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the navajo environmental
protection commission and the
environmental impact statement

HANNA J. CORTNER



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LAKE POWELL RESEARCH PROJECT BULLETIN

BULLETIN EDITORS

Jeni M. Varady, Priscilla C. Grew, Orson L. Anderson

chief editor for this issue
Jeni M. Varady

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Copies obtainable from:

Jeni M. Varady
Institute of Geophysics and Planetary Physics
University of California
Los Angeles, California 90024

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THE NAVAJO ENVIRONMENTAL PROTECTION COMMISSION
AND THE ENVIRONMENTAL IMPACT STATEMENT

Hanna J. Cortner

Institute of Government Research
University of Arizona
Tucson, Arizona 85721

September 1976

LAKE POWELL RESEARCH PROJECT

The Lake Powell Research Project (formally known as Collaborative Research on Assessment of Man's Activities in the Lake Powell Region) is a consortium of university groups funded by the Division of Advanced Environmental Research and Technology in RANN (Research Applied to National Needs) in the National Science Foundation.

Researchers in the consortium bring a wide range of expertise in natural and social sciences to bear on the general problem of the effects and ramifications of water resource management in the Lake Powell region. The region currently is experiencing converging demands for water and energy resource development, preservation of nationally unique scenic features, expansion of recreation facilities, and economic growth and modernization in previously isolated rural areas.

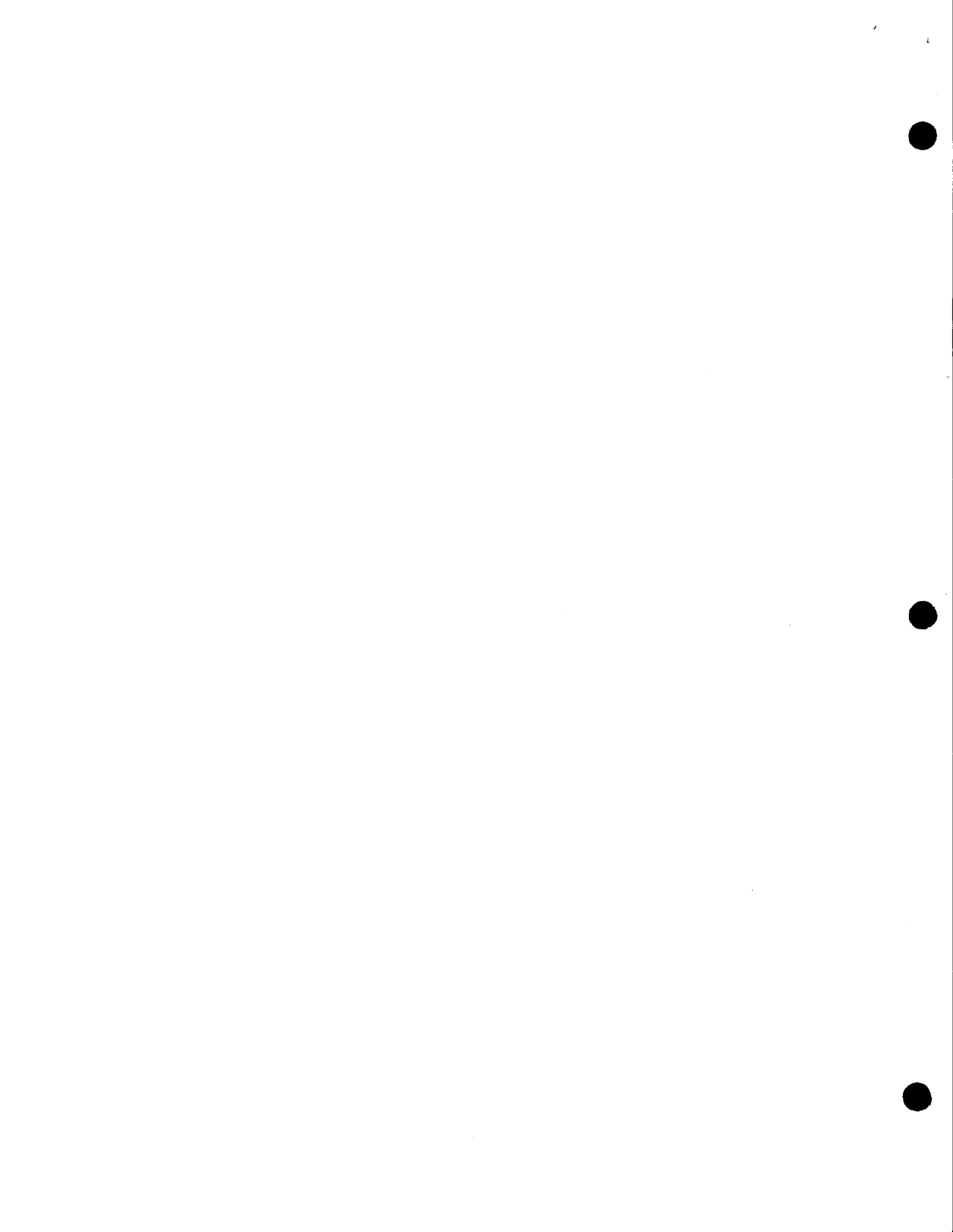
The Project comprises interdisciplinary studies centered on the following topics: (1) level and distribution of income and wealth generated by resources development; (2) institutional framework

for environmental assessment and planning; (3) institutional decision-making and resource allocation; (4) implications for federal Indian policies of accelerated economic development of the Navajo Indian Reservation; (5) impact of development on demographic structure; (6) consumptive water use in the Upper Colorado River Basin; (7) prediction of future significant changes in the Lake Powell ecosystem; (8) recreational carrying capacity and utilization of the Glen Canyon National Recreational Area; (9) impact of energy development around Lake Powell; and (10) consequences of variability in the lake level of Lake Powell.

One of the major missions of RANN projects is to communicate research results directly to user groups of the region, which include government agencies, Native American Tribes, legislative bodies, and interested civic groups. The Lake Powell Research Project Bulletins are intended to make timely research results readily accessible to user groups. The Bulletins supplement technical articles published by Project members in scholarly journals.

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ABSTRACT

The Political Science Subproject of the Lake Powell Research Project is concerned with the institutional changes which have occurred as a result of increased energy development activities in the Lake Powell area, and with the effect that the National Environmental Policy Act (NEPA) and its environmental impact statement (EIS) review process have had on the flow of environmental information in decision-making for the management of energy resources. This Bulletin focuses upon one such institutional change, the creation of the Navajo Tribal Environmental Protection Commission (NEPC), and examines it in relation to NEPA and its EIS process.

The Bulletin first describes the structure and the regulatory and environmental assessment functions of the NEPC. It argues that the organizational resources given the commission to pursue its mandate have been inadequate and have made it difficult for the commission to implement capably the duties its enabling

resolution outlines. The Bulletin then examines how the NEPC can utilize the impact statement process as a political strategy to strengthen its bargaining position in developmental decision-making. The strengths and limitations of the EIS as a source of environmental information, as the basis for a federal agency's decision, and as a series of leverage points to obtain a greater voice in the decision-making process are discussed. Because of the drawbacks of the EIS strategy, the NEPC must also pursue other strategies if it is to have a timely and substantive impact upon policy. These strategies should enable the NEPC to introduce environmental information and to exert real influence during the early stages of lease and contract negotiations while options are still open and decision-makers have not settled upon a preferred course of action. Improved access to tribal decision-makers and additional organizational resources must be sought and obtained if the NEPC is to reach its full environmental regulation and assessment potentials.

THE NAVAJO ENVIRONMENTAL PROTECTION COMMISSION AND THE ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

The Navajo Indian Reservation, located within the study area of the Lake Powell Research Project (Figure 1), is an underdeveloped semi-sovereign legal unit that is striving to become a modern, industrialized, and politically organized society with a standard of living comparable to the rest of the United States. Investments by private industry on the reservation for the purpose of energy production are viewed by some tribal officials as an opportunity for expanding and accelerating this developmental process.¹ Yet, development also has its costs. Mineral-extraction and power-generation activities significantly degrade the physical environment and disrupt long-established socioeconomic and cultural patterns. In order to balance the advantages and disadvantages of large-scale reservation energy projects, the Navajo Tribe will need to make important tradeoff decisions during the next few years. To do so the tribe will need both adequate information about its developmental alternatives, and the regulatory authority to pace development on the reservation. Moreover, the tribe must have the capabilities to generate and process information about environmental choices and to set and enforce environmental regulations. Without these independent decision-making capabilities, the Navajos are likely to succumb to the persuasions and assurances of external forces whose policy goals and objectives

may not reflect or serve Navajo interests-- an occurrence which has often characterized tribal decision-making in the past.²

The Political Science Subproject of the Lake Powell Research Project is concerned with the institutional changes which have occurred as a result of increased energy development activities in the Lake Powell area, and with the effect that the National Environmental Policy Act (NEPA) and its environmental impact statement (EIS) review process³ have had on the flow of environmental information in decision-making for the management of energy resources. This Bulletin focuses upon one such institutional change, the creation of the Navajo Tribal Environmental Protection Commission (NEPC), and examines it in relation to NEPA and its EIS process. Viewing the establishment of the NEPC as an innovative tribal response to the need to create an independent environmental assessment and regulatory organization on the reservation, this Bulletin first describes the structure and the regulatory and assessment functions of the NEPC. Then it turns to focus more particularly upon how NEPA and its EIS process can be utilized by the NEPC as a political strategy to help ensure that outside pressures are not making development-environment tradeoff decisions for the Navajos, but that the Navajos themselves make those decisions with the best available environmental impact information. Nevertheless, the Bulletin concludes, since overreliance on the EIS process could become one of the biggest obstacles to effective and timely utilization of the regulatory and assessment potentials of the NEPC, it is also requisite that the NEPC pursue alternative strategies for introducing environmental information into developmental decision-making.

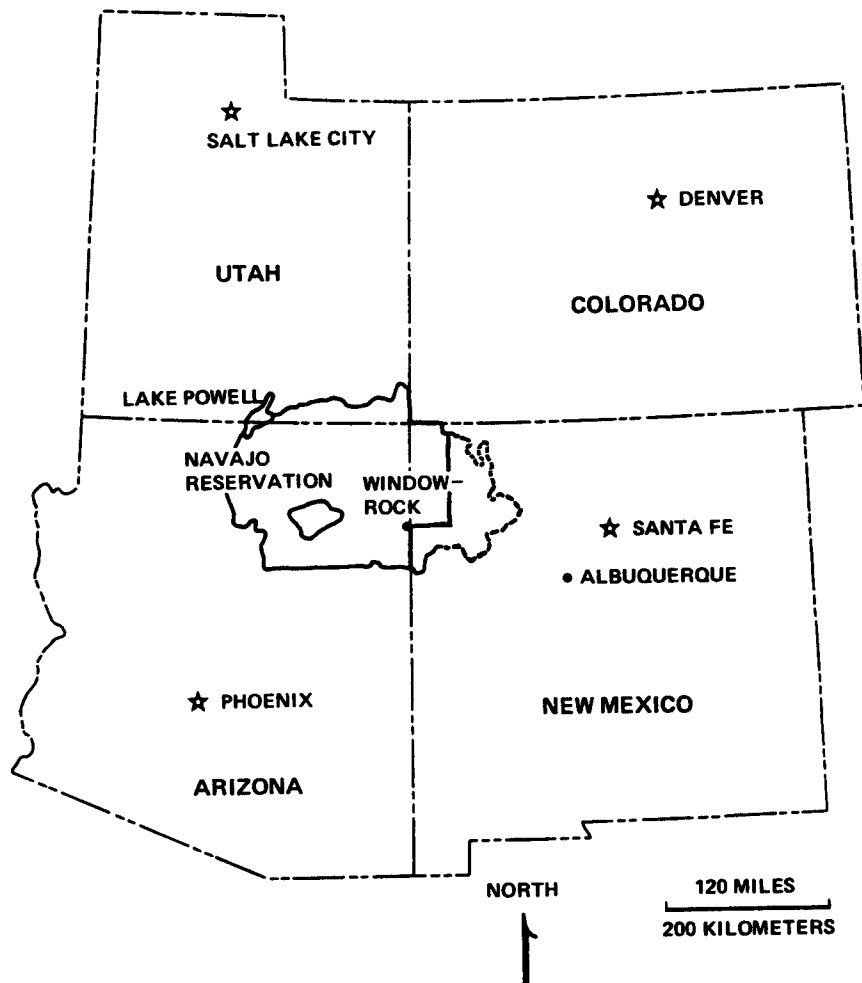


Figure 1: Index Map Showing Location of Navajo Reservation

THE COMMISSION AND ITS RESPONSIBILITIES

Origins and Structure

Originally, several offices within the executive branch of tribal government, including the Office of Program Development (OPD), which is responsible for planning and implementing the tribe's development program, handled environmentally related matters. However, officials soon found this arrangement to be inadequate. Too many offices were handling the review of environmental impact statements. (Impact statements are prepared by federal agencies on most reservation development projects because the Indian trustee relationship requires federal approval of the various leases, contracts, and agreements that tribal officials negotiate.) Yet, none of the offices that reviewed the statements had the expertise which would enable the tribe to make an informed and effective response. Furthermore, the tribe had no environmental information base of its own; it had to depend on the information supplied by the states and private groups. Companies planning projects on the reservation seldom consulted the tribe about environmental impacts. Finally, the tribe was without the means to protect itself from the adverse environmental impacts associated with large-scale development projects. The tribe realized that it needed to establish an effective agency that had environmental expertise and would be charged solely with protecting and enhancing the environmental quality of the reservation.⁴ Consequently, in August 1972, the Navajo Tribal Council, the legislative arm of tribal government, approved a resolution creating the Navajo Tribal Environmental Protection Commission and giving it the authority

to implement the environmental policy of the Navajo Tribe.⁵

The commission consists of five members, at least two of whom must also be members of the Navajo Tribal Council. All members are appointed by the Chairman of the Navajo Tribal Council, the chief executive of tribal government. The tribal chairman may also designate the commission chairman. Commission members serve three-year terms, but the tribal chairman may remove any member for cause.⁶ Through most of 1975, the membership of the commission included the following: Lee Begay, tribal councilman from Coppermine, Arizona; Larry Emerson of Shiprock, New Mexico, who is also a student at the University of New Mexico in Albuquerque; Melvin S. Morris, Professor Emeritus of Range Management at the University of Montana in Missoula; Harry Tome, tribal councilman from Red Rock, Arizona; and Fred Young, commission chairman, a Ph.D. physicist at Los Alamos Scientific Laboratory, Los Alamos, New Mexico. All except Morris are Navajos. During 1975 Emerson and Young resigned. Currently, the commission is without a designated chairman, and replacements are being sought.⁷

Although the commission is supposed to meet monthly, in reality it has been difficult to convene the membership that frequently. The commissioners live in three different states. Moreover, the commissioners have several other demands on their time. In large measure, Young, the commission chairman, resigned because he could not hold down his job at Los Alamos and also serve on the commission. Between its creation in 1972 and February 1976, the commission was able to meet only nine times, although six of those meetings occurred between July 1975 and April 1976.⁸

To implement the policies of the commission, the enabling resolution directs the commission to employ an executive director. The executive director, who serves at the commission's pleasure, is then responsible for retaining other personnel. Staff positions may be budgeted from any revenue source acceptable to the tribal chairman. The entire budget, however, must be approved by the tribal council.⁹

It took the NEPC almost two full years to organize its office in Window Rock, Arizona, the capitol of the Navajo Nation, and to find an executive director. Mr. Harold Tso, a nuclear chemist and a Navajo, who had been recommended by personnel in the New Mexico Environmental Improvement Agency, was hired as executive director in August of 1974. Tso in turn recruited Michael Willingham, a Massachusetts Institute of Technology graduate in mathematics with a background in environmental assessment, systems analysis, and computer use, to serve as the commission's environmental analyst. His responsibilities include impact statement review and the development of a comprehensive physical resources inventory for the reservation. Recently, three additional technical specialists (an environmental technician, an environmental specialist, and a survey technician) were added to the commission staff. An office secretary is the sixth staff position currently funded.¹⁰

It took almost two years to get the NEPC operating because the original intention was to fund the commission from outside funding sources such as foundations, the federal government, or private industry. However, until some revenue-sharing money became available, no outside funds could be located.¹¹ The tribal

council unanimously approved the budget, comprised of the revenue-sharing money, for the first year of actual operations (fiscal 1974-75), despite some tribal opposition, including that of a previous director of OPD who saw the commission as anti-development and as a hotbed for environmentalists.¹² Funds (approximately \$119,000) for the second year came from the regular tribal budget. However, the NEPC was left without funds for two months at the beginning of the fiscal year due to mixups. Moreover, future sources of funding are uncertain. The tribal council still wants the commission to locate additional and outside funding, but such funding runs the risk of compromising the commission's ability to speak with autonomy both on behalf of and within the tribal structure.¹³

Yet, because the commission has been hard-pressed to perform mandated tasks within current budgetary limits, it may be forced to seek and obtain outside funds. To say the least, the budgetary picture of the NEPC has been, and promises to remain, precarious.

The Regulatory Responsibility

The NEPC has authority to "implement, by appropriate rules, regulations, recommendations, and other necessary and appropriate measures," Navajo tribal policy in "matters relating to the quality of air, water and environment within the lands subject to the jurisdiction of the Navajo Tribe..."¹⁴ In order to pursue its stated purposes, the commission can issue cease-and-desist orders; levy and assess fines; commence and complete studies in cooperation with other tribal agencies whose activities affect the environment; inform and advise the Navajo Tribal Council on environmental matters;

enter into contracts and agreements; and monitor the activities of persons, entities, or agencies subject to its jurisdiction. The commission also has the power to "recommend, and by and with the approval of the Advisory Committee of the Navajo Tribal Council, to require in all leases granted by the Navajo Tribe" provisions governing environmental impacts.¹⁵

It seems clear from the enabling resolution that the commission's powers are more than advisory; they entail extensive regulatory and enforcement authority. With the exceptions, however, of the drafting of strip-mining regulations for the reservation and the exerting of jurisdictional authority over radioactive tailing piles at a reservation uranium mill site, the NEPC has not yet attempted to develop and pursue an aggressive regulatory approach. While the NEPC acknowledges the need and the mandate to act and is anxious to do so, several obstacles have inhibited the full development of the regulatory authority.

First, questions remain over the independence of the NEPC in relation to the office of the tribal chairman. Is the NEPC politically independent of the chairman or is it subordinate and advisory to the chairman? Second, procedures for promulgating regulations have only recently been settled upon and they have yet to be completely tested. The new procedures call for review by the executive branch of tribal government, for review by the tribal council, and for public hearings. While the enabling resolution could be interpreted to give the commission authority unilaterally to adopt regulations, realistically it is doubtful that regulations could be implemented in the absence of an extensive tribal review system.¹⁶ The commission's strip-mining

regulations are currently under review, and they will serve as the test for the efficiency and efficacy of the new procedures. Tribal experience with that review may well suggest areas which require modification; revised procedures will then need to be outlined before other regulations can be promulgated.

Third, there is uncertainty about the sources and strength of the political support the NEPC could muster if it were suddenly to utilize the mandate of the resolution to the fullest extent possible.¹⁷ Fourth, and related to the above, the NEPC lacks visibility. Few Navajos outside the tribal council are aware that the commission exists.¹⁸ Without visibility, it is difficult for the commission to build support within the general tribal membership for its regulatory activities. Moreover, the NEPC simply lacks the staff and budgetary resources that would be required to monitor and enforce a strong regulatory program if one were adopted.

Finally, a plethora of complex administrative and legal issues within the national political arena has affected the development of the NEPC's regulatory program. These issues include whether certain federal environmental laws are applicable to Indian tribes and, if so, whether the states, the tribes, or the U.S. Environmental Protection Agency (EPA) have the primary responsibility for program implementation.¹⁹ For example, many federal statutes--such as the Clean Air Act of 1970²⁰--are silent as to the program responsibilities of Indian tribes. While the EPA is the principal federal agency responsible for administering the Clean Air Act, the Act requires states to develop implementation plans and have them approved by EPA. Approved state plans may also receive federal grant assistance from

EPA. Yet, because the Act makes no clear reference to tribal entities, it is legally debatable whether the tribes can assume such program responsibility or receive federal grant assistance. Additionally, while states such as Arizona and New Mexico assert that the states and not the tribes have jurisdiction to develop the implementation plans to attain national air quality standards for the reservations, it is not at all clear whether the states are legally empowered to enforce pollution control standards on the reservations.²¹

Several Indian tribes, including the Navajo, are appealing to Congress and the EPA to clarify the legal situation and to grant them coequal status with the states for the purpose of federal environmental program administration. Yet, potent political forces are apt to oppose such a move. The forces include (1) those who are wary some tribes may set stricter standards than the states and in effect block the development of reservation energy resources, and, conversely, (2) those who are afraid that tribes who want to attract industrial developments may weaken standards in areas where states have already imposed strict standards.

Because of the unsettled nature of these many legal and political issues, the NEPC has had to test cautiously its jurisdictional and regulatory parameters. Politically and legally, the NEPC does not yet have the capability to assume the ambitious regulatory posture that its enabling resolution outlines.

The Environmental Assessment Responsibility

The environmental assessment responsibilities of the NEPC could conceivably embrace a number of wide-ranging activi-

ties. In order to determine environmental impacts, the NEPC could develop its own environmental assessment techniques and research methodologies, and could prepare its own environmental reports. It could also contract with private research firms or universities to gather environmental data for use by the tribe. Such environmental studies could serve as the basis upon which the commission could draft its rules and regulations and its recommendations to the Navajo Tribal Council. The NEPC could also review and comment upon reports prepared by the federal government, states, private industry, and environmental groups, and could communicate its findings and policy recommendations back to those groups. The expertise and studies of the NEPC could be utilized by tribal decision-makers throughout the entire planning and decision process. The NEPC's expertise could particularly be employed when the tribe negotiates contracts and leases with private companies. In addition to considering the economic and technological efficiencies of proposed developments, tribal decision-makers would have information which would enable them to consider the long-range environmental consequences and costs of proposed actions.

In reality, however, the NEPC does not have the capabilities to perform well all of these assessment tasks. The commission has a very small professional staff. The executive director is often so consumed with day-to-day administrative activities that he is unable to devote much of his time to research. Often one activity, such as studying the environmental impacts associated with the coal gasification plants proposed for the north-eastern portion of the reservation, will occupy most of the time of another staff member. When the staff are thus engaged they have little time or opportunity to

do many of the things they would like to do or to handle the other environmental affairs that come before them.²² Moreover, the limited budget of the NEPC has also curtailed its research activities and has hampered its efforts to hire consultants or to contract with outside organizations.

Finally, while the enabling resolution of the NEPC provides a number of environmental assessment opportunities, no provision actually demands that environmental impact information be considered when leases and contracts are being drafted. No provision requires tribal decision-makers to stop during negotiations with developers and to check out environmental impacts.

In sum, the NEPC currently does not have the resources it requires to build an independent research and advisory competence. Even in its endeavor to develop an environmental assessment capability, the commission has been thwarted in reaching its maximum potential.

THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY

The environmental impact statement (EIS) is a tool that can be utilized by individuals and groups--and especially those with limited organizational resources--who seek to gain access to and exert influence in decision-making. Yet, the EIS has liabilities as well as possibilities. It alone cannot ensure that environmentally concerned groups and individuals will have an impact upon the formulation and implementation of policy. This section of the Bulletin discusses the NEPC in relation to the EIS. It indicates how the EIS can be and has been used by the NEPC to strengthen its bargaining position

in developmental policy-making. It also points out the limits of the EIS strategy.

The Environmental Impact Statement as an Information Document

Because the NEPC has limited time, personnel, and funds with which to develop its own informational base, the information contained in the impact statement can be of considerable use. The EIS is a collection and presentation of numerous descriptive data about the ecosystems in the area. It also provides useful descriptive information about the size, scope, and operations of the proposed project. In the past, such information was frequently difficult to obtain; today, it is available in the EIS. In addition, the document is a good indicator of the positions that the federal agencies and private companies have taken concerning the environmental tradeoffs which will be made. It also reveals their perceptions of the benefits that will accrue to the tribe. Finally, because it is widely circulated in both draft and final forms, an impact statement will frequently contain an record of the interagency and interest-group conflicts with respect to the proposal; it highlights the adversary nature of the decision-making process.²³

However, as a source of scientific information about the physical environment the EIS has its weaknesses. First, most impact statements are constrained to an analysis of an individual project or plant. They tend to ignore the cumulative effects of several different types of facilities; they do not encourage a regional perspective.²⁴ An EIS, for example, probably would not discuss the cumulative environmental impacts of the several diverse energy projects (strip-mining, coal gasification plants,

coal-fired generating stations) being planned for, or already operating on, the reservation, nor would it discuss the overall effect of those projects on the socioeconomic or developmental picture of the reservation. To the extent that the EIS does address cumulative and regional impacts, one cannot really expect an in-depth analysis.

Additionally, federal agencies have not developed unified, concrete guidelines on what constitutes impact assessment or the objectives of impact assessment. Techniques for doing impact assessment are not fully developed.²⁵ Thus, data on physical impacts contained in an EIS are often inadequate and poorly organized.

Finally, many times there is a paucity of baseline data, and what data do exist are conflicting. Several disputes exist, for example, over how much water there will actually be available for use by the Upper Colorado River Basin states (Colorado, Utah, New Mexico, and a small part of Arizona).²⁶ Additional legal and political uncertainties surround the determination of how much water can or should be allotted to the Navajo Tribe.²⁷ Further, there is no clear consensus among the experts about the expected impact of powerplant emissions upon the air quality of the Lake Powell region.²⁸ However, an agency which is preparing an EIS on a project in the region can be expected to seek out and utilize the data which most closely justify and legitimate its policy decision.²⁹ Conflicting information which may be useful to the Navajo Tribe or which may raise serious questions about the potential environmental damage to the reservation will most likely be screened out or minimized during the formulation of the EIS.

While the quality of the scientific data on physical environmental aspects leaves something to be desired, the quality of the socioeconomic data is even worse. The socioeconomic consequences that are considered and discussed in the EIS are limited and narrow.³⁰ Economic benefits are usually considered the primary justification for a project. Moreover, the impacts on cultural and ethnic subgroups are rarely considered; when considered, the discussion is often scanty and superficial. Finally, no mitigating social strategies are outlined to show how a community can cope with adverse social impacts.³¹

The poor quality of the socioeconomic information which is typically found in impact statements has a particular significance for the Navajo Tribe. It can be argued, for instance, that only Navajos can understand and answer questions about how large-scale developments will affect Navajo society and culture and then make the necessary tradeoffs. Impact statements compiled by federal agencies are unlikely to address adequately the socioeconomic problems from the Navajo perspective. Thus, it is not surprising that several Navajos who testified at the hearings on the draft EIS prepared by the Bureau of Reclamation on the proposed WESCO coal gasification plants called attention to deficiencies in the social impact sections. Harold Tso, for example, testified that a Navajo was needed to do the socioeconomic impact analysis for the final EIS, and said he hoped that the bureau would attempt to locate an available Navajo.³² When interviewed, representatives of the bureau, who felt that the EIS was the best overall statement they had prepared, readily conceded that the social impact sections were unsatisfactory and would need to be totally redone.³³ Subsequently, the

bureau contracted with a Washington, D.C., consulting firm to prepare the report which the bureau utilized to rewrite the social impact sections.³⁴ The bureau's experience with the coal gasification EIS illustrates the inability of the impact statement to incorporate social impact analyses drawn from the Navajo perspective. In order to obtain useful and adequate social and cultural data and to have them available for tribal decision-makers, the NEPC will need to look somewhere other than the EIS, or it will have to itself develop the research techniques and capabilities to perform social impact analysis.

The Environmental Impact Statement Process as Leverage

The procedures which surround the preparation of the EIS provide a series of leverage points. Groups such as the NEPC can exploit these leverage points in order to obtain a larger voice in developmental and environmental decision-making.

Hearings are one such leverage point. The NEPC can use the hearings the federal agencies often hold on draft impact statements as an opportunity to prod for greater detail, to seek clarification of bothersome points, or to obtain additional information. Hearings can also provide an opportunity for the NEPC to make its views heard. Hearings establish a forum for questions, debate, and airing of the issues in which tribal officials, the federal government, states, companies, and environmental groups are all participants. For the NEPC, hearings also hold an additional benefit. They may raise enough questions and generate enough political support for tribal decision-makers to feel compelled to take a second look at the project before signing the

leases which will enable the project to proceed.

The reviews and comments that EIS procedures call for is another leverage point. H. Paul Friesema and Paul J. Culhane have delineated the usefulness of the EIS comment process.³⁵ According to the researchers, EIS comments may frequently compel a federal agency to stop, delay, or modify its plans. The threat of legal sanctions against inadequate impact statements may also force an agency to consider seriously the comments it receives. While noting that the quality of the final EIS may not differ significantly from the draft version, and that agencies may only perfunctorily respond to the comments, the authors argue that individual and group participation in the comment process may, nevertheless, increase the environmental sensitivities of the agencies. Moreover, because a federal agency is often dependent upon other governmental units to carry out a project, commentators may use their EIS comments to pressure these other units. And, the comments may indeed affect the decisions of other potential project participants. Friesema and Culhane conclude that the preparation of skilled, detailed, and technically sound comments on the EIS is a relatively inexpensive way to exert external pressure upon governmental agencies to consider the environmental consequences of their proposed actions.

In the past, one tribal official noted, the tribe used to give superficial responses when it commented upon impact statements.³⁶ With the formation of the NEPC, the tribe is now able to devote more time and expertise to review and comment. Willingham, for example, put several months of effort into review of the coal gasification EIS. Unfortunately, reviews

by the NEPC have focused predominantly on the technical aspects of proposed developments. To date, the NEPC has had little basis upon which it could review the social impact sections of the EIS.³⁷ The NEPC has had to rely heavily on secondary data; it has had few resources to commit to primary data-gathering. While Tso is a Navajo and could bring a Navajo perspective to social impact review, his training is in the technical aspects of environmental impact (e.g., air quality, water quality), and it is those sections of the EIS which demand most of his attention.³⁸

Nevertheless, as it has used the EIS hearings, the NEPC can use the EIS review process both to exert pressure upon federal agencies and to obtain more leverage within tribal decision-making. Indeed, this appears to be the strategy the NEPC has followed with respect to the coal gasification projects. In addition to preparing comments that it submitted to the Bureau of Reclamation, the NEPC has been exploring a number of technological and policy alternatives to present to the tribal council for its consideration before it decides whether to approve the coal gasification leases. The NEPC is hopeful that its work will convince tribal decision-makers that more information is needed about impacts, alternatives, and mitigating measures, and that the NEPC should be given more time to explore the coal gasification issue from the Navajo perspective.³⁹

The formation of the NEPC itself created an additional leverage point. As noted previously, prior to the creation of the NEPC, tribal input on environmental matters was rarely sought or considered by the companies, states, or federal agencies. Establishment of the NEPC

alerted those groups to the fact that they needed to consult the tribe about developments which would affect the reservation environment. Many company officials, for example, were in attendance at the first meeting of the commission, and the Bureau of Reclamation delegated one member of its coal gasification EIS team to serve as a liaison with the commission.⁴⁰ In addition, the Bureau of Indian Affairs--which was designated by the Secretary of the Interior to prepare the EIS on a proposed uranium lease with Exxon Corporation--has established at Window Rock a local environmental services office that will coordinate tribal input into the EIS.⁴¹ Thus, establishment of the NEPC gave government agencies and the companies a contact point within tribal government. It served notice that the tribe expected to be consulted during the formulation of impact statements and intended to scrutinize more fully the information and analyses contained in draft EIS.

However, the establishment of an environmental unit within the Navajo tribal governmental structure was advantageous not only to environmental advocates; companies can now point out to their critics that Navajo environmental concerns are being adequately articulated and that input from the tribe is routinely sought during the preparation of the EIS. For the developmental advocates within the tribe, establishment of the NEPC was also one way to co-opt the radicals and the environmentalists. (The appointment of Emerson to the NEPC, for example, was an outright political concession to the radical opposition that was building up within the tribe over several industrialization projects, and it was hoped that his involvement with the commission would quiet the opposition.⁴²) Further,

development proponents can now more easily sidestep impact statement questions by noting that they are the responsibility of the commission. Because the NEPC does not have the staff, time, or independent research capabilities to handle a great many referrals, reference of matters to the NEPC can, in effect, foreclose criticism. Because of the NEPC's organizational weaknesses, development proponents may not view the NEPC as a formidable threat or block to developmental plans.

The Environmental Impact Statement as the Decision Document

Most observers and scholars of NEPA and the EIS process can point to instances in which agency preparation of an EIS or negative comments submitted by EIS reviewers prompted a federal agency to cancel or significantly modify a proposed project.⁴³ Thus viewed, the EIS becomes a crucial decision document serving as a catalyst to bring the decision process under public scrutiny and to cause federal agencies to alter their decisions during the planning stage in order to make such decisions more environmentally acceptable.⁴⁴ Hence, the NEPC's participation in the EIS process could very well influence an agency to reverse or amend its plans, or it could persuade the agency to insist upon strict environmental controls as a prerequisite for governmental approval. Nevertheless, researchers in the Political Science Subproject are not so optimistic; we question the extent to which impact statements substantively affect decision-making.⁴⁵

Although some would like it to be and several judicial decisions have treated it as such, the impact statement is not the decision document (i.e., the document upon which the federal agency bases a

decision). The U.S. Department of the Interior, which includes the Bureaus of Reclamation and of Indian Affairs, views the EIS as a supplemental report and not as the singular document that presents all the considerations which the federal government needs to make, such as national security or public health and welfare.⁴⁶ Indeed, both the federal government and private companies are likely to utilize the EIS not as a decision document but as a public relations document which justifies a decision already made. The Exxon uranium agreement may well be a case in point. Negotiations between the tribe and Exxon have been completed, and the tribe is ready to proceed, even threatening suit if federal approval is not promptly given.⁴⁷ However, the Secretary of the Interior has deferred publicly announcing his decision until an EIS is written by the Bureau of Indian Affairs. In these circumstances the EIS is apt to be a formality. It will show that the federal agency has complied with NEPA's statutory procedures. It will also probably argue that leasing is a good decision because it fulfills the government's energy policy goals while also protecting and enhancing Navajo interests.

Because the courts have played an active role in NEPA's implementation, the emphasis of the federal agencies has been largely on compliance with the procedures of NEPA in order to pass judicial scrutiny. A longstanding rule of judicial review is that review is foreclosed when "agency action is committed to agency discretion by law."⁴⁸ In NEPA's case, the law does not require agencies to pick the most environmentally desirable course of action. Consequently, the courts are reluctant to rule on the substantive merits of an agency's decision. During review they tend to focus on whether the

decision was made in accordance with prescribed procedures. Therefore, the agencies tend to be concerned about the preparation of a judicially adequate EIS. The substantive merits of the EIS, its utility as a public information document, and its utilization as a planning and decision tool are lesser considerations.⁴⁹

In addition, information is likely to have more of a substantive impact if it is considered early in the decision process when the decision-maker is uncertain about the values, risks, and options involved in the question and is, therefore, more open to suggestions.⁵⁰ Information produced through the impact statement process is often introduced too late in the decision-making process. Commitments to certain policy courses (for example, to the development of Western and reservation coal resources in order to meet increased national demands for electrical energy) have already been made. Impact statements are likely to be compatible with general policy objectives; even adverse reviews are not apt to prompt decision-makers to launch a search for other possible and viable policy alternatives. Consequently, the commitment of large amounts of organizational resources to a review of impact statements with the hope of introducing information to substantively affect the decision process is, over the long run, a chancy political strategy.

Groups such as the NEPC that seek to maximize the usefulness of NEPA and the EIS process must cautiously approach the EIS as the decision document. Not all efforts to affect agency decision-making substantively will be successful. The number of agency decisions resulting in significant degradation of the reservation environment is apt to equal the number of sporadic successes.

THE NEED FOR ALTERNATIVE STRATEGIES

Creation of the NEPC provided the Navajo Tribe with an environmental spokesman where none had previously existed. In the various policy contests between development proponents and environmentalists, the tribe had had little input on the environmental side. The need existed for an organization that could provide information about the environmental impacts of projects from a Navajo perspective rather than from an Anglo perspective, and from a tribal perspective rather than a company or Interior Department perspective. Further, the need existed for a mechanism that could control development projects on the reservation, and that could act to mitigate adverse environmental impacts once a particular policy decision had been made. The enabling resolution establishing the NEPC was the first step toward an independent Navajo regulatory and environmental assessment capability. Yet, it is apparent that the actual resources given the commission to pursue its mandate have been inadequate and have made it difficult for the commission actually to do what it is empowered to do.

As has been argued in this Bulletin, the EIS is a tool that the NEPC, given its limited organizational resources, can strategically exploit to make environmental information a more integral part of developmental decision-making. But the EIS strategy also has its drawbacks, and overreliance on EIS procedures could diminish the NEPC's opportunity to have a timely impact during the formation of policy. Because of the limitations attached to the EIS process, the NEPC needs to pursue actively other strategies in order to have a substantive impact on policy. These strategies should enable the NEPC to introduce environmental

information during the early stages of decision-making, while options are still open and decision-makers have not sorted out alternatives and settled upon a preferred course of action. It is essential to determine when, where, and by whom decisions are made and to exert influence at those points. Furthermore, the NEPC must endeavor not only to gain access to federal agencies, but also to find and use the crucial decision-making points within tribal government.

Presently, however, it is not at all clear whether the NEPC has effective access to decision-makers within the tribal government. While access within the tribal government is enhanced by the presence of Councilmen Begay and Tome, who between them provide representation on the Advisory, Judiciary, Transportation and Roads, Federal Relations, and Economic Planning and Development Committees of the Navajo Tribal Council, communications with those decision-makers most closely allied with Peter MacDonald, the tribal chairman, are infrequent. The few contacts between the commission staff and the chairman himself have been of short duration and confined to specific issues.⁵¹ The situation is further complicated by the fact that many requests from the commission to the chairman's office are routed through the office of the general counsel, a private law firm in Phoenix. This procedure creates delays in obtaining information, and on occasion has led to the NEPC's being denied information that is deemed necessary for informed environmental decision-making.⁵²

Moreover, MacDonald has been eliminating more and more key tribal executives from the decision-making process. As a

result, several decisions concerning leases, contracts, and agreements have been made with little participation from those who have special skills and expertise and who are best equipped to advise the chairman.⁵³ Inputs from tribal structures and personnel such as the NEPC have typically been sought only when a particular action is either in the advanced stages of planning or is a fait accompli. For example, the NEPC was asked to consult on a coal lease renewal agreement; it was initially given only seventy-two hours to do so.⁵⁴ While the input under this severe time restraint did result in some modifications in the lease agreement and in the insertion of some environmentally protective clauses, the NEPC must be consulted before the final stages of lease negotiations and must be given adequate time to respond if it is to be effective in the long run. Otherwise, success will more and more come to be measured in terms of how many modifications can be secured in an already negotiated decision. Improvements in communication between the NEPC and both the general counsel and the office of the tribal chairman would facilitate NEPC's access to and influence with tribal decision-makers. Thus, as part of its alternative strategies, the NEPC should aggressively work to alter existing communication patterns and practices and to increase its own opportunities to contribute environmental information before policy choices are made.

In part, the NEPC's difficulties in securing access to decision-makers during early and key negotiations may be explained because it is a young organization, still building its communication networks, demonstrating its abilities, and sorting out its own internal operations and procedures. Nevertheless, the commission has troublesome

FOOTNOTES

difficulties to overcome. To establish an effective and expanded environmental assessment and regulatory capability, the NEPC will need to commit more of its limited resources to building the political support and access channels which will enable it to exert real influence at the discussion and pre-commitment stages of development decision-making. It is also absolutely essential that the NEPC convince the tribal chairman and the tribal council that the NEPC needs additional resources if it is to implement capably the duties its enabling resolution outlines. The failure to do so will increasingly force the commission into the position of reactor rather than initiator. And, for an organization with strong regulatory and environmental assessment potentials, initiative and innovation are requisite institutional attributes.

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1. The Navajo Ten-Year Plan (Window Rock, Arizona: The Navajo Tribe, June 1972); Office of Program Development, The Navajo Nation Overall Economic Development Program (Window Rock, Arizona: The Navajo Tribe, July 1974).
2. Hanna J. Cortner, "Development, Environment, Indians and the Southwest Power Controversy," 4 Alternatives (Autumn 1974), 14-20. See also: Lynn A. Robbins, "The Impact of Power Developments on the Navajo Nation," Lake Powell Research Project Bulletin No. 7 (April 1975); Philip Reno, "The Navajos: High, Dry and Penniless," 220 The Nation (March 29, 1975), 359-363; and David F. Aberle, "A Plan for Navajo Economic Development," in United States Congress, Subcommittee on Economy in Government of the Joint Economic Committee, Toward Economic Development for Native American Communities: A Compendium of Papers, 91st Congress, 1st Session, 1969, Part I, 223-276.
3. Section 102 (2) (C) of the National Environmental Policy Act of 1969 (Title 42, United States Code, Section 4321) directs all federal agencies to:

"(C) include in every recommendation or report on proposals for legislation and 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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain

- the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes."
4. Interview, Stephen W. Godoff, Acting Executive Director, Navajo Tribe Office of Program Development, March 1975; and data supplied by Gary David, Research Assistant, Law Subproject, Lake Powell Research Project, February 1976.
 5. Resolution CAU-72-72 of the Navajo Tribal Council "Establishing a Navajo Tribal Environmental Protection Commission and Adopting the Plan of Operation Thereof," August 10, 1972.
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 8. Tso, ibid; Interview, Michael Willingham, Environmental Analyst, Navajo Tribe Environmental Protection Commission, April 1976.
 9. Resolution CAU-72-72, supra note 5.
 10. Tso, supra note 7, March and July 1975 and February 1976; Willingham, supra note 8, July and October 1975 and April 1976.
 11. David, supra note 4.
 12. Godoff, supra note 4.
 13. Willingham, supra note 8, April 1976.
 14. Resolution CAU-72-72, supra note 5.
 15. Ibid. The Advisory Committee of the Navajo Tribal Council consists of 18 members of the tribal council selected by the tribal chairman, who also serves as chairman of the committee. The Advisory Committee is an executive arm of the 74-member tribal council and acts to expedite its business. The committee's responsibilities are delegated by resolution of the full tribal council.
 16. Tso, supra note 7, July 1975 and February 1976.
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THE AUTHOR

Hanna J. Cortner is a Senior Investigator in the Political Science II Subproject of the Lake Powell Research Project. The study area of this subproject is "Environmental Impact Statements in Energy Decision-Making in the Lake Powell Region." Dr. Cortner is presently (1) Research Associate in the Institute of Government Research at the University of Arizona, through which the Political Science II Subproject is funded, and (2) Research Associate in the School of Renewable Natural Resources at the University of Arizona. Her research activities focus on environmental and energy politics in Arizona and the Southwest.



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