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Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources

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MINERAL DEVELOPMENT IN INDIAN COUNTRY: THE EVOLUTION OF TRIBAL CONTROL OVER MINERAL RESOURCES*

Judith V. Royster†

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I. INTRODUCTION

By the late nineteenth century, mining had proved essential to economic growth, to industrialization, to urbanization, and to the non-Indian settlement of the American West.¹ "Without mining—from coal to iron to gold—the United States could not have emerged as a world power by the turn of the century, nor could it have successfully launched its international career of the twentieth century."² But if mining has been crucial to national growth, tribal mineral resources have been crucial to the mining industry.

Indian tribes, collectively, are the third largest owners of mineral

1. DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT, 1800-1980* 25 (1987).

2. *Id.* at 2.

resources³ in the nation.⁴ Indian lands are estimated to contain three percent of the nation's known oil and gas reserves,⁵ 30 percent of the coal west of the Mississippi,⁶ and up to a third or more of the country's uranium,⁷ as well as smaller quantities of a host of other mineral resources.⁸ The market value of minerals produced on Indian lands exceeds \$1 billion.⁹

The history of mineral development in Indian country,¹⁰ the roles of the Indian tribes, and the evolution of those roles over time present a microcosm of the history of federal-tribal relations during the last century. As federal policy moved from assimilating Indians into the majority society to encouraging tribal self-government and ultimately to promoting government-to-government relations, tribal control over mineral development strengthened. This article traces the various roles the tribes play in mineral development - owner, lessor, developer, and regulator — in their historical context.

The first and foundation role for tribes is that of owner, and during the allotment era of the late nineteenth and early twentieth centuries, the battle to retain the tribal mineral estate mirrored the larger

3. To avoid awkwardness, the term "mineral" will be used to refer to both oil and gas and other minerals. Where different provisions apply to oil and gas than to other mineral resources, specific terms will be used.

4. MARJANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT* 74 (1990). Only the federal government and the railroads hold larger mineral reserves.

5. *Id.* Some 40 reservations are estimated to contain 4.2 billion barrels of oil and 17.5 trillion cubic feet of gas. *Id.*

6. *Id.* Thirty-three reservations hold as much as 200 billion tons of coal. *Id.* Another source states that 25 tribes own approximately 15 percent of the nation's coal, including one-third of the low-sulfur coal in the west which can be strip mined. Douglas Richardson, *What Happens After the Lease Is Signed?*, 6 *AMER. INDIAN J.* 11, 11 (Feb. 1980).

7. Estimates range from 16 to 37 percent. AMBLER, *supra* note 4, at 74.

8. Other minerals produced on Indian lands as of 1989 included chat, copper, gypsum, helium, limestone, phosphate, sand and gravel, scoria, silica sand, and sulfur. UNITED STATES MINERALS MANAGEMENT SERVICE, *MINERAL REVENUES 1989: REPORT ON RECEIPTS FROM FEDERAL AND INDIAN LEASES* 72-73.

9. *Id.* at 73. Almost half that amount is attributable to coal production. *Id.* at 72.

10. Indian country is statutorily defined, in the federal criminal code, as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patents, and including rights-of-way running through the reservation, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988). This definition of Indian country has been generally accepted in the civil context as well. See *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The Supreme Court has recently clarified that § 1151(a) encompasses both "formal" and "informal" reservations: that is, "lands set aside by whatever means for the residence of tribal Indians under federal protection". *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985, 1991, 1993 (1993) (quoting FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 34 (Rennard Strickland, ed. 1982)).

war over Indian lands and Indian policy. The second role for tribes, chronologically, is that of lessor. Throughout most of the history of mining in Indian country, federal law confined the tribes to the part of passive lessors. During the allotment era, leasing tribal mineral resources to non-Indian companies reflected a national policy of assimilating Indians into the mainstream. Once the allotment policy was replaced by an era celebrating tribal self-government, however, mineral leasing reflected the new policy of according tribes increased control over their resources. With the advent in recent decades of a stronger federal Indian policy of self-determination and government-to-government relations, however, tribes have taken on a third role. As active developers of the mineral estate, tribes exercise a far greater degree of control over mineral development on Indian lands. Finally, Indian tribes are governments: sovereign entities separate from the states, with the rights to regulate and tax mineral production within their borders. The onset of tribal assertions of police powers over mineral development mirrors the increased sovereign activity of tribes during the self-determination era of federal Indian policy. Each of these roles will be explored below.

II. TRIBES AS PROPRIETORS: OWNERSHIP OF THE MINERAL ESTATE

Tribal ownership of mineral resources is critical from economic, environmental, and regulatory perspectives. Indian country with significant mineral resources is often remote territory with high rates of unemployment and poverty. For those tribes, the mineral estate represents the best, if not the only, hope for economic development of the reservation. Not only are the mineral reserves valuable in themselves, but their development represents income, jobs, and the vitality of reservation economies.

In addition to the economic potential, ownership of the mineral resources means that tribes control, at least to some degree, the decision whether to develop the minerals and the extent of permissible exploration and mining activities.¹¹ Title to the minerals permits the choice not to develop the resource as well as the choice to exploit the

11. The United Nations Working Group on Indigenous Populations noted that transnational corporations are considerably more sensitive to environmental and other concerns on native lands in the United States than in other countries. UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, WORKING GROUP ON INDIGENOUS POPULATIONS; TRANSNATIONAL INVESTMENTS AND OPERATIONS ON THE LANDS OF INDIGENOUS PEOPLES: REPORT OF THE UNITED NATIONS

mineral wealth. Ownership also means that tribes control mining activities which affect the surface estate and the environment of Indian country. And finally, ownership may affect the assertion of sovereign regulatory powers such as environmental controls and taxing authority.¹² Thus consolidating subsurface and surface ownership in the hands of the sovereign guarantees territorial integrity and simplifies tribal assertions of sovereign power.

Nonetheless, mineral estate ownership in Indian country is complicated by the land tenure patterns arising from wholesale shifts in federal Indian policy in the late nineteenth and early twentieth centuries. As a result of the half-century federal allotment policy, Indian country today consists not only of tribal trust lands, but may include individual trust allotments, land owned in fee by Indian and non-Indian individuals, and land held by the state or federal governments. As is true elsewhere, the surface and subsurface estates of Indian country may be unified in one owner or split, but the permutations are complex.¹³ In the simplest form, of course, the tribe holds both the minerals and the surface lands. But where the surface and mineral estates have been severed, either or both may be owned by individual Indians, either in trust or in fee, by private parties in fee, or by the federal government. The effect of the land tenure patterns on tribal mineral ownership is explored in the sections that follow.

A. Tribal Trust Lands

In the early decades of the nineteenth century, federal Indian policy focused on removing tribes westward, out of the way of encroaching white settlement. By the mid-1840s, however, federal policy began

CENTRE ON TRANSNATIONAL CORPORATIONS 22-23, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/Misc.1 (1991).

The critical difference in TNC performance, in these cases, appears to be the legal status of indigenous lands rather than corporation policy or corporate culture. Indigenous people in the U.S. and parts of Canada have been able to insist on participating in TNC activities because they have secure land and resource rights. In contrast, the indigenous territories in Ecuador, Panama and Chile which have been adversely impacted by mining and logging are treated as part of the national estate, and indigenous peoples have no legally-protected rights to prevent their use.

Id. at 23-24.

12. Tribal authority over non-Indian lands may be more limited than tribal authority over Indian lands. See *infra* text accompanying notes 403-422.

13. See AMBLER, *supra* note 4, at 47, for a listing of nine different split-estate situations existing today.

to shift to reserving for the tribes pockets of their aboriginal territories,¹⁴ with the intent to ease conflicts between Indians and whites, prevent the destruction of the tribes, and eventually transform the Indians into Christian agriculturalists.¹⁵ The federal reservation policy continued throughout the remainder of the century, but reached its heyday in the years from the Civil War to the onset of the new federal policy of allotment and assimilation in the late 1880s.¹⁶

When Indian lands are reserved or otherwise set aside as homelands for the tribes,¹⁷ the United States takes title to the land in trust for the tribe or tribes that occupy the territory.¹⁸ Under the trust system for land ownership, the United States holds the fee and the tribes retain beneficial ownership of their territories. Trust lands may not be alienated, encumbered, or otherwise restricted without the express consent of Congress.¹⁹ Today, virtually all tribal land of federally recognized Indian tribes is held in trust status.

During the late eighteenth and early nineteenth centuries, tribal ownership of minerals and other natural resources on reservations was not a settled question. In 1873, the Supreme Court stated that timber cut from Indian lands belonged to the federal government, "discharged of any rights of the Indians therein."²⁰ Tribal rights to the land and its resources, the Court indicated, were equivalent to those of a life tenant.²¹ During these decades, however, both Congress and

14. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 315-18 (1984).

15. *Id.* at 317.

16. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 146-47 (3d ed. 1991).

17. Most reservations were set aside by treaties, but after treaty-making with the tribes was ended in 1871, see 25 U.S.C. § 71 (1988), reservations continued to be set aside through agreements ratified by Congress. Numerous reservations were also created by executive order between 1855 and 1919. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 493 (Rennard Strickland, ed. 1982).

18. While the notion of the trust relationship is traceable to the guardian-ward analogy first proposed by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the trust status of Indian lands is more generally credited to nineteenth century views of superior and unrestrained federal "plenary" power with respect to Indian tribes. See Russel L. Barsh & James Y. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 WASH. L. REV. 627, 645 (1981); Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 A.B.F. RES. J. 1, 63.

19. Trade and Nonintercourse Act, 25 U.S.C. § 177 (1988) (first enacted in 1790). See, e.g., *Black Hills Institute of Geological Research v. United States Dep't of Justice*, 12 F.3d 737 (8th Cir. 1993) (holding that a dinosaur fossil named "Sue" found embedded within Indian trust land could not be removed and sold without the consent of the Secretary of the Interior).

20. *United States v. Cook*, 86 U.S. (19 Wall.) 591, 594 (1873).

21. *Id.*

the Department of the Interior generally treated the tribes as the beneficial owners of the mineral estate.²² And in 1938 the Supreme Court concurred, repudiating the contrary interpretation of its 1873 opinion²³ and recognizing tribal ownership of the subsurface mineral estate.

Subsurface minerals, the Court declared in *United States v. Shoshone Tribe of Indians*, are "constituent elements of the land itself."²⁴ When the land was set aside as a homeland for the tribe, the tribe acquired all "beneficial incidents" in the land, including beneficial ownership of the natural resources.²⁵ Moreover, the Court noted, the Shoshone Reservation was known to contain valuable mineral deposits, and yet the federal government included no language in the treaty even suggesting that it intended to retain any interest in those minerals.²⁶ Therefore, the Court held, interpreting the treaty to the benefit of the tribe and resolving any doubts concerning ownership in the tribe's favor,²⁷ beneficial ownership of the mineral resources vested in the tribe.²⁸

Under the rule established in *Shoshone Tribe*, then, the mineral resources of tribal lands belong to the tribes, absent an express provision reserving a federal interest in the mineral estate. When lands

22. Primary evidence is provided by the series of mineral leasing acts discussed *infra* at section II.A. See also 34 Op. Att'y Gen. 181, 189 (1924) (noting that as a "practical matter" the treaties and legislation recognized tribal ownership of the mineral reserves); JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934* 55 (1991) (describing the 1927 leasing act as "one of the most significant pieces of legislation concerning Indians passed in the 1920s because it recognized the Indians' title to executive order lands and their rights to the proceeds of mineral leases"). The 1927 Act is discussed *infra* at text accompanying notes 86-95.

23. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938). The decision in *Cook*, the Court now said, determined only that the United States was entitled to replevy from the purchaser logs cut by unauthorized tribal members: "That case did not involve adjudication of the scope of Indian title to land, minerals, or standing timber. . . ." *Id.*

24. *Id.* at 116.

25. *Id.* at 115-16.

26. *Id.* at 117. The Shoshone Reservation, today the Wind River Reservation of the Shoshone and Arapaho Tribes, contained valuable deposits of gold, oil, coal, and gypsum. *Id.* at 114.

27. *Id.* at 117. The Court read the Shoshone Treaty in light of the judicial canons of construction for treaties and agreements with the Indian tribes. The canons of construction mandate that treaties be construed liberally in favor of the Indians, that any ambiguities be resolved in favor of the tribe, and that treaties be interpreted as the Indians would have understood them. See COHEN'S HANDBOOK, *supra* note 17, at 221-22; Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 617-20 (1975). For a study of the Marshallian origins of the canons, and the Supreme Court's sporadic (at best) use of the canons in modern Indian law decisions, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

28. *Shoshone Tribe*, 304 U.S. at 117.

were set aside for Indian tribes, whether by treaty, agreement, or executive order, the minerals underneath the lands were also reserved for the tribes.

B. *Allotted Lands*

In 1887, as the cornerstone of the first federal drive to assimilate the Indians, Congress enacted the General Allotment Act.²⁹ The purpose of the Act was to break up the reservations into private ownership, with the underlying belief that individual ownership would turn the Indians from a tribal life to one of agriculture, Christianity, and citizenship.³⁰ To that end, the Act allotted to individual Indians a certain number of acres, to be held in trust for the individual for 25 years and then patented in fee.³¹ Although the General Allotment Act specified only the allotment of grazing and agricultural lands,³² the Act was largely implemented through specific allotment acts for particular reservations, many of which parcelled out mineral lands into individual ownership as well.³³ Prior to 1934, when Congress formally ended allotment and extended indefinitely the trust status of existing allotments,³⁴ millions of acres of reservation lands had been allotted.³⁵ Today, Indian allottees hold more than 9 million of the 53 million acres held in trust.³⁶

The ownership of subsurface minerals below allotted lands varies, however. In general, unless Congress provided otherwise in a specific allotment act, the mineral estate followed the surface estate.³⁷ Since one purpose of allotment was to privatize land ownership, the allottee was eventually to receive fee title to the allotment. Perfect fee title necessarily included the mineral estate as well as the land and other

29. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-358 (1988)).

30. See 2 PRUCHA, *supra* note 14, at 661 (citing Senator Richard Coke, chairman of the Committee on Indian Affairs).

31. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified at 25 U.S.C. § 331 (1988)). For the most part, allotments consisted of 80 acres of farm land or 160 acres of grazing land. 25 U.S.C. § 331 (1988).

32. 25 U.S.C. § 331 (1988).

33. PRUCHA, *supra* note 14, at 867 (noting that the specific allotment acts "were generally in favor of allotting the mineral lands to the Indians" rather than preserving those lands for the tribes).

34. Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 462 (1988)).

35. COHEN'S HANDBOOK, *supra* note 17, at 613 n.10. While the allotment policy was widespread, a number of reservations, particularly in the Southwest, escaped allotment altogether. *Id.* at 613 n.9.

36. AMBLER, *supra* note 4, at 145. Approximately one-third of Indian mineral revenue comes from allotted lands. *Id.* at 146. Both these statistics refer to the lower 48 states.

37. *United States v. Bruisedhead*, 248 F. Supp. 999, 1001 (D. Mont. 1966).

natural resources.³⁸ Thus, when land was allotted under the General Allotment Act, the mineral rights as well as the surface rights belonged to the allottee, subject to the same trust status as the land.

Nonetheless, Congress could, and sometimes did, provide otherwise in a specific allotment act. In some instances, the mineral estate of allotted lands was expressly reserved to the tribe.³⁹ In other cases, allotment acts reserved the mineral estate to the tribe for a period of time, providing that the minerals "shall become" the property of the allottees at a specified future date.⁴⁰ Where these acts made the allottees' future rights contingent upon congressional control, however, the Supreme Court has held that the allottees acquired no vested rights to the mineral estate.⁴¹ Instead, Congress retained full power to extend tribal ownership for an additional period of years or even indefinitely,⁴² without creating a claim for just compensation under the takings clause of the Fifth Amendment.⁴³

Tribal reservation of mineral resources underlying allotments began in the early 1900s and increased throughout the first decades of the twentieth century.⁴⁴ In part, that trend may have reflected a growing national unease with the allotment policy.⁴⁵ In other instances,

38. 34 Op. Att'y Gen. 181, 189 (1924).

39. See AMBLER, *supra* note 4, at 44 for a listing of the allotment acts which expressly reserved mineral rights to the tribes. The policy was not uniform. "Some reservations had already been allotted, and this mineral policy applied only to new allotments. In several cases, to keep later options open, it provided for tribal mineral ownership for a limited period." *Id.*

40. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 651 (1976) (quoting § 3 of the Northern Cheyenne Allotment Act of 1926); Adams v. Osage Tribe of Indians, 59 F.2d 653, 654 (10th Cir. 1932), *cert. denied*, 287 U.S. 652 (1932) (quoting § 2 of the Osage Allotment Act of 1906).

41. Northern Cheyenne, 425 U.S. at 658-60. See also Adams, 59 F.2d at 656-57. The Osage Allotment Act expressly provided that the allottees would take title to the minerals "unless otherwise provided for by Act of Congress." *Id.* at 654. The Northern Cheyenne Allotment Act was less clear. It provided that Congress retained control and management of the "unallotted lands" of the reservation, a term which the Court interpreted as including the unallotted mineral estate underlying allotted lands. Northern Cheyenne, 425 U.S. at 659-60.

42. In the case of the Northern Cheyenne, Congress terminated the allottees' rights in 1968 and reserved the minerals in perpetuity to the tribe. Northern Cheyenne, 425 U.S. at 652. In the case of the Osage, Congress passed a series of acts extending tribal ownership well beyond the original 25 year period, Adams, 59 F.2d at 655, and finally extended tribal ownership into "perpetuity." See Act of October 21, 1978, 92 Stat. 1660.

43. Northern Cheyenne, 425 U.S. at 651-52, 658-60.

44. AMBLER, *supra* note 4, at 44, 46. The Osage Allotment Act, reserving the minerals for a period of years for the tribe, was enacted in 1906. See Adams, 59 F.2d at 654. The first act to reserve minerals unconditionally to the tribe was at Fort Berthold in 1912. AMBLER, *supra*, at 44; see Act of Apr. 3, 1912, 37 Stat. 631.

45. Beginning in the late 1920s, federal Indian policy began to depart from its half-century assimilationist stand. In particular, publication of the Meriam Report in 1928 highlighted the economic and social destruction caused by the allotment policy. See COHEN'S HANDBOOK, *supra* note 17, at 144.

reservation of the mineral estate in favor of the tribes represented acquiescence to the tribe's wishes,⁴⁶ protection of non-Indian leaseholders, or prevention of monopoly acquisition of allottees' interests by non-Indians.⁴⁷

C. *Fee Lands*

For the most part, fee lands within reservation boundaries are an outgrowth of the allotment era. Between 1887 and 1934, when allotment ended, Indian tribes as a whole lost approximately two-thirds of their reservation lands.⁴⁸ Some 90 million acres of tribal trust land passed into fee ownership⁴⁹ in two ways: fee patents to allottees and the sale of the "surplus" lands.

Before the practice of allotment ceased in 1934, thousands of patents in fee were issued to Indian allottees.⁵⁰ Once a patent in fee was issued, all restrictions on alienation and encumbrance of the land were lifted.⁵¹ Many Indian owners subsequently sold their land voluntarily; many others lost their lands to repossession or sales for back taxes.⁵² In all, approximately 27 million acres — two-thirds of the total land allotted — passed by sale from the Indian allottees.⁵³

Once the Indian allottee received a fee patent to the land, unless the subsurface minerals had been reserved to the tribe, the individual also owned the mineral estate in fee. When the fee-patented land was subsequently sold, the mineral rights were conveyed as well. Concomitantly, when patented lands were lost involuntarily, any subsurface estate held by the surface owner was lost as well. In most instances, purchasers of Indian allotments were non-Indians, and thus the non-Indian purchaser generally acquired the mineral resources as well. Through the allotment process, then, significant tribal mineral holdings passed not only into individual fee ownership, but in most cases into non-Indian hands.

46. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656-57 (1976).

47. *AMBLER*, *supra* note 4, at 44-45.

48. *See* COHEN'S HANDBOOK *supra* note 17, at 614.

49. *Id.* at 138.

50. The liberality with which patents were issued varied over time, but during some of the more liberal periods, a thousand or more patents could issue in a single year. For example, 2,676 patents issued between 1906 and 1909; 3,400 between 1909 and 1912; and 17,176 between 1917 and 1920. *Id.* at 136-37.

51. 25 U.S.C. §§ 348, 349 (1988). *See also* *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992).

52. For example, 2,676 patents were issued between 1906 and 1909. At least 60 percent of those Indian owners disposed of their lands. *See* COHEN'S HANDBOOK, *supra* note 17, at 136.

53. *Id.* at 138.

Of the 90 million acres lost to tribes during the allotment years, some two-thirds — 60 million acres — were ceded to the federal government for sale to non-Indian homesteaders.⁵⁴ Under the General Allotment Act, once allotted lands had been parceled out, the remainder of the reservation was deemed “surplus lands” — lands over and above the needs of the Indians — and opened to non-Indian settlement.⁵⁵ The Secretary of the Interior was authorized to negotiate with the tribes for federal purchase of the surplus lands, although the Supreme Court held in 1903 that tribal consent to the loss of surplus lands was not required.⁵⁶

In general, tribal mineral rights were ceded along with the surplus lands, and thus subsequently alienated to non-Indian homesteaders. Both Congress and the courts recognized that cession of the land included loss of the mineral resources, and compensated tribes for the value of the surplus lands attributable to minerals and other resources as well as to the surface area.⁵⁷

In some instances, however, only the surface estate of ceded lands was opened to non-Indian settlement, with the tribe retaining rights to the subsurface minerals.⁵⁸ For example, in 1904 the Crow Tribe ceded over one million acres to the United States.⁵⁹ The federal government conveyed only the surface estate to non-Indians, retaining the subsurface minerals for the benefit of the tribe;⁶⁰ full beneficial ownership of the minerals underlying the ceded strip was subsequently restored to the Tribe in 1958.⁶¹

The ravages of fee patents and surplus lands sales halted in 1934

54. *Id.*; WILCOMB E. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW* 145 (1971).

55. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389-90 (1887).

56. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The Kiowa and Comanche Tribes had concluded a treaty which provided that any cession of reservation lands required the written consent of three fourths of the adult males. In 1892, less than the required percentage signed an agreement for allotment and sale of the surplus lands, and that agreement was enacted into law by Congress in 1900. The Supreme Court held that abrogation of the treaty provision calling for written consent was within the plenary power of Congress acting as the Tribes' trustee, and could not be reviewed by the judiciary. This latter aspect of the *Lone Wolf* doctrine has since been repudiated. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 409-16 (1980).

57. 34 Op. Att'y Gen. 181, 189 (1924).

58. See AMBLER, *supra* note 4, at 44, 47.

59. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982) (*Crow I*).

60. *Id.*

61. *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 897 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*). For a more detailed explanation, see David H. Anderson, *Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners*, 35 MONT. L. REV. 209, 217-18 (1974).

with passage of the Indian Reorganization Act (IRA).⁶² The IRA expressly prohibited future allotments,⁶³ extended indefinitely the trust status of any allotments not yet patented in fee,⁶⁴ and authorized the Secretary of the Interior to restore to tribal ownership any remaining surplus or ceded lands that had not passed into private ownership.⁶⁵ Nonetheless, the effects of the allotment policy on mineral ownership were profound. On millions of acres of trust allotments, the underlying mineral estate was held in trust for the individual allottee and not the tribe. Perhaps more important is the fact that vast tribal mineral resources had passed into private, often non-Indian, ownership.

Despite the havoc of the allotment years, however, tribes emerged in the third decade of the twentieth century with secure ownership rights to the subsurface estate that remained to them. Mineral ownership, in turn, placed tribes in the congressionally-chosen role of lessors as non-Indian producers began mining Indian lands. Congress initiated leasing of tribal mineral resources in 1891, and leasing thereafter dominated mineral development for 90 years.

III. TRIBES AS LESSORS: EXPLOITATION OF THE MINERAL ESTATE

Until the 1980s, virtually the only role that Indian tribes had with regard to their mineral estates was a passive one. The tribes, as beneficial owners of the minerals, were restricted to the role of lessor, and for the most part a lessor with little say in the lease provisions. Leasing of the mineral estate began during the allotment years, with major reformations of the leasing laws in the 1930s as federal policy swung away from assimilation and toward encouragement of tribal self-government. Nonetheless, for the first 90 years of mineral development of Indian lands, the tribes played only a restricted role in the exploitation of their mineral estate.

A. *Mineral Leasing in the Allotment Era*

The tribal mineral estate, like tribal land, is held in trust by the federal government. And like the land, the minerals may not be alienated or encumbered without the consent of Congress. Thus, absent

62. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in part at 25 U.S.C. § 461-494 (1988)).

63. 25 U.S.C. § 461 (1988).

64. The IRA "hereby extended and continued" any existing period of trust "until otherwise directed by Congress." 25 U.S.C. § 462 (1983). While the IRA thus ended automatic fee patents, any allottee over 21 years of age may still apply for a fee patent. 25 C.F.R. § 152.4 (1993).

65. 25 U.S.C. § 463(a) (1988).

congressional authorization, Indian lands are not open to mining by non-Indians.⁶⁶ During the allotment era, however, Congress authorized alienation of the minerals in a series of mineral leasing acts for Indian lands. Non-Indian development of the mineral resources, policy makers believed, would constitute an efficient and wise use of Indian lands⁶⁷ and “provide the Indian landlords with an object lesson in civilized behavior.”⁶⁸

In 1891, four years after the General Allotment Act, Congress enacted the first general consent to mineral leasing of tribal lands.⁶⁹ The 1891 Act permitted 10 year mineral leases on lands “bought and paid for” by Indians,⁷⁰ a stipulation that was generally interpreted to restrict the Act to reservations set aside by treaty or agreement.⁷¹ Tribes could lease out only those lands not needed for individual allotments or agricultural purposes.⁷² All mineral leases under this first leasing act required the consent of the tribe and were subject to approval by the Secretary of the Interior.⁷³

Allotted lands not needed for grazing or agriculture could also be leased for mineral development under the 1891 Act, although allotment leases were generally available only when the allottee was deemed unable to work the land by reason of age or other disability.⁷⁴

66. Trade and Nonintercourse Act, 25 U.S.C. § 177 (1988); *see also* United States v. Cook, 86 U.S. (19 Wall.) 591, 593 (1873) (timber). Mineral trespass, of course, was a continuing problem. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 356, 377-78 (1980) (describing trespass by gold prospectors in the Black Hills).

67. McDONNELL, *supra* note 22, at 50; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 168 (1984) (Indian Commissioner Francis Leupp believed that Indians were “‘grossly wasteful of their natural resources.’ Leasing would provide a remedy for this malady by turning the Indians’ lands over to efficient white businessmen.”).

68. HOXIE, *supra* note 67, at 168.

69. 25 U.S.C. § 397 (1988).

70. *Id.*

71. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 180 (1989). The primary distinction was between reservations set aside by treaty and reservations set aside by executive order. As a result, reservations set aside by agreement after the cessation of treaty-making in 1871, *see* 25 U.S.C. § 71, were also considered to be lands “bought and paid for.” *See* British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164 (1936).

72. 25 U.S.C. § 397 (1988).

73. *Id.*

74. *See* DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 111-21 (1934) (U. Okla. Press 1973). Nonetheless, leasing of allotments (for all purposes, not just minerals) exploded during the 1890s. In 1893, only four leases were approved; the next year, 295 were approved; by 1897, the number was nearly 1300; and in 1900, some 2500 leases were approved. *Id.* at 118, 120, 121. By 1920, approximately 40,000 allotment leases were entered into, covering 4.5 million acres. McDONNELL, *supra* note 22, at 48. On the special issues involving mineral development of allotted lands, *see generally* AMBLER, *supra* note 4, at 145-71.

Because of those restrictions, most leasing of allotments was accomplished under the broader authority of the Act of 1909, which authorized allottees to lease their lands for mining purposes, subject to the approval of the Secretary of the Interior.⁷⁵ Neither the 1891 nor the 1909 legislation provided for tribal consent or consultation, even as to allotments within reservation boundaries.

In 1919, as the national demand for mineral production grew,⁷⁶ Congress expanded leasing of tribal lands. The 1919 Act authorized leases on any tribal lands in nine Western states for the purposes of mining gold, silver, copper, and "other valuable metalliferous minerals."⁷⁷ The law was amended in 1926 to permit mineral leases as well for nonmetalliferous minerals other than oil and gas.⁷⁸ Leases of tribal lands in the nine states were issued for a term of 20 years, with the lessee holding a "preferential right" to renew for successive 10-year periods.⁷⁹ Lessees paid rents and royalties (minimums were specified in the Act) into the United States Treasury, and Congress was authorized to appropriate those funds for the benefit of the Indians.⁸⁰ Moreover, the 1919 Act preserved for the states "any rights which they may have" to tax the production, property, or assets of the lessees.⁸¹

In contrast to the 1891 Act, the 1919 Act eliminated tribal consent to leasing. Leasing was at the discretion of the Secretary of the

75. 25 U.S.C. § 396 (1988); *see also* 25 C.F.R. pt. 212 (1993). The allotment leasing act expressly excludes the Osage and the Five Civilized Tribes of Oklahoma. The mineral estate of the Osage is entirely reserved to the tribe, *see supra* notes 42-43, and leasing of Osage minerals is governed by 25 C.F.R. pt. 214 (1993) (minerals other than oil and gas) and pt. 226 (oil and gas). Allotments of the Five Civilized Tribes can be leased pursuant to the Act of May 27, 1908, ch. 199, § 2, 35 Stat. 312, which authorizes the Secretary to regulate leasing. The regulations are found at 25 C.F.R. pt. 213 (1993).

76. The 1919 Act was justified in part as increasing mineral output necessary for the war effort. *See* McDONNELL, *supra* note 22, at 51; HOXIE, *supra* note 67, at 186.

77. 25 U.S.C. § 399 (1988) (amended 1921, 1926, and 1976). The nine states were Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming. Metalliferous minerals are those "yielding or producing metals." A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 697 (Paul W. Thrush & U.S. Bureau of Mines, eds., 1968). The Act consequently excluded oil and gas, as well as other non-metal mineral resources, although it expressly provided that "metalliferous" should be construed to include magnesite, gypsum, limestone, and asbestos. 25 U.S.C. § 399 (1988).

78. 25 U.S.C. § 399 (1988).

79. *Id.*

80. *Id.*

81. *Id.* By 1919, the states' right to tax non-Indian lessees of Indian lands was limited by the federal instrumentality doctrine. *See infra* text accompanying note 90. The 1919 Act did not create any state taxing rights, but only preserved whatever rights the states then had.

Interior, who was charged with protecting "the interests of the Indians."⁸² Even so, the Secretary's discretion was limited by the provision of the Act that mining claims could be located on Indian lands in the same manner as under the general mining laws for public domain lands. As a result, if a mining company properly located its claim and complied with all laws and regulations of the Interior Department, the Secretary was forced to award the lease even in the face of tribal opposition.⁸³

The 1919 Act was closely followed by amendments to the 1891 leasing act in 1924 and 1927 providing for oil and gas leases on tribal lands.⁸⁴ The 1924 amendments applied to tribal lands within treaty reservations,⁸⁵ and the 1927 amendments applied to tribal lands within reservations created by executive order.⁸⁶ Both amendments permitted the Secretary of the Interior to lease tribal oil and gas resources following competitive bidding, for a term of 10 years and "as much longer as oil or gas shall be found in paying quantities."⁸⁷ Both amendments also retained the 1891 requirement of tribal consent to leasing, ensuring at least some limited measure of tribal control over oil and gas development.⁸⁸

Nonetheless, despite the nod to tribal consent, both acts undermined tribal control by expressly authorizing state taxation. As a general principle, states may not tax Indians or Indian interests within Indian country.⁸⁹ Moreover, in the early decades of the twentieth century, the federal courts invalidated state taxes on non-Indian lessees on the grounds that the lessees were federal instrumentalities which the states could not tax under the doctrine of intergovernmental tax

82. 25 U.S.C. § 399 (1988).

83. Under the 1919 Act, neither the Department nor the tribes were "in a position to prevent the acquisition of a lease after the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases." S. REP. NO. 985, 75th Cong., 1st Sess. 2 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938).

84. These leasing acts for unallotted lands applied as well to the mineral estate reserved for the tribe underneath allotted lands. When the mineral estate beneath allotted lands is reserved to the tribe, "it is tribal land." *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 165 (1936).

85. 25 U.S.C. § 398 (1988). The Supreme Court held that the 1924 Act also applied to lands set aside by agreement ratified by Congress. See *British-American Oil*, 299 U.S. at 164. The unallotted lands of the Five Civilized Tribes and the Osage in Oklahoma were expressly exempt. 25 U.S.C. § 398 (1988).

86. 25 U.S.C. §§ 398a-398e (1988). See McDONNELL, *supra* note 22, at 51-55 (describing the legislative battle to open executive order lands to mining).

87. *Id.* §§ 398 and 398a.

88. *Id.*

89. *The Kansas Indians*, 72 U.S. 737 (1867); *The New York Indians*, 72 U.S. 761 (1867). See also *Oklahoma Tax Commission v. Sac and Fox Indian Nation*, 113 S.Ct. 1985, 1993 (1993).

immunity.⁹⁰ Accordingly, absent congressional consent, the states had no authority in the 1920s to impose taxes on either the Indian or non-Indian interests in mineral development.

The 1924 and 1927 amendments represented express congressional consent to state taxation. Congress intended to bring taxation of mineral production on Indian lands into line with taxation of mineral production on federal lands, by permitting the states to tax "the entire output" of mineral production.⁹¹ To that end, the amendments authorized the states to tax oil and gas production on all tribal lands, as well as the production of "other minerals" on tribal lands set aside by treaty or agreement.⁹² Although the taxes were ostensibly imposed on the lessees, the taxes were to be paid from the tribes' share of the proceeds. The 1924 amendment directed the Secretary of Interior to pay any assessed state taxes out of the tribe's royalty interests;⁹³ the 1927 amendment provided that production taxes could be levied against the tribe's bonuses, rents, and royalties, and directed the Secretary to pay the state taxes out of the tribal funds in the federal Treasury.⁹⁴ The burden of the state taxes consequently fell upon the tribal lessors regardless of the legal incidence of the tax. Although both acts prohibited state taxes from becoming an encumbrance on tribal lands,⁹⁵ the taxes nonetheless diminished the economic benefits of tribal mineral development.

None of these mineral leasing acts fully superseded any other. Instead, as the allotment era drew to a close, mineral leasing on tribal lands was governed by a hodge-podge of laws. Oil and gas leasing on

90. See, e.g., *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (invalidating state tax on non-Indian lessee's income from oil and gas leases on restricted Osage and Creek lands). By the mid-1930s, however, the Supreme Court began to uphold state taxes on non-Indian lessees, and ultimately expressly overruled *Gillespie* and other cases applying the federal instrumentality doctrine to lessees of Indian lands. See *Helvering v. Mountain Prod. Corp.*, 303 U.S. 387 (1938) (overruling *Gillespie*); *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949).

91. "[T]he entire output of oil and gas will be taxed by the States, the producer upon his share and the Indians upon the share obtained for them." H.R. REP. NO. 1791, 69th Cong., 2d Sess. 4 (1927). The Department of the Interior supported the taxation of lessees, and "offer[ed] no objection" to state taxation of the tribes' interests. H.R. REP. NO. 386, 68th Cong., 1st Sess. 2 (1924); S. REP. NO. 546, 68th Cong., 1st Sess. 3 (1924).

92. 25 U.S.C. § 398 (1988) (authorizing state taxation of "oil and gas and other minerals" on lands subject to leasing under the 1891 Act: that is, tribal lands set aside by treaty or agreement); *id.* § 398c (authorizing state taxation of oil and gas leases on executive order reservations). The inability of states to tax mineral production other than oil and gas on executive order lands was of limited importance, since most mineral leasing on those lands was for oil and gas.

93. *Id.* § 398.

94. *Id.* § 398c.

95. The amendments provided that state taxes "shall not become a lien or charge of any kind against the land or other property" of the tribes. *Id.* §§ 398, 398c.

all tribal lands fell under the 1924 and 1927 amendments. Leasing of minerals other than oil and gas on all tribal lands in nine Western states fell under the 1919 Act. And other leasing of tribal lands on treaty reservations fell under the 1891 Act. No legal authority existed for mineral leases other than oil and gas on executive order reservations outside the nine western states specified in the 1919 Act.⁹⁶

Moreover, this multitude of leasing laws offered no uniformity. Oil and gas leases and any remaining leases under the 1891 Act required tribal consent; other leases did not. All oil and gas leases, and other mineral leases on tribal lands set aside by treaty or agreement, were subject to state taxation; other leases were not. Leases under the 1891 Act were for a term of 10 years; oil and gas leases ran for 10 years and as long thereafter as oil and gas were produced in paying quantities; and leases under the 1919 Act ran for 20 years, with options to renew for 10-year periods. The complexity of the leasing laws, and the extremely limited role accorded the tribal mineral owners, generated increasing dissatisfaction with the allotment-era approach to mineral development.

B. *Indian Reorganization Act of 1934*

The allotment era — the political climate that spawned the welter of mineral leasing acts — formally ended in 1934 with the passage of the Indian Reorganization Act (IRA).⁹⁷ Federal policy, for more than half a century directed toward assimilating Indians, now was oriented toward the promotion of tribal self-government. To that end, the IRA authorized tribes to organize constitutional governments and to obtain charters of incorporation from the Secretary of the Interior.⁹⁸ Tribes which organized IRA governments were vested with the power to prevent any lease of tribal lands and assets without the consent of the tribe.⁹⁹ Tribes which received charters of incorporation were authorized to manage and dispose of tribal property, although the IRA

96. See S. REP. No. 985, 75th Cong., 1st Sess. 1 (1937); H.R. REP. No. 1872, 75th Cong., 3d Sess. 1 (1938).

97. 25 U.S.C. §§ 461-479 (1988 & Supp. IV 1992).

98. *Id.* §§ 476 (government), 477 (charters of incorporation). Tribes in Oklahoma and Alaska were exempted from the IRA, *see id.* § 473, although the provisions of the IRA were subsequently extended to them in the Oklahoma Indian Welfare Act of 1936, *see id.* § 503, and the Alaska Act of 1936, *see id.* § 473a.

99. The statute provided:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance

limited leasing authority to a period not to exceed 10 years.¹⁰⁰

The IRA provided that it would not apply to any reservation where a majority of the adult Indians voted to reject the Act.¹⁰¹ While the majority of tribes voted to accept the IRA,¹⁰² 77 tribal governments rejected it.¹⁰³ Among these were some of the largest mineral-holding tribes, including the Navajo, the Crow, and the Shoshone and Arapaho of the Wind River Reservation.¹⁰⁴ Having rejected the IRA, these tribes were without its protection and authority for mineral leasing.

In keeping with the philosophy behind the IRA, however, Congress determined to expand the role of all tribal governments in mineral leasing, including those tribes which had not accepted the IRA. At the same time, Congress proposed to correct the problems caused by the profusion of allotment-era leasing laws. Accordingly, in 1938 Congress enacted the Indian Mineral Leasing Act.¹⁰⁵

C. *Indian Mineral Leasing Act of 1938*

The 1938 Indian Mineral Leasing Act arose from the need to consolidate and simplify leasing provisions and to provide tribes with an increased voice in the development of tribal mineral resources. To those ends, Congress enacted the 1938 Act with three stated purposes: to achieve uniformity in mineral leasing laws governing Indian lands; to help achieve the goal of the IRA to revitalize Indian tribal governments; and to promote tribal economic development by ensuring the greatest return on tribal minerals.¹⁰⁶

of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . .

25 U.S.C. § 476 (1988 & Supp. IV 1992).

100. *Id.* § 477.

101. Indian Reorganization Act, ch. 576, § 18, 48 Stat. 984, 988 (1934).

102. More than 180 of the eligible tribes voted in special elections to come under the provisions of the IRA. COHEN'S HANDBOOK, *supra* note 17, at 150 n.48 (189 tribes voted to accept); 2 PRUCHA, *supra* note 14, at 964-65 (within two years after passage, 181 tribes voted to accept, and 14 more "came under the act because they did not hold elections to exclude themselves from its operation"). Within 10 years of the IRA's enactment, 93 tribes had adopted IRA constitutions and 73 were issued charters of incorporation. 2 PRUCHA, *supra* note 14, at 968.

103. COHEN'S HANDBOOK, *supra* note 17, at 150, n.49; 1 PRUCHA, *supra* note 14, at 324.

104. AMBLER, *supra* note 4, at 18.

105. 25 U.S.C. §§ 396a-396g (1988); *see also* 25 C.F.R. pt. 211 (1993).

106. S. REP. NO. 985, 75th Cong., 1st Sess. 2-3 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 1-3 (1938); *see also* Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112-13 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982) (*Crow I*).

1. Uniformity of Laws

The first purpose of the Indian Mineral Leasing Act was to meld the profusion of allotment era laws into one coordinated leasing system. To achieve that goal, the Act established a single set of leasing procedures applicable to all mineral development on all tribal lands. All leases of tribal land would require tribal consent and the approval of the Secretary of the Interior.¹⁰⁷ All leases would issue for the same term: a period not to exceed 10 years and "as long thereafter as minerals are produced in paying quantities."¹⁰⁸ Additionally, all leases would be granted on the basis of competitive bidding and payment of a bonus consideration, although if no satisfactory bid was received, the Secretary of the Interior could authorize private negotiations.¹⁰⁹

Nonetheless, the 1938 Act contained gaps and exceptions. First, the Act excluded certain tribes and tribal lands from its coverage.¹¹⁰ Second, the Act expressly preserved the right of IRA tribes to lease lands for mining in accordance with their IRA charters or constitutions.¹¹¹ Although this exception appears to have been little used by IRA tribes,¹¹² it nonetheless permits those tribes to supersede Interior Department regulations for the mining of tribal lands.¹¹³ Third, the 1938 Act did not repeal any of the allotment era leasing acts, although

107. 25 U.S.C. § 396a (1988). This aspect of the 1938 Act is discussed *infra* at section II.B.2.

108. 25 U.S.C. § 396a (1988); 25 C.F.R. § 211.10 (1993).

109. 25 U.S.C. § 396b (1988); 25 C.F.R. § 211.3 (1993). Although the Act applies these provisions only to oil and gas leases, the Department of the Interior has extended them by regulation to all other mineral leases. *Id.* § 211.2.

110. The Act originally excluded the Papago, Crow, and Osage Reservations, the ceded lands of the Shoshone [Wind River] Reservation, and the coal and asphalt lands of the Oklahoma Choctaw and Chickasaw. 25 U.S.C. § 396f (1988). During the 1950s, Congress rescinded the exclusion of the Papago Reservation and provided for mineral leasing on Shoshone and Crow lands in accordance with the provisions of the Indian Mineral Leasing Act. Act of May 27, 1955, ch. 106, § 2, 69 Stat. 67 (Papago); Act of Aug. 27, 1958, Pub. L. No. 85-780, § 1, 72 Stat. 935 (Wind River); Act of Sept. 16, 1959, Pub. L. No. 86-283, 73 Stat. 565 (Crow). Leasing of the Osage mineral reserve is governed by 25 C.F.R. pt. 214 (minerals other than oil and gas) and pt. 226 (oil and gas) (1993).

111. The Act expressly provided that it would "in no manner restrict" the leasing rights of tribes organized or incorporated under the IRA. 25 U.S.C. § 396b (1988).

112. See *Indian Mineral Development: Hearings on S. 1894 Before the Senate Select Comm. on Indian Affairs*, 97th Cong., 2d Sess. 61-63 (1982) (statement of Joe McKay, Member, Blackfeet Tribe of Montana) [hereafter *Indian Mineral Development Hearings*]; Russel L. Barsh & James Youngblood Henderson, *Tribal Administration of Natural Resource Development*, 52 N. DAK. L. REV. 307, 311 (1975) (noting that "in practice [IRA] tribes are generally afforded only the opportunity to veto Bureau [of Indian Affairs] leasing plans").

113. The implementing regulations for the 1938 Act specifically provide that any regulation in 25 C.F.R. pt. 211 (1993) (leasing of tribal lands for mining) may be superseded by a tribal constitution or charter issued pursuant to the IRA, the Oklahoma Indian Welfare Act, or the Alaska Act, or by any tribal law authorized by such a constitution or charter. 25 C.F.R. § 211.29 (1993). *But see* Peter C. Maxfield, *Tribal Control of Indian Mineral Development*, 62 ORE. L. REV. 49, 60 (1983) (questioning the "significance" of this provision).

it did contain a general repealer clause for inconsistent provisions.¹¹⁴ Inconsistent practices thus continued for leases issued under the previous leasing acts, although any leases granted after passage of the 1938 Act would be governed by its provisions.¹¹⁵

Finally, the 1938 Act did not generally include leases of allotted lands.¹¹⁶ Many of its provisions, however, have been made applicable to allotment leases through the Interior Department's regulations.¹¹⁷ For example, while the 1909 Act permits leases "for any term of years" deemed advisable by the Secretary of the Interior,¹¹⁸ regulations restrict allotment leases to the same terms as tribal land leases: ten years and as long thereafter as minerals are produced in paying quantities.¹¹⁹ Provisions for competitive bidding, privately negotiated leases, and payment of rents and royalties are all similar to those for leases of tribal lands.¹²⁰ Like the 1909 Act, however, the regulations do not call for tribal consent or even consultation prior to issuance of a mineral lease for allotted lands.

Despite the multiple exceptions and exclusions, however, the 1938 Act did introduce considerable uniformity into the leasing process. The confusion of the allotment-era leasing laws was replaced by predictable and consistent procedures, allowing both Congress and the tribes to focus their attention on issues of tribal self-government and economic development.

2. Tribal Self-Government

The second purpose of the Indian Mineral Leasing Act was to help achieve the IRA goal of revitalizing tribal self-government. To that end, the Act promoted self-government by requiring tribal consent to any mineral lease of tribal lands.¹²¹ Leasing authority was placed with the tribal council, subject to the approval of the Secretary

114. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

115. *See id.* at 767-68. *See also* *United States v. 9,345.53 Acres of Land*, 256 F. Supp. 603, 605, 607-08 (W.D.N.Y. 1966) (post-1938 leases that do not comply with the 1938 Act are void).

116. 25 U.S.C. § 396a (1988). Certain provisions of the 1938 Act, such as the requirement that lessees post surety bonds and the ability of the Secretary to designate lease approval authority, were also expressly applicable to leases of allotted lands. 25 U.S.C. §§ 396c, 396e (1988).

117. 25 C.F.R. pt. 212 (1993).

118. 25 U.S.C. § 396 (1988).

119. 25 C.F.R. § 212.12 (1993) (referencing § 211.10).

120. *Id.* §§ 212.4-212.6, 212.14-212.18.

121. As noted previously, universal tribal consent also promoted the 1938 Act purpose of uniformity of leasing laws.

of the Interior.¹²² Tribal consent was also required before the Secretary could authorize a mineral lease by private negotiations rather than competitive bidding.¹²³ Moreover, mineral lessees were required to allow the tribes, as well as the Department of the Interior, access to leased premises for purposes of inspection.¹²⁴

Despite these statutory provisions, tribal self-government in mineral leasing remained a limited concept. First, the Department of the Interior developed a standard lease form with standardized clauses and terms. Although tribes could incorporate other requirements into a lease through stipulations, all leases were at least based on one standard form.¹²⁵ Moreover, tribal consent is generally required only for the initial decision to lease tribal lands for mineral development. Once a tribe has consented to lease its mineral resources, its ability to control the mining process is limited.¹²⁶ For example, the Secretary of Interior is not required to obtain tribal consent to the specific tracts put up for bid, so long as the tribe has previously authorized bids on an area which includes those tracts.¹²⁷ Similarly, tribal consent may not be necessary before an oil and gas communitization agreement is approved by the Secretary, despite express language in the regulations requiring tribal consent.¹²⁸

Communitization agreements may have the effect of extending

122. 25 U.S.C. § 396a (1988); 25 C.F.R. § 211.2 (1993). As noted, the Act also expressly permitted IRA tribes to continue mineral leasing under the authority of their IRA charters or constitutions. See *supra* text accompanying notes 99-100.

While secretarial approval may protect tribal interests, see *infra* section II.B.3.b, it also undercuts tribal self-government by placing ultimate authority with the federal government rather than the lessor tribe. See Barsh & Henderson, *supra* note 112, at 319 ("The veto power of the Bureau [of Indian Affairs] merely gives tribes an opportunity to make for themselves those decisions the agency considers correct."). Compare Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 128-29 (1993) (arguing that while most requirements of secretarial approval should be eliminated "as part of the decolonization of federal Indian law," the restraint on alienation of land and federal approval of substantial interests in land, such as "long term mineral leases which would interfere with other surface uses, such as leases facilitating strip mining" should be retained).

123. 25 C.F.R. § 211.3(b) (1993).

124. *Id.* § 211.18.

125. See Charles J. Lipton, *The Pros and Cons of Petroleum Agreements*, 6 AMER. INDIAN J. 2, 6 (1980); Quentin M. Jones, Note, *Mineral Resources: Tribal Development of Reservation Oil and Gas Resources Through the Use of a Nontaxation-Based Tribal Joint Development Program*, 9 AM. INDIAN L. REV. 161, 161-62 (1981).

126. *NRG Co. v. United States*, 24 Cl. Ct. 51, 56 (1991).

127. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1330-31 n.4 (1982) (asserting that the regulations requiring tribal consent for leasing "cannot be stretched to support such a proposition").

128. 25 C.F.R. § 211.21(b) (1993) provides that oil and gas leases are subject to communitization agreements, with the "prior approval of the Secretary of the Interior and consent of the Indian tribe affected."

leases of oil and gas lands. Under an agreement, oil and gas lands are organized into unit areas,¹²⁹ and the agreement provides that drilling anywhere within the unit area constitutes drilling on each lease within that area and that production anywhere within the unit area constitutes production from each tract.¹³⁰ Accordingly, production within a unit area, even if it is not occurring on tribal lands, may be sufficient to extend the lease of tribal lands beyond the initial 10 year term.¹³¹ Despite that potential effect, leases issued under the 1938 Act often contained a clause that the parties agreed to abide by any communitization agreement adopted by a majority operating interest in the unit area and approved by the Secretary of the Interior.¹³² That lease clause may operate to override Interior's regulations calling for tribal consent to each communitization agreement.¹³³

Attempts by the Secretary of Interior to expand tribal consent powers during the mining process have met with little success. In the late 1970s, the Department refused to approve a mining plan submitted by United Nuclear Corporation absent tribal approval.¹³⁴ The mining plan is the third stage that requires secretarial approval in the

129. These unit areas may include tribal lands, allotted lands, or fee lands, or any combination, depending upon the location of the mineral resources.

130. *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 585 (10th Cir. 1992), *cert. denied sub nom.*, *Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes*, 113 S.Ct. 1642 (1993); *Kenai Oil & Gas, Inc. v. Dep't of Interior*, 671 F.2d 383, 384 (10th Cir. 1982).

131. *Cheyenne-Arapaho Tribes*, 966 F.2d at 585. In addition, the leases at issue in this case included a commence drilling clause, which extended the lease if drilling was commenced during the initial 10 year lease term. *Id.* The effect is exacerbated by the provision that a communitization agreement is timely submitted if it is submitted before the expiration of the primary 10-year term, even if only four days before. *Cotton Petroleum Corp. v. U.S. Dep't of Interior*, 870 F.2d 1515, 1522 (10th Cir. 1989). Once approved by the Secretary, the agreement is effective as of the date it was submitted for approval. *Id.* at 1523.

132. See *Cheyenne-Arapaho Tribes*, 966 F.2d at 585; *Cotton Petroleum*, 870 F.2d at 1516.

133. *Cheyenne-Arapaho Tribes*, 966 F.2d at 586. The district court found that the lease provision "constituted a blanket consent to future communitization agreements" and therefore held that a lack of tribal consent to the specific agreement did not invalidate it once the Secretary had approved it. *Id.* The circuits disagree as to whether secretarial approval of lease terms inconsistent with Interior Department regulations suspends or supersedes the regulations. Compare *Hallam v. Commerce Mining & Royalty Co.*, 49 F.2d 103, 108 (10th Cir.), *cert. denied*, 284 U.S. 643 (1931); *Whitebird v. Eagle-Picher Co.*, 258 F. Supp. 308, 311 (N.D. Okla. 1966) (inconsistent regulations superseded) with *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1076 n.5 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983) (stating that "an agency normally is bound by its own regulations"). On appeal in the *Cheyenne-Arapaho Tribes* case, the Tenth Circuit did not reach the issue of tribal consent. *Cheyenne-Arapaho Tribes*, 966 F.2d at 587.

The proposed new regulations for 1938 Act leases provide that "[t]he consent of the Indian mineral owner to such unit or communitization agreement shall not be required unless such consent is specifically required in the lease." 56 Fed. Reg. 58,734, 58,741 (1991) (to be codified at 25 C.F.R. § 211.28(b)).

134. *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1434 (Fed. Cir. 1990).

surface mining process: first, once a tribe consents to leasing, the Secretary must approve the lease; second, the company prepares an exploration plan which must be approved before exploration begins; and third, the company must subsequently prepare a mining plan which must be approved before operations begin.¹³⁵

United Nuclear received a uranium lease of Navajo lands in 1971. Over the next six years, pursuant to an approved lease and exploration plan, it paid approximately \$300,000 to the Navajo Nation in bonus, rents, and minimum royalties, spent over \$5 million in exploration and related costs, and discovered more than 20 million pounds of uranium with a potential for an additional 20 million pounds on unexplored portions of the lease.¹³⁶ It then submitted a mining plan that satisfied all the regulatory requirements of the Interior Department. Nonetheless, Interior refused to approve the mining plan without the consent of the tribe, and the Navajo Nation refused to consent to the plan.¹³⁷ In 1981, the lease expired due to United Nuclear's failure to begin mining within the initial 10 year term.¹³⁸

United Nuclear brought suit claiming that the Secretary's refusal to approve its mining plan was an uncompensated taking in violation of the Fifth Amendment. The Federal Circuit agreed, noting that tribal approval of mining plans had not been adopted as an Interior Department regulation,¹³⁹ and held that the tribal approval requirement caused a substantial economic impact on the company, was not a future regulation that United Nuclear could reasonably have anticipated, and was contrary to the concept of tribal self-government.¹⁴⁰ In a passage that echoed disturbingly of the long-discredited allotment era, the court spoke of the assimilationist goal of "mak[ing] the Indians more responsible citizens".¹⁴¹ To that end, the court believed, tribal self-government would be furthered by forcing the tribe "to live

135. *Id.* See 25 C.F.R. § 216.6 (1993) (approval of exploration plan) and § 216.7 (approval of mining plan).

136. *United Nuclear*, 912 F.2d at 1434.

137. *Id.* at 1434-35.

138. *Id.* at 1435. Many leases for minerals other than oil and gas have a clause similar to the commence drilling clause, see *supra* note 131, which extends the initial 10 year term if mining operations have commenced during that time. Apparently the United Nuclear lease contained this clause.

139. The regulations have not been subsequently amended to require tribal consent, and there is no indication in the proposed new rules for 1938 Act leases that tribal consent will be required at the various stages of the mining process. See 56 Fed. Reg. 58,734, 58,737-44 (1991).

140. *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1435-37 (Fed. Cir. 1990).

141. The court stated:

It is difficult to understand, however, how encouraging the Indians not to live up to their contractual obligations, which they entered into freely and with the Secretary's

up to [its] contractual commitments"¹⁴² rather than permitting the tribe to reassess the value and the impact of the proposed mining at each stage of the mining process. Accordingly, the court held that Interior's refusal to approve the mining plan without tribal approval constituted a taking of United Nuclear's leasehold interest in the minerals.¹⁴³

In addition to the limitations on tribal consent, a tribe's ability to cancel or rescind a lease is also restricted. While a tribe has standing to sue a lessee for damages for breach of contract,¹⁴⁴ a tribe has no authority to unilaterally cancel a lease for breach of the lease terms.¹⁴⁵ Instead, the authority to terminate a lease rests with the Secretary of the Interior¹⁴⁶ or with the courts,¹⁴⁷ although in neither case is cancellation a mandatory remedy for breach.

The Secretary is empowered to cancel a lease, upon notice to the lessee, when the Secretary determines that the lessee has violated any term or condition of the lease or of the Department's regulations.¹⁴⁸ The Secretary may also cancel a lease which was entered into in error.¹⁴⁹ Nothing in the regulations, however, requires the Secretary to order cancellation. While the Secretary has the right to cancel for breach, other remedies, such as damages, may be ordered instead.¹⁵⁰

approval, could be said to encourage self-determination. To the contrary, one would think that the best way to make the Indians more responsible citizens would be to require them to live up to their contractual commitments.

Id. at 1437.

Mineral development on tribal lands is not designed "to make the Indians more responsible citizens" — a classic justification of the assimilation era. Instead, mineral development policy is oriented today toward promoting tribal control and economic development.

142. *Id.* at 1437. While United Nuclear may have been entitled to damages based on its reliance interest in the lease, compelling the tribe to accept the uranium mining is inconsistent with both tribal sovereignty and the trend of federal policy towards tribal control of mineral development. By reducing "self-determination" to nothing more than the landowner's right to refuse to lease in the first instance, the court demonstrated a profound misunderstanding of the sovereign status of tribes.

143. *Id.* at 1438.

144. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 376 (1968). A tribe can also, in appropriate circumstances, sue the Secretary for breach of trust. See *infra* section II.B.3.b.

145. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983) (commercial lease).

146. 25 C.F.R. § 211.27(a) (1993).

147. See *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982).

148. 25 C.F.R. § 211.27(a) (1993). If the lessee requests a hearing within 30 days of receiving notice, the hearing must be held prior to a cancellation order. *Id.*

149. *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) (agricultural lease) ("[T]he execution of the lease was an administrative error which the Secretary can correct by cancellation of the lease.")

150. The high court has stated:

[T]here is no justification for concluding that the severe sanction of cancellation of the

Similarly, while a tribe may maintain an action against the lessee for breach, cancellation is not automatic, but an equitable remedy which the court may order in its discretion.¹⁵¹ Where the lessees have spent a number of years and substantial amounts of money in exploration and development activities, courts are within their discretion to refuse to order cancellation of the lease.¹⁵² Damages or an adjustment of bonuses, rents or royalties may be the judicially preferred remedy.¹⁵³

The 1938 Act thus accorded tribes a limited, but crucial, ability to exercise their powers of self-government. Tribes had no say in the mining process once they authorized the leasing of their lands, and no right to certain cancellation if the lessee breached the terms and conditions. However, they did have the key right to consent before leasing could occur. As a consequence, although the 1938 Act kept tribes largely in the position of passive lessors, the tribal consent provisions were of great "tangible and symbolic importance".¹⁵⁴

3. Economic Development

The third goal of the Indian Mineral Leasing Act was to ensure that tribes received "the greatest return from their property."¹⁵⁵ The federal policy of reorganization and tribal self-government ushered in by the IRA in 1934 "rested on a foundation of economic well-being for the Indians."¹⁵⁶ In keeping with that general policy of promoting tribal economic development, the Indian Mineral Leasing Act provided for the enhancement and protection of tribal revenue generated by the mineral estate. First, the Interior Department established a

lease is the only relief for all breaches of the lease term or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement by the payment of damages and not by the cancellation of a basically satisfactory lease.

Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 374 (1968).

Under the proposed new regulations, the Secretary, upon a determination that the lessee is in breach of the lease, federal regulations, or other laws, may issue either a notice of proposed cancellation or a notice of noncompliance specifying the actions that must be taken to achieve compliance. 56 Fed. Reg. 58,734, 58,743 (1991) (to be codified at 25 C.F.R. § 211.54(a)). The regulations provide, however, that "[t]his section does not limit any other remedies of the Indian mineral owner as set forth in the lease or permit." *Id.* § 211.54(g) (proposed). In addition, the proposed new regulations provide for civil penalties, not to exceed \$1,000 per day per violation, for violations of lease terms or federal regulations or for failure to comply with a notice of noncompliance or a cancellation order. *Id.* § 211.56 (proposed).

151. *Jicarilla Apache Tribe v. Andrus*, 698 F.2d 1324, 1333 (10th Cir. 1982).

152. *Id.*

153. *Id.* at 1334.

154. *AMBLER*, *supra* note 4, at 53.

155. S. REP. NO. 985, 75th Cong., 1st Sess. 2 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938).

156. 2 *PRUCHA*, *supra* note 14, at 985.

system of bonuses, rents, and royalties to ensure an income stream. Second, courts interpreted the Act to include an enforceable trust responsibility to the tribes; the Act and its regulations required the Interior Department to act in the best interests of the tribes in approving and administering leases of Indian lands. And third, the Act did not include an express authorization for state taxation of mineral production.

a. Income Guarantees

The primary means to ensure tribal returns from the mineral estate was to ensure tribal income. The 1938 Act required all lessees to post a surety bond guaranteeing compliance with the terms of their leases,¹⁵⁷ and the implementing regulations established a system of bonuses, rents, and royalties. All mineral leases awarded through competitive bidding were "offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties."¹⁵⁸ Rents and royalties were uniform, with rates specified by regulation.¹⁵⁹ The three types of payments were intended as a comprehensive income scheme:¹⁶⁰ the bonus bids were intended to be consistent with market forces, regardless of whether Interior or the tribes knew the full value of the minerals. In addition to the bonus, tribes received specified rents whether minerals were produced or not. And if minerals were found, the tribes were paid royalties on the production.

Despite the intent to provide the "greatest return" on tribal minerals, however, the system in fact provided "only minimal levels of income."¹⁶¹ Most of the problems arose in implementation. Bonus bids were often not consistent with market forces, due largely to inadequate advertising, minimal geological information, and poor selection of those tracts offered for bids.¹⁶² Rents and royalties were also

157. 25 U.S.C. § 396c (1988); 25 C.F.R. § 211.6 (1993).

158. 25 C.F.R. § 211.3(a) (1993) (sale of oil and gas leases), § 211.2 (providing that leases of other minerals be advertised in accordance with § 211.3 unless Interior grants written permission to the tribe to bypass the competitive bidding process).

159. *Id.* §§ 211.13-211.15.

160. AMBLER, *supra* note 4, at 238.

161. *Id.*

162. *Id.*

set lower than warranted by the market,¹⁶³ and advance rent payments could be deducted from the royalties due.¹⁶⁴

In addition, royalty mismanagement, inadequate accounting practices, and mineral theft reduced the already low royalty payments to tribes.¹⁶⁵ Reports of problems began to surface in the 1950s,¹⁶⁶ but the royalty issue did not receive national attention until the early 1980s. In 1982, the Linowes Commission, appointed by the Secretary of the Interior, identified a number of specific problems leading to severe royalty losses:¹⁶⁷ "serious inadequacies" in royalty management collection practices, resulting in underpayment of as much as 10 percent;¹⁶⁸ theft and fraud;¹⁶⁹ and a lack of enforcement capabilities.¹⁷⁰ Of particular importance were errors in reporting both quantity and quality of mineral production, difficulty in determining the fair market value of the minerals, and theft and fraud.¹⁷¹ The federal government had operated royalty collection and management on an industry "honor system,"¹⁷² and that system had failed.¹⁷³ Thus, despite the intent to create a system supporting economic growth for Indian tribes, implementation of that system left tribes with significantly less than "the greatest return" on their mineral resources.

163. *Id.*

164. 25 C.F.R. § 211.12(b) (1993). The economic impact on the tribe was alleviated somewhat by provisions that no refund is owed the lessee if the rents exceed the royalties due or if the lease is cancelled or surrendered. *Id.*

165. Russell Davis, et al., *Oil and Gas Royalty Recovery Policy on Federal and Indian Lands*, 23 NAT. RESOURCES J. 391, 393-94 (1983). On royalty issues generally, see AMBLER, *supra* note 4, at 118-44.

166. In 1951, the Navajo Tribal Council requested an investigation of whether proper uranium royalties were being paid. In 1959, the U.S. General Accounting Office reported serious problems in accounting for federal and Indian oil. *Id.* at 120-21. Other GAO reports critical of federal royalty management were issued in the 1960s, 1970s, and early 1980s. See Barbara N. McLennan, *Federal Policy with Respect to Collection of Royalties from Oil and Gas Leases on Federal and Indian Lands*, 31 OIL & GAS TAX Q. 87, 92 n.12 (1982).

167. FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES: REPORT OF THE COMMISSION 13-39 (1982) [hereafter LINOWES COMMISSION REPORT]. The Commission was popularly named for its chair, David E. Linowes.

168. *Id.* at 13, 16.

169. *Id.* at 26-33.

170. *Id.* at 33-38. "It is remarkable that USGS [Geological Survey] royalty collection functions at all, considering that there are virtually no teeth to the system." *Id.* at 37.

171. Davis, *supra* note 165, at 396-400.

172. LINOWES COMMISSION REPORT, *supra* note 167, at 15.

173. See AMBLER, *supra* note 4, at 129 (the U.S. Geological Survey, the agency responsible for mineral management, "did not verify data, did not know which companies had paid, rarely conducted audits, and did not impose penalties for nonpayment or underpayments.")

b. *Trust Relationship*

To some extent, the federal government's responsibility to adequately monitor and protect tribal mineral income was enforceable through actions for breach of trust. The federal trust obligation to the Indian tribes arises from the legal status of tribes in American jurisprudence. Tribes possess the unique status of "domestic dependent nations" whose relationship with the federal government "resembles" that of wards to their guardian.¹⁷⁴ One critical aspect of that trust relationship is the trust status of tribal lands and resources.¹⁷⁵ Another, equally crucial aspect is the requirement that, in administering the federal statutes and regulations governing mineral leasing, the Secretary of the Interior act in the best interests of the tribes. While that obligation traces back at least to the 1919 leasing act,¹⁷⁶ a pair of Supreme Court cases in the early 1980s gave new importance to the federal trust responsibility.

As recently as 1975, it was "premature" to say that tribes possessed a definitive right to sue the government for breach of trust.¹⁷⁷ But in *United States v. Mitchell II* in 1983, the Supreme Court recognized a tribal cause of action against the federal government for damages for breach of trust for federal mismanagement of timber resources.¹⁷⁸ In *United States v. Mitchell I* in 1980, the Court refused to allow a breach of trust action based on the General Allotment Act, holding that the GAA created only a "limited trust relationship."¹⁷⁹ Because the GAA did not place full management responsibility for allotted lands with the United States, the Court ruled, the GAA did not impose any duty on the federal government to properly manage

174. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16, 17 (1831). Whether this guardian/ward analogy is the cause or the result of the trust relationship has never been clear.

[T]he exact source of this special relationship remains uncertain. Ownership of Indian land, the helplessness of Indian tribes in the face of a superior culture, higher law, and the entire course of dealings between the government and Indian tribes, treaties, and 'hundreds of cases and. . . a bulging volume of the U.S. Code' have all been cited as the source.

Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U.L. REV. 635, 637-38 (1982). See also Ball, *supra* note 18, at 63 ("The likely origin of the trust doctrine is not Marshall's notion of wardship but the later ethnocentrism that also produced the notion of superiority and unrestrained plenary power.").

175. This aspect of the trust relationship is discussed *supra* at text accompanying notes 17-19.

176. See *supra* text accompanying note 82.

177. Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1247 (1975).

178. *United States v. Mitchell II*, 463 U.S. 206 (1983).

179. *United States v. Mitchell I*, 445 U.S. 535, 542 (1980).

Indian resources.¹⁸⁰ But the federal statutory and regulatory scheme for timber management, by contrast, did place comprehensive, literally day-to-day management responsibility with the Interior Department.¹⁸¹ Where statutes and regulations give full responsibility for management of Indian resources to the federal government, the Court held in *Mitchell II*, those statutes and regulations create and define enforceable fiduciary obligations.¹⁸² If the government breaches those obligations, it can be sued by the beneficiary tribe for breach of trust.¹⁸³

In 1986, an en banc Tenth Circuit held that the 1938 Indian Mineral Leasing Act and its implementing regulations, like the timber management statutes and regulations at issue in *Mitchell II*, created enforceable trust responsibilities.¹⁸⁴ The federal government's role in mineral leasing, like its role in timber management, "is pervasive and its responsibilities comprehensive."¹⁸⁵ The Secretary is charged with ensuring tribes the maximum benefits from their mineral resources and must act at all times in the best interests of the tribes.¹⁸⁶ In particular, the Secretary "is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues."¹⁸⁷ The Secretary's fiduciary duties to the tribes extend to approval of leases, monitoring of lessees' compliance with lease terms and federal regulations, determination of the method of royalty calculations, and approval of communitization agreements for oil and gas.

180. *Id.*

181. *Mitchell II*, 463 U.S. at 222.

182. *Id.* at 224. The theory of an enforceable trust obligation is, of course, "tautological: the United States controls tribal resources because of a claimed trust obligation, and the United States has this trust obligation because it controls tribal resources." Ball, *supra* note 18, at 64.

183. *Mitchell II*, 463 U.S. at 226. Nonetheless, "Indian tribes have been remarkably unsuccessful in breach of trust claims in the Claims Court and the Federal Circuit," the courts with trial and appellate jurisdiction over money damages claims. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U.L. REV. 753, 789 (1992). Tribes prevailed in only two of 20 cases filed in the 1980s, and the claimants in the *Mitchell* cases have yet to recover. *Id.* at 789-91. On post-*Mitchell II* claims for money damages for breach of trust, see *id.* at 789-817.

184. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986), adopting as modified the dissent in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563-69 (10th Cir. 1984) (Seymour, J., dissenting). The 1986 modification of Judge Seymour's dissent does not affect her discussion or conclusions on the trust issue. Other federal courts have subsequently agreed. *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986); *Youngbull v. United States*, No. 31-88 L, 1990 U.S. Cl. Ct. LEXIS 3, at *19-*23 (Jan. 4, 1990). See also *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir.), *cert. denied*, 486 U.S. 1032 (1987) (agreeing with *Supron* in the context of the 1909 allotment leasing act); *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 576-77 (1990).

185. *Supron*, 728 F.2d at 1564.

186. *Id.* at 1565. See also *Kenai Oil & Gas, Inc. v. Dep't of Interior*, 671 F.2d 383, 386 (10th Cir. 1982).

187. *Kenai Oil & Gas*, 671 F.2d at 386.

The 1938 Act and the implementing regulations require the Secretary to approve all mineral leases, and to reject all bids for mineral development of Indian lands if rejection is in the interest of the tribe.¹⁸⁸ Taken together, these mandates create a fiduciary "obligation to approve or reject leases according to the best interests of the Indians."¹⁸⁹ As a part of this obligation, the Secretary has a duty to approve or disapprove leases within a reasonable time in order to avoid "the economic hardship occasioned by unreasonable delays."¹⁹⁰

The Secretary is also obligated, once a lease is approved, to monitor the lessees' performance in order to protect the tribe's mineral estate and its economic potential. The duty to monitor includes oversight of activities mandated by the lease terms and federal regulations, such as diligent development of the mineral resource and protection of the land from drainage.¹⁹¹ Even when the lessee has in fact complied with the terms of the lease and the regulations, the Secretary's failure to adequately monitor the lessee to ensure compliance constitutes a breach of trust.¹⁹²

The Secretary similarly has a trust duty to safeguard tribal returns from mineral leasing by choosing a royalty accounting method that best protects the tribe's interests.¹⁹³ Where the Secretary has a choice between two or more reasonable alternative methods of determining royalties, the trust relationship requires the Secretary to choose the method that results in the greatest return for the tribes.¹⁹⁴

188. 25 U.S.C. §§ 396a-396b (1988); 25 C.F.R. §§ 211.3(a), 211.10 (1993).

189. *Youngbull v. U.S.* No. 31-88L, 1990 U.S. Cl. Ct. LEXIS at *27. The proposed new regulations for the 1938 Act define "in the best interest of the Indian mineral owner" as referring to the standards to be applied to administrative actions affecting mineral leasing.

In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a lease, permit, unitization or communitization agreement), the Bureau may consider any relevant factor, including, but not limited to, economic considerations such as the date of the lease expiration, probable financial effect on the Indian owner, leasability of land concerned, need for change in the terms of the existing lease, marketability and potential environmental, social, and cultural effects.

56 Fed. Reg. 58,734, 58,738 (1991) (to be codified at 25 C.F.R. § 211.3).

190. *Youngbull*, 1990 U.S. Cl. Ct. LEXIS at *27-*28.

191. *Jicarilla Apache Tribe v. Supron*, 728 F.2d 1555, 1569 (10th Cir. 1980). The federal regulations requiring diligence and prevention of waste are found at 25 C.F.R. § 211.19 (1993).

192. *Supron*, 728 F.2d at 1569. This type of breach would be unlikely to give rise to a claim for damages, and consequently would not fall within the jurisdiction of the Court of Federal Claims. But a tribe may seek declaratory and equitable relief for breach of trust in the federal district courts. See *id.* at 1565 n.3; *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 576 n.7 (1990). See also *Newton*, *supra* note 183, at 774-75.

193. *Supron*, 728 F.2d at 1567.

194. *Id.* at 1567, 1569.

Finally, the Secretary has additional fiduciary obligations with respect to oil and gas leasing. The Secretary is required to undertake an independent review of applications regarding the spacing and location of oil and gas wells, and may not delegate that authority to the states.¹⁹⁵ Moreover, the Secretary must act in the tribe's best interest in determining whether to approve an oil and gas communitization agreement,¹⁹⁶ a duty which takes on added importance if tribal consent to individual agreements is not required.¹⁹⁷ In deciding whether to approve a communitization agreement, the Secretary is charged with considering all factors relevant to the tribe's best interests: conservation of the resources, production issues, engineering and geological aspects, and the short- and long-term economic effects on the tribe.¹⁹⁸ Both a failure to consider the tribe's economic interests,¹⁹⁹ and consideration only of economic factors,²⁰⁰ violate the trust responsibilities imposed by the 1938 Act and its regulations.

The fiduciary duties of the Secretary, and the creation of a judicial action to enforce those duties or to recover damages for their breach, offer increased protection for tribal mineral resources and greater opportunities to ensure that tribes receive "the greatest return" from those resources. Nonetheless, the breach of trust action is a fairly recent approach, and the appropriate judicial standards, particularly in actions for money damages in the Court of Federal Claims, are far from certain.²⁰¹

195. *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas Conservation*, 792 F.2d 782, 794-95 (9th Cir. 1986). Some limited subdelegation to the state — for example, fact-gathering functions — may be permissible if it would be in the tribe's best interest. *Id.* at 796-97.

196. *Kenai Oil & Gas, Inc. v. Dep't of Interior*, 671 F.2d 383 (10th Cir. 1982); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992), *cert. denied sub nom.*, *Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes*, 113 S.Ct. 1642 (1993). Communitization agreements are discussed *supra* at text accompanying notes 130-132.

197. *See supra* text accompanying notes 128, 132-133.

198. *Kenai Oil & Gas*, 671 F.2d at 386-87; *Cotton Petroleum Corp. v. U.S. Dep't of Interior*, 870 F.2d 1515, 1525-26 (10th Cir. 1989); *Cheyenne-Arapaho Tribes*, 966 F.2d at 589.

199. *Kenai Oil & Gas*, 671 F.2d at 387; *Cheyenne-Arapaho Tribes*, 966 F.2d at 589-90.

200. *Cotton Petroleum*, 870 F.2d at 1526-28; *see also* *Woods Petroleum Corp. v. United States Dep't of Interior*, 18 F.3d 854 (10th Cir. 1994). The court in *Cotton Petroleum* held that the Secretary acted arbitrarily and capriciously in disapproving a communitization agreement which was fair and proper and under which the Indian lessors would receive the "economic benefits. . . for which they had bargained." *Cotton Petroleum*, 870 F.2d at 1528. The court also ruled that if the Indian lessor agreed in a lease to be bound by any approved communitization agreement, and if the Secretary approved that lease as in the best interests of the Indians, then the Secretary could not disapprove an agreement for the "sole purpose of causing the underlying lease—which the Secretary had previously approved—to expire." *Id.* at 1528-29 (emphasis in original). In the 1992 *Cheyenne-Arapaho Tribes* case, however, the court stated that its refusal to defer to the Secretary in *Cotton Petroleum* was based on the Secretary's consideration of "only economic factors, rather than all relevant factors." *Cheyenne-Arapaho Tribes*, 966 F.2d at 591 n.14.

201. *See* Newton, *supra* note 183, at 810-15.

c. *State Taxation*

Unlike the 1924 and 1927 leasing amendments, the 1938 Act did not contain an express authorization for states to tax mineral production on Indian lands. Despite this lack of express authority, state taxation of mineral leases continued as a matter of course for some 40 years.²⁰² In 1977, the Interior Department Solicitor belatedly determined that states were not authorized by the 1938 Act to tax mineral leases,²⁰³ and that opinion set in motion a challenge to state taxation that culminated in the Supreme Court's 1985 decision in *Montana v. Blackfeet Tribe of Indians*.²⁰⁴

The Blackfeet Tribe challenged the application of four state oil and gas taxes to production on tribal lands under a 1938 Act lease.²⁰⁵ In accordance with the provisions of the 1924 leasing amendments, these taxes were paid by the lessees and then deducted from the royalty payments to the tribe.²⁰⁶ As a result, the Court treated the case as one involving state taxation of Indians rather than state taxation of the non-Indian lessees.²⁰⁷ The distinction was crucial, since state taxation of Indians must pass a far stricter analysis than state taxation of non-Indians.²⁰⁸

The Court thus began its analysis with the long-established proposition that absent an "unmistakably clear" intent of Congress, states may not tax Indian interests inside Indian country.²⁰⁹ The Court

202. Peter F. Carroll, Note, *Drumming Out the Intent of the Indian Mineral Leasing Act of 1938*, 7 PUB. LAND L. REV. 135, 138-40 (1986).

203. 84 Int. Dec. 905 (1977). The decision overruled or superseded five prior Solicitor's opinions, issued between 1943 and 1966, finding in favor of state taxation under the 1938 Act. Those decisions had primarily issued during the termination era of federal Indian policy, when the government had again turned to a drive to assimilate the Indians and terminate the tribes. By the time of the 1977 opinion, federal policy had shifted back to encouragement and promotion of tribal self-government. See *infra* text accompanying notes 261-266.

204. 471 U.S. 759 (1985). For more detailed looks at the *Montana* case, see Carroll, *supra* note 202; Linda P. Reppert, *State Taxation of Indian Oil and Gas Leases: Montana v. Blackfeet Tribe of Indians*, 40 TAX LAW. 459 (1987).

205. These taxes were the oil and gas severance, net proceeds, and conservation taxes and the resource indemnity trust tax. *Montana*, 471 U.S. at 761 n.1.

206. *Id.* at 761. The taxing provisions of the 1924 amendments are discussed *supra* at text accompanying notes 91-95.

207. *Montana*, 471 U.S. at 761.

208. Compare the discussions *infra* of *Montana* (state taxation of Indian royalties under 1938 Act lease), text accompanying notes 209-215, and *Cotton Petroleum* (state taxation of non-Indian lessees' interests under 1938 Act lease), text accompanying notes 226-254.

209. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985); see also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). The doctrine was recognized at least as early as 1867. See cases cited *supra* at note 90. As noted earlier, the taxing provisions of the 1924 and 1927 amendments represented an instance of unmistakably clear congressional intent to permit state taxation of Indian interests.

found nothing in the 1938 Act or its legislative history to suggest that Congress intended to authorize state taxation of mineral production on Indian lands.²¹⁰ Moreover, the Court rejected the notion that the 1938 Act implicitly incorporated the 1924 authorization to tax.²¹¹ On the contrary, the Court noted that state taxation of Indian royalties would undermine the purposes of the 1938 Act.²¹² Thus, interpreting the 1938 Act in favor of the tribes,²¹³ the Court found no clear congressional authorization for states to tax mineral production under leases issued pursuant to the Act.²¹⁴ Absent that authorization, the Court held, the states could not tax Indians or Indian tribes on the mineral production from Indian lands.²¹⁵

But the *Montana* decision affected only the authority of the states to tax Indian tribes and Indian interests; it did not address the issue of state taxation of the non-Indian mineral lessees. Yet state taxation of lessees can have significant negative impacts on tribal economic development. First, mineral production is the economy for many tribes,²¹⁶ and the existence of a state tax burden necessarily impacts non-Indian corporate decisions concerning development on Indian lands.²¹⁷ After the Court's decision in *Montana*, lessees could no longer automatically deduct state taxes from royalty payments to the tribes, since the Court viewed that as a direct state tax on the tribal interest. Instead, the burden of state production taxes now fell directly on the lessee, adding a cost of doing business that had not previously existed.

210. *Montana*, 471 U.S. at 766.

211. *Id.* at 767.

212. *Id.* at 767 n.5.

213. The Court applied the canons of construction developed by the federal courts for the interpretation of Indian treaties, and subsequently applied to legislation enacted for the benefit of the tribes. The canons are detailed *supra* at note 27.

214. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985).

215. *Id.* at 768. Indian tribes also do not pay federal tax on mineral income because the IRS has ruled that an Indian tribe is not a taxable entity. Rev. Rul. 67-284, 1967-2 C.B. 55. In addition, tribes are expressly exempt from certain other federal taxes that may affect mineral development, such as the manufacturer's excise tax. Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871 (1988).

Under limited circumstances, individual Indians are exempt from federal income tax as well. The exemption is available only to allottees whose income is derived directly from trust allotments. *Squire v. Capoeman*, 351 U.S. 1 (1956). Thus, allottees' income from bonuses, rents, and royalties from mineral development on the allottees' own land is not taxable. *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962) (royalty income); *United States v. Daney*, 370 F.2d 791 (10th Cir. 1966) (oil and gas lease bonus).

216. For the Jicarilla Apache Tribe, for example, oil and gas royalties account for 90% of tribal income. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 209 (1989) (Blackmun, J., dissenting).

217. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (noting that state taxes would "diminish[] the profitability of the enterprise for potential contractors").

Moreover, tribal taxes on non-Indian lessees represent a major source of tribal revenues for mineral-owning tribes.²¹⁸ To the extent that lessees are subject to dual taxation by both the state and the tribe,²¹⁹ tribes have two choices, both economically disadvantageous. One option for the tribes is to reduce or eliminate tribal taxation in order to make mineral leasing competitive with off-reservation development. However, that not only reduces or eliminates a critical source of revenue, but creates a negative impact on tax-funded services within the tribe's territory.²²⁰ Tax revenues collected by the state go into state coffers and may or may not be returned as services to Indian country.²²¹ Second, tribes can continue to tax, making tribal leases less attractive than off-reservation leases with a lower tax burden, thus reducing the marketability of the tribe's more expensive minerals.²²² In either case, state taxation of the lessees carries at least the potential to disrupt tribal economic development.

During the early decades of the twentieth century, non-Indian lessees were protected from state taxation by the federal instrumentality doctrine.²²³ Congress overrode that protection in the leasing amendments of 1924 and 1927, expressly authorizing state taxation of mineral production. That permission to tax, however, did not extend to leases issued under the 1938 Act.²²⁴ But in the intervening decades, non-Indian lessees had also lost the benefit of the federal instrumentality doctrine. In a series of cases in the 1930s and 1940s, the

218. Tribal taxation of mineral production is discussed *infra* at section IV.A.

219. See the discussion of *Cotton Petroleum Corp. v. New Mexico*, *infra* at text accompanying notes 226-254.

220. One court stated:

By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state-tax threatens Congress' overriding objective of encouraging tribal self-government and economic development.

Crow Tribe of Indians v. Montana, 819 F.2d 895, 902-03 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*)

221. While states must provide services to justify taxation, there is no requirement that services be proportional to the amount of the tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989).

222. See, e.g., *Crow II*, 819 F.2d at 900 (noting the non-negligible impact of Montana's severance taxes on the marketability of Crow coal).

223. See *supra* text accompanying note 90.

224. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768 (1985) ("[I]f the tax proviso survives at all, it reaches only those leases" awarded under the 1924 and 1927 amendments.).

Supreme Court rejected the idea that the federal instrumentality doctrine immunized non-Indian lessees from state taxes.²²⁵ With the demise of the federal instrumentality doctrine, and the Court's ruling in *Montana* that the tax provisions of the 1924 and 1927 amendments did not apply to leases issued under the 1938 Act, the states' authority to tax non-Indian mineral lessees was uncertain.

In 1989, in *Cotton Petroleum Corporation v. New Mexico*,²²⁶ the Supreme Court ruled that the 1938 Indian Mineral Leasing Act did not bar state taxation of non-Indian lessees. One year earlier, the Court had affirmed without opinion a decision holding that state taxes on lessees would be preempted if the tribe could show that the taxes interfered with the purposes of the 1938 Act.²²⁷ One stated purpose of the Act was to ensure tribes "the greatest return from their property,"²²⁸ and in *Montana* the Court had recognized that taxation of Indian interests would certainly frustrate that purpose.²²⁹ Nonetheless, the Court ruled in *Cotton Petroleum* that the phrase should have no "talismanic effect."²³⁰ While the 1938 Act was certainly intended to provide the tribes with badly needed revenue, the Court stated, it was not intended "to remove all barriers to profit maximization."²³¹

Moreover, the Court held that New Mexico's oil and gas taxes were not preempted by general principles of federal Indian law,²³² thus authorizing unprecedented concurrent state and tribal taxation of mineral lessees.²³³ Prior to *Cotton Petroleum*, the Court had found

225. See cases cited *supra* note 91. On the rise and fall of the federal instrumentality doctrine, see Russel L. Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531, 560-64 (1979).

226. 490 U.S. 163, 177-83 (1989). For more detailed analyses of the case, see Katherine B. Crawford, Note, *State Authority to Tax Non-Indian Oil & Gas Production on Reservations: Cotton Petroleum Corp. v. New Mexico*, 2 UTAH L. REV. 495 (1989); Charley Carpenter, Note, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 CATH. U.L. REV. 639 (1990); Charles Breer, Note, *Indian Law—Mineral Taxation—Are State Severance Taxes Preempted When Imposed on Non-Indian Lessees Extracting Oil and Gas from Indian Reservations [sic] Land?*, 25 LAND & WATER L. REV. 435 (1990); Kristina Bogardus, Note, *Court Picks New Test in Cotton Petroleum*, 30 NAT. RESOURCES J. 919 (1990).

227. *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*).

228. *Cotton Petroleum*, 490 U.S. at 178 (quoting S. REP. NO. 985, 75th Cong., 1st Sess. 2 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938)).

229. *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 179 (1989) (referencing *Montana*, 471 U.S. at 767 n.5).

230. *Id.* at 179.

231. *Id.* at 180.

232. *Id.* at 183-87.

233. The Jicarilla Apache Tribe imposed oil and gas severance and privilege taxes, which amounted to approximately six percent of the value of the lessee's production. New Mexico imposed five oil and gas taxes, which amounted to approximately eight percent of the value of the lessee's production. *Id.* at 168.

state taxes on non-Indian companies doing business with tribes in Indian country to be uniformly preempted.²³⁴

Indian law preemption bars state taxation of non-Indian lessees if the state tax places too great a burden on the tribe or represents too great a state intrusion into tribal and federal affairs. One of the key factors invalidating a state tax on non-Indian lessees is interference with a comprehensive federal regulatory scheme governing the activity being taxed.²³⁵ In addition, the preemption analysis may depend upon whether the state plays some role in Indian country such as regulation or the provision of services that would justify the tax.²³⁶ A general state desire to raise revenue or to assess taxes for services provided the lessees outside Indian country, however, is not sufficient to support the tax.²³⁷ State taxes on non-Indian lessees are also likely to be preempted if the economic burden of the tax falls on the tribe.²³⁸ Moreover, a state tax may not be so excessive that it has a negative effect upon tribal revenue from and regulation of the mineral resource.²³⁹

While the Supreme Court acknowledged this analytical framework in *Cotton Petroleum*, it manipulated existing doctrine to find that

234. *Cotton Petroleum* was the first time the Court directly addressed the preemption analysis as applied to state taxes on mineral lessees, as opposed to other types of non-Indian companies operating in Indian country, although the Court had summarily affirmed a mineral taxation case the year before. See *Crow Tribe of Indians v. Montana*, 484 U.S. 997 (1988). Nonetheless, the Court in *Cotton Petroleum* employed essentially the same analysis as it had used in the non-mineral cases.

235. This aspect of Indian law preemption was articulated in *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 689-92 (1965), and has formed the cornerstone of the preemption analysis for state taxes on non-Indians operating in Indian country. See *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163-66 (1980) (Indian trader statute); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980) (timber harvesting regulations); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 840-42 (1982) (regulations for construction and financing of Indian schools). In one case, the Court was willing to preempt state taxes on the basis of a comprehensive federal scheme alone, see *Central Machinery*, 448 U.S. 160, but in the remaining cases the Court has cited as well to several or all of the other preemption factors noted *infra* at text accompanying notes 236-239.

236. *Bracker*, 448 U.S. at 148-49; *Ramah Navajo School Bd.*, 458 U.S. at 843-44.

237. *Bracker*, 448 U.S. at 150; *Ramah Navajo School Bd.*, 458 U.S. at 843-44.

238. *Bracker*, 448 U.S. at 151; *Ramah Navajo School Bd.*, 458 U.S. at 844. This factor, by itself, would not be sufficient to justify federal preemption of state taxes on non-Indians. *Bracker*, 448 U.S. at 151 n.15.

The "economic burden" of the tax refers to the practical or actual burden, rather than its legal incidence. See *Ramah Navajo School Bd.*, 458 U.S. at 844 n.8. If the tax is imposed directly on the tribe, then it would be invalid absent clear congressional intent to permit it. See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

239. *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 900, 902-03 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*). See also *Bracker*, 448 U.S. at 149. For a detailed look at *Crow II*, see James R. Bellis, Note, *Crow Tribe v. Montana: New Limits on State Intrusion into Reservation Rights, New Lessons for State and Tribal Cooperation*, 50 MONT. L. REV. 133 (1989).

none of the factors favoring preemption was present in that case. The Court's most notable reworking of the preemption analysis was its finding that the federal regulatory scheme for mineral leasing was not "exclusive" because the state regulated the spacing and mechanical integrity of wells located on the reservation.²⁴⁰ Prior to *Cotton Petroleum*, the preemption analysis had never inquired whether the federal scheme was exclusive, but had always required only a "pervasive" or "comprehensive" federal scheme.²⁴¹ Had the Court adhered to that formulation, it should have found the mineral leasing scheme at least as comprehensive as the other federal regulatory schemes it had considered.²⁴² Indeed, the Tenth Circuit had already held, in the context of a breach of trust action, that "the federal government's role in mineral leasing [under the 1938 Act] is pervasive and its responsibilities comprehensive."²⁴³

Moreover, the reason the Court found the federal mineral leasing scheme not exclusive was the fact that the state regulated the mechanical integrity and spacing of oil and gas wells. But the source of the state's authority to regulate these matters on Indian lands was not explained. As a general proposition, states have no authority over mineral development on tribal lands.²⁴⁴ While Interior Department regulations permit the Secretary, on a case by case basis, to adopt or make applicable state law if that is "in the best interest" of the tribe,²⁴⁵ incorporation of any state law is definitively not in the tribe's best interest if it permits the extension of state taxing authority over tribal leases. Moreover, there was no indication in *Cotton Petroleum* that Interior had authorized state regulation of Jicarilla Apache oil and gas wells. In sum, to justify its holding that the federal mineral

240. *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 185-86 (1989).

241. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980).

242. See the preemption cases discussed *supra* at note 235.

243. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986) (en banc) (adopting as modified the dissent of Seymour, J., in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563, 1564-65 (10th Cir. 1984)). See the discussion *supra* at text accompanying notes 184-187. The *Supron* case involved the same tribe and the same mineral resources as the *Cotton Petroleum* dispute.

244. States have a "clear lack of jurisdiction over tribal leases." *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 796 (9th Cir. 1986) (tribal challenge to Interior Department's delegation of authority to State of Montana over location and spacing of oil and gas wells on Indian lands). See also 25 C.F.R. § 1.4(a) (1993).

245. Interior Department regulations provide that: "Any [oil and gas] well drilled on restricted Indian land shall be subject to the location restrictions specified in the lease and/or Title 25 of the CFR." 43 C.F.R. § 3162.3-1(b) (1992). Regulations in Title 25, in turn, permit the Secretary, on a case by case basis, to adopt or make applicable state laws if that is "in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. § 1.4(b) (1993).

leasing scheme was not exclusive, the Court relied on state regulation which rested, at best, on questionable legal grounds.

The Court's reformulation of the federal-scheme component of the preemption analysis was not its only manipulation of that doctrine. The Court also found, for example, that New Mexico provided substantial services to both the tribe and the company.²⁴⁶ There was no indication in the opinion, however, that New Mexico provided any services to the taxpaying lessees on the reservation. As a general proposition, services provided to the taxpayer outside Indian country are not sufficient to justify a state tax on activities inside Indian country.²⁴⁷

In addition, the Court found that the primary burden of the state's taxes fell on the non-Indian lessee,²⁴⁸ and that the state taxes had no substantial negative effect upon development of the tribe's oil and gas resources.²⁴⁹ The Court contrasted these factors to those giving rise to its summary affirmance one year earlier of a lower court decision that Montana taxes on coal production on Crow lands were preempted.²⁵⁰ The nearly 33 percent taxes imposed by Montana definitely had a negative impact on the value of the Crow coal, the Court noted,²⁵¹ whereas the mere eight percent New Mexico taxes at issue in *Cotton Petroleum* were not so "unusually large" as to impose any "substantial burden" on the Jicarilla Apache Tribe.²⁵² While the Court was willing to concede that the concurrent state taxation would have "at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate,"²⁵³ the Court nonetheless concluded that there was "simply no evidence in the record that the tax has had an

246. *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 185 (1989). During the period 1981-1985, New Mexico provided almost \$90,000 in services to Cotton Petroleum's operations, and \$10.7 million in services to the reservation as a whole. *Id.* at 170 n.6.

247. *See supra* text accompanying note 237.

248. *Cotton Petroleum*, 490 U.S. at 185 and 187 n.18.

249. *Id.* at 185.

250. *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*).

251. In *Crow II*, the state taxes at issue were "extraordinarily high," having a combined effective rate of 32.9 percent, and the Ninth Circuit expressly held that the state taxes "had at least some negative impact on the coal's marketability." *Crow II*, 819 F.2d at 900. *See Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 186 n.17 (1989).

252. *Id.* at 186. However, "[t]he Court failed to explain how at some undetermined point between 8% and 32.9% a state tax becomes impermissibly burdensome." Breer, *supra* note 226, at 443.

253. *Cotton Petroleum*, 490 U.S. at 186-87.

adverse effect on the Tribe's ability to attract oil and gas leases."²⁵⁴ The Court's affirmance of the tax may thus have resulted more from a failure of proof on the part of Cotton Petroleum than from a shift in legal doctrine.

Read broadly, the Court's decision in *Cotton Petroleum* could dramatically increase the economic burden on tribes and lessees pursuing mineral development. The lower federal courts, however, have described the decision in *Cotton Petroleum* as "reaffirm[ing] the basic principles" of Indian law preemption of state taxes.²⁵⁵ The decisions on state taxation since *Cotton Petroleum* have distinguished that case on its facts and continued to find state taxes preempted where there is a comprehensive federal scheme that leaves no room for state regulation or state services.²⁵⁶ Although the cases have not involved state taxation of mineral lessees,²⁵⁷ the lower courts' adherence to the traditional preemption analysis is promising. At a minimum, tribes and lessees able to demonstrate that the taxing state does not regulate mining in Indian country and that the taxes have some actual negative impact on the tribe should prevail in challenges to state taxation of non-Indian lessees operating under the 1938 Act.

This result would be consistent with the economic development purpose of the Indian Mineral Leasing Act.²⁵⁸ Prohibiting states from taxing mineral lessees on production from Indian lands would enhance tribal revenues, increase the attractiveness of tribal minerals for non-Indian companies, and ensure that tribal minerals are competitive in the market. Along with the prohibition against state taxation of Indian royalties and other interests in mineral production, and the stable rents and royalties income scheme, the bar to state taxation of

254. *Id.* at 191. Earlier in the opinion, the Court had also noted that "*Cotton* did not, however, attempt to prove that the state taxes imposed any burden on the Tribe." *Id.* at 170.

255. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 660 (9th Cir. 1989); *Quinault Indian Nation v. Grays Harbor County*, 19 Indian L. Rep. 3176, 3178 (W.D. Wash. 1989) [1992].

256. *Hoopa Valley Tribe*, 881 F.2d at 660-61; *Quinault Indian Nation*, 19 Indian L. Rep. at 3177-79. See also *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) (reversing trial court's dismissal of tribe's suit to enjoin state taxes). Where state taxes have been upheld, the taxes have imposed no economic burden on the tribe and the state has engaged in extensive regulation of the activity. *Cabazon Band of Mission Indians v. California*, 788 F.Supp. 1513, 1518-20 (E.D. Cal. 1992).

257. *Hoopa Valley Tribe*, 881 F.2d at 658 (timber yield tax on the value of the timber at the time of harvest); *Quinault Indian Nation*, 19 Indian L. Rep. at 3176 (compensating tax on the sale of forest lands to a tax-exempt entity); *Gila River*, 967 F.2d at 1407 (transaction privilege tax on ticket revenues); *Cabazon Band*, 788 F.Supp. at 1514 (license fee on on-reservation betting facilities for simulcast horse racing).

258. It would also be consistent with the purpose of aiding in the revitalization of tribal governments, see *supra* section II.B.2, by providing greater opportunities for raising tribal revenues and increasing tribal services.

lessees would complete Congress' intent of ensuring tribes "the greatest return" on their mineral estate.²⁵⁹

4. Conclusion

The 1938 Indian Mineral Leasing Act represented a major advance for mineral-owning tribes. It provided uniformity in leasing requirements, mandated tribal consent for all mineral leases on tribal lands, and protected tribal interests by creating enforceable fiduciary duties on the part of the Department of the Interior. On the economic side, the 1938 Act eliminated state taxation of tribal mineral income and established a scheme of bonuses, rents and royalties that guaranteed some income from leases whether minerals were produced or not.

Nonetheless, the 1938 Act fell short of its avowed goals of promoting tribal self-government and economic development. Royalty management was critically inadequate, and the Act failed to bar state taxation of non-Indian producers on tribal lands. Moreover, in large part because the 1938 Act permitted mineral development only through leasing, tribes were still relegated to an essentially passive role in the process. Tribal dissatisfaction with that lack of control under the 1938 Act led eventually to the Indian Mineral Development Act of 1982.

IV. TRIBES AS PARTICIPANTS: DEVELOPMENT OF THE MINERAL ESTATE

The 1938 Indian Mineral Leasing Act was a response to the then-new federal policy of promoting tribal self-government and economic development. In line with that policy, the 1938 Act increased tribal control over the leasing process and guaranteed a greater share of the returns to the tribal owners. But during the decades in which the 1938 Act controlled mineral development of tribal lands, federal Indian policy underwent drastic changes.

After a brief but destructive fling in the 1950s and 1960s with

259. S. REP. NO. 985, 75th Cong., 1st Sess. 2 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938). To that end, in 1992 Congress charged the newly-created Indian Energy Resource Commission with developing proposals to address the dual taxation issue. 25 U.S.C. § 3505(k)(1) (1992). In giving the Commission that mandate, Congress stated its belief that *Cotton Petroleum* was wrongly decided. H.R. REP. NO. 474, 102d Cong., 2d Sess. pt. 8, at 96 (1992) *See generally* the discussion of the Commission and its functions *infra* at text accompanying notes 383-397.

assimilation and termination of tribes,²⁶⁰ federal policy swung back to promotion of tribal self-determination and economic self-sufficiency. President Johnson signaled the change in 1968, calling for a policy of "self-help, self-development, [and] self-determination" for Indians.²⁶¹ Two years later, President Nixon built on that approach, proposing a federal policy of tribal self-determination, tribal sovereignty, and tribal control over Indian country and its resources.²⁶² As a cornerstone of the policy, Nixon advocated increased economic development of Indian lands, particularly through long-term leasing of lands and resources.²⁶³ During the 1970s and continuing into the 1980s, Congress embarked on a legislative agenda designed to carry the self-determination policy into effect.²⁶⁴ Then in January of 1983, President Reagan continued the push for increased tribal control by declaring a "government-to-government" relationship between the tribes and the United States and reiterating the primary role of tribes in the development and management of reservation resources.²⁶⁵ Throughout the 1970s, and culminating in Reagan's 1983 statement, federal Indian policy concentrated on two aspects: increased tribal control over programs and resources, and the governmental status of the tribes.²⁶⁶

During those same years, changes in tribal outlook and activities corresponded to the changes in federal policy. In particular, many tribes were taking an increasingly active role in economic development concerns. But in the mineral development arena, increased tribal control clashed with the limitations imposed by the 1938 Indian Mineral Leasing Act. While the 1938 Act had represented a giant

260. While the termination era adversely affected or even eliminated the terminated tribes' control of their mineral estates, see AMBLER, *supra* note 4, at 53-54, no new general mineral leasing laws were enacted between 1938 and 1982.

261. "The Forgotten American": *The President's Message to the Congress on Goals and Programs for the American Indians*, PUB. PAPERS 335 (1968-69).

262. *Special Message to the Congress on Indian Affairs*, PUB. PAPERS 564 (1970). Nixon is generally credited as the architect of the federal policy of tribal self-determination.

263. With respect to that policy, Professor Clinton noted:

The potential inconsistency between the tribal sovereignty and control over the Indian reservation and the impacts caused by extensive leasing of Indian lands for non-Indian controlled economic development was not noted, although this tension became a major theme in Indian economic development during the decade.

CLINTON, *supra* note 16, at 160.

264. See, e.g., Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1988) (declaring Congress' "commitment to . . . the establishment of a meaningful Indian self-determination policy").

265. *Statement on Indian Policy*, 1 PUB. PAPERS 96 (1983).

266. The philosophy of tribal self-determination and the government-to-government relationship remain as the foundations of present federal Indian policy. See *infra* text accompanying note 363.

stride forward for tribes from the assimilationist-era leasing laws, its narrow range of options ultimately proved too restrictive in the heady atmosphere of the 1970s.

A. *Dissatisfaction with Mineral Leasing*

The core problem with mineral leasing under the 1938 Act was its lack of flexibility. The standard lease term — 10 years and as long thereafter as minerals are produced in paying quantities — introduced uniformity but was not necessarily compatible with the needs of the tribes or the lessees. For example, if production of the mineral had not begun by the end of the 10-year term, the lease would expire; with many leases, however, 10 years was too short a period of time for the necessary preparation and exploration work.²⁶⁷ Where production was sustained, cyclical fluctuations in the market could cause production to fall below the “paying quantities” threshold, and the lease would terminate despite the wishes of the parties and the presence of significant remaining mineral deposits.²⁶⁸

On the other hand, the “in paying quantities” clause also locked in leases that were not advantageous to the tribes. So long as the lessee was producing minerals in paying quantities, the lease continued under its original terms.²⁶⁹ Tribes had no opportunity to renegotiate lease terms to take account of changing economic conditions or changing environmental concerns. Rents and royalties were set far lower than justified by the market, in large part because they were established as a flat rate rather than a percentage.²⁷⁰ Even the competitive bidding process for awarding leases did not necessarily result in the best possible financial return for the tribes.²⁷¹ Moreover, while

267. H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982), reprinted in 1982 U.S.C.C.A.N. 3465, 3466.

268. *Id.* The “in paying quantities” concept, applied by the 1938 Act to all minerals, was borrowed from oil and gas law. See, e.g., text *supra* accompanying note 88 for a discussion of the 1924 and 1927 oil and gas leasing amendments. The “in paying quantities” provision caused particular problems in the mining of hardrock minerals, which are subject to “considerable fluctuations” in their markets. H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982).

269. The result could be a de facto “perpetual lease.” S. REP. NO. 472, 97th Cong., 2d Sess. 9 (1982).

270. AMBLER, *supra* note 4, at 56, 238. For example, Ambler notes that the standard royalty rate on Indian coal leases was 17.5 cents per ton; when coal increased 237 percent in value between the 1950s and 1974, Indian royalties, based on this flat rate, increased by only 35 percent. *Id.* at 66, 56. In another example, two large coal producers on the Navajo reservation mined approximately 18 million tons of coal in 1977. The market value of the coal was between \$4 and \$14 per ton; the Navajo received between 25 and 37.5 cents per ton. Lorraine Ruffing, *Fighting the Substandard Lease*, 6 AM. INDIAN J. 2, 3 n.5 (1980).

271. H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982).

leases provided a steady income from the rents-and-royalties scheme, they provided no mechanism for a tribal share in the profits.²⁷² The lessees rather than the tribes were reaping the bulk of the profits generated by tribal minerals.

Beyond the economic issues, the 1938 Act relegated tribes to an essentially passive role in the development of their own mineral resources. Tribes had virtually no opportunity to participate in development and management decisions,²⁷³ to ensure environmental or cultural protection,²⁷⁴ or to bargain for such favorable terms as tribal employment preferences. Consequently, as Indian tribes gained experience with self-government, and the energy boom of the 1970s focused attention and activity on Indian reservations, the provisions of the 1938 Act offered tribes insufficient control and revenues. Tribes began to search for alternatives to the standard mineral lease.

As one means of asserting increased control, several of the energy tribes called a hiatus on mineral development in the early 1970s to gain time for planned development.²⁷⁵ Other tribes continued mineral development, but began to negotiate mineral agreements that provided them with greater decision-making and profit-making roles.²⁷⁶ To sidestep the leasing requirements of the 1938 Act, tribes relied on statutory authority that permitted them, with secretarial approval, to enter into service contracts "relative to their lands."²⁷⁷ Initially, the Department of the Interior approved a number of these

272. AMBLER, *supra* note 4, at 237.

273. H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982).

274. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT: TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 49 (1976) [hereafter TASK FORCE SEVEN REPORT] (noting that without the opportunity to bargain effectively, tribes can neither impose environmental controls nor extract higher royalty rates in return for not imposing controls).

275. AMBLER, *supra* note 4, at 62, 72. The Northern Cheyenne and Crow Tribes and the Three Affiliated Tribes of Fort Berthold "succeeded in stopping coal development on their reservation, with the sole exception of the Westmoreland lease on the Crow ceded strip." *Id.* at 67. See also NRG Co. v. United States, 24 Cl. Ct. 51 (1991) (describing the Northern Cheyenne efforts and their aftermath).

276. AMBLER, *supra* note 4, at 85-86. See also H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982) ("Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding.").

In addition, in 1975, 25 of the mineral producing tribes formed the Council for Energy Resources Tribes (CERT), primarily to provide information, technical expertise, and other advice designed to assist tribes in taking control of mineral development on their lands. See generally AMBLER, *supra* note 4, at 91-117.

277. 25 U.S.C. § 81 (1991).

negotiated agreements,²⁷⁸ but it became increasingly reluctant to continue without clear statutory authority.²⁷⁹ Then in 1980 the Department determined that it had no authority to approve an oil and gas agreement between the Northern Cheyenne Tribe and ARCO, calling into question the legality of existing negotiated agreements.²⁸⁰ The uncertainty engendered by Interior's determination was a key factor in the passage of the Indian Mineral Development Act two years later.

B. *Indian Mineral Development Act of 1982*

In 1982, Congress resolved the legal uncertainty by enacting the Indian Mineral Development Act.²⁸¹ The IMDA, part of the spate of self-determination legislation of the 1970s and 1980s, was intended "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources."²⁸² To achieve those purposes, the IMDA focused on remedying the major restraints of the 1938 Leasing Act: the lack of tribal control and economic benefits.

278. Between 1975 and 1981, the Department of Interior approved seven agreements, and three more were pending approval in early 1982. *Indian Mineral Development Hearings, supra* note 112, at 169 (detailing the ten agreements). Before an agreement could be approved, DOI was required to undertake "a rather cumbersome case-by-case analysis" to determine whether the agreement was a lease under the 1938 Act or a service contract under § 81. H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982).

279. *Indian Mineral Development Hearings, supra* note 112, at 71-72 (statement of Kenneth L. Smith, Ass't Sec'y for Indian Affairs, Dept. of the Interior). *See also* H.R. REP. NO. 746, 97th Cong., 2d Sess. 4 (1982).

280. AMBLER, *supra* note 4, at 87.

281. 25 U.S.C. §§ 2101-2108 (1991). Although the IMDA called for the Secretary to promulgate implementing regulations within 180 days, *see id.* § 2107, final regulations were not promulgated until March 30, 1994, and did not become effective until April 29, 1994. 59 Fed. Reg. 14,960 (1994) (to be codified at 25 C.F.R. pt. 225). Revised rules for the 1938 Indian Mineral Leasing Act were proposed at the same time as the rules for the IMDA, *see* 56 Fed. Reg. 58,734 (1991), but the comment period on the 1938 Act rules was reopened in September 1992, for 60 days. 57 Fed. Reg. 40,298 (1992). The Bureau of Indian Affairs subsequently issued the IMDA rules separately. 59 Fed. Reg. 14,960, 14,961 (1994). The revised 1938 Act regulations are expected in October 1994. *See* 59 Fed. Reg. 20,478, 20,257 (1994).

282. S. REP. NO. 472, 97th Cong., 2d Sess. 2 (1982); *see also* Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1458 (9th Cir. 1986). Although the primary purposes of the IMDA were to benefit the tribes, a further impetus for the legislation was the national goal, established during the 1973 oil embargo, of energy independence by 1980, coupled with a presidential call for a doubling of coal production by 1985. U.S. GENERAL ACCOUNTING OFFICE, INDIAN NATURAL RESOURCES—PART II: COAL, OIL AND GAS: BETTER MANAGEMENT CAN IMPROVE DEVELOPMENT AND INCREASE INDIAN INCOME AND EMPLOYMENT 1 (1977). Several sponsors of the IMDA noted that the Act could benefit the nation generally by increasing domestic energy production and reducing American dependence on foreign sources. *See* 128 CONG. REC. 29400-01 (1982) (remarks of Sen. Melcher), 21332 (remarks of Rep. Udall), and 21334 (remarks of Rep. Bereuter).

The means chosen by Congress was to expand tribal options beyond the standard mineral lease, authorizing all tribes to enter into negotiated mineral development agreements. The IMDA applies to a broader spectrum of lands than the 1938 Act, covers every mineral resource, permits mineral development arrangements of all types, and accords tribes increased control over, and potentially increased revenue from, mineral development on Indian lands. In the interest of maximum flexibility, the IMDA retained intact the leasing rights of IRA tribes,²⁸³ and the right of tribes to continue leasing under the Indian Mineral Leasing Act of 1938.²⁸⁴ Those options, however, are little used. By 1988 there were few standard lease sales, and most of those involved allotted lands.²⁸⁵

1. Mineral Agreements

The core of the IMDA is the provision authorizing tribes to enter into mineral agreements.²⁸⁶ Any Indian tribe, subject to secretarial approval, "may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement" for mining activities.²⁸⁷ Mineral agreements are available for all mineral resources²⁸⁸ in which the tribe "owns a beneficial or restricted

283. See *supra* text accompanying notes 99-100.

284. 25 U.S.C. § 2105 (1988). Congress intended to leave the 1938 Act intact, "so that tribes that prefer to use the existing competitive leasing process can do so." S. REP. NO. 472, 97th Cong., 2d Sess. 5 (1982).

285. AMBLER, *supra* note 4, at 241; M. Julia Hook & Britt D. Banks, *The Indian Mineral Development Act of 1982*, 7(4) NAT. RES. & ENV'T 11, 52 (1993).

286. The Act also provided a form of retroactive authorization for existing non-lease arrangements. The Secretary was directed to review the terms of all agreements approved as service contracts, see *supra* text accompanying notes 277-79, and determine if modifications were necessary to bring the agreements into compliance with the IMDA. 25 U.S.C. § 2104(a) (1988). If the terms of an agreement were in compliance, or were brought into compliance, then it would be treated as a valid mineral agreement under that Act. *Id.*

287. 25 U.S.C. § 2102(a) (1988). Agreements may be negotiated for exploration, extraction, processing, "other development," or sale or other disposition of the production or products of mineral resources. *Id.* Neither the Act nor the proposed regulations define the various types of possible agreements; that omission may be deliberate, since the point is to accord tribes maximum flexibility. Detailed descriptions of the most common types of agreements are available at AMBLER, *supra* note 4, at 241-43; Lipton, *supra* note 125, at 7-10; Peter F. Carroll, *The Dawning of a New Era: Tribal Self-Determination in Indian Mineral Production*, 9 PUB. LAND L. REV. 81, 88-89 (1988); Alvin J. Ziontz, *Indian Self-Determination: New Patterns for Mineral Development*, INST. ON INDIAN LAND DEVELOPMENT—OIL, GAS, COAL AND OTHER MINERALS 13-1, 13-8 - 13-16 (Rocky Mt. Min. L. Fdn. 1976).

288. Mineral resources are defined in the IMDA as "oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources." 25 U.S.C. § 2102(a) (1991). The regulations contain a more detailed list: "Minerals includes both metalliferous and non-metalliferous minerals; all hydrocarbons including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral." 56 Fed. Reg. 14,960, 14,972 (1994) (25

interest";²⁸⁹ the Act thus reaches the tribal mineral estate reserved under allotted or off-reservation lands. Moreover, mineral resources belonging to allottees may be included in a tribal agreement, subject to the concurrence of the parties and a finding by the Secretary of the Interior that participation in the tribal agreement is in the best interest of the allottee.²⁹⁰

While the various types of mineral agreements all offer increased tribal control over standard 1938 Act leases, they vary in the degree of control, and consequently in the degree of risk. Negotiated leases are the least risky approach, although they offer tribes no ownership interest in the development.²⁹¹ Joint ventures place tribes in the role of partners in the development, but are riskier since the tribe shares in both the costs and the profits.²⁹² Where there are no profits, the tribe would share in the losses. The risk of loss can be reduced by a mineral agreement which provides that the tribe can acquire a joint venture interest after exploration has revealed that minerals are available in sufficient quantities to justify the risk.²⁹³ That arrangement leaves tribes without an ownership interest during the early phases of the development.

Production sharing arrangements are similar to joint ventures except that the tribe receives a share of the minerals produced rather than a share of the profits.²⁹⁴ In a production sharing agreement, however, unlike a joint venture, the mining company controls the early phases of development, pays all costs, and recoups its costs from a stipulated percentage of the production.²⁹⁵ But like the joint venture, the production sharing agreement places a risk of loss on the tribe; in consequence, production sharing is not recommended where the relationship between costs of production and prices is unstable or

C.F.R. § 225.3). Under the proposed rules, a similar definition would apply to the 1938 Act. 59 Fed. Reg. 58,734 58,738 (1991) (25 C.F.R. § 211.3).

289. 25 U.S.C. § 2102(a) (1988).

290. *Id.* § 2102(b). Although the IMDA does not call for tribal consent or consultation for development of allottees' mineral resources, the provision for bringing allotted minerals into a mineral agreement represents a significant recognition of the tribe's interest in mineral development throughout its territory. The provision recognizes, if only partially, that tribes are governments and not simply mineral owners. Maxfield, *supra* note 113, at 70.

291. AMBLER, *supra* note 4, at 243.

292. *Id.* at 242; Lipton, *supra* note 125, at 7.

293. Lipton, *supra* note 125, at 8.

294. *Id.* at 9 ("The production sharing agreement differs basically from the joint venture in that the production itself is shared, in a form of share-cropping arrangement, rather than the profits.").

295. *Id.*

unpredictable.²⁹⁶

The riskiest approach for tribes, but the approach which provides the greatest control, is the service contract. Under a service contract, the tribe hires an operator to carry out the mining activities, but maintains total control, pays all costs, and takes all the risks of loss.²⁹⁷ Few tribes can afford either the capital or the risk attendant upon a service contract arrangement.

Tribes are not bound by the parameters of each type of agreement, but can enter into any mineral development arrangement agreeable to the parties and approved by the Secretary.²⁹⁸ Besides the crucial opportunity for a tribal ownership interest in mineral development, the great advantage of mineral agreements is flexibility. Economic flexibility is key. Smaller companies can participate in mineral development on Indian lands by offering little or no bonus in exchange for a larger share of the profits.²⁹⁹ Tribes can forego royalties in exchange for a share of net profits, or provide for escalating royalty payments over the life of the agreement.³⁰⁰

In addition to flexibility in revenue provisions, mineral agreements can be structured to include other types of provisions not available under 1938 Act leases.³⁰¹ The term of an agreement can be extended or limited.³⁰² The agreement can provide for enhanced environmental controls³⁰³ or tribal employment preferences, education and job-training programs, contracting of tribal businesses for related services such as road maintenance and security, and acquisition of

296. *Id.*; AMBLER, *supra* note 4, at 243.

297. Lipton, *supra* note 125, at 10; AMBLER, *supra* note 4, at 242.

298. As the regulations provide, "No particular form of agreement is prescribed." 59 Fed. Reg. 14,960, 14,973 (1994) (25 C.F.R. § 225.21(b)). Many of the existing mineral agreements have been hybrids. AMBLER, *supra* note 4, at 242.

299. AMBLER, *supra* note 4, at 240.

300. *Id.* at 240, 243; *Indian Mineral Development Hearings*, *supra* note 112, at 27 (statement of Terry Knight, Chairman, Ute Mountain Ute Tribe).

301. Total flexibility is not available. The regulations specify 21 provisions that "shall, if applicable" be addressed in the agreement. These requirements are primarily necessary to ensure the legality and operation of the agreement, and include dressed in the agreement. These requirements are primarily necessary to ensure the legality and operation of the agreement, and include such matters as the parties, the land involved, the duration of the agreement, bond and insurance requirements, auditing and accounting procedures, and the like. 59 Fed. Reg. 14,960, 14,973 (1994) (25 C.F.R. § 225.21(b)).

302. *Indian Mineral Development Hearings*, *supra* note 112, at 27 (statement of Terry Knight, Chairman, Ute Mountain Ute Tribe). *See also* the IMDA regulations at 25 C.F.R. § 225.21(b)(2), requiring only that the agreement set forth the duration. 59 Fed. Reg. 14,960, 14,973 (1994).

303. *Indian Mineral Development Hearings*, *supra* note 112, at 27 (statement of Terry Knight, Chairman, Ute Mountain Ute Tribe). *See also* the discussion of tribal environmental authority, *infra* at section IV.B.

equipment once production is completed.³⁰⁴ Mineral agreements can also be structured to take advantage of tribal exemptions from state taxation.³⁰⁵

By 1988, tribes had negotiated 67 alternative mineral agreements, primarily for oil and gas.³⁰⁶ Of these agreements, about half were negotiated leases containing provisions not available under the standard 1938 Act mineral lease, and the remainder were hybrids of the various other options available under the IMDA.³⁰⁷

Despite widespread use, however, mineral agreements under the 1982 Act were not the perfect solution. By the time the IMDA was enacted in 1982, the energy boom of the 1970s had waned and the mining industry was in a "depressed condition."³⁰⁸ Many tribes found that "the companies were no longer lined up at the tribes' doors in such numbers."³⁰⁹ Flexible arrangements that would have permitted tribes to take full advantage of the energy boom were not always advantageous during poor markets. Negotiated agreements take time, expertise, and information: commodities not always available to tribes new to minerals management.³¹⁰ Moreover, since alternative agreements require a greater investment of tribal resources and a higher degree of risk, some tribes during the 1980s saw mineral leases as providing a stable and dependable, if more modest, source of tribal income.³¹¹ Nonetheless, mineral agreements, with their greater flexibility and opportunity for tribal control, remained the preferred route for tribes undertaking mineral development activities.

304. AMBLER, *supra* note 4, at 243; *Indian Mineral Development Hearings*, *supra* note 112, at 27 (statement of Terry Knight, Chairman, Ute Mountain Ute Tribe).

305. *Id.*; AMBLER, *supra* note 4, at 241; *see also* discussion of state taxation of non-Indian mineral companies under the 1982 Act, *infra* at section III.B.3.

306. AMBLER, *supra* note 4, at 241.

307. *Id.* at 241-43.

308. By the mid-1980s, "[f]oreign competition, lower prices, and a diminished demand for minerals have spelled trouble for the entire industry." SMITH, *supra* note 1, at 163.

309. AMBLER, *supra* note 4, at 89.

310. *Indian Mineral Development Hearings*, *supra* note 112, at 127 (statement of Marvin J. Sonosky, arguing that the IMDA "would match uninformed and uneducated Indians against highly sophisticated, informed and educated geologists, petroleum and mineral engineers and lawyers specializing in oil, gas and minerals."); Lorraine Ruffing, *Agenda for Action*, 6 AM. INDIAN J. 14, 16 (July 1980) ("[T]he corporations have had a monopoly on geological data since it was they who did the exploration."). *See also Indian Mineral Development Hearings*, *supra* at 93-94 (statement of members of the Northern Cheyenne Tribe); AMBLER, *supra* note 4, at 260; U.S. FEDERAL TRADE COMMISSION, STAFF REPORT ON MINERAL LEASING ON INDIAN LANDS 95 (1975).

311. "For tribes, leasing is the easiest way in which to do business. It requires relatively little management responsibility and it does not expose the tribe to the risk of loss." Daniel H. Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 644 (1976). *See also* AMBLER, *supra* note 4, at 260.

2. Trust Relationship

Mineral agreements under the 1982 Act, like leases under the 1938 Act, require the approval of the Secretary of the Interior. As trustee for tribal resources, the Secretary must determine that the proposed mineral agreement is "in the best interest of the Indian tribe"³¹² In making that determination, the Secretary is directed to consider a variety of factors, which were derived from the "all relevant factors" standard which the federal courts mandated for trust decisions under the 1938 Act.³¹³ Specifically, the Act requires the Secretary to consider the potential economic return, the potential "environmental, social, and cultural effects" on the tribe, and the provisions in the agreement for resolving disputes between the parties.³¹⁴ The regulations expand the Secretary's duty to consider all relevant factors beyond the initial decision to approve or disapprove the agreement, and extend that duty to any administrative action which affects the interests of the tribe as mineral owner.³¹⁵

In the interest of tribal control over resource development, the Act also provides that once the Secretary has made an initial decision to approve or disapprove a mineral agreement, the Secretary must provide at least 30 days written notice to the tribe along with the Secretary's findings.³¹⁶ The purposes of the notice requirement are to ensure that tribes are fully aware of both the potential benefits and the potential risks of the agreement, and to accord tribes an opportunity to reconsider their decisions before the Secretary's action becomes final.³¹⁷ The opportunity to reconsider includes the right of the tribe unilaterally to rescind the agreement during the notice period.³¹⁸

Once the agreement is approved, however, tribal control over further stages of development may be more limited. For example, the

312. 25 U.S.C. § 2103(b) (1988).

313. See *supra* text accompanying notes 198-200.

314. 25 U.S.C. § 2103(b) (1988).

315. In making those determinations, the regulations direct the Secretary to consider "any relevant factor, including, but not limited to: economic considerations, such as date of lease or minerals agreement expiration; probable financial effects on the Indian mineral owner; need for change in the terms of the existing minerals agreement; marketability of mineral products; and potential environmental, social and cultural effects." 56 Fed. Reg. 14,960, 14,972 (1994) (25 C.F.R. § 225.3)).

316. 25 U.S.C. § 2103(c) (1988).

317. S. REP. No. 472, 97th Cong., 2d Sess. 6 (1982). See also *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1460 (9th Cir. 1986).

318. *Quantum Exploration*, 780 F.2d at 1460. The non-Indian party to the agreement has no remedy if the tribe chooses to rescind, since an agreement is not valid prior to the Secretary's final approval. *Id.*

regulations provide that, unless specified otherwise in the agreement, tribal consent is not required before the Secretary may approve an assignment of a mineral agreement.³¹⁹ Similarly, the right to issue notice of noncompliance or cancellation rests with the Secretary rather than with the tribe.³²⁰ Tribes that wish to retain control throughout the development process, therefore, should build those protections into the agreement itself.³²¹

In addition to the statutory duty to act in the tribe's best interest, the Secretary is charged with providing advice, assistance, and information during the negotiations for a mineral agreement.³²² Because that duty arises only upon the request of the tribe and then only "to the extent of [the Secretary's] available resources,"³²³ the Secretary's failure to provide advice, assistance, or information may not give rise to an action for breach of trust. Nonetheless, the duty to provide advice and assistance is consistent with the Secretary's role as trustee of Indian resources, and would serve to ensure that mineral agreements are in fact in the best interest of the tribe. Congress, however, has provided the Interior Department with neither the funds nor the staff necessary to provide this assistance.³²⁴

The specific statutory duties imposed by the IMDA are aspects of the Secretary's general trust obligation for the management of tribal mineral resources. Under the judicially developed trust doctrine, the central element of an enforceable trust relationship is the Secretary's comprehensive management and control of the tribal resources.³²⁵ Where control over the development of the resources rests with the tribe rather than the Secretary, the Secretary may have no enforceable trust obligation.³²⁶ Nonetheless, despite the fact that the IMDA is

319. 59 Fed. Reg. 14,960, 14,976 (1994) (25 C.F.R. § 225.33).

320. 59 Fed. Reg. 14,960, 14,976 (1994) (25 C.F.R. § 225.36).

321. For example, Interior suggests that mineral agreements include a provision "describing the rights of the parties to terminate or suspend the minerals agreement." 59 Fed. Reg. 14,960, 14,973 (1994) (25 C.F.R. § 225.21 (15)).

322. 25 U.S.C. § 2106 (1988). The negotiation period during which this duty exists runs from the time the developer first contacts the tribe until the Secretary's final decision on approval of the agreement. *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1461 (9th Cir. 1986).

323. 25 U.S.C. § 2106 (1988).

324. *AMBLER*, *supra* note 4, at 239. The unavailability of resources to meet these obligations was anticipated by the Department, which described the provision as "unwieldy and potentially very costly." H.R. REP. NO. 746, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.A.N. 3465, 3475 (report of the Department of the Interior).

325. *See, e.g., United States v. Mitchell*, 463 U.S. 206 (1983). *See also* the discussion *supra* at text accompanying notes 178-183.

326. *Sankey v. United States*, 22 Cl. Ct. 743, 747-48, *aff'd*, 951 F.2d 1266 (Fed. Cir. 1991) (ruling that the Secretary has no enforceable trust obligation to exercise allottees' rights to royalties in kind when regulations specifically place exercise of that right with the lessor allottee).

designed to accord tribes greater control over mineral development, the fiduciary responsibilities established in cases arising under the 1938 Leasing Act³²⁷ apply as well to mineral agreements under the 1982 Act. The IMDA expressly extends the trust doctrine to cover "the rights of a tribe. . . in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement."³²⁸ Congress specifically intended that the trust obligations of the Secretary for tribal mineral resources would remain intact, unaltered by enactment of the IMDA.³²⁹ Accordingly, the Secretary should be liable for breach of trust for failure to adequately monitor the developer's performance of the agreement, for royalty mismanagement, for approving communitization agreements without consideration of all relevant factors, and the like.³³⁰

Nonetheless, despite its express recognition of the Secretary's trust responsibilities to the tribes, the IMDA also provides that "the United States shall not be liable for losses sustained by a tribe or individual Indian" under a mineral agreement.³³¹ The purpose of this hold-harmless provision is to ensure that the Secretary, once a mineral agreement has been approved as in the best interest of the tribe, is not held to be a guarantor or insurer that the tribe will actually profit from the agreement.³³² Mineral agreements, particularly non-lease arrangements, are riskier than standard 1938 Act leases, with the potential for greater economic returns but also for economic loss. The intent of the hold-harmless provision is that if tribes wish to become partners in development, then tribes must take the risk of loss. Both the tribe by entering into an agreement, and the Secretary by approving it, will

327. See *supra* text accompanying notes 186-200.

328. 25 U.S.C. § 2103(e) (1988). The Act also extends that trust protection to allottees whose minerals are included in a tribal mineral agreement. *Id.*

329. S. REP. NO. 472, 97th Cong., 2d Sess. 4-5 (1982) ("The Secretary's trust responsibility would remain intact."); 128 CONG. REC. 29400 (1982) (remarks of Sen. Melcher) ("The trust responsibility of the Federal Government with respect to tribal mineral resources remains unaltered by the bill. In fact, the Secretary of the Interior has an obligation to assist tribes from the very inception of agreements and his responsibility to protect their interests will continue for the duration of the agreement.")

330. For discussion of these duties of the Secretary under the 1938 Act, see *supra* text accompanying notes 186-200. See also H.R. REP. NO. 746, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3470 (noting as an example the Secretary's trust obligation to monitor royalty reporting). The Secretary's fiduciary obligation for royalty management also now arises under the 1983 Federal Oil and Gas Royalty Management Act, discussed *infra* at text accompanying note 351.

331. 25 U.S.C. § 2103(e) (1988).

332. H.R. REP. NO. 746, 97th Cong., 2d Sess. 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3469-70; S. REP. NO. 472, 97th Cong., 2d Sess. 12 (1982).

exercise their best business judgment, but the Secretary is not responsible in a suit for breach of trust if the agreement ultimately proves unwise.³³³

3. State Taxation

One substantial advantage of mineral agreements under the IMDA is the potential to structure the agreements to avoid state taxation of mineral production.³³⁴ State mineral taxes are generally imposed on the producer of the minerals, and the IMDA offers tribes increased opportunities to become mineral producers. In addition, the structure and purposes of the IMDA strengthen the argument that state taxes on non-Indian producers are preempted.

Absent express congressional consent to state taxation, Indian interests within Indian country are exempt from state taxes.³³⁵ More specifically, states may not tax tribal interests in mineral production.³³⁶ In their passive role of lessors, tribes are thus exempt from state taxes on their bonuses, rents, and royalties from mineral lessees.³³⁷ Most state mineral taxes, however, are imposed directly on the producer of the minerals, and under lease arrangements the producer is the non-Indian lessee.

Mineral agreements, on the other hand, often place the tribe in the role of mineral producer. Joint ventures and production sharing contracts accord tribes a percentage ownership interest in the production, and service contracts, when full ownership remains with the tribe, make the tribe the sole producer. To the extent that state taxes on mineral production are imposed on the tribe as producer, the taxes are invalid. State mineral taxes should thus be invalid where a service contract is employed, and invalid on the tribe's percentage of a joint

333. Breach of trust is still an option if the Secretary failed to act in the tribe's best interest in approving the agreement in the first place. The hold-harmless provision:

[S]imply restates the law as it exists today. If the Secretary, acting as trustee, approves a lease or an agreement or otherwise acts in relation to the trust resources of an Indian tribe and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability.

H.R. REP. NO. 746, 97th Cong., 2d Sess. 7-8 (1982), reprinted in 1982 U.S.C.C.A.N. 3465, 3469-70.

334. AMBLER, *supra* note 4, at 200.

335. Oklahoma Tax Comm'n v. Sac and Fox Indian Nation, 113 S.Ct. 1985 (1993); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

336. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985). See the discussion of *Montana* *supra* at text accompanying notes 209-215.

337. *Id.*

venture or production sharing agreement.³³⁸

Mineral agreements do not, however, shield non-Indian producers from state mineral taxes. Instead, the taxability of the non-Indian producer's share depends upon whether the state taxes are barred by federal statute or preempted by principles of federal Indian law.³³⁹ In its most recent decision on the issue, the Supreme Court held in *Cotton Petroleum Corp. v. New Mexico* that state oil and gas taxes on the lessor under a 1938 Act lease were neither barred by the 1938 Act nor preempted.³⁴⁰ Several of the factors crucial to the outcome in *Cotton Petroleum*, however, are not present in 1982 Act mineral agreements.

First, the Court in *Cotton Petroleum* ruled that state taxation of mineral lessees was not barred by the 1938 Act because the state taxes would not frustrate the purposes of that statute.³⁴¹ The 1938 Act, the Court stated, was intended to provide tribal revenue, but not "to remove all barriers to profit maximization."³⁴² The 1982 Act, by contrast, is expressly intended "to maximize the financial return" from the tribal mineral estate.³⁴³ Accordingly, since state taxes on non-Indian producers represent a barrier to profit maximization,³⁴⁴ those taxes frustrate the purposes of the 1982 Act and consequently should be barred by the statute.

In addition, the Court in *Cotton Petroleum*, in holding that the state taxes were not preempted, relied in part on a finding that the state production taxes had no negative impact on tribal mineral development.³⁴⁵ The negative impact of state taxes on non-Indian producers under mineral agreements, however, is more readily apparent. The success of mineral agreements of all kinds, and consequently the success of the IMDA itself, depends upon the tribe's ability to negotiate the best possible terms. State mineral taxes directly impede that ability by introducing a financial burden on the non-Indian party that

338. Israel, *supra* note 311, at 650; Lipton, *supra* note 125, at 8-10. *But see* Lipton, *supra* note 125, at 8 (arguing that a joint venture operating as a separate corporation would not be exempt from state mineral taxes).

339. The preemption analysis for state taxation of non-Indian companies doing business in Indian country is discussed *supra* at text accompanying notes 235-239.

340. 490 U.S. 163, 182-87 (1989). *See* the discussion of *Cotton Petroleum* *supra* at text accompanying notes 226-254.

341. *Cotton Petroleum*, 490 U.S. at 179-80.

342. *Id.* at 180.

343. S. REP. NO. 472, 97th Cong., 2d Sess. 2 (1982). In fact, a proposed amendment to the IMDA to authorize state taxation of the non-Indian producer's share was rejected. H.R. REP. NO. 746, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3470.

344. *See supra* text accompanying notes 216-222.

345. *Cotton Petroleum*, 490 U.S. at 187-91.

must be taken into account in reaching an agreement. The financial impact from state taxes could have considerably more than "a marginal effect"³⁴⁶ on the value of mineral agreements to the tribes. Based on the adverse effect on tribal mineral development under the 1982 Act, then, state production taxes on the non-Indian parties should be preempted.³⁴⁷

4. Conclusion

The Indian Mineral Development Act of 1982 thus represents significant progress for tribes in their drive to take control of mineral development on Indian lands. The Act eliminates many of the restrictions of standard mineral leasing, increasing the opportunities for tribal participation and revenue enhancement, while maintaining the fiduciary obligations of the federal government. Nonetheless, the Act contains pitfalls for unwary tribes. Under the proposed regulations, tribal consent and control of certain activities beyond approval of the agreement will be lost if not written into the agreement itself. Crucial information concerning the mineral resources and their markets is not yet fully available to tribal negotiators, making informed decision-making difficult. And the ability of the states to tax the non-Indian parties' share of production, with its consequent burden on the tribes' ability to negotiate terms, is at present uncertain. Nonetheless, for the most part tribes have been able to use the Indian Mineral Development Act to gain greater control over the development and management of tribal mineral resources.

C. *Federal Oil & Gas Royalty Management Act*

Although tribes moved away from the standard mineral lease in the 1980s, many mineral agreements negotiated under the 1982 Indian Mineral Development Act, as well as all leases entered into under the 1938 Act, provided for royalty payments. Despite the intent of the 1982 Act to maximize tribal returns from mineral development, however, federal royalty management remained inadequate, resulting in continuing and substantial financial losses for the tribes.

In early 1982, as the Linowes Commission issued its report on the

346. *Id.* at 187.

347. The issue may be mooted before the courts rule on it. Congress has directed the newly-created Indian Energy Resource Commission to make recommendations concerning state and tribal taxation of non-Indian mineral companies. *See infra* text accompanying notes 389-393. Congress' charge to the Commission was based on its understanding that *Cotton Petroleum* was wrongly decided. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 95-96 (1992).

sorry state of federal royalty management,³⁴⁸ the Department of the Interior created a new branch with authority for royalty management, the Minerals Management Service.³⁴⁹ One year later, Congress enacted the Federal Oil and Gas Royalty Management Act (FOGRMA) to improve royalty collection, management, and enforcement.³⁵⁰ FOGRMA also was intended to meet the federal trust responsibility to the tribes,³⁵¹ and to increase tribal control over royalty management.³⁵²

To those ends, FOGRMA defined the duties of the Interior Department and the lessees, strengthened information gathering and dissemination, and provided for inspections, interest on late or deficient payments, and civil and criminal penalties.³⁵³ The Act also authorized the Secretary to enter into cooperative agreements with tribes, under which the tribe could have access to royalty information and carry out inspections, audits, investigations, and other enforcement activities other than the collection of payments or penalties.³⁵⁴

Despite the apparent promise of FOGRMA and the newly created Minerals Management Service, however, little changed. First, the provision for tribal cooperative agreements was not drafted with tribes and their needs and limitations in mind.³⁵⁵ Interior assumed that tribes could provide staffing, technical expertise, and funding at the same levels as the states, an assumption unwarranted for many tribes.³⁵⁶ Moreover, the Minerals Management Service did not implement the cooperative program.³⁵⁷ By 1989, only four tribes had entered into cooperative agreements,³⁵⁸ even then, the federal

348. See *supra* text accompanying notes 167-173.

349. Davis, *supra* note 165, at 395.

350. 30 U.S.C. §§ 1701-1757 (1988).

351. 30 U.S.C. § 1701(b)(4) (1988). See also *Pawnee v. United States*, 830 F.2d 187, 189-90 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1987) (holding that FOGRMA creates enforceable trust obligations).

352. 30 U.S.C. § 1701(b)(5) (1988).

353. *Id.* §§ 1711-1723.

354. *Id.* § 1732(a)-(b).

355. AMBLER, *supra* note 4, at 133.

356. *Id.* at 135.

357. S. REP. NO. 216, 101st Cong., 1st Sess. 124 (1989). This report, submitted by the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, was a scathing indictment of the three Interior agencies — Bureau of Indian Affairs, Bureau of Land Management, and Minerals Management Service — responsible for oversight and management of mineral development on Indian lands. Of the three agencies, however, the report found MMS the least to blame: "The problem at MMS is not institutional incompetence as at BIA, or direct antagonism towards Indian interests as demonstrated by the callousness of BLM, but lack of a clear direction and mandate concerning Indians." *Id.* at 122.

358. The Navajo Nation and the Ute Tribe of Utah had entered into cooperative auditing

government retained control of enforcement and ultimate authority to determine which leases would be audited.³⁵⁹

Other royalty management improvements were similarly slow and insufficient. Some aspects of royalty management did improve during the 1980s: reporting errors were reduced, audits and inspections were conducted more regularly, and millions of dollars in royalties and penalties were collected.³⁶⁰ Nonetheless, by 1989 severe problems with theft and accounting errors remained.³⁶¹ In 1992, Congress concluded that "little has changed to improve the process" of federal royalty management since the enactment of FOGPMA nearly a decade earlier.³⁶² Accordingly, Congress determined once again to attempt a statutory solution to royalty management problems, and enacted the Indian Energy Resources Act of 1992.

D. *Indian Energy Resources Act of 1992*

Since the advent of the self-determination era of federal Indian policy in the 1960s, the federal government's stance toward the Indian nations has stabilized. The government-to-government relationship announced by President Reagan in 1983 has survived, as has the federal emphasis on increased tribal control and economic development.³⁶³ That continuing federal policy of tribal self-government is reflected in mineral development legislation.

In 1992, as part of the massive Energy Policy Act,³⁶⁴ Congress

agreements under which funds were distributed to the tribes, while the Southern Ute and Jicarilla Apache Tribes had entered into agreements under which MMS provided staff resources rather than funds. *Id.* at 124. See also AMBLER, *supra* note 4, at 137.

359. S. REP. NO. 216, 101st Cong., 1st Sess. 124 (1989).

360. AMBLER, *supra* note 4, at 132.

361. S. REP. NO. 216, at 105-21. The report was particularly harsh on the Bureau of Land Management, the Interior Department agency charged with detecting and preventing the theft of oil and gas from Indian lands. The report noted that while Committee investigators found oil theft at six of the eight lease sites they staked out in Oklahoma, *id.* at 107, BLM inspectors had recorded only nine isolated incidents of theft in eight years, and those reports were all called in by lease operators. *Id.* at 114. Moreover, BLM had failed to report the thefts to law enforcement authorities and "expressed little concern about the theft of Indian oil by fraudulent measurement." *Id.* at 115, 117.

362. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 96 (1992). An earlier 1992 congressional study similarly stated: "Despite MMS's promises that longstanding issues are being addressed, the Program has progressed with glacial speed while serious program and system deficiencies continue." STAFF OF HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 102D CONG., 2D SESS., FEDERAL MINERALS ROYALTY MANAGEMENT 3 (Comm. Print 1992).

363. See *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments*, 27 WEEKLY COMP. PRES. DOC. 783 (June 14, 1991). See also the discussion of tribes-as-states under amendments to federal environmental laws during the 1980s and 1990s, *infra* at text accompanying notes 533-552.

364. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

enacted the Indian Energy Resources Act (IERA).³⁶⁵ In essence, the IERA continues and expands the policy objectives of the Indian Mineral Development Act of 1982. The purposes of the IERA are to promote tribal economic self-sufficiency through energy development and to further tribal control of mineral development on Indian lands.³⁶⁶ To achieve these purposes, the Act establishes three energy resource programs consisting of demonstration projects, grants, and technical assistance for the development of energy resources and projects in Indian country.

First, the Secretary of Energy, in consultation with the Secretary of the Interior, is charged with establishing and implementing demonstration projects to increase development of energy resources on Indian reservations.³⁶⁷ The aim of these demonstration projects is to promote direct tribal control of mineral development through improved tribal management and technical capabilities.³⁶⁸ Accordingly, the Act calls for the Secretary of Energy to provide technical assistance as well as two types of grants: development grants to assist tribes in obtaining managerial and technical capacity for energy resource development, and grants for vertical integration projects.³⁶⁹

Vertical integration is a concept designed to ensure that tribes receive more of the economic benefits of mineral production and take more control over that process.³⁷⁰ At present, few tribal energy resources are processed or refined within Indian country.³⁷¹ Instead, Indian energy minerals are taken off-reservation for processing, with the result that tribes receive little or none of the economic benefits of processing activities.³⁷² Vertical integration projects, which promote the use or processing of tribal energy resources in Indian country,³⁷³

365. 25 U.S.C. §§ 3501-3506 (1992 Supp.).

366. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93 (1992).

367. 25 U.S.C. § 3503 (Supp. IV 1992).

368. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93 (1992).

369. 25 U.S.C. § 3503(a) (Supp. IV 1992). In addition to the grants, the Secretary is also charged with making low interest loans available to tribes for the promotion of energy resource development and vertical integration. 25 U.S.C. § 3503(b) (Supp. IV 1992). The Act authorizes appropriations of \$10 million each year for fiscal years 1994 through 1997 for each of the three financial programs: the two grant programs and the low interest loan program. 25 U.S.C. § 3503(c) (Supp. IV 1992).

370. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93, 94 (1992).

371. *Id.*

372. *Id.*

373. 25 U.S.C. § 3503(a)(2) (Supp. IV 1992). Sample vertical integration projects include "solar and wind energy, oil refineries, the generation and transmission of electricity, hydroelectricity, cogeneration, natural gas distribution, and clean, innovative uses of coal." *Id.* Grants may also be available for transportation and marketing of energy resources. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93, 94 (1992).

are intended to return to the tribal mineral owners such economic benefits as employment and management training opportunities, as well as greater direct economic returns on development.³⁷⁴ Along with increased economic effects, however, will come increased environmental effects. While the economic effects are presumably beneficial, the environmental effects of refining and processing activities can be severe.³⁷⁵ The Indian Energy Resources Act makes no provision for financial or technical assistance to tribes to counter the potential for environmental harm.

In addition to the grants for vertical integration and other demonstration projects, the Act authorizes the Secretary of Interior to make grants, and the Secretaries of Interior and Energy to provide technical assistance and data, to tribes for the purpose of developing tribal regulation of energy resources and participation in energy development activities.³⁷⁶ To those ends, funds can be used for employee training and education, development of tribal energy databases, development of tribal laws and regulations, development of tribal legal and governmental structures for environmental regulation, and enforcement and monitoring activities.³⁷⁷

Finally, the Act authorizes the Secretary of Energy to provide financial assistance to tribes, or the private sector in cooperation with tribes, for projects concerning energy efficiency and renewable energy.³⁷⁸ Funds are available for projects "to evaluate the feasibility of, develop options for, and encourage the adoption of energy efficiency and renewable energy projects on Indian reservations."³⁷⁹

In implementing the Act and its programs, the Secretary of Energy is directed to consult with tribes "in a manner that is consistent

374. *Id.*

375. See the discussion of the environmental effects of processing and refining activities, *infra* at text accompanying notes 480-483.

376. 25 U.S.C. § 3504(a) (Supp. IV 1992). Specifically, the Secretaries are authorized to assist tribes "in the development, administration, implementation, and enforcement of tribal laws and regulations governing the development of energy resources on Indian reservations." An additional \$10 million for each of fiscal years 1994 through 1997 is authorized for this program. 25 U.S.C. § 3504(d) (Supp. IV 1992).

377. *Id.* § 3504(b).

378. *Id.* § 3506.

379. *Id.* § 3506(a). The applicant "must evidence coordination and cooperation with, and support from, local educational institutions and the affected local energy institutions." *Id.* § 3506(b). The extent of involvement by these institutions is one of the factors the Secretary is to consider in determining the amount of financial assistance. *Id.* § 3506(c)(1). For the most part, funds are available only on a cost-sharing basis. *Id.* § 3506(d). No appropriation amount was authorized; rather, "sums as are necessary" are authorized. *Id.* § 3506(e).

with the Federal trust and the Government-to-Government relationships".³⁸⁰ While this statutory mandate is vague at best, Congress stated that it intended the Act and its consultation provision to require "the full participation" of tribes in developing regulations and policy initiatives.³⁸¹ The Act itself provides only that the Secretary "shall involve and consult with Indian tribes to the maximum extent possible and where appropriate,"³⁸² but all aspects of the implementation of the IERA would seem to be "appropriate" for tribal involvement and tribal involvement in all aspects would seem necessary to the "full participation" envisioned by Congress. Nonetheless, the consultation requirement is sufficiently ambiguous that complete tribal involvement in the Act's implementation is not assured.

In addition to the programs for furthering tribal control of and involvement in energy development, the Indian Energy Resources Act also establishes the Indian Energy Resource Commission.³⁸³ The Commission is composed of 18 members appointed by the Secretary of the Interior plus the Secretaries of the Interior and Energy or their designees.³⁸⁴ Only eight of the appointed members are chosen from tribal recommendations;³⁸⁵ six of the remaining members are appointed from the private sector, while three are state representatives and one is chosen from recommendations by national environmental organizations.³⁸⁶ Given the Commission's mandate, its composition is problematic. Not only do Indian interests represent less than a majority of the Commission membership, but eight individuals will speak for dozens of tribes, including tribes with a stake in the Commission's recommendations but without the "developable energy resources" necessary to be included.³⁸⁷

380. *Id.* § 3502.

381. H.R. REP. No. 474 pt. 8, 102d Cong., 2d Sess. 93 (1992).

382. 25 U.S.C. § 3502 (Supp. IV 1992).

383. *Id.* § 3505.

384. *Id.* § 3505(b).

385. *Id.* 3505(b)(1). These eight members are appointed "from recommendations submitted by Indian tribes with developable energy resources, at least 4 of whom shall be elected tribal leaders."

386. *Id.* 3505(b)(2)-(6). The private sector representatives include two each with expertise in "tribal and State taxation of energy resources," "oil and gas royalty management administration, including auditing and accounting," and "energy development". The three state representatives are appointed from "recommendations submitted by the Governors of States that have Indian reservations with developable energy resources."

387. As noted, only tribes with developable energy resources are authorized to make recommendations to the Interior Secretary regarding potential Commission members. And yet the Commission's statutory mandate includes making proposals regarding issues — such as dual state-tribal taxation — that potentially affect all tribes. On the difficulties inherent in federal appointment of a small number of individuals to speak for hundreds of tribes, see generally Nell

The Commission is charged with developing proposals on a number of aspects of mineral development, including two that have been troublesome under the 1938 and 1982 Acts.³⁸⁸ First, the Commission is to develop recommendations on dual tribal-state taxation of mineral lessees.³⁸⁹ This mandate is a direct reaction to the Supreme Court's 1989 decision in *Cotton Petroleum*, which validated concurrent state taxation of oil and gas lessees already taxed by the tribe.³⁹⁰ In charging the Commission with investigating the dual taxation issue, Congress made clear its belief that *Cotton Petroleum* was wrongly decided.³⁹¹ If the Commission gives proper weight to tribal sovereignty and the tribal need for governmental revenue, as well as to federal policies promoting tribal self-government and economic development, it should recommend that concurrent state taxing authority be abolished. Dual taxation forces tribes into a choice of intolerable alternatives: to impose a tribal tax on top of a state tax and thus reduce the market value of tribal minerals, or to forego a tribal tax and thus lose both the revenue and the regulatory control that a tax affords.³⁹² Any state tax, regardless of the percentage amount, imposes untenable burdens on tribal control over the development of mineral resources in Indian country, and should be expressly prohibited.³⁹³

Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25 (1993). As Professor Newton notes, many proposals "that appear to be designed to open up the consultative process to more tribes are much more likely to increase the appearance of consensus in Indian country and the ease with which Congress may obtain tribal input on legislation." *Id.* at 32.

388. The Commission is charged with seven specific duties, four of which focus on energy resource development. See 25 U.S.C. § 3505(k)(4)-(7) (Supp. IV 1992). Those four are designed to carry out the IERA. The Commission is mandated to develop proposals on incentives, including tax incentives, to promote the development of Indian energy resources; identify "barriers or obstacles" to energy resource development; and develop proposals for vertical integration in Indian country.

389. 25 U.S.C. § 3505(k)(1) (Supp. IV 1992). The Commission's recommendations are to cover dual taxation of all mineral resources, not just energy resources.

390. See the discussion of *Cotton Petroleum supra* at text accompanying notes 226-254 (1938 Act leases) and 340-347 (1982 Act agreements).

391. According to one report:

The Committee [on Interior and Insular Affairs] is concerned about the disincentive the *Cotton* case has created for oil and gas companies who wish to locate on Indian land. . . . The Committee strongly questions the Court's reasoning and views the allowance of this state severance tax as potentially contrary to the fundamental principles of tribal sovereignty and the Congressional policy to create economic development on reservations.

H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93, 95-96 (1992).

392. See the discussion *infra* at notes 451-452.

393. To the extent that the state provides services to the lessees within Indian country, and thus has a valid economic argument, there are means other than taxation available to address it. It may be that the services presently provided by the state could be provided instead by the tribe or the federal government, thus obviating the state's interest in taxation. Alternatively, either

Second, the Commission is directed to develop proposals on oil and gas royalty management.³⁹⁴ Despite royalty management reforms in 1982,³⁹⁵ Congress recently recognized the "disturbing truth" that "little has changed to improve the process" in the intervening decade.³⁹⁶ Instead, the industry remains on the honor system, underpayment of royalties continues to cost tribes millions every year, and there is still no method of tracing royalties from the source payment to the tribal owner.³⁹⁷ Having failed to effect any significant changes in the system with passage of the Federal Oil and Gas Royalty Management Act, Congress is offering the Commission an opportunity to do what Congress apparently cannot: develop real reforms of the present system.

The ultimate value of the IERA remains to be seen. Certainly the Act's promised technical and financial assistance should benefit tribes struggling to control mineral development with inadequate information, staffing, and funding. Beyond those aspects, however, the Act's assurances of tribal control are vague and the statutory language equivocal. The proof of Congress' worthy intentions may lie in the Commission's eventual recommendations and, perhaps more importantly, in congressional implementation of true reform. The Supreme Court's authorization of dual mineral taxation in *Cotton Petroleum* is overdue for congressional repudiation, and effective reforms of royalty management have eluded Congress for over a decade. If Congress is finally able to resolve taxation and royalty issues in favor of tribal self-government, tribes should benefit through increased tribal revenues as well as increased tribal control over mineral development in Indian country.

E. Conclusion

The past two decades have seen greatly increased tribal control

the lessee or the tribe could agree to payments in lieu of taxes, payments that would be narrowly tailored to the actual costs incurred by the states in providing the services. In this manner, the legitimate economic interests of the states could be adequately addressed without the present burdens on tribal self-government and economic development.

394. 25 U.S.C. § 3505(k)(2)-(3) (Supp. IV 1992). Specifically, the Commission is mandated to "make recommendations to improve the management, administration, accounting and auditing of royalties associated with the production of oil and gas on Indian reservations" and to "develop alternatives for the collection and distribution of royalties associated with production of oil and gas on Indian reservations." Although the Commission's mandate is written in terms of oil and gas, reforms in the royalty management system should extend to all minerals.

395. See *supra* text accompanying notes 350-354.

396. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 93, 96 (1992).

397. *Id.*

over mineral development of Indian lands. Tribal control over the initial decision to develop tribal minerals has been expanded; tribes not only must consent to the development agreement, but they are also accorded a 30-day right to reconsider before secretarial approval becomes final. In negotiating mineral agreements, tribes have gained the opportunity for ownership interests in mineral development, for enhanced economic benefits, and for secondary benefits such as employment preferences and training programs. Congress has promised funds for demonstration projects and grants to stimulate energy production, processing, and use on Indian lands, and has appointed a commission to address two of the major remaining problem areas: royalty management and state taxation of non-Indian producers.

Nonetheless, problems remain. Mineral agreements place tribes at greater risk than leases, and tribes too often negotiate without adequate information, expertise, or advice. While tribes have increased power over the initial decision whether to enter into a mineral agreement, tribal control over, or even consent to, later steps in the mineral development process is still limited. And the potential economic benefits of mineral development remain circumscribed by possible state taxation of the non-Indian producers and by the continuing failure of the federal government to institute a workable royalty management system.

These limitations on tribal control over mineral development and its economic impacts are inconsistent with modern federal policies promoting tribal self-government and economic self-sufficiency. In keeping with those federal policies, however, tribes have begun in the last decade or two to assert sovereign rights over certain aspects of mineral development. Acting as regulators, particularly in the fields of taxation and environmental protection, tribes are taking governmental control of resource development in Indian country.

V. TRIBES AS REGULATORS: CONTROL OF THE MINERAL ESTATE

The final role of Indian tribes in the development and management of the mineral estate is that of government. Indian tribes are not only beneficial owners of the mineral resources, not only lessors and now developers of the minerals, but also sovereign entities with governmental powers of regulation and taxation.

Since the onset of the federal policy of self-government and the enactment of the Indian Mineral Leasing Act of 1938, federal policy

regarding mineral development on Indian lands has ostensibly promoted tribal self-government. Tribal governmental rights, however, were generally limited to the power to consent to mineral leasing, a power essentially indistinguishable from the right of any landowner to consent to mineral development of the land. True federal recognition of Indian tribes as governments rather than mineral owners was all but nonexistent.³⁹⁸ Mineral development legislation in the 1980s and 1990s offers greater recognition of the role of tribes as governments, and greater opportunities for tribes to act as sovereigns as well as mineral owners and developers. Nonetheless, tribal regulatory control over mineral resources developed outside the federal scheme for mineral activities in Indian country.

The late 1960s and 1970s saw the "reemergence of tribal nationalism."³⁹⁹ As federal policy emerged from the termination years, and focused on tribal self-determination and economic self-sufficiency, tribes increasingly began to assert dormant governmental powers. The self-government promise of the Indian Reorganization Act of 1934 finally began to find expression more than three decades later.⁴⁰⁰

Since the founding of the nation, federal law has recognized tribes as "distinct, independent political communities" retaining inherent sovereign rights.⁴⁰¹ In particular, tribes retain the right to control internal tribal matters, "to make their own laws and be ruled by them."⁴⁰² In consequence, Indian tribes have inherent, and virtually plenary, sovereign power to regulate Indian conduct and Indian lands within reservation boundaries.⁴⁰³

398. The prime example is the lack of tribal authority over mineral development on allotments. Allotments are lands held in trust by members (citizens) of the tribe, within the tribe's territorial jurisdiction. Nonetheless, mineral leasing of allotted lands is controlled by the federal government, with tribes having no right to control or even consult in leasing decisions. See Maxfield, *supra* note 113, at 70; *Indian Mineral Development Hearings*, *supra* note 112, at 172 (statement of the Three Affiliated Tribes of the Fort Berthold Reservation).

399. The phrase was coined by Israel, *supra* note 311.

400. As Israel notes, "No single occurrence or event brought about the reawakening of tribal sovereignty." *Id.* at 624. Israel chronicles, however, three series of events that combined to create the great surge of tribal sovereignty during those years: increased protection of Indian rights, increased federal funding to tribes, and successful actions by tribes asserting their legal rights. *Id.* at 624-34.

401. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

402. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

403. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 444 (1989) (Stevens, J.).

Tribal regulation of Indians and Indian lands is subject to the plenary power of the federal government. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate" tribal governmental powers.). See also Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 124 U. PA. L. REV. 195 (1984). By contrast, states are permitted to regulate Indian conduct or Indian lands

Tribal authority over non-Indians and non-Indian lands, however, may be more limited. As a general proposition, tribes retain all governmental powers that have not been ceded by treaty, divested by act of Congress, or lost under the judicial doctrine of implied divestiture.⁴⁰⁴ Under Supreme Court doctrine, Indian tribes are impliedly divested of certain sovereign powers that are deemed inconsistent with their status as dependent sovereigns.⁴⁰⁵ The powers lost to tribes in this manner were initially limited to certain rights of the tribes vis-a-vis other nations,⁴⁰⁶ but in the late 1970s and early 1980s the Court extended the doctrine to encompass areas of the relations between tribes as governments and non-Indians.⁴⁰⁷

Under this expanded theory of implied divestiture, tribes are presumed to have lost regulatory jurisdiction over non-Indians on non-Indian fee land within Indian country.⁴⁰⁸ That presumption, however, is riddled with crucial qualifications. First, it applies only to non-Indian activity on fee land; non-Indian activity on Indian land remains subject to tribal regulation.⁴⁰⁹ Second, Indian tribes retain inherent governmental authority to regulate the activities of non-Indians who

inside Indian country only in "exceptional circumstances." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987). The Supreme Court has confined those circumstances to two situations: liquor regulation and conservation of species. *Rice v. Rehner*, 463 U.S. 713 (1983); *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165 (1977).

404. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

405. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). See also *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 424-25 (1989) (White, J.). The ill-reasoned and ahistorical *Oliphant* decision unleashed massive and continuing criticism. See, e.g., Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 267-274; Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

406. In the early 1800s, Chief Justice John Marshall determined, under the relations between the United States and the tribes, that tribes had lost the powers to freely alienate land and to enter into foreign relations. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-88 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). The doctrine then remained essentially dormant for 150 years, until revived and modified by Justice Rehnquist in *Oliphant*, 435 U.S. at 208-10.

407. *Id.* at 210 (criminal jurisdiction); *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (regulatory jurisdiction).

408. *Montana*, 450 U.S. at 565. Most recently, the Supreme Court has formulated the presumption as follows: "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." *South Dakota v. Bourland*, 113 S.Ct. 2309, 2316 (1993). Nonetheless, the Court in *Bourland* reaffirmed the *Montana* exceptions to the general proposition. *Id.* at 2320. The *Montana* exceptions are listed *infra* at text accompanying notes 410-412.

409. Non-Indians' "presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983); *Montana v. United States*, 450 U.S. 544, 557 (1981).

enter into consensual business relationships with the tribe.⁴¹⁰ In particular, the Supreme Court recognized tribal regulatory powers of "taxation, licensing, or other means" over those non-Indians who enter into "commercial dealing[s], contracts, leases, or other arrangements" in Indian country.⁴¹¹ And third, Indian tribes retain governmental powers to regulate non-Indian conduct on fee land which will have a substantial effect on the tribe. In its initial formulation of this standard, the Court recognized tribal regulatory power over non-Indian conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁴¹² Under that "direct effects" rubric, lower courts upheld assertions of tribal regulatory authority over non-Indians in such areas as building, health, and safety codes, sewer hook-up requirements, and in particular, zoning laws.⁴¹³ When the issue of tribal power to zone non-Indian fee land reached the Supreme Court, however, the Court cut back significantly on tribal regulatory authority.

In *Brendale v. Yakima Indian Nation*,⁴¹⁴ the Court ruled that tribes could zone non-Indian fee land only where the reservation, or an area of the reservation, had retained its "essential character" as Indian land.⁴¹⁵ If the essential Indian character of the region had been lost through significant non-Indian ownership of the land, however, zoning power belonged to the state.⁴¹⁶ Although the outcome in *Brendale* was an aggregate of three separate non-majority decisions,⁴¹⁷ a majority of the justices attempted some reformulation of

410. *Montana*, 450 U.S. at 565.

411. *Id.*

412. *Id.* at 566.

413. See *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982) (building, health and safety codes); *Lummi Indian Tribe v. Hallauer*, 9 Indian L. Rep. 3025 (W.D. Wash. 1982) (sewer hook-ups); *Knight v. Shoshone & Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (zoning); *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F.Supp. 1042 (N.D. Cal. 1988) (zoning); *Colville Confederated Tribes v. Cavenham Forest Industries*, 14 Indian L. Rep. 6043 (Colv. Tr. Ct. 1987) (zoning).

414. 492 U.S. 408 (1989). See generally Craighton Goeppele, Note, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 65 WASH. L. REV. 417 (1990).

415. *Brendale*, 492 U.S. at 440-43 (Stevens, J.).

416. *Id.* at 446-47.

417. The Court split 4-2-3. Four justices, led by White, argued that tribes had no authority to zone non-Indian fee land within Indian country, regardless of the character of the region, absent "serious injury" to tribal interests. Three justices, led by Blackmun, argued that tribes had full authority to zone non-Indian fee land within Indian country, regardless of the character of the region. And the two swing justices, led by Stevens, argued that the character of the region was controlling. The result was that tribes retain authority to zone where the region is of an essential Indian character (5-4), but may be divested of authority to zone where the region has lost that character (6-3).

the "direct effects" test for tribal regulatory authority over non-Indian conduct. Justice White, writing for himself and three other justices, focused on the fact that the direct effects test stated only that tribes "may" have regulatory authority over non-Indians.⁴¹⁸ Accordingly, White argued, tribes do not retain regulatory authority in every instance of a direct effect on the tribe, but only where the impact of the non-Indian conduct on the tribe is "demonstrably serious" and "im-peril[s]" the interests of the tribe.⁴¹⁹ Justice Blackmun, writing for three justices, would, if anything, have broadened the direct effects test. He argued that tribes have the authority to regulate non-Indian conduct on non-Indian fee land whenever that conduct "implicate[s] a significant tribal interest."⁴²⁰

The effects of *Brendale* on tribal regulatory authority over non-Indians are difficult to calculate. Although the "direct effects" standard has likely been modified, exactly what that modification is, or what the new standard might be, is elusive. Regardless of the precise standard, however, the *Brendale* decision reaffirms tribal regulatory authority over Indians and Indian lands,⁴²¹ as well as over non-Indians and non-Indian lands in many circumstances. While the regulatory powers of tribal governments encompass the full range of police powers,⁴²² two aspects of tribal sovereign authority crucial to mineral development — taxation and environmental regulation — will be the focus of this section.

A. *Taxation of Mineral Production*

Taxation of mineral extraction and production is a common governmental response to mining. Natural resources taxes provide governmental revenue, compensate the sovereign for the loss of the resource, internalize the social and environmental costs of mineral development, and help regulate the growth of mineral development and

418. *Brendale*, 492 U.S. at 429 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

419. *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 429-31 (1989).

420. *Id.* at 449-51. Blackmun then concluded that no power was more central to the tribes' interests than the power to zone. *Id.* at 457-58.

421. *Id.* at 443-45 (Stevens, J.) (noting that the Yakima Nation "of course, retains authority to regulate the use of trust land, and the county does not contend otherwise").

422. Other police powers relevant to mineral development include the powers to regulate health and safety, building standards, water use, zoning, and labor. See Walter E. Stern, *Environmental Compliance Considerations for Developers of Indian Lands*, 28 *LAND & WATER L. REV.* 77, 92-96, 101-02 (1993).

related activities.⁴²³ Through the use of severance, income, and property taxes,⁴²⁴ governments assert control over mineral development activities and impacts within their territories.

With the renewed emphasis on tribal self-government and economic development in the late 1960s and 1970s came renewed interest in the tribal power to tax. Long before the self-determination era, the tribal power of taxation was well established. The inherent right of tribes, as sovereigns, to tax both members and nonmembers engaged in activities in Indian country had been recognized by the federal courts since the late nineteenth century,⁴²⁵ and by the Department of the Interior since the self-government days of the Indian Reorganization Act.⁴²⁶ By 1976, when the American Indian Policy Review Commission reported to Congress that the taxing power of Indian tribes was an essential attribute of their sovereign status,⁴²⁷ the proposition seemed beyond question.

In the early self-determination era of the 1970s, however, tribes began exercising their taxing authority at an unprecedented rate. These new assertions of tribal powers, in turn, generated challenges by the taxed and regulated parties. During those years, many of the mineral-owning tribes enacted tax laws applicable to mineral lessees of Indian lands. Their primary reasons for taxation were those of any government: revenue and regulation. First, rents and royalties were set by the federal government at low rates, and the ability of tribes to renegotiate leases to enhance tribal income was severely limited. Taxation thus provided an additional and stable source of tribal revenue.⁴²⁸ Moreover, taxation as a form of regulation could be used to discourage pollution and, through tax credits, to encourage employment of tribal members and use of tribal products and services.⁴²⁹

423. Ronald A. Kaiser & James E. Fletcher, *State Policies and Practices in Coal Severance Taxation*, 27 NAT. RESOURCES J. 591, 595-97 (1987).

424. These are the most common forms of natural resources taxation. For explanations of the various types of natural resources taxes, see Denise DiPasquale, et al., *Natural Resource Taxation*, 29 AMER. U.L. REV. 281, 284-89 (1980); Rita Neumann, *Taxation of Natural Resource Production on Tribal Lands*, 63 TAXES 813, 816-18 (1985).

425. See, e.g., *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 99 (8th Cir. 1956); *Crabtree v. Madden*, 54 Fed. 426, 429 (8th Cir. Indian Terr. 1893).

426. *Powers of Indian Tribes*, 55 Int. Dec. 14, 46-48 (1934), reprinted in I Op. Sol. Dep't of Interior Relating to Indian Affairs 1917-1974 445, 465-66.

427. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT: TASK FORCE TWO: TRIBAL GOVERNMENT 310 (1976).

428. AMBLER, *supra* note 4, at 196.

429. *Id.* at 196-99.

Despite the benefits of these taxes for the tribes, however, mineral lessees challenged their application. Initially, taxation became a bargaining point in negotiated mineral agreements. During the 1970s, as tribes moved away from standard leasing and toward negotiated agreements, producers bargained to prevent tribes from exercising their right to tax. Some tribes during the post-energy boom years were forced to offer "blanket tax holidays" in exchange for other concessions from mining companies.⁴³⁰ Nonetheless, most tribes involved in mineral development retained their sovereign power to tax the companies involved in extracting the mineral wealth.

In addition to challenging tribal taxes at the bargaining table, mineral lessees also challenged tribal taxes in court. Oil and gas lessees on the Jicarilla Apache Reservation brought suit to enjoin a tribal severance tax enacted in 1976, arguing that the Tribe was without authority to impose a tax after the lease terms were finalized. In *Merrion v. Jicarilla Apache Tribe*,⁴³¹ the Supreme Court upheld the tribal tax as a valid exercise of the Tribe's inherent sovereign power to govern.⁴³² The lessees' argument, the Court noted, confused the tribe's dual roles as mineral owner and government.⁴³³ While a lessor has no right unilaterally to alter the terms of a lease, sovereign powers are another matter. The sovereign does not abandon its powers by failing to reserve them in a commercial contract, and the contract remains

430. *Id.* at 255. One example is the 1975 oil and gas agreement between Damson Oil Corporation and the Blackfeet Tribe, in which the Tribe agreed that it "shall never tax in any way whatsoever, whether directly or indirectly, the operations contemplated hereunder." Ziontz, *supra* note 287, at 13-21 (quoting Damson-Blackfeet contract).

431. 455 U.S. 130 (1982). The *Merrion* decision spawned considerable scholarly comment. See Fred L. Ragsdale, Jr., *The Taxation of Natural Resources by Indian Tribes: Merrion, a Comment*, 22 NAT. RESOURCES J. 649 (1982); Russel L. Barsh, *Merrion: False Hope for Clear Thinking*, 8 AMER. INDIAN J. 6 (1982); Samuel Febbraio, Jr., Note, *Tribal Severance Taxes: The Uncertain Sovereign Function: Merrion v. Jicarilla Apache Tribe*, 4 U. BRIDGEPORT L. REV. 133 (1982); David B. Wiles, Note, *Taxation: Tribal Taxation, Secretarial Approval, and State Taxation—Merrion and Beyond*, 10 AM. INDIAN L. REV. 167 (1982); Note, *Indian Tribe's Taxing Authority Extends over Nonmembers of Tribe: Merrion v. Jicarilla Apache Tribe*, 36 TAX LAW. 431 (1983); Stuart R. Day, Note, *Indian Law—Tribal Authority to Levy a Mineral Severance Tax on Non-Indian Lessees*, 18 LAND & WATER L. REV. 539 (1983); David Goldstein, Note, *Indian Law—Indian Taxation of Non-Indian Mineral Lessees*, 50 TENN. L. REV. 403 (1983); Anne M. Ryan, Note, *Tribal Taxation of Mineral Resource Development: An Analysis of Merrion v. Jicarilla Apache Tribe*, 25 ARIZ. L. REV. 220 (1983); Raymond E. Cantor, Comment, *Indian Sovereignty—Commerce Clause—Taxation*, 28 N.Y.L. SCH. L. REV. 1079 (1984). On the special issues of tribal taxation in Oklahoma, see Bradley S. Bridgewater, Note, *Taxation: Merrion v. Jicarilla Apache Tribe: Wine or Vinegar for Oklahoma Tribes?*, 37 OKLA. L. REV. 369 (1984).

432. *Merrion*, 455 U.S. at 137.

433. *Id.* at 145.

subject to subsequent governmental action.⁴³⁴ Thus, tribes as sovereign governments retain the power to tax nonmembers to the extent that the nonmembers enjoy the privileges of activities in Indian country.⁴³⁵ Since the non-Indian mineral developers availed themselves of the privilege of doing business on Indian lands, and benefited from the provision of tribal services funded by governmental revenues, they were subject to tribal taxation.⁴³⁶

Three years later, the Supreme Court reaffirmed that the tribal power to tax is an inherent sovereign power, and does not depend upon the form of the tribal government. In *Kerr-McGee Corporation v. Navajo Tribe of Indians*,⁴³⁷ a mineral lessee sought to differentiate taxes imposed by the Navajo Nation from the taxes upheld in *Merrion*. The Jicarilla Apache tribal government was organized under the Indian Reorganization Act of 1934,⁴³⁸ and its constitution, like those of most IRA tribes, called for secretarial approval of tax laws.⁴³⁹ The Navajo Nation, by contrast, was not an IRA government and its taxes were not approved by the Secretary of the Interior.⁴⁴⁰ In *Kerr-McGee*, the Supreme Court rejected any notion that secretarial approval of tribal taxes was a prerequisite to valid tax laws. The Court again stressed that the tribal power to tax derives from inherent sovereignty.⁴⁴¹ Absent a provision in the tribe's constitution or some other law mandating secretarial approval, no such approval is required.⁴⁴²

434. *Id.* at 146-47. If, however, the sovereign expressly bargains away its sovereign power to tax, the lease term would be binding.

435. *Id.* at 137-38, 141-42. The *Merrion* decision was not the first time the Court had stated that principle. In a pair of cases in the early 1980s, the Court expressly affirmed a tribe's inherent sovereign right to tax non-Indians who did business in Indian country. *Montana v. United States*, 450 U.S. 544, 565 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). See also *Burlington Northern Railroad Co. v. Blackfoot Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992). The Supreme Court of the Cheyenne and Arapaho Tribes recently extended this principle to uphold tribal severance taxes on oil and gas development on allotted lands held in trust for members of the tribes. *Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n*, No. CNA-SC-91-02 (Chey-Arap. S.Ct. 1994).

436. *Merrion*, 455 U.S. at 137-38, 140-42.

437. 471 U.S. 195 (1985).

438. See *supra* text accompanying notes 97-98.

439. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982). In upholding the Jicarilla Apache tax, the Supreme Court noted that any non-Indian concerns about unfair or unprincipled taxation were addressed by the requirement of prior secretarial approval. *Id.* at 141.

440. *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 471 U.S. 195, 197-98 (1985).

441. *Id.* at 198-201.

442. *Id.* at 198-99. The Court noted, in fact, that IRA tribes are free to amend their constitutions, with secretarial approval, to eliminate the requirement of secretarial approval of tribal laws. *Id.* at 199.

As federal policy settled more firmly behind tribal self-government and economic development, and as tribes took increasing control over mineral development activities on Indian lands, tribal mineral taxation expanded. Mineral taxes brought much-needed tribal revenue, which in turn helped fund much-needed tribal governmental services. The enactment of tax laws avoided the need for tribes to negotiate taxes in each agreement for development of tribal resources,⁴⁴³ and provided developers with advance information on their tax obligations.

In the early 1980s, then, non-Indian mineral producers generally submitted to paying tribal mineral taxes. State mineral taxes were also imposed on the producers, but under a long-standing practice were passed along to the tribes by deducting the taxes from royalties due.⁴⁴⁴ In 1985, however, the same year that *Kerr-McGee* was decided, the Supreme Court held that the pass-along practice constituted state taxation of Indians, and was therefore barred.⁴⁴⁵ Suddenly, non-Indian mineral companies were facing dual taxation.

Unable to escape the tribal taxes, the mineral lessees focused on the additional burden of state mineral taxes. Initially the challenges were successful: Montana's 30 percent severance tax on coal mined on Crow lands was held invalid.⁴⁴⁶ In *Cotton Petroleum Corporation v. New Mexico*,⁴⁴⁷ however, the Supreme Court held that state taxation on top of tribal taxation was not barred by the 1938 Indian Mineral Leasing Act,⁴⁴⁸ was not (under the circumstances of that case) preempted by principles of federal Indian law,⁴⁴⁹ and did not constitute an unlawful multiple tax burden under the Interstate Commerce Clause.⁴⁵⁰ Accordingly, the Court stated, non-Indian mineral lessees were subject to both tribal and state taxes on mineral production.

443. Ziontz, *supra* note 287, at 13-32.

444. See *supra* text accompanying note 206.

445. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). See the discussion of *Montana supra* at text accompanying notes 204-215.

446. *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988).

447. 490 U.S. 163 (1989).

448. See *supra* text accompanying notes 226-231.

449. See *supra* text accompanying notes 232-254.

450. *Cotton Petroleum*, 490 U.S. at 187-91. The Court determined that the obvious burden of dual taxation "is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction [to tax]." *Id.* at 163. The Court also rejected any need to apportion the state and tribal taxes under the Interstate Commerce Clause, noting that the Interstate Commerce Clause has never been held applicable to Indian tribes. *Id.* at 191-93. "Tribal reservations are not States." *Id.* at 192 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

But dual taxation places tribes in an untenable position. The dual tax burden renders tribal mineral development considerably less attractive than development of off-reservation minerals, reducing the value of the mineral resource. To the extent that companies continue to develop tribal minerals, dual taxation will result in higher market prices for tribal resources, decreasing their marketability. Either effect diminishes tribal control of mineral development on Indian lands and undercuts tribal economic development, in direct opposition to current federal Indian policy. The alternative, however, impacts the tribe not only as mineral owner and developer, but also as sovereign government. In order to attract mineral development in a dual tax situation, tribes may be forced to lower their tax rates or negotiate tax immunities in exchange for continued mineral development.⁴⁵¹ Like full dual taxation, that alternative also diminishes tribal control and undercuts economic development, since tribes lose considerable revenues and can no longer use taxation as a form of regulation. But it also cedes a sovereign power, again in direct opposition to the federal approach to tribes as governmental entities. While tax incentives for economic development are an increasingly common governmental tool, the concern is that tribes, like other governments desperate for jobs and industry, "are apt to bargain away their right to tax for nothing."⁴⁵²

The newly-created Indian Energy Resource Commission is charged with developing proposals to address the dual tribal-state taxation of mineral development,⁴⁵³ based on Congress' understanding that the Supreme Court's decision in *Cotton Petroleum* was contrary to tribal self-government and the federal policy of economic development.⁴⁵⁴ The Commission is also mandated to develop proposals for tax incentives for mineral development in Indian country.⁴⁵⁵ If the Commission properly considers not only the needs of the tribes as owners and developers, but also the sovereign rights of the tribes as governments, it should propose to lift the dual tax burden on tribal mineral development by barring concurrent state taxation of non-Indian producers.⁴⁵⁶

451. AMBLER, *supra* note 4, at 200, 255.

452. DiPasquale, *supra* note 424, at 297.

453. 25 U.S.C. § 3505(k)(1) (Supp. IV 1992). See *supra* text accompanying notes 374-377.

454. H.R. REP. NO. 474 pt. 8, 102d Cong., 2d Sess. 95-96 (1992).

455. 25 U.S.C. § 3505(k)(7) (Supp. IV 1992). The proposals may include, but are not limited to, such tax incentives as investment tax credits and enterprise zone credits.

456. State taxes should be barred, of course, even if the tribe does not impose a tax on the

B. *Environmental Controls*

Environmental regulation in Indian country, as elsewhere in the nation, was rudimentary at best before the middle of the twentieth century. By the late 1960s, however, national attention focused on environmental preservation, culminating in the landmark enactment of the National Environmental Policy Act (NEPA) in 1969.⁴⁵⁷ Based on NEPA's recognition of "the critical importance of restoring and maintaining environmental quality,"⁴⁵⁸ state and federal legislatures responded to public awareness with comprehensive pollution control and remediation programs.⁴⁵⁹

Environmental protection in Indian country lagged behind. During the years of growing environmental consciousness and concern, tribes were asserting increased control over their mineral resources and federal policy was encouraging tribal self-government.⁴⁶⁰ Both the tribal and federal governments, however, concentrated on development of the mineral resources rather than the environmental impacts of development.⁴⁶¹ Nonetheless, recognition of the adverse environmental effects of mineral development, particularly uranium mining in the Southwest,⁴⁶² was growing.

With increased awareness of environmental harm and increased national attention to the environment, tribal governments began to assert regulatory control over environmental matters. Tribal control over the environmental aspects of mineral development can arise in a

producers. The decision not to tax an activity, like the decision to tax, is a sovereign prerogative with which a state tax interferes.

457. 42 U.S.C. §§ 4321 *et seq.* (1988). NEPA is discussed *infra* at text accompanying notes 487-490.

458. 42 U.S.C. § 4331(a) (1988).

459. Environmental legislation was by no means new. For example, the Federal Water Pollution Control Act, precursor to the Clean Water Act, was first enacted in 1948, Act of June 30, 1948, ch. 758, 62 Stat. 1155, although it was amended frequently and substantially reworked in 1972. The Refuse Act, part of the Rivers and Harbors Act of 1899, also addressed water pollution, though enforcement of the Act's provision was non-existent until the 1960s. *See* 33 U.S.C. §§ 401 *et seq.* (1988). But the scope and extent of environmental legislation ushered in by NEPA was unprecedented.

460. *See supra* text accompanying notes 261-266.

461. In fact, one of the benefits of Indian minerals for mining companies was the possible shelter from state environmental laws, with tribes "agreeing to lower air and water quality standards than typically are required elsewhere." *Indian Mineral Development Hearings, supra* note 112, at 178 (statement of Russel L. Barsh). Although one factor in the decision of some tribes to impose a moratorium on development in the early 1970s was the lack of environmental protection measures, most tribes were forced by economic pressures to develop their mineral resources. AMBLER, *supra* note 4, at 72.

462. *See, e.g.,* Robert Hilgendort, *Black Mesa: Economic Development or Ecological Disaster for the Navajo?*, 30 NLADA BRIEFCASE 171 (1972); Sandra E. Bregman, *Uranium Mining on Indian Lands: Blessing or Curse?* 24 ENV'T 6 (Sept. 1982).

number of ways. Tribes are free, in negotiating mineral agreements, to include environmental protection provisions in the agreement. As with tax provisions in agreements, however, it may not benefit the tribe to circumscribe its governmental powers by delimiting them in contract clauses. In the absence of an express contract provision limiting governmental authority, Indian tribes have inherent sovereign powers to regulate Indian conduct and Indian lands within reservation boundaries, to regulate the activities of non-Indians who enter into consensual business relationships with the tribe, and to regulate non-Indian conduct on fee land which will have a substantial effect on the tribe.⁴⁶³ Under these powers, tribes exercise general police power over environmentally harmful activities.

Nonetheless, most future tribal environmental regulation will likely result from delegated authority under federal environmental laws.⁴⁶⁴ Federal environmental law has occupied the field in such areas as clean air, clean water, and waste management, establishing federal minimum standards and programs applicable nationwide.⁴⁶⁵ For the most part, the federal laws contemplate that all states will assume program authority in the state and that some tribes will assume program authority in Indian country, but that until that time, the appropriate federal agency will regulate environmental matters. Thus, in the absence of a federally-approved state or tribal program, the federal government will administer those federal standards and programs in state and tribal territories.⁴⁶⁶

The following sections describe the environmental impacts of mineral development and related activities, and explore the environmental protection options available to tribes to control the environmental aspects of mining in Indian country.

463. See *supra* text accompanying notes 403-413.

464. As governments possessing independent powers to regulate environmental matters, tribes are capable of assuming federally delegated regulatory powers. See *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (liquor regulation); see also Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 596-97 (1989).

465. Under the federal acts, states and tribes are generally permitted to enact standards more stringent than the federal minimums, and may exercise their police powers to regulate environmental matters not covered by the federal programs, but may not choose to regulate less stringently than federal law requires.

466. See *infra* text accompanying notes 535-542.

1. Environmental Effects of Mining

Despite the severe environmental effects of mining, its importance to national growth and the economy historically outweighed environmental concerns.⁴⁶⁷ The industry made some effort at reclamation of surface mines in the early twentieth century, largely as a public relations effort due to the obvious nature of the environmental damage,⁴⁶⁸ but widespread recognition of the pollution effects of mining, and the need to control those effects, was slow to arrive. The most obvious damage caused by mining — unreclaimed lands, waste piles, and polluted waters — “was only the tip of a huge mining iceberg; like its cold counterpart, most of mining’s destructive potential lay hidden and uncomprehended at the time.”⁴⁶⁹

The environmental impacts of mineral development fall into three categories: the direct effects of mining operations; the secondary effects of mining-related activities; and the effects of mineral refining and processing.

Perhaps the most serious direct environmental impact of mining operations is water pollution. Surface water pollution results from the dumping or release of mining wastes directly into streams or, more commonly, from acid mine drainage.⁴⁷⁰ Acid mine drainage occurs when water mixes with sulfur-bearing minerals, forming sulfuric acid. The sulfuric acid, in turn, dissolves heavy metals such as lead, zinc, and copper, and the resulting solution is carried downstream in the surface waters.⁴⁷¹ Acid mine drainage is considerably more acidic than acid rain and, when substantial, can destroy aquatic life.⁴⁷²

Groundwater pollution is also a primary concern. Some portion of acid mine drainage seeps back into the groundwater. Rainwater and runoff also seep into the ground through exposed ore or waste

467. Smith refers to the “keystone conviction that mining and the success of America marched inseparably, hand in hand, and the industry bestowed only benefits.” SMITH, *supra* note 1, at 33-34. During the 1870s and 1880s, in fact, the mining industry claimed that mining pollution was actually beneficial: smelter smoke destroyed disease-causing “microbes,” arsenic contributed to beautiful complexions, and sediment in mining waste water enriched the soil. *Id.* at 45, 71.

468. *Id.* at 110-12.

469. *Id.* at 9.

470. *Id.*

471. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 49 (1992).

472. *Id.*; see also SMITH, *supra* note 1, at 15. Acid mine drainage may be 20 to 300 times as acidic as acid rain. WILKINSON, *supra* note 471, at 49.

piles, carrying pollutants into the aquifers. Injection wells for oil recovery or solution mining of uranium can introduce significant contaminants into groundwater supplies.⁴⁷³ Use of water in the mining processes, and in particular pumping of water for mine dewatering, can cause substantial drops in the water table. Nearby wells may dry up, and the reduced volume of groundwater is less able to dilute introduced pollutants.⁴⁷⁴

Air pollution is another direct consequence of mining. Wind-blown dust from mining operations and waste piles can carry a variety of pollutants. Exploratory boreholes through uranium-bearing ores can, if not plugged, release radon gas into the air.⁴⁷⁵

Two types of mineral development emphasize these common direct impacts and cause additional environmental problems. First, strip mining, which exposes vast amounts of coal to the air, exacerbates the problems with air-borne pollution and seepage into groundwater supplies. Strip mining also devastates the land. Unless strip mined areas are reclaimed, the land is scarred and unsightly, unusable for agriculture or grazing, and subject to erosion and floods.⁴⁷⁶ And second, uranium mining, which boomed in the Southwest in the 1940s and 1950s, adds the impact of radioactive contamination of the air and the water.⁴⁷⁷

The secondary environmental effects of mineral development arise not from the mining itself, but from related activities. Mineral

473. Lise Young, *What Price Progress? Uranium Production on Indian Lands in the San Juan Basin*, 9 AM. INDIAN L. REV. 1, 13-17 (1981) (uranium solution mining); see also S. REP. NO. 216, 101st Cong., 1st Sess. 132 (1989) (detailing the irreparable destruction of the groundwater supplies of the Sac and Fox Nation by a 30-year practice of injecting saltwater into oil reservoirs to force the oil into production wells).

474. SMITH, *supra* note 1, at 14; Young, *supra* note 473, at 9-12.

475. Young, *supra* note 473, at 7.

476. SMITH, *supra* note 1, at 113, 126.

477. For an excellent and detailed look at the environmental consequences of all phases of uranium mining, see Young, *supra* note 473, at 4-23. Young also describes the health, socioeconomic, and sociocultural effects on Indian communities. *Id.* at 23-36.

The environmental dangers of uranium mining are particularly well illustrated by the UNC Resources spill into waters of the Navajo Nation. In 1979, a uranium mill tailings pond operated by UNC Resources at Church Rock, New Mexico (outside the Navajo Reservation), broke and released millions of gallons of radioactive wastes into surface waters. The spill travelled through the stream system into the Rio Puerco, a primary water supply for a portion of the Navajo Reservation. Residents were warned not to drink the water or eat livestock that had drunk the water, but Navajo shepherders are dependent upon the stream for water and their sheep for their food and livelihood. Accounts of the UNC spill can be found at Young, *supra* note 473, at 21-23; Winifred T. Gross, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes*, 9 AM. INDIAN L. REV. 309, 331-34 (1981). See also *Mill Tailings Dam Break at Church Rock, New Mexico: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. (1980).

development in remote areas requires construction of access roads. Drilling operations may require the land to be "flattened and denuded".⁴⁷⁸ The effects of these operations on the land can cause erosion and even floods during spring runoff and heavy rains.⁴⁷⁹

Finally, where minerals are not transported to a remote location for processing, there are the environmental impacts of refining and processing activities. In situations where the costs of transporting ore are too high, either because of remote or difficult terrain or simply the enormous volume of ore extracted, mills, smelters, refineries, and other processing facilities are located close to the mines.⁴⁸⁰ Smoke from smelters may include sulfur, copper, and arsenic fumes.⁴⁸¹ Mills and processing plants produce wastes — in the case of uranium processing, radioactive wastes⁴⁸² — that must be disposed of or stored. Liquid wastes can seep into the groundwater or be released into surface streams; dried wastes may result in contaminated dust or seepage into groundwater during rains.⁴⁸³

Because few energy resources extracted from Indian lands are currently processed there,⁴⁸⁴ Indian country may thus far have escaped most of the environmental impacts of processing and refining minerals. But in order to keep the economic benefits of mineral development with the tribes, the Indian Energy Resources Act of 1992 promotes vertical integration projects, including the processing of energy minerals within Indian country.⁴⁸⁵ With the economic benefits of vertical integration comes the potential for environmental harms.

Tribes today have a number of avenues available to control these environmental effects of mineral development. Since the early 1970s, the National Environmental Policy Act has mandated the consideration of environmental impacts for mineral leases of Indian lands, providing tribes with badly-needed information on the effects of mining activities. In 1977, Congress established environmental controls for surface mining activities, although tribal participation under the surface mining legislation has been limited by Interior's unnecessarily crabbed interpretation of the statute. Beginning in the mid-1980s, however, tribal participation in environmental protection programs

478. Young, *supra* note 473, at 6.

479. SMITH, *supra* note 1, at 14.

480. See Young, *supra* note 473, at 19.

481. SMITH, *supra* note 1, at 76.

482. Young, *supra* note 473, at 18-19.

483. *Id.* at 19-20.

484. H.R. REP. NO. 474, 102d Cong., 2d Sess. pt. 8, at 94 (1992).

485. 25 U.S.C. § 3503(a)(2) (Supp. IV 1992). See *supra* text accompanying notes 369-375.

under other federal statutes burgeoned. Under the auspices of the Environmental Protection Agency, tribes are increasingly taking control over the protection of their air and water resources, as well as over the remediation of environmental harm. The following sections explore these avenues available to tribes.

2. Environmental Impact Assessment

Some environmental controls on mineral development of Indian lands are built into the leasing or agreement procedures.⁴⁸⁶ In particular, mineral development of Indian lands is subject to the National Environmental Policy Act of 1969 (NEPA),⁴⁸⁷ which mandates that an environmental impact statement must be prepared for all "major Federal actions significantly affecting the quality of the human environment."⁴⁸⁸ Secretarial approval of leases of Indian lands constitutes major federal action, and therefore the Secretary of Interior must comply with NEPA in the approval process.⁴⁸⁹ Nonetheless, the requirements of NEPA are procedural, not substantive. If an agency has complied with NEPA's procedures, it may determine that "other values outweigh the environmental costs" and proceed with an environmentally harmful action.⁴⁹⁰

Substantive requirements have been introduced into the mineral development process by the regulations for the 1982 Indian Mineral

486. Until the mid-1980s, these controls were virtually the only means of environmental protection in Indian country. See TASK FORCE SEVEN REPORT, *supra* note 274, at 49 (as of 1976, "Indians are unable to prevent environmental degradation resulting from development except through the very cumbersome mechanism of the National Environmental Protection [sic] Act.").

487. 42 U.S.C. § 4321 *et seq.* (1988). On NEPA in Indian country generally, see Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991); James P. Boggs, *NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning*, 19 ENV'T'L AFFAIRS 31 (1991).

488. 42 U.S.C. § 4332(C) (1988).

489. *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). See also 56 Fed. Reg. 58,734, 58,738 (1991) (25 C.F.R. § 211.7 (1993)). The same requirement extends to secretarial approval of mineral agreements under the 1982 Act. 59 Fed. Reg. 14,960, 14,974 (1994) (25 C.F.R. § 225.24(a)).

Not every approval of a lease or agreement will necessarily trigger the preparation of an environmental impact statement, although every approval will be subject to the requirements of NEPA. On the implementation of NEPA in Indian country, see Suagee, *supra* note 487, at 420-24. On the issue of when NEPA requires the preparation of a statement for mineral development on federal lands, see generally Marla E. Mansfield, *Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance*, 24 LAND & WATER L. REV. 85 (1989); George C. Coggins & Jane E. Van Dyke, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?*, 20 ENV'T'L L. 649 (1990).

490. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

Development Act. Those regulations provide that before the Secretary can approve a mineral agreement, the Secretary must determine that the agreement does not have an adverse environmental impact "sufficient to outweigh its expected benefits to the Indian mineral owners."⁴⁹¹ These regulations should offer tribes greater protection than the EIS requirement under NEPA. Not only must the Secretary comply with the procedural requirements of NEPA, but also with the substantive requirement that the benefits of a mineral agreement must outweigh any adverse environmental effects. The Secretary's failure to properly consider environmental impacts should be remediable by an action for breach of trust.

These requirements, however, are mandates on the federal government and provide the tribes with little environmental control over mineral development activities. Some measure of control may be provided by the environmental information uncovered by the environmental impact statement process. To the extent that tribes are provided with a fuller picture of the environmental impacts of proposed mineral development, tribal consent to development will be better informed.⁴⁹² In particular, environmental information may be useful to tribes entering into mineral agreements during the 30-day reconsideration period before secretarial approval becomes final.⁴⁹³ In other ways, however, the NEPA requirements may undercut tribal control, since any affected citizen may challenge the adequacy of an environmental impact statement in court. Tribal members or non-Indians can potentially delay or disrupt the mineral development process by court challenges on procedural grounds.⁴⁹⁴

Despite its potential usefulness to tribes, however, NEPA serves only to focus awareness on the environmental impacts of mineral development. It offers tribes no direct control over environmental matters in Indian country. The first attempt to bring tribes within the federal environmental protection programs, and thus to offer some measure of control over environmental issues, occurred in 1977 with enactment of the Surface Mining Control and Reclamation Act.

491. 59 Fed. Reg. 14,960, 14,974 (1994) (25 C.F.R. § 225.22(c)(2)).

492. See Suagee, *supra* note 487, at 427 (noting that "tribes can use the NEPA process to reach better decisions, at least in the environmental sense").

493. 25 U.S.C. § 2103(c) (1988); see *supra* text accompanying notes 316-318.

494. On the other hand, tribes may sometimes find it useful to delay the mineral development process by challenging the Secretary's compliance with NEPA. See TASK FORCE SEVEN REPORT, *supra* note 274, at 49 (noting that as an environmental tool for tribes, "NEPA's main contribution is to cause delay").

3. Surface Mining Control & Reclamation Act

Although the environmental impacts of surface mining have been the most obvious, by the dawning of the modern environmental movement in the late 1960s only 14 states had enacted laws to regulate surface mining.⁴⁹⁵ As a result of state reluctance to control surface mining and its effects, the focus turned to federal regulation. After nine years and two presidential vetoes,⁴⁹⁶ the federal government obliged by enacting the Surface Mining Control and Reclamation Act of 1977 (SMCRA).⁴⁹⁷

SMCRA established two major programs, designed to comprehensively regulate the environmental effects of surface mining. The abandoned mine reclamation program reached mines abandoned prior to the effective date of the Act.⁴⁹⁸ For surface mining occurring after that date, SMCRA established a permit program for the exploration and development of mines, including environmental protection performance standards and reclamation plans.⁴⁹⁹ States may, with federal approval, take regulatory control over the issuance of permits for surface coal mining operations on lands within the state, expressly excluding Indian lands.⁵⁰⁰ If a state has an approved permit program, it may also seek approval for a state abandoned mine reclamation program.⁵⁰¹

For tribes, SMCRA regulates the environmental aspects of surface exploration, mining, and reclamation on Indian lands.⁵⁰² "Indian

495. SMITH, *supra* note 1, at 146.

496. The first bills were introduced in 1968. Surface mining acts were passed by Congress in 1974 and 1975, but both were vetoed by President Ford. *Montana v. Clark*, 749 F.2d 740, 749 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985).

497. 30 U.S.C. §§ 1201-1328 (1988).

498. *Id.* §§ 1231-1243. The effective date was August 3, 1977. Clean-up or control of abandoned mines is crucial; as much as 90 percent of acid mine drainage is discharged from abandoned, rather than operating, mines. SMITH, *supra* note 1, at 146.

499. 30 U.S.C. §§ 1251-1279 (1988).

500. *Id.* § 1253. Lands within the state are defined in SMCRA as "all lands within a State other than Federal lands and Indian lands." *Id.* § 1291(11).

501. *Id.* § 1235(c).

502. Accordingly, Interior Department regulations provide that all coal leases for Indian lands under the 1938 Indian Mineral Leasing Act must include a provision that the lessee will comply with the applicable provisions of SMCRA. 25 C.F.R. § 200.11 (1993). The IMDA regulations also provide that SMCRA applies to mineral agreements under that Act. 59 Fed. Reg. 14,960, 14,973 (1994) (25 C.F.R. § 225.5). SMCRA regulations for Indian lands are found at 25 C.F.R. pt. 216 (1993), although Interior has proposed eliminating the initial program performance standards at part 216, subpart B, and amending the general standards found at 30 C.F.R. ch. VII, subch. B (1993), to make them applicable to Indian lands. 58 Fed. Reg. 15,404 (1993). The primary purpose of the proposed change is to eliminate inconsistencies between the programs. *Id.* On SMCRA programs on Indian lands, see Lynn H. Slade, *Coal Surface Mining on Indian*

lands" are defined in SMCRA as all lands within the exterior boundaries of an Indian reservation, regardless of ownership, plus any off-reservation lands in which the tribe owns either the mineral estate or the surface estate.⁵⁰³ In large part because of the expansive definition of Indian lands, however, tribal jurisdiction under SMCRA to regulate surface coal mining on Indian lands is severely limited.

During the long legislative battle to enact SMCRA, the extent of tribal authority to carry out surface mining regulatory activities was a subject of disagreement in Congress.⁵⁰⁴ At various times, one house favored full tribal regulatory control over SMCRA programs on Indian lands, while the other house believed that jurisdiction over Indian lands was too uncertain to justify that approach.⁵⁰⁵ As enacted, SMCRA embodied the cautious approach.⁵⁰⁶ Rather than accord tribes regulatory authority over Indian lands, SMCRA called for the Department of the Interior to study "the question of the regulation of surface mining on Indian lands" and make recommendations for legislation.⁵⁰⁷

Nonetheless, the conference committee, "entirely without explanation or comment,"⁵⁰⁸ added a provision treating tribes as states for purposes of the abandoned mine reclamation program.⁵⁰⁹ Tribes have

Lands From Checkerboard to Crazy Quilt, in MINERAL DEVELOPMENT ON INDIAN LANDS 10-1, 10-9 - 10-20 (Rocky Mt. Min. L. Fdn 1989).

503. 30 U.S.C. § 1291(9) (1988). Specifically, Indian lands mean "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." *Id.* This last phrase has been interpreted as including any off-reservation lands owned by an Indian tribe. Valencia Energy Co., 96 Int. Dec. 239, 254 (1989). Thus, "Indian lands" under SMCRA include, for example, the prime coal lands of the Crow Tribe's ceded strip. See *supra* text accompanying notes 59-61.

504. See generally *Montana v. Clark*, 749 F.2d 740, 749-51 (D.C. Cir. 1984), cert. denied, 474 U.S. 919 (1985).

505. *Id.* The two houses switched roles over the course of the legislative history. In 1974, the House was in favor of tribal authority and the Senate was uncertain, while in 1977, it was the Senate version which accorded regulatory authority to tribes and the House version which called for study of the jurisdictional issues.

506. S. REP. NO. 337, 95th Cong., 1st Sess. 114 (1977). The reason given by the Conference Committee for choosing the House over the Senate approach was that it "did not want to change the status quo with respect to jurisdiction over Indian lands both within reservations and outside reservation boundaries." *Id.*

507. 30 U.S.C. § 1300 (a)-(b), (h) (1988). See also S. REP. NO. 337, 95th Cong., 1st Sess. 114 (1977).

508. *Montana v. Clark*, 749 F.2d 740, 751 (D.C. Cir. 1984), cert. denied, 474 U.S. 919 (1985).

509. 30 U.S.C. § 1235(k) (1988 & Supp. IV 1992). Treatment as a state is available to tribes with lands "from which coal is produced" or with "eligible lands". *Id.* Eligible lands are defined as those "which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or other Federal laws." *Id.* at § 1234.

been unable to take regulatory authority over abandoned mines, however, because tribes have been delegated no authority to assume the surface mining permit program. And without the permit program, there is no authority for a state, or a tribe treated as a state, to seek authority to operate an abandoned mine reclamation program.⁵¹⁰ Congress' legislative oversight effectively blocked most tribal regulation of, and consequently most tribal control over, surface mining in Indian country.

At the time, however, the oversight seemed of little importance. Interior's study and recommendations were due to Congress no later than January 1, 1978,⁵¹¹ and expectations were that SMCRA would shortly be amended to accord program authority to tribes.⁵¹² The Department of Interior's study, however, was not submitted until February of 1984.⁵¹³ When it was submitted, it was unsatisfactory; the report did not meet the needs of the tribes or adequately mesh strip mining on Indian lands into the framework of SMCRA.⁵¹⁴ In consequence, a bill was introduced in the Senate that would essentially have treated tribes as states for purposes of the SMCRA programs by turning regulatory control of those programs over to the tribes.⁵¹⁵ The bill, however, was not reported out of committee before the Senate adjourned.⁵¹⁶

510. See 30 U.S.C. § 1235(c) (1988 & Supp. IV 1992).

511. 30 U.S.C. § 1300(b) (1988 & Supp. IV 1992).

512. Congress expressly directed Interior to include in the study "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." 30 U.S.C. § 1300(a). See also Thomas J. Lynaugh, *The Responsibility for Reclamation of Surface Mining on Indian Lands Under the Surface Mining Control and Reclamation Act of 1977*, 26 S.D.L. Rev. 547, 550-60 (1981) (describing legislation proposed at that time by Interior, but not introduced in Congress).

513. *Regulation of Coal Mining on Indian Reservation Lands: Hearing on S. 2879 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 22 (1984) (remarks of Leona Power, Dep. Ass't Sec'y for Land and Minerals, Dep't of the Interior) [hereafter *Coal Mining Hearing*]. The six year delay did not escape Congress' notice. See *id.* at 1 (remarks of Sen. Melcher); *Regulation of Surface Mining on Indian Lands: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 98th Cong., 2d Sess. 1 (1984) (remarks of Rep. Richardson). Although Interior took nearly seven years to prepare its report, the Council of Energy Resources Tribes submitted a report, along with proposals for remedial legislation, in 1979. COUNCIL OF ENERGY RESOURCES TRIBES, *THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS* (1979). That report had been commissioned by Interior, and was at times presumed to meet the statutory requirement for a study report. See *Montana v. Clark*, 749 F.2d 740, 741 n.1 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985).

514. *Coal Mining Hearing*, *supra* note 513, at 1 (remarks of Sen. Melcher).

515. The bill is reprinted *id.* at 4-20. The sponsor of the bill was Senator Melcher, who also sponsored the Indian Mineral Development Act of 1982.

516. See *Clark*, 749 F.2d at 741 n.1.

Control of surface mining regulation on Indian lands, therefore, remained where it had been: with Interior's Office of Surface Mining Reclamation and Enforcement (OSM).⁵¹⁷ OSM is adamant that, until Congress enacts legislation authorizing tribes to operate SMCRA programs, OSM will be the "sole regulatory authority" on Indian lands.⁵¹⁸ OSM's crabbed view of SMCRA is not necessary. If OSM chose, it could likely delegate SMCRA program authority to the Indian tribes. At the least, OSM could delegate authority for the abandoned mine reclamation program, which already provides that tribes are to be treated as states.⁵¹⁹ But even delegation of authority to tribes to seek approval of surface mining permit programs should be possible. The Environmental Protection Agency (EPA) successfully delegated authority to tribes under the Clean Air Act before that Act expressly authorized EPA to do so.⁵²⁰ And EPA is presently taking the same approach to tribal regulation under the Resource Conservation and Recovery Act.⁵²¹ Nonetheless, OSM appears unlikely to follow EPA's expansive lead in according governmental status to tribes under environmental statutes.

For SMCRA programs, therefore, OSM is the permitting agency for surface mining of tribal coal. There is, however, no provision for OSM to consult directly with the affected Indian tribes before issuing a permit. Instead, the regulations direct that the Bureau of Indian Affairs is responsible for tribal consultations;⁵²² the BIA then makes recommendations to OSM concerning permits, and OSM determines

517. See, e.g., *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1363-65 (1980).

518. 53 Fed. Reg. 3,992, 3,993 (1988). See also 30 C.F.R. § 750.6(a)(1) (1993); 59 Fed. Reg. 14,960, 14,973 (1994) (25 C.F.R. § 225.5) (IMDA regulations).

519. Slade, *supra* note 502, at 10-30.

520. *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.*, *Crow Tribe of Indians v. Environmental Protection Agency*, 454 U.S. 1081 (1981). In 1974, EPA issued regulations that authorized Indian tribes to redesignate the air quality of their reservations. In 1977, the EPA approved the redesignation request of the Northern Cheyenne Tribe, and that approval was upheld in federal court. The Clean Air Act was not amended to accord redesignation authority to tribes until after EPA's approval. Pub. L. No. 95-95, title I, § 127(a), 91 Stat 733 (1977) (codified at 42 U.S.C. § 7474(c) (1988)).

521. Although the Resource Conservation and Recovery Act does not presently treat tribes as states for purposes of assuming program authority, EPA has announced that it will promulgate rules to authorize tribes to implement RCRA's hazardous waste management program. 57 Fed. Reg. 52,024 (1992). In addition, EPA's regulation-in-progress for RCRA's solid waste permit program is entitled the State/Tribal Implementation Rule, clearly indicating EPA's intent to authorize tribes to implement the solid waste permit program as well. See, e.g., 58 Fed. Reg. 28,960 (1993).

522. A Special Committee on Investigations of the Senate Select Committee on Indian Affairs determined that "such consultation is often meaningless." S. REP. No. 216, 101st Cong., 1st Sess. 136 (1989).

whether to approve or disapprove the surface mining permits for Indian coal.⁵²³ For more than a decade after SMCRA was enacted, then, coal-producing tribes were entirely dependent upon the federal government to carry out SMCRA programs on Indian lands, with limited opportunity for tribal input into, much less control of, the process.

In recent years, however, Congress has acted to delegate statutory authority to a limited number of coal-producing tribes. In 1987, Congress authorized the Crow, Hopi, and Navajo Tribes to develop tribal programs for reclamation of abandoned mines, subject to approval by the Secretary of the Interior, and notwithstanding the absence of a tribal permit program as required by SMCRA.⁵²⁴ All three tribes submitted plans which were approved, and now operate tribal abandoned mine reclamation programs.⁵²⁵ In 1992, moreover, Congress amended SMCRA to provide that those three tribes, plus the Northern Cheyenne, were eligible for grants to develop tribal offices of surface mining regulation.⁵²⁶ The amendment was designed to permit the designated tribes to gain expertise and to assume greater control over surface mining within their territories.⁵²⁷ Congress specified, however, that the amendment should not be construed as treating the four tribes as states for purposes of the permit program.⁵²⁸

SMCRA thus still represents a rudimentary recognition of the tribal regulatory interest in surface mining. Despite expectations written into the 1977 law that tribes would eventually assume full regulatory authority on Indian lands for SMCRA programs,⁵²⁹ progress toward that goal has been halting at best. Seventeen years after passage of SMCRA, only three tribes are authorized to assume abandoned mine reclamation authority. No tribes are treated as states for purposes of the permit program, and only four are even eligible for grants for the development of tribal surface mining expertise. OSM shows no indication of relinquishing its control over Indian lands in favor of tribal governmental authority.

523. 30 C.F.R. §§ 750.6(d)(2) and (a)(2) (1993).

524. Pub. L. No. 100-71, title I, 101 Stat. 416 (1987) (codified at 30 U.S.C. § 1235(k) (1988)). See also H.R. REP. NO. 195, 100th Cong., 1st Sess. 58-59 (1987).

525. 30 C.F.R. pt. 756 (1993).

526. Pub. L. No. 486, § 2514, 106 Stat. 2776 (1992) (codified at 30 U.S.C.A. § 1300(i) (1994 West Supp.)). The four tribes were chosen because of the "significant coal resources" in their territories. H.R. REP. NO. 474, 102d Cong., 2d Sess. pt. 8, at 95 (1992).

527. *Id.*

528. 30 U.S.C.A. § 1300 (1994 West Supp.)

529. 30 U.S.C. § 1300(a) (1988).

Despite the unfulfilled promise of SMCRA, however, tribal control over environmental matters within Indian country is increasing. The Environmental Protection Agency, which administers the federal environmental programs for air, water, and waste management, has chosen to work toward, rather than against, tribal governmental control of environmental protection. Accordingly, tribal regulatory authority over the air and water resources of Indian country, as well as tribal authority over waste management and remediation, continues to increase.

4. Federal environmental statutes

Early in 1983, President Reagan issued his Indian policy statement, reaffirming the federal policy of tribal control and economic self-sufficiency, and establishing the government-to-government theme that continues today.⁵³⁰ Building on Reagan's statement, the Environmental Protection Agency (EPA) became the first, and to date the only, federal agency to issue an Indian policy of its own.⁵³¹ In 1984, EPA pledged to recognize tribal governments "as sovereign entities with primary authority and responsibility" for environmental matters in Indian country and to "work directly with Tribal Governments as the independent authority for reservation affairs".⁵³²

Beginning with the round of environmental law reauthorizations in 1986, EPA embarked on a legislative agenda designed to put its policy into practice.⁵³³ Federal environmental statutes up for reauthorization were amended to include provisions treating Indian tribes as states for all or most of the programs authorized by the acts, and new laws generally provided equivalent treatment of state and tribal governments. This legislative program has to date resulted in tribes-as-state amendments to most of the major federal pollution control laws and similar provisions in the federal environmental

530. See *supra* text accompanying notes 265-266.

531. U.S. ENV'T'L PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984).

532. *Id.* at 2. EPA reaffirmed its commitment to the government-to-government policy in 1991. U.S. ENV'T'L PROTECTION AGENCY, FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS: A CONCEPT PAPER (1991) [hereafter EPA CONCEPT PAPER].

533. EPA's attention to tribes as governments pre-dated its Indian policy by several years. See, e.g., Pub. L. No. 95-95, title I, § 127(a), 91 Stat. 733 (1977) (codified at 42 U.S.C. § 7474(c) (1988)) (making tribes the only governments with authority to redesignate air quality within reservations) (codifying EPA regulations issued in 1974). Nonetheless, the legislative activity from the 1986 session to the present represents a concentrated effort to bring the environmental statutes into line with federal Indian policy.

remediation statutes.⁵³⁴ Unlike SMCRA, as interpreted by OSM, these federal environmental acts contemplate that some tribes will take full regulatory control over the reservation environment.

Between 1986 and 1990, three of the major environmental laws were amended to treat tribes as states (TAS). These TAS provisions were added to the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act:⁵³⁵ those federal environmental laws that encourage or mandate states to take primacy for the environmental programs established in the statutes. Tribes that meet certain statutory and regulatory criteria are delegated essentially the same authority to administer programs as a state.

The statutory TAS requirements of the three statutes are similar. The tribe must demonstrate to the EPA that it is a federally recognized tribe with a governing body that carries out substantial governmental duties and powers; that the functions it will exercise under the delegated programs are within its governmental powers; and that it is reasonably expected to be capable of carrying out the statutory functions.⁵³⁶ The burden of showing that the tribe meets the TAS requirements is on the requesting tribe, which must affirmatively demonstrate its regulatory authority.⁵³⁷ Moreover, a tribe must qualify as a state under each act or even under each program within an act for which it seeks primacy. Because each act or program may require specialized capabilities or authority, qualification under one act or program does not constitute qualification as a state under all.⁵³⁸ EPA has eased the tribal burden significantly, however, by providing that a tribe need submit the basic application for TAS only once.⁵³⁹ If a

534. See generally Royster & Fausett, *supra* note 464, at 619-22; Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J.L. & PUB. POL'Y 89 (1991); Teresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 AM. INDIAN L. REV. 269 (1992); David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10579 (1993); John Williams, *The Effect of the EPA's Designation of Tribes as States on the Five Civilized Tribes in Oklahoma*, 29 TULSA L.J. 345 (1993).

535. Clean Air Act Amendments of 1990, 42 U.S.C. § 7601(d) (1992 Supp.); Clean Water Act Amendments of 1987, 33 U.S.C. § 1377 (1988); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11(a) (1988).

536. Clean Air Act, 42 U.S.C. § 7601(d)(2) (Supp. IV 1992); Clean Water Act, 33 U.S.C. § 1377(e) (1988); Safe Drinking Water Act, 42 U.S.C. § 300j-11(b)(1) (1988). There are some differences in wording among the acts, particularly as to the second requirement, which is generally tailored to the particular functions of the statute. Compare 42 U.S.C. 7601(d)(2) (Supp. IV 1992) (CAA) with 33 U.S.C. § 1377(e) (Supp. IV 1992) (CWA).

537. See 56 Fed. Reg. 64,876, 64,881 (1991); 40 C.F.R. § 131.8 (1993).

538. 56 Fed. Reg. 64,876, 64,883 (1991).

539. *Id.* Proposed simplification rules would ease the tribal burden even further. The EPA

tribe satisfies the first two requirements — federal recognition and governmental duties and powers — under one act or program, that showing will generally serve for all, with supplemental information to demonstrate the tribe's capability of carrying out the specific program.⁵⁴⁰ Deficient TAS applications will generally not be denied outright; rather, EPA will work with the tribe to resolve any problems with the application or the tribal program.⁵⁴¹ In the interim, or permanently for those tribes which do not seek TAS, the EPA retains authority to administer the environmental programs.⁵⁴²

Tribes that qualify as states under the federal environmental laws will generally exercise authority over the delegated programs throughout their territories.⁵⁴³ In some cases, the federal statutes expressly extend tribal authority to the boundaries of Indian country.⁵⁴⁴ In all cases, EPA has rejected the checkerboard approach to environmental regulation in Indian country, noting the difficulties that would arise if the tribal programs applied only to Indian lands and waters, with a state program applicable to non-Indian lands and waters.⁵⁴⁵ As a result, EPA will treat Indian reservations as "single administrative

has proposed to eliminate the existing requirement that a tribe seek TAS status prior to seeking program or grant approval, and to make the TAS determination part of the process of reviewing grant or program applications. 59 Fed. Reg. 13,814, 13,815 (1994) (tribal eligibility for financial assistance); 59 Fed. Reg. 13,820, 13,821 (1994) (tribal eligibility for program authorization). The EPA has also proposed that a tribe which satisfies the first two TAS requirements, *see supra* text accompanying note 536, under either the Clean Water Act or the Safe Drinking Water Act will be deemed to have met those requirements for both acts. 59 Fed. Reg. at 13,815; 59 Fed. Reg. at 13,821. In addition, the EPA has proposed to substantially simplify the review of tribal jurisdiction to receive grants or carry out programs. 59 Fed. Reg. at 13,816; 59 Fed. Reg. at 13,822.

540. EPA expects that "once a Tribe has qualified for one program, the key step toward assumption of other programs, in most cases, will be demonstrating appropriate capability." 56 Fed. Reg. 64,885.

541. *Id.*

542. *See, e.g.,* Clean Air Act, 42 U.S.C. § 7601(d)(4) (1992 Supp.); EPA CONCEPT PAPER, *supra* note 532, at 3-4.

543. For an argument that this result is mandated by the language of the environmental statutes and principles of federal Indian law, *see Royster & Fausett, supra* note 464, at 623-59.

544. The Clean Water Act offers TAS to a tribe regarding:

[T]he management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

33 U.S.C. §§ 1377(e)(2) (1988).

Similarly, the Clean Air Act provides that a tribal implementation plan, when approved, "shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o) (1992 Supp.).

545. 56 Fed. Reg. 64,876, 64,878 (1991). The agency's rejection of the checkerboard approach to environmental regulation, where the tribe would regulate on trust lands and the state on non-Indian fee lands, was a response to the Court's decision in *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989), discussed *supra* at text accompanying notes 414-420. Parceling out

units" under the environmental programs, delegating authority in Indian country only where the tribe or the state can demonstrate jurisdiction over pollution sources throughout the tribe's territory.⁵⁴⁶

Nonetheless, EPA does not view the federal TAS provisions as manifesting clear congressional intent to extend tribal authority over non-Indians and non-Indian lands in every instance.⁵⁴⁷ Instead, EPA will determine tribal authority over non-Indians on a "Tribe-by-Tribe basis," although it also believes that tribes generally will have the legal authority to regulate all pollution sources within reservation boundaries.⁵⁴⁸ Based on the Supreme Court's analysis in the *Montana* and *Brendale* cases,⁵⁴⁹ EPA will require "a showing that the potential impacts of regulated activities on the tribe are serious and substantial" before granting tribes TAS status throughout the reservation.⁵⁵⁰ However, EPA has stated that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare,"⁵⁵¹ and as a result, EPA has determined that tribes will usually be able to make the showing necessary to obtain program delegation over all pollution sources within the tribe's territory.⁵⁵²

regulatory authority over water resources on the basis of land ownership, as the Court parcelled out zoning authority in *Brendale*, "would ignore the difficulties of assuring compliance with [environmental] standards when two different sovereign entities are establishing standards for the same [area]." 56 Fed. Reg. 64,878 (1991).

546. EPA CONCEPT PAPER, *supra* note 532, at 3. In the case of tribal jurisdiction, however, the EPA also provided that if a tribe "cannot demonstrate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources." *Id.* at 3-4.

547. 56 Fed. Reg. 64,876, 64,880 (1991).

548. *Id.* at 64,878.

549. See *supra* text accompanying notes 392-404. For competing views of the effects of *Brendale* on tribal environmental authority, compare Royster, *supra* note 534, with Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 *Env'tl L. Rep.* (Env'tl. L. Inst.) 10429 (1990).

550. 56 Fed. Reg. 64,876, 64,878 (1991). EPA's position was based on the test in *Montana v. United States*, 450 U.S. 544, 566 (1981): "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." EPA rejected the suggestion that *Brendale* had overruled or was inconsistent with *Montana*, although it did recognize that a majority of justices in *Brendale* had attempted to reformulate the *Montana* test. 56 Fed. Reg. 64,876, 64,877-78 (1991). EPA interpreted those reformulations as essentially requiring some impact on tribal interests that was more than de minimis. *Id.* at 64,878. On that basis, EPA developed its standard.

551. *Id.*

552. *Id.* EPA's analysis also accords with its long-standing refusal to authorize state program authority in Indian country absent a demonstration by the state of independent authority to regulate in tribal territory. EPA generally assumes that states lack authority in Indian country and takes the position that the federal environmental statutes do not provide the states with authority to extend state programs onto reservations. See 45 Fed. Reg. 33,066, 33,378 (1980); U.S. ENV'T'L PROTECTION AGENCY, ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS: EPA INDIAN WORK GROUP DISCUSSION PAPER 9 (1983). See also Washington

Consequently, tribal governmental regulation of the environmental effects of mining and related activities will generally extend beyond mineral development on Indian lands to reach all mineral development within the tribe's governmental boundaries, including mining on allotted lands and fee lands. Indian tribes that assume program authority under the federal environmental statutes thus will be authorized to regulate the reservation environment in a number of ways affecting mineral development.

a. Air Pollution

Under the 1990 amendments to the Clean Air Act (CAA), tribes are authorized to develop tribal implementation plans for implementing, maintaining, and enforcing national ambient air quality standards.⁵⁵³ The plans provide the means by which the tribes control emissions from stationary sources of air pollutants, and thus would allow tribes to impose regulations and control measures on mills, refineries, and other sources of air pollution from mineral development. The 1990 amendments to the Clean Air Act also instituted a permit program, under which major sources of air pollution must obtain a permit from the state.⁵⁵⁴ While tribes are not expressly treated as states for purposes of the permit program, the Act authorizes the EPA to promulgate regulations specifying the CAA provisions for which TAS is appropriate.⁵⁵⁵ Although EPA has not yet issued the regulations,⁵⁵⁶ the agency should determine that tribes are to be treated as states for purposes of the permit program. Since tribes are authorized to be treated as states for purposes of implementation plans, depriving tribes of TAS for the permit program would undermine the tribes' ability to fully ensure Indian country compliance with national ambient air quality standards.

In addition, tribes have long had the authority under the Clean Air Act to redesignate the reservation airshed to preserve or enhance air quality.⁵⁵⁷ Areas of the country in which the air quality is cleaner

Dep't of Ecology v. Env'tl Protection Agency, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's interpretation that the Resource Conservation and Recovery Act does not grant states regulatory authority over Indian lands).

553. 42 U.S.C. § 7410(o) (1992 Supp.).

554. 42 U.S.C. § 7661 *et seq.* (Supp. IV 1992) If the state does not develop a permit program, EPA will administer one for that state. *Id.* § 7661a(d)(3).

555. 42 U.S.C. § 7601(d)(2) (Supp. IV 1992).

556. EPA was to have promulgated the regulations within 18 months after November 15, 1990. 42 U.S.C. § 7601(d)(2) (Supp IV 1992).

557. 42 U.S.C. § 7474(c) (Supp. IV 1992).

than the national ambient air quality standards require fall under a program to prevent significant deterioration (PSD) of air quality.⁵⁵⁸ These PSD areas are designated Class I, II or III, depending upon how pristine the air quality should be.⁵⁵⁹ While new sources of air pollution are allowed in PSD areas, the additional increment of pollution allowed over the baseline is far more limited in Class I areas than in Class II or Class III.⁵⁶⁰ Thus, in 1976, when the Northern Cheyenne Tribe redesignated its reservation airshed from Class II to Class I, that action forced a three-year moratorium on construction of an on-reservation power plant in order to install better pollution control devices, and “contributed to the demise” of plans on the neighboring Crow Reservation for a coal gasification plant and a coal-fired power plant.⁵⁶¹

Moreover, any new “major emitting facility” in a PSD area must obtain a permit and meet preconstruction requirements.⁵⁶² Nonetheless, the PSD program does not reach all mining activities. Fugitive dust from surface mines, for example, does not count in determining whether the mining facility is a “major” facility requiring a preconstruction permit.⁵⁶³

b. Water Pollution

For the protection of surface waters, tribes can access a variety of programs under the Clean Water Act (CWA). The CWA authorizes tribes to promulgate water quality standards for all waters within the reservation, to regulate discharges of pollutants and dredge and fill materials into waters of the reservation, and to develop management programs for nonpoint source pollution.⁵⁶⁴ Tribes may, for example, assume authority for the national pollutant discharge elimination system (NPDES) program,⁵⁶⁵ which requires a permit for the discharge

558. 42 U.S.C. § 7470 *et seq.* (Supp. IV 1992) (establishing the prevention of significant deterioration (PSD) program).

559. 42 U.S.C. § 7472 (Supp. IV 1992).

560. 42 U.S.C. § 7473 (Supp. IV 1992).

561. *AMBLER*, *supra* note 4, at 183-84. *See generally* *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom. Crow Tribe of Indian v. Environmental Protection Agency*, 454 U.S. 1081 (1981).

562. 42 U.S.C. § 7475 (Supp. IV 1992).

563. *See NRDC v. EPA*, 937 F.2d 641, 649 (D.C. Cir. 1991) (upholding EPA's rule). Fugitive dust, which “accounts for virtually all of the air pollution generated at surface coal mines,” reaches the atmosphere without passing through a smokestack or other centralized point. *Id.* at 643 and n.1.

564. 33 U.S.C. §§ 1377(e)-(f) (1988).

565. 33 U.S.C. §§ 1377(e), 1342 (1988).

of any pollutant⁵⁶⁶ from any "point source"⁵⁶⁷ into surface waters. The permits specify effluent limitations on the pollutant discharge, which reflect both technology-based limitations and limitations based on water quality standards.⁵⁶⁸

Any mining waste which is released into surface waters from a discrete, discernible conveyance is a discharge from a point source subject to the NPDES program.⁵⁶⁹ Accordingly, tribes operating the NPDES program can require point sources of mining discharge into waters to obtain a tribal permit setting effluent limitations. Exceeding permit limitations and discharging without a permit are both violations of the Clean Water Act which tribes treated as states can enforce against the violator.⁵⁷⁰ Mining wastes which are not discharged from discrete points — those which result primarily from runoff and siltation — are considered nonpoint sources of water pollution,⁵⁷¹ and are exempt from the permit program. However, tribes treated as states

566. The definition of "pollutant" under the CWA expressly excludes materials such as water and gas injected into a well for the production of oil and gas, or oil and gas wastewater disposed of by injection into a well, under certain circumstances. 33 U.S.C. § 1362(6) (1988). The underground injection control program is carried out under the Safe Drinking Water Act, see *infra* text accompanying notes 573-576.

567. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container" and the like. 33 U.S.C. § 1362(14) (1988).

568. 33 U.S.C. § 1342 (1988). Tribes may seek approval to be treated as states for purposes of establishing those water quality standards. 33 U.S.C. §§ 1377(e), 1313 (1988).

569. The leading case is *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370-74 (10th Cir. 1979) (overflow from sump used in gold leaching was discharge from a point source). See also *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1844 (1993) (acid mine drainage from collection and settling ponds); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (discharge water released from sluice box); *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 44-45 (5th Cir. 1980) (overflow of surface runoff from strip mines collected in sediment basins); *Residents Against Industrial Landfill Expansion v. Diversified Systems, Inc.*, 804 F.Supp. 1036, 1038 (E.D. Tenn. 1992) (discharge from sediment ponds).

In addition, contaminated storm water discharges from both active and inactive mines are subject to the NPDES permit requirement. EPA determined that storm water discharges from mines, except for inactive mines reclaimed under SMCRA or certain other state or federal laws, were not subject to the general permit moratorium on storm water discharges. 55 Fed. Reg. 47,990 (1990); 33 U.S.C. § 1342(p) (1988). See also *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992) (upholding EPA's determination as reasonable).

570. 33 U.S.C. §§ 1377(e), 1319 (1988).

571. Nonpoint sources include "mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines". 33 U.S.C. § 1314(f)(B) (1988). As the courts have noted, however:

[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance. Thus, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources.

Trustees for Alaska, 749 F.2d at 558. When mining activities release pollutants otherwise, however, the release is a nonpoint source of pollution.

are eligible for grants to develop tribal nonpoint source management programs.⁵⁷²

Groundwater protection programs are available to tribes under the Safe Drinking Water Act (SDWA). The SDWA provides that tribes may assume primary responsibility for drinking water quality standards and underground injection control programs.⁵⁷³ Underground injection wells are used in oil and gas recovery and solution mining of uranium.⁵⁷⁴ Moreover, waste waters, and in particular waste waters from oil fields, can be disposed of by injection back underground through former production wells.⁵⁷⁵ Unless underground injection is properly planned and carefully executed, the process carries a threat of serious environmental damage to groundwater supplies.⁵⁷⁶ Tribal primacy under the injection control program allows tribes to regulate the underground injection of mining wastes.

c. Waste Management

Aside from the underground injection control program, however, tribal control and management of wastes generated from mineral development may be limited. The Resource Conservation and Recovery Act (RCRA), which authorizes states to operate federally-approved hazardous waste programs, is the only major federal environmental law which does not treat Indian tribes as states.⁵⁷⁷ That obstacle appears temporary, however, since EPA has announced its intention to issue rules authorizing tribes to implement RCRA's hazardous waste management program.⁵⁷⁸

The more serious obstacle to tribal regulation of mining wastes is the 1980 Bevill amendment to RCRA, which reflects Congress' uncertainty whether mining wastes should be regulated as hazardous wastes, as solid wastes, or not at all.⁵⁷⁹ Under the amendment, solid

572. 33 U.S.C. §§ 1377(f) (1988).

573. 42 U.S.C. §§ 300j-11(a), 300h-1(e) (1988).

574. See Young, *supra* note 473, at 13-17; S. REP. NO. 216, 101st Cong., 1st Sess. 132 (1989).

575. Catherine Vandemoer, *The Development of Underground Injection Control Programs on Indian Lands: Issues, Challenges, and a Blueprint for Tribal Program Development*, in MINERAL DEVELOPMENT ON INDIAN LANDS 17-1 (Rocky Mt. Min. L. Fdn 1989).

576. *Id.*

577. RCRA is codified at 42 U.S.C. § 6901 *et seq.* At the present time, RCRA groups tribes with municipalities. 42 U.S.C. § 6903(13) (1988).

578. 57 Fed. Reg. 52,024 (1992). Moreover, the Act is currently up for reauthorization, and all indications are that it will then include a tribes-as-states provision. The proposed Senate reauthorization amendments in the 102d Congress, for example, contained a provision authorizing EPA to treat tribes as states. 23 Env't Rep. (BNA) 247, 257 (1992).

579. John R. Jacus & Thomas E. Root, *The Emerging Federal Law of Mine Waste: Administrative, Judicial and Legislative Developments*, 26 LAND & WATER L. REV. 461, 466 (1991).

waste "from the extraction, beneficiation, and processing of ores and minerals"⁵⁸⁰ was to be regulated not under the stringent hazardous waste program of RCRA's Subtitle C, but only under other applicable laws until a study was completed and appropriate regulations were in place.⁵⁸¹ After a decade of uncertainty,⁵⁸² EPA reached its final determination that 20 mining wastes were subject to continued exclusion from RCRA's hazardous waste regulations under the Bevill amendment.⁵⁸³ Consequently, even when EPA authorizes tribes to be treated as states for purposes of the Subtitle C program, those mining wastes will not be subject to the stringent regulatory standards for hazardous wastes.

However, some 23 mining wastes were ruled outside the Bevill amendment, and thus subject to regulation under RCRA.⁵⁸⁴ If those wastes exhibit hazardous characteristics, they are subject to regulation under RCRA's Subtitle C hazardous waste program.⁵⁸⁵ If they are not hazardous wastes, they are subject to regulation under RCRA's Subtitle D solid waste program, as are those mining wastes which fall under the Bevill amendment exceptions.⁵⁸⁶ EPA has stated its intent to develop a Subtitle D program for mineral extraction, beneficiation, and processing wastes,⁵⁸⁷ but to date no mining waste program is in place. In the absence of a federally-mandated regulatory program for

580. 42 U.S.C. § 6921(b)(3)(A)(ii) (1988). Beneficiation is the process of separating the desired mineral from the host rock. Jacus & Root, *supra* note 579, at 465.

581. 42 U.S.C. § 6921(b)(3)(A) (1988). The EPA was to study the environmental effects of solid wastes from active and abandoned surface and underground mines and from the extraction, beneficiation, and processing of ores and minerals. 42 U.S.C. § 6982(f), (p) (1988).

582. The long and tortuous implementation of the Bevill amendment is detailed at Jacus & Root, *supra* note 579, at 466-73. See also *Solite Corp. v. U.S. Env'tl Protection Agency*, 952 F.2d 473, 477-82 (D.C. Cir. 1991).

583. 56 Fed. Reg. 27,300 (1991). EPA's determinations were upheld for the most part in *Solite Corp.*, 952 F.2d 473. The primary criteria for determining whether mining wastes would fall under the Bevill amendment were high volume and low hazard. 54 Fed. Reg. 36,592 (1989); see also *Solite Corp.*, 952 F.2d at 483-90.

The list of Bevill amendment mining wastes excepted from hazardous waste regulation under RCRA is found at 40 C.F.R. § 261.4(b)(7) (1993). In addition, a federal district court has recently ruled that acid mine drainage is a mining waste covered by the Bevill amendment. See 24 Env't Rep. (BNA) 184 (1993) (noting an unpublished May 11, 1993 order from the Eastern District of California. In an earlier published opinion, the court had refused to rule on whether acid mine drainage came within the Bevill amendment on the grounds that the parties had neither raised nor briefed the issue. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1540 (E.D. Cal. 1992)).

584. *Solite Corp.*, 952 F.2d at 481.

585. 54 Fed. Reg. 36,592, 36,595 (1989).

586. EPA has stated that it intends to address 18 of the 20 Bevill amendment wastes under Subtitle D, and the remaining two under the Toxic Substances Control Act. See 56 Fed. Reg. 27,300 (1991).

587. 56 Fed. Reg. 27,300, 27,317 (1991).

non-hazardous mining wastes, tribal regulation of those wastes can be accomplished through tribal governmental police powers.⁵⁸⁸ Many tribes, however, will not have the funding, staff, or expertise necessary to develop mining waste management programs of their own.

d. Remediation

Nonetheless, tribes may control remedial actions or other response measures for contamination caused by the release of mining wastes. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund Act),⁵⁸⁹ when a hazardous substance or other pollutant which may cause imminent and substantial danger is released into the environment, the federal government is authorized to undertake appropriate remedial action.⁵⁹⁰ Tribes are authorized to enter into contracts or cooperative agreements with the federal government to carry out those actions in the case of a release in Indian country.⁵⁹¹ For tribes which do not enter into cooperative agreements, CERCLA provides for consultation with the tribe before the federal government determines the appropriate remedial action.⁵⁹²

One potential snag to tribal involvement in remediation under CERCLA is the possibility that some mining wastes are not covered by the Superfund Act. Although CERCLA applies to any release of a hazardous substance, the definition of hazardous substance incorporates the Beville amendment from RCRA.⁵⁹³ Almost all federal courts

588. See Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 244-45 (1993).

589. 42 U.S.C. § 9601 *et seq.* (1988).

590. 42 U.S.C. § 9604(a)-(b) (Supp. IV 1992).

591. 42 U.S.C. § 9604(d)(1)(A) (Supp. IV 1992). The federal government must first determine that the tribe "has the capability to carry out any or all of such actions" in accordance with the Superfund Act, "and to carry out related enforcement actions". *Id.*

592. 42 U.S.C. § 9604(c)(2) (1988). Indian tribes are to be treated as states for purposes of that subsection. 42 U.S.C. § 9626(a) (Supp. IV 1992). One commentator points out that tribes are excluded from the section providing for "substantial and meaningful involvement" by states "in initiation, development, and selection of remedial actions to be undertaken in that State," see 42 U.S.C. § 9621(f)(1) (Supp. IV 1992). Stern, *supra* note 422, at 99-100. That exclusion may be mooted in part, however, by the consultation rights under § 9604(c).

In addition to treating tribes as states for consultation on remedial actions, CERCLA also provides for TAS treatment for notification of releases, access to information, health authorities, and most roles and responsibilities under the national contingency plan. 42 U.S.C. § 9626(a) (Supp. IV 1992). There is no requirement in CERCLA, as there is in the pollution control statutes, that tribes first qualify as states before the TAS provisions apply.

593. 42 U.S.C. § 9601(14)(C) (Supp. IV 1992). The Beville amendment to RCRA is discussed *supra* at text accompanying notes 579-587.

considering whether mining wastes are therefore excluded from CERCLA have concluded that they are not, so long as the mining waste at issue falls under one of the other definitions of hazardous substance in the Superfund Act.⁵⁹⁴ Nonetheless, one federal district court recently held that all Bevill amendment wastes, which include 20 mining wastes,⁵⁹⁵ are excluded under CERCLA.⁵⁹⁶ Until the issue is resolved, tribes' ability to respond to environmental harm caused by releases of mining wastes may be compromised.⁵⁹⁷

In addition to remediation of damages caused by hazardous substances generally, tribes may also be involved in remediation of oil spills. The Oil Pollution Act of 1990 (OPA)⁵⁹⁸ provides that a tribe may recover from the responsible party any removal costs incurred by the tribe in response to an oil spill.⁵⁹⁹ Since the OPA applies to all facilities involved in oil development,⁶⁰⁰ it offers tribes greatly increased control over the remediation of any oil spill connected with development of oil resources in Indian country.

In addition, the OPA and CERCLA authorize tribes to recover

594. The leading case is *Eagle-Picher Industries, Inc. v. U.S. Env'tl Protection Agency*, 759 F.2d 922, 926-29 (D.C. Cir. 1985). See also *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 13 F.3d 1378 (9th Cir. 1994); *Idaho v. Hanna Mining Co.*, 699 F.Supp. 827, 833 (D. Idaho 1987); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665, 673 (D. Idaho 1986); *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1146-47 (D. Ariz. 1984).

595. See *supra* text accompanying note 583.

596. *United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1539 (E.D. Cal. 1992). Although the *Iron Mountain* holding itself has now been nullified by the Ninth Circuit's decision in *Louisiana-Pacific*, 13 F.3d 1378, most federal circuits have not ruled on the issue. The possibility of conflicting interpretations therefore remains.

Despite its ruling on CERCLA, the *Iron Mountain* decision did not relieve the mining company of liability. Following the decision, EPA ordered the company to continue clean-up under the authority of RCRA. See 24 Env't Rep. (BNA) 184 (1993). RCRA authorizes the EPA to bring suit to force clean up whenever the storage or disposal of any solid or hazardous waste presents an imminent and substantial endangerment to the environment. 42 U.S.C. § 6973(a) (1988). However, tribes are not able to act directly under RCRA and thus the loss of CERCLA authority would impinge substantially on their ability to control environmental damage from mining waste spills.

597. While the majority view is preferable from both the environmental and tribal perspective, tribes may be reluctant to act in the face of the legal uncertainty.

598. 33 U.S.C. § 2701 *et seq.* (1992 Supp.).

599. 33 U.S.C. §§ 2702(a)-(b)(1)(A) (1992 Supp.), permitting tribes to recover removal costs incurred under 33 U.S.C. § 1321 of the Clean Water Act.

600. Although the OPA was enacted in response to the Exxon Valdez oil spill, it applies to oil spills into navigable waters from onshore facilities as well as offshore facilities and vessels. The Act provides that facility includes "any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes." 33 U.S.C. § 2701(9) (Supp. II 1990). The definition of onshore facility also specifies that it reaches any motor vehicle or rolling stock "of any kind located in, on, or under, any land within the United States other than submerged land". *Id.* § 2701(24).

natural resources damages resulting from oil spills or releases of other hazardous substances.⁶⁰¹ Under both acts, the tribe may recover for damages to natural resources "belonging to, managed by, controlled by, or appertaining to" the tribe.⁶⁰² Natural resources are broadly defined by both acts to include the land, air, and water, and plant, fish and wildlife resources.⁶⁰³ Defenses to natural resources damages actions are limited to the usual act of God, act of war, and act or omission of a third party,⁶⁰⁴ except that a responsible party under CERCLA may raise compliance with the terms of an environmental impact statement and a federally approved permit or lease as a defense, so long as the federal actions did not violate the trust responsibility to the tribe.⁶⁰⁵

While the ability to recover damages for natural resources does little to protect those resources from the initial damage, it does put tribes on an equal footing with states and the federal government.⁶⁰⁶ And once damage occurs, tribes may recover the costs of restoring, rehabilitating, or replacing the resources, or acquiring equivalent resources; the diminution in value pending restoration; and the reasonable costs of assessing the damages.⁶⁰⁷ Tribal control over

601. 33 U.S.C. §§ 2702(a), (b)(2)(A); 2706(a), (b)(4), (c)(3) (Supp. IV 1992) (OPA); 42 U.S.C. § 9607(f)(1) (1988) (CERCLA). See generally Rachel Jacobson & Peter Monson, *Natural Resource Damages: Tribes as Trustees*, FIFTH ANNUAL CONFERENCE ON NATURAL RESOURCES MANAGEMENT AND ENVIRONMENTAL ENFORCEMENT ON INDIAN LANDS (ABA SONREEL 1993).

602. 33 U.S.C. § 2706(a)(3) (Supp. II 1990) (OPA); 42 U.S.C. § 9607(f)(1) (Supp. IV 1992) (CERCLA). Under CERCLA, the tribe may also recover for damages to natural resources belonging to tribal members if those resources are subject to trust restrictions on alienation. 42 U.S.C. § 9607(f)(1) (Supp. IV 1992).

603. 33 U.S.C. § 2701(20) (Supp. II 1990) (OPA); 42 U.S.C. § 9601(16) (CERCLA) (Supp. IV 1992).

604. 33 U.S.C. § 2703(a) (Supp. II 1990) (OPA); 42 U.S.C. § 9607(b) (CERCLA) (Supp. IV 1992).

605. CERCLA provides that a responsible party shall not be liable to a tribe for natural resources damages:

[W]here the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe.

42 U.S.C. § 9607(f)(1) (1988). The environmental impact statement may be required by NEPA, discussed *supra* at text accompanying notes 487-490.

606. 33 U.S.C. § 2706(a) (Supp. II 1990) (OPA); 42 U.S.C. § 9607(f)(1) (Supp. IV 1992) (CERCLA).

607. 33 U.S.C. § 2706(d)(1) (Supp. II 1990).

remediation, combined with recovery of damages to natural resources, enhances the tribes' ability as governments to respond to environmental harm within Indian country.

5. Conclusion

Thus, while tribal environmental control over surface coal mining is limited under SMCRA, the tribal role in environmental regulation under federal laws administered by EPA is expanding. Under the tribes-as-states provisions found in most of the federal environmental laws, tribes are potentially the regulatory authority for air quality, surface water quality, and drinking water quality standards. Moreover, the tribal role in waste management, remediation, and recovery of damages to natural resources is growing. As tribes increasingly assume authority to determine, implement, and enforce these programs, tribal control over development of mineral resources within reservation boundaries will correspondingly increase.

Tribal regulatory powers over mineral development are a fairly recent phenomenon. In the last two decades, tribes have asserted their inherent governmental authority to take control of mineral development activity in ways that the federal mineral statutes, with their emphasis on the tribes as mineral owners, could not provide. Through the powers of taxation and environmental regulation, tribes can assert sovereign control over the effects of mineral development within their territories, reaping the full economic benefits of mineral activities and providing protection for the reservation environment.

VI. CONCLUSION

Indian tribes thus play a variety of roles in the development of mineral resources in Indian country. In the early years of mineral development, during the allotment era of the late 19th and early 20th centuries, Indian tribes concentrated on their ownership role. Preserving the mineral resources for the tribes, through leasing rather than sale and through judicial recognition of tribal ownership, was of primary importance.

With ownership secure, the tribal role became primarily that of lessor. During the allotment era, the tribal role was minimal: many of the mineral leasing acts did not provide for tribal consent but did authorize state taxation. In 1938, however, as part of the resurgence of tribal government, a new mineral leasing statute provided for standardized provisions, tribal consent and decision-making, and revenue

generation through a system of bonuses, rents, and royalties. But the narrow options available under standardized mineral leases ultimately proved too restrictive for tribes taking control of their lands and government.

In the late 1970s and 1980s, then, tribes moved to more active roles in mineral development. No longer restricted to passive lessors, tribes after 1982 had the option to participate directly in mineral development on Indian lands as developers and owners. During the same period, tribes also began to assert their governmental role in mineral development, acting as regulators through the powers of environmental regulation and taxation of mineral production.

The first general mineral leasing act for Indian lands was enacted in 1891. In the century since, the history of mineral development on Indian lands has been one of increasing tribal control over the mineral resources. So long as federal Indian policy continues to foster tribal self-government and self-sufficiency, the tribal role in mineral development in Indian country will continue to expand.

