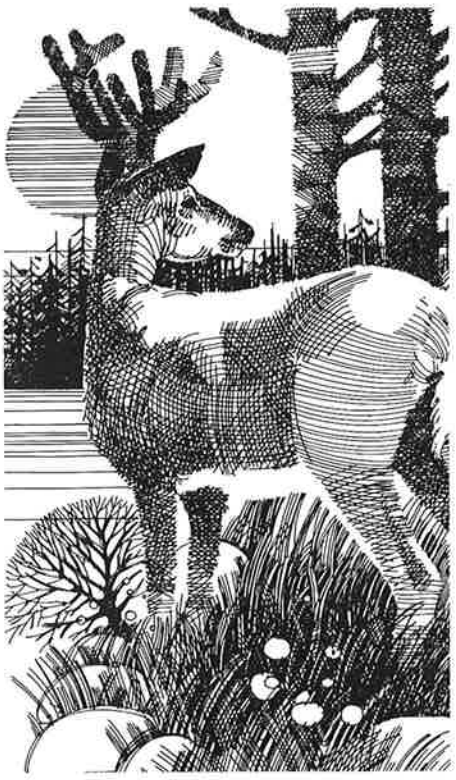

Acquiring rights of access and surface uses on Indian lands

by Daniel H. Israel

The interest which Indian Tribes hold in their reservations represents a unique form of property right.

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This paper will consider ways in which surface access, including rights-of-way, prospecting permits, leases, and other enforceable rights for the use of Indian surface lands may be obtained. In its analysis the paper will focus on the ways in which the rights to Indian surface lands may be acquired in the context of mineral development activities and also where surface lands are required for a broad array of non-mineral commercial endeavors.

The unique nature of federal restrictions on the creation, use, and disposition of Indian lands as a background to the current statutory alternatives which Congress has created to obtain rights of access and other surface uses, the nature of federal authority over the Indian reservations including rights of access, alternative congressional schemes which are currently available for companies to obtain access, rights-of-way, prospecting permits, and surface rights on Indian lands either associated with mineral development or wholly independent of mineral development, and the ever broadening scope of tribal authority over all aspects of reservation affairs and the necessity for anyone seeking the use of reservation lands to take into account the expanding role of tribal governments when negotiating surface rights on the reservations will be examined.

The unique nature of Indian property

Approximately 52 million acres of land are now held in trust by the United States for Indian Tribes and individual Indians. Included within this acreage are vast areas containing oil and gas, coal, uranium, oil shale, and hardrock minerals. The interest which Indian Tribes hold in their reservations represents a unique form of property rights developed as a result of both a federal trust over Indian lands and unique statutory restraints against alienation. Tribal property, including mineral interests, is held in common for the benefit of all members of the Tribe. Tribal membership is determined under tribal laws and regulations. Individual tribal members may influence the development of tribal resources and the uses of tribal lands through their participation and tribal government.

Typically, tribes have acquired interests in real property by aboriginal possession, by treaty, by Act of Congress, and by executive order, and today such reservation lands are held in trust by the United States not only as tribal lands but also as allotted lands for the beneficial use of individual Indians. Allotted lands, like tribal lands, are subject to comprehensive federal restrictions and are available for mineral development and surface use.

Treaties were utilized to secure reservation lands in exchange for the release of other reservation lands, and to acquire outright new reservation lands. Utilization of a treaty to recognize preexisting aboriginal title vested the Tribe with an enforceable property right as it made subsequent takings by the United States compensable. In the alternative, Congress utilized statutes to secure tribal rights in land in a broad range of situations, most commonly to reserve a portion of the public domain from entry and sale to create a permanent Indian reservation. Regardless of the precise language utilized, permanent reservation lands will be found to have been established if the statutory language and

legislative history reveal the lands were intended to be reserved for the use of the Indians under the supervision and protection of the United State.

Finally, more than 20 million acres of reservation land had been set aside by executive order for Indian reservations. The tribal property rights to executive order reservations are equivalent to those of Indian reservations created pursuant to treaty or statute. Under current laws, mineral development and access rights on executive order reservations are governed by the same procedures and laws which apply to reservations created by statute and treaty.

The allotting of Indian lands (i.e., the conveyance of communally held tribal lands in severalty to individual Indians) has played an important role in the history of Indian land ownership. From 1854 to 1934, the United States, through congressional and administrative action, allotted millions of acres of Indian reservation lands.[1] In 1887, Congress enacted the General Allotment Act which provided for the mandatory allotment of reservation lands.[2] By 1934 almost 90 million acres of previously tribal lands had been conveyed to non-Indians through the sale of reservation lands under the public land laws. Some reservation lands were also opened to public land entry at the same time that other reservation lands were being allotted and such lands had their trust status lifted immediately upon public entry. While federal law required the allotted lands to be retained in trust status for an initial period of years, once the federal trust was lifted the lands in nearly all cases were acquired by non-Indians. This acreage represented nearly two thirds of the total acreage held by tribes in 1887.[3]

After the first two decades of the twentieth century, the federal government began extending the trust periods on many allotments in order to slow the wide sale loss of allotted trust lands.Then in 1934, Congress passed the Indian Reorganization Act,[4] which repudiated the policy of allotment of tribal holdings.

The allotment of millions of acres of reservation lands is a complicating factor in acquiring rights in the surface lands of Indian Reservations, because separate congressional and regulatory authorization has been adopted for the leasing and development of allotted lands.

Federal power over Indian affairs, including Indian lands, is pervasive and extends beyond the creation of the Indian reservations in the first instance.[5] Beginning with the Trade and Intercourse Acts, Congress has enacted statutes comprehensively regulating the commercial transactions by which Indians dispose of their land as well as other matters including trespass and settlement on Indian lands[6] and the furnishing to Indians of goods, services and money by the federal government.[7].

With respect to Indian property, Congress has granted leases and rights of way on Indian lands to third parties, and has disposed of Indian property without the consent of the Indians.[8] Congress has also terminated the trust status of Indian tribal property, distributing it to tribal members under so-called Termination Acts.[9]

While Congress' power over Indians is extremely broad, it is subject to constitutional limitations.[10] Thus, if Congress takes Indian property for non-Indian

use, the United States is liable to provide comprensation under the fifth amendment.[11] Recently, in *Delaware Tribal Business Committee versus Weeks,*[12] the Supreme Court ruled that Congress power over Indian property was not so pervasive as to render its legislation not subject to judicial review. Rather, the Court held that the constitutional standard for judicial review is whether the legislation under attack is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[13]

Because of the pervasive federal power over Indian real property interests, Congress must explicitly authorize the leasing of tribal and of allotted lands. Hence, the acquisition of surface rights on Indian reservations must strictly adhere to those statutory and regulatory schemes enacted pursuant to Congressional authority.

In addition to federal statutory restraints on the alienation of Indian land, federal law has also protected tribal possessory rights against intrusions by third parties. For example, federal statutes provide criminal sanctions for unauthorized hunting, trapping, or fishing on Indian land[14] and provide a restitutional remedy against non-Indian trespassers who ignore tribal orders on Indian lands.[15] Other federal statutes prohibit the grazing of livestock on Indian lands without tribal consent and preclude unauthorized persons from settling on Indian lands.[16]

Department of the Interior responsibilities on the reservations

As a result of the broad reach of federal responsibility over the reservations, the Department of the Interior has been designated over the years as the federal agency to administer and protect Indian lands. Companies acquiring surface rights for resource development purposes or acquiring access to Indian lands for non-resource mineral purposes should become familiar with both federal and tribal governmental powers in order to understand how the federal and tribal functions interrelate. The federal trust responsibility limits the authority of federal officials in the administration of Indian property. Under applicable Supreme Court decisions federal officials are held to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards", and are "bound by every moral and equitable consideration to discharge [t]heir trust with good faith and fairness."[17]

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The Secretary of the Interior holds the ultimate responsibility to carry out the trust relationship between the United States and the Indian people, and the congressionally delegated responsibilities with respect to Indian lands. The Secretary has created the Bureau of Indian Affairs (BIA) as an agency to administer directly these responsibilities. The BIA has a central office in Washington, Area Offices in Albuquerque, Phoenix, Portland and Billings. An agency office is located on the major Indian reservations. The BIA's role in direct reservation resource development including access and rights-of-way is declining because of the increased aggressiveness and sophistication of tribal governments,[18] and because Acts of Congress, particularly the recent Indian Mineral Development Act of 1982, reveal a congressional preference to have tribes and developers arrive at commercial development utilizing negotiated private arrangements.[19] The BIA nevertheless remains responsible for administering regulatory programs covering the development of Indian trust lands and resources as well as the protection of surface waters and other environmental resources of the reservations.

Congressional enactments permitting the acquisition of surface rights

Four separate and independent statutory schemes exist which permit access rights and surface rights to be acquired on Indian lands. They will each be separately considered. Two of the statutory schemes, the Indian right-of-way statute of 1948 and the Surface Leasing Act of 1955 exist wholly independent of mineral development activities, but may be utilized in conjunction with mineral development. Two separate statutes, the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982 are principally designed as mineral development authorizations, but may nevertheless permit a developer to obtain surface access, rights-of-way and other necessary and associated reservation surface rights. Each of these statutory bases will next be considered.

The General Right of Way Act of 1948.

In 1948 Congress authorized the Secretary of the Interior to grant rights-of-way for any purposes over all trust and restricted Indian lands.[20] The Secretary is required by federal law[21] and regulations [22] to obtain the consent of tribes and allottees for rights-of-way over trust lands. Where allottee lands are involved individual allottee consent may be replaced by Secretarial consent where under the regulations it is deemed too difficult or cumbersome to obtain such consent.[23] Further, just compensation must be paid to the tribes and to allottees.[24] The purpose of the 1948 Act was to simplify and provide uniformity to the law of Indian rights-of-way, and to include an authorization for right's-of-way across allotted lands. The use of Indian lands for rights-of-way is subject to such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of the reservation.

The Secretary's regulations furnish little in the way of standards for granting rights-of-way. They provide that consideration "shall be not less than appraised fair market value" plus any severance damages for the remaining lands.[25] Typically rights-of-way, unlike leases, are not subject to periodic appraisal and revision of annual payments.[26] The regula-

tions provide that rights-of-way for railroad, telephone lines, telegraph lines, sewage disposal and treatment plants, water control and use programs, oil, gas and public utility pipelines, electric power projects, electric transmission and distribution lines, and service roads may be created without limitation as to terms of years. Rights-of-way for all other purposes shall not be for a period to exceed fifty years.[27]

The BIA regulations in Part 169 include specific provisions relating to rights-of-way for the purpose of constructing, operating, or maintaining dams, water conduits, reservoirs, transmission lines, or other works which constitute a part of any project for which a license is required under the Federal Power Act. Under the Federal Power Act any license which shall be issued to use tribal lands shall be subject to and contain such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of such lands. In those cases where the lands belong to a tribe organized under the Indian Reorganization Act of 1934, the Federal Power Act requires annual charges for the use of such tribal lands subject to the approval of the tribe.[28]

Rights-of-way regulations for railroads include requirements relating to maps and protections of the lands in addition to those imposed on general rights-of-way.[29] Similarly, oil and gas pipelines which cross tribal or individually owned lands are not only subject to the general rights-of-way regulations but also to specific oil and gas pipeline requirements.[30] The regulations contain restrictions on how such pipelines are to be buried and constructed, and provide mapping requirements to identify the location of all structures such as pumping stations or tank sites which are developed in association with such pipelines.

Additional requirements also exist with respect to telephone and telegraph lines, radio, television and other communication facilities.[32]

Rights-of-way on the reservations remain Indian country for jurisdictional purposes. This results in tribal and federal courts having principal jurisdiction over disputes arising out of such rights-of-way.[33] If a right-of-way has not been properly obtained or if the user of a right-of-way does not strictly conform to the scope of the right-of-way granted, such user obtains no interest in the reservation lands through adverse possession, and indeed will likely be treated as a trespasser.

In light of the increasing powers of tribal sovereignty, the Tribes may grant licenses with or without conditions to enter upon and use tribal lands. Because the permissive use of such lands by the Tribe does not create an interest in land, such limited use rights do not require the consent of the Secretary of the Interior. While there exists no statutory bar to the creation of a license to use and enjoy tribal property mutually entered into by a company and a tribe, such an "informal" arrangement is revokable at will by the Tribe and will not provide any secure protections against such arbitrary tribal action.[34]

Surface leases

The first general statutory authorization for the surface leasing of tribal lands was in 1891.[35] In 1955 Congress authorized surface leasing for 25 years with an option to renew one additional 25 year term.[36] Leases under this statute may be made for "public, religious, educational, recreational, residential, or business purposes." Various amendments have made in this Act since 1955 which confer in some cases 99 year leasing authority upon selected tribes. The amendments have also resulted in additional requirements imposed on the Secretary to consider certain environmental and land use factors before the approval of any lease.[37] The Secretary must:

satisfy himself that adequate consideration has been given to the relationship between the use of leased lands and the use of neighboring lands . . . the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.[38]

The Secretary has issued leasing regulations which provide for formal requirements for Indian leases and condition approval on the payment of a "present fair annual rental."[39] Leases may either be negotiated or be bid upon at advertised bid sales.

Indian Mineral Leasing

Prior to 1938, Congress had enacted a broad array of inconsistent statutes for permitting leases for resource development. Then Congress enacted the Mineral Leasing Act of 1938 which was designed to be comprehensive legislation governing the leasing of tribal lands for mining purposes and repealing all inconsistent earlier enactments.[40] The goal of the 1938 Act was to achieve uniformity in the law and procedures concerning the mineral leasing of tribal lands. Provision was made for competitive sales of oil and gas leases and for negotiation of leases without competitive bidding where the Tribe so consented. Congress delegated a broad authority to promulgate rules and regulations governing such leases to the Secretary of the Interior.[41] The regulations can be found at 25 C.F.R. puts. 211 (Tribal Lands) and 212 (Allotted Lands).

As a part of his mineral development regulations, the Secretary has permitted, with the consent of the tribal authorities, surface access to companies to prospect for resources other than oil and gas upon tribal lands.[42] Such permits must describe the area to prospected and must definitively state the period of time within such work is permitted. Such a prospecting permit does not permit a developer to remove resources from the reservation, nor does it permit any preference right to lease or joint venture unless specifically so stated in the permit. In such cases all permits granting a preference right to a lease or joint venture must comply with all the laws and regulations applicable to mineral leases on tribal Indian lands.[43]

Indian Mineral Development Act of 1982

On December 22, 1982, Congress enacted the Indian Mineral Development Act of 1982.[44] the Act authorized tribes to enter into and the Secretary to approve any joint venture, operating, production sharing, service, managerial, lease or other agreement providing for the exploration or extraction, processing or other development of oil, gas, uranium, coal, geothermal, or other energy or non-energy mineral resources. Congress provided that in approving or disapproving a negotiated mineral agreement, the Secretary must determine if the agreement is in the best interest of the Indian tribe and individual Indians who may be a party to such agreement, and consider the potential economic return to the Tribe, potential environmental, social and cultural effects on the Tribe, and review the adequacy of the agreement's provisions for resolving disputes as they may arise between the parties.[45]

In the Act, Congress was careful to provide that nothing in the Act would affect the Mineral Leasing Act of 1938. Congress intended that Tribes and developers be given two separate and independent alternatives for mineral development. They could continue to lease under a traditional lease arrangement relying on the 1938 Mineral Leasing Act or they could elect to enter into a joint venture (which could include lease terms) under the new independent authority of the Indian Mineral Development Act of 1982. significantly, the Act provides that a plan for mineral development may take into account not only tribal lands but also individual Indian lands.

To the extent the Act authorizes the entering into and creation of "agreements" providing for the exploration of energy or non-energy mineral resources, it would appear to create enough discretion in the Tribes and the Secretary of the Interior to permit the inclusion of access, right-of-way or surface leasing provisions within the scope of an overall mineral joint venture. Indeed, the Act permits the creation of a separate exploration agreement which can or cannot be tied into a subsequent mineral development arrangement and hence appears to encompass the granting of a wide scope of surface rights so long as they are associated with an ongoing or projected mineral development. Whether or not the agreement focuses on exploration only or on both exploration and mineral development, it is apparent that Congress intended the statute to give both developers and tribes substantially greater latitude and flexibility than previously existed in developing appropriate agreements.

Environmental concerns relating to surface access and surface leases

Reservation surface access and leasing activities whether or not they are associated with mineral development, can trigger a broad range of environmental concerns depending upon the nature and scope of the activities. Such environmental protection issues may include requirements under the National Environmental Policy Act, the creation and enforcement of tribal environmental codes, tribal responsibilities under the Surface Mining Control and Reclamation Act of 1977 and the tribes' responsibilities to cooperate with federal and state officials pursuant to general applicable federal environmental statutes. Depending upon the policies of the given tribe, developers may also be subject to a broad range of tribal ordinances (not mandated by federal environmental laws) affecting land use, the utilization of water resources and the maintenance of health and safety requirements. Because each reservation's tribal ordinances will vary, the discussion here focuses on those federal restrictions which apply to all reservations regardless of the nature and scope of tribal ordinances.

In 25 C.F.R. part 216, federal regulations establish minimum measures to avoid, minimize, or remedy injury to the public health and safety of reservation lands.[46] The surface regulations of the Secretary are principally designed to protect and conserve non-mineral resources taking place during operations for the discovery, development, and extraction of mineral resources on the reservations. The 25 C.F.R. part 216 regulations do not cover environmental impacts from oil and gas, rather only from mining. Environmental concerns generated by oil and gas exploration are not formally addressed in the regulations and are incorporated into oil and gas leases or oil and gas joint venture agreements. There exist no specific environmental regulations or requirements with respect to rights-of-way or other legal interests created in Indian lands independent of mineral development.

Perhaps the most important initial environmental concern covering surface access and use agreements is to determine the reporting requirements under the National Environmental Policy Act of 1969 (NEPA)[47] In NEPA, Congress determined that the policy of the United States was to use all practical means to create and maintain conditions under which man and nature can exist in productive harmony. At the heart of NEPA is a requirement that for every major federal action significantly affecting the quality of the environment, the responsible federal agency must prepare a detailed environmental impact statement. It was not until 1972 that the BIA and the Tribes became clearly subject to the mandates of NEPA and became involved in the development of environmental impact procedures.[48] In the years since 1972 the BIA, in cooperation with the Tribes, has prepared a large number of environmental impact statements ranging from minor single location projects to massive multi-location and multi-year energy development programs. In recent years the BIA has issued a NEPA handbook which provides guidance to BIA personnel and developers on how to prepare documents required by NEPA and to advise tribal officials how to comply with the NEPA requirements. The handbook provides that in most cases the BIA will be the agency with primary responsibility for the preparation of environmental impact statement, but the tribal governments, which have substantial authority for environmental protection within the reservations as an aspect of their retained tribal sovereignty, will pay an important role in coordinating the NEPA process.

NEPA required environmental impact statements or findings of no significant environmental impact (typically contained in an environmental assessment (EA)) are applicable to the granting of rights-of-way, leases and permits, contracts, commercial and industrial development leases, and surface interests relating to water and irrigation projects. Any developer, whether or not involved in mineral leasing, who undertakes commercial development on the reservations must become involved early on in the process of determining the scope of the NEPA responsibility and of assisting the tribe and the BIA to determine the environmental impacts of the project. the failure to adhere strictly to the NEPA requirements will likely result in administrative delays and possibly may result in subsequent and costly litigation.

With the advent of federal policies favoring tribal self-government and economic self-sufficiency... it is inevitable that the tribes will continue to increase their involvement... in commercial development... on the reservation.

Tribal sovereignty and surface access and use

Developers doing business on Indian reservations must not only become knowledgeable about the broad range of federal statutes, regulations, and administrative policies which control significant aspects of the acquisition of and operations under surface and resource leases and joint ventures, they must also be fully appraised of and sensitive to the increasing exercise of sovereign authority by tribal governments over their reservations. With the advent of federal policies favoring tribal self-government and economic self-sufficiency[49] and with the increasing level of education and sophistication on the part of tribal governments, it is inevitable that the tribes will continue to increase their involvement and participation in commercial development taking place on the reservations. In order to understand the full impact of tribal sovereignty, it is first necessary to analyze the origin and scope of retained sovereignty, and then to analyze the manner in which that sovereignty may be exercised as well as the limitations on the exercise of that unique power.

Scope of retained Tribal sovereignty

Indian Tribes enjoy all of the powers of a sovereign government recognized under federal or international law, subject to express limitation by reason of the tribes' status as dependent upon the United States.[50] Beginning in the 1970's, the tribes began expanding their exercise of tribal tax ordinances while others have enacted land use restrictions, environmental codes, employment preferences, and health, welfare, and safety codes. It is expected that in the years ahead the tribes will attempt to exercise sovereignty over matters traditionally regulated by the states. There are important limits, however, to the substantive scope of the tribes' sovereign powers and also to the manner in which they may exercise the sovereign powers they retain.

In any dispute in which a tribe attempts to assert a sovereignty power, it is necessary to assess the legitimacy of that tribal assertion by first examining the scope of the tribal power. This analysis involves a review of the tribe's history of relations with the United States (through treaty agreement, and executive order), the history of the treatment of the tribe's reservation by the United States, and the treatment of the particular sovereign power at issue under both federal and international law.[51]

Even in a situation where a tribe may exercise authority pursuant to its tribal sovereignty, the tribe may seek to exercise or enforce that power in a manner which is unlawful because it violates fundamental rights of non-Indians. Because the tribes continue to enjoy a broad measure of sovereign immunity from the orders of federal and state courts at the very time that they are expanding the scope of sovereign self-government, non-Indian personal and property rights are often less than fully secure, and on occasion the courts have intervened to protect what they characterize as the unwarranted intrusion of the tribes into the personal and property interests of non-Indians.[52] Thus, in every case an analysis must first be made as to whether the particular tribal assertion is within the scope of reserved sovereign powers and then whether the tribal power is being asserted in a way that the personal and property rights of non-Indians may be subject to unwarranted tribal intrusion.

Among the most important sovereign

powers is the power to tax non-members who enter into contractual relationships with the Tribes, particularly when such activities affect property and personal interest of the tribes and their members.[53] The power originates in both the sovereign power of the tribes to govern their reservations and in the power of the tribes to condition entry on the reservations. Because the right to tax is predicated not only upon sovereign powers but also on the power to condition entry, such taxes may be imposed either through tribal tax ordinances or through the insertion of taxing provisions in surface access agreements, leases, or joint venture arrangements.

The scope of tribal sovereignty in recent years has extended beyond the assertion of taxing authority over resource development in particular and commercial development in general. Tribes are currently in the process of adopting ordinances providing for land use and environmental controls, rights-of-way, business licensing, and water codes. As described above, in each case an inquiry into the viability of such ordinances initially concerns whether or not the subject matter of the ordinances is one within the scope of tribal sovereign power and, if so, whether the power is being exercised in a lawful manner. Recently, the courts have upheld a tribal zoning ordinance finding that the Tribe retained broad attributes of sovereignty, including civil jurisdiction over the activities of non-Indians on Indian reservation lands.[54] The Court found that in the context of the zoning ordinance no treaty provision had deprived the tribes of their zoning power, nor had Congress acted to deny such right. Further, the Court found that the power had not been denied by implication as the necessary result of the Tribe's past status. The Court was influenced by its findings that the Tribes had a significant and substantial interest in the area sought to be zoned and that neither the state in which the reservation was located nor any of its political subdivisions had exercised land use control powers within the reservation. Similarly, the Ninth Circuit has upheld the imposition of the health and safety ordinance on non-Indian businessmen operating within the boundaries of an Indian reservation, again finding that the tribes had demonstrated a legitimate governmental interest.[55]

Other areas of emerging tribal ordinances include tribal laws dealing with protecting water resources and preserving Indian employment preferences.

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Court jurisdiction over surface access and use agreements

Modern tribal governments have undergone much development since the passage of the Indian Reorganization Act of 1934.[57] Civil jurisdiction of most tribal courts includes the power to enforce tribal ordinances and to resolve conflicts between Indians and between Indians and non-Indians relating to a broad range of civil matters, including commercial matters, property matters, and probate matters.[58] It is likely that the scope of civil jurisdiction will continue to increase and that tribal courts will play an important role in the resolution of conflicts emerging from reservation economic development.

Tribal court jurisdiction over persons in civil actions arising on Indian reservations is exclusive in some circumstances and is concurrent with state and federal courts in other circumstances. When the parties are Indians, tribal courts have exclusive jurisdiction.[59] When a non-Indian brings an action which arises on an Indian reservation, against an Indian, tribal courts will normally have exclusive jurisdiction.[60] However, if the dispute involves a non-Indian defendant the courts have reached different conclusions as to whether tribal courts have exclusive jurisdiction, or whether the state courts have concurrent jurisdiction.[61] Finally, if only non-Indian parties are involved, tribal courts lack jurisdiction, for in such a situation there is not the requisite overriding tribal or Indian interest to sustain the exercise of tribal authority.[62]

If tribal interests are at issue, the tribal court will be preferred forum for resolving reservation conflicts.[63] The tribal court will give way to a federal forum only in situations in which the ordinance creating the tribal court will not on its face permit relief to be granted, or when a federal statute has preempted tribal court jurisdiction. In the former category are disputes in which the scope of tribal court jurisdiction does not permit one or more of the parties to be named as a defendant.[64]

In some areas Congress has acted to preempt tribal court jurisdiction. For example, in Santa Clara Pueblo versus Martinez,[65] the Supreme Court held that federal court enforcement (as opposed to tribal court enforcement) of significant liberty and property jurisdiction on behalf of persons in tribal custody.

It is essential that any surface access or surface lease agreement, whether or not associated with mineral development, should specify the judicial forum or forums where particular disputes are to be resolved. Arbitration procedures, tribal courts, and federal courts are each available to resolve disputes, particularly if the parties identify beforehand the agreed-upon forum for particular classes of disputes and if appropriate waivers of sovereign immunity are obtained to assure that both the tribe and the developer enjoy the power to enforce whatever relief is acquired. In any such agreement, it is essential that appropriate provisions for waivers of sovereign immunity be concerted. In a number of cases the Supreme Court has held that the Indian tribes enjoy sovereign immunity in suits similar to that of the United States.[66] Congress has the authority to waive the tribe's right to sovereign immunity but such waivers must be clearly expressed and are to be

(see Indian next page)

Day (from page 2)

Lesson #2

Friendship is bigger than political beliefs. Friendship is knowing someone for what he is and has nothing to do with what he believes.

A few month later, John proposed a budget that included a $25 dues increase. I thought this would ruin the association; the Board of Directors would never approve such a thing and if they did most of the members would quit rather than pay it. John maintained that if the membership were convinced it was really needed, they would pass it.

Lesson #3

Never underestimate the intelligence and loyalty of our members. They belong because they believe in the association.

Just six months ago, the I.E.C. voted on who should be the new Executive Vice President and John had lobbied hard for the man he believes is best qualified. John's man loses, Jim Overcamp wins. John is the first one to tell Jim that he will work with him in complete cooperation.

Lesson #4

Fight for what you believe in, give no quarter, but when beaten hold no grudges, be a team player for the good of all.

Contributions to the building fund are being accepted in John's name. John strongly believed the association should own its building and a plaque on that building recognizing these contributions will be a fitting remembrance of President John Day.

Tribal Taxation Upheld

The U.S. Supreme Court has once again upheld the right of Indian tribes to establish reservation tax policy. In an 8-0 decision, the Court upheld the Navajo's possessory interest tax on mineral leasehold interests and its business activity tax, levied on receipts from the sale of property extracted from tribal lands and on services sold within the reservation. Kerr-McGee, a mineral lessee, had challenged the taxes as invalid without the approval of the Secretary of the Interior. The Supreme Court held, however, that the power to tax is an essential attribute of Indian Sovereignty.

Indian (cont. from page 17)

strictly construed. The less settled question is the extent to which tribes may waive their own immunity without authorization from Congress. In the Indian Reorganization Act of 1934[67] Congress permitted the tribes an additional amount of freedom to enter and compete in the private business world and Congress authorized the tribes to organize two separate entities; a political governing party to exercise preexisting powers of self government and a new tribal corporation to engage in business transactions. Typically, those tribes which have elected to form business corporations have received a charter which frequently allows the corporation to sue and be sued.[68] Recently, the United States Court of Appeals for the Ninth Circuit has ruled[69] that as part of the tribe's sovereign powers, the tribes have the right to waive their immunity independent of any express specific congressional authorization so long as such waiver is expressly stated and terms of the waiver are described in detail. Given these developments it would appear that so long as surface access, right-of-way, or other surface use agreements specifically spell out the forums in which such tribal immunity is waived, the claims and causes of action which the waiver would encompass, and the kinds of relief (injunctive and/or money damages) which the waiver would include, federal law will likely uphold such waivers.

Conclusion

Ample congressional authority exists to support an agreement providing for access to Indian lands or indeed an agreement providing for long-term surface use. If such access or use is desired in the context of a mineral development agreement, it is advisable to utilize the Indian Mineral Development Act of 1982 as a format for negotiating a comprehensive development arrangement which would include all aspects of access or surface usage. In such an agreement, to be privately negotiated, not only would the right of access and the rights of surface use be detailed, but all issues relating to the scope of tribal sovereignty, including the powers to tax and the utilization of tribal or federal courts for resolving disputes should be spelled out in great detail.

In those situations where the right of access or surface use is wholly unrelated to mineral development, then either a right-of-way agreement under the 1948 Act, or a surface lease number under the 1955 Act should be negotiated.[70] As in the case of surface access and surface use associated with mineral development, an agreement where the access and use is for economic purposes independent of mineral development should not only include the acquisition of the necessary property rights but also should include provisions dealing with all forms of tribal sovereign powers. Only when such a comprehensive arrangement is fully negotiated will a developer be assured that the arrangement will not be substantially altered or changed during its life. As a result, such agreements should take into account the growing taxing issues raised recently by the tribes as well as the frequent problem of overlapping state taxes, impacts on water resources of the tribe, land use and zoning ordinance concerns, health and safety codes, preservation of antiquities and other tribal areas of historical or cultural concern, employment preferences, and, as described in detail above, the important issues relating to resolution of conflicts.

Those developers who understand federal law, the federal regulations, and the emerging pattern of tribal sovereignty will be in a position to move directly with the tribes to negotiate an agreement which provides both the property rights desired by the developer and at the same time, puts into writing an agreed-upon approach for determining which tribal ordinances, laws, and policies will apply during the life of the agreement.

Footnotes:

1. *See* D. Otis, *Dawes Act and the Allotment of Indian Lands* (University of Oklahoma Press, 1973).
2. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 354, 381 (1982).
3. American Indian Policy Review Commission, 95th Cong. 1st Sess., Final Report 6 (Comm. Print 1977).
4. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C.§§ 461-479 (1982).
5. *See e.g.*, Trade and Intercourse Act of 1796, ch. 30, § 3,1 Stat. 469, 470.

6. *See e.g.*, Trade and Intercourse Act of 1834, ch. 161, § 11, 4 Stat. 730 (codified at 25 U.S.C. § 180 (1982)).
7. *See e.g.*, Act of Apr. 18, 1796, ch. 13, §§ 5,6,1 Stat. 452, 453.
8. *See e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903).
9. *See e.g.*, Menominee Tribe v. United States, 391 U.S. 404 (1968). However, once the Indian property rights (tribal, allotted, or both) vest, they cannot be terminated or distributed by Contress without payment of compensation.
10. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977), *reh'g. denied*, 431 U.S. 960 (1977)).
11. Shoeshone tribe v. United States, 299 U.S. 476 (1937).
12. 430 U.S. 73, 83-85 (1977).
13. *Id.* at 85.
14. 18 U.S.C. § 1165 (1983).
15. *Id.*
16. 25 U.S.C. §§ 179, 180 (1982).
17. *See e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935); Seminole Nation v. United States, 316 U.S. 286 (1942).
18. *See*, "The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development," 47 U. Colo. L. Rev. 617 (1976).
19. Pub. L. No. 97-382, 96 Stat. 1938, (codified at 25 U.S.C. § 2102).
20. Act of Feb. 5, 1948, 62 Stat. 17, (codified at 25 U.S.C. 323-328). The regulations concerning rights-of-way are found at 25 C.F.R. part 169 (1984)
21. 25 U.S.C. 324.
22. 25 C.F.R. 169.3 (1984).
23. *See* 25 C.F.R. 169.3(c) (1984).
24. 25 U.S.C. § 325.
25. 25 C.F.R. § 169.12 (1984).
26. 25 C.F.R. § 169.18 (1984).
27. *Id.*
28. 16 U.S.C. §79(e) and 803(e)
29. 25 C.F.R. § 169.23
30. *See*, 25 C.F.R. §169.25.
31. 25 C.F.R. §169.25 (1984).
32. *See*, 25 C.F.R. §169.27 (1984).
33. 18 U.S.C. § 151.
34. *See* Cohen, "Handbook of Federal Indian Law" (1982 ed.), pp. 544-546.
35. Act of Feb. 28, 1891, 1891, 26 Stat. 794, (codified at 25 U.S.C. § 397.
36. Act of Aug. 9, 1955, 69 Stat. 539 (codified as amended at 25 U.S.C. §§ 396, 415-415(d). *See* Leasing Regulations published at 25 C.F.R. § 162 *et seq.* (1984).
37. 25 U.S.C. § 415(a)
38. *Id.*
39. 25 C.F.R. § 162.5 (1984).
40. Act of May 11, 1938, 52 Stat. 347 (codified and amended at 25 U.S.C. §§ 396(a)-396(g).
41. 25 U.S.C. § 396(d)
42. 25 C.F.R. § 396(d)
43. *Id.*
44. 25 U.S.C. § 2102, *et seq.*
45. *Id.*
46. 25 C.F.R. pt. 216 (1984)
47. 42 U.S. §§ 4321-4361.
48. *See* Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).
49. *See e.g.*, Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461, 463 (1982)); Indian finance Act, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451, 1543 (1982).
50. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Washington v. Confederated Tribes, 447 U.S. 134 (1980); Montana v. United States, 450 U.S. 544 (1981).
51. Such an analysis can often be complex, and indeed requires a 200 year critique of the relations between the United States and the tribes. *See, e.g.*, Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). See also Indian Reorganization Act of 1934, 25 U.S.C. § 476, 479 (1982); (tribal powers acknowledged by Congress), Solicitor Op. "Powers of Indian Tribes," 55 I.D. 14 (1934).
52. *See e.g.*, Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 293 (1982); Dry Creek Lodge, Inc. v. Arapahoe and Shoshone tribes, 623 F.2d 682, (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1980); Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983); UNC Resources, Inc. v. Benall6y, 514 F. Supp. 358 (D.N.M. 1981).
53. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).
54. See Knight v. Shoeshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).
55. *See* Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) *cert. denied* 103 S. Ct. 293 (1982).
56. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§461-479 (1982)).
57. *See* Oliphant v Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian retention of sovereign power does not encompass criminal jurisdiction over non-Indians).
58. *See* Ziontz, "After Martinez: Indian Civil Rights Under Tribal Government," 12 *U.C.D. L. Rev.* 1 (1979).
59. Fisher v. District Court, 424 U.S. 382 (1976) (an adoption proceedings); whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959) *cert. denied.* 363 U.S. 829 (1960) (a divorce proceeding).
60. *See, e.g.*, Kennedy v. District Court, 411 U.S. 423 (1971); williams v. Lee, 358 U.S. 217 (1959).
61. *See, e.g.*, Bonnet v. Eekins, 126 Mont. 24, 243 P.2d 317 (1959); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).
62. *See, e.g.*, Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 *Wash. L. Rev.* 479, 479-508 (1980).
63. *See. e.g.*, United States v. Montana, 450 U.S. 544 (1981) (tribal court is the preferred forum for adjudicating significant Indian property interests).
64. *See, e.g.*, Dry Creek Lodge Inc. v. Arapaho & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) *cert. denied* 449 U.S. 1118 (1981), *reh'g. denied*, 450 U.S. 960 (1981) (the court sustained a cause of action for damages against a tribe in federal court finding that the tribal court was unavailable to the litigant). Another example is disputes in which the United States is an indispensable party, because it has not waived its sovereign immunity for purposes of tribal court jurisdiction, and as a result an effective remedy against the United States or a federal official is available only in federal courts. See 3 K. Davis, *Administrative Law*§§ 25.01-27.10 (1958).
65. 436 U.S. 49 (1978)
66. The United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940).
67. 25 U.S.C. §§461-479.
68. U.S.C. §477, but *see*, Morgan v. Colorado River Indian Tribe, 443 P.2d 424 (1968).
69. *See* United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981)
70. Yet additional authority for surface access or surface use may be gleaned from 25 U.S.C. §81, a 100-year-old statute which appears to have language sufficiently broad that it could encompass such agreements. In any case, if an agreement is negotiated, 25 U.S.C. §81 should be referred to where appropriate as an additional federal statutory basis for authority.