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MINERAL LEASING IN INDIAN COUNTRY

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado

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I. To Lease or not to Lease: A Comparison of "Traditional" Indian Mineral Leases with other Structures for Mineral Development.

A. The Statutes. Federal law requires consent of Congress to any conveyance of Indian lands. ^{1/} Two basic modern statutes govern mineral development of Indian tribal lands: ^{2/}

1. The Indian Mineral Leasing Act of 1938, codified as amended as 25 U.S.C. §§ 396a-396g. In general, the 1938 Act permits leases of tribal lands for not to exceed a ten-year primary term and as long thereafter as minerals are produced in paying quantities. The Act requires competitive sales of oil and gas leases by public auction or sealed bids after appropriate notice. The Secretary can reject all bids and readvertise oil and gas leases. Also, with consent of the tribe, an oil and gas lease may be negotiated without competitive bidding -- but only with the Secretary's approval. Performance bonds must be furnished to assure compliance with

^{1/} A tribe developing its own minerals entirely by itself would not require any federal approval. However, if a tribe enters into a lease, or any kind of service or employment contract with an outside company or any non-Indian, that lease or contract would require federal approval. See 25 U.S.C. § 81.

^{2/} These two statutes relate to tribal development of minerals. Leasing of individual Indian allotments for mining purposes is chiefly governed by 25 U.S.C. § 396.

lease terms. Leasing under the 1938 Act is also governed by fairly extensive Secretarial regulations.

2. Indian Mineral Development Act of 1982, codified at 25 U.S.C. §§ 2101-2108. The 1982 Act authorizes leases or any other agreement such as a joint venture, operating, production sharing, service, or managerial agreement. Unlike the 1938 Act, the 1982 statute does not require competitive bidding for oil and gas leases. An individual Indian holding a beneficial interest in mineral resources can include these in a tribal mineral agreement if the Secretary approves. In deciding whether to approve a minerals agreement under the 1982 Act, the Secretary shall consider the potential economic return to the tribe, the potential environmental, social and cultural effects of the agreement on the tribe and provisions for resolving disputes that may arise between the parties to the agreement.

B. Tax and Other Incentives to Develop Minerals on Indian Lands.

1. Under the 1982 Act. A tribe is ordinarily not subject to any form of state taxation or state regulation, except in the very unusual circumstance where Congress has specifically authorized it. This should be the result wherever a tribe develops its own minerals.

Similarly, if a tribe develops its own minerals under the 1982 Act by entering into an employment contract or service agreement with a non-Indian mineral company to assist it, state severance, personal property, gross receipts and like taxes should not apply.

Under such an agreement, the non-Indian contract miner could lease equipment to the tribe or the tribe could purchase the equipment paying for it over time. Alternatively, by agreement the contract miner could contribute equipment to the joint venture with the tribe. A contract miner could also agree to provide other services.

There is strong authority for the proposition that the non-Indian contract miner would also not be subject to state taxation or state regulation on its share of the proceeds. E.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). However, these cases require that the courts undertake a "particularized inquiry" into any state interest supporting a regulation or particular tax, as against the federal and tribal interest in a tax or regulatory immunity. Thus, the exact outcome may turn on the fact situation of a particular case, and cannot be predicted with certainty.

2. Under the 1938 Act. In a lease transaction, the result should be the same. The Supreme Court in 1988 summarily affirmed the Ninth Circuit holding (819 F.2d 895) that the State of Montana could not impose its 30% coal severance tax on a mineral lessee of Crow coal. Montana v. Crow Tribe, __ U.S. __, 98 L. Ed. 2d 638 (1988). It may be, however, that the size of this particular tax militated heavily in favor of tribal immunity. It remains to be seen whether immunity will be the rule in all cases challenging state taxes on non-Indian mineral lessees. The Supreme Court has recently granted review Cotton Petroleum Corp. v. State of New Mexico, __ 745 P.2d 11 (N.M. 1987). In Cotton, the New Mexico Court of Appeals held that the state taxes could be imposed.

3. Tribal taxes. In Cotton, the Tribe also taxed the production of minerals. This right has been confirmed. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

If both the State and the Tribe can legally tax mineral extraction, and both do so, there is an obvious disincentive to develop Indian minerals. For example, Cotton Petroleum paid taxes (state and tribal) amounting to about 14 percent of the value of its production. On non-Indian land, its state taxes would be about 8 percent of production. Moreover, the existence even of moderate state taxes as a practical matter limits the tax revenues a tribe can expect to

receive and therefore the governmental services it can provide on the Reservation and for its people. (To illustrate, if New Mexico's 8 percent tax cannot legally be applied to Cotton, the tribe involved could raise its 6 percent tax to 8 percent and still be competitive with non-Indian lands.) Because of this result, I believe any state taxation of mineral extraction which a tribe also taxes impermissibly interferes with the authority of a tribe to govern itself. It remains to be seen whether the Court will agree.

The structure of the mineral development venture may have tribal tax implications as well. The tribe of course will not be taxing its own enterprise, so if a tribal enterprise develops coal or oil and gas under the 1982 Act, it would not be taxed. A lessee is, however, subject to tribal severance and other taxes. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). (Some tribes have agreed to tax-caps in mineral leases, but any kind of limitation on tribal taxation raises serious issues as to tribal sovereignty which are avoided if a tribal enterprise does the development with assistance of a contract miner under the 1982 Act.)

4. Regulatory implications. It is likely that state regulatory law also does not apply to tribal development of tribal minerals. Federal regulations (a) of general application, or (b) that specifically pertain to Indian minerals would generally be applicable. This immunity from

state law may create particular incentives for Indian mineral development.

C. Tribal control. Some argue that joint ventures or service agreements that give tribes "a piece of the action" provide greater tribal control of the transaction. In theory, at least, there should not be greater tribal control under a 1982 Act agreement than under a 1938 Act lease. In either circumstance, the duties, powers and responsibilities of the parties are spelled out by the agreement -- be it a lease, a service agreement, a joint venture or a partnership. The governing document controls. Its terms are flexible. The Secretary, moreover, must approve both transactions, so both are subject to federal regulation.

D. Economic and financial implications. Tribes should think carefully about the economic implications of an oil and gas agreement under the 1982 Act. Competitive bidding in the 1938 Act does provide protections. Even the best of experts may be wrong in a speculative field like oil and gas development. If the tribe develops its own oil and gas pursuant to a service contract, and hits a dry hole, the tribe takes nothing. By contrast, competitive bids under the 1938 Act provide a front-end bonus, which can be substantial. With hardrock minerals, where the consequences of a mineral development are more predictable, a 1982 Act agreement is more attractive from the tribal standpoint.

A joint venture, moreover, may require some tribal financial contribution -- in contrast to a more traditional lease where all the capital must be advanced and all the risk of loss borne by the non-Indian company. Of course, the extent of the Tribe's financial obligations are governed by the mineral agreement itself.

II. Other Issues.

A. Dispute resolution. However a mineral transaction is structured -- as a lease or otherwise -- thought needs to be given to dispute resolution. Tribes will surely resist state courts, and non-Indian companies may resist tribal courts -- although tribal courts are increasingly being recognized as forums for settlement of civil disputes.

Thought could be given to structuring a binding arbitration process. This was done in the Fort Peck Water Compact which will be discussed separately at the Conference. The Compact provides for binding arbitration by establishing a three-member board, one selected by the Tribe, the other by the State (in a mineral agreement, by the mineral company) and a third neutral selected by the two. The board can be empowered to hold hearings, subpoena witnesses and documents from the tribe and company, take evidence and reach written decisions on virtually every issue that could be subject to dispute. The parties can set time frames in which decisions

must be reached in the agreement. The agreement can limit judicial review to simply enforcing the arbitrator's decision unless it was produced by fraud, corruption or the like.

B. Employment issues. Indian preference or a set quota of jobs is likely to be of great importance to tribes. Union and other objectives are often important to companies. Any agreement must consider employment questions if the development is expected to be a significant source of jobs.