Federal and Indian Oil & Gas Royalty Valuation and Management

Book 1

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INDIAN TRUST ISSUES

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Paper 14

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Indian Trust Issues

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Part

1

A Brief History of Indian Trust Law

From Justice Marshall to Navajo Nation

Since the founding of the United States, the relationship between the Federal government and Indian tribes has swung back and forth from termination of Indian tribes and cultures to strict oversight by the Secretary of the Interior to support for tribal sovereignty and self-determination. Underlying the shifts in law and policy through the years, however, has been the concept that the United States has a trust responsibility to Indian tribes and Indian people and is bound to act in their best interest. [4]

The concept of the trust relationship was first enunciated by no less a jurist than Chief Justice John Marshall. Writing in a case where the Supreme Court was faced with deciding whether an Indian tribe was a "foreign state", he said that the tribes, rather than being states or foreign nations, are "domestic dependent nations" and that the relationship of the tribes "to the United States resembles that of a ward to his guardian." [5] Through the years since 1831, many Federal court decisions at all levels have opined on the nature of the trust responsibility. More than one hundred years later, the Supreme Court summed up the duties of the United States with respect to Indian tribes and individuals.

> Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. [6]

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[4] What follows in the first portion of this paper is a brief and cursory overview of the context for the application of the trust responsibility to the collection of royalties on Indian mineral leases. A complete explanation of the trust responsibility and the shifts in Indian law and policy through the years is a huge subject, well beyond the scope of this paper. The definitive treatment of that subject can be found in the first three chapters of RENNARD STRICKLAND, *ET AL.*, EDS., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) (hereinafter Cohen).

[5] Cherokee Nation v. Georgia, 30 U.S. 1, 33 (1831).

[6] Seminole Nation v. United States, 316 U.S. 286, 296-7 (1942) (citations and footnote omitted).

The extent of the trust responsibility is defined by relevant statutes and regulations.[7] When interpreting those statutes, courts (and the Secretary of the Interior) will resolve ambiguities in statutes in favor of the Indians.[8] As ruled by the Tenth Circuit Court of Appeals, the same principle applies to the interpretation of regulations.

> When the Secretary is acting in his [trustee] role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe.[9]

As with the concept of the trust responsibility itself, the relevant statutes and regulations date to the beginning of the United States.

Beginning in 1790, Congress enacted a series of laws, under its broad constitutional authority "to regulate commerce . . . with the Indian tribes"[10] that were aimed at controlling trade between Indians and non-Indians and protecting Indian lands from fraudulent purchase or conveyance.[11] One of those laws was the Nonintercourse Act. As currently codified, the Nonintercourse Act provides, in pertinent part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[12]

Even though the United States stopped entering into treaties with Indian tribes in 1871[13], the Nonintercourse Act still requires that any alienation of Indian land must have the consent of the United States.[14] The Nonintercourse Act's "overriding purpose is the protection of Indian lands," which is achieved by "imposing on the federal government a

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[7] Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2000), *citing*, Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) *and* United States v. Mitchell, 463 U.S. 206, 224 (1983) ("Mitchell II").

[8] Bryan v. Itasca County, 426 U.S. 373 (1976).

[9] Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as majority opinion as modified en banc, 782 F.2d 855 (10th Cir. 1986).

[10] U.S. Const., art. I, § 8, cl. 3.

[11] *See*, Act of July 22, 1790, 1 Stat. 137; *see also* Act of Mar. 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of Mar. 3, 1799, 1 Stat. 743; Act of Mar. 30, 1802, 2 Stat. 139; Act of May 6, 1822, 3 Stat. 682; Act of June 30, 1834, 4 Stat. 729.

[12] Act of June 30, 1834, 4 Stat. 730, reenacted as Rev. Stat. § 2116 (1875 ed.) (adopting INA in its current form), currently codified at 25 U.S.C. § 177. The whole series of acts were titled the Trade and Intercourse Acts. The United States Supreme Court referred to this portion of the Acts as the Nonintercourse Act in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), and that is what it is commonly called in the Indian legal community.

[13] Act of March 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. § 71).

[14] Oneida, 470 U.S. at 240.

fiduciary duty to protect those lands."[15] While the particular justifications for the Nonintercourse Act's restraints on the alienation of tribally owned lands have changed over time, the need for such restraints remains:

> Today, the statutory restraints on alienation of Indian land insulate Indian lands from the full impact of market forces, preserving the Indian land base for the furtherance of Indian values. If tribal land were not subject to restraints on alienation and tax immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation. . . . The continued enforcement of federal restrictions, in this view, derives not from a presumed incompetence of the "ward," but from a perceived value in the desirability of a separate Indian culture and polity.[16]

Thus, with certain exceptions not relevant here, the leasing or other alienation of tribal land, including that for mineral development, requires the consent of the United States. That consent is now given by Congress or delegated by Congress to the Executive Branch, generally to the Secretary of the Interior.[17]

Not all Indian land is tribal land, however. In 1887, in an attempt to break up the tribal system and "civilize" the Indians, Congress passed the General Allotment Act (GAA).[18] Section 1 of the GAA authorizes the President to allot to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land found within the reservation.[19] Section 5 of the Act provides that the United States shall retain title to such allotted lands in trust for the benefit of the allottees.[20]

Because of these restrictions on alienation, allotted Indian land can only be leased or otherwise alienated under the same condition as tribal land, i.e., with the consent of the United States, either through direct Congressional action or delegation from Congress to the Executive Branch, again generally the Secretary of the Interior. Thus, with respect to Indian land (and mineral resources), the trust responsibility flows to the Indian landowner, whether that owner is an Indian tribe or the individual Indian owner of allotted land.

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[15] United States *ex rel.* Santa Ana Pueblo v. University of New Mexico, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853 (1984).

[16] Cohen, at 509-510.

[17] Indian statutes and regulations generally impose duties on the "Secretary of the Interior" or the "Secretary" rather than a specific bureau, such as the Bureau of Indian Affairs or the Minerals Management Service. The references in those statutes and regulations are understood to refer to the Secretary or whatever bureau or official has delegated responsibility from the Secretary. This paper follows that same convention.

[18] 24 Stat. 388 (codified as amended in scattered sections of Title 25 of the United States Code). The two major purposes of the GAA were summarized at the time by Representative Perkins: "[the] bill provides for the breaking up, as rapidly as possible, of all the tribal organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship." 18 Cong. Rec. 190, 191 (1886). He asserted that one object of the bill was to enable Indians "to support themselves by industry and toil." Id.

[19] 25 U.S.C. § 331.

[20] *Id.* at § 348. The original period during which the land would remain in trust was 25 years. Under Section 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462, the United States now holds title to these lands indefinitely.

Although the Nonintercourse Act and the GAA are the fundamental charters for the restrictions on leasing of Indian land, those statutes do not impose specific trust duties on the United States or the specific conditions (apart from Federal approval) under which the land may be leased.[21] In the mineral leasing context, especially for oil and gas, those duties are generally found in the Act of March 3, 1909; the Indian Mineral Leasing Act (IMLA); the Indian Mineral Development Act (IMDA); and, for royalty management, the Federal Oil and Gas Royalty Management Act (FOGRMA), and in the regulations promulgated by the Secretary under those statutes.[22] Those statutes and regulations recognize and allow for tribal self-determination, but still require the Secretary to act in the overall best interest of the tribe or the individual Indian, even if that means choosing to do what is in the long term best interest of the tribe or the individual Indian (with due consideration of the short term interests and of the wishes of the tribe or individual Indian).

After the GAA went into effect, Congress realized that the allotment policy was not working to give the allottees the income from their land necessary to make them self-reliant. It therefore passed a series of statutes allowing for the leasing of their land by the allottees with the approval of the Secretary of the Interior. One such statute was the Act of March 3, 1909.[23] That Act provides that:

> [all] lands allotted to Indians in severalty . . . may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect.[24]

The Secretary has fleshed out the bare bones of this statute in regulations. Because those regulations, through extensive cross-references, largely track those for tribal land, they will be discussed here in conjunction with the tribal regulations.

The first general nationwide statute providing for mineral leasing of tribal land was the Indian Mineral Leasing Act of 1938.[25] The IMLA provides, like the 1909 Act, that tribes may lease their land for mineral development, with the approval of the Secretary.

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be

[21] United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I).

[22] 25 U.S.C. § 396, 25 U.S.C. §§ 396a-g, 25 U.S.C. §§ 2101 et seq., and 30 U.S.C. §§ 1701 *et seq*., respectively. There are many other statutes providing for mineral leasing on Indian lands in particular states or for particular tribes, but those noted here are the most important general authorities.

[23] 35 Stat. 783, 25 U.S.C. § 396.

[24] *Id.* The Act does not apply to allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, both of which have their own mineral leasing authority.

[25] 25 U.S.C. §§ 396a-g.

leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.[26]

Again, like the 1909 Act, the IMLA provides that any mineral lease of tribal land is subject to the regulations of the Secretary.[27]

The general regulations implementing the IMLA and the 1909 Act are in 25 C.F.R. Parts 211 and 212, respectively. The regulations set the standard for the Secretary's administration of mineral leases by noting that they "are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that *maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development.*"[28]

The regulations also define how the Secretary determines what is in the best interest of the Indian mineral owner:

In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a lease, permit, unitization, or communitization agreement), *the Secretary shall consider any relevant factor, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasibility of land concerned; need for change in the terms of the existing lease; marketability; and potential environmental, social, and cultural effects.*[29]

Since the tribe (for tribal land) generally submits these leases to the Secretary for approval, its desire is that the lease be approved. The Secretary must still go through this analysis, however, to determine if she agrees that the lease is in the tribe's best interest.[30]

Furthermore, the "best economic interests" language does not mean that the Indian mineral owner is entitled to the maximum possible royalty to the exclusion of any other factors. In *Supron*, cited above, the Tenth Circuit opined that certain portions of the legislative history of the IMLA led it to the conclusion that Congress intended Indian mineral owners to receive the greatest return from their property in the short term.[31] The

[26] 25 U.S.C. § 396a. Despite the nationwide nature of this statute, Section 396f provides that the IMLA does not apply "to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." Again, all of these areas have their own mineral leasing authority.

[27] *Id.*, at § 396d.

[28] 25 C.F.R. § 211.1(a) (emphasis added). The regulations for allotted land contain the same provision. 25 C.F.R. § 212.1(a).

[29] 25 C.F.R. § 211.3 (emphasis added). The regulations for allotted land contain the same provision. 25 C.F.R. § 212.3(a).

[30] Although many leases for allotted land are granted by the Secretary, rather than being negotiated by the Indian mineral owner, the same standards apply to that grant. The same standards also apply to any negotiated leases for allotted land.

[31] Supron, 728 F.2d at 1565.

Supreme Court has cautioned that the language relied upon by the Tenth Circuit should not be given "talismanic effect"[32], and, in an opinion in March 2003, stated that the purpose of the statute was to provide Indians with a profitable source of revenue and to remove obstacles to leasing Indian land for mineral development.[33] Likewise, the 1909 Act does not require the Secretary to maximize an allottee's revenue to the exclusion of any other factors, absent a contrary duty in the regulations.[34]

By the mid-1970's, the business climate in Indian country had changed. Many tribes found that the limitation on the form of transactions under the IMLA to leases did not allow them sufficient flexibility to compete with non-Indian mineral owners, who could be more creative with the transaction (and the terms of the transaction). At the same time, the Indian policy of the United States government, having swung from assimilation in the late 19th and early 20th centuries to support for tribal sovereignty in the 1930's and 1940's to termination of tribes in the 1950's, was swinging back to self-determination and support for the practical exercise by tribes of their inherent sovereign powers. This shift is best seen in the Indian Self-Determination and Education Assistance Act of 1975, in which Congress specifically stated that:

> The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that –
>
> > (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
> > (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.[35]

In the mineral context, the self-determination policy, together with the need for more flexibility for tribal mineral development, culminated in the Indian Mineral Development Act of 1982.[36] Under the IMDA:

> Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") providing for the exploration for, or

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[32] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 179 (1989).

[33] United States v. Navajo Nation, 537 U.S. 488, 123 S. Ct. 1079, 1094, n. 16 (2003).

[34] Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987).

[35] 25 U.S.C. § 450(a).

[36] 25 U.S.C. §§ 2101 et seq.

> extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.[37]

Allotted mineral resources may be included in a tribal Minerals Agreement subject to the concurrence of the parties and a finding by the Secretary that such participation is in the best interest of the individual Indian.[38] The possibility for inclusion of the interests of more than one beneficiary in an agreement with the same trustee acting simultaneously on behalf of both is inherent in the role Congress has set for the United States as trustee.

> The Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.[39]

The IMDA thus affords the tribe (and individual Indian, if included) the flexibility to negotiate the terms of its own agreement, without the active involvement of the Secretary. The Secretary's role is limited to rendering assistance to the tribe in the negotiation process,[40] approval or disapproval of the Minerals Agreement,[41] and enforcement of its terms.[42]

Both the IMDA and its implementing regulations reflect the current tension in the administration of the trust responsibility between Secretarial oversight and self-determination. The statute specifically provides that the Secretary must consider in the approval process, among other things, "the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes between the parties to the agreement", similar to the provisions noted above in the IMLA regulations.[43] The IMDA, however, also specifically provides that the disapproval of an Agreement cannot be delegated lower in the Department of the Interior than the Assistant Secretary–Indian Affairs, thus making disapproval of an Agreement much more difficult than approval, which tends to support the tribe's determination of its

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[37] *Id.*, at § 2102(a).

[38] *Id.*, at § 2102(b).

[39] Nevada v. United States, 463 U.S. 110, 128 (1983).

[40] 25 U.S.C. § 2106.

[41] *Id.*, at §§ 2103(a)-(d). The IMDA provides that the Secretary's approval will not render the United States liable for losses sustained by the tribe or individual Indian should the tribe or individual Indian enter into a bad deal. *Id.*, at § 2103(e).

[42] *Id.*, at § 2103(e).

[43] *Id.*, at § 2103(b).

best interest.[44] Likewise, in the IMDA regulations at 25 C.F.R. Part 225, the list of the factors the Secretary must consider is similar to that in the IMLA regulations.[45] The IMDA regulations also list the required terms for Mineral Agreements, as do the IMLA regulations, but limit the requirement to types of terms, e.g., provisions for royalties and valuation of production, rather than a detailed discussion of the substantive contents of the term, *e.g.*, the actual royalty rate and method of calculating the value of production.[46]

The tension between Secretarial oversight and tribal self-determination is also reflected in the statute and regulations for the collection and disbursement of royalties from mineral leases of Indian land, the Federal Oil and Gas Royalty Management Act of 1982.[47] Congress enacted FOGRMA in recognition that "the system of accounting with respect to royalties and other payments due and owing on oil and gas produced on [lease sites on Federal and Indian land] [was] archaic and inadequate".[48] The provisions of FOGRMA were therefore intended both "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of States" (i.e., Secretarial oversight) and "to effectively utilize the capabilities of the States and Indian tribes in developing and maintaining an efficient and effective Federal royalty management system" (i.e., tribal self-determination).[49]

Congress fulfilled its dual intentions in FOGRMA through several specific provisions. First, it required that the Secretary "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner."[50] The Secretary must also deposit royalties for Indian leases at the earliest practicable date after receipt and must provide an explanation of the payment to the Indian mineral owner.[51] On the other hand, in recognition of tribal self-determination, the Secretary may enter into cooperative agreements with Indian tribes under which the tribe can "carry out inspection, auditing, investigation, or enforcement . . . activities under this Act in cooperation with the Secretary", with certain exceptions.[52] As of this writing, the Secretary has entered into such agreements with eight tribes or groups of tribes. Together, the royalties under these eight agreements account for 88% of the Indian tribal royalties nationwide.

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[44] Id., at § 2103(d).

[45] 25 C.F.R. § 225.3.

[46] *Compare* 25 C.F.R. §§ 225.21(b)(6) *and* (7) *with* 25 C.F.R. § 211.41(b) *and* (c).

[47] 30 U.S.C. §§ 1701 *et seq.*

[48] 30 U.S.C. § 1701(a)(2).

[49] *Id.*, at §§ 1701(b)(3) and (5). Section 1701(b)(4) also notes that a purpose of FOGRMA is "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources."

[50] *Id.*, at § 1711(a). The detailed regulations for implementing this program are in various parts of 30 C.F.R. Chapter II, Subchapter A.

[51] 30 U.S.C. §§ 1714 and 1715(a). *See also* the regulations at 30 C.F.R. Part 219.

[52] 30 U.S.C. §1732. *See also* the regulations at 30 C.F.R. Part 228.

This tension between Secretarial oversight and tribal self-determination continues to lead to judicial results that can be difficult to reconcile, except on a case-by-case basis. For instance, the Supreme Court recently ruled that the Indian coal leasing process, including the IMLA and its regulations, did not impose specific trust responsibilities on the Secretary. In so ruling, the Court noted that the imposition of such duties would be "out of line" with the self-determination purpose of the IMLA[53], emphasizing tribal self-determination rather than Secretarial oversight. Several months later, the United States Court of Federal Claims ruled that the United States's trust responsibility for collection of royalties was not diminished or affected by the fact that the tribes in that case had entered into a cooperative agreement under FOGRMA[54], emphasizing Secretarial oversight rather than tribal self-determination. The judge noted in her opinion that such a ruling "could restrain the government from entering into cooperative agreements", and that such a result would be contrary to the letter and spirit of FOGRMA.[55]

[53] Navajo, 123 S. Ct. at 1092.

[54] Shoshone and Arapaho Tribes of the Wind River Reservation v. United States, 58 Fed. Cl. 77, 2003 U.S. Claims LEXIS 263 (2003).

[55] *Id.*, 2003 U.S. Claims LEXIS 263 at *22-*23.

Part
2

Royalty Management Trust Principles

Indian Leasing

Indian lands have been leased for oil and gas development for most of the Twentieth Century.[56] Leasing is undertaken by the Indian mineral owner, whether individual or tribal, and must be approved by the Secretary.[57] Indian lease terms have varied over the years. In the 1920's, when gas was not considered to be a very valuable commodity, many leases did not have *ad valorem* royalty clauses pertaining to gas. As time went on, most leases were drafted with three clauses that set them apart from many private leases. First, they had a clause giving the power to determine value for royalty purposes to an official of the Department of the Interior. Second, they generally had a clause that provided for that the Secretary should consider as value the highest price paid for the major portion of production (major portion clause). The third clause found in most Indian leases is a provision that requires comparison of the values of processed or unprocessed gas. This clause (known as the "dual accounting" requirement) typically will require royalty to "be computed on the value of gas or casing head gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater."

These clauses are not always easy to comply with, and as they are not standard in private leases, many lessees have historically ignored them. By the 1970's, several Indian tribes decided that they wanted to see better compliance with their lease terms. In addition to problems with dual accounting and major portion, there were complaints about stealing and mis-measurement, particularly related to crude oil.

MMS – Born in the Throes of Indian Trust Disputes

The Minerals Management Service (MMS) was created by order of the Secretary on January 19, 1982.[58] Secretary Watt was reacting to the Report of the Commission on Fiscal Accountability of the Nation's Energy Resources, chaired by David Linowes (Linowes Commission), which was officially released on January 21, 1982. The Commission was chartered to investigate allegations of 1. "massive irregularities in royalties ... owed to the Federal government, Indian tribes and States" and 2. "theft of oil from Federal and Indian lands."[59] These allegations of failures of the U.S. Geological Survey (USGS) to properly manage the royalty interests of the Federal government and Indian minerals owners were most publicly brought to the nation's attention by lawsuits

[56] For a thorough history of mining on Indian lands, *see* Judith Royster, *Mineral Development In Indian Country: The Evolution Of Tribal Control Over Mineral Resources,* 29 TULSA L. J. 541 (1994).

[57] Although approval by Secretary of the Interior is required for leasing of allotted Indian land for mining purposes, he is not lessor and he cannot grant lease on his own authority. Poafpybitty v. Skelly Oil Co., 88 S.Ct. 982, 390 U.S. 365, 19 L.Ed.2d 1238 (1968).

[58] Ronald Reagan, *Remarks on Receiving the Final Report of the Commission on Fiscal Accountability of the Nation's Energy Resources*, January 21, 1982, http://www.reagan.utexas.edu/resource/speeches/1982/12182c.htm

[59] REPORT OF THE COMMISSION ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES, January 21, 1982, at xi. (Linowes Comm. Rpt.)

alleging breaches of trust brought by the Jicarilla Apache Tribe[60] and the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation[61].

With a history derived from breach of trust litigation, MMS has been made keenly aware of the importance of taking its trust responsibility seriously. The trust responsibility can be viewed from three perspectives: 1) what are the normal legal standards for what a fiduciary should do, 2) how do these legal standards differ when the beneficiary does not choose the trustee and 3) under what conditions can an Indian trust beneficiary collect money damages from the Federal trustee. These three standards overlap and it cannot be said that one is stricter or more favorable to one side than the others.

Royalty management by the federal government includes the collection, distribution and disbursement of minerals revenues. It also includes determining values associated with the leases and compliance activities from audit, to site inspection. Part of that responsibility are the enforcement activities necessary to ensure that lessees comply with lease terms, regulations and laws.[62]

The Linowes Commission found that the Department had inadequate management and inadequate tools to properly manage its responsibilities with respect to minerals, especially its trust responsibilities. In January 1983, Congress enacted the Federal Oil and Gas Royalty Management Act of 1982. Through this Act, the Secretary's responsibilities were clarified and he was given new enforcement tools to properly carry them out.

At about the same time that MMS was formed, the suit by the Jicarilla Apache Tribe ("JAT") was on appeal to the Tenth Circuit Court of Appeals. In 1973, the JAT had complained to the Secretary about concerns it had with the way he carried out his trust responsibilities. In 1975, the Tribe brought suit against the Secretary in the U.S. District Court for New Mexico, asking for declaratory judgment that he had breached his fiduciary responsibility with respect to Tribal oil and gas leases. The JAT also claimed that several oil and gas producers on the JAT Reservation had breached their responsibilities under their leases.

The District Court reasoned that the Department, and also the lessees, had an obligation to follow the lease terms and the regulations. The Department also had to interpret the regulations in a reasonable way, but had to choose the interpretation that favored the trust responsibility over other policies. While the JAT's claims that the lessees had failed to diligently develop did not have merit, the valuation claims were upheld, but the remedy was limited to damages.

> From a practical viewpoint, Ms. Davenport's conclusion would appear to be reasonable. However, the Secretary has obligated himself and his governmental representatives to the most exacting standards required of a fiduciary of an Indian Tribe. Limited financial resources cannot excuse the Secretary from his strict fiduciary obligation to oversee leases on Indian lands and insure that lessees comply completely and timely with the terms thereof.
>
> The Secretary may well have placed himself in a hopeless situation having bound himself to the standards of a fiduciary without the resources to satisfy those obligations. Directives have been set out

[60] *See* Jicarilla Apache Tribe v. Andrus, 546 F.Supp. 569 (D.N.M. 1980), *aff'd in part, rev'd in part* 687 F.2d 1324 (10th Cir. 1982).

[61] *See, e.g.* Shoshone Ind. Tribe of the Wind River Res., Wyo. v. U.S. (Ct. Fed. Cl. 2003), 56 Fed. Cl. 639 (2003). The Linowes Comm. Rpt. recounts that in an audit pre-dating the report three major oil companies were found to have underpaid more than $1 million in royalties over periods of from one to nine years.

[62] *See* 30 U.S.C. §1711.

> in Ms. Davenport's memorandum and additionally in a memorandum to conservation managers of the Central, Eastern and Western Regions from the Acting Chief of the Conservation Division of the USGS subsequent to and in light of Ms. Davenport's memorandum.... Whether these in fact comport with the concept of diligent development as that term has meaning in law is not an issue in this law suit. Accordingly, I decline to comment on those guidelines. What is in issue in this law suit, however, is the Tribe's claim that the Secretary has failed to satisfy his fiduciary duty to the Tribe under the leases.
>
> I find that, notwithstanding the unique and extensive effort given by the USGS to monitoring the Tribe's leases and defendants-lessees' adherence to the terms therein, the Secretary has breached his fiduciary duty to insure for the Tribe that its lessees have complied with the term of the leases which requires diligent development. It is not that the Secretary has provided too little in terms of satisfying his fiduciary duty but that it has come too late. That defendants have, in my opinion, diligently developed the leases is fortuitous and did not result from timely action taken by the Secretary. 479 F.Supp. at 547.

The Court similarly found the Secretary had breached his responsibility with respect to protecting the tribal leases from drainage (although no drainage was found to have occurred). The Court also found a breach by the Secretary in determining value: "the Secretary's fiduciary obligation to the Tribe necessarily circumscribes the discretion granted him by the lease terms should it be determined that the two are in conflict." *Id.* at 549. In particular, the Secretary was required to enforce the requirement to pay on the higher of three values: sales price, value in the unprocessed state and value when the components have been separated into component products. While a comparison of three values is required, this requirement is known as "dual accounting" and the Court held it is required both of plant owners and of lessees which do not own a processing plant.

> According to the lease term, value can be computed any number of ways. ... Royalties are to be paid on whichever is the greater... The regulations, based on the lease term, require the Secretary to make two comparisons. He must compare sales price with the value of production on gas produced at the wellhead, and sales price with value by the net realization method of accounting when residue gas and liquids are produced at the tailgate of a gas plant. Royalties are computed on the higher of the two values derived from these two comparisons.... I conclude that where, as here, gas produced from the lease is processed into component products, dual accounting is required by the terms of the lease. Accordingly, the Secretary had the obligation to require defendants-lessees to account on the net realization method. Defendants-lessees never accounted for gas produced from the leases on the net realization method, nor were they required to do so by the Secretary. Because the Secretary failed to implement this requirement of dual accounting, he has failed to accurately account for value according to the terms of the lease. *Id.* at 549-551.

Finally the Court determined that the fact the issue of whether dual accounting is required was before the Interior Board of Land Appeals and the Solicitor of the Department of the Interior at the time this decision was made was irrelevant. It found that the JAT had litigated the issue of the Secretary's breach and the issue of dual accounting and held that: "I see no reason to foreclose or postpone plaintiff's day in court on the basis of an administrative appeal in which plaintiff may or may not be permitted to participate."[63]

The trial court's decision was affirmed on all grounds, except as to the valuation issues by the Court of Appeals for the Tenth Circuit.[64] As to the valuation issues, the majority held that the Secretary had made a reasonable choice that deserved deference, despite the fact that by the time the case was on appeal, the Department had reversed its position and

[63] *Id.* at 552.
[64] Jicarilla Apache Tribe v. Supron Energy Corp. 728 F.2d 1555 (10th Cir. 1984).

accepted the holding of the District Court. The Court then accepted the case for reconsideration *en banc*, which affirmed the District Court, adopting the opinion of Judge Seymour in dissent from the panel decision.[65]

Seymour's opinion is based, at its core, on the proposition that the Secretary's trust responsibility places some affirmative duty on the Department when its officials make decisions that impact Indian trust property. Citing *Mitchell, Bryan* and *Seminole Nation*, the opinion finds: Because of this trust relationship, the Government, in both its executive and legislative branches, is held to a high standard of conduct, one consonant with its 'moral obligations of the highest obligation and trust.' For the same reason, whenever doubt or ambiguity exists in federal statutes or regulations, such doubt is resolved in favor of the tribes."[66] The decision goes on to explain that the majority failed to consider that the Secretary has two roles, one as an administrator, where he is granted deference and the second, as trustee, where he has more specific responsibilities.

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator, a principle recently made explicit by this court in *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir.1982): "We are convinced ... that the plain, mandatory terms of the regulations do not leave room for deference to this interpretation, which does not serve the interest of the Indians. If there is any doubt, the interpretation should be made liberally in favor of the Indians for whose protection these provisions were promulgated."[67]

According to Seymour, the question was not whether the Secretary's interpretation was reasonable, but whether it was the alternative among reasonable alternatives that better promoted tribal interests. The Court at no time determined, nor was it asked to determine, whether the regulations themselves best served the tribe's interests, nor whether it would have the power to overturn regulations if they themselves did not meet that best promote tribal interests standard. The Court also did not determine what the Secretary should do if there was a conflict between alternatives what would both promote tribal interests. For example, if one choice had better short-un advantages and another had better long-run advantages. In addition, Seymour considered the interaction with state law and Indian royalties, in this case the effect of the New Mexico Natural Gas Pricing Act (NMNGPA), and held that 'to the extent the state law is interpreted to place a ceiling on the Tribe's royalties, it conflicts impermissibly with federal law.[68]

The decision in *Supron* did not automatically cause lessees to comply with the major portion and dual accounting clauses. Producers who did not own a plant and did not process their gas continued to try to avoid the dual accounting requirement. They complained that they did not have the information necessary to calculate the value of residue gas and gas plant products, nor the allowable deduction, when they sold the gas in its unprocessed state. MMS responded that such a lessee could conduct a theoretical dual accounting.

[65] Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986).
[66] 728 F.2d at 1563.
[67] *Id.* at 1567.
[68] *Id.* at 1571. The *en banc* decision simply determined that the NMNGPA did not act so as to impermissibily limit the price, so the Court did not need to decide whether there was a conflict with federal law. 782 F.2d at 857.

Theoretical NGL volume calculations

STEP 1. Determine the plant at which the gas is processed. This information may be obtained from the purchaser in most cases.

STEP 2. Calculate the amount of each NGL that is theoretically available from the lease. Periodic gas analyses (on a well or meter basis) must be performed for the gas removed from the lease to determine the GPM of each recoverable NGL; for example, ethane, propane, butane, etc. Multiply the GPM by the wellhead volume (wet gas volume) in thousand cubic feet (Mcf) to arrive at the theoretically available NGL volumes.

STEP 3. Calculate the NGLs recovered at the gas plant by multiplying the theoretically available NGL volumes by the appropriate plant efficiencies. Plant efficiency information may be obtained from the plant operator.

Theoretical residue gas volume calculations

STEP 1. Convert the recovered NGLs volume to equivalent gas volumes in Mcf and million British thermal units (MMBtus) by using the tables in the current *Gas Processors Suppliers Association (GPSA) Engineering Data Book, Volume II.*

STEP 2. Convert the plant fuel and incidental flare volumes incurred during processing to equivalent gas volumes in Mcf or MMBtu. Plant fuel and flare volumes (usually a percentage of plant inlet or residue gas volumes) may be obtained from the plant operator.

STEP 3. Calculate the theoretical residue gas volume by subtracting the Mcf or MMBtu equivalent NGL, plant fuel, and flare volumes from the wet gas volume.

Residue gas and NGL valuation

STEP 1. Calculate the value of the residue gas by multiplying the wellhead gas price in $/MMBtu by the calculated MMBtus of residue gas.

STEP 2. Determine the NGLs value by using pricing information for the area in which the plant is located. If specific information for sales at the plant is unavailable, NGL prices in commercial bulletins, such as *Platt's Oilgram Price Report*, for either Mont Belvieu, Texas, or Conway, Kansas, may be used, with a deduction for fractionation costs, provided that only a raw make is produced at the plant. Fractionation costs would be those representative of the costs incurred by fractionation plant operators in the area where the posted price is valid.

Transportation Allowances. Because the wellhead price under the arm's-length contract reflects the residue gas value at the wellhead, a transportation allowance for the residue gas may not normally be allowed when determining its value.

STEP 1. Calculate a transportation allowance for the NGLs for preplant transportation. The preplant transportation allowance is for the actual costs that would be incurred to transport the estimated recovered NGLs and the plant fuel and flare from the lease to the plant. The preplant transportation costs are obtained either from published tariffs or from the transporting pipeline company.

STEP 2. Calculate a transportation allowance for the NGLs for postplant transportation if the point of valuation for the NGLs is away from the plant. The postplant transportation allowance is for the costs that would be incurred to transport the NGLs from the plant to the

point where the NGLs value is established. The postplant transportation costs are obtained either from published tariffs or from the transporting pipeline company.

Processing Allowance. Determine the processing allowance based on the actual costs incurred by the party processing the gas. The costs may be the plant processor's costs that are calculated and reported to MMS or the charges assessed under an arm's-length processing agreement with the plant. The processing allowance is limited to 66 2/3 percent of the value of the NGLs unless an exception is granted by MMS.[69]

Despite this instruction, and repeated attempts to inform lessees of their responsibility to follow the lease terms, which they agreed to, many lessees still failed to properly complete their dual accounting requirements. Perhaps a greater issue arises from the major portion requirement. It is the Secretary's responsibility to conduct major portion analyses and to inform lessees of amounts owed.[70] Failure to pay on dual accounting or major portion prior to receiving an order is not grounds for cancellation of a lease.[71]

Would it be a breach of the Secretary's trust responsibility or would the U.S. be liable to an Indian lessor for MMS's failure to calculate major portion[72] or to properly enforce the dual accounting requirement? MMS has been increasing its enforcement of the dual accounting requirements consistently for the last 20 or so years. Conducting a major portion analysis requires MMS to be more proactive, as it is more likely to be able to get the needed data than a lessee. MMS began consistently calculating major portion prices after settlement of breach of trust litigation brought by allottees in western Oklahoma.[73]

There is no simple answer to this question, but there are some factors to consider. *Navajo Nation* set the standard for when an Indian, claiming a breach of trust by the United States, can collect money damages. First, the plaintiff (Indian) must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." Next the court must determine whether the substantive law can "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties."[74]

The Court of Federal Claims, in some recent decisions in *The Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. U.S.*, has interpreted *Navajo Nation* in the context of a suit for damages due to alleged breaches by MMS. First, the Court held that IMLA and its implementing regulations did impose a money mandating trust responsibility on the United States.[75] More directly, the Court found that both MMS and the Bureau of Indian Affairs promulgated regulations under the IMLA and FOGRMA, both prior to 1988 and after 1988. Those regulations constituted at least with respect to oil and gas, in the words of the court, a "comprehensive valuation framework [that] creates fiduciary responsibilities

[69] MINERALS MANAGEMENT SERVICE, OIL AND GAS PAYOR HANDBOOK, Vol. III, Sect. 4.4.2 (2001).
[70] Delgado v. Dept. of the Interior, 153 F.3d 726 (10th Cir. 1998) (unpublished).
[71] *Id.* at 726. (Finding that it is not uncommon for MMS and lessees to have different interpretations of valuation requirements.
[72] Under the regulations in effect from 1988 to 2000, conducting a major portion required arraying comparable arm's-length prices in order and selecting the median price. Burlington Res. Oil & Gas Co. 151 IBLA 144, 159 (1999).
[73] Kauley v. Lujan, No. 84-3306T (W.D. Okla. 1991).
[74] *Navajo Nation*, 123 S.Ct. at 1091
[75] Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. U.S., 56 Fed. Cl. 639, 646 (2003). *See also* 52 Fed. Cl. 614, 625 (2002) (dealing with claims regarding trespasses by the Department and the removal of sand and gravel).

on the part of the government."[76] The court also held that, despite the government's argument that like *Navajo Nation*, which dealt with coal leasing and which held that an economic analysis was not mandated by any statute or regulation that the statutes and regulations applying to valuation left discretion in the hands of the Secretary, the discretion in the valuation regulations did not "protect [the government] from liability."[77]

> In the post-1988 regulatory framework, under 30 C.F.R. §206.102, "if data are available to compute a major portion, MMS *will*, where practicable, compare the value determined in accordance with this section with major portion." ... The clause "if data are available" creates a condition precedent affecting certain decisions, but does not render the subsequent decisions discretionary. Nor does the qualifying phrase "where practicable," render the responsibility discretionary.[78]

The pre-1988 framework also provided ample basis for government liability. It mandated that the appropriate official give "due consideration" to a number of factors in setting the "estimated reasonable value." The court then found that the regulations provide "the Secretary with guidelines within which to exercise her discretion." [79] This also gave the court a way to evaluate the Secretary's choice. The court found the Secretary's discretion to be limited by the enumerated choices and held that the claim could proceed.

Under *Navajo* and *Shoshone* for the government to be liable for breach of trust, it must fail to carry out some money mandating obligation. Under *Shoshone*, it appears that any failure to carry out a regulatory requirement could be a money mandating breach of trust. The *Shoshone* case settled in December, 2003 and it is not clear what the standard would have been for when a failure is a breach. It would have been a question of fact as to whether MMS had acted unreasonably and the court had not been asked to rule that all failures were breaches as a matter of law.[80]

Tribal Powers

Tribes have considerable power to control oil and gas production on their reservations. Despite the importance and often overwhelming nature of federal oversight and the trust relationship, tribes are sovereign nations and have many powers that may overlap or supplement the federal ones. For example, tribes have the power to exact severance taxes on minerals extracted from the lands of their reservation that are in addition to the royalties they collect by virtue of being the equitable owner of the land and mineral estate.[81]

Congress has also granted special powers to tribes that they enjoy due to their governmental status. Other Indian mineral owners, including individuals who have gained their mineral estates through the allotment process, do not have governmental status and have much less control that tribes. For example, tribes can enter into cooperative

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[76] Shoshone, 56 Fed. Cl. at 648 (2003).
[77] *Id.* at 649.
[78] *Id.* (emphasis added). *See also* Shoshone Ind. Tribe of the Wind River Reservation, Wyo. v. U.S., 58 Cl. Ct. 77, 99 (2003). "This regulatory language creates money mandating obligations ... because MMS duties go 'beyond the 'bare' or minimal level, and thus could 'fairly be interpreted as mandating compensation' through money damages if the Government faltered in its responsibility."
[79] *Id.*
[8080] *But see*, Pawnee v. U.S., 830 F.2d 187, 191 (Fed. Cir. 1987) "That there is such a general fiduciary relationship does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust."
[81] *See*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (Tribe has inherent power to tax, which is not in conflict with Commerce Clause).

agreements "to share oil or gas royalty management information, to carry out inspection, auditing, investigation or enforcement ...activities under this chapter in cooperation with the Secretary" under FOGRMA 30 U.S.C. §1732. Tribes may also enter into contracts for any activity the federal government performs for Indians due to their status as Indians under the Self-Determination Act, 25 U.S.C. §450. In addition to leases, tribes may enter into other sorts of mineral agreements under the IMDA, 25 U.S.C. §2101.

Importantly, as mentioned above in the text at n.54, *supra.*, the Court of Claims also held that the fact that a tribe had entered into a cooperative agreement to audit did not relieve MMS of whatever responsibilities it had to be sure that the regulations were enforced to assure that lessees paid the proper royalties there under. What effects these decisions will have on MMS and its Indian compliance program is still uncertain.

Recent Changes

In 2000, MMS revised the Indian gas valuation regulations to simplify the calculation of dual accounting and market value, as a substitute for major portion. The regulations allow, for most Indian lands, value to be based on published prices, instead of major portion or gross proceeds. Also, in lieu of performing actual dual accounting, or even the theoretical dual accounting set out above, then new regulations add a factor to the value of wet gas, which depends on how high the Btu content of the gas might be and whether the plant is owned by the lessee. These new regulations have greatly simplified the calculation of value for most Indian gas. The main areas where there are manual compliance efforts will now be for gas that is not subject to the "index zone" published price valuation process, for gas that the lessee elects to value using actual dual accounting calculations and for gas sold downstream not at arm's length. For downstream non-arm's-length sales of gas, MMS (or the tribes under cooperative agreements) must calculate a "safety net" price, which depends on the actual resale price of the gas.

Part

3

Energy Policy - The Impact of Trust Responsibility and Self-Determination

The West includes substantial holdings of Indian land that contain valuable non-renewable energy resources, including oil, gas and coal. Prudent exploration and development of these resources helps satisfy the Nation's need for energy, while also providing economic development opportunities to tribes and allottees. To the extent that a federal energy policy exists, its consideration of Indian lands is principally reflected in systems that allow for the leasing of such lands to energy companies, generally with the consent of the Indian landowner, subject to the regulatory supervision of the Secretary and the Secretary's authorized delegates. In addition to encouraging further exploration and development of Indian lands, it is likely that future energy policy will confront the changing role of tribes as governmental institutions, regulators, and mineral developers. Debate regarding the role of tribes in energy resource development may also influence the manner in which other legislation balances the tension between trust responsibility and tribal self-determination in a larger context.

The Indian Mineral Development Act of 1982

A cornerstone of federal Indian policy is the statutory requirement that the transfer, conveyance or leasing of Indian lands may be accomplished only under a program authorized by Congress.[82] For more than 100 years, Congress has allowed the mineral lands of Indian tribes and allottees to be leased.[83] As a consequence of the federal government's trust responsibility, however, the Secretary historically maintained management responsibility for all phases of leasing and lease-related activities, other than the initial decision to issue a lease. With passage of the Indian Mineral Development Act

[82] Section 177 of Title 25, United States Code, provides, in part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same by made by treaty or convention entered into pursuant to the Constitution.

This statute, often referred to as "The Nonintercourse Act," was originally enacted by Congress in 1790 as part of the first Indian Trade and Intercourse Act. 1 Stat. 137. For recent application, *see Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003).

[83] *See, e.g.*, Act of February 28, 1891, ch. 383, 26 Stat. 795 (permitting the leasing of lands "bought and paid for" by Indians for mineral development for terms not to exceed ten years, provided that the lands were not otherwise needed for agricultural or allotment purposes) (25 U.S.C. § 397); Act of March 3, 1909, ch. 263, 35 Stat. 781 (opened all allotted lands to mineral leasing, except those of members of the Five Civilized Tribes and the Osage Tribe of Oklahoma) (25 U.S.C. § 396); Act of May 29, 1924, ch. 210, 43 Stat. 244 (permitted mineral leasing of all unallotted tribal lands by auction, except those of the Five Civilized Tribes and Osage Tribe) (25 U.S.C. § 398); Act of May 11, 1938, ch. 198, 52 Stat 347 (establishing uniform leasing practices for almost all tribal lands, under the supervision of the Secretary, for primary terms of ten years) (25 U.S.C. §§ 396 a-396g).

of 1982, Congress took a major step toward tribal self-determination when it authorized Indian tribes to negotiate directly with industry the terms of mineral resource development agreements. Even then, however, the tension between tribal self-determination and federal trust responsibility was evident. On the one hand, IMDA promoted flexibility in the form of business agreements that could be reached between a tribe and an energy company. On the other hand, Congress required that the Secretary approve the negotiated agreement as a condition for its validity.

Indeed, the statutory procedures for obtaining such review and approval by the Secretary, as complemented by regulations, are far from streamlined. Preliminarily, because the issuance of Secretarial approval of an IMDA agreement (or any other form of Indian lease) is a federal action under the National Environmental Policy Act of 1969, appropriate NEPA review is an initial requirement. The IMDA directs the Secretary to render a final decision to approve or disapprove a negotiated agreement within the later of (i) one hundred and eighty days after its submission or (ii) sixty days following compliance with NEPA reporting requirements. Following a written determination of intent to approve or disapprove a proposed mineral agreement, a minimum period of thirty days must elapse prior to final approval, presumably within which time the parties may elect to withdraw from the transaction or make such modifications to the mineral agreement needed to meet Secretarial conditions for approval. Among other factors to be considered by the Secretary in reviewing an agreement for approval are: whether the agreement is in the best interest of the Indian party; the economic returns to the tribe; the social and environmental impacts of the agreement; and the adequacy of dispute resolution provisions.

Particularly noteworthy are the provisions of IMDA that delineate the federal government's liability for tribal and federal decisions undertaken under that act. The statute provides:

> Where the Secretary has approved a Minerals Agreement in compliance with the provisions of this Act and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement: *Provided*, That the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement: *Provided further*, That nothing in this Act shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.[84]

The provision is both a disclaimer of certain federal trust liability and a restatement of federal obligations. However, disagreement as to its intended meaning has importance in discussions about how Congress might define the respective roles of the United States and tribes in future energy legislation. At first blush, the first portion of the provision suggests that the Indian parties–not the United States–will be responsible for the business decisions negotiated by a tribe and an energy company, though approved by the Secretary. Even with respect to this relatively clear portion of the provision, there is room for debate. Given that Congress has also directed the Secretary to determine that a proposed agreement is in the best interests of the Indian party, should that determination have been rendered unreasonably and (with the benefit of hindsight) inaccurately, would such an agreement have been approved "in compliance with the provisions of this Act?" Or, would the disclaimer then be inapplicable? In the middle portion of the provision,

[84] 25 U.S.C. §2103(e).

Congress acknowledged that the Secretary "shall continue to have a trust obligation" to protect Indian parties against violations of the contractual terms of an agreement, but Congress did not describe affirmatively the scope of that "trust obligation" or the remedies available to Indian parties if that duty were breached. The final provision suggests that whatever the trust relationship was before IMDA was passed remains unaffected by the statute. Recognizing that the making of legislation does not always lend itself to resolving issues with clarity, this provision invites judicial interpretation, not only as to its internal workings, but also as to its broader undefined terms, like "trust obligation" and "trust relationship," that are crucial to its meaning and application. The provision also reflects the tensions at play in legislative efforts to include Indian tribes as more active participants in the development of their own resources.

Energy Policy Legislation

Congress' legislative session came to a close in 2003 without passage of a long-awaited comprehensive energy policy enactment; however, most observers anticipate that Congress will revisit the matter in 2004. The joint conference committee report, on which the Senate failed to act,[85] included a separate title addressing Indian energy issues, to be known as the "Indian Tribal Energy Development and Self-Determination Act of 2003."[86] The Indian energy provisions of the joint conference committee report (Title V) would have amended the existing Indian energy resource provisions of the Energy Policy Act of 1992[87] by adding a number of new sections, including several new grant and low-interest loan programs designed to promote Indian energy development and conservation. One of the more controversial proposals was contained in proposed Section 2604, which substantively addressed the potential roles of the United States and tribes in entering into new mineral leases, business agreements and rights-of-way agreements relative to Indian lands.[88]

In drafting proposed Section 2604, the conferees attempted to provide tribes the option of entering into future mineral leases, business agreements, and right-of-way agreements without having to obtain the approval of the Secretary; provided that other key conditions were met.[89] Principal among those conditions, was the requirement that the tribe and the Secretary had previously entered into a master "tribal energy resource agreement" ("TERA"), the mandatory terms of which the conferrees addressed in considerable detail.[90] Under this optional and revocable program, a TERA could be approved by the Secretary only if the Secretary first determined that the electing tribe "has sufficient capacity to regulate the development of [the tribe's] energy resources . . . ."[91] In addition to describing the enumerated procedural components to be used by a tribe in evaluating a subsequently

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[85] Energy Policy Act of 2003, H.R. Conf. Rep. No. 108-375 (2003).

[86] Title V, H.R. Conf. Rep. No. 108-375, at 128-142 (2003).

[87] Act of Oct. 24, 1992, Pub. L. No. 102-486, Title XXVI, 106 Stat. 3113.

[88] H.R. Conf. Rep. No. 108-375, at 132 (2003) ("Section 2604").

[89] Section 2604 (a)-(c).

[90] Section 2604(e).

[91] Section 2604(e)(2)(B)(i).

proposed energy-related agreement,[92] the conferees also directed that a TERA include a tribal environmental review process, inclusive of an opportunity for public review and comment on the environmental impacts of a proposed energy-related agreement.[93] Further, the conferees confirmed that the Secretary's approval of a TERA, was itself subject to NEPA review; however, only the "direct effects of that approval" were subject to NEPA evaluation.[94] The proposal also called for ongoing monitoring and evaluation of each TERA by the Secretary and limited administrative review, following exhaustion of tribal remedies, by a person or entity having sustained or being threatened with "significant adverse environmental impact as a result of the failure of an Indian tribe to comply with" an approved TERA.[95]

Like IMDA, proposed Section 2604 also addressed the respective roles and legal responsibilities of the United States and participating tribes. Specifically, the conferees provided as follows:

> (A) For purposes of the activities to be undertaken by the Secretary pursuant to this section, the Secretary shall—
>
> (i) carry out such activities in a manner consistent with the trust responsibility of the United States relating to mineral and other trust resources; and
>
> (ii) act in good faith and in the best interests of the Indian tribes.
>
> (B) Subject to the provisions of subsections . . . waiving the requirement of Secretarial approval of leases, business agreements, and rights-of-way executed pursuant to tribal energy resource agreements approved under this section, and the provisions of subparagraph D, nothing in this section shall absolve the United States from any responsibility to Indians or Indian tribes, including, but not limited to, those which derive from the trust relationship or from any treaties, statutes, and other laws of the United States, Executive Orders, or agreements between the United States and any Indian tribe.
>
> (C) The Secretary shall continue to have a trust obligation to ensure that the rights and interests of an Indian tribe are protected in the event that —
>
> (i) any other party to any such lease, business agreement, or right-of-way violates any applicable provision of Federal law or the terms of any lease, business agreement, or right-of-way under this section; or
>
> (ii) any provision in such lease, business agreement, or right-of-way violates any express provision or requirement set forth in the tribal energy resource agreement pursuant to which any lease, business agreement, or right-of-way was executed.
>
> (D) Notwithstanding subparagraph B, the United States shall not be liable to any party (including any Indian tribe) for any of the negotiated terms of, or any losses resulting from the negotiated terms of, a

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[92] Section 2604(e)(2)(B)(iii)(I)-(XIV).

[93] Section 2604(e)(2)(C).

[94] Section 2604(e)(3).

[95] Section 2604(e)(2)(D) and (e)(7).

lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement approved by the Secretary under paragraph (2). For the purpose of this subparagraph, the term "negotiated terms" means any terms or provisions that are negotiated by an Indian tribe and any other party or parties to a lease, business agreement, or right-of-way entered into pursuant to an approved tribal energy resource agreement.[96]

In summarizing this statement of liability contained in Section 2604(e)(6), the following observations can be made. First, the conferees insisted that the Secretary's decision to enter into a TERA, including the determination of tribal capacity to regulate energy resource development, must be undertaken in good faith and in a manner consistent with the tribe's best interest. In that regard, the conferees directed the Secretary to promulgate regulations setting forth the criteria for measuring that capacity.[97] Second, the conferees reaffirmed, but did not attempt to define, the general trust responsibility of the United States to Indian tribes. Third, the conferees acknowledged the Secretary's continuing obligation to protect tribes against third-party violations of a federal law, the terms of the TERA, or the terms of energy-related agreements reached under authority of Section 2604. Finally, the conferees disclaimed federal liability for losses arising from the business terms negotiated between a tribe and a third party.

Proposed Section 2604 received a mixed reaction from the public and from the Indian community. Some Indian tribes, including the Southern Ute Indian Tribe, and tribal organizations, such as the Council of Energy Resource Tribes, strongly supported the legislation as an example of self-determination and optional withdrawal from Secretarial oversight. In their eyes, a tribe with a demonstrated capacity to manage the development of its natural resources, should be free to avoid the delay occasioned by Secretarial review and approval of energy-related agreements. Their support for the legislation included acceptance of responsibility for the business terms they would negotiate with other parties. Other tribes, including the Navajo Nation, and tribal organizations, such as the National Congress of American Indians, opposed the initiative, even though optional in nature, as an abandonment or weakening of the federal government's trust responsibility. Their opposition also reflected general frustration with the perceived inadequacy and lack of commitment of the Secretary in carrying out federal trust obligations, as reflected in the *Cobell* litigation. Representatives of the environmental community also objected to the proposal because formal NEPA review and the opportunity for citizen challenges under NEPA would no longer be available with respect to each energy-related agreement approved by a tribe following approval of that tribe's TERA. They appeared generally unwilling to accept tribal governmental oversight of the environment in substitution for the NEPA process.

Whether proposed Section 2604 will reappear in the next session of Congress remains to be seen. While commonly sharing the positive and negative features of the federal trust responsibility, tribes differ with respect to their political views and their resource bases. Because of those differences, it seems likely that any modification of existing law that permits tribes to undertake energy resource development decisions without direct federal trust oversight, will require an optional approach. As evidenced by the debate regarding Section 2604, however, even optional programs toward that end will encounter opposition from some quarters within and outside the Indian community.

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[96] Section 2604(e)(6).

[97] Section 2604(e)(8).