



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 pre-existing 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 lands⁶ and the furnishing to Indians of goods, services and money by the federal government.⁷

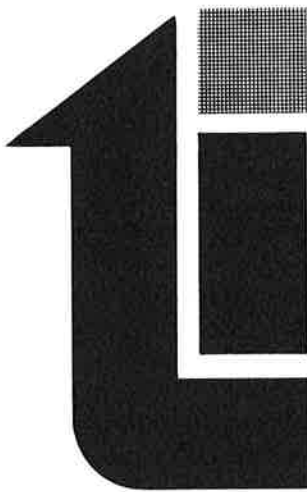
With respect to Indian property, Congress has granted leases and rights of way on Indian lands to third parties, and has disposed of Indian property without the consent of the Indians.⁸ Congress has also terminated the trust status of Indian tribal property, distributing it to tribal members under so-called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

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