

UNITED STATES

Native American Lands and Natural Resource Development

By Maura Grogan
with Rebecca Morse and April Youpee-Roll



The Revenue Watch Institute promotes the effective, transparent and accountable management of oil, gas and mineral resources for the public good. Through capacity building, technical assistance, research, funding and advocacy, we help countries to realize the development benefits of their natural resource wealth.

Cover Image

The Navajo Generating Station, Navajo Indian Reservation, Arizona.

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Revenue Watch Institute

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LIST OF ACRONYMS

BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
CERT	Council of Energy Resources Tribes
DEMD	Division of Energy and Mineral Development
DIEPD	Division of Indian Energy Policy Development
DOE	Department of Energy
DOI	Department of the Interior
EPA	Environmental Protection Agency
IEED	Office of Indian Energy and Economic Development
IMDA	Indian Mineral Development Act
IMLA	Indian Mineral Leasing Act
IRA	the Indian Reorganization Act
FOGRMA	the Federal Oil and Gas Royalty Management Act
GAO	Government Accountability Office
MGS	Mojave Generating Station
MMS	Minerals Management Service
NARP	Native American Resources Partners
NCAI	the National Congress of American Indians
NGS	Navajo Generating Station
NNOGC	Navajo Nation Oil and Gas Company
ONRR	Office of Natural Resources Revenue
OSM	Office of Surface Mining
OST	Special Trustee for American Indians
RMMLF	Rocky Mountain Mineral Law Foundation
STRAC	State and Tribal Royalty Audit Committee
TERA	Tribal Energy Resource Agreement
TEEIC	Tribal Energy and Environmental Information Clearinghouse
USGS	United States Geological Survey

EXECUTIVE SUMMARY

Tribal lands in the United States contain significant amounts of nonrenewable energy resources, with ownership of major energy resources concentrated within a relatively small number of tribes in the western United States.

Although several tribes already have sufficient expertise to oversee mining and oil and gas production on their lands, most remain reliant on the U.S. government for support. Despite recent legislation offering tribes greater decision-making authority over natural resources, barriers to Indian economic development—including minerals development—remain formidable.

American Indian lands are estimated to include nearly 30 percent of the nation's coal reserves west of the Mississippi, as much as 50 percent of potential uranium reserves, and up to 20 percent of known natural gas and oil reserves. These lands also may contain rare earth minerals, increasingly sought after for use in manufacturing.

Only recently have tribes had opportunities to decide how to develop these resources in line with their development priorities. From the late nineteenth to late twentieth centuries, Native Americans were afforded mostly a passive role in mineral extraction and often saw their mineral-rich lands expropriated under federal legislation designed to transfer land rights to white settlers. Yet some tribes retained lands that contain potentially vast amounts of mineral wealth, and they have taken an increasingly larger role in managing these assets.

Today, tribes engaged in significant extraction continue to build their capacity to manage mining and oil and gas development. A few—such as the Southern Ute Indian Tribe—have created exploration and development companies that control virtually every aspect of the extractive process. However, even in these cases, the federal government retains final approval authority, due to the nature of its trust responsibilities to tribes.

The federal trust doctrine calls for protection of Indian trust lands and Indian rights to use those lands; protection of tribal sovereignty and rights of self-governance; and the provision of basic social, medical and educational services. It requires the federal government to act “in the best interests” of tribes, a mandate often colored by political agendas that can foster a lingering paternalistic attitude within government agencies.

The federal bureaucracies and regulations that govern tribal resource development are complex. Depending on the resource being extracted, and on the land containing the resource, at least four federal agencies are involved in the execution of each lease. These agencies are chronically underfunded and understaffed, and have been implicated in lawsuits brought by tribes seeking redress for the mismanagement of tribal trust assets.

In 2010, the resolution of the landmark lawsuit *Cobell v. Salazar* led to congressional approval of a \$3.4 billion class action settlement for the federal government's historical mismanagement of individual Indian trust funds. Cases like this have drawn attention to the accountability of federal authorities involved in oversight of resources and revenues on Indian lands. They also have highlighted the critical role that oversight functions play in ensuring that tribes and individuals receive the benefits due from their natural resource assets.

Mining and oil and gas production are as controversial in Indian Country as they are elsewhere in the United States. Many tribal citizens do not want mining on their lands—regardless of how large or valuable their natural resource endowments may be—while others see development of those resources as the surest way out of poverty. The overarching issue facing American Indian tribes and their leadership, however, is their ability to make this sovereign decision independently and in accordance with tribal priorities.

1. Introduction

American Indian lands contain vast amounts of natural resources—both renewable and nonrenewable—and are among the least explored and least developed lands in the United States. In particular, the development potential of energy resources on these lands is substantial. As U.S. concerns about energy sufficiency and security have risen, and as Indian nations have recognized the potential economic benefits of resource development, these resources have drawn increased attention from industry, the federal government and tribes themselves.

Developing these resources, however, is far from simple. Multiple actors are involved, including a diverse set of Indian nations and—in some cases—individual Indians; local, national and international corporations; and numerous federal agencies. Further, the regulatory regimes governing resource development are complex, land tenures are diverse, and the development goals of Indian nations can place constraints on the form and extent of development. Meanwhile, tribal extractive planning and activities often are opaque, not only to outsiders but also to tribal members. Locating, gathering and interpreting information about that process is itself challenging.

This report answers basic questions about the development of energy resources on Native American lands: What resources are involved? Who are the key actors? How has the field of energy-resources development in Indian Country changed over time? What does the process of development look like? And what happens to the revenues that such development generates?

2. Project Background

The issues surrounding extraction on U.S. Indian lands are extraordinarily complex. The analysis in this report is limited to a discrete set of extractive activities, namely the exploitation of oil, gas and mineral resources on tribal trust land.

These resources are governed by common federal legislation and regulations, and can have an outsized impact on the tribes that choose to develop them. Not only do oil, gas and energy mineral resources represent a singularly significant potential source of income for tribal governments and citizens, but also the extraction of these resources poses a special challenge to the protection of tribal homelands and cultural resources.

Much of this report deals with extractive resources and decision-making on tribal (as opposed to individual Indian) lands, and looks closely at those tribes in the lower 48 states that qualify as owners or producers of major energy resources. This report's focus on traditional nonrenewable energy resources means it does not address nascent activities in renewable energy, nor the development of rare earth minerals or other raw materials, such as sand and gravel.

This report was researched and written by Maura Grogan of Grogan | Cornell Consulting. It incorporates notes and information gleaned from fieldwork carried out by April Youpee-Roll of the Harvard Project on American Indian Economic Development; she conducted site visits in early 2011 to major energy tribes including the Crow Nation, the Assiniboine and Sioux Tribes, the Three Affiliated Tribes, the Navajo Nation and the Southern Ute Indian Tribe.

This research benefited from the advice of an advisory group whose members included: Jose Aguto, policy advisor, National Congress of American Indians; Eric Henson, vice president, Compass-Lexecon, and a citizen of the Chickasaw Nation; Miriam Jorgensen, research director at the Native Nations Institute at the University of Arizona, and at the Harvard Project on American Indian Economic Development; and David Lester, executive director, Council of Energy Resources Tribes, and a citizen of the Muscogee Creek Nation.

The author and field researcher also interviewed people knowledgeable about aspects of extraction on Native American lands; their names and affiliations are cited in footnotes where appropriate.

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3.

The Significance of Energy Resources on Native American Lands

Among the 565 federally recognized tribes, 337 reside in the lower 48 states, on reservations covering nearly 56 million acres (or about 2.3 percent of the country's total land base.) Of this land, the U.S. Department of the Interior (DOI) estimates that there are "15 million acres of potential energy and mineral resources" in addition to the 2.1 million acres already being tapped for its resource wealth.¹ All of this land is held in trust by the U. S. government, which legally is responsible for maintaining it for the benefit of current and future generations of Native Americans.²

Significance to Tribes

Lands containing substantial energy resources are distributed unevenly among Indian nations. The western United States contains not only the vast majority of Indian lands in the lower 48 states but also the majority of both the country's and Native American nations' energy and mineral assets. While some tribes have potentially meaningful coal, oil and gas deposits in Florida, New York, the Midwest, California and Washington, the major concentrations of tribes with significant quantities of these resources are in Arizona, Colorado, Montana, New Mexico, Oklahoma, Utah and Wyoming.³

For those Indian nations with substantial energy-resources endowments, development can have a transformative economic potential. Native Americans living on Indian reservations are the most economically disadvantaged people in the country. In 2000, the most recent year for which U.S. Census data is available, Indians on reservations had real per capita income of \$7,942 compared with \$21,587 for the average U.S. resident; 39 percent lived in poverty compared with 9 percent of white Americans; and the Indian unemployment rate was nearly four times greater than the U.S. average.⁴ Living on land that often is isolated from educational and economic opportunities, Indians residing on reservations too often have been forced to rely on subsistence living and federal support in order to survive. In this context, accessible energy resources can be a lifeline to prosperity and opportunity. For a handful of tribes, minerals extraction already has had a substantial financial impact. As one example, coal revenues accounted for 88 percent of the Hopi Tribe's budget for 2009.

1 Robert W. Middleton. Hearing before the Committee on Indian Affairs, US Senate. *Indian Energy Development: Statement of Dr. Robert W. Middleton*, 110th Congress, Second Session, 1 May, 2008. http://www.indian.senate.gov/public/_files/May12008.pdf, accessed April 26, 2011.

2 There are three components to the federal trust responsibility to Indian nations: the protection of Indian trust lands and Indian rights to use those lands; the protection of tribal sovereignty and rights of self-governance; and the provision of basic social, medical and educational services for tribal members. See Friends Committee on National Legislation, "The Origins of our Trust Responsibility towards Tribes," see http://fncnl.org/issues/nativeam/the_origins_of_our_trust_responsibility_towards_the_tribes/index.html, accessed April 26, 2011.

3 There are substantial oil and gas deposits on Indian lands in Oklahoma, and much of them are currently being extracted. However, Indian land tenure in Oklahoma is distinctive, and most of these resources lie under allotted land owned by individual Indians rather than by the tribes. Even more distinct is minerals ownership within the Osage Nation. Allotted lands are discussed in Section 5 and the Osage Nation in Section 9.

4 Harvard Project on American Indian Economic Development (HPAIED). *The State of the Native Nations: Conditions under US Policies of Self-Determination*. (New York: Oxford University Press, 2008): 114-116.

Nevertheless, that same year, while the Arizona unemployment rate was 8.5 percent, Hopi unemployment was more than 50 percent.⁵

The federal Office of Natural Resources Revenue (ONRR), which oversees the collection and disbursement of royalty and other payments from energy leases on federal and Indian lands, states that it tracks payments from 4,620 energy leases on Indian lands in the lower 48 states. Of these, 4,272 leases are producing oil and gas, six are producing coal, and the remainder are either not producing anything or produce other minerals and geothermal energy. In the 10-year period from 2001 to 2010, ONRR distributed more than \$4 billion in royalty, rents and other revenues to tribes. In fiscal year 2010 alone, ONRR distributed payments of \$407.6 million to 34 tribes and 30,000 individual Indians. Royalty payments to American Indians accounted for 4.4 percent of a total of \$9.2 billion in federal royalty disbursements.⁶ While this percentage may seem low, the untapped potential on Indian lands is substantial.

Important to note, however, is the fact that choosing not to extract mineral assets is an approach many tribes have taken. Some tribes, like the Northern Cheyenne, have elected not to mine their substantial coal reserves (although there is pressure even within the tribe to change that stance). Others, like the San Carlos Apache and some neighboring Arizona tribes, are fighting the opening of a copper mine that is not on their reservation lands, but lies on land that is sacred to their people.

Significance to the United States

The pursuit of mineral wealth has played a key role in the country's history of westward expansion, and helped define its relationship with the Indian people. As one academic has noted: "If mining has been crucial to national growth, tribal mineral resources have been crucial to the mining industry."⁷

Today, the Indian component of U.S. energy resources is anything but trivial. The precise extent of nonrenewable resources on American Indian lands is a matter of debate, but most estimates

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fall within a fairly consistent range. It appears fair to say, based on a number of reports, that Indian lands contain about 30 percent of the coal found west of the Mississippi, up to 50 percent of potential uranium reserves, and as much as 20 percent of known natural gas and oil reserves.⁸ Robert Middleton, former director of the Office of Indian Energy and Economic Development, estimated, "These lands contain over 5 billion

barrels of oil, 37 trillion cubic feet of natural gas, and 53 billion tons of coal that are technically recoverable with current technologies."⁹

Further, many Indian lands are well positioned to develop renewable energy resources. A substantial number of tribes throughout the country are exploring projects in wind, solar, biomass, geothermal and hydropower, often with grant funding from the U.S. Department of Energy's Tribal Energy Program. Together with their vast nonrenewable resource potential, it is clear that any long-term U.S. energy policy must include Indian nations as partners in the process.

5 LeRoy Shingoitewa, "The Hopi Tribe's Comments on the Environmental Protection Agency's Advanced Notice of Proposed Rulemaking Regarding Best Available Retrofit Technology for Nitrogen Oxide Emissions at the Navajo Generating Station," see <http://www.capsmartenergy.com>, accessed April 26, 2011.

6 Office of Natural Resource Revenues, US Department of the Interior, "ONRR Statistical Information, ONR website, <http://www.onrr.gov/ONRRWebStats>, accessed Nov. 1, 2010. Information on the 10-year payments was calculated using these data.

7 Judith Royster, "Mineral Development in Indian Country: The Evolution of tribal Control over Mineral Resources." *Tulsa Law Journal* 29 (1993): 541.

8 Saleem H. Ali, *Mining, the Environment, and Indigenous Development Conflicts*. (Arizona: The University of Arizona Press, 2003) and Marjane Ambler, *Breaking the Iron Bonds*. (Lawrence: University of Kansas Press, 1990).

9 Middleton testimony, 2008.

4.

Snapshot of Known Nonrenewable Energy Resources

Coal

Major coal operations take place on three reservations today: the Crow Tribe in Montana (Westmoreland Coal Co.); the Hopi Tribe in Arizona (Peabody Energy); and the Navajo Nation in Arizona (BHP Billiton and Peabody Energy). The Northern Cheyenne Tribe in Montana also owns substantial coal reserves, but to date has elected not to mine them.

Copper

The Tohono O'odham Nation in Arizona has several substantial surface and underground copper mines, some operational and some not. The Cyprus Tohono mine, opened in 1974 and operated by Freeport McMoRan, is a Superfund site. It is nonoperational except for some recovery of copper from existing ore stockpiles. ASARCO's Mission Complex mine is active on both tribal and nontribal lands. According to the tribe's website, there has been copper oxide mining on reservation lands since the 1880s. Elsewhere in the state, the San Carlos Apache and several other Arizona tribes are fighting to keep the Resolution Copper mine from opening on lands off the reservation that are sacred to these tribes.

Oil and Gas

Oil and gas are much more broadly extracted than coal. The Bureau of Land Management (BLM) reports that 42 federally recognized tribes have oil and gas production, on either tribal or allottee lands.¹⁰ The main tribes involved in significant oil and gas production today are: the Blackfoot Nation (Montana); the Three Affiliated Tribes (Fort Berthold, North Dakota); the Assiniboine and Sioux Tribes (Fort Peck, Montana); the Jicarilla Apache Nation (New Mexico); the Navajo Nation (Arizona, New Mexico, and Utah); the Osage Nation (Oklahoma); the Southern Ute Indian Tribe (Colorado); the Ute Indian Tribe of the Uintah and Ouray Reservation (Utah); the Ute Mountain Ute Tribe (Colorado); and the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation (Wyoming).

Uranium

There has been active uranium mining on Indian lands, most notably at Laguna Pueblo in New Mexico, on the Navajo Nation, and on lands of the Spokane Tribe in Washington. However, all uranium mining on Indian reservation lands appears to have ceased, and the Navajo Nation and the Spokane Tribe have banned future uranium mining.

¹⁰ Bureau of Land Management, US Department of the Interior. *Oil and Gas for Managers: American Indian Issues*. Retrieved through the Bureau of Land Management National Training Center, http://www.ntc.blm.gov/krc/uploads/214/Native%20American%20Issues_DL.ppt, accessed April 26, 2011.

Other Minerals

Sand and gravel, decorative rock, aggregate, molybdenum and many other minerals are found, and often mined, on Indian lands. Sand and gravel, in particular, represent a significant enterprise for some tribes. These activities are governed by many of the same laws and federal oversight that cover coal, oil and gas.

Rare Earth Minerals

A number of rare earth minerals are found on Indian lands, and according to one DOI employee interviewed for this study, the federal government is interested in further exploration.¹¹ Yttrium, an element used in lasers, high-temperature superconductors and microwave filters, is known to exist on lands of the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana, on Mescalero Apache lands in New Mexico, and on lands of the Three Affiliated Tribes in North Dakota (Fort Berthold). The Rocky Boy's Reservation also has deposits of cerium, which can be used as a chemical oxidizing agent, polishing powder, coloring agent in glass and ceramics, catalyst for self-cleaning ovens, and a fluid cracking catalyst in oil refineries. Fort Berthold has known quantities of yttrium, used in infrared lasers and as a chemical reducing agent. Tribes with unspecified rare earth minerals include the Oglala Sioux Tribe (South Dakota), Lower Brule Sioux Tribe (South Dakota), Coeur d'Alene Tribe (Idaho), Hopi Tribe (Arizona), Shoshone-Bannock Tribes of the Fort Hall Reservation (Idaho), Assiniboine and Sioux Tribes (Montana), the Cheyenne River Sioux Tribe (South Dakota), and the Blackfeet Nation (Montana).¹²

11 Stephen Simpson (Office of the Solicitor, Department of the Interior), interview with author, Dec. 7, 2010.

12 Information about rare earth minerals on specific Indian lands was obtained from a series of studies on the status of mineral resources commissioned by the Bureau of Indian Affairs in the 1970s and 1980s.

5.

Native American Land Ownership and Its Impact on Resource Extraction

Understanding the myriad types of land ownership in Indian Country is key to understanding resource extraction on Indian lands, both historically and today.

The Federal Trust Responsibility

The federal trust responsibility that forms the basis of the relationship between Indian tribes and the U.S. federal government arises from a series of Supreme Court decisions known as the Marshall Trilogy. Decided between 1823 and 1831, these three rulings held that tribes are sovereign entities, but are not independent of the United States. With a status of “domestic dependent nations” within the United States, the court decreed that Indian land could not be legally encumbered or conveyed without the approval of the U.S. government, acting as trustee for Indian lands and obligated to manage those lands for the welfare of tribes and their citizens. This premise persists today and affects not only the land itself, but also the management of surface and subsurface resources on this land.

Because of the precedents established by the Marshall court, the federal government has certain duties with respect to minerals development on tribal land, and can invoke its trust obligations “at the point of leasing or contracting, in the administration by the Bureau of Indian Affairs (BIA) of activities under approved agreements, and in courts’ resolutions of disputes regarding the lands of tribes or individual Indians.”

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that resulted from it endure today, increasingly “the fundamental trust concept, that tribes cannot manage their lands and resources, is being eclipsed in the self-determination era by tribes’ efforts to control resource development and exert governmental primacy.”¹⁴

The Allotment Era

Following the Marshall decisions came changes to land tenure under the General Allotment Act of 1887, also known as the Dawes Act. This act parceled certain tribal lands into individual allotments, with the intent to fully assimilate Native Americans through encouraging private, rather than collective, land ownership. While some reservations (such as many of the New Mexico pueblos)

13 Slade, Lynn H. “The Federal Trust Responsibility,” Modrall Sperling, <http://www.modrall.com/0928071191007965.art>, accessed April 26, 2011.

14 Slade, “The Federal Trust Responsibility.”

escaped significant allotment activity, others (such as the Osage in Oklahoma or the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota) saw most or all of their reservation lands allotted to individual Indians. Fortunately for the Osage, although all of the surface land on their reservation was allotted, the federal government retained the subsurface rights for ownership collectively by the tribe. This was not true at Fort Berthold, where allottees also were granted subsurface rights, although in 1984 150,000 acres of subsurface mineral rights were returned to the tribe, mostly on lands under Lake Sakakawea.¹⁵

Over time, because of federally devised inheritance laws, some allotment parcels have become fractionated into lots owned by hundreds of owners, turning decision-making about land use on allotted land extremely difficult and often contentious. Other allotment land has been either lost or sold. This has resulted in a “checkerboard” of land ownership at reservations like Crow, where even within reservation boundaries trust land and non-Indian land are intermingled.

Such divisions make the kind of comprehensive land-use planning needed for mineral extraction extraordinarily difficult. On allotted land, for instance, 51 percent of a parcel's allottees must approve of a lease sale before it is offered, while some parcels might be owned by literally hundreds of individual owners.

The Indian Reorganization Act Era

The allotment era ended with the passage of the Indian Reorganization Act (IRA) in 1934. The IRA stopped the allotment process and returned some land and mineral rights to select tribes—its primary intent being the improvement of tribal economic self-sufficiency and increased tribal control over tribal affairs. Unfortunately, the federal government provided neither the resources nor the necessary independence from federal interference and oversight to promote real self-sufficiency under this legislation. Instead, tribes were encouraged to adopt U.S.-designed governing structures and constitutions.

Nonetheless, the IRA gave tribes the right to prevent any leasing of tribal lands without tribal approval, and a majority of tribes adopted IRA structures. Interestingly, some tribes that rejected the IRA (such as Navajo, Crow and Wind River) also owned substantial mineral resources and were left without approval authority on the leasing of their resources.¹⁶

Types of Land Tenure Today

Today, there are three main types of land ownership possibilities for tribes and/or individual Indians.¹⁷ They are:

Trust land – The United States holds legal title to trust land, but the beneficial interest remains with the tribe or individual Indian. Most tribal and some allottee land falls in this category. The land cannot be encumbered or conveyed without the approval of the United States and can never be sold.

Restricted Fee – The tribe or individual Indian holds legal title to restricted fee land, but there are legal restrictions against alienation or encumbrance. Most allottee land falls into this category, and the land can be conveyed or sold only with the approval of the United States.

Fee Simple Absolute – There is little of this type of land ownership in Indian Country, and most of it has arisen in recent years as tribes have purchased historical tribal territory back from non-Indian owners. (Gaming revenues and other economic development opportunities have helped some tribes in this effort.) If a tribe does not request that the federal government place fee simple absolute land

15 Steve Kelly, “Oil and Gas Business Development on the Fort Berthold Reservation,” presentation to Western Energy Alliance, Denver, Colo., March 7, 2007. See <http://westernenergyalliance.org/wp-content/uploads/presentations/IndianLands/kelly.pdf>, accessed March 23, 2011.

16 Royster, 1993: 557-558.

17 Simpson interview.

into trust status, it remains like any other private land. Neither the federal nor any state government has a say over the decision to extract on this land, but once extractive activity begins, the government retains the same oversight responsibilities it exercises over mining activities on any private land.¹⁸

Finally, other types of land arrangements can further cloud the ownership picture—including those related to federal and state lands—when tribes might either have special rights to, or limitations on, extraction.

18 While putting land into trust status removes the tribe's ability to have full control over that land, it can have many advantages. "Because it is owned by the federal government, trust land is immune from state tax and zoning laws, and it may not be seized under the state's power of eminent domain or lost through adverse possession. . . . These advantages are so great that when a tribe purchases private land, it usually asks the Secretary of the Interior to transfer it into trust status, a conversion authorized by federal law." (See Stephen L. Pevar, *The Rights of Indians and Tribes: The authoritative ACLU guide to Indian and tribal rights*. (Carbondale: Southern Illinois University Press, 2002): 98.)

6.

The Changing Regulatory Environment for Extraction

Early Twentieth Century – Tribes as Landlords

Congress first passed legislation allowing mineral leasing on tribal lands in 1891 and required tribal consent for extraction. In 1919, Congress removed the consent requirement for certain mineral leases on tribal lands in western states and allowed states to tax lessees. These early laws gave non-Indians clear access to Indian mineral resources. As a result, for most of the twentieth century, the predominant way for tribes to extract minerals from tribal trust land was to lease these lands for development by outsiders, with the leasing process controlled by federal agents.

Indian Mineral Leasing Act (IMLA) of 1938

In the 1930s, the years of the Indian Reorganization Act (1934) and other developments, federal policy became more supportive of tribes. This was reflected foremost in the Indian Mineral Leasing Act (IMLA) of 1938, which prohibited state taxation of tribal mineral income, established and standardized a system of rents, royalties and bonuses, and provided at least some transparency and accountability on the part of the federal government to tribes and individual allottees through standardized processes. Perhaps most importantly, it restored tribal control over the decision as to whether lands could be leased for mineral development.

While an improvement, the IMLA also was replete with problems. Beyond the leasing decision itself, the tribal role remained entirely passive, as the 1938 act gave tribes “the key right to consent before leasing could occur,” but allowed them “no say in the mining process once they authorized the leasing of their lands, and no right to certain cancellation” for breach.¹⁹ Not only the mining process, but also royalty amounts and other payments and lease terms were decided on and enforced—or not—by the federal government, through the U.S. Geological Survey (USGS) and the Bureau of Indian Affairs (BIA), with USGS carrying primary responsibility for managing royalties and other payments. Neither agency carried out its duties to tribes with much integrity under the IMLA, as throughout most of the twentieth century the federal government consistently undervalued Indian resources and did a notoriously poor job of negotiating and collecting royalties.

The 1970s and Beyond – Tribes as Negotiators

In the 1970s, in the face of activist Indian politics and a growing movement among tribes to take control of their own affairs, the U.S. government moved toward a policy of tribal self-determination. In 1982 the Linowes Commission, appointed by the secretary of the Interior in response to allegations of theft and mismanagement of oil and gas on Indian lands, issued a report that was highly critical of his agency and USGS. The commission found evidence that lackadaisical agency oversight had enabled chronic underpayment of royalties, theft and fraud by some lessees. Its report was one of the factors leading to a major change in the federal approach to tribal mineral resources and

¹⁹ Royster, 1993: 565.

In 1982, the passage of the Indian Mineral Development Act (IMDA) substantially strengthened tribal control of minerals development, allowing tribes (though not allottees) to enter into any sort of agreement for extraction they desired, including leases and joint-venture and production-sharing agreements. Tribes can negotiate IMDA terms directly with companies and other partners, and can seek assistance from the federal government.

the creation of the Minerals Management Service (MMS) in 1982. It also contributed to the passage later that year of the Federal Oil and Gas Royalty Management Act (FOGRMA), an important reform that facilitated state and tribal participation in collecting and accounting of mineral revenues, and provided for civil and criminal penalties for underreporting.

Indian Mineral Development Act (IMDA) of 1982

In 1982, the passage of the Indian Mineral Development Act (IMDA) substantially strengthened tribal control of minerals development, allowing tribes (though not allottees) to enter into any sort of agreement for extraction they desired, including leases, joint ventures, production sharing and so on.²⁰ Tribes can negotiate IMDA terms directly with corporations or other partners, and can seek help from the federal government if desired. Furthermore, under an IMDA, tribes can negotiate tribal employment preferences, tribal business subcontracting, improved environmental controls and other conditions that previously were not available.

Tribes began implementing IMDAs right away, dramatically changing the development picture in Indian Country. Indeed, “by 1988 there were few standard lease sales” still taking place, and tribes already “had negotiated 67 new alternative mineral agreements, primarily for oil and gas.”²¹ Today, IMDAs remain the primary vehicle for tribes leasing out land for extraction.

While IMDAs have allowed tribes the right to a much more active role in the development of their own mineral resources, under these agreements they still are subject to federal controls. The federal government has retained the final say over any arrangements involving minerals extraction on Indian lands, and even today, each IMDA requires approval by the secretary of the Interior.

While an IMDA represents a step toward increased sovereignty for those tribes that have sufficient infrastructure and industry knowledge to negotiate favorable minerals development deals, many tribes don't have these advantages. Meanwhile the federal government is required to offer assistance only to the extent it can (while relying on limited resources). Unless a tribe is knowledgeable enough to write protections into its contracts, it must rely on the federal government to enforce or cancel them. Accessing capital also remains a challenge for tribes, which in many cases remain dependent on outside investors for the financial resources necessary to undertake major extractive projects.

Today – Tribes as Developers and Owners

In 2005, Congress passed the Energy Policy Act, which included as Title V the Indian Tribal Energy Development and Self-Determination Act. This authorized tribes to create Tribal Energy Resource Agreements or TERAs. Unlike an IMLA or IMDA agreement, once a TERA is approved by the secretary of the Interior, it gives the tribe blanket authority to undertake mineral development on its lands, without having to get separate approval for each business arrangement the tribe makes.

Tribal Energy Development and Self-Determination Act (TERA) of 2005

TERAs represent the latest step in the U.S. government's effort to foster self-determination and enable economic development of extractive resources on Indian lands. Information posted on the Tribal Energy and Environmental Information Clearinghouse website states, “Under a TERA, a tribe, at its discretion, may enter into leases and business agreements for the purpose of energy resource development on tribal land for:

1. Exploration for, extraction of, or other development of the energy mineral resources of the Indian tribe located on tribal land including, but not limited to, marketing or distribution;
2. Construction or operation of an electric generation, transmission, or distribution facility located on tribal land; and

²⁰ An allottee can participate in a tribal IMDA agreement but cannot negotiate his or her own.

²¹ Royster, 1993: 585, 588.

3. A facility to process or refine energy resources developed on tribal land.”²²

To date, several tribes have discussed TERAs with DOI, but no tribe has yet entered into one.²³ Because they devolve so much power to the tribes and the federal government still must exercise its trust responsibilities, the rules and regulations around implementing a TERA are exceedingly complex.

Future Directions – More Self-Governance or More of the Same?

Mineral development in Indian Country is more than a century old, but only recently has this development begun to occur under Indian auspices and with substantive Indian participation. An externally imposed legal and regulatory regime has gradually—and sometimes grudgingly—loosened its grip over the resources that remain on Indian lands. Yet even in the contemporary era of self-determination, a tribe's freedom to develop its energy resources is constrained by external approvals and controls.

In an attempt to facilitate greater tribal sovereignty over tribal extractive processes and to correct for inefficiencies in federal management of the sector, U.S. Sen. Byron Dorgan (D-N.D.) introduced a draft tribal energy bill for comment in May 2010. Titled the Indian Energy Promotion and

Parity Act of 2010, it was intended to address “obstacles to Indian energy development and promote solutions to unlock the potential of Indian energy resources and increase energy efficiency programs in Indian Country,” as well as “contribute to [America’s] domestic energy supplies.”²⁴

This bill was modeled on recommendations proposed in an “Indian Energy Concept Paper” circulated in 2009 by Dorgan and Sen. John Barrasso (R-Wy.),

chair and vice chair of the Senate Committee on Indian Affairs, respectively. These recommendations arose out of Senate hearings and additional meetings when the committee heard testimony from tribal chairs and other Indian energy experts. A related concept paper acknowledged that while recent federal laws “have begun to support tribal energy development by encouraging tribes to take an active role in developing their resources,” implementation of these laws has been slow, and “a century of bureaucratic federal policies . . . have created uncertainty and an unlevel playing field for tribal energy development.”²⁵

A few of the changes proposed by the Dorgan-Barrasso legislation included:

- expanding the “one-stop shop” program already in place at the Navajo and Fort Berthold reservations, which brings together DOI employees from multiple agencies to “ensure that lease, permit, and royalty processing occurs in an efficient and timely manner”;
- allowing individual Indians to negotiate IMDAs or TERAs in a manner similar to tribes, “eliminating some of the steps currently needed to process energy leases”;
- bundling leases and right-of-ways to leased Indian lands, so these two actions don’t have to be negotiated separately;
- encouraging long-term reservation-wide planning;

In an attempt to facilitate greater tribal sovereignty over tribal extractive processes and to correct for inefficiencies in federal management of the sector, U.S. Sen. Byron Dorgan (D-N.D.) introduced a draft tribal energy bill in May 2010.

22 TEEIC, Office of Indian Energy and Economic Development, “About Tribal Energy Resource Agreements,” TEEIC website, <http://teeic.anl.gov/abouttera/index.cfm>, accessed March 24, 2011. The clearinghouse is a service of the Office of Indian Energy and Economic Development, which is part of BIA.

23 Simpson interview.

24 “Dorgan Releases Draft Indian Energy and Parity Act,” US Senate Committee on Indian Affairs press release, March 12, 2010, see <http://indian.senate.gov/news/pressreleases/2010-03-12.cfm>, accessed April 27, 2010.

25 “Indian Energy and Energy Efficiency Concept Paper,” US Senate Committee on Indian Affairs paper, September 10, 2009, see <http://indian.senate.gov/issues/upload/Indian-Energy-and-Energy-Efficiency-Concept-Paper.pdf>, accessed April 26, 2011.

- repealing the \$6,500 fee assessed by BLM for processing each application to drill for oil on Indian lands;
- requiring implementation of a DOE Indian Energy Loan Guarantee Program, which was authorized at \$2 billion, but was never implemented; and
- amending the TERA legislation so that it might be “streamlined and improved to make the TERA process a more practical, effective and attractive alternative to the IMDA or the Mineral Leasing Act.”²⁶

Sen. Dorgan chose not to run for reelection in 2010, leaving the status of these reforms uncertain. Without them, tribes will have to continue to find ways to work with, and around, burdensome—and sometimes arcane—federal regulations and policies.

²⁶ “Indian Energy and Energy Efficiency Concept Paper,” US Senate Committee on Indian Affairs.

7.

Federal Agencies and Their Roles

The sheer complexity and opacity of the federal bureaucracy involved in the extraction of resources from Indian lands makes transparency and accountability difficult, if not impossible, to ensure. It appears that the federal government's fiduciary capacity—its ability to accept payments and credit them to the right minerals owners—has improved in recent years. However, its ability (and, perhaps, willingness) to facilitate aggressive negotiation of lease terms, monitor whether payments are sufficient, and enforce lease terms, remains limited.

The federal government clearly is conflicted between its “role as trustee for Indians and the land in general on the one hand and as an agent of economic development and prosperity on the other.”²⁷ Additionally, while there is documented evidence of poor management and even unethical actions on the part of some federal employees, even a diligent, well-trained person trying to properly fulfill his or her federal responsibility might find the job confusing and overwhelming at times. The number of regulations (and exceptions to those regulations) and the amount of intra- and inter-departmental coordination and overlap are substantial. BLM teaches its staff that—in contrast to handling mineral leases on federal lands—working with Indian leases takes more time, because of the coordination required among other agencies and the tribe, and the importance of adequately analyzing what is in a tribe's best interest.²⁸

Research for this study found that trust responsibilities factor heavily in the decision-making of federal employees involved in Indian extraction. As DOI is aware, oil, gas and mining companies are very sophisticated, and have access to the best legal advice; in such a context, the trust responsibility becomes critical to leveling the playing field for tribes. However, while the concept of trust responsibility is fairly well-defined for DOI employees, the interpretation of how this responsibility must be administered in exercising an agent's day-to-day duties is not. A BLM staff presentation, for example, cites numerous statutes and departmental manuals that describe the trust responsibility, which it notes “is a highly debated issue between the DOI and tribes.”²⁹

Nor is the tribal side of the equation simple; federal employees deal with multiple tribes, each of them with unique cultures and often unique development issues to address. Tribes and individual Indians, too, have differing interpretations of the federal government's trust responsibility and how it should be executed to their benefit. Success in this extraordinarily complex intergovernmental and interorganizational environment requires a special brand of competence, maturity and sophistication.

The morass of federal offices (and acronyms) involved in managing the Indian mineral estate contributes to confusion and lack of coordination. The entities involved in decision-making, revenue flows and oversight of resource extraction include at least the Bureau of Indian Affairs (BIA), the

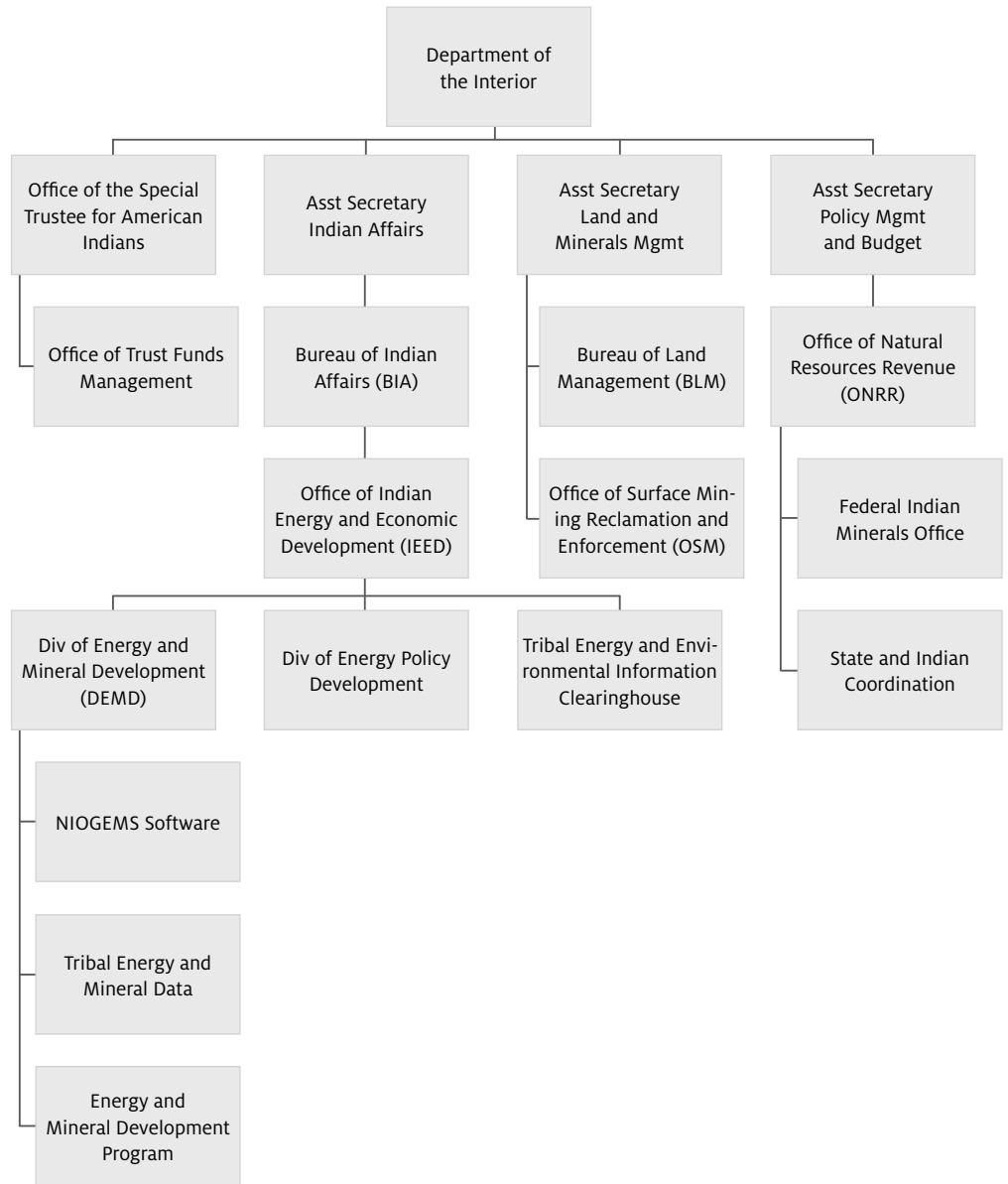
27 Ali, 72.

28 Bureau of Land Management, US Department of the Interior, “Oil and Gas for Managers: American Indian Issues,” PowerPoint presentation retrieved through the Bureau of Land Management National Training Center, http://www.ntc.blm.gov/krc/uploads/214/Native%20American%20Issues_DL.ppt, accessed April 26, 2011.

29 Bureau of Land Management, “Oil and Gas for Managers: American Indian Issues.”

Bureau of Land Management (BLM) and the Office of Natural Resources Revenue (ONRR; formerly the Minerals Management Service, or MMS). Where coal is at issue, the Office of Surface Mining (OSM) also is involved. And while royalty and other payments go to various departments depending on the phase of the extractive process, most end up in yet a fifth location, the Office of the Special Trustee for American Indians (OST), which is responsible for the actual distribution of royalties and other payments to tribes or individuals. All of these entities are housed within DOI.

Figure 1.
Entities within DOI dealing
with minerals extraction on
Indian lands



Bureau of Indian Affairs (BIA)

The Bureau of Indian Affairs has primary authority “for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for American Indians, Indian Tribes, and Alaska Natives.”³⁰ In its role as manager of

30 Bureau of Indian Affairs, US Department of the Interior, “Who We Are,” BIA website, <http://www.bia.gov/WhoWeAre/index.htm>, accessed March 25, 2011.

Indian real property, BIA is the first agency that must be involved in any activity on those lands. Its responsibilities include: facilitating or negotiating lease sales; approving and issuing leases, IMDAs and agreements involving allottee lands; maintaining lease and ownership records; determining minimum royalty rates (currently 12.5 percent on coal and 16.66 percent on oil and gas), rental rates and lease terms; approving easements for extractive activity on trust lands; recommending approval of the Application for Permit to Drill to BLM; providing assistance and technical guidance to tribes and individual Indians; and determining that the approval of all activities are in the best interests of the tribe or individual Indian. Most leases are reviewed and commented on by staff from all the agencies—BIA, BLM and ONRR, plus OSM if it is a coal lease—before BIA gives its approval to the tribe or an individual Indian to move ahead.

Even if a tribe negotiates its own contract under an IMDA, federal approval and oversight still are required. Concerned about properly maintaining its trust responsibility and avoiding lawsuits, BIA tends to scrutinize IMDAs closely, which can make obtaining IMDA approval excruciatingly slow.³¹ In response to pressure from tribes and Congress, BIA and other agencies have coordinated to create “one-stop shops” at Navajo and Fort Berthold to improve efficiency.

Bureau of Land Management (BLM)

Once a contract is signed, the Bureau of Land Management takes over and is responsible for the preparation and review of production and mining plans. (BLM handles several pre-lease functions on oil and gas leases, including mineral appraisals, evaluation of tracts, well spacing, and recommendations on fair market value of bonus bids.) For oil and gas (and non-coal minerals) BLM is the lead agency, responsible for the Application for Permit to Drill, inspection, enforcement and other duties. A few tribes handle their own inspection and enforcement under “638” contracts with BLM.³² In these cases, BLM trains and certifies qualified tribal inspectors and funds the tribe's efforts.

Office of Natural Resources Revenue (ONRR)

The Office of Natural Resources Revenue is the primary entity with responsibility for receiving, accounting for and disbursing payments to tribes and individual Indians on “producing” mineral leases.³³ Each month, a lessee submits two reports to ONRR for each lease it operates: a production report and a royalty report. (At this stage the information is specific only to the lease level, not to the individual owner level.) Lessees also remit monthly payments to ONRR for each month that sales occur.³⁴ ONRR reviews the information in these two reports, transmits any monies received to OST, and sends the lease production and royalty information to BIA. BIA takes this information and determines the individual owners on each lease, and what percent of that lease each owner—tribe or individual—owns. It then transmits ownership-specific information to OST, so that OST can process payment to the proper owner(s).

In addition to being at the center of the flow of money, ONRR is the primary accountant and auditor for mineral leases for all individual Indian mineral owners and all tribes except the Osage.³⁵ ONRR has been criticized in GAO reports and congressional testimony for conducting too few audits and relying too heavily on industry to self-report. Even today, ONRR has neither the staff nor the resources to do full-blown audits on more than about 5 percent of oil and gas leases annually.³⁶

In addition to audits, the office conducts annual compliance reviews on a large percentage of its leases and recently has upgraded its computerized system. This system has built-in checks and

31 Congressional testimony consistently notes that it can take several years or more to get all the approvals needed to begin drilling for oil on Indian lands, while the same process usually takes only a few months on nearby private land.

32 Public Law 93-638 is part of the Indian Self-Determination and Education Assistance Act of 1975. Commonly referred to as a “638” contract, it allows the tribe to take over certain activities formerly done by the federal government.

33 Yearly rent payments on “non-producing” leases, as well as the bonus payment on a newly producing lease are handled by BIA. Once production begins, yearly rental and monthly royalty payments are handled by ONRR.

34 Some oil and gas leases have low production, so oil is stored at the well site until there is a sufficient amount to offer for sale.

35 See information on Osage in Section 9.

36 John Barder (manager, Western Audit and Compliance Management, ONRR), interviews with author. December 14, 2010, and February 8, 2011.

balances to prevent lessees from submitting their reports if information falls outside certain ONRR parameters. When that happens, ONRR works with the lessee to resolve the error or problem. (These can range from insufficient or incorrect identification of which wells the report is covering to incorrect royalty rates. Because errors can contribute to lessor payment delays, ONRR makes it a priority to resolve problems on Indian leases ahead of federal leases.) Recently, ONRR received authorization and funding to hire 19 additional employees, some of whom have been assigned to the main Denver office and others to ONRR's Houston, Oklahoma City and Tulsa offices. These staff members work on a combination of Indian and federal lease issues.³⁷ ONRR has authority to order companies to pay additional royalties and can invoke civil penalties if necessary.

A few tribes handle their own auditing through what are known as cooperative agreements. These include: Arapahoe and Shoshone, Blackfeet, Jicarilla Apache, Navajo, Southern Ute, Uintah and Ouray Ute, and Ute Mountain Ute.³⁸ In the cases of a few of these tribes, some staff were trained by working for two to three years at the ONRR offices in Colorado before going back to their tribes. Tribal auditing staff members are not required to train at ONRR, but all must meet certain preliminary and continuing educational standards and follow government auditing standards. Under a cooperative agreement, members of the auditing staff are tribal employees, but their salaries and other office expenses are reimbursed to the tribe by the federal government.

Royalty payments for some of these same tribes (Blackfeet, Jicarilla Apache, Navajo, Southern Ute and Uintah and Ouray Ute) go directly into tribally selected bank "lockboxes" rather than through ONRR—an option that allows the tribe to get its money faster and bypass federal approval in how the money is spent or invested. A DOI employee interviewed for this report speculated that the likely reason only a handful of tribes take advantage of this option is that some tribes desire the additional protection provided by federal approval; when DOI manages the money, it is harder for tribal politics to influence related investment decisions. For tribes that don't have lockboxes, royalty payments go first to OST and then to the tribe.

Office of the Special Trustee for American Indians (OST)

The Office of the Special Trustee for American Indians was established in 1994 to improve accountability and management of Indian funds held in trust by the federal government. A substantial portion of these funds come from minerals extracted on tribal or individual Indian lands. OST invests funds on behalf of tribes, makes payments via direct deposit, debit card or check to Indian mineral owners, and mails an explanation of payment based on instructions and information from BIA. DOI's fulfillment of its fiduciary trust responsibilities has been far from ideal in the past, and tribes have brought several lawsuits alleging mismanagement of trust funds, most notably through the *Cobell v. Salazar* litigation discussed in more detail in Section 8.

Office of Surface Mining

The Office of Surface Mining is the lead agency for all coal mining on Indian lands and has regulatory authority for permitting, inspection and enforcement of coal leases. Both BIA and BLM provide OSM with support and coordination.

Other Agencies

Finally, depending on the situation, several other government entities can become involved in approving or having oversight on minerals extraction from Native American lands. These include: the U.S. Army Corps of Engineers (if extraction interacts with wetlands protection); the U.S. Fish and Wildlife Service (if extraction interacts with endangered species protection); and the Environmental Protection Agency (to ensure compliance with environmental standards and review of environmental impact studies). The U.S. Forest Service is involved, for example, when mining might affect

³⁷ Barder interviews.

³⁸ The Crow Tribe used to have a cooperative agreement, but no longer does.

Indian sacred sites on the lands it manages. There also are some tribal activities that fall under the Department of Energy. These include cleanup of nuclear waste sites near or on tribal lands as well as management of the Tribal Energy Program. Finally, all tribal leases must go through both National Environmental Policy Act review and cultural resource review under the National Historic Preservation Act—two requirements adding time and complexity to tribal lease approval that incidentally, private owners do not face.³⁹

State Governments

States are limited in the authority they have over Indians and Indian Country. As the result of two Supreme Court decisions, states are prohibited from taxing Indian mineral owners (*Montana v. Blackfeet Tribe of Indians*), but are allowed to tax non-Indians extracting resources on Indian lands (*Cotton Petroleum Corporation v. New Mexico*). In some states, this has created a situation of double taxation, when both the state and the tribe demand severance payment and other taxes on minerals. In these instances, the amount of the tax can make extraction prohibitively expensive. In other cases, such as with the Hopi, the tribe foregoes taxes but the state of Arizona collects substantial revenues from Peabody Coal.

³⁹ Thomas H. Shipps, "Tribal Energy Resource Agreements: A Step Toward Self-Determination." *Natural Resources & Environment* (Summer 2007): 55.

8.

Benefits and Tensions in the Federal/ Tribal Relationship

Since tribes and the United States first entered into treaties that resulted in delineations of protected lands, recognition of certain rights, payments, and other benefits, and establishment of the U.S. trust responsibility, the relationship between tribes and the federal government has been complex. Sometimes, tribes have viewed the federal government as an adversary, suing it for breach of treaty obligations and other reasons. At other times, tribes have sought help from the federal government in issues such as third-party lawsuits or providing technical assistance. The push and pull between the trust obligations of the U.S. government and the sovereign right of tribes to control their own affairs and resources can be difficult.

Federal Government Resources

Although the resources provided to Indian Country remain constrained, the federal government provides a variety of financial and other assistance to help tribes and individual Indians who want to develop their mineral assets. These resources include the following:

Office of Indian Energy and Economic Development (IEED)

Within BIA is the Office of Indian Energy and Economic Development (IEED). This houses five divisions, two of which, described in detail below, have major interaction with tribal energy issues. IEED's overarching mission is to support economic development in Indian Country "by promoting economic infrastructure on reservations, increasing tribal business knowledge, jobs and business start-ups, encouraging capital investment in tribal economies and businesses, and providing technical and advisory assistance for the development of energy and mineral resources."⁴⁰

Division of Indian Energy Policy Development (DIEPD)

This division's role is to develop policy guidance and provide technical and financial assistance to tribes wanting to develop their own energy resources. DIEPD also manages TERA implementation. Its duties under TERA are to process, review and track decisions for tribal TERA applications, conduct outreach to tribes wanting to understand and implement TERAs, develop procedures and processes for all aspects of TERA regulatory requirements, and review and update TERA regulations after three years.

Division of Energy and Mineral Development (DEMD)

The division provides technical assistance to tribes, advising them on the exploration, development and management of their energy and mineral resources. DEMD especially seems to have a better reputation with tribes than do many other federal entities. It maintains sustained

⁴⁰ Office of Indian Energy and Economic Development, US Department of the Interior, "Respecting Tradition while on the Path to Prosperity: Program Overview," IEED website, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/Expert/index.htm>, accessed March 24, 2010.

relationships with some tribes, offering input and assistance at each stage of the extractive process, as it has at Fort Berthold since 2000. There, DEMD has carried out seismic evaluations of tribal resources, assisted the tribe in marketing its resources, offered technical assistance during tribal lease negotiations, and provided analysis to aid the tribe's long-term economic and development planning, among other services.⁴¹ DEMD has been especially helpful to a number of tribes by collecting and housing mineral assessments and other documents related to tribal extractive resources. Former IEED director Robert Middleton noted that IEED "has accumulated a significant repository of industry-confidential exploration data (e.g., seismic data, well data)," which it purchases and interprets on behalf of tribes.⁴² These data have helped to identify immediate and potential development projects, and are made available via subscription to interested tribes through a software application called NIOGEMS.

IEED, in collaboration with the Department of Energy's Argonne National Laboratory also is creating a Tribal Energy and Environmental Information Clearinghouse (TEEIC) available at <http://teeic.anl.gov>. While TEEIC's stated purpose is to provide "information about the environmental effects of energy development on tribal lands," it really is much more than that. The site contains a wealth of basic information on numerous aspects of tribal resource extraction.

As part of the TERA legislation, IEED is supposed to fund grants to build tribal capacities to regulate, evaluate and monitor their energy development activities themselves. In 2007, IEED provided \$400,000 in grants, and in 2008 it was planning to provide nearly \$1 million. Unfortunately, it does not appear that any grants have been issued since.

Office of Natural Resources Revenue (ONRR)

There are two units within ONRR that provide support to Indian and tribal mineral holders. They are:

Federal Indian Minerals Office

This is a "one-stop shop" created specifically for Navajo allottees and located in Farmington, New Mexico. Its intent is to provide more efficient service for these individuals by having a single location staffed with ONRR, BIA and BLM personnel. In 2009, ONRR established a "virtual one-stop" office in New Town, North Dakota, for the Fort Berthold reservation. It is unclear whether the two offices are connected under common responsibilities or management.

State and Indian Coordination

This office, located in Denver and with team sites in New Mexico and Oklahoma, serves as a focal point for Indian mineral issues and coordination among tribes, allottees and various federal agencies. Its mission is "to serve as an advocate for the fulfillment of [ONRR's] trust responsibility and to resolve Indian mineral related issues."⁴³ In any given year, this office will conduct as many as 65 meetings on different reservations to meet directly with Indian mineral owners.⁴⁴

Individual field offices within BIA, BLM, ONRR and other agencies also provide technical assistance and funding for capacity building. Examples of these activities include the several years of training and subsequent funding that ONRR provides to enable tribes to do their own cooperative audits, the training and funding provided by BLM to tribes that want to do their own inspection and enforcement, and the myriad workshops and meetings held to provide information and improve coordination.

41 Stephen Manydeeds (acting director, Indian Energy and Economic Development, US Department of the Interior), interview with author, March 30, 2011.

42 Middleton testimony.

43 Office of Natural Resources Revenue, US Department of the Interior, "State and Indian Coordination," ONRR website, <http://www.onrr.gov/SIC/default.htm>, accessed April 27, 2011.

44 Barder interviews.

The Federal Government from a Tribal Perspective

Although tribes increasingly have demanded, and often won, more rights of self-governance, they ultimately are beholden to the federal government in exchange for trust protection. The federal government, not the tribe, has the final say on resource development, which means that the twists and turns of national energy policy, political maneuvering in Washington, and many other factors can determine whether a tribe can develop its resources and be properly compensated for them. When the political winds favor Indian self-determination, tribal development agendas can move forward. Attitudes in Washington can change, however, and derail that positive movement with potentially disastrous consequences. The factors complicating the relationship between the federal government and tribes are legion. A few that relate specifically to resource extraction are highlighted below.

Political Shifts

A first complicating factor in the tribal/federal relationship can be the fairly constant turnover in leadership on both sides. Many tribes have elections every two years, and depending on the political instability of the tribe, this can mean new leadership and new direction every two years. The federal agencies experience similar shifts in leadership turnover and similarly are subject to changes in political agendas. Agency turnover was a point of frustration cited by Sen. Dorgan during his tenure; he testified to Congress in 2008 that “the BIA . . . does not have a great reputation in performing, and for lots of reasons,” and cited his distress at the constant, “unbelievable” turnover in its ranks.⁴⁵ Indeed from 2001 to 2009, the agency had eight different leaders, serving variously from about five months to two years, until Larry Echohawk was appointed to run the department in May 2009.

Historical Mismanagement

Over the years, tribes and individual Indians have sued the government for perceived failure to properly administer its trust responsibilities. The largest, and most recent, lawsuit was the class action lawsuit in *Cobell v. Salazar*, which accused the federal government of gross mismanagement, over many years, of money held in trust for individual Indians. A significant portion of the money was tied to the Indian mineral estate. Brought in 1996, the suit approached its conclusion in December 2010, when a \$3.4 billion class action settlement legislated by Congress was signed by President Barack Obama and received preliminary approval from the U.S. District Court for the District of Columbia.

Further documentation of the federal government’s mismanagement of resource revenues is not hard to find. While many people involved in coal production on Indian lands report little recent conflict with ONRR’s management of coal revenues, the department’s handling of oil and gas revenues continues to be problematic.

In 2008, a report from the Government Accountability Office noted that:

Representatives from the states and tribes who are responsible for conducting compliance work under agreements with MMS have expressed concerns about the quality of self-reported production and royalty data they use in their reviews. . . . Several representatives reported that because of concerns with MMS’s production and royalty data, they routinely look to other sources of corroborating data, such as production data from state oil and gas agencies and tax agencies. Finally, several respondents noted that companies frequently report production volumes to the wrong leases and that they must then devote their limited resources to correcting these reporting problems before beginning their compliance reviews and audits.⁴⁶

45 Byron Dorgan. Hearing before the Select Committee on Indian Affairs, US Senate. *Indian Energy Development: Statement of Senator Byron Dorgan*, 110th Congress, Second Session, 1 May, 2008, http://www.indian.senate.gov/public/_files/May12008.pdf, accessed April 27, 2011.

46 US Government Accountability Office, *Data Management Problems and Reliance on Self-Reported Data for Compliance Efforts Put MMS Royalty Collections at Risk* (Publication No. GAO-08-893R), Retrieved via GPO FD System: <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-08-893R/pdf/GAOREPORTS-GAO-08-893R.pdf> accessed March 24, 2011.

Echoing these findings in a stinging criticism delivered to Congress, David Lester, executive director of the Council of Energy Resources Tribes (CERT), testified that “while issues of concern to Tribes are well known to the officials at MMS, the resolution of these concerns has never been a priority of that agency,” and that he knew personally of “at least one person who audits company-reported oil and gas payments for a Tribe in the Southwest [who] routinely reports a 30% underpayment for natural gas produced on tribal lands.” Thanks to such widespread mismanagement, he noted, “the only way some Indian Tribes have been able to monitor the payments is by doing it themselves.”⁴⁷

At the same hearing, testimony provided by Dennis Roller, then the audit manager for the North Dakota Auditor’s Office, described the scale of underreporting by companies to the federal government, noting that from 1982 through 2001 in states where audit functions were handled independent of DOI, “the total additional royalty collections [resulting from investigations of company underreporting] were over \$296.5 million.” While he mentioned that tribes were not included in these numbers because some chose not to publicize information on their revenue capture, Roller believed that tribes had achieved similar success.⁴⁸

It was largely in response to these regulatory issues, compounded and given a sense of urgency by the British Petroleum Macondo well blowout and oil spill in the Gulf of Mexico, that MMS, the predecessor to ONRR, was dissolved in 2010 as part of an overarching reorganization of DOI. As part of this reform, Secretary Ken Salazar’s administration has committed to ongoing improvements of its operations, including: strengthened auditing and compliance efforts and implementation of a risk-based compliance strategy; hiring new auditors; installing new software and computer systems to better detect and correct errors; and more timely disbursement of revenues to Indian mineral owners.⁴⁹ However, whether these proposed reforms will have a positive effect remains to be seen, as the problems that ONRR inherited are complex and entrenched.

Development Disadvantages

Even with more accountable management from DOI, it is not certain that tribes would be able to take full advantage of structural reforms. As has been noted several times already, the number of federal agencies with some role in mineral extraction on Indian lands is substantial. It can take years for a tribe to begin tapping into its mineral wealth because at any time in the process one of the many agencies—BIA, BLM, ONRR, EPA and numerous others—can demand more information, or even call a halt to the activity. Tribes are held to standards that don’t apply to private owners (for example, every lease granted on trust land must incorporate special environmental reviews and a cultural/archeological inventory); bear costs that don’t apply to private owners (such as a \$6,500 BLM-instigated drilling fee); and suffer a legacy of mismanagement of land ownership records that sometimes prevents perfecting title for rights-of-way or drilling. Finally, most tribes, once they begin the process of extraction, lack sufficient infrastructure to manage their mineral wealth without relying on the federal government. Unfortunately, that same government has shown time and again that it too has neither the resources nor often the political will to ensure that the benefits of that wealth to Indian Country are maximized.

47 David A. Lester. Oversight Hearing before the Committee on Natural Resources, US House of Representatives. *Royalties at Risk: Administration of the Minerals Management Service*: Prepared Statement of A. David Lester, 110th Congress, 28 March, 2007, see <http://naturalresources.house.gov/uploadedfiles/lestertestimony03.28.07.pdf>, accessed April 27, 2011.

48 Dennis Roller. Oversight Hearing Before the Committee on Natural Resources, US House of Representatives. *Royalties at Risk: Administration of the Minerals Management Service*: Prepared Statement of Dennis Roller, 110th Congress, 28 March, 2007, see <http://naturalresources.house.gov/uploadedfiles/rollertestimony03.28.07.pdf>, accessed April 27, 2011.

49 US Department of the Interior, “Interior Establishes Office of Natural Resources Revenue” DOI press release, October 1, 2010, see <http://www.doi.gov/news/pressreleases/Interior-Establishes-Office-of-Natural-Resources-Revenue.cfm>, accessed April 27, 2010.

Lack of Capacity

Finally, most tribal citizens and federal employees lack the depth of expertise needed to manage a sophisticated energy extraction business effectively and are not provided with the financial resources to hire outside expertise. In particular:

Managing energy resource development and effectively negotiating lease agreements requires highly specialized technical skills and information about geological formations and market behavior. Most tribes, and BIA officials . . . find themselves seriously disadvantaged in dealing with large corporations which possess an abundance of technical information. This lopsided arrangement has produced a series of lease negotiations which virtually have given away Indian resources and have drawn bitter criticism from groups inside and outside the Federal Government.⁵⁰

Because of these shortcomings, the federal government and many tribes are forced to rely on the companies they do business with to behave honorably and report accurately. No one—from the tribes to the various inspectors general reviewing Indian mineral activity over the years to the Senate Committee on Indian Affairs—thinks this is an ideal or appropriate way to do business. However despite plenty of evidence that relying on companies is problematic, reforms are minimal and generally favor the status quo.⁵¹

Complications With Legislation for Increased Tribal Sovereignty

The TERA legislation might be described as a good faith but inadequate effort from DOI. Meant to offer tribes greater control over their extractive affairs, it has been crippled by structural issues and a lack of funding. Essentially, a TERA is a master agreement with the secretary of the Interior that allows a tribe to develop some or all of its mineral resources under a blanket agreement, in lieu of having to negotiate each lease approval separately.⁵² As a condition to getting a TERA, a tribe must go through a 270-day approval process, prove that it has “sufficient capacity to regulate” tribal energy resource development, and establish and ensure compliance with a strict environmental review process.⁵³

No tribe has yet implemented a TERA, though several have met with DOI to discuss entering into one. Tom Shipps, an attorney who has worked extensively with the Southern Ute Indian Tribe and was involved in developing TERA legislation, has posited that the reasons for this are threefold:⁵⁴

1. Tribes are concerned about moving forward into the sort of self-reliance promised by a TERA if doing so releases the federal government from performing its trust functions. While the legislation says DOI must still honor its trust responsibilities, it also says that the federal government is not liable for losses suffered by a tribe for business conducted under a TERA. In vehement objection to this aspect of the proposed TERA language, the Navajo Nation called “this scheme, wherein a cabinet Secretary has prescriptive control over decisions regarding Indian energy development, but no subsequent liability” an “abdication of the federal trust responsibility that is patently unfair to tribes;”⁵⁵

50 C. Matthew Snipp, “American Indians and Natural Resource Development: Indigenous Peoples’ Land, Now Sought After, Has Produced New Indian-White Problems.” *American Journal of Economics and Sociology* 45 (October 1986): 457.

51 Some argue that this reticence has to do with the federal government’s fear of litigation for breach of its trust duties. For instance, David Lester posits that “reform up to now has been driven by the government’s fear of its liabilities rather than a desire to bring the doctrine into the twenty-first century,” and that making old policies “more efficient and effective” rather than drafting new ones “may not serve the interests of twenty-first century Indian tribes.” (David Lester (executive director, Council of Energy Resource Tribes), personal communication with author, February 1, 2011.)

52 The terms of leases that can be approved under a TERA are limited as follows: energy-related leases primary terms not to exceed 10 years; and energy-related business agreements and energy-related rights of way terms not to exceed 30 years.

53 Thomas H. Shipps, “The Pros and Cons of Tribal Energy Resource Agreements,” PowerPoint presentation to NCAI/CERT Energy Policy Summit, November 11, 2007. Denver, CO. See [http://www.ncai.org/ncai/advocacy/nr/docs/Tom_Shipps_TheProsandConsofTribalEnergyResourceAgreements\(11-11-07\).ppt](http://www.ncai.org/ncai/advocacy/nr/docs/Tom_Shipps_TheProsandConsofTribalEnergyResourceAgreements(11-11-07).ppt), accessed April 27, 2011.

54 Tom Shipps (attorney for Southern Ute Indian Tribe), interview with author, January 21, 2011.

55 Judith Royster, “Practical Sovereignty, Political Sovereignty, and the Indian tribal Energy Development and Self-Determination Act.” *Lewis & Clark Law Review* 12 (2008): 1098.

2. There is a lack of capacity at most tribes to oversee the full scope of what TERA allows. The legislation provided for substantial financial resources to conduct training, and for tribes to hire outside experts and grow tribal capacity, but meaningful funding has not yet materialized. Tribes thus are concerned that they will bear the full costs of preparing a TERA—“negotiating leases, agreements, and rights-of-way, conducting environmental reviews, and responding to challenges by ‘interested parties’”—without adequate funding from the government to support such a large transfer of responsibility and liability;⁵⁶
3. The legislation prohibits tribes from assuming responsibilities that are “inherent federal functions.” Tribes are unclear on what, exactly, “inherent federal functions” are, and they are unwilling to take on the risks of TERA without knowing precisely its limitations.⁵⁷

⁵⁶ Royster, 2008: 1098-99.

⁵⁷ In his 2008 Senate testimony, former IEED director Middleton admitted that the agency had “been in long-term discussions with tribes . . . to try and delineate what these inherently Federal functions would be,” but at the time of the legislation’s implementation these functions still had not been clarified.

9. Tribes with Major Energy Resources⁵⁸

Most tribes with significant extractive resources—whether extracted or in the ground—are located in the western United States. The tribes with major energy resources are considered to be those “that receive a significant portion of their income from energy minerals or that own substantial undeveloped reserves.”⁵⁹

Figure 2.
Select Major Energy
Resource Tribes

State	Tribe	Resource	Trust Acreage	% Allotted
AZ	Hopi	C, O, G	1,561,213	<1
	Navajo	C, O, G, U	15,432,170	5
CO	Southern Ute	C, O, G	309,970	1
	Ute Mountain Ute	C, O, G, U	597,308	1
MT	Blackfeet	C, O, G	1,525,712	31
	Crow	C, O, G	1,516,005	73
	Assiniboine and Sioux (Fort Peck)	C, O, G	931,792	57
	Northern Cheyenne	C, O	436,947	27
NM	Jicarilla Apache	C, O, G	823,580	0
ND	Three Affiliated (Fort Berthold)	C, O, G	988,000	62
OK	Osage	O, G	168,794*	100
UT	Uintah and Ouray Ute	C, O, G, OS	1,021,556	1
WY	Arapahoe and Shoshone (Wind River)	C, O, G, U	1,811,365	6

Sources: Marjane Ambler, *Breaking the Iron Bonds*, various BIA reports on individual tribes, and individual tribal websites.

*Osage surface acreage is fully allotted; however the tribe owns 1.5 million acres of subsurface mineral rights.

C – Coal, O – Oil, G – Gas, OS – Oil Shale, U – Uranium

Below are snapshots of resource extraction for some of the tribes involved in significant coal mining, or oil and gas production. These snapshots, based on desk research and interviews with key stakeholders, provide an overview of the types of activities and issues faced by tribes developing their energy resources.

58 N.B.: The content in this section was current as of the publication of this report, but should not be considered a definitive source of information on geological data or revenue streams accruing to tribes.

59 Ambler, 3.

Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation: Montana

The Fort Peck Tribes are located in the Williston Basin on the Bakken shale formation. While Fort Peck experienced an oil boom in the 1950s and again in the early 1980s, the Bakken oil—if it lives up to industry hype—could create a boom that dwarfs the earlier ones.

Oil and gas leases at Fort Peck are handled through two annual lease sales that BIA runs for both tribal and allottee leases. BIA also oversees environmental and cultural assessments and royalty distributions. BLM handles drilling and production issues, while royalty collection is done through ONRR. Meanwhile, accounting for “production and revenue . . . on Tribal lands . . . under joint-venture agreements and other operating agreements is handled by an independent accounting firm other than [ONRR].”⁶⁰

Adding to the federal involvement in resource extraction on Fort Peck lands are the actions of Montana state agencies, which have been embroiled in struggles with the Assiniboine and Sioux Tribes for years over the double taxation of the tribes’ oil and gas production. In 2008, the tribes and the state signed an oil and natural gas production tax agreement designed to avoid double taxation of new oil and gas production, and to ensure that the same level of tax is imposed both within and outside the reservation boundary. Existing production is not affected by this agreement; but for

Adding to the federal involvement in resource extraction on Fort Peck lands are the actions of Montana state agencies, which have been embroiled in struggles with the Assiniboine and Sioux Tribes for years over the double taxation of the tribes’ oil and gas production.

leases assigned after its finalization, the state will collect taxes on trust land production, and then remit half to the tribes and retain the other half.⁶¹

Activity around resource extraction at Fort Peck has picked up in recent years, in anticipation of a boom phase to be built on Bakken formation assets. In 2008, the tribes signed an MOU with Native American Resources Partners (NARP) to conduct a comprehensive assessment of their collective natural resources. The next year, the tribes announced the creation of Fort

Peck Energy Co. LLC, a partnership in which the tribes and NARP each own 50 percent. In a recent press release, Fort Peck Energy noted that it “is currently leasing Allottee, Tribal and other lands for a drilling project to test the Bakken and Three Forks oil formations on the Reservation” in an area covering more than 40,000 acres, and that to date the partnership has invested “over \$1,250,000 on the Project for lease bonuses, rentals and staff salaries.”⁶²

What this investment means for the Fort Peck Tribes, and whether they are prepared to take advantage of an influx of oil production activity and revenues, is an open question. The NARP agreement is designed to address two of the biggest limitations facing development on the Fort Peck Indian Reservation: tribal technical expertise and access to capital. However what remains are issues of staffing limitations (the minerals department is also the taxation office, for example), a ponderous federal bureaucracy that can significantly delay lease approval and royalty processing, and overlay fees and regulations to which state and private land are not similarly beholden. Additionally, the nation—like many others—faces severe health care rationing, high unemployment and various societal ills that constantly stress the general fund. The pressure to spend—rather than save or invest—any windfall from oil will be immense.

Blackfeet Nation: Montana

On the Blackfeet reservation, located in north-central Montana on the Canadian border, oil was discovered in 1921, but did not become a major economic factor until after World War II. Reservation lands total 1.5 million acres. Ownership of the mineral estates breaks down as follows: 41.8

⁶⁰ Ambler, 3.

⁶¹ An added aspect of this relationship that is of note is that as part of the bargaining that led to this arrangement, the tribes provided a limited waiver of sovereign immunity (valid until 2017) for all claims or suits arising from the agreement, for a value of up to \$750,000 per claim and \$1.5 million per occurrence.

⁶² “Fort Peck Energy Continues Leasing Allottees,” Fort Peck Energy Company press release, November 10, 2010, see <http://www.fortpeck-tribes.org>, accessed March 24, 2011. (N.B.: Of the eight people employed in Fort Peck Energy’s Poplar office, four are tribal members.)

percent by the tribe, 31.3 percent by allottees, and 26.9 percent by fee owners (some owned by tribal members and some by others.)⁶³

The Blackfeet Nation, like Fort Peck, is undergoing an oil and gas exploration boom as it too lies over the Bakken shale formation, estimated by the U.S. Geological Survey (USGS) to contain “3 to 4.3 billion barrels of recoverable oil.”⁶⁴ (There also are an estimated 3 million tons of sub-bituminous coal on the reservation, but this reserve is not deemed large enough for commercial production.) “Blackfeet Reservation New Oil and Gas Exploration,” a brochure produced by the Blackfeet Nation, mentions that three companies—Rosetta, Newfield and Anschutz—have leased most of the reservation’s land for exploration. It credits DEMD for having played an important role in negotiating favorable contract terms for the tribe as well as for supplying the seismic data used by these companies for subsurface interpretations.

The companies are exploring on lands that have all three types of ownership—tribal, allottee and fee—and have distinct agreements with each type of owner. Allottees negotiate separately with the appropriate company and are promised at least as good a deal as the tribe gets, but can seek to dictate better terms for themselves. The tribe monitors the companies closely and recently called them to task. Grinnell Day Chief, the tribe’s head of oil and gas leasing, reported to the *Glacier Reporter* that because “the Tribe realized some of the company reps were pressuring members to rescind their signatures with one company and sign with another,” the tribe convened a meeting with company representatives, the Blackfeet Tribal Council and BIA to make sure that all parties understood the negotiated lease terms.⁶⁵

The total amount of oil and gas on the reservation is substantial. USGS estimates that in more than 80 years of commercial production, wells on the Blackfeet reservation have produced 1.1 trillion cubic feet of gas, 440 million barrels of oil, and 192 million barrels of natural gas liquid. More than 1,400 wells have been drilled on the reservation since the 1930s, and today there are “240 producing wells operated by nearly a dozen different companies extracting a total of 550 barrels of oil a day.”⁶⁶ The deal with Newfield was the tribe’s most recent and by far its most lucrative. While the tribe has not publicized its terms, it says it stands “to gain more than \$12 million from Newfield . . . [in] the largest oil agreement the tribe has ever signed.”⁶⁷ Notably, the tribe has refused to accept royalty payments less than 20 percent (while standard BIA leases levy a royalty of 16.66 percent). These deals have enabled the tribe to erase a \$20 million debt and may represent a windfall for years to come.

Like many tribes, Blackfeet’s sophisticated understanding of resource production and financial negotiation has developed over time. Historically, as the nation has noted, “oil and gas leasing practices on the reservation have not favored the tribe.” That changed in 1975 when the tribe struck an advantageous deal that provided the basis for its recent successful negotiations over the Bakken oil. The 1975 deal, signed with Damson Oil Co., enabled the tribe “to participate in management decisions and profit sharing,” in exchange for assuming some financial risk. According to the tribe, this contract “encouraged the Blackfeet to ensure that other oil and gas leases involve the tribe and that royalties and bonuses are more equitable.”⁶⁸

The tribe’s history with revenue collection and management is equally strong. Just three decades ago, oil production logs for Blackfeet oil were handled solely by companies, which self-reported these figures to DOI and to the tribe. After the tribe discovered discrepancies in oil and gas accounting in 1981, however, it took a much more involved and formal role in monitoring exploration and production. According to the nation, today the tribe’s oil and gas office “has access to all seismic data, monitors all seismic activity and keeps a close watch on all production,” and “has employed a tribal elders committee that monitors all lease sales and seismic activity . . . so that

63 US Department of Energy, “Blackfeet Reservation,” DOE website, <http://www1.eere.energy.gov/tribalenergy/guide/pdfs/blackfeet.pdf>, accessed March 24, 2011.

64 Alex Sakariassen, “Boom and Gloom,” *Missoula News*, June 24, 2010.

65 John McGill, “Blackfeet country oil and gas leasing explained by Day Chief,” *Glacier Reporter*, Dec. 22, 2010.

66 Sakariassen, “Boom and Gloom.”

67 Sakariassen, “Boom and Gloom.”

68 Blackfeet Nation, “Our History,” BN website, see <http://www.blackfeetnation.com/about-the-blackfeet/our-history.html>, accessed April 27, 2011.

sacred and religious sites, important in Blackfeet history and traditions, are not damaged.”⁶⁹ On most other reservations, many of these duties are instead carried out by DOI.

Crow Tribe: Montana

The Crow Tribe is sitting on what may be among the largest coal beds in the United States. The Powder River Basin, on which the Crow reservation lies, produces about 50 percent of the nation’s coal. Oil and gas appear to exist in marketable quantities at Crow, but the tribe currently is focused on coal as its best option for tapping into its mineral wealth. IEED has noted, “Vast coal resources exist along the eastern portion of the Crow Reservation . . . in an area 60 miles long and up to 12 miles wide, containing over 10 billion tons of coal recoverable by surface mining methods.”⁷⁰ It also has confirmed that the department has “performed geologic and engineering studies that identified 6 billion tons of sub-bituminous coal that could be surface mined and marketed in the near future.”⁷¹

The Absaloka coal mine owned by Westmoreland Resources Inc. has operated since 1974 on Crow Ceded Lands,⁷² just outside the reservation boundary. Although the tribe lost the surface rights to this land in 1904, it did retain the subsurface rights. Westmoreland pays royalties to the tribe, most of which are distributed in per capita payments to individual tribal citizens, and it pays production taxes that are shared between the state and the tribe. These tax payments comprise the majority of the tribe’s general fund.⁷³

In 2009, the mine was extended onto the reservation, with the approval of DOI and the Crow tribal legislature. This extension is expected to add “approximately 93.9 million tons of in-place coal reserves, with 76.6 million tons estimated to be recoverable.”⁷⁴ Westmoreland estimates that production on the mine extension might yield 6.5 million to 7 million tons of coal annually, extend the life of the existing mine to 2020 or 2021, and create about 171 jobs.⁷⁵ (The majority of the Absaloka mine’s current employees are Crow Tribe members, and it is likely that Crow will fill a majority of the new jobs as well.)⁷⁶ In a progressive move, the tribe negotiated the new lease terms so that royalty rates escalate when the price of coal increases. Under the new lease, tribal citizens are receiving per capita royalty payments averaging approximately \$300 per quarter, compared with less than \$100 per quarter under the old lease.⁷⁷

In addition to its coal activities, the nation announced a \$7.4 billion deal in 2008 with the Australian-American Energy Co. (subsequently purchased by Canadian-based Terra Nova Minerals) to build a coal-to-liquid plant on its reservation, named the Many Stars project. The start of construction for Many Stars already has been pushed back to 2013, however, and many are skeptical whether the project will ever get built. If the project does get off the ground, the potential revenues could be huge; a 2008 article in the *Billings Gazette* claimed that “total proceeds to the tribe could eventually top \$1 billion annually—a breathtaking sum that dwarfs the Crow’s current annual budget of about \$26 million.”⁷⁸

Although the extraction of coal provides substantial revenues to the Crow Tribe, and there likely is much more coal that can be mined, the tribe’s nearly exclusive reliance on this finite resource to fund its annual budget is problematic. Royalties from mining all go to per-capita payments to

69 Blackfeet Nation, “Our History.”

70 Middleton testimony.

71 Middleton testimony.

72 In 1904, the U.S. government enacted legislation that required the Crow Tribe to cede 1.1 million acres of its existing reservation to the United States. The government conveyed the surface estate to non-Indians, but retained the subsurface minerals for the tribe. The Office of Surface Mining Reclamation and Enforcement (OSMRE) shares the regulatory authority responsibilities for the Indian Lands Program on these ceded lands with the Montana Department of Environmental Quality (MT-DEQ).

73 U.S. Department of the Interior and Montana Department of Environmental Quality, “Final Environmental Impact Statement for the Absaloka Mine Crow Reservation South Extension Coal Lease Approval,” October 2008, MT-DEQ website, deq.mt.gov/eis/Absaloka/FEIS.pdf, accessed April 27, 2011.

74 Shelley Beaumont, “Absaloka Mine South Extension Approved,” *Big Horn County News*, 2008.

75 Beaumont, “Absaloka Mine South Extension Approved.”

76 DOI and MT-DEQ, “Final Environmental Impact Statement for the Absaloka Mine.”

77 Joanie Rowland (former minerals director, Crow Tribe), interview with author, December 17, 2010.

78 Matthew Brown, “Tribe agrees to coal project.” *Billings Gazette*. Aug. 7, 2008.

individual tribal members, leaving the tribe's general fund reliant on mining tax revenues to fund its day-to-day operations. Since it spends all of the funds it receives, the tribe has no savings and is vulnerable when payments are delayed. While the mine employs many Crow citizens in production, it is said that representation in administrative positions is limited, and promotion to upper management is nearly nonexistent. Even taking into account that most of the mine's 170 employees are Crow, it makes a small dent in the employment opportunities on the reservation as there are 11,000 Crow citizens, 7,900 of whom live on the reservation.⁷⁹ Many tribal members express dissatisfaction with the company for various reasons, but in the absence of additional revenue streams, the nation has remained with the status quo.

Despite the Crow Tribe's vast reserves and growing expertise in the management of its coal sector, having sufficient human and capital resources to manage its own extractive activities is a problem. The tribe lacks sufficient internal capacity to rely exclusively on its own expertise, so it must either seek the federal government's assistance or hire outside consultants. While some of this expertise is available through DOI's Division of Energy and Mineral Development (DEMD), its mission as a federal agency and its own budget and staffing limitations restrict its usefulness and leave the tribe reliant on expensive outside advice. Today, Crow must lease to outside companies both for exploration and production. In recent years, at least, the tribe has negotiated with outside exploration companies so that it retains copies of any resource assessments done on its lands. The tribe credits DEMD with being especially helpful in this regard.⁸⁰

Hopi Tribe: Arizona

The Hopi Tribe is part owner—along with the Navajo Nation—of one of the richest coal deposits in the country. The Black Mesa area, which includes the Black Mesa and Kayenta mines, is estimated by USGS to contain 21 billion tons of coal, potentially worth \$100 billion.⁸¹ Peabody Energy holds an exclusive right to extract defined tonnages of Black Mesa coal under separate lease contracts signed with each tribe in 1966.⁸² The coal under contract to Peabody is but a fraction of what still is available to be mined if the Hopi and Navajo tribes ever choose to do so.

The Hopi and Navajo tribes' relationship with Peabody has had a long history of controversy, originating with lease terms that, in the early days at least, massively undervalued what was paid to the tribes. Peabody at that time was able to take advantage of the tribes' lack of sophistication, BIA's failure to negotiate effectively on their behalf, and an attorney who claimed to be representing Hopi but also was on Peabody's payroll. As if that weren't sufficient, Peabody convinced the tribes to allow some of the coal to be transported from the mine to one generating station via a 273-mile slurry line. This slurry line required substantial amounts of water to operate, in a region that is notoriously arid, and the water used for this came from one of the major aquifers supplying potable water for both tribes. Despite these problems, the exclusive relationship between Peabody and the tribes has endured, and today seems more amicable.

Until 2005, Hopi coal supplied two coal-fired generating stations—the 1580-megawatt Mojave Generating Station (MGS) in Laughlin, Nevada, and the 2280-megawatt Navajo Generating Station (NGS) located on the Navajo Reservation near Page, Arizona. The MGS utilized the slurry line for its coal delivery, and it was closed in December 2005, following a Clean Air Act lawsuit that would have required expensive retrofits to meet air quality standards. With the closure of the MGS came the

79 For Westmoreland employment data see: Westmoreland Coal Company, March 11, 2011 10-K filing, <http://www.westmoreland.com/admin/library/C13974WestmorelandCoalCompany10-K-bannerless57.pdf>, accessed April 5, 2011.

80 Rowland interview.

81 It's worth noting, however, that former Hopi tribal attorney Scott Canty believes this estimate may be overly optimistic. As he stated: "Most of this coal is in deep seams far below depths at which surface mining is economical. The deeper seams could be accessed by underground mining technology only. While there is some underground mining in the Four Corners area, such techniques have not been proven in the Black Mesa area on a large scale." (Scott Canty, interview with author, Jan. 2, 2011.)

82 Some of the coal in the complex is on land owned exclusively by the Navajo Nation; Peabody began leasing this land under a third, Navajo-only contract, in 1964. Most of the coal on Black Mesa is located outside of the Peabody leases on both Navajo and Hopi lands that are not under any contracts at present.

closure of the Black Mesa mine. The NGS is still operating, and it is now the sole customer for Hopi and Navajo coal coming from the remaining mine.

The closure of the MGS and the Black Mesa mine hurt the tribe financially (though the closure of the MGS benefited the tribe's water supply, since its slurry line closed as well.) Adding to the Hopi Tribe's anxieties, the Environmental Protection Agency currently is assessing whether to require possible environmental retrofits to the NGS in order to improve air quality in the Four Corners region. The Hopi Tribe has responded with some concern about what changes might be required, fearful that this station too might close. In a letter to the agency, the tribe mentioned that income from coal amounted to \$14 million in 2009, which represented 88 percent of the tribe's annual budget.⁸³ Because of the Hopi reservation's remoteness, the tribe feels that other options to replace coal revenues seem scarce.

Based on interviews conducted for this report with several people who worked or still work for the tribe in some capacity, the relationship with Peabody today seems improved, and there is reasonable comfort expressed that the tribe is getting paid appropriately and that coal is being accounted for properly. At Hopi, all monies go into the tribe's general funds, so no per capita payments are made to individual tribal citizens. One quirk of the tribe's extractive activities is that, unlike many other tribes, it does not collect any taxes from companies operating on its lands; since such taxes already are levied by the state of Arizona, the tribe has chosen not to discourage investment by imposing a system of double-taxation. As a result, one interviewee noted, in some years prior to the MGS closure the state earned more from taxes on the Hopi's coal production than the tribe earned from royalty and other payments.

With the Hopi Tribe, all decisions surrounding mining negotiations and revenue spending are made by the tribal council or its committees. While the details of its negotiations with companies are not disclosed to tribal citizens, the council representatives share general information during their village meetings, though not always on a consistent basis.⁸⁴

The Hopi Tribe still relies heavily on the federal agencies for support for its coal operations. BIA has very little involvement (it handles water issues and does some permitting), while ONRR, BLM and OSM have much larger roles. While the tribe is working toward supporting its own inspection and auditing program, at present it relies on BLM and OSM for inspection and enforcement. The tribe's relationship with the various federal agencies generally is positive, although the tribe does have a trust fund mismanagement lawsuit pending against the United States. Within the tribe, mining's use of water resources appears to have generated more controversy than has mining itself, although some tribal members adamantly oppose mining. Without another significant revenue stream to replace mining, however, it is unlikely that mining will end anytime soon.

Navajo Nation: Arizona

The Navajo Nation, which encompasses 15.4 million acres over 27,000 square miles of portions of Arizona, New Mexico and Utah, is the country's largest tribe (with more than 250,000 members), with the largest land base. It also is among the most sophisticated of the tribes in terms of managing its own affairs and is the largest oil-producing Indian tribe in the United States.

The Navajo Nation possesses major coal reserves, which are mined under two separate contracts with Peabody Energy dating from the mid-1960s (one of which covers coal properties jointly owned with the Hopi Tribe). BHP Billiton has had a separate contract since 1963 to extract coal from the Navajo elsewhere on the nation. The nation also has significant oil and gas deposits, and has been producing oil since shortly after signing its first lease in the early 1920s. Today, oil and gas production are overseen by the Navajo Nation Oil and Gas Co. (NNOGC), whose mission "includes the goal of re-establishing Navajo ownership of the Nation's resources."⁸⁵

In 1933, Congress enlarged the Navajo reservation with the Aneth extension in southeast Utah.

83 Shingoitewa, "The Hopi Tribe's Comments..."

84 Wayne Taylor (former Hopi tribal chairman), interview with author, Jan. 3, 2011.

85 Navajo Nation Oil and Gas Company, "Corporate Highlights," <http://www.nnogc.com/highlights2.html>, accessed April 27, 2011.

The Greater Aneth oil field area, whose first well was pumped in 1956, has proven to have rich deposits. Many of today's producing wells are in this area, and the tribe has been acquiring wells when lease contracts expire, purchasing working interests in leases, and slowly taking control over all aspects of the business, from exploration and drilling to pipeline shipment to selling product wholesale. In November 2004, NNOGC purchased 25 percent of the Chevron-Texaco interests in the Aneth, McElmo and Ratherford units of Aneth field and in March 2005 a 50-percent interest in the Tohonadla and Desert Creek fields.⁸⁶ The company also operates the Running Horse Pipeline, "an 87 mile, 16 inch interstate crude oil pipeline purchased from GIANT Industries in 2002 . . . [which] transports nearly all the crude oil from southeast Utah to market."⁸⁷

While today the Navajo Nation manages its extractive resources with skill and to the great financial benefit of the tribe, its successes were hard-won and not without setbacks. Even recently, the nation has experienced disappointment. Twice it appeared before the Supreme Court (in 2003 and 2009) seeking an additional \$600 million in compensation relating to its coal leases with Peabody Energy, alleging that the federal government negotiated lease terms with that company that shortchanged the tribe for decades. Despite the fact that the tribe was able to confirm that DOI Assistant Secretary Donald Hodel attended secret meetings with Peabody Energy and shared confidential information about the tribe's coal reserves as deals were struck, the Supreme Court ruled that the government had not breached its fiduciary trust duties and dismissed both suits.

A history of frustration with the federal government has led the Navajo Nation to manage its own affairs in the extraction process to the greatest extent possible. The tribe conducts its own minerals audits under a cooperative agreement with ONRR and has its coal royalty payments go directly to a bank lockbox rather than through ONRR. Additionally, the nation institutes and manages its own taxes (levying a 4 percent oil and gas severance tax, among other business taxes), and manages its own regulation and enforcement activities. It also handles its own environmental assessments through an independent EPA and minerals department within the nation's Division of Natural Resources.

Finally, the Navajo Nation used a \$217 million legal settlement to establish a Permanent Trust Fund in 1985 to provide a future source of funds to replace depleting coal, natural gas and oil resources. The nation instituted a 20-year freeze on any spending from the fund, and thereafter allowed that 95 percent of income earned by the fund could be spent, while the remaining 5 percent had to be reinvested in the fund. Additionally, the nation required that 12 percent of its annual projected revenues be reinvested into the fund. Although the nation now could access earnings from the trust fund, it has yet to do so, and the principal now is worth more than \$1 billion.⁸⁸

Ironically, however, with the Navajo as with many of the energy tribes, "tribal energy resources have repeatedly been developed without ensuring that tribal needs were met." Just a dozen years ago research found that "over 50,000 members of the Navajo Nation had no regular electricity service, while local energy resources, particularly Navajo coal, helped supply 20 percent of Southern California's electricity needs."⁸⁹ Even today, portions of the reservation remain without water or electricity.

An interest in ensuring that tribal resources are fully benefiting all members of the Navajo Nation has motivated recent calls from activist Navajo members for "more transparency and community involvement in tribal politics," including in the negotiation of energy leases. In 2010, in response to such demands, the Navajo tribal government made public for the first time its negotiations with Peabody Energy over royalty rates for coal extracted at Black Mesa's Kayenta mine.

86 The first deal is a joint-venture agreement with an outside operator that provides for assistance to NNOGC in the development of its production operations capabilities, and also allows NNOGC to increase its ownership share over time. (See Navajo Nation Oil and Gas Company, "Corporate Highlights.")

87 Significant quantities of uranium also exist on the Navajo reservation, although in 2005, the tribal council passed a resolution banning further uranium mining on reservation lands "until all adverse economic, environmental and human health effects from past uranium mining and processing have been eliminated or substantially reduced to the satisfaction of the Navajo Nation Council." (See the Resolution of the Navajo Nation Tribal Council, "An Act Relating to Resources, and Dine Fundamental Law; Enacting the Dine Natural Resources Protection Act of 2005; Amending Title 18 of the Navajo Nation Code," <http://www.sric.org/uranium/DNRPA.pdf>, accessed April 27, 2011.)

88 Peterson Zah, "Navajo Nation Trust Funds," PowerPoint presentation at Arizona State University, June, 2007, www.asu.edu/president/zah/events/documents/PERMANENTTRUSTHISTORYJune07aversion_001.ppt

89 HPAIED: 164.

“Instead of rubber-stamping another 10-year lease with Peabody,” the tribe held an “open discussion of [this] lease agreement,” which “brings millions of dollars to the Navajo Nation and earns many more millions for Peabody, the largest coal mining company in the world.”⁹⁰

Northern Cheyenne Tribe: Montana

The Northern Cheyenne Tribe also is sitting on a huge coal reserve, estimated in a 1975 BIA assessment to contain 23 billion tons of coal, of which 5 to 6 billion tons may be mined by surface mining methods. These resources first were tapped in 1966, when BIA began accepting leases from Peabody Coal at \$0.12 an acre—at a time when “similar coal already had received bids of \$16 to \$100 an acre.”⁹¹ DOI continued to allow companies to grossly underbid for Northern Cheyenne coal, and by 1971 “coal companies had won rights to mine 56 percent of the Cheyenne reservation, with bids averaging only \$9 an acre.” Research done by outside scientists in the early '70s provided tribal members with data on the true value of their coal, and examined the environmental and social impacts its development. In 1973, Northern Cheyenne’s tribal council voted unanimously to petition for the cancellation of all of its existing permits and leases, citing violations of federal regulations and trust responsibilities. Congress nullified these leases in 1980, and the tribe has chosen not to mine its coal since.

However, this may change in the very near future. A deal pending congressional approval as of March, 2011 contemplates transferring the rights to almost 150 million tons of coal lying within the reservation boundaries back to the tribe, which will allow it to consolidate its resource holdings and also will yield the Northern Cheyenne a share of royalties on off-reservation coal that will be extracted by a private company. This exchange is meant to address a longstanding Northern Cheyenne claim that the tribe’s mineral rights were given away in error more than a century ago, when the reservation’s borders were expanded without a concurrent transfer of subsoil mineral rights. This deal has the approval of tribal President Leroy Sprang, who estimates that the transaction, if approved, “could bring in tens of millions of dollars over the next decade,” a heavy sum considering that the tribe’s general fund budget averages less than \$2 million annually.⁹² Nevertheless, the decision of whether or not to engage in coal mining continues to be a contentious issue within the tribe, something Sprang has recognized with a promise to hold open referendums to gauge the support of tribal members.

Oil and gas also have a history on this reservation. In 1980, the tribal government negotiated an oil exploration deal with ARCO, a major international company that has since been subsumed by British Petroleum. One observer has posited that at the time, “the majority of Northern Cheyenne were willing to accept oil extraction because the economic benefits were clear and oil exploration did not threaten the land base, reservation political autonomy, and Northern Cheyenne culture in the dramatic way that a large influx of non-Cheyenne onto the reservation and massive strip mining would have.”⁹³ But the ARCO deal caused a major rift between Northern Cheyenne’s tribal government, which approved the exploration and claimed the mineral rights, and some individual tribal member allottees who did not want ARCO on their lands. The issue eventually settled itself when ARCO drilled seven dry holes and called it quits after investing \$28 million.

Osage Nation: Oklahoma

Oil was discovered on the Osage lands in Oklahoma in 1894, and the reservation has been actively producing oil and gas ever since—a fact made more remarkable considering how drastically the tribe’s land ownership rights changed in 1906, when the Osage were targeted for termination under the Dawes Allotment Act. Through the act, the tribe saw its entire reservation allotted to individual Indians (and a few non-Indians), though critically it was able to convince the United States to retain subsurface mineral rights on behalf of the tribe.

90 Ngoc Nguyen, “Navajo Activists Win Victory, Open Coal Talks to Public,” *New American Media*, March 23, 2010.

91 Ambler, 63.

92 Associated Press, “Deal Would Transfer Montana Coal Tracts to Texas Company, Allow Tribe to Consolidate Reserves,” March 23, 2011.

93 Duane Champagne, “Economic Incorporation, Political Change, and Cultural Preservation among the Northern Cheyenne.” *Social Change and Cultural Continuity among Native Nations*. Ed. Duane Champagne. (Lanham, MD: AltaMira Press, 2007): 305.

Under the allotment process, a group of 2,229 people (including children born before July 1, 1907) were considered to be on the tribal rolls and were given “headrights,” which entitled them to receive quarterly distributions from collective funds held by the Osage Mineral Estate. The Allotment Act also created a tribal council and stipulated that only headright owners could vote or serve on the council. This requirement created two classes of Osage citizens, those with headrights (about a quarter of whom today are non-Osage and include other American Indians, non-Indians, churches and community organizations) and those without (including Osage citizens born after July 1, 1907, or their descendants).⁹⁴ The council eventually became the Osage Mineral Council and remained the de facto government for the tribe until 2006, when a new tribal constitution was finally approved that enabled all citizens—not just those with headrights—to participate in governance. Today, the Osage Mineral Council deals only with the mineral estate.

During the early 1900s the Osage were considered among the richest people in the world, with income from Osage mineral leases providing each headright owner “an annual income of \$10,000.”⁹⁵ Over the last century, more than 42,000 wells have produced more than 1.3 billion barrels of mostly high-grade oil and 165 billion cubic feet of gas. Headright owners continue to enjoy substantial prosperity today; for the third quarter of 2010 alone, each headright owner earned \$7,320, based on total revenues from the prior quarter of \$16.3 million.⁹⁶

Because of the Osage’s long history of energy development and the wealth earned from oil and gas, the tribe has a successful track record for getting properly compensated for their minerals. For instance, the tribe long ago discovered that penalties combined with effective monitoring could help to secure on-time payments from lessors. Osage has a computerized system that tracks

Because of the Osage’s long history of energy development and the wealth earned from oil and gas, the tribe has a successful track record for getting properly compensated for its minerals.

3,900 leases and levies a late fee of 1.5 percent for each month a payment is late. Its oversight is so effective that at one point, a federal auditor discovered that while up to 70 percent of payments due to other U.S. tribes were delivered late, at Osage only around 0.3 percent were not delivered on time.⁹⁷

The nation also has an unusual amount of clout with the federal government, and is served by its own offices of the BIA and a separate section of the Office of the Special Trustee. The nation has invested some of its mineral wealth to supplement BIA staff, at one time enabling the BIA Osage Agency to hire more lawyers and petroleum geologists who were experts in the technical aspects of oil and gas than any other BIA office in the United States.⁹⁸ Osage has become renowned for its effective management of tribal resources—so much so that both the U.S. government and other tribes have called on the nation for technical assistance in the sector.

Even so, the Osage Nation has not been immune to problems arising from poor management decisions at DOI. In 2001, Koch Industries paid the U.S. government a \$25 million settlement to compensate for its long-term theft of oil from federal and Osage Nation lands, \$3.57 million of which was disbursed to Osage.⁹⁹ More recently, the U.S. Court of Federal Claims awarded the nation nearly \$331 million resulting from BIA’s trust mismanagement of the Osage mineral estate from 1981 to 1994. Additional awards may result when remaining claims are settled.¹⁰⁰

Today, the Osage Nation reports regularly on its extractive fiscal regime and the revenues headright owners earn from tribal resources. The tribe’s mineral council website publishes information on: lease sales (including information on lease fees, bonus bid payments and royalty rates); total

94 Osage Nation Mineral Council, “FAQs about the Osage Mineral Estate,” Council website, http://www.osagetribe.com/mineral/info_subpage.aspx?subpage_id=6, accessed April 27, 2011.

95 Osage Are Richest People: Greatest Per Capita Wealth in World Results from Oil Deal,” *New York Times*, June 25, 1921.

96 Osage Mineral Council, “Third Quarter News,” www.osagetribe.com/mineral/uploads/2-OMC/3rd_Quarter_News_2010.pdf, accessed March 24, 2011.

97 Ambler, 129.

98 Ambler, 122.

99 Joysa Winter, “Osage net \$3.56 Million from Koch Lawsuit,” *News from Indian Country*, December 15, 2001.

100 Shannon Shaw, “Federal Judge Awards Nation \$330.7 Million in Trust Case,” *Osage News*, Feb. 25, 2011.

annual revenues disaggregated by benefit stream; and the value of quarterly payments disbursed to headright mineral owners.¹⁰¹

Southern Ute Indian Tribe: Colorado

The Southern Ute Indian Tribe is—by a wide margin—the most successful tribe in terms of energy resources in the United States. It operates five energy businesses, and its Growth Fund (the tribal entity in charge of energy management and other businesses) is reputed to be worth about \$4 billion.¹⁰² While the tribe still is subject to the trust management and regulation of the U.S. government, Southern Ute probably is closer to self-determination than any other of the tribes.

Credit for building the foundation for its current success largely goes to Leonard Burch, who at the time he was first elected in 1966, was the youngest tribal member ever elected chairman at Southern Ute. He stayed in office until 1984 and then was reelected from 2000 to 2003. In 1974, concerned that the tribe was not getting appropriate compensation from its energy leases, Burch convinced the tribal council to call a moratorium on issuing any new leases. Needless to say, stanching royalty revenue was at the time considered a huge risk. As *High Country News* noted in a 2010 article on the Southern Ute, with his moratorium Burch not only “put his government in financial danger, but he also effectively reduced the per capita payments to tribal members, many of whom relied on the meager sums—not much more than \$1,000 per year—for their entire income.”¹⁰³ Today, each of the 1,400-plus tribal members is worth millions.

Following the moratorium, the tribe took advantage of a federal grant to map its undeveloped reserves along with those covered by existing leases. This process quickly revealed the undervaluation of the tribe’s gas by companies, and DOI’s inadequate approach to auditing and royalty collection. In fact, the Southern Ute’s experience in uncovering DOI’s inefficiencies and poor management directly contributed to Congress’s creation of MMS (now ONRR) in 1982 and encouraged the passage of the Indian Mineral Development Act, the legislation that gave tribes the power to negotiate mineral leases on their own behalf.¹⁰⁴

Because Burch was comfortable working with non-Indians, when the tribe decided to reinstate extraction, it brought in outside experts—including attorneys, auditors, petroleum geologists and others—to help negotiate more favorable leases, establish a tax department to levy severance taxes, and recommend how to set up energy businesses. The tribe aggressively pursued court rulings to counter historical federal mismanagement and used one \$8 million water settlement to start the first of its energy businesses, Red Willow Energy. As *High Country News* remarked, “If outsiders could get rich drilling the tribe’s land, Ute leaders and advisers figured, why couldn’t the tribe itself? As obvious as the idea may sound, it was revolutionary at the time.”¹⁰⁵

Currently the Southern Ute Indian Tribe conducts its own audits, has a land division that is expert in negotiating oil and gas contracts with the U.S. federal government on behalf of tribal energy companies, supports its own gas marketing agency, and conducts its own environmental assessments for extractive activities. Additionally, the tribe owns and manages the following energy companies:

- Red Willow Production Co. – Engaged in oil and natural gas production predominantly in the western United States and the Gulf of Mexico, this company is also regarded as a leading expert in coal-bed methane extraction.
- Panther Energy Co. – Works to discover off-reservation oil and gas reserves, which it then develops in partnership with Red Willow. The company is an industry leader in exploiting oil and gas reserves.

101 For figures see Osage Nation Mineral Council website, <http://www.osagetribe.com/mineral>, accessed March 23, 2011.

102 Susan Moran, “Indian Tribe Becomes Force in West’s Energy Boom,” *New York Times*, July 24, 2007.

103 Jonathan Thompson, “The Ute Paradox,” *High Country News*, July 19, 2010.

104 Thompson, “The Ute Paradox.”

105 Thompson, “The Ute Paradox.”

- Red Cedar Gathering Co. – A joint venture between the tribe and Kinder Morgan Energy Partners, Red Cedar gathers and treats high-quality gas from deposits predominantly within reservation boundaries to sell to intrastate and interstate pipeline companies.
- Aka Energy Group – Engages in activities similar to those Red Cedar Gathering undertakes, but outside of Southern Ute's reservation boundaries.
- Southern Ute Alternative Energy – Manages the tribe's investments in alternative and renewable energy, which are currently in wind, electrical transmission and biofuels.¹⁰⁶

Red Willow Production is engaged in oil and gas exploration projects across the country, competing directly against major international exploration companies, and on other reservation land such as at Fort Berthold in North Dakota.

Tribal self-management has paid dividends to the Southern Ute in several ways. First, the tribe significantly increased production from its wells through better management. Next, it increased its profit margin because it was exempt from many of the taxes non-Indian operators are obliged to pay. Finally, it used its knowledge from running its own operations to act as a more informed, effective partner with federal agencies and with those outside companies still drilling on its lands. For example, while the tribe does its own inspections and audits, it coordinates these with BLM and with company inspectors.

Southern Ute's tribal attorney, Tom Shipps, noted in interviews conducted for this report that as a result of the knowledge gained by managing its own activities, "the tribe now has an ability to understand both sides of the picture," and "works with other operators to jointly solve problems." Additionally, he adds, "because Southern Ute has been so aggressive, and because it's also in the oil and gas business, the companies are on pretty good behavior."¹⁰⁷ The tribe likewise has been successful in doing something many other tribes—including some other major energy tribes—have been less successful in doing, which is effectively separating business from politics. While the tribal council retains ultimate decision-making authority, the managers of tribal businesses make day-to-day business decisions.

It is unclear what the tribe's total net worth is, but it is estimated to be in the many billions of dollars. Southern Ute places its earning into two funds: a Permanent Fund and a Growth Fund. The Permanent Fund "invests energy royalties and casino profits in securities, which generate a steady revenue to pay for government and social services."¹⁰⁸ Other revenues are put into the Growth Fund, which has a portfolio of energy, real estate, building materials, private equity and other operations, and distributes payments on a per capita basis as dividends to tribal citizens between the ages of 26 and 59, and as a retirement benefit to those 60 and older.

It also is unclear how much information the tribal council discloses about its business dealings to individual Southern Ute citizens, though at least one who was willing to be interviewed by *High Country News* appeared to be frustrated by what he depicted as the tribal leadership's lack of transparency. "Theoretically, we're all supposed to be stockholders in all of this," he said, "but we're not. We reap financial benefits, but that's about it. Our finances are like a Swiss bank account. We don't know what's going on."¹⁰⁹

Three Affiliated Tribes (Fort Berthold): North Dakota

Oil was discovered on the Fort Berthold reservation 60 years ago. However, until recently, the tribes were stymied in their efforts to take advantage of their resources, in part thanks to the fact that oil within the Bakken shale formation, on which the entire reservation lies, has been difficult to recover using existing technologies. New technology makes recovery more feasible, and while estimates

106 Southern Ute Indian Tribe, "Business Areas," Southern Ute General Fund website, <http://www.sugf.com/BusinessAreas.aspx>, accessed March 24, 2011.

107 Shipps interview.

108 Thompson, "The Ute Paradox."

109 Thompson, "The Ute Paradox."

about the amount of this oil reserve vary widely, it presents the possibility of a windfall resource for the Three Affiliated Tribes.

The Fort Berthold Reservation, home to the Mandan, Hidatsu and Arikira Nation (also known as the Three Affiliated Tribes) encompasses 988,000 acres in western-central North Dakota. Of this land, allottees own 373,000 acres of surface and subsurface rights, and the tribes collectively own 90,000 surface and 230,000 subsurface acres.¹¹⁰ Most of the tribes' mineral interests lie under Lake Sakakawea, and only recently has technology facilitated the kind of drilling needed to access oil there. Further complicating development is the fact that this lake itself is controlled by the U.S. Army Corps of Engineers.¹¹¹

In 2008, frustrations boiled over when an oil boom was occurring all around the reservation but only one well had been drilled on it. This prompted Sen. Dorgan, then chairman of the Senate Indian Affairs Committee, to hold hearings on impediments to tribal resource development. Marcus Wells Jr., then chairman of the Three Affiliated Tribes, testified in those hearings that “delays in lease approval and other bureaucratic hurdles have not only caused untold harm on the Tribe and the Fort Berthold Mineral Owners but have utterly frustrated the Oil and Gas Industry as to the prospect of actual oil and gas exploration on the Fort Berthold Reservation.”¹¹² Chairman Wells also testified that three IMDAs prepared by the tribe had taken more than three years to gain DOI approval.

Following the hearings, the Office of Indian Energy Development opened a “one-stop shop” to try and streamline Interior’s bureaucracy around Fort Berthold’s resource management. When it opened, staff from six federal offices—BIA, BLM, ONRR, OSM, OST and USGS—provided on-site expertise, and BIA and BLM both increased the number of staff in the area office to expedite leases and permits. In an article in the *Minot Daily News* in May 2010, Sen. Dorgan celebrated the one-stop shop and its “significant role in cutting through the red tape,” and noted that oil and gas companies were reporting more consistent and reliable permit processing and approvals following the establishment of this office.¹¹³

The tribes have begun addressing two other major impediments to development in recent years. One was the level of uncertainty faced by companies interested in drilling on the reservation that were wary of double-taxation at the hands of separate state and tribal taxes, and unclear on how different state and tribal rules and regulations around drilling might affect their on-reservation activities. To address these concerns, in 2008 the tribe signed an agreement with the state of North Dakota that caps oil taxes on the reservation at 11.5 percent, empowers the state to collect all taxes and pass half onto the tribe, and created common rules and regulations.

A second issue hampering development is related to land tenure, and the fact that much of the oil-rich land on the reservation is owned by allottees and can be fractionated with up to 100 different owners per parcel. Drilling on these lands must be approved under communitization agreements that require a simple majority of the land’s owners to approve exploration and drilling. A simple majority is an improvement over an earlier DOI rule that demanded 100 percent of owners giving approval. Even so, working with fractionated allottee ownership can be problematic. Ownership records are incomplete, the paperwork on these parcels is complex, and federal agencies have been accused of placing allottee payments at a lower priority than tribal payments. This manifested at Fort Berthold in extreme delays in payments to allottees, an issue which mobilized Sen. Dorgan’s office to pressure BLM into processing its backlog and distributing about \$5 million in back royalty payments to allottees in October of 2010—a move which helped to alleviate some of the issues imposed on productive development by fractionated interests.¹¹⁴

All told, with these barriers mitigated, in the last few years an oil-drilling boom has come to Fort Berthold. As the tribe attested in a 2010 press release, before its 2008 tax agreement was signed

110 Kelly, “Oil and Gas Business Development on the Fort Berthold Reservation.”

111 Eloise Ogden, “Fort Berthold Reservation Prime Bakken Area,” *Minot Daily News*, April 24, 2010.

112 Marcus D. Wells, Jr. Hearing Before the Committee on Indian Affairs, US Senate. *Indian Energy Development*: Chairman Marcus D. Wells, Jr., 110th Congress, Second Session, 1 May, 2008, http://www.indian.senate.gov/public/_files/May12008.pdf, accessed April 27, 2011.

113 Eloise Ogden, “Energy Resources Provide Jobs,” *Minot Daily News*, May 2, 2010.

114 James MacPherson, “Feds forced to clear backlog of \$5M in oil royalty payments to local tribes,” *Bismarck Tribune*, October 21, 2010.

with the state, “only one well existed on trust land,” whereas since the agreement, “[more than] 160 new wells have been established on the Fort Berthold Reservation, with 40 of those new wells located on trust lands.”¹¹⁵ Since the tribe established an energy department in 2007, 16 companies have drilled for oil and gas on the reservation.¹¹⁶ In 2008, 14 drilling permits were approved, while in 2010, 92 were granted, with nearly 100 more awaiting approval.

And revenues are flowing. *The Bismark Tribune* noted in February 2010 that as of that month, tribal members and the tribe itself “had been paid more than \$180 million, primarily from leases” and were taking in more than \$1 million a month in production royalties.¹¹⁷ Funds accruing to the tribal government, which has mineral ownership in about one third of the reservation’s one million acres, are held by its treasury.

To say that the momentum of the Northern Plains’ oil boom has overwhelmed the Three Affiliated Tribes is an understatement. For one, the reservation’s infrastructure—particularly its roads—cannot adequately accommodate the increased traffic and heavy equipment accompanying the rush to develop the Bakken shale formation. In part to increase funding for infrastructure improvements, the tribe’s reelected chairman, Tex Hall, has stated his interest in renegotiating the tribe’s current 50/50 tax sharing arrangement with the state to an 80/20 split in favor of Three Affiliated.¹¹⁸

Staffing limitations at the federal level are another major concern for the tribe and its energy department. MHA Energy serves as an oversight office but lacks regulatory teeth, acting mostly as a facilitator and clearinghouse, communicating with BIA, BLM, ONRR, OST, EPA, and the North Dakota Industrial Commission on behalf of the tribe.¹¹⁹ While Three Affiliated found a powerful ally in Sen. Dorgan, with his retirement the tribe lost a voice of support representing its interests in Congress and on the Senate Committee on Indian Affairs. Sen. Dorgan’s muscle no longer backs the “one-stop shop” he helped establish to ease development processes on the reservation, and the office has shrunk dramatically even though the tribe’s lack of internal capacity means it must rely on federal agencies for assistance.

Individual allottee owners are garnering most of the wealth that comes from signing bonuses and royalties. The tribe, too, is generating revenues from royalties and taxes, but not at the same headline-grabbing amounts as allottees. The tribe currently is routing all its revenues into funding current budget priorities and has not yet moved toward establishing a more permanent fund. Meeting immediate societal needs and funding the infrastructure requirements exacerbated by the oil boom has strained the already understaffed and under-resourced tribal government. How and whether the tribal leadership, and its citizens, will use oil production to benefit Fort Berthold’s long-term economic planning, remains to be seen.

115 “Chairman Levings and Governor Hoeven to sign continuance of oil/gas tax agreement,” MHA Nation press release, http://www.mhanation.com/main/news/2010/2010_01_11_Levings_Hoeven_Oil_Tax.html, accessed on April 27, 2011.

116 Ogden, “Energy Resources Provide Jobs.”

117 Lauren Donovan, “Three Affiliated Tribes Hits \$1 Million Oil Benchmark,” *Bismark Tribune*. February 24, 2010.

118 Indian Country Today Media Network, “ND Oil Rush: Three Affiliated Tribes Want Higher Tax Cut for Road Repair,” *Indian Country Today*, February 10, 2011.

119 The North Dakota Industrial Commission’s Department of Mineral Resources, Oil and Gas Division regulates the drilling and production of oil and gas in the state.

10.

Energy Development Challenges

American Indian nations with energy resources face at least three major challenges. The first is a political challenge: to secure decision-making power over resource extraction. The second is a strategic challenge: to decide if and how resource extraction fits the nation's vision of its future. The third is a capacity challenge: to build the capacity to make informed decisions about energy resources and—if the nation decides to move forward with extraction—to manage the process and its results effectively.

Individual Indians have somewhat different challenges. Those with extraction occurring on their allotted lands need to ensure that their concerns get proper attention and are not subsumed under either tribal or federal political agendas. Those with extraction occurring on their tribal lands need to ensure that their tribal leadership is making good decisions about those resources for the collective benefit of the tribe.

The Political Challenge

It may be tempting, in this federal-policy era of tribal self-determination, to conclude that the political challenge has been addressed. It is certainly true that “with the advent in recent decades of a stronger federal Indian policy of self-determination and government-to-government relations . . . tribes exercise a far greater degree of control over mineral development on Indian lands” than they did before.¹²⁰ Many decisions that once lay in the hands of the Bureau of Indian Affairs or other federal land managers have moved into the hands of Indian nations. In terms of natural resource development, tribes have evolved from being “passive beneficiaries of royalty payments” to being “active partners with the opportunity to participate in decision making and in profit making.”¹²¹

This shift has been largely a product of tribal actions. Over the last forty years, increasing assertions of tribal control over natural resources have gone hand-in-hand with assertions of tribal control over nearly every other aspect of their lives and lands.

However, while this process has moved a long way, it is far from complete. Indian nations and their lands exist in a strange legal stasis. They are treated as wards of the United States under a doctrine of trust responsibility. The U.S. government legally owns the lands we know as Indian Country, and is obligated by law to protect those lands “for the benefit of” Indian peoples today and in perpetuity. Even so, a key question remains: who determines what does and what does not benefit Indian peoples?

Self-determination—the name by which federal Indian policy generally has been known since the mid-1970s—appears to answer that question. But final approval for actions such as mining and oil and gas production that will have major impacts on tribal lands still rests with the federal government, and the process of resource development still is embedded in a bureaucratic maze

120 Royster, 1993: 544.

121 Ambler, 85-86.

that makes it difficult for tribes to be entrepreneurial, to move quickly, or to effectively integrate decisions about natural resource development with decisions about community development more generally. Sometimes, the inability of tribes to negotiate in competitive marketplaces without government interference has protected them from potentially disastrous decisions. At other times, the government bureaucracy has forced bad deals on tribes or has delayed approval for so long that tribes have missed out on market opportunities.

But even within the fiduciary constraints of the trust responsibility, there is room for an expansion of tribal control. The challenge for tribes is to continue to progress toward genuine self-determination and self-government, moving the federal government from a dominant decision-making role to a supportive resource role and sharing responsibility for outcomes. To do so while still protecting the tribal estate, however, will require tribes—and the federal government—to address the third challenge, explored below: building tribal capacities for effective and informed decision-making and management.

The Strategic Challenge

Once Indian nations have the authority to decide what happens to their lands and resources, they encounter an additional challenge: deciding whether and how those resources fit into their visions of their own futures. These are not simple decisions. While Indian nations recognize the economic value of their resources, they also recognize that the extraction of those resources can have significant physical, social and—in some cases—cultural effects. When federal agencies make most of the decisions about what happens to tribal resources, such effects often are ignored, but they loom large in the strategic visions of many Indian nations. As decision-making power shifts, so do the considerations that enter into decisions.

For example, when the Northern Cheyenne Tribe in the 1970s asked the secretary of the Interior to cancel coal leases originally negotiated by BIA with six energy companies, their concerns had to do in part with BIA's own violations of Department of the Interior rules and regulations governing leasing contracts. The tribe also was concerned about issues that had nothing to do with paper contracts, among them possible environmental damage to Northern Cheyenne lands caused by strip mining, the social impact that would result from a massive influx of outsiders in the extractive phase of mining, and the difficulties that large-scale development and all its associated effects might pose for the cross-generational transfer of Cheyenne values and culture. Even the promise of hundreds of jobs and more than \$1 billion in potential profits over 20 years of reservation coal mining could not overcome broad-based opposition in the Northern Cheyenne community.¹²² Clearly, Northern Cheyenne priorities were not at all the same as BIA priorities, and the shift from BIA to Northern Cheyenne decision-making altered the course of the tribe's development.

This is only one case, and there are numerous counter examples. For example, as the Northern Cheyenne were asking DOI to cancel their coal leases, the Crow Tribe of Montana, whose lands lie just west of the Northern Cheyenne reservation, were pursuing coal development aggressively.

This is what tribal self-determination means: the power of individual Indian nations to make meaningful decisions that reflect their own priorities and values, and their own calculations about what best serves their long-term interests. Under conditions of self-determination, different nations may make different strategic choices. Certainly the pressures to develop energy resources are intense, and not all of them come from industry or federal bureaucrats. With high unemployment rates, high rates of household poverty, and limited sources of revenue, most tribes with energy resources have felt compelled to develop those resources in one way or another, and some have pursued development with enthusiasm. Strategic thinking in such cases has less to do with a thumbs-up/thumbs-down decision about development itself than with how development moves forward; where it happens relative to protected sites, watersheds, residential areas and so forth; the conditions placed on the development process; and how to use the revenues that development produces.

122 Champagne: 285.

There is another strategic issue facing tribes engaged in developing nonrenewable resources. What happens when the resources run out? Nonrenewable means just what it says: when it's gone, it's gone. This consideration may not have much effect on whether a nation decides to develop its resources, but it may have a substantial effect on decisions about how to use the revenues that development produces. When the resource-based economy runs dry, what will replace it?

This issue has a history in Indian Country. When uranium mining ended on the Spokane and Laguna Pueblo reservations in the early 1980s, it had disastrous effects on employment. When AMAX pulled out of a molybdenum project on the Colville reservation, it "left the tribe in desperate economic straits."¹²³ In cases such as these, not only are there jobs involved, but also those revenues may be an important source of support for tribal government. With this in mind, some nations are using resource-related revenues to diversify their economies, trying to limit their dependence on a single, nonrenewable asset. The Southern Ute Indian Tribe appears to have addressed this concern quite effectively. Concerned about their reliance on a single source of income—oil and gas extraction—the tribe, as noted in Section 9, regularly invests a share of its energy profits into a diversified portfolio of gaming enterprises, real estate and alternative energy development.

The Capacity Challenge

Even those Indian nations that are able to exercise substantive control over what happens to non-renewable energy resources on their lands face a third challenge: developing the capacity to make informed decisions about those resources and, if they decide to move forward with extraction, to manage the process and its results.

One of the criticisms of the TERA legislation, and less so of the deals made under IMDA, is that some tribes with significant energy resources lack "the governing capacity to negotiate fair

deals and to manage resources responsibly."¹²⁴ As the Harvard Project on American Indian Economic Development has noted, a not uncommon worry in Indian Country is that "many tribes lack the institutional and enforcement mechanisms, as well as the lawyers and scientists, that it takes to avoid being exploited by experienced energy developers."¹²⁵

This capacity challenge has multiple components. It includes the legal and regulatory infrastructure

necessary to manage resource extraction and its effects according to tribal goals and concerns. It includes the legal infrastructure necessary to support tribal corporations and to attract and support joint ventures with outside partners. It includes the internal financial policies and procedures necessary to monitor and manage high-value transactions with sufficient transparency and accountability to reassure citizens, partners and auditors.¹²⁶ It includes the expertise necessary to support decision-making and implementation in a complex, highly competitive, heavily regulated industry.

To conduct a fully integrated minerals extraction operation, a tribe needs to be able to draw on a substantial body of expertise, ranging from mining or petroleum geologists and engineers to lawyers, accountants and experienced business managers. Few tribes are able to meet this demand from among their own citizens, at least in the short run, but whether they draw from within or from outside the nation, they have to be able to find such expertise, retain it, and depend on it.

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123 Cornell, Stephen. *The Return of the Native: American Indian Political Resurgence*. (New York: Oxford University Press, 1988): 210-11.

124 HPAIED: 165.

125 HPAIED: 165.

126 Lack of transparency is, in part at least, prompted by legislative restrictions. 25 USC 2103(c) of the 1982 Indian Mineral Development Act states that almost all information, including "the financial return to the Indian parties" and the "value or disposition of Indian mineral resources . . . shall be held by the Department of the Interior as privileged proprietary information of the affected Indian or Indian tribe." This statutory privilege, as well as case law, has sufficient strength to defeat FOIA requests for royalty information related to IMDA agreements. (Tom Shipps, personal communication with author, April 12, 2011.)

This is not simply a matter of searching out talent. Some individuals with the requisite skills and integrity—including tribal citizens—may be discouraged from pursuing tribal jobs because of tribal politics, choosing instead to work for private developers or for tribes that have managed to insulate their economic enterprises from political interference in hiring and other management matters. The capacity challenge, in other words, is partly institutional: does the nation have in place the kinds of business policies and practices that encourage skilled, energetic individuals to invest their talents with the nation instead of somewhere else?

Even if a tribe has what it takes to manage resource extraction effectively, coal, oil and gas production are high-risk enterprises. Some tribes may choose to lease those resources because, while they forego ownership of the operation and potentially higher profits, they achieve a steady income stream and place most of the financial risk on the lessor. That decision—to lease or pursue tribal ownership—like the decision of whether to develop the resources at all, requires access to reliable information and expertise.

Some Indian nations that have developed these capacities have begun sharing their expertise and experience with others. The Harvard Project on American Indian Economic Development reported in 2008, for example, that “the Blackfeet Indian Nation is being advised by the Southern Ute Indian Tribe on opening some of its reservation to gas exploration and production.”¹²⁷ Such sharing is a capacity-building strategy.

These three challenges—political, strategic and capacity—are related. As Indian nations increase their expertise, they are able to make more informed strategic decisions. As their track record of capable governance and development grows, they are better able to defend their right to make decisions for themselves. As they secure that right, they increase their capacity to shape their development futures in their own ways.

Implications for Tribes

First, as a starting point, tribes must know the value of the resources they own. Over the years, various energy companies have undertaken many assessments of the amount, quality and extractability of nonrenewable resources on Indian lands. In the past, most of that information stayed with the companies that gathered it. Today, nations like the Crow Tribe are becoming more aggressive about gaining access to and retaining company-based research. The federal government is helping by housing relevant resource data at BIA’s Division of Energy and Mineral Development (DEMD) and making it available through the NIOGEMS database. At some future point, the ideal would be for tribes to be able to do their own analyses, either by hiring outside experts and then owning the data or by hiring their own citizens who have developed the skills to do this work. It may take time to develop that capacity; meanwhile, as a condition of allowing corporate access to tribal lands for exploration and analysis, tribes can demand access to the resulting data.

Second, tribes must develop their ability to make use of data in ways that serve tribally identified priorities and interests. This includes at least two things. On the one hand, tribes have to develop strong governing structures that are capable of prompt, informed decision-making, of implementing the decisions that are made, and of sustaining productive relationships with outside entities such as energy corporations. In essence, this is a good governance requirement. It means stability, openness and public participation in tribal governance and decision-making; fair and effective resolution of disputes; the ability to uphold contracts and follow through on commitments; and in general, the creation of an environment that encourages outsiders to invest time, energy and money with the nation.

On the other hand, these same tribal governments must be able to conduct comprehensive, reservation-wide planning to maximize the potential of both their renewable and nonrenewable resources. A century or more of fickle federal policy has led Indians to take advantage of federal handouts whenever they are on offer, anticipating that they may disappear soon after. Using this

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approach, some tribes have chased after whatever federal grants were available, regardless of whether the projects funded had long-term sustainability or were related to long-term tribal objectives. The more sophisticated tribes today, particularly those in energy resource extraction, realize that most energy projects are going to occur over a 25- or 30-year timeframe (or longer) and must be planned for thoughtfully and comprehensively. They do not chase after available federal dollars simply because they are there, but instead pursue those grants and partnerships that support their objectives. This is fundamentally a strategic planning requirement: the ability to establish and enact a long-term strategic vision that makes clear what the expected role of resource extraction is in the tribe's present and future. Extractive development has big impacts on communities, land and relationships. Some of those impacts are positive; some are negative. Tribes need the space to think carefully about the trade-offs involved and make decisions that reflect their own strategic priorities.

Third, tribes must invest in building capacity to undertake and manage extraction themselves. The most economically successful tribes have figured out how to limit federal involvement in their affairs while building their own tribally managed effective infrastructure. In the area of energy development, the Southern Ute Indian Tribe represents the gold standard. That tribe's leadership chose to take the time needed to map its resources so it knew their value; then—making strategic use of federal monies—it hired the expertise it needed until it could grow its own. Finally, while using a portion of its earnings to make quarterly per-capita payments to its citizens, it reinvested a significant portion of its revenues for the long-term benefit of the nation.

Implications for the Federal Government

Perhaps in an ideal world, the federal government would relinquish its oversight of Indian lands and allow tribes to be fully self-governing and sovereign. Since this is unlikely to happen, the best way for the government to honor its trust obligations is to stop trying to determine what is in the best interest of tribes and instead support tribal efforts to make that decision autonomously. Federal reform that consolidated oversight of Indian resource development activities into a single agency with adequate funding tied to tribal priorities and gave its employees a clear mandate to support (rather than oversee) tribal decisions would go a long way.

For now, the most important activities the federal government might pursue would do the following: provide sufficient funding to tribes to map their mineral resources and conduct comprehensive, reservation-wide planning; correct—through legislation and funding—the issues that prevent reservation-wide implementation of plans (including fixing a century of inaccurate and inadequate record-keeping on Indian land ownership issues, resolving fractionation issues on allotments and funding tribal purchases of land on checkerboard reservations); and fund tribal capacity building so that tribes can employ trained, professional staff capable of managing the various aspects of large-scale extraction as well as the revenues that come from those activities.

11.

Conclusions

While the issues around extraction of nonrenewable resources in Indian Country are highly complex, a few key observations help define the current situation.

1. Ownership of major non-renewable energy resources is concentrated within a relatively small number of tribes, most of which reside in the western United States.
2. With a few exceptions, tribes do not yet have the infrastructure to manage their own extractive activities effectively, even though legislation increasingly supports tribal autonomy.
3. The federal government's oversight and assistance seems generally well-meaning but often is not as effective, efficient or responsive to tribal needs as it must be to make a real difference. Political expediency continues to override smart business decisions, and federal funding for capacity building has not been forthcoming. The government continues to do a poor job of negotiating advantageous business terms for tribes and continues to allow industry to call too many of the shots.
4. At the tribal level, there appears to be significant variation in the amount of detail tribal governments share with tribal members on how much money is earned from extraction and how it is spent. To be sure, tribal sovereignty extends to decisions over what level of transparency should be applied to a tribe's energy resource activities. However it is clear that when tribes have had greater access to data on the benefits accruing from extractive activity, they have been able to improve revenue collection and tribal profits. Similarly, greater transparency within tribes might allow for increased monitoring and oversight from tribal citizens, and help ensure that decision-making related to extraction on tribal lands incorporates citizen oversight and participation.
5. Tribes are diverse, and within any tribe there may be a multiplicity of goals. Maximizing revenue may not be a tribe's only bottom line. Preserving culture, land and resources for future generations often are paramount. For some tribes, a decision to limit resource extraction or ban it completely may make sense.

Overall, real change must be effected within and by Indian Country, not on behalf of Indian Country. Many feel that the appropriate role for the federal government today is as a resource-provider, facilitating independent decision-making and true self-governance by tribes. When tribes are free to make decisions for themselves, they have the opportunity to align policy and planning with tribal priorities. Nowhere is this opportunity more critical than in the high-risk—and potentially high-reward—extractive sector.

Appendix A

Major Milestones in Extraction on U.S. Indian Lands

- 1824 Establishment of the Bureau of Indian Affairs, the oldest bureau in the Department of the Interior (DOI).
- 1872 Passage of the General Mining Law.
- 1882 Discovery of oil in the Oklahoma territory. This caused major disruption, including forced removal, for Indian peoples living in the territory.
- 1887 General Allotment Act. Allowed division of reservation lands into allotments for individual Indians.
- 1880s Copper oxide mining begun on Tohono O'odham lands.
- 1891 Act passed to allow mineral leasing of tribal lands; tribal consent needed.
- 1909 Act passed to allow mineral leasing of allotted lands; no tribal consent needed.
- 1918 Vanadium and uranium mining begun on Navajo lands; ceased in 1923.
- 1919 Act passed to allow leasing for gold, silver, copper and other minerals on lands in nine western states. The act eliminated the need for tribal consent and allowed for state taxation of lessees.
- 1924 Congress confers U.S. citizenship on all Indians born in the United States.
- 1934 Indian Reorganization Act passed, which ends the allotment era. Requires tribal consent for leasing.
- 1938 Indian Mineral Leasing Act passed. Standardizes leasing policies and attempts to maximize financial returns.
- 1944 Founding of the National Congress of American Indians (NCAI).
- 1946 Establishment of the Bureau of Land Management within DOI.
- 1951 Navajo Tribal Council requests a GAO investigation on uranium royalty underpayment. GAO finds substantial problems, but there is no later evidence of improvements following the report.
- 1952 Laguna Pueblo signs a lease with Anaconda Copper (ARCO) to open the Jackpile mine for uranium. (Mine closed in 1982.)
- 1972 Navajo Nation and Exxon negotiate first Indian mineral contract providing for ownership interest.

- 1975 Founding of the Council of Energy Resources Tribes (CERT).
 Passage of the Indian Self-Determination and Educational Assistance Act. Within this act is PL93-638, which allows tribes to take over certain responsibilities from the federal government.
 Blackfoot Tribe and Damson Oil negotiate joint venture oil contract.
- 1979 An earthen tailings from dam at the Church Rock mine, operated by United Nuclear, Inc. near the Navajo Reservation, fails, creating the largest release of radioactive waste in U.S. history.
- 1980 Jicarilla Apache Tribe assumes control of Palmer Oil wells on the reservation.
- 1982 Linowes Commission appointed by secretary of the Interior to examine serious inadequacies of USGS oversight, which contributed to underpayment, theft and fraud.
 Passage of the Indian Mineral Development Act, which allows tribes to negotiate mineral development agreements of all types, not just leases.
 Creation of the Minerals Management Service, vested with responsibility for oversight of federal and Indian mineral royalty collection, management and enforcement (a result of the Linowes Commission findings).
 Passage of the Federal Oil and Gas Royalty Management Act (FOGRMA). This authorizes DOI to enter into cooperative agreements with any state or Indian tribe to share oil or gas royalty management information, to carry out inspection, auditing, investigation or enforcement (not including the collection of royalties, civil or criminal penalties or other payments) activities and vehicle inspection activities.
- 1983 Jicarilla Apache Tribe drills oil and gas wells using own funds.
- 1984 Fort Peck Tribes produce oil from a tribally owned well.
- 1985 *Montana v. Blackfeet Tribe of Indians* Supreme Court decision prohibits state taxation of Indian lessees. State still could tax non-Indian lessors.
- 1994 Creation of the Office of the Special Trustee for American Indians.
- 2005 Passage of the Energy Policy Act, which included as Title V the Indian tribal Energy Development and Self-Determination Act.
- 2010 Dissolution of MMS and creation of the Office of Natural Resources Revenue.

Sources: Saleem Ali, *Mining, the Environment, and Indigenous Development Conflicts*; Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development*; Stephan Pevar, *The Rights of Indians and Tribes: The authoritative ACLU guide to Indian and tribal rights*; Judith Royster, "Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources," *Tulsa Law Journal*.

Appendix B

Legislation Indirectly Affecting Extraction on Indian Lands

General Mining Law (1872)

This law gave anyone the right to seek out mining claims on public lands designated for mining. The law has endured, so that today a miner can stake a claim to an underground ore body by paying an annual fee of \$100. The law does not contain any regulations regarding environmental damage or royalty payments by those who obtain minerals from public lands. Many attempts to reform the law have failed, making it one of the oldest U.S. laws to remain unamended or replaced.

Burke Act (1906)

This act focused on the citizenship issues raised by the Dawes Act, which parceled tribal lands into individual allotments with the intent to assimilate Native Americans. Burke granted citizenship to individual Indians after a 25-year probationary period, provided that they took an allotment of land.

Wilderness Act (1964)

This act designates wilderness areas on public lands, where new mining claims are prohibited. (N.B.: According to U.S. Code of Federal Regulations Parts 6300 and 8560, as of midnight, December 31, 1983, the location of new mining claims became statutorily prohibited in wilderness areas designated by the Wilderness Act. However, when passed the act specifically recognized valid existing mineral rights, including the right to mine valid claims that existed at the time the wilderness was designated and have been properly and continuously maintained since that time.)

National Historic Preservation Act (1966)

This act was enacted to preserve historical and archeological sites, and created the National Register of Historic Places, among other registries. It establishes that historic properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion” in the National Register of Historic Places. It also requires consultation with tribes when federal agency activities may affect tribal historic properties that are either located on tribal lands, or hold religious or cultural significance to a tribe, whether or not they are located on tribal trust land.

National Environmental Policy Act (1970)

This act establishes policy and contains procedures to ensure that environmental information is made available to public officials and citizens during federal decision-making processes about land and resource use. Among other reforms, it requires the development of Environmental Assessments and Environmental Impact Statements as part of its approval processes.

Clean Water Act (1972)

This act was designed to prevent toxins from contaminating water sources and set a 1985 deadline to remove toxins already present. It set up a permit system for industrial and governmental facilities, to be administered by the Environmental Protection Agency (EPA). Importantly, the act does not cover groundwater, just surface water. Additionally, the text of the act explicitly instructs EPA to treat a tribe as it would a state in its direction of the act's implementation.

Safe Drinking Water Act (1974)

This act was designed to ensure safe drinking water in all public water systems. It does not apply to personal wells. In this act (as in the Clean Water Act), EPA is instructed to treat tribes like states.

Federal Land Policy and Management Act (1976)

This act created the idea of "multiple use" of public lands. Originally, it was intended to allow for uses such as grazing and logging, but has also come to incorporate resource extraction. Land governed by the act does not include land held in trust on behalf of Native Americans. However, land that is not deemed part of Indian Country, but may be of spiritual or cultural significance to tribes, could be affected.

Resource Conservation and Recovery Act (1976)

This act is the main law that governs solid/hazardous waste disposal. It superseded the Solid Waste Disposal Act of 1965, and was designed to protect humans and the environment from waste, encourage the reduction of waste, and conserve natural resources. The act requires waste to be tracked and protected from its creation point, throughout transport, and finally to treatment/destruction phases.

Surface Mining Control and Reclamation Act (1977)

This act was designed to combat the environmental effects of coal mining and to reclaim abandoned mines. It instigated a permitting system for coal mines and dictated that the Office of Surface Mining would oversee inspection and enforcement related to the act on behalf of tribes.

National Materials and Minerals Policy, Research and Development Act (1980)

This act was designed to stimulate private research on and development of U.S. natural resources.

Comprehensive Environmental Responsibility, Compensation and Liability Act, aka "Superfund" (1980)

EPA administers this act, which provides for the cleanup of hazardous substance spills, typically by ordering the causal actor to undertake cleanup activities under EPA scrutiny. The act explicitly states that tribes should be subject to the same requirements and have access to the same monies under the Superfund Act as do states.

Native American Graves Protection and Repatriation Act (1990)

This act requires all federal agencies, or any entity receiving federal funding, to return all Native American artifacts and remains to their respective people.

Oil Pollution Act (1990)

The act was passed in reaction to the Exxon Valdez oil spill. It gives the federal government authority to determine oil pollution liability and compensation. In addition, it allows the federal government to direct and manage oil spill cleanups, as well as to assess damages and restore natural resources that have been contaminated by the discharge, or threatened discharge, of oil.

In practice, the U.S. Coast Guard has jurisdiction over coastal/marine oil spills and oil spills that threaten navigable waters, DOT's Office of Pipeline Safety regulates the transport of oil through pipelines, and EPA is the lead response agency under the act for inland pipeline spills.

Radiation Exposure Compensation Act (1990)

This act allows U.S. citizens to receive compensation for cancer and other diseases related to their exposure to uranium weapons manufacture and related mining processes.

Indian Tribal Economic Development and Contract Encouragement Act (1999)

This act amends federal law around contracting with tribes. It invalidates any contract with a tribe that encumbers tribal lands for seven or more years that does not have approval from the secretary of the Interior. It applies lands held in trust by the United States or by a tribe subject to a restriction by the United States against alienation.

Source: Westlaw database

Appendix C

Tribal Associations and Other Resources

While each tribe has its unique governance, culture and history that affect the way extractive resources are managed within specific tribal communities, there are some tribal associations that collate information and encourage communication across tribes.

Council of Energy Resource Tribes (CERT)

CERT is an intertribal organization representing tribes that own energy resources on their native lands. It has approximately 60 member tribes, representing about 55 percent of all native lands in the lower 48 states. CERT was founded in the Reagan era as an attempt to give tribes more control over their resources while bridging the interagency federal maze. This approach was abandoned under the Clinton administration, however, and CERT took on a more truly tribal identity and has continued to work toward assisting tribes to take more direct, informed management of their resources.

CERT plays a dual role of increasing tribal capacity to manage resources and representing tribal interests on the national level. Although CERT has limited in-house technical assistance services, it plays a facilitation role by putting tribes in touch with national laboratories, universities, companies or other tribes with more experience. It also acts as a clearinghouse of information, although the resources provided directly on its website are limited. The organization has provided several scholarship and fellowship programs to encourage capacity among Native Americans in various aspects of the extractive industries. Annual CERT meetings have provided a forum for knowledge sharing, capacity building and strategizing for policy development and advocacy engagement on the national level.

National Congress of American Indians (NCAI) Policy Research Center

NCAI was founded in 1944 in response to termination and assimilation policies that the United States forced upon the tribal governments in contradiction of their treaty rights and status as sovereigns. Since 1944, it has continued to work to inform the public and Congress on the governmental rights of Native Americans and Alaskans. NCAI includes 250 member tribes from throughout the United States and informs many federal decisions that affect tribal government interests. Among other things, NCAI covers issues related to environmental protection and natural resources management, and advocates at the federal level for the promotion of economic opportunity in Indian Country, through development incentives and other programs.

The NCAI Policy Research Center (PRC) was launched in 2003 and serves as a think tank focused on issues facing tribal communities. Although PRC is not engaged in research on extractives on native lands, current research areas do cover related themes in natural resources and economic development.

Rocky Mountain Mineral Law Foundation

The Rocky Mountain Mineral Law Foundation (RMMLF) is a “collaborative educational non-profit organization dedicated to the scholarly and practical study of the law and regulations relating to mining, oil and gas, water, public lands, land use, conservation, environmental protection, and other related areas.”¹²⁸ RMMLF offers conferences and workshops on relevant issues. It also publishes the Gower Federal Service—Royalty Valuation and Management that provides tribes and others with a comprehensive source of information on federal and Indian royalties.

State and Tribal Royalty Audit Committee (STRAC)

STRAC is a monitoring and advocacy organization made up of royalty auditors from ten states and eight tribes.¹²⁹ In the heyday of mismanagement at MMS, STRAC was vocal in raising issues regarding the bureau’s lack of transparency and poor royalty oversight and management, and produced audit reports of state-level royalty management and audit bodies. While the organization has not been as active on these fronts in recent years, there are signs that under a new federal administration, STRAC may experience resurgence.

¹²⁸ See RMMLF’s website, <http://www.rmmlf.org/geninfo/what.htm>, accessed March 24, 2011.

¹²⁹ STRAC members are Alaska; Blackfeet Nation; California; Colorado; Fort Peck Tribes; Jicarilla Apache Tribe; Louisiana; Montana; Navajo Nation; New Mexico; North Dakota; Oklahoma; Shoshone and Arapaho Tribes; Southern Ute Indian Tribe; Texas; Utah; Ute Indian Tribe; Ute Mountain Ute Tribe; and Wyoming.



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