

# The Navajo Nation Seeks to End a Mining Lawsuit

Carol Berry / January 10, 2013

The Navajo Nation, facing conflict over the expansion of a mine that supplies coal to the Four Corners Power Plant, unsuccessfully invoked sovereignty in an environmental advocacy case January 4 in the U.S. District Court for Colorado.

District Court Judge John L. Kane denied a motion by the Nation to dismiss a lawsuit by five environmental groups that want more analysis under the National Environmental Policy Act (NEPA) of proposed expansion of Navajo Mine, an open-pit coal strip mine operation extending across 13,000 acres on the Navajo Reservation in northwestern New Mexico.

Navajo Mine is operated by BHP Navajo Coal Co. under a longstanding lease with the Navajo Nation and a surface coal mining permit issued by the U.S. Office of Surface Mining, Reclamation and Enforcement (OSM), which is also charged with ensuring NEPA compliance on Indian lands.

Proposing an inherent contradiction that would end the litigation, the Nation argued that it has sovereign immunity from the lawsuit but that, at the same time, it is an indispensable party to it so that the case could not proceed without the Nation, a contention with which the court disagreed.

The Nation and BHP were granted intervention in the conflict, but the involvement was limited to the Nation's motion for dismissal.

Plaintiffs in the full lawsuit are Dine' Citizens Against Ruining Our Environment (Dine' CARE), San Juan Citizens Alliance, Sierra Club, Center for Biological Diversity, and Amigos Bravos.

Those defending the mine expansion are OSM, Secretary of the Interior Kenneth L. Salazar, and four OSM officials, including the director of the Western Division in Denver.



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The mine had applied to OSM for a permit allowing a 3,800-acre expansion of its current area in 2004. The application was approved the following year based on a 14-page Environmental Assessment and a Finding of No Significant Impact (FONSI), both categories in federal environmental law.

Dine' CARE and the Alliance sought judicial review of BHP's revised license. The district court at that time concluded OSM had violated NEPA in approving the expansion application and remanded the case to OSM for further analysis.

Among other concerns, Dine' CARE and the Alliance contended the revised permit would allow mining within 100 feet of burials and could also lead to impacts to traditional cultural properties and sacred sites, even though no detailed environmental impact statement had been prepared under NEPA guidelines.

After the district court asked OSM "to conduct a lawful NEPA analysis," OSM reduced the size of the expansion, prepared another assessment and again issued a FONSI despite environmental groups' continuing to seek a more complete analysis and an injunction against the expansion.

Under the Nation's current sovereign immunity logic, "virtually all public and private activity on Indian lands would be immune from any oversight under the government's environmental laws" and "this is neither the intent nor the import of Indian sovereign immunity," the district court said.

U.S. federal law doesn't apply to foreign sovereigns, but "'general acts of Congress,' including NEPA, do apply on Indian lands," the court found in denying the Nation's motion for dismissal.