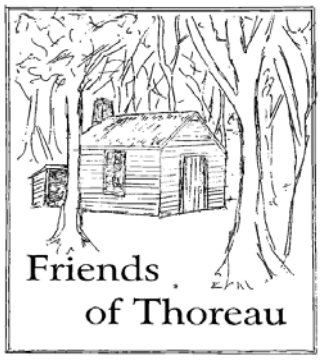

Native Americans and Natural Resources: Black Mesa

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Main Page

I.- Introduction.

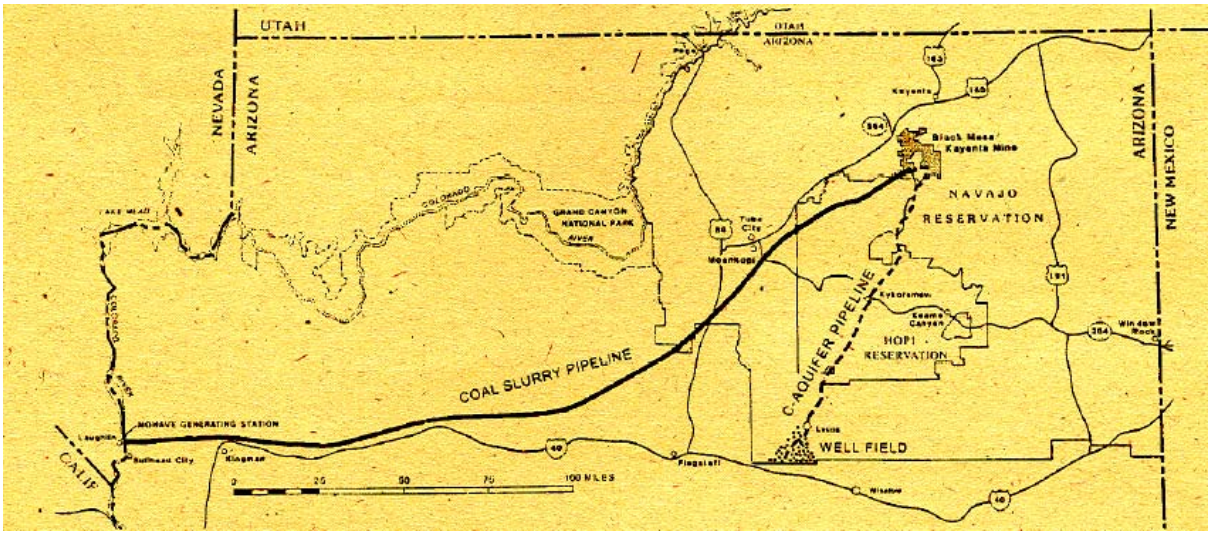
Currently, the U.S. Office of Surface Mining (OSM) is in the process of writing an Environmental Impact Statement (EIS) on the Black Mesa strip-mine located in the Northeast corner of Arizona and borders the Navajo and Hopi Indian reservations. The EIS is being prepared due to the most recent issues regarding the Black Mesa Mine: the Life of the Mine permit (LOM) submitted by Peabody Western Coal Company (hereinafter Peabody), the so-called Black Mesa Project (See map in picture 1).

Peabody originally filed for a permanent program permit in 1985. In 1990, the Secretary of the Department of the Interior (DOI) put the permit application under “administrative

delay" where it is still sitting to this day (Testimony for the U.S. Senate Committee on Indian Affairs).

For over twenty years, Peabody has been operating without a permit. However, Peabody still has leases with the tribes. The federal OSM will include in its EIS the concerns the Hopi tribes, Navajo Nation, NGOs, and other individuals have regarding the Black Mesa Project. The laws and regulations that the OSM is using for the EIS are the National Environmental Policy Act (NEPA), the Guidelines of the Council on Environmental Quality (CEQ), the DOI Department Manual, the DOI Office of Environmental Policy and Compliance Environmental Statement Memoranda, and the OSM NEPA Handbook (See Box 1).

This case study and the question of whether or not to continue mining on the Black Mesa can not easily be answered by looking at it only from an environmental perspective. The fact alone that it is situated on tribal land brings together more affected parties, a complicated history, a web of regulations and policies, and a challenge to constitutional principles concerning the status of Native Americans within the Union, from the scope of self-government and the content of the federal trust of the tribes to the management of cultural and natural resources and sacred sites. Much is at stake besides the environment.



Picture 1. Map of the Black Mesa Project.

What brought the attention of the international community to the mining of Black Mesa, and why has it become a passionate subject to all parties involved?

Box 1 Applicable Regulations

National Environmental Policy Act of 1969 – Sec. 2 [42 USC § 4321]. "The purpose of this Act are [sic]: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of resources important to the Nation; and to establish a Council on Environmental Quality." Its Section 102 [42 USC § 4332] mandates the following: "*The Congress authorizes and directs that, to the fullest extent possible:… (2) all agencies of the Federal Government shall --C) include in…other major Federal actions significantly affecting the quality of the 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 of resources which would be involved in the proposed action should it be implemented.*" (See http://ceq.eh.doe.gov/nepa/regs/nepa/nepaeqia.htm).

CEQ Regulations – The regulations of the Council on Environmental Quality were approved to support NEPA. Some of the many procedures of the guidelines include: making sure all procedures include scoping and public hearings; identifying the effects the project will have on the environment, the economy and historic and cultural resources; making sure that alternatives for resource use have been offered; consulting of Indian Tribes when their land is involved, ensuring that federal agencies will not be bias in their decisions… (Center for Environmental Quality, CEQ Guidelines). (See http://ceq.eh.doe.gov/nepa/regs/1983/1983guid.htm)

Executive Order 11514 – On March 5, 1970 the President issued this E.O. farther specifying the responsibilities of the federal agencies concerning the implementation of NEPA. (See http://www.fsa.usda.gov/dafp/cepd/epb/exec_orders/EO11514.pdf)

DOI Department Manual – This extensive manual is the means of documenting policies and procedures for all federal agencies that are under the Department of the Interior jurisdiction. Regarding environmental policies and regulations, the DOI wants to make sure that all its agencies are on the same agenda and that they all follow the same guidelines. In the case of Black Mesa, the two federal agencies involved that are under the DOI are the Office of Surface Ming (OSM) and the Bureau of Indian Affaires (BIA). The Manual also "serve[s] as the primary source of information on organization structure, authority to function, and policy and general procedures." (See http://elips.doi.gov/elips/DM_word/3614.doc)

Office of Environmental Policy and Compliance Environmental Statement Memoranda – This office, which is under the DOI, helps develop a balanced environmental stewardship. It does this by helping federal agencies develop proposals that follow the CEQ and NEPA guidelines that find a medium between cultural, human and environmental resources. If environmental issues affect more than 1 federal bureau, then the Office of Environmental Policy and Compliance coordinates with the bureau to make sure their proposed policy is alike (Office of Environmental Policy & Compliance). (See http://www.doi.gov/oepc/ememoranda.html)

OSMRE NEPA Handbook - This handbook is derived from the DOI manual. It describes in detail internal procedures of how the Office of Surface Mining, Reclamation and Enforcement (OSMRE) will implement NEPA, CEQ guidelines, and Executive Order 11514, March 5, 1970 "Protection and Enhancement of Environmental Quality." It is the OSMRE handbook that will decide which type of NEPA document should be prepared depending on the extension of the foreseeable impact: either an environmental impact statement (EIS) or a finding of no significant impact (FONSI). (In this case study, it is the EIS.) (See http://www.wrcc.osmre.gov/bmk-eis/OSM%20NEPA%20Handbook%20REG-1.pdf)

II.- The Black Mesa Mine.

II.1.- What is a strip-mine?

The most common type of strip-mining in the U.S. is coal mining (See Box 2).

Box 2 Strip-mining
Strip-mining can be defined as a type of surface mining in which a trench is dug to extract the mineral, then a new trench is dug, parallel to the old one; the overburden from the new trench is put into the old trench, creating a hill of loose rock known as "spoil bank". It is, thus, a type of surface mining (when the extraction of mineral resources is done near the Earth´s surface by first removing the soil, subsoil and overlying rock strata) different from open-pit mining (a type of surface mining in which a giant hole [quarry] is dug to extract iron, copper, stone or gravel)

Raven & Berg, Environment

Before strip-mining an area, the mining company drills several "test" cores to "determine the depth, thickness, and quality of the coal, and to assess the difficulty of removing the overburden…" (Gale Group). The overburden are all of the rocks, soil, and vegetation that makes up the land. If the terrain is rocky, then sometimes blasting of the land occurs. Strip-mining is done in rows, after the removal of the overburden; power shovels for coal extraction leave a "canyon-like cut" in the earth (see Picture 2). After mining, the topsoil that was removed is placed back in the mined areas and reclamation begins under the mandatory requirements of the 1977 Surface Mining Control & Reclamation Act (SMCRA).

II.2.- How it works

Once the coal is stripped from the mesa (see Box 3), it is carried 273 miles via a slurry pipeline (see Box 4) to the Mojave Generating Station (MGS) that is located in Laughlin, Nevada. (See Pictures 1 and 3) (The Black Mesa Mine is the *only* source of coal for MGS, which does not process coal from any other coal mine for its operations.)

"About 4.8 million tons of coal per year are mined from the Black Mesa Mine." (U.S. Department of Interior, Office of Surface Mining, at 24). Before the coal goes to Laughlin,

it is pulverized and mixed with water to allow it to flow through the pipeline to the MGS. The slurry pipeline is the only one of its kind operating in the United States. This method of coal transportation is unpopular because of the excessive use of water a slurry pipe uses to transport coal. (The issue of water use will be discussed later.) The 1,580 megawatt generating station then processes the coal into electricity which is used to power parts of Arizona, Nevada and Southern California. This includes the major cities of L.A., Las Vegas and Phoenix. MGS is operated and partially owned by Southern California Edison. The Preparation Plant and Coal Slurry Pipeline are owned by Black Mesa Pipeline, Inc., a subsidiary of Northern Border Partners, L.P.

Box 3

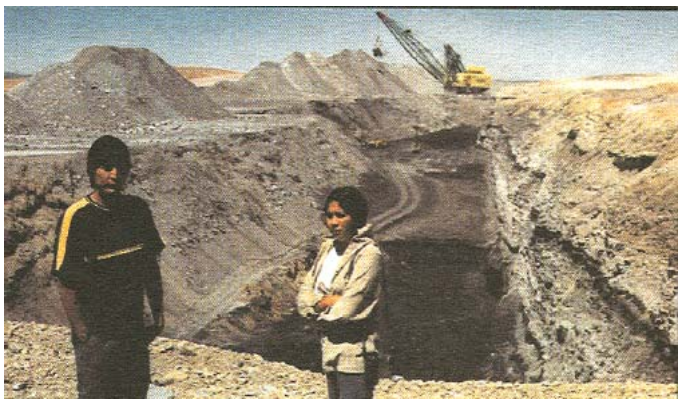
A mesa (currently in Spanish "meseta"; from Spanish mesa=table;) is an isolated high plateau with a flat top and steep sides, common in dry regions of the western and southwestern U.S.. In many cases, mesas are part of larger plateaus which are detached from the rest of the land by the formation or widening of canyons

Robert K. Barnhardt, The American Heritage Dictionary of Science, Boston 1986)

Box 4

Slurry. A watery mixture of insoluble matter resulting from some pollution control techniques

Environmental Program Assistance Act



Picture 2. Black Mesa Mine (Black Mesa Trust, Save Black Mesa Water)

Picture 3. Mojave Generating Station (the Center for Land Use Interpretation)

III.- The history of the issue.

The complex history of the Black Mesa Mine has several key players. Besides the Diné, or Navajo, and Hopi tribes and their leaders, who are the ones who live on the land and have cultural ties to it, there are, among others, several agencies of the U.S. Federal Government such as the Bureau of Indian Affairs (BIA), Office of Surface Mining (OSM), the Department of the Interior (DOI) and its Secretary, Peabody Mining Co., and lastly, the attorneys for the tribes.

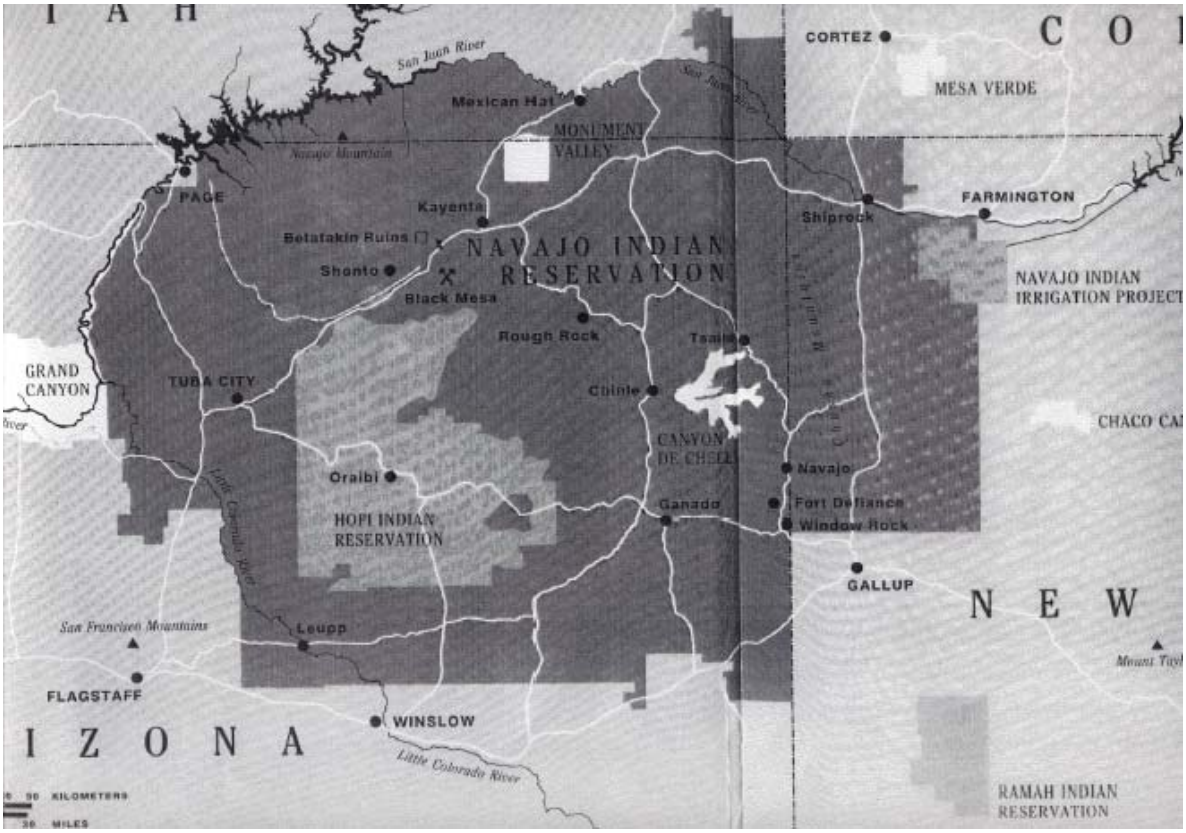
In 1864, the federal government signed a treaty with the Navajo tribe allotting them 3.5 million acres to live on (See The Hopi-Navajo land dispute in Section II of Guiding Students´ Discussion). Eventually through more treaties, executive orders of the President and acts of Congress, the Navajo Reservation grew to its present size of 82,256 square miles. (Frantz, at 42-43).

The Hopi reservation was formed in 1882 by an executive order from President Arthur. He allocated 2.5 million acres in the North Eastern corner of Arizona for the Hopis. However, the ambiguous wording of the treaty was such that the land wasn't given in trust exclusively to the Hopis. (This would eventually cause problems that will be later discussed in further detail.)

"It is hereby ordered that the tract of country in the Territory of Arizona…[be] withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui [Hopi Tribe] and such other Indians as the Secretary of the Interior may see fit to settle thereon." Chester A. Arthur (Klapper)

Today, the Hopi tribe has only 9% of its original reservation size due to the enlargement of the Navajo reservation and the unclear wording of the Executive Order.

The reservations (see map on picture 4) were given to the tribes under a trust that would be managed by the Secretary of the DOI because it was thought that Native Americans were incapable of governing their land. (See Section VI of Scholars´ Debate). Thus, the federal government made them "wards of the state."



Picture 4.A. Map of Navajo and Hopi Reservations

Coal was detected beneath Black Mesa as early as 1909. It wasn't until the mid 20th Century population boom in the Southwest that the need for electricity increased and the coal underneath Black Mesa became high priority for mining companies (National Research Defense Council, A Question of Trust). Up to this point, the tribes typically retained a traditional way of life. The tribes were still run by chiefs and the peoples lived within their traditional clans. Peabody Coal Company had a difficult time finding an authoritative entity to sign a lease because there was no such thing as a tribal government.

"I think our ancestors…have long known that when they [the white man] would come, they would change everything. But, when the mining company came [they] established, in my opinion, a very mute tribal government. The Indian Reorganization Act (IRA) [See Box 6] at the time was to push onto people the American way of doing things, which is one leader. When they found that Hopis were sitting on vast amounts of coal, our 11 villages had chiefs and the chiefs had to agree on the issue regarding whether to mine or not. The company and the Federal government knew that this would take a long time. So, about that time the usefulness behind the IRA governments which lead to constitutions which tribes like mine developed, [sic] they began to concentrate on one leader who spoke for the whole tribe."
Vernon Masayesva, Executive Director, Black Mesa Trust (personal communication, January 15, 2005)

Picture 4.B.Location of the Peabody mine in the Black Mesa (courtesy of Black Mesa Trust)

After 20 years of disagreements amongst the Hopi tribe about how a tribal government should function, John C. Boyden, an attorney from Utah, was appointed to the Hopi general council by the BIA. He formed a Hopi government that was then able to sign a lease. John Boyden failed to tell the Hopi government that at the same time he was representing the tribe, he was also on the Peabody payroll (National Research Defense Council, A Question of Trust).

The Navajo Government had been formed in 1923 (before the 1934 Indian Reorganization Act, IRA) when the federal government, lobbied by mining companies, replaced the Diné Council of Elders with a "Grand Council." Instead of being made up of elders and traditionalists, the Grand Council was comprised of men that were educated off the reservation (Churchill, W., at 145). In 1947, Norman Littell, of Arlington, VA, was assigned to be the Navajo Nation's counsel for the first negotiations with Peabody (Benedek, E., at 134).

Now that the two tribes had official legal representation, the history of the Black Mesa Mine became a bit more complicated. Neither tribe knew exactly to whom the land belonged because both tribes had been living side by side for many years. They had no official borders to speak of. In 1958, the Hopis filed a friendly suit against the Navajos, in *Healing v Jones* (United States District Court D. Arizona 210 F.Supp. 125, Sept. 28, 1962, Aff´d Supreme Court 373 US 758, 1963) to establish official boundary lines between the two tribes and to figure out which tribe owned Black Mesa and the surrounding area (Benedek, E., at 36). This in turn would decide which tribe owned the mining rights. The court held that both tribes had equal rights to the part of land to be mined and the revenues would be split 50/50 (Short History of the Big Mountain Black Mesa).

Norman Littell was anxious to settle the issue of which tribe owned the rights to Black Mesa and the land surrounding it. In 1946, Congress instituted the Indian Claims Commission where Native American tribes were allowed to receive monetary compensation for the land that the U.S. Government took from them. Written into the 1946 Act was the right for the tribe's attorneys to receive 10% of what the tribes received in

compensation from the Federal Government (Benedek, at 134). After Littell represented the Navajos in *Healing v Jones* (see citation above, and discussed further below in Section II of Guiding Students´ Discussion), Littell sued the Navajo Nation for $2.8 million, 10% of the value of the land dispute settlement (Benedek, at 140; Consequently, Norman Little didn't receive his $2.8 million. After years of legal work, in 1980, he settled for $795.000).

Leases were signed for the mining of Black Mesa between Peabody and the Navajo tribe in 1964 and with the Hopi tribe in 1966 (Office of Surface Mining, Background Black Mesa/Kayenta Mine). Both tribes' lawyers negotiated below average royalty fees for the tribes, about 37.5 cents per ton. Twenty years later, when the royalty fees were to be readjusted, the 37.5 cents was equivalent to 2% of gross proceeds. "It is not disputed that this was well below then-prevailing royalty rates," said a U.S. Court of Appeals (Robbing the Indians). In addition, the leases were, "rife with inequities. For example, it accorded Peabody the rights to 40,000 acres of land for at least ten years, even though federal regulations ordinarily limited coal leases in Indian country to just 2,560 acres…And for each acre-foot of groundwater, Peabody was to pay the tribe a mere $1.67 – a rate that one prominent scholar has called 'laughable.'" (Natural Resource Defense Council, A Question of Trust).

There were also no public hearings regarding the leases. The majority of Hopis and Navajos did not know what was going on. Because the Secretary of the Interior is the official trust holder for Native Americans, the DOI had to approve the lease agreements to ensure that the royalty fees were fair before the leases could be executed. "We sold our souls when we signed the leases." (Vernon Masayesva, personal communication, January 15, 2005)

The leases between both tribes and Peabody were renegotiated several times since the mid-1960s. In addition to environmental justice issues, i.e., health, water and socioeconomic issues, the tribes are still attempting to negotiate fair royalty fees. There are constant court battles among all of the actors regarding those royalty fees, as well as land disputes, and

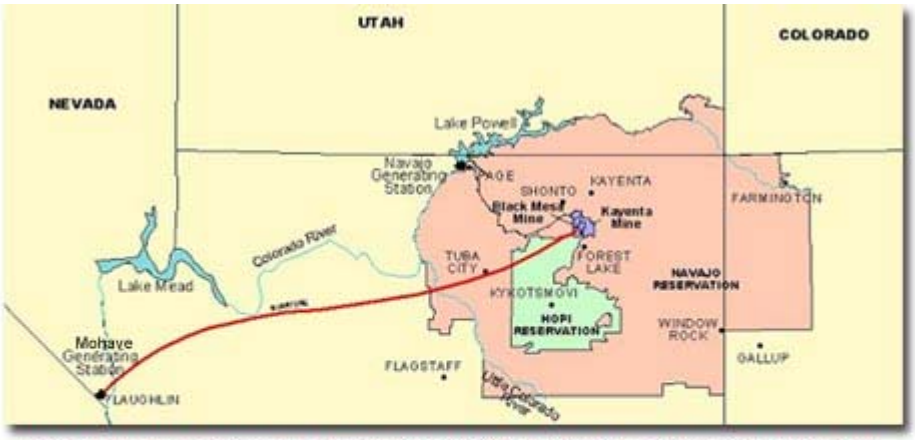
trust obligations. The most recent issues being discussed are the Black Mesa Project and the Life of the Mine permit (LOM). (See Box 5).

IV.- Why is Black Mesa important to the Hopis and Navajos?

Marilyn N. Verney, a Navajo, describes Native Americans' relationship with the environment as, "[a] life of balance and harmony based on kinship with all living things in the universe." (personal communication, January 12, 2005).

Land is sacred to Native Americans. The creation story of the Diné takes place within the land that is between the four sacred mountains (Mount Blanca, Mount Taylor, San Francisco Peaks, and Mount Hesperus) which are located within the four corners area of the United States (see picture 5). Religion teaches them that land should not be abused, and its resources should not be used in excess to ensure that it will provide for future generations.

The point of view from Peabody Energy:
http://www.peabodyenergy.com/Stewardship/arizonaactivities.html



Black Mesa Mine conveys coal 273 miles to the Mohave Generation Station near Laughlin, Nev., through an underground coal water-pipeline that is unseen and unobtrusive. Out of respect for cultural concerns associated with using the Navajo Aquifer, Peabody is working with the Hopi Tribe, the Navajo Nation and the power plant owners to pursue development of an alternative water source to convey coal to the Mohave Station.

Box 5 The Black Mesa Project

The following details of are from a scoping meeting that was monitored by Richard Holbrook, OSM head of Western Branch. Flagstaff, Arizona. January 13, 2005 at the Coconino County Board Room.

"I'd like now to give a summary of what is the proposed Black Mesa project. Peabody's February 2004 Life of Mine Permit revision application proposes that the Black Mesa…will continue [to be mined] through at least 2026. Mining methods will not change... The annual coal production rate at the Black Mesa mine would increase from 4.8 million tons to 6.2 million tons…

Because of increased coal production, the amount of water needed to slurry coal from the mine would increase from about 3100 to 3700 acre feet per year. When or if the C-Aquifer [Coconino Aquifer] water supply system is constructed, the preparation plant will start using C-Aquifer water instead of N-Aquifer [Navajo Aquifer] water to make the coal slurry. Few if any modifications to the existing coal slurry preparation plant are proposed. Black Mesa Pipeline, Inc. would replace about 95% of the 273 mile long coal slurry pipeline because the existing pipeline is reaching its designed life. Pipeline construction would involve decommissioning the existing buried pipeline, mostly leaving it in place and burying the new coal slurry pipeline adjacent to the existing pipeline.

Southern California Edison is proposing a new water system for [Black Mesa Mine] and for coal slurry transportation to the Mojave Generating Station in Laughlin, Nevada… The C-Aquifer water supply system will provide an alternative water source to N-Aquifer water currently used to slurry coal at the Black Mesa Preparation Plant and for non-related issues at the mine. The system would be capable of providing up to 6,000 acre feet per year for coal slurry and mine related issues. Development of this water supply system also would provide an opportunity to make water available to the Navajo Nation and the Hopi Tribe for municipal and industrial uses. By making the pipeline larger, additional capacity would allow future pipelines to be constructed to the Navajo and Hopi communities. Major components of the C-Aquifer water supply system would include a well field in the Southwest part of the Navajo reservation consisting of about 5 to 20 wells, a pipeline from the well field, North, Northeast to the Black Mesa Mine following to the extent possible existing roads. It will be about 120 miles long. About 5 pump stations along the pipeline with access roads and electrical transmission lines would also be constructed. Under the proposals, most of the water used by the Black Mesa…for coal slurry transportation would come from the C-Aquifer rather than the N-Aquifer."

Navajo tradition says that Black Mesa has several religious significances. These stories have been passed down from generation to generation through oral accounts.

"As Diné people, we were given the boundaries of the four sacred mountains to live within; they are also the foundation of our universe. There are a few depictions of this traditional universe and each of them show the sacred mountains in a relation to the male Hogan- the four 'cardinal' mountains…being the pillars, while other sacred sites mark significant places within the Hogan. Black Mesa, as it has been explained to me, is the area in the Hogan where the patient sits during a ceremony for receiving medicines and prayers, therefore it represent [sic] an 'altar'."
Klee Johnson (personal communication, February 14, 2005)

Amos Johnson, the Navajo Nation council representative for the Chapter Community of Black Mesa, Forest Lake (the community where the mine is located) and Rough Rock describes Black Mesa as the following,

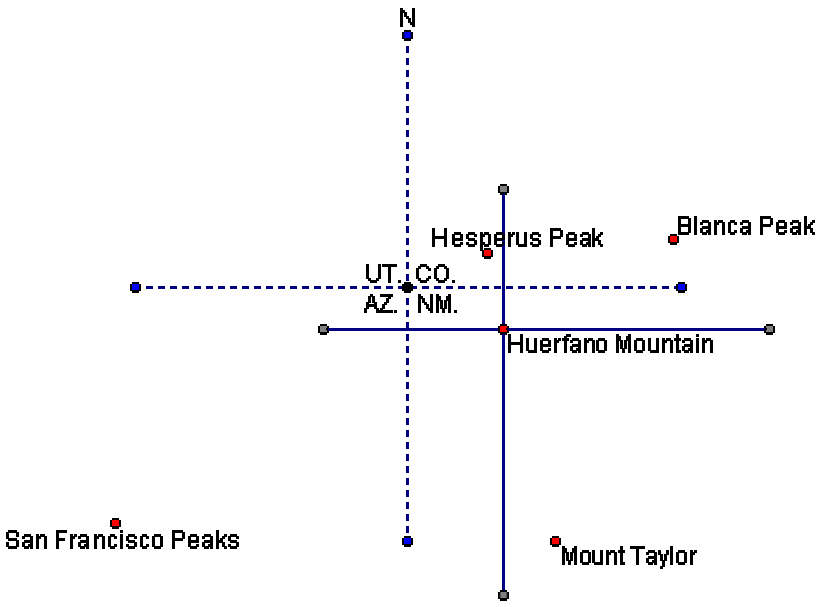
"Black Mesa is Tsé'Lizhin which means, I guess translates into English, means [sic] Black Mountain…[The] relationship the Navajos have with Black Mesa is time immemorial, so the people…have always recognized that the Black Mesa is a place of refuge, a spiritual place. I always say on the counsel floor that I come from "God's country" which is Black Mesa. It also provides subsistence to the people that live there and Black Mesa has a long history. The Diné have used [Black Mesa] as a place of refuge against Spaniards, other tribes, and even the western society that is encroaching on the people, the Navajo people."
Amos Johnson (personal communication January 11, 2005)

Black Mesa also plays a role in the religious traditions of the Hopis. The Hopi oral history tells that their land (*tutsqua*) was given to them by Maa'saw, the guardian of the world. They made a pact with Maa'saw that as long as they cared for and guarded the land, they could remain on their ancestral homeland (The Hopi Tribe, About the Hopi Tribe *Tutsqua* – the word for "land" in Hopi). The Hopis have lived on their land since 500 A.D. This makes Hopis the longest "authenticated occupation of a single area by any Native American tribe in the United States." (The Hopi Tribe, Tutsqua Ancestral Land).

"It's said in the [Hopi's] chronological migration stories that as far west as the Grand Canyon, as far South as Phoenix, and as far East as New Mexico, all this was Hopi land. The Hopi people have always been here, they haven't been anywhere else."
Vanessa Charles, Public Relations, Hopi Government (personal communication January 13, 2005).

Still among some of the most traditional indians in the Americas, they continue to observe the spiritual beliefs and practices of their forefathers of thousands of years ago:

"Our religious teachings are based upon the proper care of our land and the people who live upon it. We must not lose the way of life of our religion… We believe in that; we live it day by day… We the leaders of the traditional Hopi (…) want our way of life to continue on; for ourselves, for our children, and for their children who come after".
Bluebird, Chief of one of the Hopi villages, cited by Alvin H. Josephy Jr, 500 Nations.



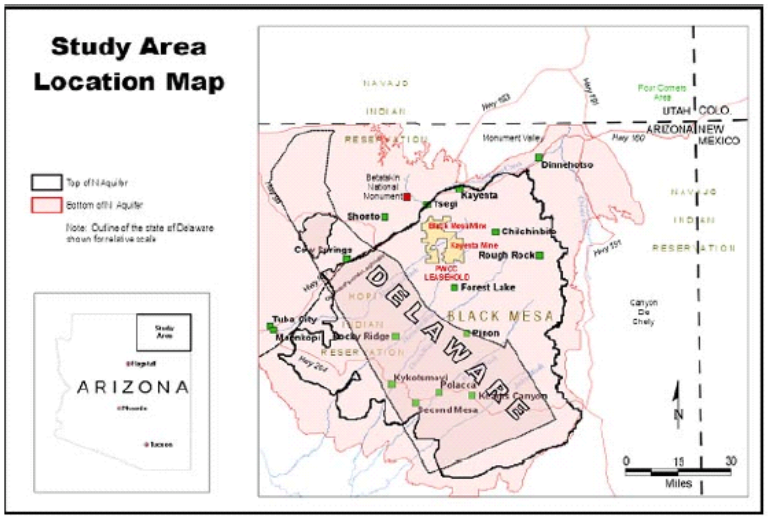
Picture 5. Using Huérfano Mountain (Dzilná'oodilii)as the center, one can easily get an idea of where lay the four sacred mountains 1.Mountain to the East: (Sisnaajiní) Blanca Peak, near Alamosa, CO; 2.Mountain to the South: (Tsoodzil) Mount Taylor, near Grants, NM; 3.Mountain to the West: (Dook'o'oosliid) Francisco Peaks, near Flagstaff, AZ; and 4.Mountain to the North: (Dibé Nitsaa) Hesperus Peak, near Hesperus, CO.

V.- The effects of mining Black Mesa

V.1.- The N-Aquifer

The fact that Black Mesa is sacred ground to both the Hopi Tribe and the Navajo Nation makes the logistics of the mine a sensitive issue for all parties involved. The mining of Black Mesa by the Peabody Mining Co. has substantial impact on environmental and

cultural resources that are revered by both Native American tribes. The foremost environmentally damaging effect of the mine that impacts the Hopi religion is the depletion of the Navajo Aquifer (hereinafter, N-Aquifer) (Peabody Energy Company, Inc., Navajo Aquifer).



In the Black Mesa basin, the Navajo Aquifer spans more than 7,500-square miles, an area the size of Delaware. A vast and robust resource, it holds an estimated 400 acre-feet of water, about 17 times the size of Lake Powell at full pool.

Picture 6.

The 35,000 year old N-Aquifer is made of porous rock that filters ground water and also acts as a "transmitter" to allow water to flow through the rock to different streams and wells. The water easily passes EPA standards and is so pure that it has often been said that it is like using Evian Water to wash the coal (Black Mesa Trust). OSM states that the N-Aquifer recharges about 13,000 to 16,000 acre-feet per year (Peabody Energy Company, Inc., Navajo Aquifer). This might seem like a lot, but not in comparison to the amount of water that is pumped out of the aquifer every year. Peabody pumps about 3,100 acre-feet per year to use for the slurry pipeline (1 acre-foot of water is equal to 325,851 gallons and 3 acre feet are equal to 1 million gallons of water) and the tribal communities that depend on the N-Aquifer for their drinking water use 3,000 acre-feet per year (Natural Resource Defense Council, Reclaiming the Future).

Picture 7. Many residents on the reservations get their water from community wells like this one at the Pinon Community Center, Navajo Nation

When calculating the math, this seems like not very much, but hydrologists have predicted that the Hopi community on Black Mesa will run out of water within the next 20 years.

There have already been signs of water depletion of the N-Aquifer even without scientific evidence (see picture 8). Some of the sacred springs that Hopis have used for thousands of years have dried up or are on the verge of extinction. These springs are used for consecration and regeneration rituals (In Light of Reverence, Bullfrog Films).

Since the leases were signed in the mid-60s, there have been 11 studies done on the water levels of the N-Aquifer by Peabody, the Navajo Nation, the Hopi Tribe and other government and non-government organizations. The latest research that was funded by Peabody consisted of a 3-dimensional model of the N-Aquifer. The model Peabody used is considered accurate because Peabody was able to use 15-20 years worth of collected data. After many surveys and tests, Peabody claims that the 3-dimensional model has shown that its usage of the aquifer is minimal (Peabody Energy Co., Inc., Miracle on Black Mesa).

The other organization to have done tests on the N-Aquifer is the National Research Defense Council (NRDC). NRDC's scientific measurements have concluded that the DOI

"should require that Peabody cease mining the aquifer no later than 2005," due to the severe depletion of the N-Aquifer and its surrounding springs (Natural Resource Defense Council, Executive Summary). In fact, seven out of nine monitored springs by the NRDC have shown a decline in excess of 10 percent (Natural Resource Defense Council, The Worth of Water).

Picture 8. Spring on the Hopi Reservation that shows a decrease in water level (Nabham, G., at 40.)

V.2.- Reclamation

Peabody contends it does a good job of following the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This Act requires that land that has been mined be returned to an equal or better condition than before it was ever mined. After an area has been mined, Peabody first uses heavy machinery to grate the land back to its near contours. Then, the ground is tilled and reseeded. "Once it [the land] passes the criteria set by regulators, then the land will be released back to the Navajo tribe or the Hopi tribe and the land has a greater capacity of grazing now, 20 times more than before the mining began." (Eric Bronston, Senior Environmental Quality Technician; Peabody Energy Company, Inc., Miracle on Black Mesa). Peabody monitors the reclaimed area for up to ten years. In addition, Peabody states that they are careful to replant those species of plants that have cultural significance. Out of 120 identified species of plants on Black Mesa, Peabody grows

65 of them in its nursery. Out of those 65, over 100,000 of them have been planted in reclaimed areas (Peabody Energy Company, Inc., Miracle on Black Mesa).

Other parties are dissatisfied with Peabody's reclamation. Strip-mining Black Mesa as discussed above does great environmental damage to its natural ecosystem. The areas that have been strip-mined on the mesa have changed the "balance of life" between Native Americans and their land. "For Diné, to lose our relationship with our land would be devastating because it would mean loss of our being, in both our physical existence and metaphysical identity." (Waters, A). An issue that has arisen is that some of the plants that are being destroyed are used by medicine men for religious ceremonies. There are now areas that have been reclaimed by Peabody where medicine men used to gather herbs, but instead of the herbs, there is only Kentucky Blue Grass and rolling hills. (Klee Johnson personal communication, February 14, 2005). The companies that come to mine on the reservations are outsiders and do not know the significance of the plants that are being uprooted from the mesa. There are claims that there have been species not native to the area planted in the reclamation process, i.e., Salton Cedar, that consumes mass quantities of water (Amos Johnson, personal communication, January 11, 2005)

Another concern is that the reclaimed areas are considered off limits to the people who live in the surrounding communities.

"Some of these local people who tend livestock have no other place to take their livestock. So, right now, when they take their livestock into these reclaimed areas, the companies or Office of Surface Mining believes they're trespassing and they tell the people to get their livestock out and they even threaten to impound them [the livestock]."
Amos Johnson (personal communication, January 11, 2005)

Pictures 8 & 10. Many Navajos still herd sheep as a way of life such as this Navajo elder near Pinon, AZ.

The reason for this is that when the Navajo Government signed the lease with Peabody, the Navajo Government gave the rights to mine the land to Peabody and along with mining rights is reclamation of the land. The people have been compensated for their grazing rights to the land, so it is no longer considered theirs. Currently, the Navajo Nation Government and the BIA have been working on a plan to give grazing permits for the reclaimed areas. (Amos Johnson, personal communication, January 11, 2005)

V.3.- Graves and Sacred Sites

The Navajo religious belief is that once a person has passed away, the body (person) is neither to be talked about, looked at, nor handled. The only people allowed to do these three things are medicine people who perform the burial ceremonies and dress the body after the person has died. Navajo tradition states the reason behind this belief is that the person's spirit could still be on earth, and it could be looking for a body to "live" in. There is no way of knowing if it is a good spirit or a bad spirit. (Marilyn N. Verney, Navajo, personal communication, February 11, 2005) Unburying the dead goes against Navajo tradition and for many traditionalists, this is sacrilegious. This is another reason why many Navajo see the mining of Black Mesa as damaging to their culture. The mining has caused

several prehistoric and historic burial sites to be unburied and relocated. (The tribal governments and the OSM have worked together to try to find a solution to the problem which will be discussed later.)

Picture 11. Navajo operating machinery at Black Mesa (Lindig, W., at 210)

VI.- Some economics

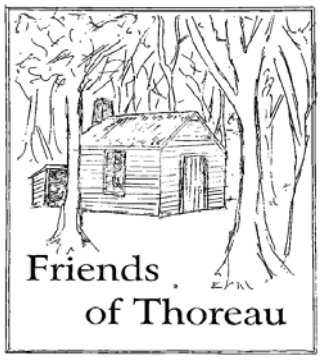
Within the last 40 years, both tribes have become near economically dependent on the royalties that they receive from Peabody, even though their proportion of the royalties is unfairly low. 1/3 ($7.7 million) of the Hopi Government's budget and/or $25 million of the Navajo Nation's budget depends on the operations at Black Mesa (Indianz.com) (A Navajo tribal delegate stated that this amount is inflated and the actual number of royalties the Navajo Nation receives is about $15 million.) (Amos Johnson, personal communication, January 11, 2005). The royalties help pay for schools, roads and social services on the reservation. Without this money, some of these services would have major cut backs or even shut down. This is a scary thought for many. The reservations are an impoverished area. The numbers are high for those that live below the U.S. poverty line. The latest 2000 Census showed that 2,808 out of 6,750 Hopis and 77,326 out of 180,290 Navajos live below the poverty level (American Fact Finder). In addition to poverty, unemployment rates also soar to 50% (Lindig, W., at 210). At least 90% of the Black Mesa Mine employees are Native American, mostly Navajo. (Only about 10-12 Hopis work at the mine.) (V. Masayesva, personal correspondence, January 11, 2005). Jobs are hard to come

by on the reservations and the shutting down of the mine would increase an already high unemployment rate.

VI.- Concluding Questions

The final EIA report on the Black Mesa Project isn't scheduled to be finished until June 2006. However, NRDC and both tribes have lobbied that Peabody should cease using water from the N-Aquifer all together by 2005. Will this be accomplished before December 31st, 2005 and which of the actors has jurisdiction over the operation of the mine?

Another factor to remember is that if MGS does not install air pollution reduction equipment by December of 2005, which was specified in a 1999 Consent Decree, it will be forced to shut down permanently (Norrell, B). California Edison states that it would cost $58 million to install the equipment and this would require shutting down the generating station anywhere from 6 to 12 months (Edward, J.G.). In the meantime, if the OSM, Navajo Nation, Hopi Tribe, BIA, and Peabody can't find a solution in regards to a different water source, there is a chance that the mine could be shut down anyways. Black Mesa is the only source of coal for MGS, so unless MGS found another coal source, it would have to shut down. Should the Hopis, Navajos, and NRDC continue lobbying to find a water alternative if the risk of closing the mine would socioeconomically have a negative affect on the two tribes not to mention the effect it would have on the populations of L.A., Las Vegas and Southern Arizona?



Native Americans and Natural Resources: Black Mesa

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Scholars' Debate

I.- The Coconino Aquifer

The C-Aquifer's (see map in picture 12) name originates from the Coconino Sandstone that lines most of the aquifer. It is "the most productive aquifer in the Little Colorado River Basin." The C-Aquifer is located in the four corners area and spans 27,000 square miles. In the Flagstaff region, the aquifer averages an annual recharge of 290,000 acre-feet; this amount differs outside of the Flagstaff area. In addition, the amount of water that is in the aquifer is estimated to be 4,800,000 acre/ft., which is only 10% of the total aquifer volume (Water Resources of Arizona).

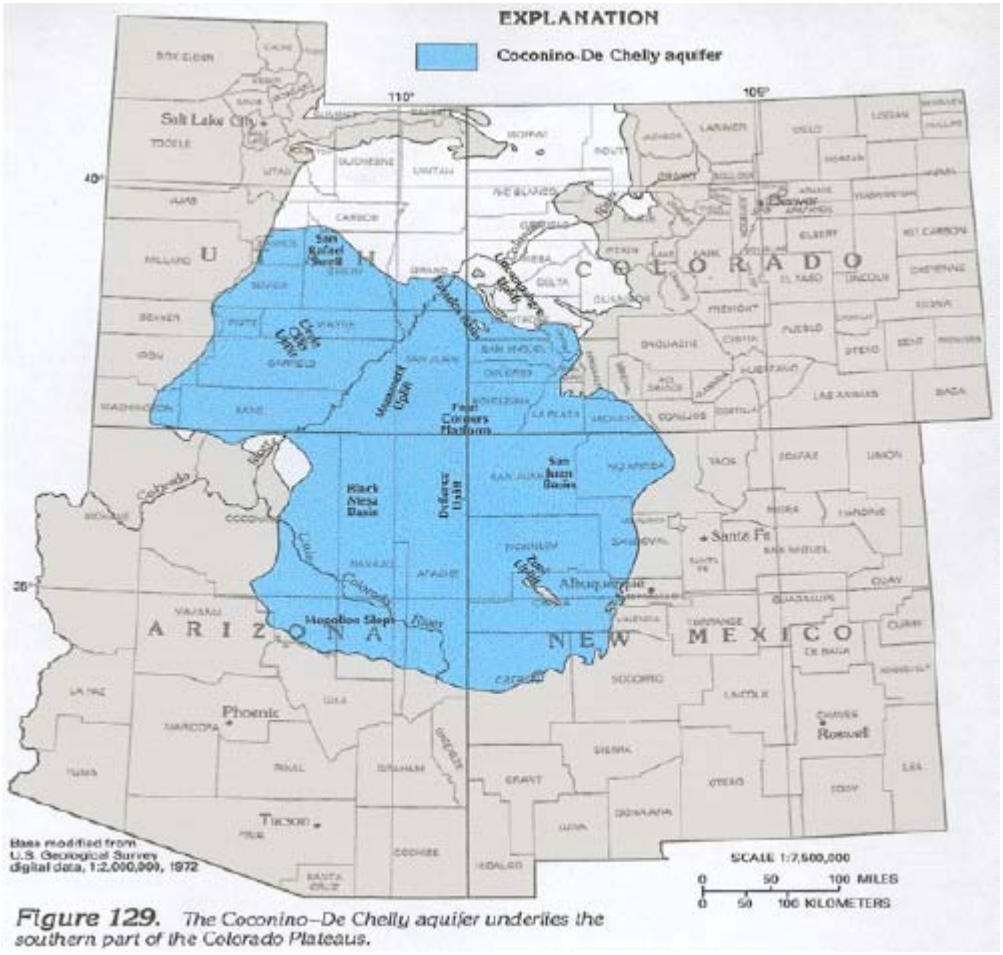


Figure 129. The Coconino–De Chelly aquifer underlies the southern part of the Colorado Plateaus.

Picture 12. Source: Ground Water Atlas of the United States

The proposed use of the C-Aquifer to use for the slurry pipeline is also not without its conflicts. Those who oppose the use of the C-Aquifer use the same arguments as stated above for the use of the N-Aquifer. The depletion in the level of local springs and the extinction of washes will only move from the Hopi community to another one if the C-Aquifer is used for the slurry line. This does not solve the issue of environmental sustainability, but only prolongs the problem.

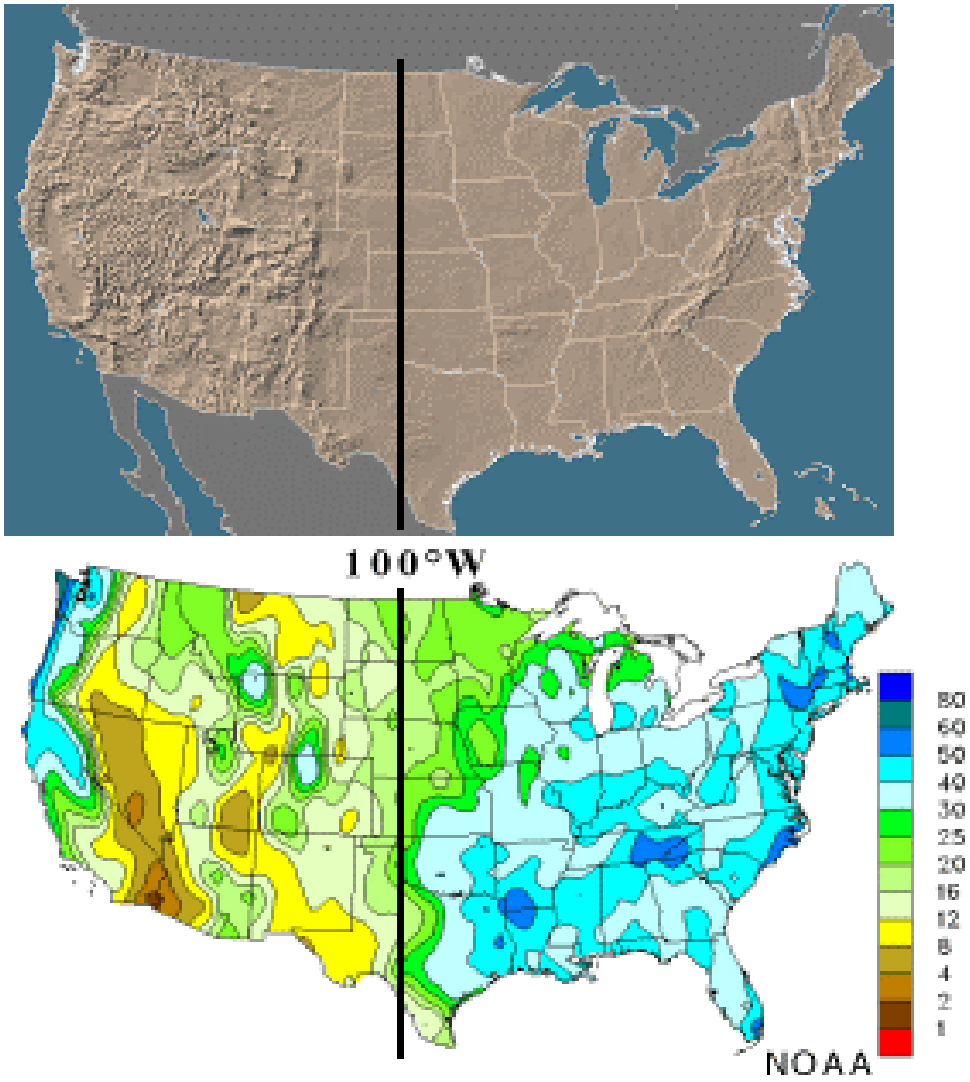
"We've spoken loud and clear that we no longer wish to continue to use water for coal mining. When the springs are dry, then what do we do? We begin to speak out and reach out. We've been heard. I think that some of these people in tribal [Hopi] leadership that value water want to keep their [own] water, but want to use someone else's water. This is not Hopi. It's against our way of life to use water for coal slurry."
Leonard Masayesva, President of Black Mesa Trust (personal communication, January 11, 2005)

In addition to the members of the Navajo and Hopi tribes who are against the use of the C-Aquifer for coal mining, members of the non-reservation communities whose main source of water is the C-Aquifer are publicly speaking out against its use. On the flip side, there would be the same economical benefits for using the C-Aquifer as there are for the N-Aquifer. At the present time, the reason why there is no industry on the Hopi reservation (besides the mine) is because there is no guaranteed permanent water source. If the Black Mesa project were to be implemented, the pipeline from the wells to the mine would go right through the Hopi reservation and this would bring a permanent water source to their land. The view of the Hopi Tribal government is that using the C-Aquifer would be beneficial for the Hopi people.

"For instance this village, the village of Kytsmovi was going to have a dialysis center…We couldn't even have that because we don't have a guaranteed water supply. If we were to get the C-Aquifer [sic]…what we can do is build a pipeline from the C-Aquifer to Mojave, but we could also build pipelines to the Hopi reservation and the Navajo Nation, insuring that the villages have water for industrial use. If you look around…there is nothing going on here. We have no industry; we don't have any jobs... We can't even build or have industrial development or even a store…because there's no guaranteed water supply."
Vanessa Charles, Public Relations Officer for the Hopi Tribe (personal communication, January 13, 2005)

This is a complicated issue. Should the C-Aquifer be used for the slurry pipeline? How are these issues of water allocation solved in he U.S.? Is water allocation law the same where the water is plentiful, as in the East Coast, and where the water is scarce?

What does the 100th meridian divide (see picture 13) tell you about water management in the U.S.? Who discovered this ecological feature and planned for the development of the West based on this ground? Did he/she succeed?



Picture 13. Source: Donald Worster, The Challenge of the Arid West, in Nature Transformed. The Environment in American History. National Humanities Center.

II.- Alternatives in the Black Mesa Project.

What other economic and energy alternatives are there for the N-Aquifer and for Black Mesa Mine? These are not questions that have shown up recently in tribal council meetings; these questions have been well thought-out for several years. One option is to use pumped water from Lake Powell. The Hopi Government website, explains why pumping water from Lake Powell would be beneficial. The Mother Earth News website, argues against using

water from Lake Powell and the potential damage that can occur. (See www.hopi.nsn.us/water_qanda.asp#13 and www.motherearthnews.com/arc/5340/.)

Although utilization of water from Lake Powell would require the use of an aboveground source of water instead of using underground water sources, reasons for not using Lake Powell as a water source for the slurry line seem to be the as those for not wanting to use the aquifers.

What about an alternative to the slurry pipeline? The idea of using a railroad to transport coal from Black Mesa to MGS has been discussed. This is not a feasible option because the cost of a railroad from Black Mesa to MGS is astronomical. Recent studies have shown that it would cost $3.5 million per mile of rail. If the cost of retrofitting the MGS is included, the total estimated cost would be $500 million. (Vanessa Charles, personal communication, February 10, 2005) Because this would be such a grandiose project, the question of who would pay for it is not on the table at this point in time. (Amos Johnson, the Black Mesa delegate to the Navajo Nation noted that the Navajo Nation opened their financial books to Peabody to show that the Navajo Nation does not have the funds to help pay for a railroad, but Peabody refused to open their accounting books to the Navajo Nation to determine if they have enough capital to be able to pay for a railroad.)

If the actors can not come up with a solution to the slurry pipeline, can the tribes come up with alternatives that would help them economically and help reduce the cultural impacts that mining has on the tribes? At the moment, both tribes are in the brainstorming process to find an answer to this problem that could promote sustainable environmental, social and economic development. So far, two of the solutions have been wind and solar power. Currently, the Hopi tribe is negotiating with a San Francisco turbine company to construct a turbine farm along I-40. In addition, the tribe is also negotiating with energy and transmission line companies for the use of Hopi land. Building solar panel farms is also a viable alternative to mining. For some, these two sources seem a feasible alternative. There is no need to strip the land, the area on which to place the wind turbines and solar panels can be located on designated non-sacred areas and even better, these alternatives don’t

require water. However, Vanessa Charles, the Hopi public relations officer states that land issues will still be a problem for the Hopi tribe no matter the alternative solution.

"The land collectively belongs to the Hopi people, and then the land belongs to different villages because different villages have claim to the land. Then it [land] belongs to [the] clan, and then from the clan it belongs to the family, and then the individual which [sic] is usually the woman because it's a matriarchal society…Even if we were to get these wind turbines, essentially who is going to give the land to do that?"
Vanessa Charles (personal communication, January 13, 2005)

If the land were to be "given up" by the family or clan, turbines and panels take capital. This is a hindrance on both tribes whose budgets are already stretched tight.

The Navajos have approved (via an election) the proposition to build a casino on their reservation. (Amos Johnson, personal communication, January 11, 2005) This would generate millions in revenues and create jobs. (The Hopis have decided not to make their tribe a gaming tribe.) The Navajos are also researching to see what kinds of services can be paid for by outside grants.

Both tribes are still in the process of devising "outside of the box" alternatives to the Black Mesa Project. Should the tribes take the position that mining the coal from their reservations is for the greater good of society (utilitarianism) and continue to strip-mine Back Mesa; or should the tribes take the position that they should not be subjected to the consequences of strip-mining no matter what the benefits are (rights-based theory)? Utilitarianism is associated with economic efficiency and the greater well-being of all. If Peabody continues to mine, then economies of the tribes would continue to benefit and the populations of Southern California, Nevada and Arizona would also be able to consume electricity at the present rate. If the coal mine were to be shut down, would that mean the inhabitants in those states would have to suffer economically because Native Americans in Arizona and New Mexico shut down a coal mine? What would happen to the bright lights of Las Vegas?

III.- Modernists v. Traditionalists

At first thought, a reader might think that this was a conflict between Peabody versus the Hopi and Navajo tribes, "administered" by federal authorities. What are not so open in the public air are the intertribal conflicts surrounding the issue of Black Mesa. This is the conflict between the traditionalists and the modernists. Modernists can be defined as mostly the younger generations who see progress and industrialization as an asset to the reservation. Traditionalists are the exact opposite, they are comprised mostly of elders who view industrialization as something that is threatening their culture and religion and that tribes can continue to survive by following the traditional ways.

Traditionalists from both tribes believe that Black Mesa was given to them in their creation stories. It is land that is to provide for the people as long as the people reciprocate the favor and are good stewards of the land. Evie Tsosie, a mobile equipment operator for Peabody at the Black Mesa mine still believes this, but she takes a modernist point of view.

"I was told Black Mesa was a female and a mother to all nature. When I was able to work up here, I turned around and looked at it [Black Mesa], you know. Well, this mother is going to provide a lot of things for me, in a way you know; my home, pay my home, transportation and, and [sic] this mother is taking care of me with food on the table and clothe me and my kids [sic]." (Peabody Energy Company, Inc., Miracle on Black Mesa)

Without jobs from Black Mesa, the unemployment level of the Navajos would be higher than 50% and the already soaring poverty rate would also increase. Since the opening of the mine, the communities that surround it have come to resemble tiny suburbs. There is running water and electricity, which they didn't have before. (Note that there are still areas on the reservation without these amenities.) The homes are nice and do not look like the typical Indian housing that the federal government has built on the reservation. Apart from the increase in their standards of living, some Navajos have claimed that the level of education on the reservations has increased due to the royalties of the mine.

Bobbie Begay, a Navajo from Big Mountain community, has worked at the mine for 25 years. He sees the benefit of the mine for his children and is afraid that if the mine closes,

then the reservation school his children attend will close. Bobbie also agrees that revenues from the mine have increased the standards of education. (personal communication, scoping meeting, Flagstaff, AZ, January 13, 2005)

In addition, parents who work at the mine have been able to send their children to college so that they can acquire an education and get out of the cycle of poverty that is all too common on many Native American reservations.

Due to the increase in technology and communication, the younger generation of Native Americans have become part of mainstream American society. “I think a lot of our people have swayed. They’re taking part in the American dream…” (Vernon Masayesva, personal communication, January 11, 2005.)

Traditionalists insist that their culture is so strong and rich with traditions that there is no need for modern amenities, especially when it causes such destruction to the land. It is mostly the younger generations that do not learn how to speak their traditional tongue and do not take the time to learn the traditional ceremonies. Once Navajos and Hopis discontinue the practice of their religion, then as a race, they will be changed forever.

From interviewing Hopi and Navajo government representatives, they seem for the most part to have a modernist point of view. The “official” side of the tribes is to give the go-ahead for the Black Mesa Project, to stop the pumping of the N-Aquifer, but to continue using the slurry pipeline via the C-Aquifer. The pubic relations officer for the Hopi government states, “It [mining of Black Mesa] doesn’t really infringe per se on the religious aspect of the Hopi tribe and the Hopi people. What is at stake is not necessarily the mining; it is the use of the water, which is the N-Aquifer…” (Vanessa Charles, personal communication, January 13, 2005)

The Navajo tribal council has already voted on a resolution to stop the pumping of the N-Aquifer by December 31, 2005, however, the attorneys for the tribe advised the government to rescind the resolution. Some delegates and the Navajo President are discussing this

decision right now. Amos Johnson, states that there are new delegates in the tribal council who think differently from previous delegates. They will decide and do what is best for the people, not jump at the mining companies' beck and call which is what some might argue earlier tribal leaders did. (Amos Johnson, personal communication, January 11, 2005) This shows that even amongst the delegates of the Navajo Nation government, there are mixed ideas between the modernists and traditionalists.

The Navajo Nation has passed laws that attempt to find the balance between these two sides. For example, the Navajo Nation Cultural Resource Protection Act's aim is for the protection of cultural assets, but at the same time it allows for progress. Before a mine is opened or a new piece of land is stripped, the Black Mesa Review Board talks to the local people and makes an assessment regarding health, welfare and the effects that will be on the environment and the people if the new area of land were to be stripped for coal. The review board proposes what needs to be done as far as compensation for the Navajo families if their land was to be turned into a strip-mine to Peabody, the Navajo Nation and the Navajo Historic Preservation Office. On much of the land, there are cultural and human remains that would have to be moved.

The Cultural Preservation Department has two types of burial policies depending if it is a prehistoric or historic burial that needs to be moved. This policy is called Jishchaa'.

Prehistoric burials are to be reburied as close to their original area as possible, they are not to be moved out of the area or taken to museums. (This is spelled out under the North American Graves Protection and Repatriation Act, NAGRPA, which will be discussed further.) Historical burials are a little different. The lineal descents decide what will happen to the remains of their relatives. If the lineal descents says to leave the remains as they are, then under the Navajo Nation Resource Protection Act, that is what will happen and mining will not be allowed in that area (Ronald P. Maldonado, Supervisory Archaeologist, personal communication, February 3, 2005).

An example of the modernists and the traditionalists working together to solve these situations can be seen as follows:

When a new area of Black Mesa was opened up, ethnographers found a Navajo shrine and a game corral. Of course, the traditionalists wanted to save the prehistoric sights and not mine on that part of Black Mesa, and the modernists wanted the mining to begin. After intense negotiations in the community that included medicine men, the Navajo Historic Preservation Department, OSM, Black Mesa Advisory Board and the Navajo Nation, it was decided that the corral would be destroyed and the shrine would be moved. The corral was photographed and recorded and the shrine was taken apart meticulously and it was rebuilt outside the mining area.

Is this a new era for the history of Native American tribes or have Indigenous peoples world wide always had to find a balance between modern times and traditions? Indian tribes have had to learn to balance their traditions with that of the European influence. In today's modern times, it is becoming more difficult due to globalization. The United States is the world's largest consumer of goods and this part of the American culture has flooded onto the reservations. As a Navajo who works for Peabody puts it, "we are in a transition period." (Stanley Yazzie Acting director, Navajo Nation Community Development department, Vicepresident of the Shonto Chapter).

IV.- Indigenous Environmental and Cultural Rights in the United States

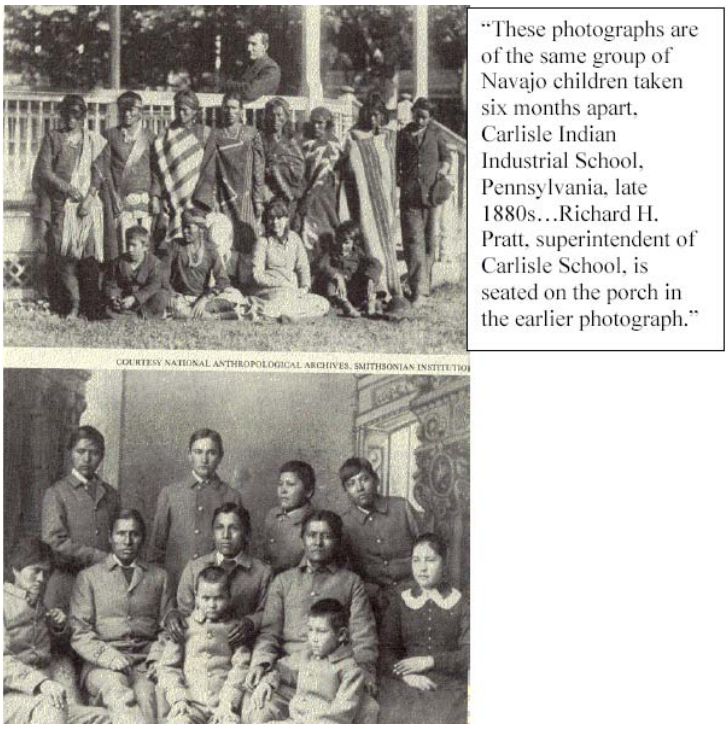
The majority of the federal regulations the actors for this case study abide by were written in the latter part of the 20th century, with some exceptions, such as the Winters Doctrine concerning water rights (See Box 6). The history behind the formation of the legislation is long and complex. The laws regarding tribal lands of Native Americans alone could take up volumes. In the early part of the 20th Century, legislation was still being passed by Congress that inhibited Native Americans from protecting their land from environmental destruction. In 1922, Secretary Fall declared the General Leasing Act of 1920 which

provided for “leasing of mineral deposits on public domain by private businesses…” This applied to reservations that were established by Executive Order after 1871. (This would apply to the Hopi Reservation, but only parts of the Navajo Reservation.)

It wasn’t until 1984 that the Environmental Protection Agency adopted a new policy that tribes could develop their own environmental programs regarding their resources (Reed, J.B., at 64).

Besides land rights, many of the treaties and laws regarding Native Americans until recently were focused on the idea of assimilation (Reed, J.B., at 64).

The fundamental cultural values of Native Americans had been under attack ever since the arrival of the British. Cultural preservation of Native Americans was unthinkable. Native Americans were forced to cut their hair, attend Christian services and wear Americans-style clothing. In addition, their rituals such as the Sun Dance were banned (Olson, J. S., at 86).



Picture 14 from Olson, J.S.

In the early 20th Century, the federal government as well as conservatives realized that policies towards Native Americans had to be changed. The thought was that if they had not assimilated for the past three centuries, chances of Native Americans assimilating to the U.S. culture in the future were weak. When John Collier became the Commissioner of Indian Affairs in 1933, he began to change the way the federal government approached Native Americans. Instead of passing laws that forced assimilation, Collier passed laws that were to restore Indian tribe's land and their culture. Under the many policies of the "Indian New Deal" that Collier aided in drafting under Roosevelt, Collier claimed that "Religious freedom was not limited to instruction in the tenets of Christianity." (Olson, J.S., at 113). This marked the end of the assimilation period. Note, though, that Collier also had his critics amongst the leaders of the Indian tribes. Collier was the person who influenced the BIA into implementing the Indian Reorganization Act which as discussed above under "History of Black Mesa" forced tribes into giving up their traditional way of governing themselves.

During the Civil Rights Movement of the 1960s, African Americans and Chicano Movements alike held marches, sit-ins and protests for racial equality. Native Americans watched how the passive aggressive techniques of these two movements gained national and international attention for their causes. They observed and learned from these techniques and formed their own protests and lobbying groups. 1969 is considered the beginning of the Indian Civil Rights Movement, when Native Americans took over Alcatraz. Much of the legislation that has been written for the preservation of tribe's environment and cultural rights was written either during or after this period. They include; the Indian Civil Rights Act of 1968, the 1978 American Indian Religious Freedom Act, the Archaeological Resource Protection Act of 1979, the Indian Mineral Development Act of 1982, the 1990 Native American Graves Protection and Repatriation Act, and the 2000 Executive Order 13175 (For detail about these laws see Box 6) During the eighties and nineties, the environmental justice movement began to form as well, creating legislation that aided the Indian Rights Movement in their quest for tribal preservation. Do these laws go far enough to safeguard indigenous rights on Black Mesa?

Many of the Acts listed above mention the protection of cultural and environmental rights. However, some of the wording is not specific so the interpretation of the law can be different depending on which actor is reading it. For example, §470cc. (c) of the Archeological Protection Act of 1979, requires the "notification to Indian tribes of possible harm to or destruction of sites having religious or cultural importance…as determined by the Federal land manager…". What if the Federal land manager doesn't know which site has religious importance and which one doesn't? Part of the solution to this question is to hold scoping meetings like the one held in Flagstaff regarding the Black Mesa Project (See Box 5). As stated above, the Hopis and Navajos believe all of Black Mesa is of cultural importance.

Box 6. List of major federal Acts concerning Native Americans in the Black Mesa

Winters Doctrine – The Winters Doctrine has to do with Native American water rights. The history of it is from a Supreme Court decision made in the 1908 ruling of *Winters v United States* 207 US 564 (1908). This doctrine stated the water rights on reservations belong to the tribe from the date that the reservation was created. The water rights of the tribe do not expire even when the water is not in use (Grinde, D. A., at 1474).

1934 Indian Reorganization Act or Wheeler-Howard Act. Legislation passed in 1934 in the United States in an attempt to secure new rights for Native Americans on reservations. Its main provisions were to restore to Native Americans management of their assets (mostly land); to prevent further depletion of reservation resources; to build a sound economic foundation for the people of the reservations; and to return to the Native Americans local self-government on a tribal basis. The objectives of the bill were vigorously pursued until the outbreak of World War II. Although the act is still in effect, many Native Americans question its supposed purpose of gradual assimilation; their opposition reflects their efforts to reduce federal condescension in the treatment of Native Americans and their cultures (The Columbia Encyclopedia, Sixth Edition. 2001-05).

1968 Indian Civil Rights Act – The Indian Civil Rights Act was written for tribal governments. Before the Indian Rights Movement, many Native Americans saw their tribal leaders as puppets of the BIA. The history of the BIA and was to assimilate Native Americans, this Act ensures Native Americans the same rights that other American citizens have. The writing of the Indian Civil Rights allows Native Americans to preserve their culture by allowing them freedom of religion, press and the right to assemble for a "redress of grievances." The tribal governments also can't "take any private property for a public use without just compensation." (Pevar, S. L., at 191-193).

1975 Indian Self-Determination and Education Assistance Act. It significantly increased tribal control over programs on Indian reservations and helped fund public school construction on and near reservations *(*1999/2000 issue of the Indian Education Newsletter).

1978 American Indian Religious Freedom Act – This Act gave the right to Native Americans access to sacred sites, the use of sacred objects and the freedom to worship through ceremonial and traditions. In addition, federal offices such as DOI are required to consult Native American religious leaders regarding the department's policies so that traditional culture may be preserved (National Parks Service, 1978). Even though this Act is used to protect the culture and religious freedom of Native Americans under *Lyng v. Northwest Indian Cemetery Protective Association* (1988) the Supreme Court held that, "the legislative intent of the bill did not 'confer special religious rights on Indians,' and as such, provided Indians with no judicial recourse." (Grinde, D. A., p. 121).

1979 Archaeological Resource Protection Act – The Archeological Resource Protection Act was implemented to protect archeological resources on public lands and Indian reservations; Indian tribes are to be notified if cultural resources are to be removed or damaged (Historical Preservation Service).

1982 Indian Mineral Development Act – The purpose of this Act was to allow tribes enter into joint ventures which would allow them to obtain better terms and conditions instead of having to sign a lease with a mining company. If tribes were in joint ventures, then they would be in a better position to protect their resources and to increase their revenues (United States House of Representatives).

Executive Order 13175 – This Executive Order was signed by President Bill Clinton in 2000. It's aim was to strengthen the communication between the Federal and Indian governments when federal policies have implications on Indian tribes. Federal agencies shall also respect tribal sovereignty and rights (United States Department of Energy).

ILO Convention on Indigenous and Tribal Peoples, 1989- This ILO Convention ensures that indigenous peoples, "…benefit on an equal footing from the rights and opportunities which national laws and regulations grant…" the rest of the population. Article 12 states that indigenous peoples shall be able to take legal action if these rights are abused. Article 16 gives indigenous peoples the right to refuse relocation if there is no free and informed consent. In addition, the ILO states that governments shall respect "cultural and spiritual values" people have with their land. This convention also claims that indigenous peoples shall be allowed to implement their own educational system in their own language. The US is not a party to ths Convention (Office of the High Commissioner for Human Rights).

1990 Native American Graves and Repatriation Act- NAGRP helps determine who has lineal rights to remains and sacred objects that have been excavated or found. All federal agencies and museums that posses' Native American remains and funerary objects are required to inventory them, research the origin of the remains, and contact the proper tribe. Once this procedure is finished, the agency or museum, "shall expeditiously return such remains and associated funerary objects." (National Parks Service, 1990).

Rio Declaration on Environment and Development – Principle 1 of this Declaration states that humans, "…are entitled to a healthy and productive life in harmony with nature." The Declaration includes present and future generations in this statement. Principle 15 states that, "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The Rio Declaration also recognizes the traditional knowledge that indigenous peoples have and that this knowledge should be included when "achieving sustainable development." (United Nations, 1992)

Akwé: Kon Guidelines – These 2004 international guidelines are "voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities." (Secretariat of the Convention on Biological Diversity)

Other international instruments of relevance:

International Covenant on Economics, Social and Cultural Rights- The very first article of this International Covenant gives all people the right to self-determination, which includes political status and economic, social and cultural development. In addition, with regards to resources, the covenant shall not be deprived of their "own means of subsistence." (Office of the High Commissioner for Human Rights (1966), International Covenant on Economic, Social and Cultural Rights).

International Covenant on Civil and Political Rights - For this case study, this Covenant is similar to the International Covenant on Economics, Social and Cultural Rights. It believes in the right of self-determination and to protect peoples' means of subsistence (Office of the High Commissioner for Human Rights (1966), International Covenant on Civil and Political Rights).

Another example is Sec. 101 [42 USC § 4331] of the NEPA. b.4. “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice…” Is Native American heritage necessarily always a part of the United States’ national heritage?

V.- Indigenous Rights in the International Community

The above lists the legal resources that protect the cultural and environmental rights of Native Americans in the United States. Other countries also have their own laws to protect the rights of their indigenous tribes, i.e., the Cultural Heritage Act No. 3501 of Ecuador and Australia’s Aboriginal and Torres Strait Islander Heritage Act of 1984; but are there international laws and norms that the Navajos and Hopis can use to solve the conflict between the tribes, the federal agencies, and Peabody?

Indigenous peoples around the world have had to struggle to control their land and resources from governments and big corporations. They make up to 6% of the world’s population (United Nations, 1994). A Colombian anthropologist has made the observation that, “’the Indians often tell me that the difference between a colonist [a non-Indian settler] and an Indian is that the colonist want to leave money for his children and that the Indians want to leave forests for their children.” (Ayres, E., at 2861).

1981 is when the international community began to really take action to protect Indigenous rights. UNESCO held a meeting in Costa Rica to discuss issues like the protection and use of cultural sites, the return and reburial of human remains, and community control of research, and property rights. The “Declaration of San José” was the first UN document written regarding ethnocide (United Nations, 1997).

Since this time, other international instruments have been approved, including the Rights of Indigenous Peoples in Conventions and Declarations. 1993 was the International year of the world’s indigenous people. Not only was the aim of that year to protect the human rights of

indigenous peoples, but to tell, "…the world of the special knowledge of indigenous peoples, about their unique traditions and values and about their contributions towards solutions for some of the problems of the modern age." (Boutros Boutros-Ghali, Seeds of New Partnership, front page).

The international community became involved in the politics of Black Mesa when in 1996, members of the Navajo community, frustrated because legally they felt like they were running into a brick wall over a number of issues, sent representatives to the First Session of the International Peoples Tribunal on Human Rights and the Environment (Black Day for the Diné). The Navajo Government was not involved. The Big Mountain Legal Defense/Offense Committee worked with the Indian Law Resource Center that is located in Washington, D.C. in drafting the presentation to the UN (Churchill, W., at 170). Afterwards, not only did the UN get involved, but the European Parliament passed an "Urgency Resolution" "…condemning the forced relocation of the Diné, the violation of their human rights and land rights and the environmental destruction being wrought on the land and people of the Black Mesa." (Black Day for the Diné). Was going in front of an International Tribunal pointless for members of the Navajo Nation because International Treaties cannot be enforced? Is there any international tribunal with jurisdiction?

VI.- The Trust Relationship: U.S. v. Navajo and its follow-up.

When the federal government signed reservation treaties and executive orders, the federal government appointed itself as the trustee of the Native Americans and their land. Indian affairs would be under the jurisdiction of the Department of the Interior and the Secretary of the Interior would have the ultimate say in what was most beneficial for Native Americans. The federal government was to decide what was best for the Indians regarding health, schooling and even the manner of earning income. The popular phrase that is often used is that Native Americans were the "white man's burden" and they were like "wards of the state." As discussed above, the federal government set up their own schools where Indian children had to go in order to learn the "American way." In the mid 19th century, the

federal government altered the Navajo economy by providing them with sheep and farm tools. This was an attempt by the federal government to pacify the Navajos and domesticate them (Grinde, D., at 112).

In *Cherokee Nation v. Georgia*, 30 US 1 (1831) the Supreme Court first recognized the trust responsibility of the federal government over Native Americans. Chief Justice John Marshall ruled in *Worcester v. Georgia* 31 US 505 (1832) that the relationship between the United States and Native tribes "…was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of master.'" (O'Brien S., at 259). Indian tribes were considered sovereign nations that traded the majority of their land for the protection of the U.S. Government. (Because tribes are still considered sovereign nations, States have very limited jurisdiction over them. As a general rule states do not have any jurisdiction over Indian tribes since *Worcester v Georgia* 31 US 515 (1832), but during two centuries the rule has been eroded. Nowadays, as the Supreme Court says, "there is no rigid rule by which to resolve the question whether a particular state law may be applied an Indian reservation or to tribal members", *White Mountain Apache Tribe v. Bracker*, 448 US 136 (1980). (For the detailed rules on when state law may be applied, see Prevar, S.L., Chapter VII, at 111 and ff).

Reid Peyton Chambers, a scholar of the Federal Trust Doctrine, has drawn two types of Indian trust obligations by the federal government. On the one side, there are the judicially enforceable Indian trust obligations. These obligations come from the executive branch of government, which is the branch of government the Department of Interior falls under. The second form of trust obligations are the non-enforceable obligations that fall under the jurisdiction of Congress (Cross, R., at 370). The actions of federal agencies that are involved with Indian affairs, such as the BIA, Bureau of Reclamation, National Park Service, and the Fish and Wildlife Service all have regulations to follow when working with tribes. If they do not follow these regulations, Indian tribes can take these agencies to court. For example, in the case of *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), *cert. granted*, 71 U.S.L.W. 3653 (U.S. Mar. 22, 2004) (No. 02-1472), the federal

government was found liable in the amount of $8.5 million for the failure of Indian Health Services to pay full cost of indirect services.

On the other side, Congress is not obliged to provide for the services implied in the trust responsibility and can not be forced to do so. It can even decide to terminate its services to an Indian tribe, or even terminate (legally speaking) the tribe itself -as it did in the 50s- and the federal courts can not prevent it. With respect to Congress, then, the trust responsibility is more of a moral than a legal obligation" (Stephen L. Prevar, at 33).

The trust doctrine has been extended since 1831 to three main aspects: 1) federal statutes, agreements and executive orders can create trust obligations, as a treaty can; 2) the federal trust can create implied (not need to express) commitments; and 3) the trust responsibility imposes on the federal government the obligation to remain loyal to the Indians, to advance their interests, including their interest in self-government (Stephen L. Prevar, at 26-27).

The third principle was best articulated by the US Supreme Court in *Mitchell I* and *Mitchell II* (*United States v. Mitchell*, 445 US 535, 1980; *United States v. Mitchell*, 363 US 206, 1983). Both cases dealt with the claim for compensation by an Indian tribe based on the mismanagement by the federal government of timber resources. The first case was based in a statute that imposed very broad trust obligations (the General Allotment Act of 1887, which required the federal government to manage timber resources "wisely", and the Supreme Court rejected the claim. In the second case, the tribe based the same claim on the more specific statutes and regulations which provided the federal government with very specific mandates concerning the management of the timber resources. Supreme Court this time allowed for the recovery of damages. So, the more specific the obligation the higher the duty of care. In 1977, a Senate committee defined the trust responsibility in the following way:

"…This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society."

In conclusion, “the Indian trust doctrine has had a long love-hate relationship with Indian tribes (Alex Tallchief Skibine, at 247), or as others say, “it has been used on Indian tribes as both a sword and a shield” (Ray Torgerson & Blake A. Watson). The way in which the Secretary of the Interior Donald Hodel conducted himself during the setting of the royalties to be paid by Peabody to the Navajo raised one of the most important issues concerning the specifics about how the trust needs to be the administered in a case that reached the US Supreme Court (*United States v. Navajo Nation*, 537 US 488, 2003).

In 1964, the Navajo Nation (Tribe) permitted the predecessor of Peabody Coal Company (Peabody) to mine coal on the Tribe's lands pursuant to Lease 8580. The Lease established a maximum royalty rate of 37.5 cents per ton of coal, but made that figure subject to reasonable adjustment by the Secretary on the 20-year anniversary of the Lease and every ten years thereafter. As Lease 8580's 20-year anniversary approached, its 37.5 cents per ton rate yielded for the Tribe about 2 percent of gross proceeds. This return was higher than the ten cents per ton minimum established by then-applicable regulations implementing the Indian Mineral Leasing Act of 1938 (IMLA). It was substantially lower, however, than the rate Congress established in 1977 as the minimum permissible royalty for coal mined on federal lands under the Mineral Leasing Act. In June 1984, the Area Director of the Bureau of Indian Affairs, acting pursuant to authority delegated by the Secretary and at the Tribe's request, sent Peabody an opinion letter raising the Lease 8580 rate to 20 percent of gross proceeds. While Peabody's administrative appeal was pending before Deputy Assistant Secretary for Indian Affairs John Fritz, Peabody wrote to Secretary Hodel, asking him either to postpone decision on the appeal or to rule in Peabody's favor. Peabody representatives also met privately with Hodel during that period. In July 1985, Hodel sent a memorandum to Fritz "suggest[ing]" that he inform the parties that his decision was not imminent and urging them to continue their efforts to resolve the matter in a mutually agreeable fashion. The Tribe resumed negotiations with Peabody. In November 1985, the parties agreed to amend the Lease to provide, among other things, for a royalty rate of 12 1/2 percent of monthly gross proceeds, which was the then-customary rate for coal leases on federal and Indian lands. Hodel approved the amended Lease in December 1987.

In 1993, the Tribe brought this action for damages against the United States, alleging, *inter alia*, that the Secretary's approval of the Lease amendments constituted a breach of trust.

The Supreme Court, in a majority decision (Justice Souter filed dissenting opinion in which Justices Stevens and O'Connor joined), rejected the claim based on the fact that

1) Neither the (IMLA) nor any of its regulations established anything more than bare minimum royalty, and therefore, Interior Secretary's approval function did not include duty, enforceable in action for money damages, to ensure higher rate of return for Tribe concerned, and no pertinent statutory or regulatory provision required Secretary, on pain of damages, to conduct independent "economic analysis" of reasonableness of royalty to which Tribe and third party had agreed; and that

2) Neither Indian Mineral Leasing Act (IMLA) nor its implementing regulations proscribed lessee's *ex parte* communications with Interior Secretary during lessee's appeal of decision of Area Director of Bureau of Indian Affairs setting royalty rate for mineral lease on tribal lands; administrative appeal process was largely unconstrained by formal requirements.

The Solicitor General, Ted Olson, appointed by President George W. Bush stated that if the Court favored the Navajo Nation, then it would open up a Pandora's Box. Litigations brought forth from Indian tribes would be never ending.

The critics argue that, "…as far as the U.S. Supreme Court is concerned given its recent decision in *United States v. Navajo Nation*, there is no independent legal basis for imposing liability on federal Indian trust administrators for their alleged mismanagement of Indian trust resources…" (Cross, R., at 371).

In any case, the Navajo keep on insisting on their right to recover for damages. Besides a private lawsuit (*Navajo Nation v. Peabody Holding Company, Inc. et al.*, Civil Action No.

99-0469) at least three additional different lawsuits were initiated after the described decision of the Supreme Court in *United States v. Navajo Nation* of March 4, 2003:

A.- Since march 2004, if the US should pay damages for breach of trust based on statutes different from IMLA (Indian Mining Act)

B.- Since April 2004, if Peabody should pay damages for conspiring (racketeering) to obtain a favourable fee from the US Government.

C.- Since June 15th 2004 (and in the US Supreme Court since December 2004) if an existing arbitrated settlement on the royalties (12,5%) should be enforced. Peabody claims that the said settlement exists while the Diné and the Court (of San Francisco) denied that the settlement was binding. Peabody has taken the case to the Supreme Court on this issue last December appealing the decision of the San Francisco court.

In the Supreme Court's 2003 *United States v. Navajo Nation* ruling, did it infer that tribes don't have legal rights to keep the government in check if the trust obligation has been violated? The government is obligated to represent Indian tribes when they go to court. Is this considered a conflict of interest when Indian tribes bring legal action against the United States? Should Congress draft specific legislation that would state what type of legal protection tribal governments have in regards to the Trust Doctrine? Should the Trust Doctrine be abolished and should tribes be able to govern and regulate themselves?

This brings us to the next topic of this case study: Indian Self-Government.

VII.- Indian Self-Government

Indian inherent sovereignty recognized as early as 1832 by the Supreme Court (*Worcester v Georgia*, 31 US 515) has remained the same in principle (for the legal implications of tribal self-government in detail see Prevar, S.L., Chapter VI, at 79 and ff) but eroded in practice, - some claim that specially after the Supreme Court adjudicated United States v. Navajo, see

Raymond Cross, 2003, “The Federal Trust Duty in an Age of Indian Self- Determination: An Epitaph for a Dying Doctrine?”- (for a legal critical analysis of the erosion of the basic principles of Indian Law, see Fletcher, M.L.M., “Sawnawgezewog ["They are in difficulty"], the Indian problem" and the lost art of survival” 2’’3/2004).

Concerning the land, the loss of control by the tribes was almost consolidated through the passage on February 8, 1887 of the Allotment Act (or Dawes Severalty Act), signed by President Chester Arthur and later amended in April 2, 1892. The Act´s intention was to break up Indian land tenure, destroy tribal life built on the old foundations, and to assimilate Indians individually. Two-thirds of Indian land was alienated while it was in effect (47 years). It provided the granting of 80 acres of agricultural land or a double quantity of grazing land to each individual (note that the ideal surface of the National Grid as it was established by the Homestead Act was 160 acres). By the turn of the Century it was decided that children born to a white father and an Indian mother would follow the father´s citizenship and was not entitled to allotments on the public domain (in 1902). The effects of this Act and the regulations and policies based on it was clear: reservations with lands divided into plots of limited size for distribution to individual Indians who would receive title and those holding allotments would become citizens. Its proponents argued that Natives would benefit from the civilization that owning private property implies, and that they would become farmers. The land not allotted to individual Indians could be sold to whites. The results were large tracts of land open to white settlement, which led to the loss of about 90 million acres of Indian land to whites and the creation of a grid-based checkerboard pattern of property status in the reservations.

By 1920 the conditions faced by Indians, who had not been assimilated, began to become a public issue. Allotments were incentivated with obtaining citizenship (Citizenship Act of 1924, which also conferred citizenship to all Indians who served in the Army). In 1928 the Meriam Report found that the majority of Indians were extremely poor and had not adjusted to the economic and social system of the dominant white society of the US. The report gave detailed accounts of disease, inadequate living conditions, suffering and discontent. Clearly the assimilation policies had not accomplished their goals and individual ownership through allotment had not made farmers out of Indians, accustomed

to fishing or hunting. The report condemned in particular the practice of removal of Indian children from their homes by the Indian Service and the disintegration of family and community life which it created. The report, though, did not ask for the termination of the assimilation policy. I it suggested instead improvements to help Indians who still wanted assimilation and assist those others who preferred to live in accordance with their own traditions.

It was not until the passage of the Indian Reorganization Act (IRA) in 1934, as a part of President Franklin D. Roosevelt's Indian New Deal, that the state of affaires started to turn by changing the old policies of forced assimilation into new ones based on a certain admission of cultural pluralism. It is still unclear (and historians remain divided on the issue) if the IRA succeeded or not in bringing more Indian self-determination. Many historians before the mid 1970s emphasized its positive achievements. Since the late 1970s, however, some others have questioned that it made any real achievements (As a recent defender of the IRA, after a thorough study, see Elmer R. Rusco, 2000).

The Indian New Deal, passed through Congress as the Indian Reorganization Act of 1934, was the beginning of an attempt to reinforce in the real world Indian self-determination. The federal government wanted the tribes to be able to function on their own. However, it was difficult for Indian tribes to be able to function economically and socially on their own because by this time, the federal government had controlled just about every aspect of their lives for a several generations. This tribal renaissance was short-lived, however, as Congress declared in 1953 a goal of terminating the special status of Indian tribes and repudiation of the federal trust responsibility (Robert McCarthy, at 1).

The idea of self-determination became a heated debate during the Indian Rights Movement (although it was during the early 20th Century that the idea of self-determination was first put on the table.) Tribes wanted more sovereignty to be allowed to govern themselves and have authority over their land without the interference of the BIA. At a National Congress of American Indians (NCAI) meeting in Chicago in 1961, more than 500 Indians from 67 tribes met to write the “Declaration of Indian Purpose.”

In it, they stated,

"…When Indians speak of the continent they yielded, they are not referring only to the loss of some millions of acres in real estate…With that continent gone, except for the few parcels they still retain, the basis of life is precariously held, but they mean to hold the scraps and parcels as earnestly as any small nation or ethnic group was ever determined to hold to identity and survival…" (Olson, J.S., at 159).

The NCAI's Declaration emphasized how important land was and is to Native Americans, even the small acres that they still claim. For the assurance of their survival, indigenous people know they have to take care of the land for future generations.

The National Indian Youth Council (NIYC) also formed during this period out of the younger generation's frustration with the elders' method of cooperation and patience with the federal government. If the Native tribes' demands have not been met yet, then what makes them think waiting longer would make the federal government to meet their demands? NIYC's "Statement of Policy" states,

"'The major problem in Indian affairs is that the Indian has been neglected in determining the direction of progress and monies to Indian communities…Our viewpoint, based in a tribal perspective, realizes, literally, that the Indian problem is the white man, and, further, realized that poverty, educational drop-out, unemployment, etc., reflect only symptoms of a social-contact situation that is directed at unilateral cultural extinction.'" (Olson, J.S., at 159).

The passion and determination of the Indian Movement helped bring about change that aided Indian tribes towards self-determination. For example, the 1968 Indian Civil Rights Act, the 1975 Indian Self-Determination and Education Assistance Act were all laws recognized by Congress that aided the tribes to have to rely less on the government and be able to self-govern their own affairs.

Still, to this day, Indian tribes are not totally self-governing. The bureaucracy of the BIA hangs over the tribes. The BIA still plays a huge role in determining reservation policies. As seen in this case study, the BIA's regulations under the DOI are the ultimate authority. The heavy handed middle-man role of the BIA brings frustration to tribal leaders. Amos Johnson, a Navajo Nation delegate states that, "Everything has to go through the Bureau of Indian Affairs in terms of economic development, road projects, school projects, and

request for federal funds. Everything goes through the BIA and we feel that the BIA is our own worst enemy." (A. Johnson, personal communication, January 12, 2005) Vanessa Charles, the Hopi PR, states that there is a "fundamental disconnect" between the obligations of the federal government and the tribes and that the BIA has been, "egregious in misappropriated funds." (personal communication, January 13, 2005)

As can be seen from the increase of tribal lawsuits against the federal government in the later half of the 20th century and the beginning of the 21st century, tribes have been attacking the BIA through lawsuits instead of sit-ins and protests of the 1960s and 70s. Perhaps their aim is to frustrate the federal government with the cost of court fees and the litigation time that this will cause the federal government to allow tribes more "freedom."

As Robert McCarthy puts it:

"throughout its existence, the BIA may be the most maligned agency in the entire United States Government. The BIA has been vilified from all sides, adjudged "incapable" by a federal court, condemned by members of Congress, deemed "incompetent" by a Presidential Commission, and eviscerated in countless editorials. On many reservations, tribal members wryly joke that the acronym stands for "Bossing Indians Around." Perhaps the harshest criticism has come from the most unexpected source, when, in the year 2000, the agency's head offered a moving apology for "the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve."

On the other side, continues McCarthy:

"despite this constant drumbeat of disparagement, the BIA seems to have been remarkably immune to change. Moreover, when condemnation turns to calls for the abolition of the BIA, as it often does, prominent Indian leaders, tribes, and their supporters rush to the BIA's defense. Some critics have argued that the BIA manipulates such tribal demonstrations of support with the selective distribution of rewards and punishments, especially at the Area (now Regional) Office level. Others might argue that Indian tribes view the BIA as their main advocate, however weak, within the federal bureaucracy, in part because BIA personnel are largely drawn from tribal ranks, thanks to Indian preference in BIA hiring. The long-time Director of the American Indian Law Center recently expressed

his own ambivalence about the notion that `if you attack the Bureau of Indian Affairs, you are attacking Indians´."

What is the real story?

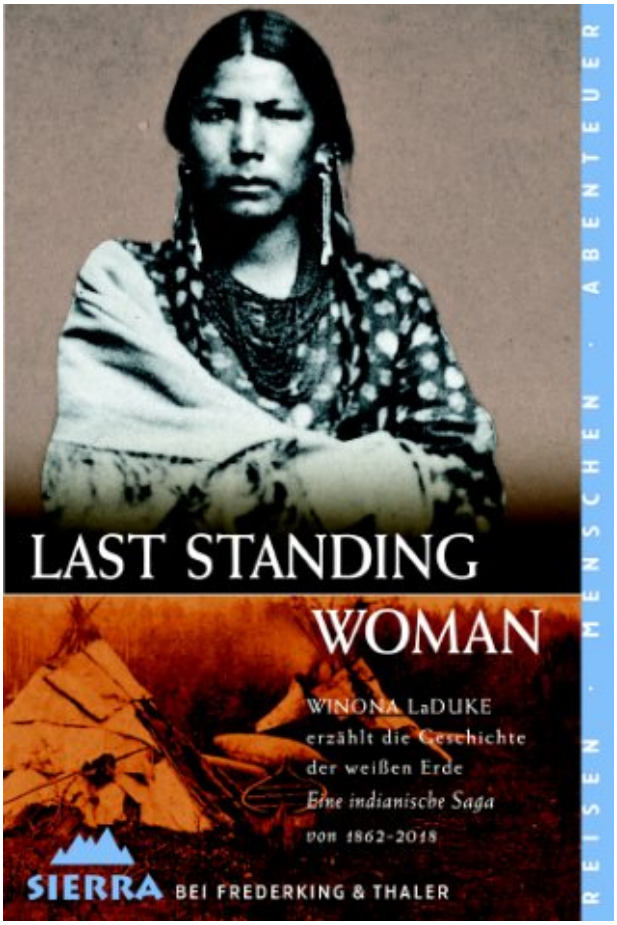
Is abolishing the BIA a feasible option? Abolishing the BIA altogether first came to the table during the Hoover administration in 1928. In 1926, the Institute for Government Research (now the Brookings Institute) conducted a study of Native Americans called the Meriam Report. The report thoroughly studied the education, health, sociology, economics and laws of the tribes. After reading this report, Secretary Wilbur recommended that the BIA should be abolished within 25 years because the report concluded the cause for the Native American's status was the allotment of land, the neglect of the BIA, and Congress failing to provide sufficient funding for Indian services (Olson, J. S., at 100-102). This suggestion never made it past the floor of Congress.

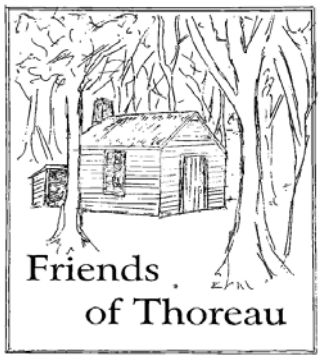
A different issue is the administration by the Federal Government of the trust funds that it maintains for more than 300,000 individual Native Americans (See Thomas Panoff, 2004). Should the management of the Indian trust fund system be changed?

What the tribes would desperately love to see is the freedom for them to own their own natural resources and be able to extract them as they see fit and according to their traditional customs. Tribes would be able to negotiate their own fees for the coal and be able to negotiate their own lease agreements. When asked if this is possible, Amos Johnson agreed that the government can always step in and say "Hey, you can't do that," even though Indian tribes are considered sovereign governments. (personal communication, January 11, 2005) Is the sovereignty of Native Americans a "fake sovereignty"? Before the Native Americans can have full self-determination, does the federal government first need to recognize them as full sovereign nations? Would Native American tribes be able to function without the aid of the United States? Some tribes are becoming wealthy from revenues of casinos, but this solution is either not feasible or completely out of the question for some tribes. Either the tribe does not want to be a gaming tribe (Hopis) or the tribe is located far away from a populous area that a casino is not practical (Native Alaskans).

Many historical works and socio-political essays have tried to describe the saga of the Native Americans towards self-control. An important attempt to describe it by using literature is Winona La Duke´s “Last Standing Woman” (1997). Publishers Weekly recommends it as “a powerful and poignant first novel that traces the lives of seven generations of Anishinaabe (Ojibwe/ Chippewa). Beginning in the 1860s and extending into the future, Last Standing Woman chronicles a reservation and its people's struggle to restore their culture. ´Skillfully intertwines social history, oral myth, and character study´."

Reading it should be recommended and the issue of whether fiction literature is more valuable than scientific essays for the description of reality should be put in the table of public discussion.





Native Americans and Natural Resources: Black Mesa

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Guiding Students´ Discussion

I.- Evolution of Law

What is interesting about law is that it is always evolving. In 1999, after actions by the Navajo against the way in which Donald Hodel, Secretary of the Interior, had administered the trust responsibilities failed even in the Supreme Court (see Section VI of the Scholars´ Debate), the Navajo Nation sustained that he had, nevertheless, violated the Racketeer Influenced and Corrupt Organizations Act, 1970 (RICO). The purpose of this Act was meant specifically to aid officials in the capture and arrest of organized criminals. In 1980, attorneys began to use the RICO Act in civil lawsuits for persons that were injured in their business by a RICO violation.

The Navajo Nation claimed that Peabody violated the RICO Act when it had *ex parte* contacts with the Secretary of the DOI (Donald Hodel) while the Navajo Government and Peabody were negotiating an increase in royalty rates. (See Section VI of Scholars´ Debate) Other violations of the RICO Act included in the lawsuit are, "…breach of contract, interference with fiduciary relationship, conspiracy and fraudulent concealment." (*Navajo Nation v. Peabody Holding Co., No. 99-469, 2002 WL 1457121, at *5, DDC June 24, 2002).* This case is still pending in the federal district courts.

Even though the Court's opinion has not been rendered yet (as of October 2005), does the Navajo Nation's challenge of the activities of the Secretary under the RICO Act change the definition of "racketeering" of the Act? Why was RICO put originally in the books? What are the types of activities that have been criminalized under RICO?

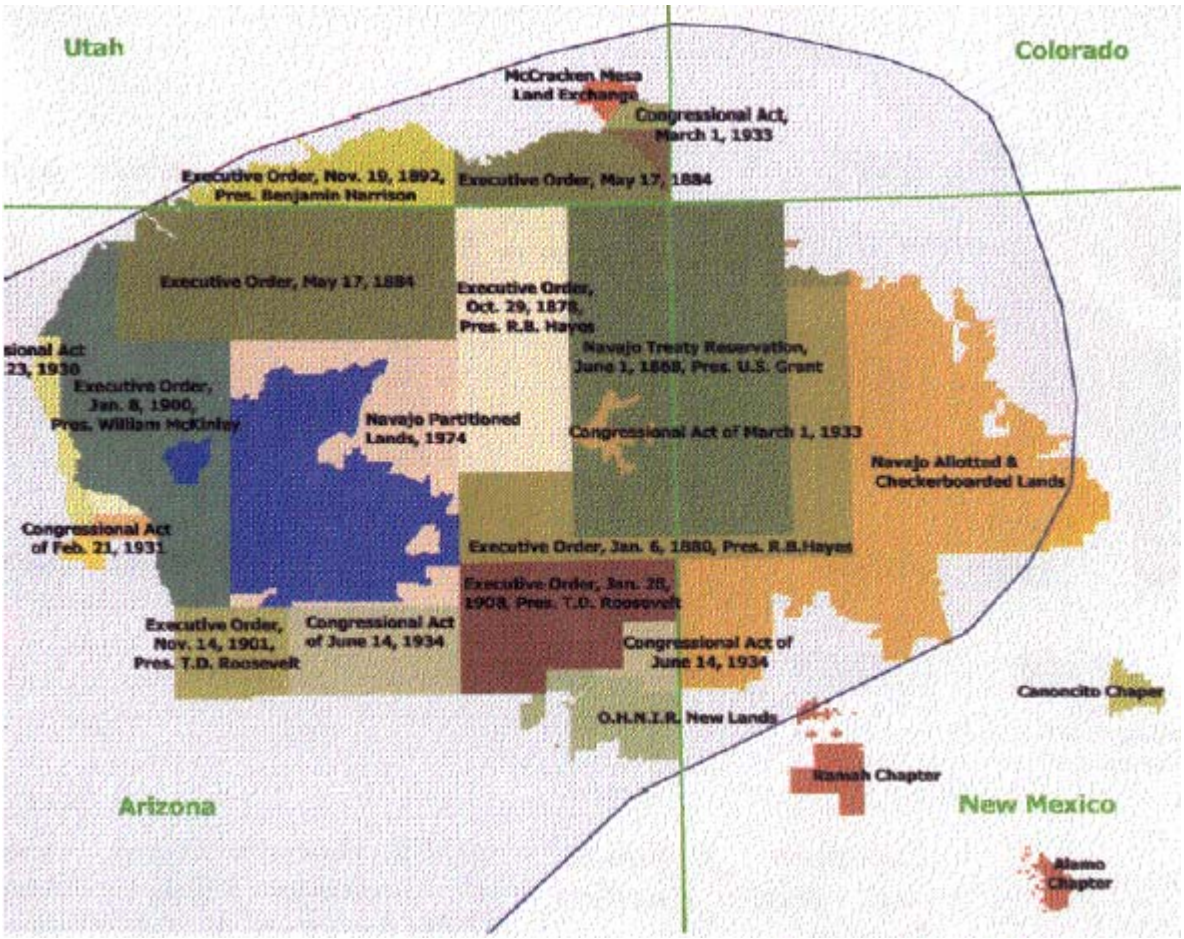
Under the evolution of administrative action in the area of civil rights, as it relates to environmental discrimination, a new type of discrimination has been framed to try to solve problems in which social unfairness due to environmental degradation affects discrete minorities. The notion of "environmental justice" was created in the nineties in order to address them. Originally environmental justice was created to allow African Americans to fight against environmental degradation affecting their communities. (See the Case study.- Farming in the Elkhorn Slough Watershed, Environmental Justice & the Hispanic Community, of the Friends of Thoreau Program at the Institute of North American Studies of the University of Alcalá, in http://www.iuien-uah.net/es/imagenes/pdf_fot/Farming.pdf). Can the situation in the Hopi-Navajo reservation concerning the activities of Peabody be considered an environmental justice issue? What would change if that were the case?

II.- Hopi-Navajo Land Dispute

The modern Hopi-Navajo land dispute dates back to President Chester Arthur's 1882 Executive Order when he allotted a section of land for the Hopi reservation and "…such other Indians as the Secretary of the Interior may see fit to settle thereon." (See History of

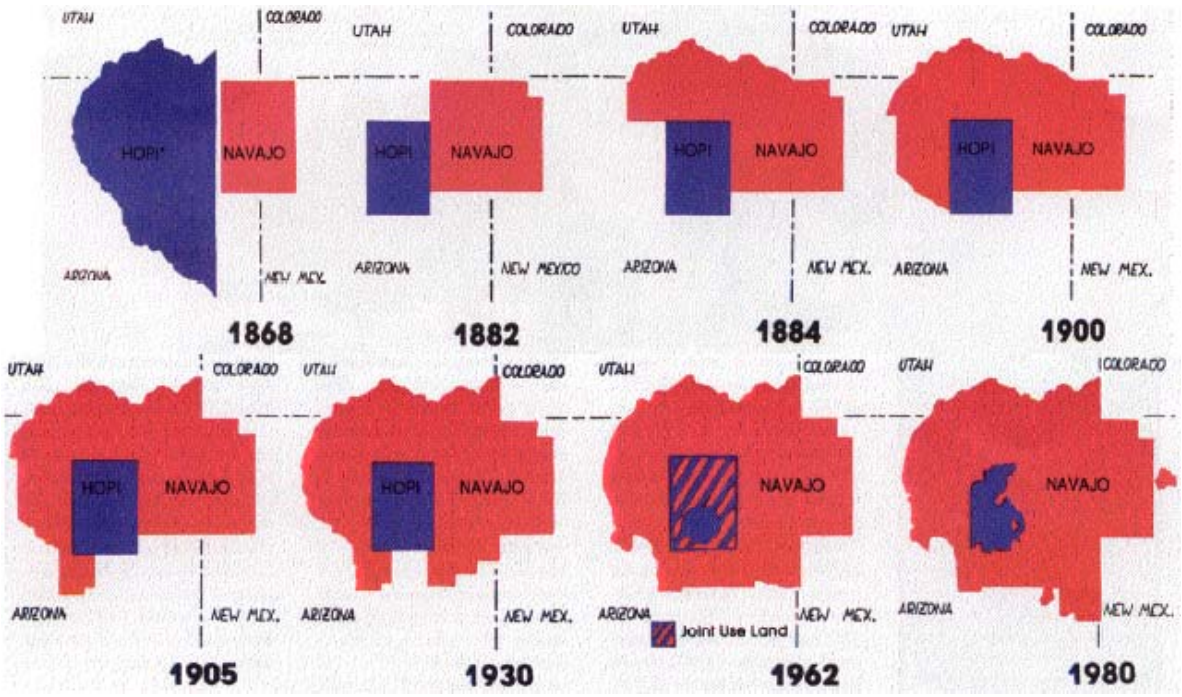
the Issue in the Main Page.) This portion of land was significantly less than that of the Hopi's ancestral lands. Others say the dispute didn't really begin until 1934 when Congress expanded the Navajo reservation to include parts of what the Hopi understood was their territory. The feelings many Hopis have about the encroachment of the Navajos onto the Hopi reservation (see pictures 15 and 16) was explained by the Hopi public relations officer, Vanessa Charles, in the following way:

"It would be like if your family was from California and you had ranch lands, 150 acres, and slowly but surely I start coming in with friends and families and start moving into the outlying areas. Because its 150 acres you won't have the opportunity to go around and see if I came in, but surely over the next few decades before you know about it, I'm all over the place, and I'm surrounding you. So, after a while, you're going to say, 'My great grandfather, this was his land, he came here, he's always been here, this was his land and we want our land back. Give us back our land.'"
Vanessa Charles (personal communication, January 2005)



Picture 15. Source: Hopi Tribe (2000)

However, others say the riff between the two tribes began in 1958 when *Healing v Jones* went to the federal courts (210 F.Supp. 125, 1962, Aff´d Supreme Court, 373 US 758, 1963) (see Section III of Main Page). The Court ruled that the Hopi tribe would have exclusive rights only to lands within District 6 and the rest of the Hopi reservation would become part of a Joint Use Area. (The Secretary of the Interior had divided the Hopi reservation and the 1934 Navajo reservation into 21 grazing districts in 1940, See Library of Congress, Background, at 1). The Court also ruled that Navajos and Hopis would have equal surface and subsurface rights to the 1882 Reservation. This began a long and drawn out legal battle in the court system that to this day still has not been settled.



Picture 16. Source: Hopi Tribe, (2000)

Before *Healing v Jones*, the tribes lived side by side peacefully, some even intermarried. There were no great problems that occurred because the two tribes' lifestyles coexisted, the Navajos were sheep herders and lived interspersed and the Hopis were farmers and lived in permanent villages (Churchill, W., at 144). When coal became an important resource in the

1940s and 50s, the actual ownership of the land became important to the coal companies and the federal government. (See Section III, History of the Issue, in the Main Page) Once again, John Boyden comes back into the picture. Because he was representing both Peabody and the Hopi Government at the same time, it was important for him that Hopis owned most of the land. "With a long-term money-maker functioning at Black Mesa, Boyden returned his attentions to his real agenda: securing the entirety of the Executive Order Area, and the fossil fuels underlying it…" (Churchill, W., at 150; Note that Boyden's actions did not represent all of the Hopi's sentiments.) Boyden with the help of a public relations group he had hired from Utah mounted a campaign in newspapers that marred the relationship between the Hopis and Navajos. The group published false accusations that tension and violence was mounting between the even threatening a "range-war" (Churchill, W., at 153-154100). Although there were serious arguments between members of the tribes over the land, the explosive situation did not reach that far. Boyden had brought several lawsuits before the courts to relocate the Navajos, but many of the Navajos refused to move.

In 1974 Congress passed The Navajo and Hopi Indian Land Settlement Act. This Act was an attempt to settle the land dispute between the Hopis and Navajos regarding the 1882 Executive Order and the 1934 Reservation. Included in the 1974 Act was a program to relocate both Hopis and Navajos to their respective sides of the partition. The Act also helped both tribes to establish Navajo and Hopi negotiating teams to discuss the 1882 dispute. There was to be a Federal mediator to aid in negotiations. If mediation was not successful, then the courts would follow the mediator's advice on how to partition the land (Library of Congress, *Background*, at 1).

When the 1974 Act was written, Congress estimated that the relocation process would cost $37 million (Churchill, W., at 160) but the cost has been more than $330 million (Library of Congress, *Background*, at 2). In total, 109 Hopis were moved to the partitioned Hopi land and an estimated 17,500 Navajos have been relocated to their side (Churchill, W., at 160). Many Diné would not leave and so the government impounded their sheep as a tactic to force them to move. In addition, a building freeze had been put on Navajo families who

lived in the Hopi partitioned land. Navajos could not even make repairs or improve upon their homes because this was in violation of the building freeze (Churchill, W., at 164-165).

After many years of living away, Stewart Udall, the congressman from Arizona that pushed the 1974 Act through Congress returned to Arizona.

"He was shocked to find that the little boundary dispute and the lawsuit that grew out of his bill had become the largest relocation of civilians in the United States since the internment of Japanese-Americans during World War II." (Benedek, E., at. 32).

Between 1974 and 1996, more agreements had been passed, more legal battles fought, and additional interference by BIA officials over land disputes went to the courts. In 1996 both negotiating teams from the Hopi and Navajo Governments came to an Accommodation Agreement.

Part of this Agreement "…obligates the Hopi Tribe to offer a 75-year leasehold interest to Navajo families currently residing…on Hopi Partitioned Lands." (Library of Congress, *The Navajo and Hopi Land Settlement Act of 1974*, at 3). In the lease agreement, there are terms clarifying certain activities such as religious practices, grazing and firewood gathering.

Left Picture 17: Navajo elders sign lease agreements with the Hopi Tribe in 1997. Right Picture 18: Former Hopi Chairman Ferrell Secakuku (seated second from right) looks on as another Navajo family signs a lease agreement with the Hopi Tribe, 1997 (Hopi Tribe, 2000)

To this day, the Navajo-Hopi land dispute still has not been settled. Fences that have been erected on both sides by the BIA and tribal members have caused problems with grazing and have prohibited members of tribes from visiting religious sites. Several Diné families refuse to sign leases with the Hopi tribe which does not help the job of the negotiating

teams (on the issues raised by the agreement see Ruble, E. & Torres, G., Perfect Good Faith, 2004.)

Picture 19. BIA officials erecting a barbed wire fence to partition the land into Hopi and Navajo (Earthworks, Inc.).

Are there any other land-disputes in either the United States or the world where both sides have a right to the land that is in dispute? What is a possible solution to the Navajo-Hopi Land Dispute?

III.- Forced resettlement.

The two groups that have been forcibly relocated in the later half of the 20th century in the United States have been Native Americans and Japanese-Americans. There is a long standing tradition of not questioning those resettlements. See *Korematsu v. United States*, 323 US 214 (1944). Was there a racial factor in the relocation of these groups or was it just a coincidence that they happen to be minority groups?

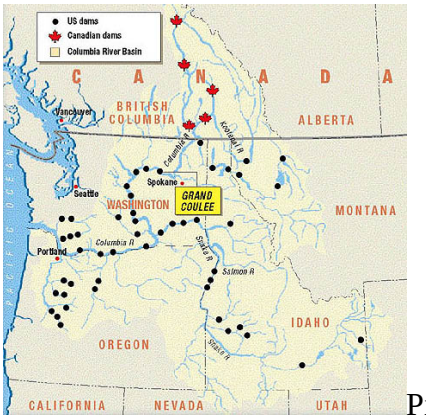
Other stories are less well known and related to the exploitation of natural resources. Dam construction is a typical example. The beneficiaries from dams (irrigation, water supply, electricity, or flow control for other purposes) are usually far away, if not very far away, from those who were the users of the river flow or banks of the areas to be flooded by the dam. These are removed and resettled. The costs of rebuilding communities are usually not included in the prize of the condemnation of property, which is based in Western private

property individual rights. The World Commission on Dams has examined several cases (Dams and Development, A New Framework for Decision-Making, November 2000) and one of the case studies was conducted in the U.S. by Ortolano, L., Kao Cushing, K., and other contributing authors. It analyses with a historical perspective the Grand Coulee Dam on the Columbia river, in central Washington (see map in picture 21). It is the largest concrete structure in the United States (see picture 20). Managed by the U.S. Bureau of Reclamation, it produces up to 6.5 million kilowatts of power and irrigates over half a million acres of Columbia river basin farm land and provides abundant wildlife and recreation areas. Initial excavation of the dam site began in December of 1933. By 1941 the main dam was essentially finished.

..

Picture 20

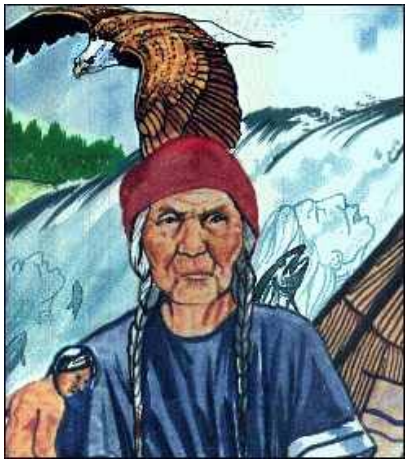
Nevertheless it was not until the 1990s that the 1,300 to 2,000 displaced people from Colville and Spokane tribes were compensated.



Picture 21

In “A River Lost” (1996) Lynn Bragg and Virgil Marchand recreate the story. The “Message from Grandma Toopa” lyrically but realistically summarizes it.

“Toopa is -was, for she did not live the 50 additional years to see belated compensation in 1995 for destruction of her tribe's way of life, the river and salmon on which they depended- an elder of the Arrow Lakes Band of the Confederated Colville Tribes of Washington State. Toopa describes the feasting, the preparation of food, and the function of Kin-Ka-Now-Kla, their salmon chief, who apportioned the catch, to make sure all got a fair share, especially elders who might be in need of food because their own families had been decimated by the white man's wars, and by the diseases that accompanied confinement of the band, along with a dozen other tribes of mutually incompatible languages, to the Colville reservation in 1872: ”Every summer, my family camped at the Falls. When the salmon swam upstream to spawn, the water became so thick and matted with their red bodies that it looked as if you could walk across the river on the backs of In-Tee-Tee-Huh". She describes to her great-grandchild how basket nets and basket-woven traps were extended across the bottom of the falls, where salmon who fell back on making thir leaps were caught. Men stood on narrow wooden platforms out over the falls to gaff the fish; it was dangerous but very productive -- the tribe was "rich with salmon....We traded for hides with the Plains tribes. Later we traded salmon for flour, guns, goods and tobacco from the settlers at the fort….". Lynn Bragg, worked with Margurite Ensminger to translate Grandma Toopa's story into English.



Picture 22. This cover portrait is from Arrow Lakes Band artist Virgil Marchand's full-page watercolor illustrations

How should careful policy of infrastructures affecting Native Americans be devised? Does current policy need any changes? Can the reconstruction of community relationships within its members and with the surrounding environment be economically evaluated through the typical western legal concepts of private property compensation?

IV.- What is culturally significant?

The U.S. Federal Acts and Orders that are listed in Boxes 2 and 6 were mostly formed for the key purpose of cultural preservation, whether it be Native Americans or any other ethnic group in the U.S. Some of the Acts also call for the preservation of U.S. historical sites. Who decides what is considered a historical site?

What may be historical to one group might not be considered historical to law makers in Washington D.C. The Navajos and Hopis claim that Black Mesa is historically important to them.

A well known example of a community that fought in the courts for the preservation of a cultural and historical site is in the case of *R.I.S.E., Inc. v. Kay*, No. 91-2144, 1992 U.S. App. (4th cir. Oct. 15, 1992) (unpublished opinion), aff'g 768 F. Supp. 1144 (E.D. Va. 1991). In this lawsuit, a predominately African American community filed suit against Chesapeake Corporation because the corporation planned to develop a landfill next to their place of worship, Second Mt. Olive Baptist Church. This Church is historically significant to this community because it was founded in 1869 by freed slaves. It was argued that if a landfill was to be next to the church, it would "desecrate the special significance of the historic church." (Lyman, J.W. , at 327). This case went all the way to the U.S. Court of Appeals where it was found that "at worst, the Supervisors appear to have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood. However, the Equal Protection Clause [of the US Constitution] does not impose an

affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race. The plaintiffs [the community] have not provided sufficient evidence to meet this legal standard. Judgment is therefore entered for the defendants".

Would this be the same as allowing a landfill next to the National Cathedral in Washington D.C. or not?

Other cases, all of them affecting Native American religious sites, such as Devils Tower or Mount Shasta have been explored (together with Woodruff Butte in Black Mesa, where seven of the shrines that ring the Hopi homeland have been destroyed by a the coal mining operation), in the famous Bullfrog Films documentary "In Light of Reverence". It tells the story of three indigenous communities and the land they struggle to protect: the Lakota of the Great Plains, the Hopi of the Four Corners area, and the Wintu of northern California:

"Across the USA, Native Americans are struggling to protect their sacred places. Religious freedom, so valued in America, is not guaranteed to those who practice land-based religion. Every year, more sacred sites - the land-based equivalent of the world's great cathedrals - are being destroyed. Strip mining and development cause much of the destruction. But rock climbers, tourists, and New Age religious practitioners are part of the problem, too. The biggest problem is ignorance".

Devils Tower, above the meandering Belle Fourche River, in Wyoming (the US first national monument, 1906)

Mount Shasta, in Northern California

V.- Reduction of Human Consumption of Resources

Is it possible to pass policies that would force people to reduce the amount of natural resources they consume on a daily basis? Is it possible to reduce the use of electricity by the city of Las Vegas that is famous for its night life and lights that illuminate the night sky? In a country that consumes the most resources in the world and produces the most garbage, we are used to a lifestyle of excess, including natural resources. As this case study has shown, the likely solution for the use of the N-Aquifer for the slurry pipeline is to use the C-Aquifer. This solution does not reduce the use of resources, but only continues the cycle of depletion.

The forced reduction of natural resources would have a negative effect on the economy because it would increase the costs of inputs for businesses. In addition, the majority of U.S. cities have minimal public transportation. People would not be able to drive as much, because of the high cost of gasoline, thus decreasing their trips to the stores and shopping malls. In the long run, would the economy perk back up because people would adjust to having less to consume? Because of a possible negative effect on the economy, would law makers be willing to draft and pass laws to implement resource use reduction? How would it be enforced?

Is this a federal, state, or local issue? Should cities, for example, extend the assessment of their environmental impact by looking not only at the territory which they occupy but also to the impacts that there existence and the provision of services and goods to their citizens, and their expansion, might have many miles away?

VI.- What can be learned from the Black Mesa case study?

This case study describes the history of all indigenous peoples around the world. Governments have not always accepted indigenous tribes within their borders. Tribes have been discriminated against and taken advantage of, especially in terms of their natural

resources and knowledge of these resources. Indigenous peoples have had to learn to adapt to their changing environments and sadly some tribes have all but vanished due to urbanization or government regulations making it difficult to live by traditional customs.

In the United States alone, how many indigenous tribes have vanished within the past half century? Pictures 23 and 24 describe the extension of the territories formally (through treaties, not *de facto*) given to the US when compared with the extension of Indian reservations in 1923. Are land rights the only conflictive issue at stake when dealing with relationships between indigenous communities and the sovereign modern States within whose territories the former are located? (About how land claims are still made difficult to Native Americans through the US legal system, see Fletcher, M.L.M, 2005).

Governments have begun to recognize that indigenous people have cultural and environmental rights separate from that of non-indigenous populations. As it has been discussed above, native peoples believe that the Earth has given them life, and in return they must give back to the Earth, as was shown in both the traditionalists' and modernists' points of view. Both points of view came to the conclusion that the Earth provides water, food, and shelter, and it should be treated with the outmost respect.

To conclude, what we have learned from this case study and others like it is that the rest of the world is beginning to "catch up" to the indigenous peoples' ideas of preserving natural resources for future generations. Indigenous peoples hold traditional knowledge of the land that is useful not only for their sustainability but also for the preservation of goods and services to the global community.

Think about appropriations of non-material goods done by some people by using modern property rights (patents, copyright…). For example, the knowledge some tribes posses of plant species' medicinal values have been copyrighted. This has prohibited tribes from using these plants and herbs they have used for centuries because they would be violating international copyright laws.

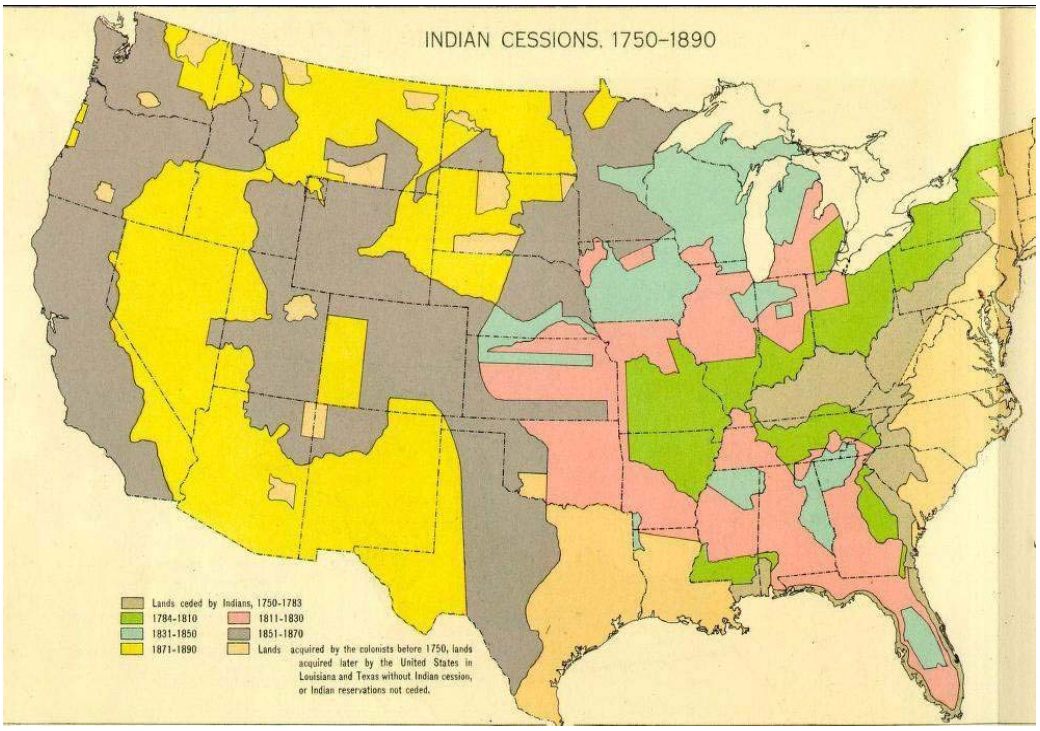
Through the protection of "traditional knowledge" (TK), biodiversity can be preserved because the former leads to a better understanding of what uses can be made out of resources whose usefulness the "modern" world may forget. If TK disappears, the resources on which it was based loose their value. If TK is preserved and new added value can be traced to it, the incentive to preserve the resources on which it is based will not disappear.

This is the reason why article 8J of the Convention on Biological Diversity imposes upon the world community the obligation to preserve TK:

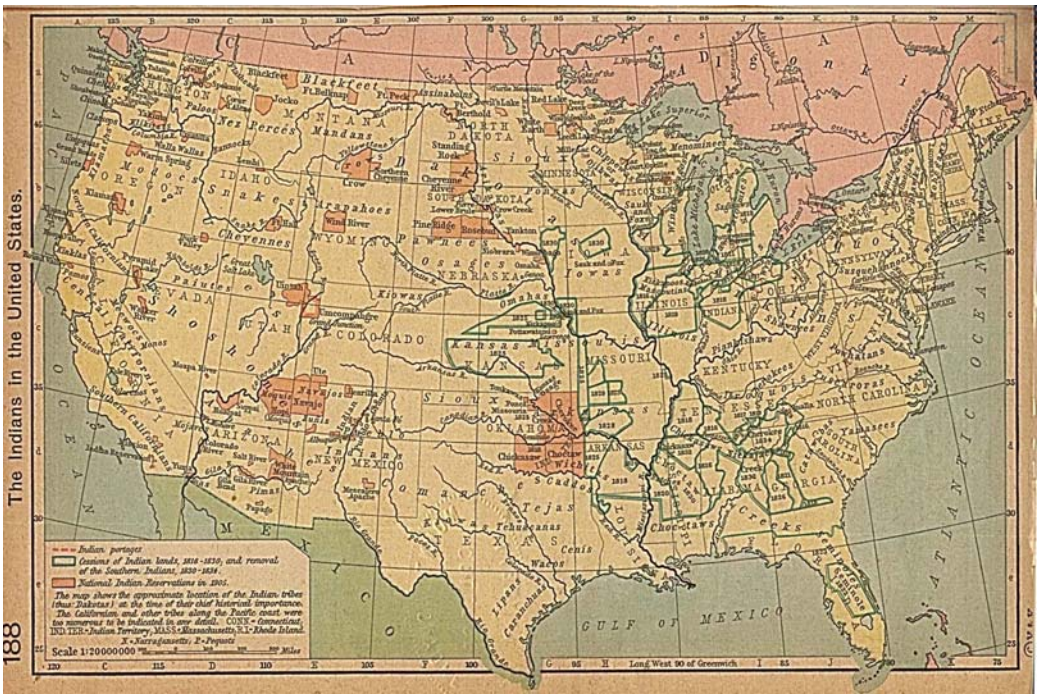
"Each Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

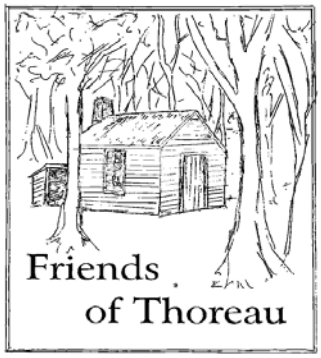
How would you protect TK? What do you consider would be the best policy to ensure that the ownership of TK remains in the tribe? What mechanisms should be put in place to add value to TK?

As TK is a very complex issue, and there are several for a where the ways and means to protect TK are been discussed. While many consider the CBD to be the forum most sympathetic to the perspective if indigenous and local communities, the World Intellectual Property Organization (WIPO) has technical expertise on intellectual property rights (IPRs) (See http://www.wipo.int/tk/en/) and the World Trade Organization (WTO) imposes, via the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (See http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm) the worldwide expansion of the protection of "modern" property rights that sometimes lead to the private appropriation of TK by the first patent applicant that registers the content of the knowledge as if it were totally innovative. The United Nations Conference on Trade and Development (UNCTAD) addresses the issue from the trade and development perspective and can thus have a somewhat more holistic approach, but it has no intergovernmental body regularly addressing the issue (See e.g. Geneva, Switzerland: UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practice, 30 October-1 November, 2000).



Pictures 23 & 24





Native Americans and Natural Resources: Black Mesa

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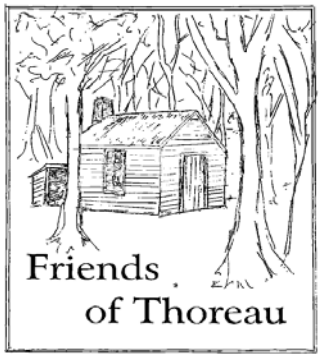

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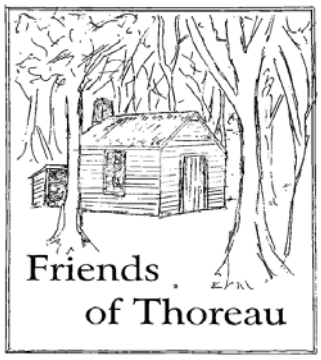

Native Americans and Natural Resources: Black Mesa

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