American Indian Law Review

Volume 4 | Number 2

1-1-1976

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Recommended Citation

Patti P. McGee, *Indian Lands: Coal Development: Environmental/Economic Dilemma for the Modern Indian*, 4 AM. INDIAN L. REV. 279 (1976),
<https://digitalcommons.law.ou.edu/ailr/vol4/iss2/5>

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INDIAN LANDS: COAL DEVELOPMENT: ENVIRONMENTAL/ECONOMIC DILEMMA FOR THE MODERN INDIAN

Patti Palmer McGee

Introduction

In January, 1877, a Kiowa by the name of Wohaw drew a picture rich in symbolism. An Indian stands at the meeting of two cultures. On his right stand the buffalo and tipi, the traditional food and lodging, and on his left stand the white man's spotted cow and a frame house. In the traditional gesture of respect, the man offers the sacred pipe to both.¹ This is a familiar scenario, but the conflict between the old ways and the new ways has never been brought so sharply into focus as it has in the area of coal development on Indian lands.

Reemphasis on Coal as An Energy Source

Recently, coal has gained attention as an attractive alternative energy source with potential for replacing oil and gas as the primary energy supplier to the United States. The excitement stems from the existence of vast resources of coal in the United States.² Nearly one-fourth of the total world resources underlie the the United States.³ According to the United States Geological Survey, those resources equal nearly three trillion tons.⁴ The reserves are considerably less than the total resources, weighing in at only 195 billion tons.⁵ Despite the relatively small amount of presently recoverable reserves compared to the total resources of coal, those reserves equal 55 times the amount of the total energy input of the United States in 1970.⁶

The renewed emphasis on coal as an energy source is due primarily to the recognition that oil and gas reserves are being depleted rapidly. This recognition of the diminishing reserves was brought about in part by the onset of the national energy crisis precipitated by the Arab oil embargo. The House Committee on Interior and Insular Affairs expressed its awareness of the situation in the report accompanying a proposed surface mining bill:

The Nation's dangerous overreliance on imported oil and the parallel inadequacy of its domestic oil and natural gas supplies have brought about a general awareness that increased develop-

ment of our coal reserves is necessary to provide for economic and national security needs.⁷

The new awareness is widespread, and Congress has responded with the enactment of legislation to fund coal research and development,⁸ and to accelerate the technologies for the production of synthetic fuels from coal.⁹ Administrative agencies also play a large part in the coal reemphasis. Research and development funds for coal authorized in the President's budget for fiscal year 1977 include \$405,700,000 to the Energy Research and Development Agency, \$93,592,000 to the Bureau of Mines, and \$8,047,000 to the United States Geological Survey.¹⁰ The statistics on coal production for 1975 show how rapidly producers of coal responded to the rather sudden reemphasis on coal. The United States Geological Survey shows that coal production in 1975 reached a 28-year high, with the production of 640 million tons.¹¹

The largest percentage of coal resources in the United States is located in the western United States in the northern Great Plains and Rocky Mountain provinces.¹² The federal government controls the majority of the coal lands in the western provinces, and much of the coal is under Indian lands.¹³ At present there are some 250,000 to 300,000 acres of Indian lands that are subject to both producing and nonproducing coal leases.¹⁴ The extent of coal resources on Indian lands becomes vitally important because of the renewed emphasis on coal as an energy source.

Surface Mining: Environmental Effects and Rehabilitation Potential

Much of the coal under the western lands is found in wide seams, making surface mining the most economical form of mining.¹⁵ Unfortunately, the past performance of mining companies in regard to surface mining has been poor indeed. The scars of mining operations conducted years ago attest to yesterday's *laissez-faire* practices and also contribute to the poor public image of surface mining. Not only were such practices aesthetically displeasing, but they also caused acid drainage, which ruined an estimated 1,000 miles of streams, caused the loss of prime hardwood forests, degraded productive farm land, destroyed wildlife habitat, caused siltation and sedimentation of river systems, caused recurrent landslides, and caused the destructive movement of boulders.¹⁶ The impact of surface mining on Indian lands carries even more serious ramifications because of the unique historical and cultural relationship the Indian has maintained with the land. This relationship is best illustrated by the Hopi belief that coal-rich Black Mesa, known as "Tukunavi,"

is the sacred center of Mother Earth entrusted to the Hopi by Massau'u, the Great Spirit.¹⁷ The lands at the sacred center are the key to Hopi life.¹⁸ This same relationship has been examined in more simplistic terms by Justice Black, as follows:

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of the reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children and their forbears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.¹⁹

The modern Indian is faced with the dilemma of whether the economic benefits brought about by coal development outweigh the dangers surface mining may impose on the continued existence of the Indian's unique historical and cultural relationship with the land.

In order to understand better the stress placed on the relationship of the Indian to the land by the coming of large-scale coal development, it would be helpful to analyze a study conducted by the National Academy of Sciences (NAS) concerning the potential for rehabilitation of western coal lands.²⁰ The study, although directed at western lands in general, can be applied to Indian lands because most of the coal under Indian lands is in the West. NAS listed three major areas of concern affecting western coal development. The first is the revegetation of arid lands, which are defined as those lands that receive less than 10 inches of precipitation per year. Even though the vegetation on arid lands is scanty, it does serve a vital function in stabilizing the complex ecological system of the area. NAS concluded that:

The drier areas . . . pose a more difficult problem. Revegetation of these areas can probably be accomplished only with major, sustained inputs of water, fertilizer, and management. . . . Rehabilitation of the drier sites may occur naturally on a time scale that is unacceptable to society, because it may take decades, or even centuries, for natural succession to reach stable conditions.²¹

The arid lands represent about 11 per cent of the total western area underlain by coal.²² Based on the analysis by NAS, certain deposits should not be developed at all due to the poor vegetation potential.

One such area is the Four Corners deposits that are on Hopi and Navajo reservations.

The second area of concern involves the impact of mining on the water resources of an area. The actual water requirements for surface mining and rehabilitation are not substantial, but mining may have secondary impacts on the water resources of these areas. The hydrologic balance of an area is a complex interrelationship of a number of factors: (1) flow patterns of ground water within aquifers; (2) the quantity of surface water as measured by the volume rate and duration of flow in streams; (3) the erosion, transport, and deposition of sediment by surface runoff and stream flow; (4) the quality of both ground and surface water, and (5) the interrelationship between ground and surface waters.²³ A change in any one of these factors as a result of mining could trigger changes throughout the system.

The NAS was concerned primarily with two areas of potential impact on the hydrologic balance. The first area is applicable in western coal seams where the coal is in the groundwater aquifer and the use of water for mining operations would be competing with the uses of individuals in watering livestock and in providing water for domestic purposes. The second area of impact is the changing or destroying of drainage patterns by surface mining operations. The patterns are changed by increased erosion and by the increased sediment load during intense rainfall.²⁴ In the arid and semiarid coal areas the erosional balance of stream valleys is very fragile, and the potential for large area impacts adjacent to streams is great.²⁵

Attempts by Congress to regulate against the dangers imposed by surface mining have been met with serious opposition. Within the last two years three surface mining bills have been vetoed, because of predictions by the Bureau of Mines and other agencies that the enactment of a bill with stringent requirements would result in a substantial loss in coal production, which would cause a loss of thousands of jobs and drive up the cost of coal.²⁶ Each of the vetoed bills contained basically the same provisions: (1) areas to be restored to their approximate original contour; (2) the surface owner to give permission to the coal company holding a federal coal lease to produce coal; (3) the regulatory scheme to be administered by the states; (4) stripping to be by permit only, and this permit to be granted only if there is an acceptable plan of rehabilitation; (5) mining on alluvial valley floors to be allowed only for preexisting mines, or for new mines which would disturb such a small acreage of farm land that the impact on that land would be negligible; (6) special safeguards to be provided to protect owners of ground and

surface water rights affected by a mining operation; (7) an annual allocation of \$200 million in the form of payments the government receives from outer continental shelf oil leases to be made for the rehabilitation of "orphan" lands; and (8) an annual allocation of \$50 million to allow research to be conducted to improve underground coal mining technology.²⁷ Despite the three vetoes, comprehensive federal legislation of surface mining is expected; the form it takes may depend on the newly elected President.

Indian Response to the Dangers Inherent in Coal Development

Litigation under the National Environmental Policy Act (NEPA) has been the most effective way of dealing with environmental destruction on Indian lands.²⁸ However, from the Indian viewpoint the application of NEPA has not been totally satisfactory because it results in outside parties bringing suits for the protection of Indian lands. This places the Indian in a unique dilemma. Although NEPA provides certain assurances to the Indian concerning the use of Indian lands, it also may restrict tribal sovereignty. Indian tribes exist as sovereign entities, and yet the applicability of NEPA to Indian lands limits to some extent the Indians' decisions in relation to their land.

The protection of NEPA has generally come from Section 102(2)(c), which provides that:

. . . [T]o the fullest extent possible: . . . (2) all agencies of the Federal Government shall . . . (c) include in . . . major Federal actions significantly affecting the quality of human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments or resources which would be involved in the proposed action should it be implemented. . . .²⁹

This provision has succeeded in forcing federal agencies to consider environmental factors in their decision-making process. The requirement of an environmental impact statement has been applied to the action of an official of the Bureau of Indian Affairs in approving a lease between a New Mexico developer and the Pueblo Indians of Tesuque in *Davis v. Morton*.³⁰ This particular suit was brought by

two landowners living near the leased property and two nonprofit corporations concerned with the protection of the environment.³¹ The tribe was noticeably absent as a party plaintiff. A clue as to the reason for the tribe's absence might be found in one of the government's arguments to the court. The government contended that to impose the burden of providing an environmental impact statement for development on private Indian lands is undesirable because it "places the Indians at an economic and competitive disadvantage, and subjects their property to judicial challenge by non-Indian competitors laboring under no such environmental restriction."³² The court cursorily dispensed with this argument by saying that the intent of the drafters could not possibly have been to exclude Indian lands from the application of NEPA because such an interpretation would serve to exclude all federal lands from NEPA's requirements.³³ Despite the treatment of the government's argument by the court, the argument does serve to exemplify the economic and environmental dilemma that faces the Indian.

The reticence of the Indian in accepting the applicability of NEPA is best illustrated in the recent Ninth Circuit case of *Cady v. Morton*.³⁴ The Crow Tribe was a party defendant in a suit brought by individuals living on the "Crow Ceded Area" in Montana and by Friends of the Earth seeking to invalidate coal leases entered into between Westmoreland Resources and the Crow Tribe, approved by the Bureau of Indian Affairs.³⁵ The court made it completely clear that the fact that the Indians were parties to the lease did not alter the conclusion that the plaintiffs had standing to sue.³⁶ The court concluded that the purpose of NEPA was to insure protection of the environment to *all* Americans, and that prior interpretations of NEPA gave "no indication that major federal actions primarily pertaining to Indians were to be immune from environmental challenges by all but such Indians."³⁷

The conflict that exists between the interests of Indians and the interests of outsiders, having its roots in the historical relationship between the white people and the Indians, is perhaps more easily understandable than intra-tribal conflicts. The development of coal on Indian lands has served to emphasize both such conflicts. The modern Indian is forced into making decisions that seriously affect the cultural development of the tribe. The pathos of this dilemma is poignantly illustrated in *Lomayaktewa v. Hathaway*, which involves coal development in the Black Mesa region.³⁸ There existed a coal lease on a strip of land called Black Mesa.³⁹ The lease was entered into in 1966 between the Peabody Mining Company and the Hopi Tribe.⁴⁰ A group of Hopi Indians, known as "Kikmongwis,"

the traditional spiritual leaders of the Hopi, sought to invalidate the lease in order to protect the sacred mesa.⁴¹ The suit was terminated because the court determined that the Hopi Tribe was an indispensable party to the suit.⁴² The "Kikmongwis" could not join the Hopi Tribe as a party defendant without their consent, because as a sovereign entity the tribe was immune from the suit. Since the Hopi Tribe chose not to join as a party plaintiff, there was no remedy left.

There are, of course, instances in which the Indian tribe as plaintiff has been the prime mover in seeking protection against environmental destruction through the mandate of NEPA. In *Jicarillo Apache Tribe of Indians v. Morton*, the tribe sought a judgment declaring that the Secretary of the Interior did not comply with NEPA as to the construction of six electric-generating facilities in four southwestern states.⁴³ The Four Corners plant located on the Navajo Indian Reservation in New Mexico and the Mojave plant in Nevada were substantially complete and in operation by the effective date of NEPA, and therefore the court refused to apply NEPA to them.⁴⁴ The Kaiporowitz plant, to be situated on public lands in Utah, was merely proposed at the time of this suit and therefore the court held that there was no major federal action involved as to it.⁴⁵ The court concluded that as to the remaining three plants (the Navajo plant in Arizona, the San Juan plant in New Mexico, and, the Huntington Canyon plant in Utah), the impact statements prepared by the Secretary of the Interior were valid.⁴⁶ The court further determined that public hearings are not mandatory before completion of the impact statement, and that the decision of whether to hold public hearings is within the discretion of the Secretary of Interior.⁴⁷ In order to invalidate an impact statement on the basis that public hearings were not held, the tribe would have to show that the Secretary abused his discretion in not allowing the hearings.⁴⁸ This apparently would require a rather stringent showing, because the allegation that the question is a complex one which involves broad public concern, or that public hearings are necessary to guard against a potential conflict of interest because the Bureau of Indian Affairs owns 24.5 per cent of the Navajo plant was held to be insufficient.⁴⁹

Presently there is a suit pending in the District Court of Montana wherein the Crow Tribe is seeking to cancel prospecting permits and coal strip mining leases approved by the Bureau of Indian Affairs in eastern Montana.⁵⁰ The Crow Tribe has made several allegations: (1) the defendants failed in their fiduciary duty as trustee of Indian lands by approving leases and permits that will result in extensive strip mining; (2) the leases approved by the defendants violated

their own regulations; (3) the defendants failed to file an environmental impact statement; and (4) that the defendants failed their fiduciary duty by not informing the tribe of the impact of coal development on the tribe's land and culture.⁵¹ The outcome of this suit will no doubt be extremely significant in determining the approach Indian tribes take in regard to the problems surrounding continued coal development on tribal lands.

The dilemma facing the modern Indian concerning coal development on tribal lands defies simple solutions. It does seem clear, however, that the court will play a significant role in effecting coal development on Indian lands through its interpretation of NEPA. Despite the court's involvement in many NEPA suits, it will no doubt continue to refuse to become involved in intra-tribal disputes such as the one between the "Kikmongwis" and the Hopi tribe in *Lomayaktewa v. Hathaway*.⁵² The court shies away from becoming the arbitrator between two tribal factions. The court's attitude is best expressed in *Martinez v. Santa Clara Pueblo*, which involved the interpretation of the Indian Civil Rights Act.⁵³ The court refused to construe the Act in a manner "which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated."⁵⁴ Such judicial restraint is particularly appropriate when applied to the conflict between the economic benefits of coal development and environmental destruction.

Conclusion

The choices facing Indian tribes concerning the development or nondevelopment of coal lands are complex. Tribes dedicated to the preservation of their land must be allowed to restrict coal development, while tribes that wish to develop their coal resources and reap the concomitant economic rewards must be free to do so in a responsible manner. The following suggestions are submitted as being a responsible approach to coal development: (1) avoid development in arid areas; (2) avoid development in areas where the coal is located in ground water aquifers; (3) avoid development on alluvial floors; (4) avoid development in areas of cultural and spiritual importance, such as the Black Mesa region; and, (5) support a surface mining bill which would insure the rehabilitation of strip mined lands. By limiting strip mining to those areas that are best able to sustain environmental destruction, and which are of least historical and cultural importance, modern Indians may balance their in-

terest in economic development with their interests in preserving their land and culture.

NOTES

1. K. PETERSON, PLAINS INDIAN ART FROM FORT MARION 91 (1971).
2. "Resources" and "reserves" have separate and distinct meanings. The word "resources" means the total quantity of coal in the ground, whereas the word "reserves" means that portion of the total "resources" that can be profitably mined at any given time under existing economic, technological, environmental, and other conditions. 1 STANFORD RESEARCH INSTITUTE, EVALUATION OF PROCESSES FOR THE LIQUEFACTION AND GASIFICATION OF SOLID FUELS, COAL MINING AND CONVERSION 38 (1975) (subsequent volumes to be forthcoming) [hereinafter cited as SRI].
3. *Id.*
4. P. AVERITT, U.S. GEOLOGICAL SURVEY PROFESSIONAL PAPER 820, 136 (1973).
5. This data is based on resources located under less than 6,000 feet overburden and in beds of 14 inches or greater thickness for bituminous, anthracite, and in beds of 2½ feet or greater thickness for sub-bituminous and lignite. H.R. REP. NO. 94-986, 94th Cong., 2d Sess. 32 (1976).
6. THE SCIENCE AND PUBLIC POLICY PROGRAM, UNIVERSITY OF OKLAHOMA, ENERGY ALTERNATIVES: A COMPARATIVE ANALYSIS, 1-3 (1975) [hereinafter cited as ENERGY ALTERNATIVES].
7. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 24 (1976).
8. Special Energy Research and Development Appropriations Act, Pub. L. No. 93-322 (June 30, 1974).
9. Nonnuclear Energy Research and Development Act, 42 U.S.C. §§ 5901 *et seq.* (Supp. IV 1974).
10. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 25 (1976).
11. Conclusion of Sam Friedman, Okla. Geol. Survey, Univ. of Okla., based on information from U.S. Bureau of Mines Mineral Survey Indus. (yearbooks).
12. ENERGY ALTERNATIVES, *supra* note 6, at 1-8.
13. *Id.*
14. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 33 (1976).
15. SRI, *supra* note 2, at 291.
16. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 25 (1976).
17. ART IN AMERICA (July-Aug., 1972), at 98.
18. *Id.*
19. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (dissenting opinion).
20. SRI, *supra* note 2, at 317.
21. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 15-16 (1976).
22. SRI, *supra* note 2, at 321.
23. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 56 (1976).
24. SRI, *supra* note 2, at 318.
25. H.R. REP. NO. 94-986, 94th Cong., 2d Sess., 59 (1976).
26. *Id.* at 2.
27. H.R. 9725, 94th Cong., 2d Sess. (1976).
28. 42 U.S.C. §§ 4321 *et seq.* (Supp. III 1973).
29. 42 U.S.C. § 4332 (Supp. III 1973).
30. 469 F.2d 593 (10th Cir. 1972).
31. *Id.* at 594.

32. *Id.* at 597.
33. *Id.*
34. 527 F.2d 786 (9th Cir. 1975).
35. *Id.* at 789.
36. *Id.* at 791.
37. *Id.* at 791-92.
38. 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3545 (U.S. Mar. 30, 1976).
39. *Id.* at 1325.
40. *Id.* at 1324.
41. *Id.* at 1325.
42. *Id.*
43. 471 F.2d 1275 (9th Cir. 1973).
44. *Id.* at 1278.
45. The proposal for the Kaiporawitz plant has since been abandoned.
46. Jicarillo Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1281 (9th Cir. 1973).
47. *Id.* at 1285.
48. *Id.*
49. *Id.* at 1287.
50. Crow Tribe v. Kleppe, CV-76-10-BLG, filed Feb. 3, 1976, Fed. Dist. Ct., Billings, Mont. (taking depositions).
51. *Id.*
52. 520 F.2d 1324 (9th Cir. 1975).
53. 402 F. Supp. 5 (D.N.M. 1975).
54. *Id.* at 18.