA requirements are mainly implemented to ensure procedural compliance. The agency must put together an EIS (or have the company that is applying for federal approval put it together).¹⁵¹ The EIS must include information about the project's environmental impact as well as considerations of less harmful alternatives.¹⁵² As long as the agency performs this procedure and considers the alternatives, it should have no trouble making a decision that will be supported by the courts, whether it wants to continue the project or pursue an alternative.¹⁵³

To date, courts have deferred to agency discretion in such decisions so long as the procedures were performed correctly.¹⁵⁴ In one of the early NEPA cases, *Calvert Cliffs' Coordinating Committee v. U.S. AEC*, for example, the court overturned an agency's procedure and decision by holding that an agency cannot just make an EIS and then ignore it.¹⁵⁵ The

¹⁴⁶ *Peshlakai v. Duncan*, 476 F. Supp. 1247, 1250–51 (D.D.C. 1979); Brief for Petitioner, *supra* note 111, at 3.

¹⁴⁷ Opening Brief for Petitioner, *supra* note 105, at 27–28.

¹⁴⁸ 42 U.S.C. § 4321.

¹⁴⁹ 40 C.F.R. § 1508.18 (2011).

¹⁵⁰ *Id.*; accord *Begay v. United States*, 591 F. Supp. 991, 1003 (D. Ariz. 1984).

¹⁵¹ 42 U.S.C. § 4332.

¹⁵² *Id.*

¹⁵³ *Id.*; accord *Calvert Cliff's Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

¹⁵⁴ *Calvert Cliff's*, 449 F.2d at 1118.

¹⁵⁵ *Id.*

court held that NEPA requires at least an “automatic consideration of environmental factors” and held that the agency “must at least examine the statement carefully . . . [a]nd it must independently consider the final balance among conflicting factors that is struck in the staff’s recommendation.”¹⁵⁶ Later cases have held that as long as the agency approving the EIS takes the necessary procedural steps to consider the EIS, the court cannot challenge the substantive decision made by the agency.¹⁵⁷ In *Strycker’s Bay Neighborhood Council, Inc. v. New York*, the court upheld an agency decision by deeming that NEPA is meant “to insure a fully informed and well-considered decision,”¹⁵⁸ and that “the only role for a court is to insure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”¹⁵⁹ Thus, NEPA requires that the agency consider the environmental impact but does not have substantive requirements on what decisions need to be made, which creates problems for community groups and the Navajo government when they are appealing NRC decisions over insufficient application of NEPA.¹⁶⁰

NEPA demonstrates one of the many ways that courts have prevented petitioners from halting mining and milling. This is particularly problematic because the responsible agency has systematically failed to prevent environmental problems and injuries to people living around uranium operations. In *Peshlakai v. Duncan*, plaintiffs claimed that the project being considered was a violation of NEPA.¹⁶¹ The U.S. Geological Survey decided that a full EIS was unnecessary because its research indicated that the initial exploration would not significantly impact the environment.¹⁶²

NEPA does not always require an EIS, but the agency responsible for creating the EIS is the one deciding if it is necessary. While the plaintiffs can appeal that decision, they are seldom successful. The court held in *Peshlakai* that “the responsibility for making a threshold determination as to whether an EIS is required by NEPA for a particular project lies with

¹⁵⁶ *Id.*

¹⁵⁷ *Strycker’s Bay Neighborhood Council, Inc. v. New York*, 444 U.S. 223, 227–28 (1980).

¹⁵⁸ *Id.* at 227. (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Counsel, Inc.*, 435 U.S. 519, 558 (1978)).

¹⁵⁹ *Id.* at 227–28 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

¹⁶⁰ *Peshlakai v. Duncan*, 476 F. Supp 1247 (D.C. Cir. 1979).

¹⁶¹ *Id.*

¹⁶² *Id.*

the federal agency involved. The burden is on plaintiffs to establish that a decision not to require an EIS constitutes a violation of NEPA.”¹⁶³ The court further held that this “decision will be reversed by a court only if it is unreasonable or arbitrary and capricious.”¹⁶⁴ Proper EIS and its considerations were also being unsuccessfully argued by the New Mexico Environmental Law Center in its appeal of ISL mining pursued near the towns of Church Rock and Crowpoint, which border the Navajo Nation.¹⁶⁵ Apparently, the courts have been giving these agencies too much deference by allowing them the authority to make significant decisions as long as they follow the correct environmental procedure. The NRC, the agency responsible for regulating mining, is not properly regulating these requirements either. Thus, when the agency fails to properly regulate and the courts defer to the agency, it is difficult for the public to appeal these decisions that are causing contamination and injury.¹⁶⁶

E. FEDERAL VERSUS STATE AUTHORITY (BUT NEVER TRIBAL AUTHORITY)

There are also distinctions based on the traditional responsibility of federal or state agencies that further subdivide the responsibility of different agencies to regulate particular activities. Like every other mining operation on private or state land, underground uranium mining is solely the responsibility of the state.¹⁶⁷ For environmental impact regulation (NEPA), there is also a divide in whether the state or federal government has jurisdiction over a particular activity. NEPA only gives federal agencies like the NRC and the EPA the ability to regulate on federal land.¹⁶⁸ If the state agency creates a program that sufficiently regulates water use, the EPA can grant the state primary authority to supervise public water systems on state land.¹⁶⁹ In New Mexico, the EPA ceded authority to the NMED. The problems surrounding this grant of power

¹⁶³ *Id.* at 1251–52.

¹⁶⁴ *Id.* at 1252.

¹⁶⁵ *Id.*; accord Brief for Petitioner, *supra* note 111, at 2–4.

¹⁶⁶ Opening Brief for Petitioner, *supra* note 105, at 27–28; Petition for Writ of Certiorari, *supra* note 27, at 4.

¹⁶⁷ *Begay v. United States*, 591 F. Supp. 991, 1001 (D. Ariz. 1984).

¹⁶⁸ See National Environmental Policy Act, 42 U.S.C. § 4321 (2006).

¹⁶⁹ *Id.* at §§ 4321–75 (1982). See also *States with NEPA-like Environmental Planning Requirements*, NATIONAL ENVIRONMENTAL POLICY ACT, http://ceq.hss.doc.gov/state_information/states.html (last visited Jan. 22, 2012) (explaining that “[s]everal states have environmental planning requirements that are similar to NEPA.”).

were litigated in *Hydro Resources, Inc. v. U.S. EPA*, in which the court concluded that “the state and county exercise jurisdiction over private lands throughout the checkerboard area.”¹⁷⁰ These mines are out of the EPA’s authority, in an area of Church Rock called the Checkerboard, which is very near Navajo land.¹⁷¹ However, while ISL mining is regulated by the state for environmental impact (instead of regulated by the EPA), the uranium milling process is still regulated by the NRC because it is considered a milling process of radioactive material.¹⁷²

The land the mine will be on is checkerboard where the land switches between Native American, private, state, and federal land.¹⁷³ The mining will be near the Navajo reservation and its impact will cross borders and affect the Navajo reservation (the authority of the Navajo government was never considered).¹⁷⁴ The argument made by the EPA in this case is based on the EPA’s regulations under the Safe Drinking Water Act (“SDWA”). The SDWA defines “Indian country” as “(1) reservations, (2) ‘dependent Indian communities,’ and (3) allotments.”¹⁷⁵ It is land that is “set aside under federal protection for the residence of tribal Indians, regardless of origin.”¹⁷⁶ Therefore, even though the land may not be part of the main Navajo Nation territory, if it is part of the trust that the federal government is holding and protecting for the Navajo people, the EPA and other federal agencies should be the sole powers that regulate that area. However, if the land is actually just private property or part of the land that belongs to the state, then the authority has been delegated to the NMED through the federal limitation of NEPA.¹⁷⁷ The dispute thus became about whether the EPA or the NMED had the authority to examine and approve (or disapprove as the EPA would do) the mining company’s underground injection control permit application.¹⁷⁸ The standards that the EPA sets for

¹⁷⁰ *Hydro Res. Inc., v. U.S. Env’tl. Prot. Agency*, 608 F.3d 1131, 1137 (10th Cir. 2010).

¹⁷¹ *Id.*

¹⁷² *Id.*; *Regulation of Radioactive Materials*, U.S. NUCLEAR REGULATORY COMM’N, <http://www.nrc.gov/about-nrc/radiation/protects-you/reg-matls.html> (last visited Mar. 28, 2012) [hereinafter *Radioactive Materials*].

¹⁷³ *Hydro Res., Inc. v. U.S. Env’tl. Prot. Agency*, 562 F.3d 1249, 1256–57 (10th Cir. 2009) *overruled by Hydro Res. Inc.*, 608 F.3d 1131 (10th Cir. 2010).

¹⁷⁴ *Hydro Res., Inc. v. Env’tl. Prot. Agency*, 562 F.3d 1249 (10th Cir. 2009), *rev’d*, 608 F.3d 1131.

¹⁷⁵ *Hydro Res., Inc.*, 562 F.3d at 1253.

¹⁷⁶ *Id.* at 1272 n.1 (quoting FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 34 (Rennard Strickland ed. 1982)).

¹⁷⁷ *Hydro Res., Inc.*, 608 F.3d at 1134.

¹⁷⁸ *Id.* at 1174.

these programs are meant to ensure that no mining takes place in areas that endanger drinking water sources.¹⁷⁹ The court held that the mine was on private land. However, although the land is not on the main Navajo territory, the nature of the checkerboard means that it will impact Navajo land. If the land is private property or belongs to the state, then the authority has been delegated to NMED by the EPA through the SDWA and the federal government is precluded from regulating despite the damage that could be done to the land the EPA maintains authority over.¹⁸⁰ However, although the EPA did not have the authority to regulate the impact of the mining, the NRC's duty to monitor milling processes like ISL mining means that it still has authority.¹⁸¹

F. NRC: THE MOST RESPONSIBLE AND IRRESPONSIBLE AGENCY

The NRC is a particular problem for Navajo and environmental groups that are trying to prevent uranium milling development, or force the complete reclamation of a contaminated site. The NRC is supposed to be a regulatory agency, however it becomes difficult to actually regulate when it also helps companies receive permits to mine without properly meeting the necessary safety requirements.¹⁸² According to the Code of Federal Regulations, the NRC must consider information about "proposed specifications relating to milling operations and the disposition of tailings or wastes resulting from such milling activities."¹⁸³ However the NRC's regulations permit mining in areas where it will negatively affect a large population of Navajo, without proper plans of reclamation.¹⁸⁴

The NRC is not behaving as a regulatory agency, which is why a number of environmental groups and Navajo people are suing the NRC.¹⁸⁵ The NRC permits new ISL mines to be started with reduced standards for

¹⁷⁹ *Id.* at 1138.

¹⁸⁰ *See, e.g., id.* at 1132 (the petitioner's land did not fall within a "dependent Indian community" and therefore the proposed mine was not subjected to EPA regulation).

¹⁸¹ *Regulation of Radioactive Materials, supra* note 172.

¹⁸² Petitioners' Revised Opening Brief, *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677 (10th Cir. 2010) (No. 07-9505), 2007 WL 4732316, at *27 [hereinafter *Petitioners' Revised Opening*]; *Petition for a Writ of Certiorari, supra* note 27, at 11–12.

¹⁸³ 10 C.F.R. § 40, App. A.

¹⁸⁴ Opening Brief for Petitioner, *supra* note 105.

¹⁸⁵ *See, e.g., Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677 (10th Cir. 2010) (petitioning for review, by a non-profit environmental organization, community organization, and two local ranchers, of NRC's issuance of license for ISL uranium mining at multiple sites near the Navajo Reservation).

environmental protection in areas where past mines still contain contaminants that exceed the level allowed by the NRC's own regulations for cleanup.¹⁸⁶ This lack of regulation and lack of cleanup will combine to magnify contamination and radioactive emissions. This careless disregard for decreasing habitability demonstrates that the NRC is an ineffective source of regulation and does not adequately protect the interests of the people living near the mills and mines under their authority.

In *Morris v. NRC*, the NRC and Hydro Resources are being sued because the NRC is permitting Hydro Resources to begin preparation for an ISL mining operation near an aquifer and without the regular EIS.¹⁸⁷ This may result in people in the nearby area receiving contaminated drinking water.¹⁸⁸ The courts defer to NRC regulatory authority despite the fact that Navajo and environmental groups fighting the NRC's decision have reasons that show that the permitted contamination is not being correctly considered by the NRC.¹⁸⁹

The first problem pointed out in the *Morris* appeals is that the NRC allows mining companies to avoid standard paperwork with a simplified version of the EIS that does not reasonably consider environmental impact.¹⁹⁰ Instead of requiring a regular EIS, which is the general practice for permitting ISL mining, the NRC requires a General Environmental Impact Statement ("GEIS").¹⁹¹ The problem with the GEIS is that it does not require the site-specific exploration of the impact of a particular mining operation on the area, instead applying a generic document to all mine sites in Nebraska, New Mexico, South Dakota, and Wyoming.¹⁹² Also, the GEIS "would limit public participation in licensing proceedings, and would reduce the type of studies required at each site."¹⁹³ The GEIS enables a corporation to begin mining with reduced standards of environmental protection.¹⁹⁴ Also, with less opportunity for the public to have input, there is less of a chance for people that have already suffered

¹⁸⁶ Petitioners' Reply Brief at 3, *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677 (10th Cir. 2010) (No. 07-9505), 2007 WL 4732317, at *3 [hereinafter Petitioners' Reply].

¹⁸⁷ *Morris*, 598 F.3d at 682.

¹⁸⁸ Petitioners' Reply, *supra* note 186, at 13.

¹⁸⁹ Petition for Writ of Certiorari, *supra* note 27, at 8.

¹⁹⁰ Petitioners' Revised Opening, *supra* note 182, at *4.

¹⁹¹ *Id.*

¹⁹² Eric Jantz, *Nuclear Regulatory Commission (NRC) ISL GEIS*, N.M. ENVTL. LAW CTR. (July 2007), http://nmenvirolaw.org/index.php/site/cases/nuclear_regulatory_commission_nrc_isl_geis/.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

from past radioactive waste to prevent further contamination and exposure to radioactive material by appealing the EIS. With these concerns, the GEIS appears to be completely opposite to the needs of the public. It is forcing people to live under poorer safety standards and dangerous exposure without an opportunity to appeal agency decisions within the NRC or to the courts.¹⁹⁵

The second problem discussed in *Morris* is both the NRC's and the court system's failure to understand the risks and consequences of permitting certain mining.¹⁹⁶ ISL mining in particular uses a large quantity of water and presents a risk of contamination to the ground water in any area that it has been used in.¹⁹⁷ The NRC permitted the company to use testing methods of water quality below the standards required by the EPA.¹⁹⁸ It also allowed the company to postpone presenting a reclamation and restoration plan for water quality.¹⁹⁹ However, the court held that "the NRC's interpretation of [the statute] was entitled to deference because it was not 'plainly erroneous' or inconsistent with the NRC's statements of intent in promulgating the regulations."²⁰⁰ As the sole dissenting judge in the court of appeals, Judge Lucero pointed out that the NRC's conclusion "violates a fundamental rule of construction . . . [and] the majority's decision . . . will unnecessarily and unjustifiably compromise the health and safety of the people who currently live within and immediately downwind of [the area of the proposed mine site]."²⁰¹ In this case, unlike ISL mining in the past, the water in part of the affected area is good quality.²⁰² The risk of affecting a pure water source that people rely on in a desert locale demonstrates how permitting ISL mining in this area is irresponsible of the NRC and the courts that uphold the permitted application, which instead should hold that the NRC decision is "plainly erroneous".²⁰³

Third, as the Navajo Nation explained in its brief for appeal of the

¹⁹⁵ *Regulation of Radioactive Materials*, *supra* note 172.

¹⁹⁶ See Petitioners' Revised Opening, *supra* note 182, at 3–5.

¹⁹⁷ Petition for Writ of Certiorari, *supra* note 27, at 4.

¹⁹⁸ *Id.* at 18.

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 8 (citing *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 688–89 (10th Cir. 2010)).

²⁰¹ *Id.* at 8–9. (citing *Morris*, 598 F.3d at 705–07 (Lucero, J., dissenting)).

²⁰² *Id.* at 11. Also, it will arguably affect a nearby underground aquifer that is used for drinking water (although the mining company and the NRC claim that there is no chance this will happen). *Id.* at 17.

²⁰³ Opening Brief for Petitioner, *supra* note 105, at 27–28.

Morris case, the NRC's interpretation of the regulations violates the federal/tribal relationship.²⁰⁴ According to precedence, "an agency must 'consider its strict fiduciary obligation when interpreting regulations that directly affect its 'administration of Indian lands.'"²⁰⁵ This requires the agency to adopt an interpretation of a statute "that is most consonant with the unique federal/tribal relationship" to preserve the health and wellbeing of the tribe.²⁰⁶ The NRC is evidentially disregarding Navajo life, instead following interpretations of statutes inconsistent with the wellbeing of the Navajo or the policies of the tribal government. The NRC is thus not protecting the interests of the federal/tribal relationship, which federal agencies are responsible for. As the NRC disregards both the rights of the tribe and the safety of the individual Navajo in favor of helping mining companies reduce liability, it is clear how far the NRC's actions have strayed from those of a proper regulatory agency.

G. PROBLEMS WITH THE STATUTES: DEFERENCE TO AGENCY DECISIONS

As embodied by the problems with the NRC, statutes give agencies too much authority essentially independent of judicial review.²⁰⁷ The judiciary defers to the judgment of the agencies' interpretations of the statutes so long as the agency's explanations are not completely unreasonable.²⁰⁸ The standard of review for these kinds of cases, explained in *Quivira Mining Co. v. U.S. Nuclear Regulatory Commission*, is that a court will only change an agency's decision if the agency's rule is held to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁰⁹ An agency decision will be overturned only if:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a

²⁰⁴ Brief Amicus Curiae of the Navajo Nation in Support of Appellants' Petition for Rehearing and Rehearing en Banc at 7, *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677 (10th Cir. 2010) (No. 07-9505), 2010 WL 2154294, at *7 [hereinafter Brief Amicus Curiae].

²⁰⁵ *Id.* at 7 (citing *HRI, Inc. v. Env'tl. Prot. Agency*, 198 F.3d 1224, 1246 (10th Cir. 2000)).

²⁰⁶ Brief Amicus Curiae, *supra* note 204, at 7-8.

²⁰⁷ See discussion *supra* Part III.6.

²⁰⁸ *Id.*

²⁰⁹ *Quivira Min. Co. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1246, 1249 (10th Cir. 1989).

difference in view or the product of agency expertise.²¹⁰

Thus, unless any of the aforementioned standards are met, courts will defer to Congress and the agency's interpretation of Congress's will. Here the court limited its inquiry to "whether the NRC ensured that the costs of its general approach to regulating uranium mill tailings, as embodied in the unamended criteria, were reasonable in light of the benefits to be gained from such regulation."²¹¹ Because of the court's deference, the Navajo are unable to appeal NRC decisions. To counter this powerlessness, the Navajo Nation needs power to control activities affecting Navajo land, which includes activity near Navajo territory.

IV. FAILED ATTEMPTS AT COMPENSATION AND REPARATION

The inability to achieve compensation or reparation for the damage and illnesses caused by mining demonstrates a consistent pattern of injustice to the Navajo by mining companies and the U.S. government, which has refused to hold companies responsible for their actions. While this injustice may not be a direct result of prejudice against the Navajo, greed and a lack of imposed responsibility have resulted in prejudice that the law has permitted thus far. The government's actions are resulting in prejudice against the Navajo. Although all miners were not told about the dangers, the Navajo were still prevented from later applying for compensation due to conflicts between the American legal culture and the unique Navajo culture. This cultural divide inhibited the Navajo's ability to prove their case for compensation. The Supreme Court has continued to rule that the Navajo courts do not have authority to try the cases, which further prevents the Navajo from effectively achieving compensation and justice.²¹² Thus, nearly all of the lawsuits being pursued by the Navajo to either gain compensation or force regulation have been ineffective. Thus far, the sole successful case has been the recent lawsuit against a mining company by the Navajo Nation as reimbursement for past contamination;²¹³ federal courts have dismissed all other lawsuits.²¹⁴

²¹⁰ *Id.*

²¹¹ *Id.* at 1254.

²¹² *Id.*

²¹³ \$1.2 Million Settlement, *supra* note 131.

²¹⁴ *Brugge & Globe*, *supra* note 4, at 1415-16.

A. LAWSUITS BY MINERS—SUING THE GOVERNMENT AND COMPANIES
FOR PAST MISDEEDS

There have been numerous lawsuits against both the U.S. government and the uranium mining companies for failing to provide adequate safety. First, however, in an attempt to gain reparations for their illnesses, the Navajo miners attempted to encourage the passage of federal legislation that would extend compensation for black lung disease survivors to include uranium miners.²¹⁵ When the legislation attempt was unsuccessful, the uranium miners, with the help of Stuart Udall, former Secretary of the Interior, sued both the U.S. government and the companies in 1979.²¹⁶ In both cases, the plaintiffs lost.

The case against the companies was lost on the grounds that the miners would be compensated for their illnesses through workers' compensation, though most miners were not actually compensated.²¹⁷ Court precedence throughout the state has held that workers' compensation "precludes lawsuits against the workers' employer for occupational health and safety injuries or illness."²¹⁸ New Mexico, like most states, held that in instances of injury within the scope of employment, compensation according to the Workers' Compensation Act provides compensation that excludes other liability.²¹⁹ In the cases against the mining companies, the miners' injuries were within the scope of employment and the companies were excluded from other liability.²²⁰

The U.S. government is immune to most lawsuits, including those concerning the uranium exposure of the miners, because the government had national security reasons for uranium purchase and promotion, rather than regulation.²²¹ The policy reason behind this is that government officials need to be immune from lawsuits so they are not afraid to make difficult decisions for the good of the country.²²² However, the government would later accept some responsibility when it passed laws to compensate the uranium miners, such as the Radiation Exposure Compensation Act.

²¹⁵ *Id.* at 1415.

²¹⁶ *Id.* at 1416; *Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984).

²¹⁷ *Brugge & Globe*, *supra* note 4, at 1416.

²¹⁸ *Id.*

²¹⁹ N.M. Stat. Ann. § 52-1-9 (2011).

²²⁰ *Brugge & Globe*, *supra* note 4, at 1416.

²²¹ *Begay*, 591 F. Supp. at 1012-13.

²²² *Id.* at 1011.

The miners sued the government for failing to inform them about the dangers from work in the mines and for failing to enforce standards on the mining companies to reduce exposure.²²³ The courts held that the government is immune because the U.S. was acting for national security reasons.²²⁴ The court construed the uranium mining and milling as a valid government purpose. A result of the court's interpretation, the lack of information given to the miners—including the public health study, were all considered to be a part of the government's valid goal to protect the nation.²²⁵ The appeals court concluded from the evidence that "the decision reached by Holaday [Chief of PHS's investigation team], not to disclose the possible dangers of uranium mining to the miners was based on his judgment of what the best course of action was under the existing circumstances."²²⁶ Since these actions were taken under the Surgeon General's authority, they are protected by the discretionary power of the executive branch, preserving this decision by the PHS from judicial review.²²⁷ The district court analyzed the steps taken by federal agencies to suggest that action should have been taken sooner, but the court could not permit the suit.²²⁸

B. RADIATION EXPOSURE COMPENSATION ACT—PROBLEMS WITH GOVERNMENT COMPENSATION

The U.S. government, however, accepted some responsibility for its participation in the contamination, which was created as part of the uranium boom, when it passed the Radiation Exposure Compensation Act in 1990 ("RECA"), for the purpose of ensuring that miners were compensated for their injuries.²²⁹ Uranium miners are eligible for compensation if they can show that they had worked for a mine in a particular period, had health problems related to radon exposure in mines, and had sufficient Working Level Month Exposure to Radiation ("WLM").²³⁰ This is set using the half-life of the daughters of radon, or the radioactive decay products of radon, that release energy and are calculated

²²³ *Id.*; Brugge & Globe, *supra* note 4, at 1416.

²²⁴ Brugge & Globe, *supra* note 4, at 1416.

²²⁵ *Id.*

²²⁶ *Begay v. United States*, 768 F.2d 1059, 1065 (9th Cir. 1985).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Brugge & Globe, *supra* note 4, at 1416.

²³⁰ 28 C.F.R. 79.41(n)-(o) (2004) (WLM is the accumulation of radioactive exposure by a uranium miner that the miner will be exposed to every day).

to be exposed to a certain level a day.²³¹ However, miners could gather “an equivalent cumulative exposure over a greater or lesser amount of time” if working in a mine with poorer ventilation, which means the exposure to dust is greater.²³² Also, the miner applying for compensation is required to meet a higher standard for WLM if the miner was considered a smoker.²³³ If a miner meets all of the requirements for RECA, then the miner would have the opportunity to receive up to \$100,000 in compensation from the government.²³⁴

However, the Navajo uranium miners’ applications for compensation are often rejected and their appeals through the court system have been ineffective.²³⁵ This is due in part to the high standard imposed on smokers, but also due to the ethnic and cultural reasons.

One of the factors that make it more difficult for Navajo miners to win compensation is the language barrier. Many Navajo miners did not speak English.²³⁶ The Navajo’s education on the reservation and their general mistrust of the American government resulted in a unique language barrier and a lack of exposure to the American legal system.²³⁷ They had to use interpreters to speak to both doctors and the investigators for the Justice Department.²³⁸ The language barrier also made it more difficult to understand the process of applying for compensation and then appealing the decisions of the Justice Department.²³⁹ As Udall said, “[T]hey’ve put these people in a bureaucratic legal maze designed to prevent compensation to Navajo miners. There’s no pity for what happened to these people. No understanding.”²⁴⁰ This compensation problem continues to be difficult and frustrating for the Navajo to overcome.

In addition, the Navajo miners often lack medical and other historical records including records of their births or proof of medical treatment which is a result of “a traditional system of undocumented tribal law and

²³¹ *Id.*

²³² 28 C.F.R. 79.41(o) (2004).

²³³ *Id.*

²³⁴ *Howell v. Reno*, 939 F. Supp. 802, 804–05 (D. Colo. 1996).

²³⁵ *Id.* at 802; Keith Schneider, *A Valley of Death for the Navajo Uranium Miners*, N.Y. TIMES, May 3, 1991, at A1.

²³⁶ *Id.*

²³⁷ JUDY PASTERNAK, *YELLOW DIRT: AN AMERICAN STORY OF A POISONED LAND AND A PEOPLE BETRAYED* 21–22 (Free Press 2010).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Schneider, *supra* note 235.

custom.”²⁴¹ They also face problems proving that they even worked in the mines because often neither they nor the mining companies have any documentation.²⁴²

Third, this is exacerbated because Navajo miners often lack regular documentation that citizens of the U.S. usually have, such as marriage documents. Therefore, unlike their non-Native American counterparts who have been compensated because they speak English and are familiar with “American traditions,” the Navajo have been denied compensation for reasons that amount to ethnic and cultural prejudice.²⁴³ The Director of the Torts Branch of the Justice Department explained in 1993 that they were attempting to avoid fraud, but “the problem in most cases is that we have not received the documents we need to establish the illness.”²⁴⁴ However, during the 1940s, which is the time period for when documentation is required, the Navajo often did not document their marriages.²⁴⁵ The Navajo who are appealing the delayed or unfavorable compensation decisions by the Justice Department, with the help of Stuart Udall, argue that while the government began to compensate miners for their health problems, it has not done this fairly. Amongst the 1,112 miners that filed for compensation in 1993, 328 claims were approved, while “just 54 of those who have received payments are Navajos.”²⁴⁶ Although the government may not have intended to discriminate against the Navajo, the organization and implementation of the compensation program, which ignore tribal culture, constitutes prejudice. The prejudice against this minority group, combined with past injustices makes the lack of success with lawsuits particularly frustrating.

C. LAWSUITS CONCERNING REMAINING WASTE—GETTING CONTAMINATION CLEANED UP

Besides the injuries that the uranium miners themselves have been suffering, their families and other Navajo living near the mines or mills have also been experiencing illness as a result of the leftover radioactive material that has not been reclaimed. Radioactive waste and tailings have made Navajo residents living near the mines or mills ill.²⁴⁷ Children have

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Uranium Miners Tell Panel Radiation Caused Ailment*, N.Y. TIMES, Mar. 14, 1990, at

played in riverbeds contaminated by radioactive waste²⁴⁸ and wind has blown radioactive dust into houses.²⁴⁹ The remaining exposure made a significant number of the Navajo in the area ill with a variety of diseases, ranging from cancer to developmental diseases that afflicted children whose mothers drank contaminated water while pregnant.²⁵⁰

D. THE PUERCO RIVER SPILL AND FAILED RESOLUTION ATTEMPTS OF NAVAJO COURTS

Another example of the lack of attention and compensation given to the Navajo people by the agencies instructed to protect them is found in one of the largest spills of radioactive material in the U.S., which occurred on Navajo land.²⁵¹ The Puerco River spill occurred when a pond of radioactive material from a uranium mill broke and spilled radioactive liquid.²⁵² This incident went relatively unnoticed and the cleanup was insufficient at best.²⁵³ To this day, people in the area are in danger because the radioactive liquid could leak into the underground aquifer and contaminate drinking water.²⁵⁴ Also, people in the area are at risk every time they eat meat because the radioactive material contaminated livestock.²⁵⁵ In fact, the Center for Disease Control recommended that individuals avoid eating animal parts that are likely to retain radioactive particles, such as the liver, which has made it difficult for the Navajo to sell their meat.²⁵⁶

Also, the Navajo affected by the spill were unable to sue the responsible corporation in tribal court. Specifically, the Arizona District Court held that unless there is "express congressional authorization,"²⁵⁷ the tribal courts do not have jurisdiction over defendants who are not

A20; *accord* UNC Res., Inc. v. Benally, 518 F. Supp. 1046, 1048 (D. Ariz. 1981).

²⁴⁸ Judy Pasternak, *Oases in Navajo Desert Contained 'A Witch's Brew'*, L.A. TIMES (Nov. 20, 2006), <http://www.latimes.com/news/la-na-navajo20nov20,0,356449,full.story>.

²⁴⁹ *Id.* See also Tsosie, *supra* note 96, at 220 ("The wind blew dust from the tailing piles into Navajo homes and water sources.").

²⁵⁰ Pasternak, *supra* note 248.

²⁵¹ Brugge *supra* note 104, at 1598.

²⁵² Benally, 518 F. Supp. at 1048.

²⁵³ *Id.*; *accord* Brugge, *supra* note 104, at 1598–99.

²⁵⁴ Tsosie, *supra* note 96, at 221.

²⁵⁵ *Id.* at 220.

²⁵⁶ HARVEY WASSERMAN & NORMAN SOLOMON, KILLING OUR OWN 181 (Delacorte Press 1982).

²⁵⁷ Benally, 518 F. Supp. at 1052.

members of the tribe.²⁵⁸ In fact, tribal courts have only had criminal jurisdiction over Native Americans since 1999.²⁵⁹ In particular, an Arizona District Court held:

It is abundantly clear that in providing for a system of turnover agreements between the United States and individual States, Congress had no intention of granting any control over the nuclear power industry to Indian tribes. The court determines that the exercise of Tribal Court jurisdiction in the pending case is not among the retained powers of the Navajo Tribe since such jurisdiction conflicts with the overriding federal interests in preventing unwarranted intrusions of protected liberties and in regulating the production of nuclear energy.²⁶⁰

Also, a district court in New Mexico issued a similar holding.²⁶¹ Both district courts admit that the U.S. government does not want to relinquish any of its power to the Navajo government. For this reason, Navajo courts still lack jurisdiction over non-Native Americans.²⁶² Additionally, to further justify its decision, the Arizona court concluded that non-Native American defendants should not have to appear in a tribal court because they would be unable to appeal the decision.²⁶³ In the Puerco River spill cases, the Arizona and New Mexico district courts refused to hold that the UNC was innocent.²⁶⁴ Nevertheless, they still did not allow the Navajo to pursue their claims in tribal court simply because Congress had not granted the courts express jurisdiction.²⁶⁵ The Navajo have subsequently been unable to recover adequate compensation for the disaster.²⁶⁶ For example, the UNC only had to pay a minimal amount of damages.²⁶⁷

However, Navajo courts are starting to gain some power. More recently, the Supreme Court held that the tribal courts should be able to determine their jurisdiction.²⁶⁸ In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, the Court held that the Federal government

²⁵⁸ *Id.* at 1047–49.

²⁵⁹ Criminal Jurisdiction over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991).

²⁶⁰ *Benally*, 518 F. Supp. at 1052.

²⁶¹ See *UNC Res., Inc. v. Benally*, 514 F. Supp. 358, 361–64 (D.N.M. 1981).

²⁶² *Benally*, 518 F. Supp. at 1052; accord *UNC Res., Inc.*, 514 F. Supp. at 361–64.

²⁶³ *Benally*, 518 F. Supp. at 1053.

²⁶⁴ *Id.*; *UNC Res., Inc.*, 514 F. Supp. at 361–64.

²⁶⁵ *Benally*, 518 F. Supp. at 1052–53; *UNC Res., Inc.*, 514 F. Supp. at 361–64.

²⁶⁶ *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 478–79, 488 (1999).

²⁶⁷ *Tsosit*, *supra* note 96, at 220–21.

²⁶⁸ *Neztosie*, 526 U.S. at 483–84.

should not make a decision on jurisdiction, but should wait until the tribal court has had an opportunity to decide its own jurisdiction.²⁶⁹ In fact, later the Court stated that “Congress is committed to a policy of supporting tribal self-government . . . [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.”²⁷⁰ However this does not mean that tribal courts get to determine their own jurisdiction; the Supreme Court may review any decision they make.

In *El Paso Natural Gas Co. v. Neztosie*, however, the Court held that the tribal government did not have jurisdiction since the lawsuit was based on the Price-Anderson Act.²⁷¹ The act required that any “public liability action arising out of or resulting from a nuclear incident” be addressed in a federal district court instead of a tribal court.²⁷² In this case, the tribal court did not have jurisdiction because of the specification of the act. The Court thus treated the tribal court as it would a state court, still resulting in the tribal court having no jurisdiction with which to make a decision. The tribal courts have been removed from jurisdiction over nuclear incidents, further reducing tribal authority so that there is a question about the enforceability of any law that the Navajo Nation passes concerning nuclear power.

V. FIGHTING FOR AUTHORITY: THE NAVAJO BAN ON URANIUM MINING

The development of nuclear power as an environmentally friendly power source has started a new uranium-mining boom. This time, however, the Navajos have specifically expressed their disapproval. In 2005 then Navajo President Joe Shirley signed a law forbidding uranium mining on Navajo land,²⁷³ introducing the issue of the Navajo’s authority to control mining on their land. Nevertheless, the ban has been essentially ignored and companies continue to mine around Navajo land.²⁷⁴ Since the ban, federal and state agencies have debated whether entities should be

²⁶⁹ *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985).

²⁷⁰ *Id.* at 856.

²⁷¹ *Neztosie*, 526 U.S. at 487–88.

²⁷² 42 U.S.C. § 2210 (2006); *Neztosie*, 526 U.S. at 483–84.

²⁷³ Press Release, Office of the President and Office of the Vice President, Navajo Nation, Navajo Pres Joe Shirley, Jr. Signs Diné Natural Resources Protection Act of 2005 (Apr. 30, 2005), <http://www.sric.org/uranium/Navajo%20pres.%20signs%20uranium%20ban,%20for%20April%2030.pdf>.

²⁷⁴ *Morris v. Hydro Res., Inc.* 598 F.3d 677, 681–84 (10th Cir. 2010).

allowed to mine in areas near Navajo land, because doing so affects Navajo underground aquifers. Whether the Navajo Nation's law can actually control the land is not addressed in these federal cases. Instead, to determine whether a mine or mill may be erected, courts only consider the environmental impact of the operation on the surrounding land and the proper procedures for regulating such companies; they do not consider the ban or the opinion of Navajo courts.

When Mr. Shirley passed the ban he stated that, "[A]s long as there are no answers to cancer, we shouldn't have uranium mining on the Navajo Nation. . . . I believe the powers that be committed genocide on Navajo land by allowing uranium mining."²⁷⁵ Nevertheless, courts have specifically held that the Navajo government cannot enforce mining regulations over companies that operate near reservations because they are not on tribal land and are not Native Americans; it does not matter that they may be contaminating tribal land.²⁷⁶ The question of the extent of control the Navajo Nation can flex over its land and the surrounding area changes based on the interpretations of the courts and the laws passed by Congress.

VI. INDIAN CHILD WELFARE ACT AND REPARATIONS: A GUIDE FOR A SOLUTION

Additionally, the U.S. government has made it easier for corporations to harm the Navajo people. Specifically, it does not sufficiently regulate mining organizations because it fears that doing so would stunt corporate growth. Thus, to promote economic prosperity, it has allowed organizations to poison tribal land. As a result, the government has indirectly given many Navajos cancer. Legal action needs to be taken to enable the Navajo Nation to protect its people.

The Indian Child Welfare Act implies that Congress may be willing to expand the authority of Navajo courts. According to the Act, Congress has "assumed the responsibility for the protection and preservation of Indian Tribes and their resources."²⁷⁷ To compensate for past misdeeds, the tribes were given "exclusive jurisdiction" over Native American child custody proceedings and Native American parents were given the right to intervene in foster care proceedings to enable them to preserve their own

²⁷⁵ Press Release, *supra* note 273.

²⁷⁶ *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985).

²⁷⁷ Indian Child Welfare Act, 25 U.S.C. § 1901(2).

culture and prevent external influence.²⁷⁸ Congress gave Native American governments the power to preserve their culture and granted the expansion of power because “an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by non-tribal . . . agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”²⁷⁹

Congress should pass another act, which grants Navajo courts the authority to control their land for the same reasons it passed the Indian Child Welfare Act. As the history of Navajo authority and uranium mining has shown, the limitation of the rights of the Navajo has not just been with the legitimized theft of their children under the pretense of child health concerns. Therefore, similar to the special treatment provided in the Indian Child Welfare Act, Congress should enable the Navajo Nation to get special authority to manage tribal land with similar authority granted to states for controlling the cleanup, compensation, and regulation of uranium mining that will affect Navajo people. Currently, state and federal agencies both pressure and limit Navajo authority over their own and surrounding land. Legislatively expanding Navajo authority would enable the Navajo to better control the limited land that they have been allotted in the past and enable the Navajo government to prevent the continued exposure that is currently being forced upon them.

VII. SOLUTION: NAVAJO SOVEREIGNTY BASED ON NEW LAWS GIVING THE NAVAJO GREATER AUTHORITY

Only a direct mandate from Congress would sufficiently enable Navajo sovereignty. This kind of congressional authority is exemplified by the Delaney Mandate, which required food manufacturers to eliminate all carcinogens from their products. Although the court believed that a complete elimination was not necessary, it had to follow the mandate because Congress clearly expressed its intent.²⁸⁰ In contrast, by interpreting vague statutes against the Navajo people, courts have significantly reduced the rights of tribal governments. Thus, only a direct and clearly worded congressional mandate would sufficiently expand the authority of Navajo courts and tribal government. This new authority should allow the Navajo government to regulate and try non-Native

²⁷⁸ *Id.* at § 1911(a)–(c).

²⁷⁹ *Id.* at § 1901(4).

²⁸⁰ *Public Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987).

Americans that damage the Navajo environment, just as any state could do.

Corrective justice theories, as applied by Congress in the Indian Child Welfare Act, justify expanding the authority of Navajo courts. Specifically, the new law should allow the Navajo government to regulate and try non-Native Americans that damage tribal land. Even the very existence of the tribes was affected by the whims of Congress throughout history. As a result of this one-way relationship, courts were able to strip away Navajo children from their families. This injustice was not corrected until Congress passed the Indian Child Welfare Act, which provided the Navajo with greater authority.²⁸¹ To compensate for historical injustices such as this, as well as to allow them to define for themselves their own people groups, the Navajo Nation should be granted greater authority over its land as a sovereign tribe. However, Congress has resisted efforts to increase Navajo authority because this would reduce the federal government's power.

An optimal solution that would satisfy the interests of both Congress and the Navajo Nation would be to give the Navajo authority over uranium mining. Under the NRC's lax oversight, federal agencies have proven inept at regulating uranium mining and cleanup. Courts have deferred to the agencies' poor decisions, perpetuating inefficient and reckless mining. On the other hand, the Navajo government has both the interest and organizational capacity to regulate uranium mining because the Nation has a personal stake in protecting its people from further exposure to radioactive material. The interests of the Navajo suggest that, with congressional help, the Navajo government would work to resolve the unfair treatment of its people through careful management of uranium mining.

A. CURRENT FEDERAL REGULATIONS ARE INSUFFICIENT

Federal regulations are insufficient because they are sent throughout the bureaucracy, where various agencies can enforce them differently. Federal agencies enforce regulations unevenly because they often have opposing political goals. Moreover, in the case of Navajo land contamination, some of the agencies do not even communicate with Navajo agencies.²⁸² For example, when the EPA was working on the

²⁸¹ 25 U.S.C. § 1911(a)–(c).

²⁸² Navajo Nation Environmental Protection Agency, Abandoned Uranium Mines (AUMs) Navajo Superfund Program White Paper (Apr. 2000), <http://frontiernet.net/~nnepansp/>

cleanup process and reclaiming CERCLA sites on Navajo territory, the EPA did not consult with the Navajo's environmental protection agency regarding the testing and cleanup process.²⁸³ Conflicting political goals, poor communication between cooperating agencies, and negligence by agencies that disagree with Navajo policies have left the Navajo community burdened with radioactive material for a long period of time, without compensation, and incapable of preventing mining from contaminating their homes.

Furthermore, the NRC is an ineffective regulatory agency because it frequently grants mining companies exceptions in standards of care and contamination levels. These exceptions are easily supported by the courts so long as the agency presents acceptable reasons for their decisions. After the first court decision of *Morris* in March 2010, the Navajo Nation submitted a brief in support of the petitioner's case for the appellate court.²⁸⁴ The Navajo Nation expressed its concerns with the NRC's ability to regulate uranium mining when it stated that this case "will determine whether the NRC may ignore known health risks in licensing decisions nationwide under its new interpretation[s] of [regulations]."²⁸⁵ The NRC's interpretations of mining regulations allow for greater levels of radioactive exposure to those living near mines, and ignore man-made radioactive waste in determining levels of background exposure.²⁸⁶ Mining companies must take background exposure levels into account when determining how much waste they are responsible for cleaning up.²⁸⁷ The higher the background exposure levels, the higher the total radioactive waste, and the more the company must clean up. If, in accordance with the NRC interpretations, man-made radioactive waste is ignored when calculating background exposure levels, this means that man-made amounts of radioactive waste will not be included in the calculation of total radioactive waste. Since the total radioactive waste is underreported, the amount of waste that a company must clean up will also decrease because less waste is assumed to exist from the start. Thus, mining companies can more easily receive mining permits, since they must satisfy lower cleanup requirements. As indicated above, the NRC, the agency that has the greatest responsibility of controlling uranium mining, has failed to

Aum2.htm; *accord* Begay v. United States, 591 F. Supp. 991, 1003 (D. Ariz. 1984).

²⁸³ *Id.*

²⁸⁴ Brief Amicus Curiae, *supra* note 204.

²⁸⁵ *Id.* at 1.

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.* at 1.

prioritize the safety of people in the area.

B. CURRENT LAWS GIVING THE NAVAJO POWER ARE INSUFFICIENT TO GRANT SOVEREIGNTY

There are several sources of legislation that could provide the Navajo with separate authority, but these laws have existed for years and have failed to grant the Navajo authority over non-Native Americans, including mining companies, and the land surrounding Navajo territory. For example, the CWA contains a number of provisions that allow tribes to be treated as states if the tribes can demonstrate sufficient governing organization and control.²⁸⁸ The main flaw with this solution is that it relies on the interpretation of a court system that has traditionally limited tribal power and authority. The CWA has been in existence since 1972 and has still failed to grant the Navajo Nation the authority it needs to protect its environment. The courts have consistently held that the Navajo cannot exert authority over non-Native Americans, which has prevented the enforcement of any Navajo legislation against mining companies.²⁸⁹ Although there are other ways to protect the Navajo from private companies and uranium contamination, increased Navajo sovereignty is likely the only way to ensure Congress's stated goal of preserving the long-term survival of the Navajo culture.

Although treaties have attempted to give Native Americans control over their own land, federal courts have consistently interpreted them to limit Navajo sovereignty and control. If Native Americans are to be given greater sovereignty, they must be granted this authority in a direct mandate from Congress that the courts cannot ignore. In cases such as *Neztsosie* and *Benally*, the courts held that tribes did not have the authority to criminally or civilly try non-Native Americans.²⁹⁰ At the same time, in cases such as *Montana* and *Hydro Resources Inc.*, the courts redefined and limited the physical jurisdiction of the land that Native Americans could control.²⁹¹ Through these cases, the courts demonstrated intent to limit the power and control of tribes, in effect delegating control over these issues to the U.S. government. This could be more acceptable if the U.S. government and its agencies were proven good stewards of the areas

²⁸⁸ Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1987).

²⁸⁹ See *Hydro Res., Inc. v. U.S. Nuclear Regulation Comm'n*, 608 F.3d 1131, 1134 (2010).

²⁹⁰ *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1051 (D. Ariz. 1981); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 (1999).

²⁹¹ *Montana v. United States*, 450 U.S. 544, 545 (1981); *Hydro Res., Inc.*, 608 F.3d at 1149.

where the Navajo live. However, as discussed earlier, the U.S. government permitted and continues to permit the Navajo population to become sick with radioactive exposure by allowing new companies to increase the exposure without providing plans for the proper protection of nearby residents. By disallowing greater sovereignty to the Navajo Nation, the government is not only failing to protect the Navajo population, but it is also preventing them from protecting themselves.

C. THE CURRENT EXTENT OF NAVAJO SOVEREIGNTY OVER NAVAJO LAND

To ensure that Navajo laws adhere to the Constitution, the Navajo tribe can be treated as any other state, and have the constitutionality of its laws examined by the Supreme Court, as would be the case with any other state law. The U.S. government does not need to grant tribal governments the same rights as a state or a sovereign nation, but it should release them from their current limbo in which they are unable to protect themselves from injuries caused by non-Native Americans. The steps toward increasing Navajo authority are rooted in the acknowledgement of the many past injustices created by the power of the federal government. Our shared history includes unfair treaties and injustices like the Trail of Tears, the forced removal of children, and the exposure of unknowing residents to radioactive material. Accordingly, history shows that Congress's stated goal of the recovery and "protection and preservation" of the Navajo can be achieved more rapidly, if at all, by granting tribal governments the ability to make independent decisions for the benefit of its people.²⁹²

It is possible that the Navajo government will be influenced by the same bureaucracy and private interests that affect the federal government, and thus choose the same path of reduced regulations for mining companies. However, in this case, the Navajo people will have the power to then appeal to the Navajo government, giving individuals greater opportunities to protect themselves from a radioactive environment.

D. POTENTIAL PROBLEMS WITH INCREASED NAVAJO SOVEREIGNTY

Sovereignty is the best and perhaps the only way to provide the Navajo with an effective means of preventing uranium mining. However, some problems may arise. The Navajo may decide to make environmentally unfriendly decisions such as allowing a coal mine to

²⁹² Indian Child Welfare Act, 25 U.S.C. § 1901 (1978).

develop, which they are currently promoting.²⁹³ Furthermore, Navajo sovereignty may clash with federal or state governments, as the decisions of the Navajo may harm or interfere with state or federal land interests. For example, the Navajo are currently fighting uranium mining, which is an interest that both federal and state governments pursued without concern for the Navajo's desires²⁹⁴—an interest of national security.

Another potential problem with Congress granting the Navajo government sovereignty is that the current Congress cannot bind future Congresses. History has shown that newly elected Congressional bodies can dissolve and recreate tribal governments at will.²⁹⁵ This suggests that Congress would have to pass a constitutional amendment to permanently establish the sovereignty of tribal governments, which is politically unlikely to occur and difficult to achieve. Another solution would be to adjust agency policy or change the judicial standard of review for agency decisions. Agencies could be encouraged to change their political views concerning regulations and Navajo government policies, but this will be neither likely nor permanent, as agency policies also change with different administrations. Moreover, the courts are unfamiliar with details surrounding the uranium mining industry, which is why we have agencies such as the NRC and the EPA to make decisions concerning these complex areas of law. To avoid requiring judges to become experts in environmental and mining law, it is wise to permit the courts to rely on agencies for their expertise and knowledge concerning environmental issues rather than require stricter review of agency decisions.

Navajo sovereignty is nonetheless the only practical solution for enabling the Navajo to protect themselves from environmental contamination when the federal and state governments have failed. Despite the potential concerns, granting Navajo sovereignty is the superior choice for three main reasons. First, the U.S. government will be giving a nation the ability to preserve itself after years of being prevented from doing so. Second, Navajo sovereignty may protect an area that is quickly being considered a National Sacrifice area to prevent further contamination. Finally, Navajo sovereignty (with the continued help of federal agencies) may enable a faster and more secure cleanup of the mine waste and mill tailings that have continued to cause illnesses to the Navajo people.

²⁹³ Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 499 (2010).

²⁹⁴ See *Hydro Res., Inc.*, 608 F.3d at 1148.

²⁹⁵ See *id.* at 1134.

VIII. CONCLUSION: THE NAVAJO NEED GREATER SOVEREIGNTY

The history of uranium mining and the treatment of Native American tribes demonstrate that Native Americans have not been, nor are currently treated with the same respect shown to U.S. citizens. The court system has allowed the federal government to continually grant exceptions to mining companies, allowing non-Native Americans to exercise lower levels of care on Native American territories. In effect, tribal law has become worthless in its attempts to protect the environment, because the main contaminators of the environment, non-Native Americans, are exempt from tribal law. While it may be true that the Navajo government cannot regulate non-Native American actors within its territory without federal aid, the federal government has demonstrated that it alone does not have the efficiency, regulatory organization, or intent to protect the Navajo tribe. Federal and state authorities have failed to protect the people that are still suffering from exposure to radioactive material and the federal court system continues to interpret existing legislation to limit the ability of the Navajo government to protect its people. Therefore, only new and direct congressional legislation will be sufficient to protect the Navajo people.