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THE INDUSTRY PERSPECTIVE:
THE PROS AND CONS OF
MINERAL DEVELOPMENT IN INDIAN COUNTRY

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THE INDUSTRY PERSPECTIVE:
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I. Introduction

A. Summary.

Any major mineral development project, wherever located, is a long-term, complex, difficult and risky business proposition. Moving such a project forward always requires solutions to numerous legal and technical problems involved in acquiring the rights to prospect for the minerals, in structuring the transaction and acquiring extraction rights from the mineral resources owner, in financing the project, obtaining environmental permits, solving marketing and transportation problems and entering into sales contracts, and in producing the minerals for market.

In the author's professional experience, developed from the perspective of representing a lessee of coal from the Crow Tribe of Indians since the early 1970's, an additional level of complexity is added to almost every step of the process when the minerals to be developed are owned in trust for an Indian Tribe. This additional complexity can cause delays, uncertainty and competitive disadvantages to the project.

This outline sets out a very selective and brief chronology of significant events occurring during the development

and operation of the Westmoreland Resources, Inc. ("WRI") Absaloka Coal mine on the ceded strip adjoining the Crow Reservation. It next identifies some of the significant legal and practical issues for WRI's relationship with the Crow Tribe arising from those events. It then suggests that, from the Industry perspective, many of the legal issues relating to the development of Indian mineral resources which will have been discussed by the preceding speakers can make development of Indian-owned minerals seem to be significantly more uncertain and risky than developing competing state, federal or fee reserves.

B. General Background.

During the early 1970's, the members of the Western coal mining industry were affected by numerous major legal and public policy disputes. These involved environmental impact statement disclosures on coal leasing and development, land management and planning issues and implementation of various aspects of the Clean Air Act, the Surface Mining Control and Reclamation Act and the Clean Water Act. (See, e.g., Kleppe v. Sierra Club; 427 U.S. 390, 49 L.Ed. 2d 576, 96 S.Ct. 2718 (1976); Natural Resources Defense Council v. Hughes, 454 F. Supp. 148 (D.D.C. 1978).)

The WRI Absaloka mine also had many of these same types of general environmental issues to litigate. (See, e.g., Cady v. Morton, 527 F.2d 786 (9th Cir., 1975). In addition, WRI had to deal with many other legal and practical issues arising out of the Indian-owned status of the coal it had leased.

II. Chronology of an Indian Lands Mineral Development

A. Chronology of Significant Events.

As indicated in the "events" chronology below, WRI became involved in significant litigation and Interior Department proceedings involving various aspects of the Interior Department's trust responsibility, the Crow Ceded Strip's legal status, the taxing powers of Montana and of the Crow Tribe, the regulation of surface mining and other legal and economic issues.

1. On October 20, 1970, in a competitive sale conducted by the Bureau of Indian Affairs (BIA), WRI was the successful bidder for two Mineral Prospecting Permits (Tracts 2 and 3) in Big Horn Country, Montana on the so-called "Ceded Strip" immediately to the North of the Crow Reservation. The permits gave WRI the right to prospect for and obtain leases on specific terms and conditions

from the Crow Tribe of Indians for the coal underlying Tract 2 and Tract 3.

2. On June 6, 1972, WRI converted the two Prospecting Permits it obtained in 1970 into coal leases. The leases were approved by the BIA. The leases provided for a \$0.175 per ton royalty to the Tribe, an annual lease rental of \$1.00 per acre and an annual minimum royalty of \$2.00 per acre for the first four years and thereafter a minimum annual royalty of \$5.00 per acre. The term of the leases was for 10 years and so long thereafter as coal is produced in paying quantities. The leases also had a unitization provision that allowed the production in paying quantities from one Tract to satisfy the paying quantities provision of the other Tract.

3. On June 15, 1972, WRI signed identical contracts with four utilities providing for the sale of an aggregate 4.0 million tons of coal per year for 20 years beginning in 1974. The tonnage for 1974 was to be prorated based on the start-up date of the mine. The contracts passed royalty and tax costs through to the customers.

4. After acquiring the Crow Tribe leases and signing the long term contracts with the four utilities, WRI began developing the Tract 3 lease by proceeding to construct a 38 mile rail spur, erecting a 75 cubic yard dragline, applying for mine permits, and constructing the plant facilities necessary to ship the contract tonnage. WRI's investment in plant and equipment quickly approached \$70 million. During this process, WRI became involved in national scale (Kleppe, supra) and "site specific" (Cady, supra) litigation regarding the Interior Department's compliance with NEPA on western coal development and coal mine permitting.

5. At about the same time as the mine was being built, the Arab oil embargo and the "energy crisis" led to a rapid increase in oil prices and to a rush to obtain and develop Western coal. This, in turn, led to a demand from the Tribe that the 1972 coal leases be renegotiated. WRI reached several agreements on renegotiated lease terms with the Crow Tribe's mineral committee, but none were approved by the Tribal Council. During this apparent impasse, on July 1,

1974, WRI shipped the first unit train of coal from Tract 3 to Northern States Power.

6. On July 13, 1974, the Crow Tribe, acting through the Crow Tribal Council, adopted a resolution declaring the Coal Mining Leases for Tracts 2 and 3 invalid and directing that action be taken with the Secretary of the Interior or otherwise to establish such invalidity. On July 31, 1974, the Crow Tribe filed a Petition with the Secretary of the Interior asking that the leases be declared invalid or modified. The grounds asserted were that the leases did not conform in all respects to the BIA coal leasing regulations, and that the BIA had inadequately protected the Tribe's interests, in breach of its trust responsibilities and its fiduciary duties.

7. WRI opposed the Tribe's petition before the Secretary, and no action to cancel the leases was taken pending efforts to settle. Following extensive negotiations in Washington, D.C., representatives of the Crow Tribe and Westmoreland reached an agreement settling and compromising all their disputes and differences, which was then approved by the Tribal Council. The settlement was represented by two Amended Coal Mining

Leases, a Land Purchase Agreement and a Settlement Agreement, all approved by the Secretary of the Interior. The Amended Coal Mining leases provided for a sliding scale percentage royalty rising to six percent in place of the \$0.175 per ton royalty in the original leases. At the time the leases were signed, this was the highest percentage royalty in effect in the West. It was subject to renegotiation after 10 years on a portion of the coal under lease.

8. In April, 1975, the Montana Legislature passed a bill increasing the Montana Coal Severance tax from \$0.34 per ton to 30% of the Contract Value. It also created a new Gross Proceeds tax, applied to 45% of the gross proceeds of coal mining at the county mill levy. For the Severance tax, Contract Value was defined as the F.O.B. mine price less taxes based on production or value. Taxes based on production or value can also be deducted before determining the Gross Proceeds from mining. The midwestern utilities who had contracted to buy Montana coal, including WRI's customers, brought a suit in Montana State Court to challenge the constitutionality of these taxes. They were ultimately

unsuccessful in avoiding and in limiting these Montana taxes, both in the Supreme Court and in Congress.

9. The Crow Tribe passed its own severance tax in 1976. The tax rate was 25% of the F.O.B. mine price, with no deductions. This tax was approved for the Crow Reservation proper (where no coal mining was being conducted) in 1977, but was not approved by the Secretary for the Ceded Strip because of a disclaimer of jurisdiction in the Crow Tribe's constitution.
10. In 1976, the minimum royalty for new leases of surface mined federal coal was set by Congress at 12.5 percent of the F.O.B. mine price.
11. Congress passed the Surface Mining Control and Reclamation Act in 1977. Section 710 of the Act, 30 U.S.C. §1300, provided for a study of the question of coal mine regulation on "Indian Lands", defined by the Act to include all lands owned in trust for a Tribe. Section 1300 (h) directed the Secretary to analyze the jurisdictional status of such lands outside of Indian Reservations. Also under the Act, a

Federal Reclamation Fee of \$0.35 per ton became effective on October 1, 1977. This fee goes to reclaim abandoned mines, coal and otherwise, and for the administration of the Act, but does not go to reclaim land currently being mined. The mine operator pays for current and future reclamation costs.

12. A Federal Black Lung tax became effective on April 1, 1978. The tax was 2% of the F.O.B. mine price or \$0.25 whichever was less. This tax is to cover past claims for Black Lung benefits. WRI and its mining contractor pay for future claims through private insurance.

13. In 1978, the Crow Tribe brought suit in the U.S. District Court for the District of Montana against the State of Montana, and Big Horn and Treasure Counties, seeking to invalidate the Montana Severance and Gross Proceeds taxes as unconstitutional. WRI intereved as a defendant, seeking judgments that neither the Tribe nor Montana could tax its mining operation. After ten years, this litigation is entering its third phase. The Tribe has prevailed against the State, but WRI's utility customers are now seeking to intervene to

challenge the Tribe's right to obtain tax monies which they have paid WRI in the past, including the approximately \$28 which WRI has paid into Court. Crow Tribe of Indians v. State of Montana (Crow I), 650 F.2d 1104 (9th Cir. 1981), cert. den. 459 U.S. 916 (1982), (reversing 469 F. Supp. 154) (D. Mont. 1979). Crow Tribe of Indians v. State of Montana (Crow II), 657 F. Supp. 573 (D. Mont. 1985), reversed, 819 F.2d 895 (9th Cir. 1987), aff'd ___ U.S. ___ (1988).

Because this case is very much in active litigation at the time this outline is being prepared, I will not further characterize the positions of the parties.

B. An Overlay Chronology of Issues.

The "Events Chronology" set out above carries with it a "practical and legal issues" chronology which has developed during the same 18-year period. The issues which are significant for purposes of the present discussion are as follows:

1. Who speaks for (and can bind) the Crow Tribe in business negotiations?
2. Is an agreement with the Crow Tribe, which the Secretary has approved, going to be enforceable in accordance with its terms? How?

3. What is the geographical extent of the governmental powers of the Crow Tribe?
4. What is the precise legal status of the Ceded Strip?
5. To what extent can Montana regulate the Mining of Crow Tribe coal under SMCRA?
6. To what extent can the Crow Tribe regulate the mining of Crow Tribe coal under SMCRA?
7. How much duplication in surface mining regulation can the WRI mine withstand?
8. How much duplication in taxation can the WRI mine withstand?
9. What approach will the Crow Tribe take in exercising its newly-recognized taxing powers in competition with other governments.
10. To what extent can WRI's customers, who have taken as little Crow Tribe coal as their contracts permit, be

persuaded to increase their purchase commitments based on Tribal decisions?

III. Indian Mineral Resource Development Issues from an Industry Lawyer's Perspective

A. The General Point of View of Industry.

In relating "pros and cons" of dealing with Tribes on natural resource matters, I can only speak for myself, and indicate the concerns which I have heard my clients and others in industry express. In a very general way, the events and the issues set out above have instituted the following present viewpoints.

1. As a lawyer for a number of natural resources developers, I tend to have a perspective on the legal issues being discussed at this conference which is different from lawyers responsible for representing Tribal governments. It is not a negative perspective, but it recognizes previous difficulties my clients have encountered, and insists that new arrangements avoid them.
2. I recognize and respect the desires of Indian Tribes to play more direct and significant roles in the

development of their natural resources. However, these desires raise legal issues which do not have to be dealt with when developing federal or state-owned minerals, and which many clients may wish to avoid because their tolerance for uncertainty is low.

B. Regulatory Issues.

1. My clients do not generally see any particular advantage to them in dealing with yet another sovereign on what are already complex regulatory issues.
2. They think the only guaranteed outcome of a dispute over who has power to regulate them is uncertainty and duplication, neither of which are good for their business.
3. If they believe that economic self-interest will lead their Tribal regulators to permit mining techniques or other environmental protection measures any less stringent than the structure of the federal or state requirements, I believe they will be in for a rude awakening.
 - a. The coal mining laws don't appear to contemplate

any such relaxation of performance standards in Indian Lands Regulatory Programs.

- b. Any easier regulatory regime for Indian-regulated mining operations would be difficult to justify environmentally or politically, either within the Tribe or outside of it.

4. Stricter environmental regulation is likely to generate competitive difficulties.

C. Economic Issues.

1. Clients are likely to fear that the Interior Department will see to it that the economic terms one agrees to with an Indian Tribe will be upset if the market turns against the Tribe, but will be immutable if the market turns against them.

- a. Crow Tribe royalty rates were readjusted upward under Interior Department pressure when coal was in short supply.
- b. 10 years later in a soft market, the Department refused to approve new royalties on a portion of the Tribe's coal at less than the federal rates.

2. Clients are likely to fear that they will generally be expected to defer to a Tribe's economic needs:
 - a. In usual business negotiations, neither of the parties generally is expected to act against its own self-interest in order to provide benefits to the other.
 - b. There is a tendency for this convention not to be accepted by Indian Tribes and those who represent them.
 - c. Whatever terms are agreed to, they will not be seen as sufficiently protective of Tribal interests by future evaluators.
3. Tribes tend to want to be involved in setting the economic terms of specific transactions.
4. Clients tend to want fixed royalty and tax rates, and freedom to market on their own with no need to consult with a Tribe on terms and conditions.

IV. Conclusion

A minerals industry member is likely to look at natural resources development opportunities in some overall context, i.e., realizing that in today's markets it can choose

among competing resource owners with whom to deal. Indian Tribes and those advising them must consider carefully how to approach industry member reluctance to deal with unusual, uncertain and complex arrangements, and prepare to deal constructively with the business and legal issues industry members, and their customers, will be concerned with.