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Indian Tribes: Self-Determination through Effective Management of Natural Resources

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NOTES AND COMMENTS

INDIAN TRIBES: SELF-DETERMINATION THROUGH EFFECTIVE MANAGEMENT OF NATURAL RESOURCES

Toward the close of the third decade of the nineteenth century, when the Cherokee Nation began to publish a newspaper, the name Phoenix was selected for the masthead. It was an appropriate choice. The power of the ancient mythical bird who was consumed by fire and arose from his own ashes seems to be inborn in the soul of the Cherokee people. There is an eternal flame of the Cherokees—a fire so carefully guarded that it has continued to burn for them through forcible removal, civil war, and tribal dissolution. According to the ancient legend, as long as that fire burns, the Cherokee will survive.[1]

This opening paragraph to Professor Rennard Strickland's history of the legal system of the Cherokee Indian Nation[2] might characterize the spirit of any of the American Indian tribes. Although threatened with extinction by the discovery of the Americas, resulting colonization, and formation of the Union, American Indian tribes survive today as distinct political and cultural entities within the United States.

The history of the American Indian since the Revolutionary War has been grounded in a unique relationship between Indian tribes and the federal government. The United States Constitution vests authority over Indian tribes in the Congress,[3] creating the basis for federal con-

1. R. STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 1 (1975).

2. *Id.*

3. U.S. CONST. art. I, § 8, cl. 3. In addition to the commerce clause which gives Congress power to regulate "commerce with foreign Nations, and among the several States, and with the Indian Tribes," other constitutional grants of power have played a role in policy formulation and subsequent legislation concerning Indian tribes. Significant among these are the treaty making power, art. II, § 2, cl. 2; expenditures for the general welfare, art. I, § 8, cl. 1; and the property clause, art. IV, § 3, cl. 2. For a complete discussion of clauses relied on to establish control of Indian affairs, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-90 (1942).

trol of Indian affairs. The history of government policy towards Indians has been cyclical.[4] Early judicial opinions recognized the sovereignty of Indian tribes and their right to self-government.[5] Even though this right has been consistently protected by courts,[6] it has often been ignored by treaty makers, legislators, and administrative officials.[7] By individual treaties with Indian tribes[8] and statutes adopted by Congress,[9] governmental policy regarding Indians has moved through various stages: Removal and relocation of Indian tribes, allotment of Indian lands to individual members, tribal reorganization, termination and, most recently, self-determination.[10] Indians have enjoyed periods of relative security or, conversely, have confronted white intolerance and confiscation of their rights and property.[11]

4. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 289 (1980).

5. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Chief Justice John Marshall, in an opinion still relied upon in contemporary Indian law, characterized the Indian Nations as "distinct, independent political communities, retaining their original natural rights." *Id.* at 559. This precluded the jurisdiction and control of state governments over Indian tribes and affirmed that intercourse with the tribes was vested only in the federal government.

6. Two recent Supreme Court decisions reaffirmed the inherent sovereignty of Indian tribes. *See* Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169 (U.S. Jan. 25, 1982) (Nos. 80-11 and 80-15); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

7. F. COHEN, *supra* note 3, at 122.

8. *Id.* at 91.

9. Federal legislation regarding Indians began when the First Congress enacted the Act of Aug. 7, 1789, 1 Stat. 49, which provided that the Department of War should handle Indian affairs. From this beginning, Congress has created a unique set of laws, now codified in title 25 of the U.S. Code, governing Indian affairs. The Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564 (codified as amended at 25 U.S.C. § 1 (1976)) created the Commissioner of Indian Affairs in the War Department. In 1849, the Office of Indian Affairs was transferred to the Department of Interior. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395.

10. After initial recognition of Indian tribes as sovereign entities with rights in property, the Indians were displaced from their original homelands and moved westward. Under the voluntary removal policy of President Monroe and the Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (repealed 1839), the tribes were assured that the lands given to them in exchange for that which they held would forever be secure to them. P. MAXFIELD, M. DIETERICK & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 25-27 (1977). The complete assimilation of Indians into the dominant society was contemplated by the General Allotment Act of 1887, ch. 199, §§ 1-5, 7-8, 10-11, 24 Stat. 389 (codified as amended in scattered sections at 25 U.S.C. (1976 & Supp. III 1979)), and again in the 1950's when the government began a process of "termination." According to one commentator, H.R. Con. Res. 108, 83d Cong., 2d Sess., 67 Stat. B132 (1953), declared it to be the policy of the United States to "abolish federal supervision over the tribes as soon as possible and to subject the Indians to the same laws, privileges, and responsibilities as other citizens of the United States." DOCUMENTS OF UNITED STATES INDIAN POLICY 233 (F. Prucha ed. 1975). Most Indian tribes, having grown dependent upon government services, were not ready for abrupt termination and their outcry against this policy prevented it from being extensive.

11. This history is punctuated by tragic incidents such as the now infamous "Trail of Tears" which occurred during the Indian removal. Sixty thousand members of the Five Civilized Tribes (Choctaw, Chickasaw, Creek, Seminole, and Cherokee) were forcibly uprooted and marched from

In the late 1960's and early 1970's, Indian policy was marked by renewed emphasis on self-determination. Congress officially recognized this policy by enacting the Indian Self-Determination and Education Assistance Act of 1975.[12] Upon request, the tribes may contract to plan or administer programs that are operated by the federal government for the benefit of Indians.[13] Although still subject to the control and supervision of the federal government through the Bureau of Indian Affairs, within the Department of Interior, tribes across the nation are currently attempting to strengthen their sovereign rights.[14] Tribal leaders recognize the social, educational, and economic responsibilities owed by the tribes to their members. Confronting reduced government spending,[15] the tribes are frequently reminded that they must develop an economic base to protect their members' interests. As Indian tribes hold lands which contain abundant energy resources, the most logical way to accomplish economic growth is through the development of tri-

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their aboriginal homelands in the South to Indian Territory. G. FOREMAN, INDIAN REMOVAL preface (1932). Of 16,000 Cherokees forced to move, 4,000 died on the march. *See generally* G. WOODARD, THE CHEROKEES (1963).

12. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n (1976 & Supp. III 1979)). In its policy statement, Congress recognizes "[t]he strong expression of the Indian people for self-determination," *id.* § 450a(a) (1976), and pledges to maintain its relationship with and responsibility to the Indians through "a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective meaningful participation by the Indian people." *Id.* § 450a(b).

13. 25 U.S.C. § 450f (1976).

14. *See* Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169 (U.S. Jan. 25, 1982) (Nos. 80-11 and 80-15); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). The Supreme Court upheld the tribe's sovereign right to tax on their land: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Colville*, at 152. "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 50 U.S.L.W. at 4171. *But cf.* R. BARSH & J. HENDERSON, *supra* note 4, at 290-93 (grave concern over the Supreme Court's interpretation that the aspects of sovereignty may be "withdrawn by treaty or statute, *or by implication as a necessary result of their dependent status*") (emphasis added by authors) (citing United States v. Wheeler, 435 U.S. 313, 325 (1978), in which the Court used Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), as authority). The concern is that the Court will extend the powers found to be lost by implication from the lack of criminal jurisdiction over non-Indians (as held in *Oliphant*, 435 U.S. at 211-12), to civil matters which will impair zoning regulations and health standards on the reservations. However, in *Colville*, decided subsequent to the publication of this book, the Court limited this divestiture of power to those cases "where the exercise of tribal sovereignty would be inconsistent with overriding interests of the National Government." *Colville*, 447 U.S. at 153. In *Merrion*, 50 U.S.L.W. at 4177, the most recent case on tribal sovereignty rights, the Court upheld the right of the Jicarilla Apache tribe to impose a severance tax on oil and gas production.

15. The BIA requested $1.055 billion for Fiscal Year 1982 and received only $835,646,000. H.R. REP. NO. 315, 97th Cong., 1st Sess. 16 (1981), *reprinted in* 127 CONG. REC. H8158, H8162 (daily ed. Nov. 5, 1981). This represents a $22 million increase over the previous year, but shows an operating loss when the inflation rate is considered.

bal land and natural resources.[16]

Mineral development on Indian lands was first authorized in 1891.[17] Acting on behalf of the tribes pursuant to this authorization, the Bureau of Indian Affairs negotiates and approves mineral leases with third parties. In this arrangement, the Indians are relegated to a passive role as merely the recipients of royalties negotiated between the BIA and the producers. With the demand for minerals following the Arab oil embargo and the resulting dramatic increase in oil prices, tribal governments have recognized the economic advantages of increased mineral development.[18] However, strict administrative interpretation of current statutes has obstructed Indian efforts to enhance the development of their energy resources.

On November 30, 1981, Senator John Melcher (D-Mont.) introduced legislation which, if passed, will explicitly authorize Indian tribes and individual Indian mineral owners to utilize alternative forms of agreements for the development of oil, gas, geothermal, and other minerals. The Bill, S. 1894,[19] is currently in committee hearings. If this Legislation is enacted, it will be the first statutory change in federal policy regarding mineral development of Indian tribal lands since the 1938 Omnibus Indian Mineral Leasing Act.[20] The new Bill evidences

16. *See* 1981 COUNCIL OF ENERGY RESOURCE TRIBES, ANNUAL REPORT; Comptroller General of the U.S., Report to the Senate Committee on Interior and Insular Affairs, Indian Natural Resources—Part II: Coal, Oil, and Gas—Better Management Can Improve Development And Increase Indian Income And Employment (Mar. 31, 1976), *reprinted in Oil and Gas Leases on Indian Lands (Part 3): Hearing before the Senate Select Committee on Indian Affairs*, 97th Cong., 1st Sess. 9 (1981); *see also* Ickes, *Tribal Economic Independence—The Means to Achieve True Tribal Self-Determination*, 26 S.D.L. REV. 494 (1981).

This Comment does not address the Indian lands of Alaska. Those tracts are governed by the Alaskan Native Claims Settlement Act of 1971, Pub. L. No. 92-203, ch. 33, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977 & Supp. II 1978 & Supp. III 1979 & Supp. IV 1980)). *See generally* Lazarus & West, *The Alaska Native Claims Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132 (1976); Note, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act through a Comparison with the Dawes Act of 1887*, 4 AM. INDIAN L. REV. 269 (1976).

17. The Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795, (codified at 25 U.S.C. § 397 (1976)) authorizes mineral leases for a term not to exceed ten years and subject to approval of the Secretary of Interior. Indian consent is not required.

18. 1981 COUNCIL OF ENERGY RESOURCE TRIBES, ANNUAL REPORT, *supra* note 16, states this as the fundamental basis for its formation in 1975. Several writers have indicated the importance of effective mineral development on Indian lands. *See* Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D.L. REV. 307 (1975) (urging tribal initiative in this area); Ruffing, *Agenda for Action*, 6 AM. INDIAN J. 14 (July 1980) (specific suggestions for achieving maximum development and benefits); Wilkinson, *Perspectives on Water and Energy in the American West and in Indian Country*, 26 S.D.L. REV. 393, 404 (1981) (urges cooperation in negotiation).

19. For the full text of Senate Bill 1894, see Appendix A *infra*.

20. Ch. 198, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1976)). Senate Bill

an underlying philosophical change with respect to the development of Indian mineral resources. To modify the 1938 Act's competitive bidding procedure for oil and gas leases, Senate Bill 1894 would allow tribes to *negotiate* alternative mineral agreements such as service contracts and joint ventures.[21] This would allow the tribes to structure an agreement through which they could exercise more control over energy resource development.

Senator Melcher emphasized the need for a more active role for tribes by stating that the Bill will "further promote Indian self-determination for energy development by allowing tribes to be involved in managing the development of their own resources in a number of ways not now possible under existing law."[22] If this Bill is enacted, Indian tribes will move a step closer to self-determination. The successful development of tribal mineral resources can determine, to a great extent, the future political and economic viability of Indian tribes.

This Comment will first trace the history of governmental control and protection of Indian lands and demonstrate that these measures have impeded profitable mineral development. Next, recent developments in energy use and production and their effects upon Indian mineral development will be summarized. The response of the Indian community and the government to these effects will be highlighted. Finally, this Comment will address the steps which should be taken in future Indian mineral development, and the benefits which can and should be derived therefrom.

I. HISTORY OF THE LAW OF MINERAL DEVELOPMENT ON INDIAN LANDS

The starting point for an historical review of Indian mineral development is the nature of property rights. Felix Cohen, in his monumental work on Indian law, defines tribal property as "property in which an Indian *tribe* has a legally enforceable interest."[23] As such, Indian lands have a legal status which is distinct from either public or private property. Although a form of ownership in common, this legal interest is

1894 will also change leasing policy regarding allotted lands, which is governed by the Act of Mar. 3, 1909, ch. 263, 35 Stat. 783 (codified as amended at 25 U.S.C. § 396 (1976)).

21. *Compare* 25 U.S.C. § 396(b) (1976) *and* 25 C.F.R. § 171.3 (1981) *with* S.1894, § 1, *reprinted in* Appendix A *infra*. For an explanation of the available alternative agreements, see *infra* note 107 and accompanying text.

22. 127 CONG. REC. S14127 (daily ed. Nov. 30, 1981) (introductory statement of Sen. Melcher).

23. F. COHEN, *supra* note 3, at 287 (emphasis added).

distinguished from tenancy in common and other forms of private collective ownership because individual tribal members have no alienable or inheritable interests in the property.[24] The tribe holds the property interest "in common for the benefit of all living members of the tribe."[25]

A. *Acquisition of Tribal Lands*

There are several ways that interests in real property have been acquired by Indian tribes: By aboriginal possession,[26] by treaty, by act of Congress, by executive action, by purchase, or by action of a colony, state, or foreign nation.[27]

The property interest created by aboriginal title was defined by the Supreme Court in *Johnson v. M'Intosh*.[28] Although the Court recognized tribal claims to occupancy and possession, it limited these rights by applying the principle of discovery: "That discovery gave exclusive title to those who made it."[29] The discoverer of lands allowed those in occupancy to retain these rights subject to sovereign extinguishment. Since the United States possessed title after the Revolutionary War, only the United States could extinguish the Indian right of occupancy. The exclusive right of the United States to extinguish the title not only gave the tribes protection from other claims to their lands, but also restricted their power to sell or convey without approval of the sovereign.[30]

This principle became one of the underlying bases for the concept of the inalienability of Indian land without governmental approval. The other constitutional basis for inalienability is the Indian commerce clause.[31] The statutes enacted, in furtherance thereof, require congressional approval for conveyance of Indian property.

The first Congress of the United States recognized the property rights of Indian tribes based on treaties made with Britain, France, and Spain.[32] The United States continued to use treaties, and occasionally,

24. *Id.* at 288.
25. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 472 (1982 ed.).
26. Aboriginal Indian title, also called "original Indian title," refers to the right of occupancy and possession of those lands occupied by the tribes at the time of European discovery. For a thorough discussion of the historical development of this concept, see *id.* at 486-93.
27. F. COHEN, *supra* note 3, at 291.
28. 21 U.S. (8 Wheat.) 543 (1823).
29. *Id.* at 574.
30. *Id.*
31. U.S. CONST. art. I, § 8, cl. 3.
32. *See generally* F. COHEN, *supra* note 3, at 47-48.

statutes to establish Indian tribal rights.[33] In 1871, Congress statutorily discontinued treaty making,[34] but continued to recognize the validity of prior treaties and Indian property rights established thereby. After this, tribal acquisition of real property interests was accomplished through statutory enactment, executive order, or direct purchase.[35]

B. *Tribal Lands and Individual Ownership*

Tribal lands are not held by individual Indians as tenants in common, but rather as communal property;[36] therefore no private ownership of land is recognized. In the second half of the nineteenth century, the prevailing societal value of individualism led many reformers to observe that the concept of communal property was alien to notions of civilization.[37] They reasoned that only by the dissolution of tribal life, and the vesting of property rights in individual Indians, could the Indian rid himself of his "injurious habits" and acquire the benefits of "civilization."[38]

The concept of limited individual Indian ownership of land began in the early nineteenth century,[39] but growing public sentiment accelerated the movement. The result was the General Allotment Act of 1887.[40] Certain tribes—notably the Iowas, Senecas, Creeks, Choctaws, and Cherokees—had specific objections to allotment.[41] They were initially exempted from the General Allotment Act of 1887.[42] However, the strong government policy favoring allotment prevailed, and they

33. *See, e.g.*, F. COHEN, *supra* note 25, at 473-77 (description of various treaties made during this period).

34. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1976)).

35. The right of a tribe to acquire land in its own name is a consequence of its general contractual power, recognized legislatively and judicially. F. COHEN, *supra* note 25, at 482. For a complete discussion of tribal rights in real property, and the effect of the source on the nature of the interest involved, see *id.* at 471-99.

36. *See supra* notes 24-25 and accompanying text.

37. D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8-9 (P. Prucha ed. 1973).

38. *See generally id.* at 8-11. Otis documents several public statements made by Indian agents and U.S. Senators which describe the hostile attitude towards communal life and the misunderstandings of the traditional Indian culture. Regardless of the prosperity and contentment of the tribes, the "white man's way was good and the Indian's way was bad." *Id.* at 9.

39. *Id.* at 3. By 1885 the government had issued over 11,000 patents to individual Indians and 1,290 certificates of allotment.

40. Ch. 199, §§ 1-5, 7-8, 10-11, 24 Stat. 389 (codified as amended in scattered sections of 25 U.S.C. (1976 & Supp. III 1979)).

41. The Iowas had previously experienced allotment and found it did not work. The Five Civilized Tribes and the Senecas preferred their traditional system which provided for tribal protection and care of the individual Indians. D. OTIS, *supra* note 37, at 42-46.

42. *Id.* at 42-43.

were later included in the allotment scheme.[43]

Justifications offered for the allotment of Indian lands include replacing tribal culture with white civilization, and protecting Indian lands from further depredation by covetous individuals, railroads, and the government.[44] The concept of individualism, which stressed private land ownership, promised more rapid progress than tribal community life. Since enhanced affluence would help assimilate the Indians into the dominant culture, the government would be relieved of further responsibility in Indian relations.[45]

Unfortunately, other powerful interests behind allotment did not possess these philanthropic purposes. There were those who proposed that the real aim of the allotment scheme "was to get at the Indian lands and open them to settlement."[46] Homesteaders, land companies, and railroads viewed allotment as a legal method to acquire vast areas of Indian lands.[47] The allotment Act proved to be successful in opening the lands for settlement. Purchases from speculators and land-hungry white settlers soon depleted Indian landholdings from 155,632,312 acres in 1881[48] to 48,000,000 acres in 1934.[49]

The purported goals of assimilation and advancement of the Indians were not met by allotment. In a move to reestablish the Indian tribes, the allotment process was ended with the Indian Reorganization Act (IRA) of 1934.[50] But the process had created an individual Indian

43. The Dawes Commission, appointed in 1893, Act of Mar. 3, 1893, 27 Stat. 612, 645, was unable to negotiate with the tribes. By Act of June 28, 1898, 30 Stat. 495, Congress provided for enrollment of tribal members so that allotments could be made without the consent of the tribes. Recognizing that Congress would proceed over their resistance, the tribes reluctantly agreed to allotment of their tribal lands. F. COHEN, *supra* note 3, at 430-32.

44. S. TYLER, U.S. DEP'T OF INTERIOR, A HISTORY OF INDIAN POLICY 96 (1973).

45. *Id.* at 96-97.

46. H.R. REP. No. 1576, 46 Cong., 2d Sess. 10 (1880), *reprinted in* D. OTIS, *supra* note 37, at 19.

47. D. OTIS, *supra* note 37, at 31-32.

48. S. TYLER, *supra* note 44, at 97. In 1900, Indian lands totaled only 77,865,373 acres. *Id.*

49. F. COHEN, *supra* note 3, at 216-17.

50. Ch. 576, 48 Stat. 984-88 (codified as amended at 25 U.S.C. §§ 461-479 (1976 & Supp. III 1979 & Supp. IV 1980)). Section one of the Act abolished the allotment policy and the remaining sections encouraged tribal reorganization and acquisition of land. BIA Commissioner Collier, who encouraged the policy of the IRA, summarized the problems of the allotment system in the 1934 ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 78-83:

> If we can relieve the Indian of the unrealistic and fatal allotment system, if we can provide him with land and the means to work the land; if through tribal organization and tribal incorporation, we give him a real share in the management of his own affairs, he can develop normally in his own environment. The Indian problem as it exists today, including the heaviest and most unproductive administration costs of public service, has largely grown out of the allotment system which has destroyed the economic integrity of the Indian estate and deprived the Indians of normal economic and human activity.

property interest as opposed to tribally owned lands. These individual interests also came under the control and supervision of the United States Government.

C. *Federal Control of Indian Lands*

The United States Constitution vests exclusive authority over Indian affairs in the Congress,[51] which has enacted a body of law, codified as title 25 of the *United States Code*, governing Indian affairs. Originally, the duties of administering the laws were placed in the Department of War.[52] In 1824, the Secretary of War created a Bureau of Indian Affairs within that Department,[53] and in 1832, Congress officially approved this office and authorized the President to appoint a Commissioner of Indian Affairs to serve under the Secretary of War.[54] In 1849, control of the Bureau was transferred to the newly created Department of Interior.[55] Under current statutes,[56] the Secretary of Interior is responsible for administering the laws and discharging government responsibilities to Indians. These duties may be delegated to the Commissioner of Indian Affairs[57] who directs the daily operations of the Bureau.

Under the body of law created by Congress[58] and interpreted by the Supreme Court,[59] a trust relationship exists between the United

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Id. at 84, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 225.

51. U.S. CONST. art. I, § 8, cl. 3; *see supra* note 3.

52. *See supra* note 9.

53. S. TYLER, *supra* note 44, at 51. The Secretary of War created this new office without authorization from Congress to handle the routine work of Indian affairs.

54. Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564 (codified as amended at 25 U.S.C. §§ 1-2 (1976)).

55. The Act of Mar. 3, 1849, ch. 108, § 1, 9 Stat. 395 (codified at 43 U.S.C. § 145 (1976)), established the Department of Interior, and provided "that the Secretary of Interior shall exercise the supervisory and appellate power now exercised by the Secretary of the War Department, in relation to all the acts of the Commissioner of Indian Affairs." *Id.* For several years, attempts were made to return this power to military control, but Congress preferred civilian control. F. COHEN, *supra* note 3, at 11; *see* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 10, at 80. Apparently, although the War Department was still used when force was necessary, the policy of peace predominated.

56. *See supra* note 54.

57. The Commissioner's office has recently been upgraded to Assistant Secretary of the Interior for Indian Affairs.

58. "Utmost good faith" towards Indians and protection of their "property rights and liberty" were statutorily declared by the first Congress in the Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. The Indian Nonintercourse Act of 1790, ch. 33, § 4, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (1976)) established an obligation for the United States to protect Indian property rights.

59. As early as 1831 the Supreme Court held that a fiduciary relationship existed between the United States and Indian tribes which "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The guardian-ward relationship was confirmed in

States and Indian tribes. This relationship has created a unique property right. The United States holds Indian lands and resources, both tribal and allotted, in trust for the perpetual and beneficial use of the Indian people. Congress and, by delegation, the Department of Interior have the power to control and manage the property, but this power is subject to the restraints of the trust responsibility doctrine. One of the most effective methods employed to control Indian lands has been statutory restraints on alienation. Interests in lands owned by Indian tribes or individual allottees may not be transferred except as authorized by federal statute or treaty.[60] Since interests in unsevered minerals are interests in land, the principle of inalienability without government consent applies to the development of minerals. The restraints on alienation of mineral rights differ for tribal and allotted lands.

1. Alienation of Tribal Lands

The Nonintercourse Act invalidates any "purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians . . . unless the same be made by treaty or convention entered into pursuant to the Constitution."[61] Although "specifically designed to protect the Indians from unfair treatment in disposing of their lands,"[62] it also statutorily constrains the tribes' ability to convey their own property and forecloses mineral development on these lands until authorized by law.[63]

Beginning in 1891,[64] piecemeal legislation authorizing leasing of minerals was enacted which "left the law governing mineral leases in a state of confusion."[65] Therefore, in 1938, Congress passed a broad

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United States v. Kagama, 118 U.S. 375, 384 (1886); *see, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 295-96 (1942); United States v. Creek Nation, 295 U.S. 103, 109-10 (1935).

60. The first Congress placed restraints on sales of Indian lands by the Indian Nonintercourse Act of 1790, ch. 33, § 4, 1 Stat. 137. This Act and those which subsequently reenacted the prohibition against alienation are called the Nonintercourse Acts. The Nonintercourse Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 has been codified as amended at 25 U.S.C. § 177 (1976).

This principle received early and continuous federal recognition. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 503 (1823); *see also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Joint Tribal Council v. Morton, 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

61. 25 U.S.C. § 177 (1976).

62. P. MAXFIELD, M. DIETERICK & F. TRELEASE, *supra* note 10, at 49.

63. *Id.* at 159.

64. The Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795 (codified at 25 U.S.C. § 397 (1976)), authorized mineral leases for a period not to exceed ten years on lands "bought and paid for" by the Indians.

65. F. COHEN, *supra* note 25, at 534. The various acts passed during this period are described

mineral leasing act authorizing and regulating the mineral development of all tribal lands except for certain named exceptions.[66] Thereafter, the Secretary of Interior replaced all existing regulations governing tribal leasing with new regulations based on this Act.[67] Remaining substantively unchanged since its enactment,[68] this Act is still relied upon by the Department of Interior as the sole authority for leasing.[69]

2. Alienation of Allotted Lands

Government administration of Indian mineral interest has paralleled changing federal policy toward Indians. Early allotment statutes subjected the individual allottee to restrictions on alienation of lands and made no provisions for leasing. The statutes created either a "trust patent" or a "restricted fee."[70] When it became apparent that the allotment program was not effectively assimilating Indians into white society, but was leaving them in a worse position than before, attempts were made to improve the condition of the Indians. By relaxing the ban on alienation of Indian lands to permit leasing, Congress believed the individual could benefit from the lease revenues.

In 1909, the first of a series of statutes authorizing leases for mining purposes, subject to Department of Interior consent, was enacted.[71]

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id. at 533-34. Instead of a comprehensive act dealing with mineral development, separate acts were passed when it was decided additional authority was needed.

66. May 11, 1938, ch. 198, §§ 1-6, 52 Stat. 347 (now codified at 25 U.S.C. §§ 396a-396g (1976)). Section 396f specifically excepts from sections 396a-396d the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, and the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma. These lands are governed by special statutes.

67. Currently the regulations are found in 25 C.F.R. pt. 171 (1981).

68. The only amendment to the Act has been to delete "Papago Indian Reservation Arizona" from the lands excepted in § 396f. Act of May 27, 1955, ch. 106, § 2, 69 Stat. 68.

69. Under existing regulations, 25 C.F.R. §§ 171.2-.3 (1981), leases of Indian lands may be made with approval of the Secretary of Interior or his representatives. All oil and gas leases must be advertised for competitive bidding. Other mineral leases may be negotiated, if *prior* written permission is granted by the Commissioner. Any negotiated lease must be filed in the Agency office within 30 days after permission to negotiate is given. The Secretary of Interior may reject any negotiated lease. No lease is valid without the approval of the Secretary.

70. A "trust patent," created by the General Allotment Act of 1887, ch. 119, 24 Stat. 388, retains legal title to the land in the United States. Alienation requires consent of the United States on the issuance of a fee patent to the allottee. Section 5 of the Allotment Act provided for a twenty-five year period in which the United States would hold the land in trust for the allottee. The statutes dealing with allotments among the Five Civilized Tribes created a "restricted fee," by which the legal fee is held by the allottee under a deed which prohibits alienation without the consent of an administrative officer. F. COHEN, *supra* note 3, at 109.

71. Act of Mar. 3, 1909, ch. 263, 35 Stat. 783; Act of Aug. 9, 1955, ch. 615, § 3, 69 Stat. 540 (now codified as amended at 25 U.S.C. § 396 (1976)).

Originally, no restrictions were placed on the lease term.[72] However, in 1910 Congress limited the lease term to five years.[73] Various other acts[74] prescribe rules under which the leases may be made. The discretion given to the Secretary of Interior by these acts is supported by the trust relationship between the government and the Indian. In general, the Secretary has the duty to protect and assist in the development of the individual Indians' lands and mineral resources. It has been argued that by relaxing the alienation restrictions on these lands, the result has been an erosion of the land base of most allotted reservations.[75] When the allotment era ended in 1934, with the passage of the Indian Reorganization Act,[76] "an estimated 41 million acres of the land of 125 Indian tribes had been allotted to individual members, of which three-quarters had slipped from Indian ownership in the forty-seven year interim."[77]

D. *Establishment of Tribal Government*

Although the passage of the IRA reasserted the principles of tribal sovereignty and the validity of the treaties, the Act did not apply to the Indians of Oklahoma. Many of its provisions, particularly those which extended the existing trust period, limited alienation of restricted lands, authorized tribal corporations, and established new reservations, were inappropriate for nonreservation tribes such as those of Oklahoma.[78] In 1938, the Oklahoma Indian Welfare Act[79] made self-government, corporate organizations, credit, and land purchase power available to all of these tribes except the Osage Tribe.[80]

The passage of the IRA and the Indian Welfare Act has made it possible for tribes to begin restoring their land bases. This has been accomplished first, by allowing the tribes to assert, as sovereigns, claims to lands which formerly belonged to them[81] and, second, by authoriz-

72. *Id.*

73. Act of June 25, 1910, ch. 431, § 4, 36 Stat. 856 (codified at 25 U.S.C. 403 (1976)). This Act retained administrative control and extended it to supervision over the benefits.

74. *See, e.g.*, 25 U.S.C. §§ 403a-405 (1976).

75. *See, e.g., Commission on Fiscal Accountability of the Nation's Energy Resources: Hearings* (Sept. 22, 1981) (Statement of Connor and Waits, Attorneys at Law) (copy on file in the *Tulsa Law Journal* office).

76. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984-88 (codified as amended at 25 U.S.C. §§ 461-479 (1976 & Supp. III 1979 & Supp. IV 1980)).

77. *Fiscal Accountability Hearings, supra* note 75.

78. F. COHEN, *supra* note 3, at 455.

79. 25 U.S.C. §§ 501-509 (1976).

80. *Id.* Section 509 specifically excepts the Osage Tribe from the Act.

81. Basing their decision upon the principles that only the United States can extinguish In-

ing the Secretary of the Interior to acquire lands on behalf of the tribes.[82] As a result of these initiatives, in addition to the millions of allotted acres held by individual Indians, over 52 million acres are held by the Indian tribes.[83]

Throughout the 200 year history of United States Indian policy, constitutionally-granted congressional control of tribal lands has been a major source of Congress' plenary power over Indian affairs.[84] Acting under the auspices of "trust" responsibility and protection, Congress has controlled the alienation of Indian lands and the development of their natural resources. By delegation, the Bureau of Indian Affairs promulgates and implements rules and regulations pertaining to this development.[85] These regulations adhere to a system of competitive leasing in which Secretarial approval takes precedence over the involvement of Indian tribes and individuals. In the last few years, Indians, as tribes and as individuals, have realized that mineral leases are not always to their benefit.[86]

In the past, both the lack of Indian expertise in assessing and developing resources and excessive governmental restrictions regarding alienation of Indian lands have kept the tribes from becoming actively involved in the formation, enforcement, or management of mineral agreements. However, in the past few years, Indians, both individual

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dian title, and that this must be done by a clear and specific act of Congress, the Supreme Court has returned land to the Indian tribes. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 354 (1941); *see also* F. COHEN, *supra* note 25, at 490-92. The Indian Claims Commission Act, Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70 to 70v-3 (1976)), waived sovereign immunity, and allowed claims to be brought against the United States. The Commission was dissolved in 1978, but the Court of Claims has assumed jurisdiction over tribal claims at present. F. COHEN, *supra* note 25, at 564.

82. 25 U.S.C. § 463(a) (1976).

83. Council of Energy Resource Tribes, Proposed Revisions to the Report of the National Petroleum Council Land Use Task Force, Group on Onshore Oil and Gas Systems (May 29, 1981); F. COHEN, *supra* note 25, at 471 & n.1.

84. F. COHEN, *supra* note 3, at 94.

85. Regulations pertaining to leasing of allottees are set forth in 25 C.F.R. pt. 172 (1981). For tribal lands, the 1938 Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (1976), has been interpreted in 25 C.F.R. pt. 171 (1981).

86. The Chairman of the Navajo Nation has been explicit about his discontent with the traditional leasing system:

> [U]nder BIA-approved leases the Navajos are still receiving between 15 and 37 cents for each ton of coal that is mined. The going rate off Indian reservations is $1.50 and $2.00 per ton . . . [a]nd the figures for other Indian resources aren't any more heartening: an average 14 percent of actual value for natural gas, 15 percent for oil and 20.8 per cent for uranium. In exchange for that meager return, the tribes forfeited virtually all control over the speed, manner and impact of the mining of their resources.

McDonald, *America's Energy Future: What Role for the Indians?*, NAT'L J., Sept. 2, 1979, at 1588.

allottees and tribal leaders, have sought to abandon this passive role, and become active participants in the development of their natural resources.

II. CONTEMPORARY DEVELOPMENTS IN ENERGY AND THEIR EFFECT ON INDIAN MINERAL DEVELOPMENT

The major goals of Indian policy during the last 200 years—removal, allotment, reorganization, and termination—have "coincided with significant historical trends in the demand for and availability of natural resources."[87] Thus, when demand for land has been great, Congress has restricted and reduced Indian access to land; during periods of low demand, Congress has liberalized Indian access to land and resources. For example, the General Allotment Act of 1887 occurred near the 1884 peak of homesteading. Similarly, the Indian Reorganization Act of 1934, which allowed tribes to repurchase allotted lands, was enacted only a year after the twentieth century low point in United States farmland prices.[88]

During the 1950's and 1960's, government policy encouraged tribal development, except for an interlude in the 1950's when termination was considered by Congress and discarded.[89] During a period of significant growth up through the 1970's, many tribes were building functioning governmental units to serve the social and economic needs of their members. However, the 1970's and the 1980's demonstrate that Indian policy continues to be intertwined with historical trends. Predictably, Indian land is once again a focus of the national government and private enterprise in their global search for new sources of energy.

Inexpensive and available oil during the 1950's and 1960's led to unprecedented worldwide economic growth. Although the United States had been the major international oil producer in the twentieth century, in 1970 domestic production peaked and began to decline.[90] The end of secure and inexpensive oil occurred in late 1973 and early 1974 with the Arab oil embargo. The world prices of oil began to rise, and by 1974, became eight times higher than five years earlier.[91] As the

87. B. BARSH & J. HENDERSON, *supra* note 4, at 289.

88. *Id.*

89. *See supra* note 10.

90. R. STOBAUGH & D. YERGIN, REPORT OF THE ENERGY PROJECT AT THE HARVARD LAW SCHOOL 1-18 (1979). This decline occurred 111 years after the birth of the American oil industry when "Colonel" Edwin Drake struck oil near Titusville, Pa.

91. *Id.* at 4. United States dependence on foreign oil rose rapidly from 3.4 million barrels a day in 1970 to 8.2 million barrels a day in 1979. This imported oil represents nearly half of all

price of oil continues to escalate and efforts at domestic production accelerate, Indian lands, many of which contain mineral resources, become more valuable. The tribes are now presented with the possibility of either expanded economic growth or renewed exploitation of their resources.

III. RESPONSE OF THE INDIAN COMMUNITY—THE BIRTH OF CERT

Recognizing the present opportunity to develop a more secure economic base from the efficient utilization of their mineral resources, American tribes have responded both individually and collectively. Because of the unique legal status of Indian lands, this response differs from that of the private landowner. As detailed earlier, Indians do not have the freedom to negotiate private agreements regarding their interests in lands, but are dependent on the United States government to exercise its trust responsibility over Indian affairs. The principles of inalienability without government consent and of protection of Indian tribes have foreclosed the options available in a private lessor-lessee relationship.

Although tribes and individual allottees have been involved in mineral development for several decades, they have necessarily relied on others—the government and private developers—to decide how and when their resources should be developed. Agreements have been limited to the leasing of minerals as prescribed under the 1938 Omnibus Mineral Leasing Act.[92] This often provides the Indian with only minimal compensation from, and no control over the means of exploration and development of their resources. Under the present statutory scheme, without authority to enter into agreements or control the development of their lands, tribes can make negligible progress toward enhancing the benefits derived from mineral development.

In 1975, the Council of Energy Resource Tribes (CERT) was formed by several Indian tribes.[93] It is a nonprofit organization that now represents twenty-nine American Indian tribes.[94] CERT seeks "to

domestic petroleum consumption. AMERICAN PETROLEUM INSTITUTE, TWO ENERGY FUTURES: A NATIONAL CHOICE FOR THE 80'S (1980).

92. 25 U.S.C. §§ 396a-396g (1976). Allotted lands are leased under *id.* § 396.

93. 1981 COUNCIL OF ENERGY RESOURCES TRIBES, ANNUAL REPORT. CERT receives its primary funding from an interagency grant with the Department of Energy, Department of Health & Human Services, and Department of Commerce. It also receives funding from the Department of Interior. *Id.* Residual funding is derived from membership fees paid by the tribes.

94. The member tribes of CERT are Navajo, Nez Perce, Jicarilla Apache, Northern Cheyenne, Southern Ute, Crow, Ute Mountain, Pueblo of Laguna, Fort Berthold, Acoma Pueblo,

promote the well-being of its members through the protection, conservation, control, and prudent management of their oil, natural gas, uranium, geothermal, oil shale, and alternate energy resources."[95] In order to achieve this goal, "CERT's mandate is to assist its member tribes to develop the capability to manage their energy resources for their benefit, according to their values."[96] CERT advocates the profitable development of mineral resources on Indian lands, rather than the impediment thereof. CERT espouses that the tribes must exercise more control over exploration and development in order to attain the greatest benefit. It contends that major changes in the form and enforcement of mineral agreements are needed to achieve this objective. Past governmental policies have stifled innovation in these areas and have precluded the tribes from obtaining a fair share of the economic benefits comparable to those available to private landowners.[97]

Several provisions of the 1938 Act and their implementation by the Department of Interior are directly related to the dissatisfaction that the Indian tribes and CERT express regarding current development policies. The Act has been interpreted by the Department of Interior to preclude any form of agreement other than a lease.[98] A lease may be made only with the approval of the Secretary,[99] after a competitive bidding process, either by public auction or sealed bids,[100] as prescribed by the Secretary. Although this process ostensibly protects the Indian lessor, strict interpretation by the Bureau of Indian Affairs has

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Blackfeet, Cherokee, Chippewa-Cree, Fort Belknap, Fort Hall, Fort Peck, Hopi, Jimez Pueblo, Kalispel, Rosebud Sioux, Salish Kootenai, Santa Ana Pueblo, Spokane, Unitah-Ouray, Yakima, Zia, Cheyenne-Arapahoe, Seminole, Pawnee, Umatilla, Walker River, Hualapai, Turtle Mountain, and Muckleshoot.

95. 1979 COUNCIL OF ENERGY RESOURCE TRIBES, ANNUAL REPORT.

96. *Id.*

97. Recent escalation of domestic exploration has dramatically increased bonus and royalty rates for mineral development. Rates for Indian mineral development have remained essentially the same. *See supra* note 86.

98. 25 U.S.C. § 396a (1976). The regulations governing agreements stipulate a procedure only for *leasing* and the payment of rents and royalties which arise from this arrangement. 25 C.F.R. §§ 171.2-.3 (1981).

99. 25 U.S.C. § 396a (1976). The actual approval is made by the superintendents of district agencies, who are delegated the authority under 25 U.S.C. § 396e (1976). Although the Act provides that the tribe must consent, this is usually pro forma, as this procedure is the only one currently available for mineral development.

100. 25 U.S.C. § 396b (1976); 25 C.F.R. §§ 171.2-.3 (1981). Section 171.2 provides that the Commissioner may waive the requirement for advertised sale for "other minerals" rather than oil and gas by written permission. If a negotiation were in progress, this requirement of written approval is impractical because of the delay involved. Leases for oil and gas may be made only after competitive bidding. *Id.*

foreclosed the use of "negotiated" agreements.[101] The Act allows leasing for an established term, "not to exceed ten years." If there is production, the lease can continue for "as long thereafter as minerals are produced in paying quantities."[102] Again, this provision is interpreted strictly. Although some oil and gas lease terms have recently been restricted to five years,[103] even this shortened term allows the lessees of Indian lands to enjoy longer periods of non-production unavailable to lessees on the private lease market.

Although the Indian tribe is the nominal lessor, agreements entered into pursuant to the Act grant the BIA broad authority and divest the tribe of the usual control mechanisms. After the lease is approved, rents and royalties are paid to the agency to be disbursed to the tribes.[104] Rates for rentals and royalties are stipulated in the regulations implementating the Act.[105] Under these laws and regulations, a lease is the exclusive form of mineral agreement utilized for development of Indian lands. This restriction on the form of agreement is aggressively opposed by CERT.[106] The inability of the Indian tribe to negotiate is a major obstacle to optimum development. Thus, it is the freedom to negotiate both the types and terms of agreements that is recommended by CERT. No "typical" form is suggested, but rather, CERT recommends that the structure and terms of Indian oil and gas agreements be tailored to the particular circumstances involved.

CERT maintains that through negotiation the Indian tribes can obtain the greatest benefits, not only monetarily, but in other areas as well. Areas of primary concern include increased tribal control over development, provisions for the employment of tribal members, and environmental protection from overdevelopment. Each tribe is encouraged to determine its goals with respect to these benefits, and then to consider various kinds of negotiated agreements not limited to leases. Four basic forms are recommended for consideration: Negotiated lease agreements, joint ventures, limited partnership agreements,

101. *Id.*

102. 25 U.S.C. § 396a (1976); 25 C.F.R. § 171.10 (1981).

103. Under 25 C.F.R. § 171.10 (1981), the ten year maximum term for mineral leases has recently been interpreted as allowing shorter leases, specifically those for five years.

104. *Id.* § 171.12.

105. Rentals are set at $1.25 per acre per annum and royalties at 12½%. The agency may set a higher royalty, but must do so before the advertisement of the lease. *Id.*

106. Council of Energy Resource Tribes, Policy Resolution No. 81-10. (Oct. 1981).

and service contract agreements.[107] Each of these provides for more control by the tribe, and for the possibility of greater revenues.

To assist tribes in negotiating, CERT has developed guidelines to use in choosing the type of agreement and in preparing for negotiation. The guidelines, "Energy Contract Negotiations" emphasize preparation in three simple steps: Know what you have, know what you want, and know with whom you are dealing.[108] Through its Technical Assistance Center,[109] CERT can provide the expertise and assistance to help the negotiating tribe answer these questions.

Under present law and regulations, there is a question whether oil and gas agreements other than leases are allowed. As explained above, the 1938 Act and the recently revised regulations require competitive bidding for oil and gas "leases".[110] The revised regulations do allow for negotiations in the leasing of "other minerals" but only if the Commissioner gives prior written permission.[111] Under this measure, the

107. This material was summarized from a CERT worksheet. In brief the agreements may be defined as follows:

Negotiated Lease Agreement: This employs the traditional structure of the oil and gas lease, but specific and definite goals should be incorporated into the agreement if it is used. There is little risk of any investment loss and administrative costs to the tribe are low.

Joint Venture: There are various forms of joint ventures. CERT recommends a so-called syndicated agreement whereby the tribe agrees to mutual control of development and sharing of net profits. The tribe contributes the mineral resource and the developer contributes the capital. When production is obtained the developer's investment is recovered first, after which the net profits are shared. There is a greater profit potential in this arrangement than in the royalty payment under a lease. It offers the advantages of increased flexibility. The tribe must assume increased administrative responsibility with this agreement.

Limited Partnership Agreement: As in the joint venture, the tribe contributes the resource, but the tribe uses capital of private "passive" investors, who are allowed to write off the expenses against income, thus reaping tax benefits the tribe cannot use because of its tax exempt status, Rev. Rul. 67-284, 1967-2 C.B. 55. Thus the tribe is in complete control and shares in the profits, but has little or no financial risk. However, this arrangement presupposes that the tribe has the capabilities to properly monitor and manage the development project.

Service Contract Agreement: Under this agreement the tribe retains ownership of its resource but contracts with an independent developer to drill and operate the wells for a fee. Since the tribe owns the well, the equipment, and the production, there are no income taxes for windfall profits (the tribes have been exempt from this tax, 26 U.S.C. § 4994(d) (Supp. IV 1980)), so the maximum economic return can be realized if there is production. But the tribe assumes the risk of low production or a dry hole. Therefore, these agreements are recommended only in areas where the exploration risk is relatively non-existent or the size of potential recovery is so great as to be worth the risk. *Id.*

108. *Id.*

109. CERT Technical and Operational Headquarters are located in Denver and provides on-site technical assistance such as: Evaluation of geological structure and drilling data for resource potential; environmental impact analysis; water quality and quantity studies; financial analysis; development of reclamation techniques; and tribal management and long-term planning assistance. 1981 COUNCIL OF ENERGY RESOURCE TRIBES, ANNUAL REPORT.

110. *Supra* notes 98-101 and accompanying text.

111. 25 C.F.R. § 171.2 (1981).

Navajos have negotiated a uranium arrangement with Exxon Corporation in which it may choose to act as a partner in production.[112] In the past, the Bureau of Indian Affairs has maintained that the lease form must be used in oil and gas agreements and has opposed "negotiated" lease agreements, other than those with the "highest bidder" after the competitive bidding process.

A review of eighteen points[113] recommended by CERT for consideration in negotiating reveals that departing from the standard lease should provide more control for the tribes. Through negotiation the tribes can limit the term of the lease, provide for more exploration and development, establish the rights to the data collected from exploration, and provide for tribal consent before assignment of the lease. Negotiation could also result in greater monetary return to the tribes and for tribal enforcement rights. Currently, enforcement is delegated to the United States Geological Survey, a division of the Department of Interior. Tribal exercise of these fundamental rights would more closely parallel those of private lessor-landowner, who has ordinarily enjoyed those and similar benefits under the traditional private mineral development arrangement.

Over the past few years, USGS enforcement of the Indian royalty management program has been gravely inadequate. Recently, charges have been made of thefts from oil fields located on Indian lands[114] and underpayments of royalties. In response, the Senate Select Committee on Indian Affairs conducted hearings during the first part of 1981 to review the procedures of federal supervision of oil and gas leases on

112. The Navajo Tribe signed a contract with Exxon Corporation regarding uranium exploration and development. The Navajos conducted extensive negotiations with Exxon and four other companies before choosing to contract with Exxon. Under this agreement, the decision concerning the method of development is deferred until mining actually begins. At that time the tribe may elect either a lease arrangement providing for bonuses and royalties, or an equity arrangement such as a joint venture. The Navajo Energy Development Authority will recommend to the Navajo Council which option to implement, based upon the economic conditions prevailing at that time. This agreement, which was the first significant departure from the traditional tribal leasing for hard minerals, was signed in January of 1974. The Department of the Interior finally approved this agreement in January of 1977, but did not officially change its policy regarding implementation of the 1938 Act. Telephone interview with George Vlassis, Legal Counsel to the Navajo Tribe (Feb. 22, 1982) (notes on file in the *Tulsa Law Journal* office).

113. The eighteen objectives for mineral negotiation suggested by CERT are reprinted in their entirety in Appendix B *infra*.

114. Underpayments of royalties surfaced during government audits of the USGS. The theft of oil from Indian and federal lands was discovered in the summer of 1980 when USGS personnel began to stop trucks that did not have run tickets. *Oil and Gas Leases on Indian Lands (Part 2): Hearings Before the Senate Select Committee on Indian Affairs*, 97th Cong., 1st Sess. 2-3 (1981) (opening statement of Sen. Gorton, Acting Chairman).

Indian lands. Although lack of adequate supervision had been documented in 1976 and 1979,[115] there had been no response by the Geological Survey to earlier recommendations of the Comptroller General. The findings of the Senate Hearings have resulted in the appointment of a commission to probe the allegations concerning underpayments of royalties and theft of oil from Indian and federal lands,[116] as well as the introduction of S. 1894 by Senator Melcher.

The Commission issued a report on January 21, 1982, containing sixty recommendations to improve the management and enforcement program for federal and Indian lands. Secretary of the Interior Watt has praised the report and has begun to implement the goals, which he states will require "new levels of cooperation between Federal and Tribal governments."[117]

Senate Bill 1894,[118] which authorizes alternative mineral agreements, is a positive response from Congress. If the Bill is enacted, the tribal leaders will be allowed to negotiate agreements offering the greatest overall benefit in light of the factors involved. The factors which need to be considered are the particular mineral involved, the capital needed for development, the investment risks, and the tribe's ability to assume a managerial role in one of the alternative development arrangements. Using this type of assessment some tribes will have the financial capacity and leadership to enter into the active participation of a joint venture; others, less sophisticated in business dealings, may need to rely on Bureau assistance. Under S. 1894 tribes unable to actively develop their mineral resources through alternative methods may still rely on the leasing measures previously used. Regardless of the method chosen, more tribal control may be exerted over the process of alienation of Indian mineral rights.

Under the Melcher Bill the negotiated agreement will still be subject to secretarial approval. However, if this approval is denied, the Act

115. Comptroller General of the U.S., Report to the Senate Comm. on Interior and Insular Affairs, Indian Natural Resources Part II (1976), *reprinted in Senate Committee Hearings, supra* note 114, at 9; Comptroller General of the U.S., Report to the Congress of the U.S., Oil and Gas Royalty Collections (1979), *reprinted in Senate Committee Hearings, supra* note 114, at 58.

116. The Commission on Fiscal Accountability of the Nation's Resources, popularly called the Linowes Commission, was appointed by Secretary of Interior James Watt, and began hearings on August 27, 1981.

117. Letter from James Watt, Secretary of the Interior, to Tribal Leaders (Jan. 22, 1982) (discussing the recommendations of the Commission on Fiscal Accountability of the Nation's Energy Resources) (copy on file in *Tulsa Law Journal* office).

118. Appendix A *infra*.

provides for presidential review,[119] rendering the requirement of continued agency approval less objectionable than under the existing scheme. However, it is questionable that the Secretary needs a year within which to oppose any proposed agreement as provided in the Act.[120] This length of time could be a serious impediment to negotiations if the lessee is anxious to begin exploration. The adverse consequences of this provision should be considered during the hearings on the Bill.[121]

Another positive government response has been the recent creation of the Division of Energy and Mineral Resources within the Office of Trust Responsibility of the Bureau of Indian Affairs.[122] The duties of the Division include overseeing the development of all minerals for Indian tribes and allottees. The Division provides advice to the tribes and approves mineral agreements. Another important function is long-range development planning which involves the collection of geological data concerning available mineral resources. The Division is involved in a massive compilation effort. When completed, the geological information gained will become the exclusive property of the tribes. The goals of the Division are to provide assistance to the tribes, and to allow more tribal participation in resource development.[123]

IV. THE FUTURE OF MINERAL DEVELOPMENT AND SELF-DETERMINATION

There are no official government statistics on the amount of available mineral resources on Indian land, but at least one official notes that the figure is "substantial."[124] CERT has estimated that its member

119. *Id.* § 1(b).

120. *Id.* § 1.

121. Hearings on S. 1894 began on Friday, Feb. 12, 1982.

122. The Division of Energy and Mineral Resources began operations in Lakewood, Colorado, in June of 1980. It is presently headed by David Baldwin, former Superintendent of the Osage Reservation. Until the establishment of the Division, mineral development was handled by the area offices of the BIA. With the increased activity and productivity of Indian resource development, BIA officials felt that more expertise and oversight could be offered by the establishment of a new, centralized office.

123. Telephone interview with David Baldwin (Jan. 15, 1982) (notes on file at *Tulsa Law Journal* office).

124. *Id.* Although the Division of Mineral Resources is currently involved in a project to secure this information, it is confidential and not available to the public. When the project is complete, the information will become the property of the Indian tribes. A report prepared by Mr. Baldwin to be sent to the Washington office of the Bureau of Indian Affairs, indicates that currently 31 tribes are producing oil and gas, and 12 additional tribes have leases without production. The number of tribes producing minerals other than oil and gas are: coal (3), uranium (3), cop-

tribes own one-third of the strippable coal in the West, roughly four to five percent of the country's onshore oil and gas resources, some forty percent of all privately owned uranium, and substantial quantities of oil shale, hydroelectric and geothermal resources.[125] The Commission on Fiscal Accountability reported that mineral royalties from Indian lands rose from $143 million in 1979 to $197 million in 1980.[126]

Indian tribal leadership seeks to maximize the benefits from these resource holdings. After earlier reliance upon the federal government to control and develop Indian land under its trust responsibility, many tribes appear ready to assume the responsibilities and risk of development themselves. Under the leadership of Senator Melcher, and the Senate Select Committee on Indian Affairs, the government appears more willing to allow this independence.

Undoubtedly, the formation of CERT has been a major step in the direction of tribal independence.[127] It offers assistance to tribes not only in the area of mineral agreements, but also through technical assistance, educational programs, and political lobbying. Although all Indian tribes do not require this type of assistance,[128] it is a valuable service to most.

CERT's suggested program provides a basis upon which Indian tribes can make informed decisions regarding their resource holdings, future goals, and accomplishment of these purposes. In summary, CERT's major recommendations suggest negotiation for greater control in the operations of mineral development, a greater share of profits, increased tribal input regarding impact on the environment, and an enhanced oversight function by the tribes.

Although enhanced production and the resulting financial benefits

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per (1), lead and zinc (1), vanadium and phosphate (1), gypsum (1), basalt (1), chat (1), and granite (4). *Id.*

125. Council of Energy Resource Tribes, Testimony before the House Energy and Water Development Appropriations Subcommittee (March 25, 1981) (testimony by E. Gabriel, Executive Director).

126. *Fiscal Accountability Hearings, supra* note 75, at 116.

127. Although CERT was criticized by some in the beginning as being an "Indian OPEC," Cook, *New Hope on the Reservations*, FORBES, Nov. 9, 1981, at 108, 109, it has developed into a stable, viable organization.

128. For example, the Osage Nation, the richest oil tribe in Oklahoma, was an early member of CERT but later discontinued its membership. Sylvester Tinker, Chief of the Osage, stated that the organization "cannot do anything for the Osages." But he did acknowledge that the Osage have their own set of laws governing oil and gas development. This was created by an act in 1906 which allotted the lands of the Reservation. In order to administer the enormous oil and gas resources, the BIA maintains expert personnel directly on the reservation. Telephone interview with Sylvester Tinker (Jan. 17, 1982) (notes on file at *Tulsa Law Journal* office).

are the primary goals of the Indian tribes, there are other benefits which follow from these. Tribes are not in the position of individual owners who may make decisions based upon personal needs or desires. The tribes are governmental bodies responsible for the health, safety, and welfare of their members. A major concern is increased employment among these persons. Involvement in development at this level would permit the tribal leaders to accomplish the compatible goals of employment and training of tribal members and preferential purchasing by energy producers at tribal enterprises.[129]

In developing a long range plan, it is imperative for tribes to realize that minerals are nonrenewable resources. Profits from mineral development are important because they can provide a foundation for general economic development, which will continue after the nonrenewable resources are exhausted. If the Indian tribes are to be successful in their pursuit of self-determination, a solid economic base is necessary. By using this base to create industry and jobs, the tribes can assure their continued existence and fulfill the responsibilities toward their members after the minerals are depleted.[130]

Self-determination has been the goal of the Indian in the past decade. But if self-determination is to be attained, the tribes must be willing to rely less on the trust responsibility of the government.[131] They must be willing to assume responsibility and take the risks associated with independence. Effective development of their mineral resources can provide a financial foundation upon which tribes can build, and help shed the dependency that has resulted from congressional and administrative control.

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129. For example, a negotiated contract could stipulate that a certain percentage of employees on the project be tribal members; that qualified tribal members be given employment preference; or that on-the-job training be available for tribal members. The producer could be required to purchase goods and services which might be available from Indian-owned businesses.

130. David Baldwin, Chief of the Mineral Division, stresses that the tribes need to realize that minerals are nonrenewable assets and that they need to develop income generating entities, which will continue after the minerals are gone. As an example of the lack of long-range planning, he cites the current closing of the uranium mines on the Laguna Reservation in New Mexico. As these mines close, since no long-range plan has been developed, tribal members are finding themselves not only without royalties, but without employment. Interview, *supra* note 123.

131. The decision in United States v. Mitchell, 445 U.S. 535 (1980), is read by some commentators as having narrowed the government's trust responsibility toward Indians. In their opinion, the U.S. Supreme Court rejected the Quinault allottees' claim that the government was liable for money damages due to federal mismanagement of reservation timber. One thoughtful writer on Indian policy does not view this as a detriment, but as a benefit through increased freedom from regulation. His contention is that "[n]o general theory of trusteeship is necessary or consistent with self-government." Barsh, *U.S. v. Mitchell Decision Narrows Trust Responsibility*, 6 AM. INDIAN J. 2, 14 (Aug. 1980).

Perhaps the goal of self-determination was best explained by Felix Cohen almost forty years ago:

> The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a governmental department.[132]

Margaret A. Swimmer

APPENDIX A

The text of Senate Bill 1894 reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any Indian tribe may enter into any joint venture agreement, operating agreement, joint production agreement, risk services agreement, managerial agreement, lease (other than a lease approved pursuant to the Act of May 11, 1938), or other agreement approved by the Secretary of the Interior (hereinafter referred to as the "Secretary") for the disposition of oil and gas, geothermal, or for the sale of production from operations on tribal lands. Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation. The Secretary shall approve any such agreement within one year of submission to him unless the Secretary finds that—
>
> (a) such agreement is not in the best interest of the tribe; and
>
> (b) whenever the Secretary disapproves an agreement pursuant to subsection (a) he shall state his findings in writing within 30 days of making his decision. Upon disapproval of a tribal proposal the tribe shall have an opportunity for Presidential review provided that request for review is filed within 30 days.

132. F. COHEN, *supra* note 3, at 122.

SEC. 2 (a) Individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to section 1 of the Act may join in such an agreement with the tribe, subject to the approval of the Secretary of the Interior.

(b) The Secretary at his discretion may approve agreements listed in section 1 for individual Indians owning trust or restricted minerals.

SEC. 3. Agreements of the type described in the first section of this Act for the development of production of oil and gas or other mineral resources of tribal lands approved by the Secretary prior to the date of the enactment of this Act are hereby ratified as of the date of such approval.

SEC. 4. Nothing in this Act shall affect the validity of any lease approved or hereafter approved pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. § 396a *et seq.*).

SEC. 5. Within 180 days, the Secretary of the Interior shall promulgate rules and regulations to implement the provisions of this Act.

S. 1894, 97th Cong., 1st Sess., 127 CONG. REC. S14128 (daily ed. Nov. 30, 1981).

APPENDIX B

CERT has collected several objectives for Indian tribes negotiating mineral agreements. These provisions were developed by Charles J. Lipton, a New York Attorney retained by CERT, and appear in 6 AM. INDIAN J. 2 (Feb. 1980). They suggest:

1. An agreement for a limited time period, preferably 20 to 25 years, not for "so long as petroleum can be profitably produced."
2. An agreed-upon exploration work-program detailing what is to be done and when. This includes drilling and a requirement for a specified minimum expenditure.
3. The delivery to the tribe of all information obtained, including the interpretations. Further, the tribe should have the property rights to the information, subject to confidentiality, for a limited period, and the right to use

the information for purposes of carrying out the agreement.

4. A relinquishment provision requiring the operator to give up percentages of the exploration area over a period of time. This should not preclude dividing the area into a number of blocks and reserving certain blocks (in a checkerboard pattern) for future possibilities, should a discovery be made that would then increase the value of the reserved blocks.
5. A fiscal arrangement whereby the tribe would share in the true profits, including tax credits and allowances and other direct or indirect subsidies, on a sliding scale increasing progressively with profitability, or after the operator has recovered a multiple of its original costs.
6. The tribe's minimum share of the profits should not be less than a royalty equal to a percentage of the fair market value of production each year, also, perhaps, on a sliding scale increasing progressively with the value of production, starting at not less than 16 2/3 percent.
7. A minimum specific revenue to the tribe each year after discovery, regardless of production, as an advance royalty or profit share.
8. Fair market rental for the use of surface areas, adjusted by a price index for changes in the cost of living, or other inflation protection.
9. Cash bonuses: on signature, on discovery and at different production levels, perhaps keyed to value rather than quantity. A tribe would probably be better off, however, trading an immediate cash payment ("front end money") for a share of the profits or a higher royalty, that is, unless no petroleum discovery is made.
10. Where a tribe shares in profits, limitations on the rates at which an operator can recover its initial investment in computing profits, over a period of years or limited to the value of a specified percentage of production each year.
11. Genuine employment and promotion preferences for tribal members, in all employment categories (especially supervisory, administrative, technical and managerial). Preference policies should be coupled with commitments

to provide educational opportunities and on-the-job training for tribal members (both on and off the reservation) and fixed-term employment contracts for outsiders to make promotion possibilities realistic.

12. Preferences for tribal enterprises and members to obtain subcontracts and to provide goods and services.
13. Meaningful procedures to ensure that the tribe, not the operator, determines how the land will be used and what the future of the reservation will be. This should include concurrence in decisions on:
    (a) the location of plant, equipment and infrastructure;
    (b) the size, method and rate of operations;
    (c) the impact of operations on air, water and community facilities;
    (d) conservation, reclamation and restoration, and
    (e) marketing arrangements.
14. Indemnification of the tribe against liabilities arising out of operations.
15. Effective record-keeping and reporting requirements.
16. Effective inspection and monitoring procedures.
17. No assignment without the tribe's consent.
18. Appropriate guarantees or performance bonds.

While the list is not exhaustive, it is meant to include the most important features of what might be considered a fair and reasonable agreement.

Id. (footnote omitted).