

Tulsa Law Review

Volume 32
Issue 4 *Mineral Law Symposium*

Summer 1997

Secretarial Discretion in Communization of Indian Oil and Gas Leases: The Tenth Circuit Speaks with a Forked Tongue

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SECRETARIAL DISCRETION IN COMMUNITIZATION OF INDIAN OIL AND GAS LEASES: THE TENTH CIRCUIT SPEAKS WITH A FORKED TONGUE

Randolph L. Marsh[†]

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I. INTRODUCTION

Many business dealings of Indians and tribes are subject to trust supervision by the Secretary of the Interior. Though the Secretary¹ must act in the best interests of the Indian or tribe, discretion whether to approve or disapprove a

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1. Throughout this paper, “Secretary” will be used to denote the Secretary of the Interior or any official in the decisional chain of command designated to act on his or her behalf.

commercial venture or alienation of an interest in land still rests with the Secretary. Supervision of oil and gas resources is within the Secretary's responsibility.

This paper focusses on the Secretary of the Interior's ability or duty to ratify or deny oil and gas communitization agreements where Indian trust land is sought to be included in an oil and gas production unit, but where the unit well is located on a tract other than the Indian tract in question. In a string of four cases, the Tenth Circuit has examined the Secretary's decisional criteria for performing his trust responsibility, and has imposed restrictions on the Secretary's actions so that a limit to the trust responsibility may be discerned. In the confluence of competition between the trust responsibility and separate, though positive, public policies, the court's endeavor to speak for both has brought confusion to an already complicated field.

This paper identifies a conflict among the court's decisions and explores some of the competing forces that generate such contrary results. While the oil boom and the resultant explosion in property values that precipitated the subject cases has long since past, it is the nature of the industry to rebound. As long as there remains oil or other valuable resource in Indian Country, the potential for conflict will exist. Whether or how this conflict may be resolved is a question this paper attempts to be a first step in answering.

II. BACKGROUND

A. *The Trust Doctrine*

It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. This extraordinary body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it.²

The relationship between the United States and the Indian Tribes has been characterized as one of trust from an early time.³ Though often described by use of the same terms, there are many levels of the duty owed the Indians. In its broadest sense the duty is along the lines of a moral obligation toward the Indians. Congressional action falls within this area. Congress has been given authority to deal exclusively with the Indians in the Constitution,⁴ and has often made decisions more or less favorable to Indian interests in the face of

2. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 99 (Government Printing Office, 1977).

3. *See Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1 (1831). *See generally* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 207-28 (1982 ed.); STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 28-36 (2d ed. 1992); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 9-56 (2d ed. 1988).

4. Congress was given the power to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Another source of federal power lies in the President's power to make treaties, which necessarily includes Indian treaties. *See* U.S. CONST. art II, § 2, cl. 2.

other competing interests or policies.⁵ The other end of the spectrum is not unlike a strict fiduciary duty. In discussing the trust doctrine, one must bear in mind this difference between moral obligation and legal duty; a line not easily found and one more and more subject to litigation as tribes and individual Indians attempt to hold the government to the higher standard.⁶

The line may generally be defined by the specificity of the obligation, the more specific the obligation the greater the duty owed. Thus, no court has ever enforced the trust obligation against Congress.⁷ No specific task can be forced upon the government unless some treaty, statute or agreement imposes or clearly implies the obligation.⁸ But where statutes and regulations impose specific duties upon the government, specific trust obligations arise. In the case of statutes and regulations expressly authorizing the Secretary of the Interior to manage Indian natural resources,

a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, [minerals,] and funds).⁹

The government may be held liable in damages for breach of this duty.¹⁰

The doctrine has been perhaps most developed in regard to Indian mineral resources.¹¹ "The federal government is the 'fiduciary' of tribal resources, which means 'that it must act with good faith and utter loyalty to the best interests' of the Indians."¹² In the area of mineral development, the government has enacted such a pervasive system of statutes and regulations that the

5. See PEVAR, *supra* note 3, at 30, 32-33. Most antithetical to Indian interests was the policy of "termination" (circa 1953-1968) wherein tribes' special relationship with the government was severed and Indians were to be subject to the same laws, rights, and responsibilities as other U.S. Citizens. Though thought in the best interest of the tribes at the time, in freeing them from the bureaucracy of the Bureau of Indian Affairs, the policy of severance of the tribes from the Federal Government is today generally regarded as a failure. See PEVAR, *supra* note 3, at 30; CANBY, *supra* note 3, at 25.

6. See CANBY, *supra* note 3, at 32-33. See generally Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 329-34 (1995) (examining the origin and the development of the trust doctrine and the relatively recent rise of the legally enforceable federal trust obligation); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (noting the trend toward greater executive liability but, as of 1975, a cause of action for breach of trust could not yet be stated); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 233-75 (3d ed. 1991).

7. See CANBY, *supra* note 3, at 33.

8. See PEVAR, *supra* note 3, at 27.

9. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*).

10. See *id.* at 226. See also *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 33 Fed. Cl. 464 (1995) (holding breach of trust responsibility, as determined in 10th Circuit case finding wrongful approval of communization agreement, precluded issue in current damage action).

11. See generally, 5 EUGENE KUNTZ, *A TREATISE ON THE LAW OF OIL AND GAS* § 67.7 (1991); Michael E. Webster, *Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls*, 39 ROCKY MTN. MIN. L. INST. § 2.01-04 (1993); Louis R. Moore & Michael E. Webster, *Indian Leasing*, in 2 *LAW OF FEDERAL OIL AND GAS LEASES* ch. 26 (1991) [hereinafter Moore & Webster]; COHEN, *supra* note 3, at 531-38.

12. PEVAR, *supra* note 3, at 27 (citing Final Report, *supra* note 2, at 128).

stronger trust duty arises.¹³ Under these statutes and regulations, decisions regarding mineral leasing and development are committed to the Secretary's discretion.¹⁴ The Secretary may not delegate this discretion to state agencies,¹⁵ and may not, through routine procedures "rubber stamp" decisions made by other agencies or proposals by lessees, but must base his decision on the "best interests" of the Indian tribe or individual lessor.¹⁶

B. Oil and Gas

1. The Purpose of Conservation

When ownership of oil and gas deposits was first being determined, less was known about the nature of petroleum deposits. Seeming to appear in random locations, oil was analogized to the rules developed for wild animals, specifically the rule of capture. Under the rule of capture, oil or gas belongs to whomever can first reduce it to possession. This rule generated intense development which was extremely wasteful, both economically and physically, because it promoted the drilling of more wells than were necessary to efficiently produce petroleum from a given formation and fostered production practices that left otherwise recoverable oil in the ground and unrecoverable.

The desire to reduce waste gave rise to the current system of conservation which, under statutory authority, entrusts state conservation agencies with overseeing the orderly development of petroleum resources. Methods used to prevent waste include the regulation of the spacing of wells, the density of drilling, and limiting the amount of oil and gas taken from a given well or production area.

In Oklahoma, well spacing and density are controlled through the establishment of drilling and spacing units.¹⁷ Unlike many states, a drilling unit in Oklahoma also apportions production from the unit. Production is apportioned to each owner within the unit on a per acre basis, and the apportionment relates

13. See, e.g., Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1983); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1983).

[T]he test is whether "the relevant statutory and regulatory provisions [contain] an enumeration of duties which would justify a conclusion that Congress intended the Secretary to be a trustee. . . ."

[T]he federal government's role in mineral leasing is pervasive and its responsibilities comprehensive. . . . The evident purpose of the statute is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing. . . . Because the statutes and regulations contain such an explicit and detailed enumeration of duties, [case law] compels the conclusion that Congress intended the Secretary to be a trustee.

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1564-65 (10th Cir. 1984) (Seymour, J., concurring and dissenting), *dissent adopted as maj. op. on reh'g en banc*, 793 F.2d 1171 (10th Cir. 1986).

14. See *infra* notes 27-36 and accompanying text. See generally Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974).

15. See Assiniboine and Sioux Tribes v. Board of Oil & Gas Conservation of Montana, 792 F.2d 782 (9th Cir. 1986).

16. See Webster, *supra* note 11, § 2.03[1](b).

17. See OKLA. STAT. tit. 52, § 87.1 (Supp. 1996). This should not be confused with unitization, which is beyond the scope of this paper. Where "unit" is used, it refers to operations on a single drilling and spacing unit.

back to first production, or establishment of the unit, whichever is later.¹⁸ Well location within the unit does not affect the apportionment.¹⁹

Formation of the drilling unit serves to apportion production, but not cost and risk. In order to share the risk of the drilling venture the cost bearing interests within the drilling unit must be pooled.²⁰ Formation of a drilling unit in Oklahoma automatically pools a 1/8th royalty interest that is free of costs. The remaining 7/8th interest, whether leased or unleased, is burdened with costs. That is to say, unleased mineral owners, or non-participating lessees, would be entitled to their proportionate share of production (based on acreage), but only after the costs of drilling, completing and operating the well had been recouped by the operator.²¹ In pooling the cost bearing interests, the costs of the well are apportioned among those pooled, regardless of the amount of production. In this way the risks of drilling are shared among the respective interest holders, and not borne solely by the person drilling the well. This may be accomplished either through voluntary pooling or through resort to the force pooling statute.²²

2. State Conservation and Federal Preemption

Not all mineral interests, however, are subject to regulation by state conservation agencies. Through the mechanism of federal preemption, federal mineral interests are not always subject to state conservation efforts.²³ Where correlative rights or waste is the issue of regulation, state conservation agencies have no power to communitize (or pool) absent approval from the Secretary.²⁴ This is particularly true where the land involved is Indian land.²⁵

18. See *Ward v. Corporation Comm'n*, 501 P.2d 503, 508 (Okla. 1972).

19. See generally KUNTZ, *supra* note 11, § 77.3.

20. Pooling is known as "communitization" when dealing with federal mineral interests. Communitization is the term used in the remainder of this paper; it should not be confused with *communization*.

21. See *Miller v. Wenexco, Inc.*, 743 P.2d 152, 156 (Okla. 1987) (citation omitted) ("[P]roducing co-tenants must account to the non-producing co-tenants for the pro-rata share of the latter in any net profits derived from the mineral exploration").

22. See OKLA. STAT. tit. 52, § 87.1 (Supp. 1996). This statute covers both the establishment of drilling units and pooling. This dual coverage, and the wording of the statute, has at times caused confusion and lack of differentiation between formation of a drilling unit and pooling the interests within the unit. See, e.g., *Ward*, 501 P.2d at 506-07.

23. See generally, 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, *OIL AND GAS LAW* § 905.1 n.49 (1991); 1 Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization*, § 16.05 (3d ed. 1995); KUNTZ, *supra* note 11, § 70.3; Richard K. Books, Comment, *Oil and Gas: The Effect of Oklahoma Conservation Laws on Federal and Indian Lands*, 29 OKLA. L. REV. 994 (1976); Brian T. Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 21 ROCKY MTN. MIN. L. INST. 475 (1975). Cf. Edward B. Berger & William J. Mounce, *Applicability of State Conservation and Other Laws to Indian and Public Lands*, 16 ROCKY MTN. MIN. L. INST. 347 (1971).

24. See *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1126 (10th Cir. 1982).

25. See generally Webster, *supra* note 11, § 2.03[12].

However, for the very reasons that lack of controlled development leads to the ills of the unchecked rule of capture, the federal government has followed a policy of submitting to state control, at least where oil and gas resources are involved. Through voluntary acquiescence, conservation agency expertise is utilized and efficient, orderly development is fostered for the benefit of all owners, while averting regulatory conflicts. In some instances, the Secretary, or Bureau of Land Management (BLM), has negotiated understandings with state conservation agencies where communitization and drilling unit determinations would be given effect, unless the Secretary objects. Though not relinquishing control, this practice demonstrates the long history of cooperation with state conservation agencies regarding conservation determinations.²⁶

Though this may be satisfactory for public lands, the Secretary has been specifically prohibited from using such a system where Indian interests are concerned. The trust responsibility may not be abdicated nor delegated, but rests with the Secretary.²⁷

In *Samedan Oil Corp. v. Cotton Petroleum Corp.*,²⁸ lessors of Indian mineral interests could not participate in production from neighboring leases, though all the leases were within the same state ordered drilling and spacing unit. The Secretary had previously promulgated regulations suspending the operation of any state or local regulation on Indian land.²⁹ The Oklahoma Corporation Commission had no authority to include the Indian tracts within the spacing unit without secretarial approval.³⁰ As the primary lease term ended prior to secretarial approval, the leases lapsed for lack of production.³¹ Similarly, the Interior Board of Land Appeals has recognized the Bureau of Indian

26. See David G. Ebner, *State and Local Regulation of Activities on Federal Oil and Gas Leases*, in 2 LAW OF FEDERAL OIL AND GAS LEASES § 24.03[3] (1991).

27. See *Assiniboine and Sioux Tribes v. Board of Oil & Gas Conservation of Mont.*, 792 F.2d 782 (9th Cir. 1986).

28. 466 F. Supp. 521 (W.D. Okla. 1978).

29. See 25 C.F.R. § 1.4 (1996). That section reads:

§ 1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

Id. 30. See *Samedan*, 466 F. Supp. at 526. *But cf.* *Currey v. Corporation Comm'n of Okla.*, 617 P.2d 177, 180 (Okla. 1979) (finding that Corporation Commission order requiring plugging of wells on Indian leases was not preempted).

31. See *Samedan*, 466 F. Supp. at 526. It should be noted that the first lease had expired of its own terms prior to any drilling or submission of a communitization agreement. This distinguishes this case from those following in Part III, *infra*.

Affairs' exclusive authority to set drilling and spacing requirements for Indian mineral interests.³²

The requisite of secretarial approval is also recognized in regard to fee lands, as was demonstrated in *Kardokus v. Walsh*.³³ Where the "unit well" is on Indian land, even though production or drilling activity has begun, until the drilling unit has been approved by the Secretary, activity on the Indian land is not attributable to the unit and therefore leases on fee lands within the same (proposed) drilling unit will not pass into the secondary term by virtue of their pooling or drilling clauses.³⁴

It should be noted that there are two separate approvals under discussion. The first is inclusion in the drilling and spacing unit, and the second for communitization. Requests submitted to the conservation agency (the Oklahoma Corporation Commission) to establish a drilling unit, and for pooling that unit, are often submitted and approved together. Likewise, when seeking secretarial approval, request for inclusion within the drilling and spacing unit is a requisite part of the communitization application. However, they are not one and the same. For Indian land, authority for approving drilling and spacing units, or rather, submitting to state concurrent jurisdiction regarding drilling and spacing units, is found in the Code of Federal Regulations, title 25, section 1.4(b).³⁵ Authority for approval of communitization agreements is found in the particular statutes authorizing mineral leasing, which for the purposes of this paper is the Indian Mineral Leasing Act of 1938.³⁶

Statutory authority in Oklahoma for setting drilling and spacing units, as well as pooling and force pooling, are contained in the same statute.³⁷ By operation of the statute, those mineral owners that are unleased are treated as royalty owners for 1/8 of their interest, and working interest owners for 7/8 of their interest. For owners of unleased fee lands, their 7/8 working interest may be force pooled and effectively sold to other working interest owners should they decide not to participate in drilling the unit well. However, where the Commission is without authority to require inclusion within the drilling unit (e.g. Indian land absent secretarial approval), the respective owners are free to drill wells on their own tracts. Section 87.1 states that these separate wells will then be limited in the amount of allowed production in proportion to the size of each tract in relation to the whole drilling (and proration) unit.

32. See San Juan Citizens Alliance, 129 Interior Bd. Land App. 1 (1994), available in LEXIS, Energy Library, IBLA file.

33. 797 P.2d 322 (Okla. 1990).

34. See *id.* at 325. See also OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1996) (noting that the Commission may be without authority to require pooling in some instances).

35. See *supra* note 29.

36. 25 U.S.C. §§ 396a-396g (1983). This act applies to unallotted lands. For allotted lands, authority lies under 25 U.S.C. § 396 (1983), first adopted in 1909. The Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1983), was adopted in 1982 and was not yet in use at the time the leases under discussion were entered into. See generally Webster, *supra* note 11, § 2.02.

37. OKLA. STAT. tit. 52, § 87.1 (Supp. 1996).

It should also be possible that the Secretary could approve inclusion within the drilling unit, which would allocate production, but yet not approve an allocation of cost and risk by way of a communitization agreement. If this were the case then the Indian tracts within the drilling unit would be a net profits interest.

III. RECENT CASES — “BEST INTERESTS” AND THE ALL RELEVANT FACTORS TEST

The “best interests” of the Indian or tribe is a measure that is used throughout the statutes and regulations regulating Indian affairs. In the current context, in considering approval of communitization agreements, the Secretary has broad discretion; a discretion limited, however, by the best interests of the Indian mineral owner. There is disagreement as to the nature or shape of this limitation.³⁸ Indeed, the “best interests” of the Indian or tribe is the essence of the trust responsibility, and in the restraints placed on secretarial discretion, by the courts’ understanding of “best interests,” we see reflected the modern shape of the trust doctrine.

The following four cases all involve remarkably similar facts. They all entail the Secretary’s decision of whether to approve a communitization agreement, committing Indian mineral leases³⁹ to joint development with fee lands where the joint well would be on land other than the lease in question. In all of these cases, the communitization agreement was submitted prior to expiration of the lease, drilling had commenced within the communitization area, and the lessee had otherwise complied with all lease terms. Further, all the leases contained a clause permitting communitization which read:

The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.⁴⁰

38. See generally Webster, *supra* note 11, § 2.03[14]; Moore & Webster, *supra* note 11, § 26.15; KRAMER & MARTIN, *supra* note 23, § 16.06.

39. All leases under discussion were under the authority of the Indian Mineral Leasing Act of 1938. See *infra* note 41 (listing statutory and regulatory authority for leasing) and note 90 (discussing the Indian Mineral Development Act and limitations of the Indian Mineral Leasing Act).

40. Cotton Petro. Corp. v. United States Dept. of Interior, 870 F.2d 1515, 1516 (10th Cir. 1989); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 585 (10th Cir. 1992); Woods Petroleum Corp. v. Dept. of Interior, 47 F.3d 1032, 1035 n.1 (10th Cir. 1995).

As we have seen, approval of communitization agreements is committed to the discretion of the Secretary.⁴¹ In exercising his discretion, however, the Secretary has not always met with approval from the 10th Circuit, as the following cases demonstrate.

A. Kenai

The first of the quartet, *Kenai Oil and Gas, Inc. v. Department of Interior*,⁴² is set in Utah, while the rest arose in Oklahoma. In *Kenai*, the lessee sought to communitize an unproductive Indian lease with fee land which had a producing well and submitted a communitization agreement for approval the weekend before the expiration of the ten year lease term. The Superintendent,⁴³ after studying the information available over the weekend, decided not to approve the communitization agreement, believing it not to be in the best economic interests of the Indians.⁴⁴

The court recognized that approval of communitization agreements is within the discretion of the Secretary,⁴⁵ and though the statute has no specific standards governing the Secretary's conduct, his discretion is "limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands."⁴⁶ The Department of Interior is charged with administration of oil and gas leases on restricted tribal lands,⁴⁷ and the Secretary, as trustee, "must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues."⁴⁸ As the Secretary's action was a discretionary action subject to judicial review,⁴⁹ the scope of review is whether the Secretary's action was arbitrary or capricious, an abuse of discretion, or contrary to law. "If the Superintendent considered all relevant factors in

41. For tribal land, statutory authority resides in 25 U.S.C. § 396d (1983):

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

The accompanying regulation is 25 C.F.R. § 211.21(b) (1996):

(b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

For allotted land, by virtue of 25 U.S.C. § 396 (1983), which grants authority to make regulations necessary for leasing allotted lands, regulatory authority is contained in 25 C.F.R. § 212.24(c):

(c) All leases issued pursuant to the regulations in this part shall be subject to a co-operative or unit development plan affecting the leased lands if and when required by the Secretary of the Interior.

42. 671 F.2d 383 (10th Cir. 1982).

43. The Superintendent was acting as a designee in authority for the Secretary.

44. See *Kenai*, 671 F.2d at 387.

45. See *id.* at 385-86. See also 25 U.S.C. § 396d (1983); *supra* note 41 and accompanying text.

46. *Kenai*, 671 F.2d at 386.

47. See *id.*; 25 U.S.C. §§ 396a-396g (1983).

48. *Kenai*, 671 F.2d at 386 (citing *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir. 1968)).

49. See *Kenai*, 671 F.2d at 386.

reaching his decision and has made no clear error of judgment, his action cannot be overturned.”⁵⁰

The lessees contended that the Superintendent exceeded the scope of his discretion by considering economic factors.⁵¹ They felt that, due to the statutory and regulatory restraints, the Superintendent could only act to preserve Indian natural resources, and that as long as the communitization agreement was sound in production and conservation respects, the Secretary could not consider economic factors in considering approval of the agreement.⁵²

Both the district court⁵³ and the Tenth Circuit found that this asserted limitation on the Superintendent’s discretion “has no basis in the statute or regulation.”⁵⁴ On the contrary, the court found that limiting the Superintendent’s discretion solely to conservation considerations would be inconsistent with the trust responsibility and that in determining the best interests he may take into consideration all factors affecting the Indian interests and may reject a plan that is economically unsatisfactory.⁵⁵

After *Kenai*, the Secretary established guidelines so that Superintendents and Area Directors of the Bureau of Indian Affairs (BIA) could evaluate proposed communitization agreements in accord with *Kenai*’s “all relevant factors” test.

B. Cotton Petroleum

Cotton Petroleum Corp. v. United States Department of Interior,⁵⁶ involved multiple Indian tracts within a 640 acres drilling and spacing unit. Included in the lease were commence drilling and communitization provisions like we have seen previously.⁵⁷ The communitization agreement was submitted four days before any of the leases were to expire. The Superintendent of the Agency, after consultation with the Minerals Management Service (MMS), a required step in the process, forwarded the agreement to the Area Director for final approval. One Indian owner, Rose, objected, but the Area Director nonetheless approved the agreement.⁵⁸

50. *Id.* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

51. *See Kenai*, 671 F.2d at 386. Appellants also contended that the Superintendent’s procedure in reaching his decision was defective. *See id.* As this issue was answered in the negative and does not reach the issue of this paper or subsequent cases, it has been ignored.

52. *See id.*

53. *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521, 534 (D. Utah 1981).

54. *Kenai*, 671 F.2d at 387 (citation omitted).

55. *See id.* Note that this is a license to consider economic criteria, not a limitation.

56. 870 F.2d 1515 (10th Cir. 1989).

57. *See supra* note 40 and accompanying text.

58. The court noted:

The Area Director observed that: the primary purpose for leasing constitutes an agreement between lessor and lessee whereby the ultimate goal is production through a joint effort; refusal to approve a communitization agreement defeats the primary purpose of the lease; the agreement had been timely submitted before any affected lease had expired and the drilling operations on the unit had been diligent; and, it is not feasible to release an isolated 80-acre tract because it is not likely that an oil company would be interested in drilling the second well, when it has been determined that the common source of supply may be drained by one well.

Cotton, 870 F.2d at 1517.

The owner appealed to the Secretary of the Interior who, acting through the Assistant Secretary for Indian Affairs (Operations), reversed the approval for the Rose tract, causing the lease to expire. The Secretary further held that, as unleased restricted Indian landowners within the unit, they were entitled to 8/8 of production for their 80 acres,⁵⁹ or 12.65 percent of all production, under the terms of the communization agreement.⁶⁰

Cotton filed suit in District Court, which upheld the Secretary's action, finding that he had not abused his discretion.⁶¹ The Tenth Circuit, however, found that denial of a communization agreement, causing a lease to fail, and approving the same agreement virtually in the same breath, constituted an abuse of discretion.⁶² As evidence of the capricious nature of the Secretary's decision, the court stressed that he gave no explanation for the inconsistent treatment of like situated Indian lessors, that the Secretary had previously approved the lease of which the communization clause was a part, and that lease approval implicitly approved an express promise by the parties to abide by any communization agreement adopted for the unit and approved by the Secretary.⁶³ Disapproving the communization for the sole purpose of causing the underlying lease to expire, a lease which the Secretary had already approved, was arbitrary and capricious.⁶⁴

In *Cotton*, we find additional support for the decision in the court's determination of the contractual expectation of the parties. However, the holding rests on finding that the Secretary abused his discretion in that he did not consider *all relevant factors*. As noted, after *Kenai*, the Secretary promulgated guidelines to assist Superintendents and Area Directors in complying with the *Kenai* decision.⁶⁵ The permissiveness in *Kenai*, that the Secretary *may* consider economic factors in exercising his discretion was turned into a strict test in *Cotton*, whereby the Secretary must consider *all relevant factors*, and further, must document his decision. As the court found, the Secretary had neither followed his own guidelines nor documented his departure therefrom; his finding was arbitrary and capricious.⁶⁶ This represents a substantial break from previous administrative practice in that, where in violation of guidelines, the most a court could do would be to remand to the agency for further consideration.⁶⁷ In stressing "all relevant factors," the court strays from the notion that the Secretary need only *consider* all relevant factors, and that as long as there is a

59. See OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1996).

60. See *Cotton*, 870 F.2d at 1517. See *infra* notes 86-91 and accompanying text (discussing possible confusion between approval of communization and approval of spacing units).

61. See *Cotton*, 870 F.2d at 1521.

62. See *id.* at 1527.

63. See *id.* at 1528. A lessee is entitled to rely on the pooling clause. *Kenai*, 671 F.2d at 389 (Barrett, J., dissenting). Judge Barrett wrote the majority opinion in *Cotton*.

64. See *Cotton*, 870 F.2d at 1528.

65. See *id.* at 1518-19.

66. See *id.* at 1527.

67. See *id.* at 1530 (McKay, J., dissenting). Note that Judge McKay wrote the majority opinion in *Kenai*.

rational basis for the conclusion, the court may not overturn the determination.⁶⁸

C. Cheyenne-Arapaho

The strict procedural test established in *Cotton*, which was used to strike the Secretary's decision to let a lease expire, produced just the opposite effect in *Cheyenne-Arapaho Tribes of Oklahoma v. United States*.⁶⁹ In *Cheyenne-Arapaho* the Indian lessors appealed the approval of a communitization agreement. The Tenth Circuit agreed with the District court, finding that the Secretary had abused his discretion in approving the communitization agreement.

The court noted that approval of communitization agreements is within the Secretary's discretion,⁷⁰ but that his discretion must be governed by fiduciary standards and limited by fiduciary duties;⁷¹ one duty being to maximize lease revenues.⁷² The court repeated the standard of review from *Kenai*: "If the [Secretary] considered all relevant factors in reaching his decision and has made no clear error of judgment, his action cannot be overturned."⁷³ The court found the issue to be "whether the Secretary considered all the factors relevant to a fiduciary's decision and whether the Secretary complied with his duty to maximize lease revenues when he approved the communitization agreements."⁷⁴

Admittedly, the reviewing official did not consider market value or marketability of a new lease. As the market was in the middle of a boom at the time, the court found that the market factors should have been examined and therefore the trust responsibilities toward the tribe were "uncontrovertedly breached by failure to examine all relevant factors before approving the agreement."⁷⁵

As in *Kenai*, *Cotton*, and *Woods*,⁷⁶ the lessees in *Cheyenne-Arapaho* advanced the argument that "the quintessential component of communitization of leases is whether the proposed plan is reasonable and appropriate for the purpose of proper development and conservation of natural mineral resources," and as the plan was reasonable and appropriate, the Secretary was within his discretion in approving it.⁷⁷ The *Cheyenne-Arapaho* court found that this reasoning ignored the fiduciary relationship. When acting as a fiduciary, the Secretary's "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fidu-

68. See *id.* at 1531 (McKay, J., dissenting).

69. 966 F.2d 583 (10th Cir. 1992).

70. See *id.* at 588 (citing 25 U.S.C. § 396d (1983) and companion regulation 25 C.F.R. § 211.21(b)). See also *supra* note 40.

71. See *Cheyenne-Arapaho*, 966 F.2d at 589.

72. See *id.* (quoting *Kenai*, 671 F.2d at 386).

73. See *Cheyenne-Arapaho*, 966 F.2d at 589 (citations omitted).

74. *Id.*

75. *Id.* at 590.

76. See *infra* notes 82-85 and accompanying text.

77. *Cheyenne-Arapaho*, 966 F.2d at 590. Of course, in *Kenai*, the argument was that the Secretary's discretion was limited solely to conservation matters.

ciary.”⁷⁸ The fiduciary responsibility does not allow the Secretary the discretion to not consider certain factors. “Absent consideration of current market developments, the [Secretary’s] conclusion that he could not protect the Tribe’s economic interests if the communitization agreements were disapproved was inconsistent with the agency’s fiduciary obligations to the Tribe, and seems more consistent with a policy of blanket approval than with a policy of maximizing tribe revenues.”⁷⁹

Cheyenne-Arapaho, in finding that the secretary abused his discretion by not considering economic factors, does not refer to *Cotton* except to distinguish it (in passing) in a footnote.⁸⁰ It declared itself consistent with *Cotton* by stating that *Cotton* overturned the Secretary’s decision because he considered only economic factors, whereas in *Cheyenne-Arapaho*, in not considering the economic factors, the Secretary did not consider all the factors and would likewise also be overturned.⁸¹ The necessary implication of *Cheyenne-Arapaho*, however, contradicts the thrust of *Cotton*. An important theme in *Cotton* and *Woods* is the impropriety of affecting (canceling) another instrument (the lease) for purely economic reasons. In *Cheyenne-Arapaho*, the Secretary was overturned for not considering the economic conditions. Under the economic reality of the situation, the Indian lessors would receive no economic benefit, no increased money or earnings, without the failure of the original lease. For a consideration of the economic conditions of the time to have any meaning, ne any relevance, it is a necessary implication that the underlying leases would have to expire. By using the same “all relevant factors” razor as used in *Cotton*, *Cheyenne-Arapaho* cuts with the same motion, but comes to the contrary result.

D. Woods Petroleum

In the final case of our quatrain we have yet another reversal. *Kenai*, the root of the tree, was the only case not to overrule the Secretary. In *Cotton*, the Secretary was overruled for letting a lease expire. In *Cheyenne-Arapaho*, the Secretary was overruled for letting the lease continue. In *Woods Petroleum Corp. v. Department of Interior*,⁸² the Secretary was once again overruled for letting a lease expire. In all four cases the factual setting was the same and the economic issue was the deciding factor. In *Woods*, however, by a 7-2 en banc majority,⁸³ we may have the Tenth Circuit’s final word on the matter.

In *Woods*, the Secretary, after having a best interests assessment performed, chose to disapprove a communitization agreement so that the Indian lessors could enter into more profitable leases. In fact, a \$400,000 bonus had already been offered for a new lease. The tract was re-leased and a new

78. *Id.* at 591.

79. *Id.*

80. *See id.* at 590 n.14.

81. *See id.*

82. 47 F.3d 1032 (10th Cir. 1995).

83. It is interesting to note that the two dissenters, Judge Henry and Chief Judge Seymour, are the only two active judges from Oklahoma on the Tenth Circuit.

communitization agreement prepared by the new lessees was approved eight months later with an effective date as of the first date of production. In overturning the Secretary's decision, the Tenth Circuit Panel found that

the sole reason behind the Secretary's rejection of the communitization agreement was to provide a pretext for the ulterior motive of enabling the Indian lessors to acquire an additional bonus payment from a new potential contracting party. . . . [T]o reject a communitization agreement for that purpose, and then to accept essentially an identical communitization agreement, particularly while permitting retroactive benefits to inure to the Indian lessors, constitutes arbitrary and capricious conduct and cannot stand.⁸⁴

The Tenth Circuit granted rehearing en banc to square itself with the cases previously discussed and explicitly affirmed the panel decision by holding that

the Secretary acts arbitrarily and abuses his discretion . . . when he (1) rejects a proposed communitization [sic] agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into a new, more lucrative, lease, and then (2) approves essentially the identical communitization [sic] agreement, with the new lessee of the Indian lands simply substituted for the old lessee, and permits the Indian lessors to collect royalties retroactively to the date of first production under the original unit plan.⁸⁵

Though narrowly stated, a fair reading of the holding essentially requires communitization agreement approval where the only reason for not doing so is based on the economics of a new lease. This flies in the face of *Kenai* and *Cheyenne-Arapaho*.

E. *The Two Tongues*

Woods is certainly consistent with *Cotton*. The en banc opinion was issued to square itself with *Kenai* and *Cheyenne-Arapaho*. *Woods* did this by adherence to the all relevant factors test, which of course was used as the operative tool in all the cases. However, *Woods* says nothing regarding the fiduciary duty to maximize lease revenue, as expressed in *Cheyenne-Arapaho*, and to the extent that *Cheyenne-Arapaho* implicitly authorizes lease termination for economic reasons, it should be considered overruled by *Woods*. *Kenai*, read fairly, explicitly authorized the expiration of the underlying lease so that a new lease could be entered into.

Another factor the *Woods* court used to distinguish the cases was the existence of a state ordered drilling and spacing unit in *Woods* and *Cotton*, which *Woods* states did not exist in *Kenai* or *Cheyenne-Arapaho*. *Woods* treats as synonymous the existence of a drilling and spacing unit and a communitization agreement. The Oklahoma Corporation Commission may make spacing and

84. *Woods Petro. Corp. v. United States Dept. of Interior*, 18 F.3d 854, 859-60 (10th Cir. 1994) (hereinafter *Woods I*).

85. *Woods Petro. Corp. v. Dept. of Interior*, 47 F.3d 1032, 1034 (10th Cir. 1995) (hereinafter *Woods II*).

pooling determinations at the same time, but the two are not synonymous. True, secretarial approval is needed for the operation of either on Indian land, but it should be noted that the authority to approve drilling and spacing unit determinations⁸⁶ and communitization agreements⁸⁷ are separate.

As an example, where an owner owns so much land as to encompass multiple units of the spacing pattern, or simply the whole spacing unit, there is no need to communitize the interests as they all reside in a single ownership. Drilling and spacing determinations are made to prevent waste and to allocate production whereas communitization agreements allocate (or prorate) cost and risk among multiple owners within the unit. As discussed above,⁸⁸ an interest may not be subject to force pooling, and yet still be within the framework of the drilling and spacing pattern.

Indeed, *Cheyenne-Arapaho*, in finding that the communitization agreement should not have been approved, found the underlying leases had expired and the Tribe was therefore the rightful owner of all royalty and working interest and entitled to revenues attributable to the tracts after the expiration of the leases.⁸⁹ In so finding the court recognized the Secretary's approval of the drilling and spacing unit and the Tribe's right to be included in the same as an unleased mineral owner. The argument that the Indian lessors owned all the working interest after expiration of the lease was put forth in *Cotton*, as well as *Woods*, but was rejected.⁹⁰ In this, too, *Cotton* and *Woods* conflict with *Cheyenne-Arapaho*, a conflict that seems not to have been understood, much less explained.

Woods, in finding approval of the new communitization agreement arbitrary and capricious, even though submitted eight months after the second lease, argues against the Secretary's ability to ever let a lease lapse, as was approved in *Kenai* and mandated in *Cheyenne-Arapaho*. In any lease market that would give rise to this situation (i.e. an oil and gas market so active as to bring about the possibility of much higher bonuses and the concomitant pressure to let leases expire for economic reasons) there will be much activity. The rectangular survey in Oklahoma and other Western states and the propensity of most Conservation Commissions to lay out drilling and spacing units in a regular pattern, suggests that once a drilling and spacing unit has been proposed or established, it is less than likely that it will change, at least in the near future. Under *Chey-*

86. See 25 C.F.R. § 1.4 (1996). See *supra* note 29.

87. See *supra* note 41.

88. See *supra* notes 35-37 and accompanying text.

89. See *Cheyenne-Arapaho*, 966 F.2d at 587.

90. As Indian interests, they should not be amenable to the force pooling statute, but should indeed be able to participate as owners of the working interest. See *supra* notes 35-37 and accompanying text (examining the operation of the Oklahoma pooling statute in relation to Indian lands). One reason the issue is dealt with so clumsily in the cases is that, under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1983), minerals could only be developed under leases; there was no statutory authority to act as an operator. Under the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1983), however, myriad forms of developmental ventures are authorized and the problem of what to do with a lapsed lease will no longer be such a problem. The essential problem of the extent of secretarial authority in approving communitization agreements may well return in conjunction with the new developmental forms.

enne-Arapaho, the lease's expiration was essentially mandated, as the communitization agreement should not have been approved.⁹¹ This communitization agreement covered 640 acres, the largest unit allowed in Oklahoma,⁹² and as a gas well, it may never be re-spaced and made into smaller spacing units.⁹³ As *Woods* considers drilling and spacing units and communitization agreements synonymous, the practical result, then, is that the *Cheyenne-Arapaho* tracts may not be communitized, under *Woods*, unless circumstances change, and should not have been allowed to participate in the drilling and spacing unit as unleased owners. With the unlikelihood of changing drilling and spacing units, *Woods* practically mandates the approval of communitization agreements if the Indian owner wishes to participate at all. This effectively creates the rubber-stamping so despised in *Kenai* and *Cheyenne-Arapaho*, and is yet another area where the two sides of this issue fail to meet.

One final disagreement between the two tongues of these cases is the timing of submitting the communitization agreement for approval. Of course, the length of time between submission and expiration of the lease will affect which factors receive more weight; the further from the expiration of the lease, any possible financial gains from letting the lease lapse, or pursuing other modes of development, the more speculative both become. The issue here, however, is the amount of time given the administrator to make his or her decision. *Kenai* and *Cheyenne-Arapaho* may be read to treat the amount of time available to the administrator as a factor in weighing the best interests of the Indian or tribe. *Cotton* and *Woods*, however, find that as long as the agreement was submitted before the lease expired, time will not be a factor.

IV. ANALYSIS

In reaching their substantive judgments then, what values does the court promote? Were there to be a pooling clause in leases on fee land which required the lessors' approval before the tract could be pooled, there would be little question that the lessors would have the right to deny pooling if they so chose. Moreover, an executive interest holder⁹⁴ who approves pooling under such a clause in a rising market will surely be liable to the royalty interest owners for the forgone income of new bonuses. Such is the case with the Indian lease forms. A communitization clause is included, but it is not automatic. In order to be effective and include the leased land within the unit it must be approved.

91. See *Cheyenne-Arapaho*, 966 F.2d at 591.

92. See OKLA. STAT. tit. 52, § 87.1 (Supp. 1996).

93. Gas can migrate farther within a formation than oil. One well often efficiently drains a 640 acre section of land. Such spacing units are common for gas.

94. One who has the authority to lease on behalf, or for the benefit, of owners of royalty interest. The duty owed by the executive interest holder may be good faith, utmost good faith, or even a fiduciary duty, depending upon circumstances and jurisdiction.

In *Cotton* and *Woods* the court reads into the Indian lease clause an expectation that simply does not exist in normal oil and gas leases. The leases that were negotiated had a pooling (communitization) clause that required the Secretary's approval before they could become effective. The companies took the leases knowing that a fiduciary's authorization would have to be forthcoming before the pooling clause could be relied upon, yet in *Cotton* and *Woods* the court protects the company's expectation interest in the pooling clauses. Protection of the commercial interests over that of the Indian beneficiary should not comport with the trust responsibility.

There is obviously a conflict. The original *Woods* court recognized this and stated:

[W]e are again called upon to address and resolve the tensions arising from the confluence of a number of legitimate interests: 1) the right of a state to establish drilling units to control the development of its oil resources; 2) the duty of the United States Department of the Interior to protect and maximize the return to Indians from their allotted lands; 3) the contractual rights of oil producing companies such as plaintiffs, which commit millions of dollars in drilling costs in reliance on provisions in leases executed with both Indian and non-Indian landowners with full knowledge of the Department of the Interior, and 4) the expectations of all lessees of a state-mandated drilling unit to receive approval from the Secretary of the Interior as to Indian leases of a duly-executed communitization agreement allocating proportional revenues from oil production to each tract in the drilling unit regardless of whether or not a producing well is drilled on a particular tract within the unit or not.⁹⁵

How effectively does the *Woods I* court state the conflict? As to the first interest, it totally ignores the force of federal preemption and the Secretary's authority (or duty) to exercise control over oil resources belonging to the United States (even if within the geographic boundaries of Oklahoma). The second interest may be fairly stated. The third interest is certainly sizable, at least in monetary terms, but its relative weight in comparison to other interests is indeed the question at issue. The final interest, though suffering from the lack of differentiation between drilling and spacing units and communitization, perhaps comes closest to addressing the basic conflict.

It is the public, or national, interest in the orderly and efficient development of mineral resources, maximizing overall recovery, and promoting a profitable industry in order to sustain development that weighs against the interests of the Indians. Though conservation is accomplished under state law, the federal government has, from the beginning, been involved in the promotion and maintenance of the oil industry. The long pattern of federal acquiescence to state regulation promotes the goals of orderly development and works well, most of the time. Only when the market experienced explosive growth in speculative value for new leases did the conflict of interest materialize.

95. *Woods I*, 18 F.3d at 855.

A. *Conflicts of Interest in Indian Law*

In these cases is demonstrated the difficulty experienced when multiple, and not always consistent, public policies operate in the same circumstances. The most common conflict experienced in Indian law is that of division of loyalties within administrative agencies; charged with representing the Indian interest and the public interest in general. As stated by President Nixon in 1970:

The United States government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.⁹⁶

Resolution of this conflict has resulted in many different approaches, running the gamut between complete deference to Indian interests to complete ignorance of them. In arguing for a position closer to the former, in conjunction with congressional investigation of the conflict of interest problem, Reid Chambers noted:

This "conflict" then, is not one which properly can be resolved through the process of balancing conflicting interests. Such a balancing procedure within the executive department is desirable where competing *public* policies are being balanced; this, of course, is the method by which public policy is formulated. But private rights, which the United States is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes. The government's relationship to the Indians is, in this respect, unique in character.⁹⁷

Recently, Professor Judith Royster has stated the issue more strongly. "Balancing the tribal interest against public considerations, and in particular subordinating the tribal interest to public interests represented by agencies such as the BLM, violates the Secretary's trust obligations to the Indian tribes."⁹⁸ Many conflict of interest cases have been decided regarding the allocation of water. Where the Department of Interior was charged by Congress to carry out reclamation activities, the Supreme Court found that the burdens of complying with congressional objectives of reclamation and the trust responsibility of the Indians would have to be carried on "two shoulders."⁹⁹ Professor Royster finds conflicts jurisprudence developed in such cases inapplicable to mineral development on the Indian land itself. Unlike water management, mineral development

96. Message of President Nixon to the Congress, 116 CONG. REC 23,131 (1970).

97. COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., A STUDY OF ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES 3 (Comm. Print 1971) (by Reid P. Chambers) (discussing eight instances of conflicts of interest within the Department of Interior between 1967 and 1970).

98. Royster, *supra* note 6, at 329.

99. *Nevada v. United States*, 463 U.S. 110 (1983).

is based on the full fiduciary duty. "Because of that full fiduciary relationship, the balancing approach of the off-reservation cases is inappropriate. The Secretary is obligated under the mineral development scheme not to weigh tribal interests against public values, but to act in the best interests of the mineral owning tribes."¹⁰⁰ "When the federal government acts with respect to tribal minerals, its obligation is thus not to reconcile competing interests, but to act as a trustee for the benefit of the mineral owners."¹⁰¹

Another view of the trust doctrine, one gaining momentum in recent years, is the concept of increased sovereignty through greater autonomy.¹⁰² The current push is for putting management and commercial decisions in the hands of the tribes.¹⁰³ Efforts are also underway to allow the tribes to make their own management decisions. Indeed, this has been the aim during the last era of Indian policy, that of Indian self determination.¹⁰⁴ Robert Clinton has stated this position as follows:

[F]ederal Indian law should move back to Chief Justice Marshall's conception of the trust responsibility as a doctrine that simply involves federal legal obligations of protection of Indian tribes against intrusions from third parties on their lands, resources, and sovereignty. Federal Indian law should move away from the models of federally supervised Indian resource development set forth in the 1938 Mineral Leasing Act and the 1982 Indian Mineral Development Act. Rather, the tribes, with technical assistance from the United States, should assume the ultimate responsibility for their deals. No federal approval should be required. The tribal governments should be required to assume the political accountability if and when those deals go sour.¹⁰⁵

These two differing views of the trust relationship are mirrored in the four cases discussed. The call for responsibility and accountability in mineral management is evident in *Cotton* and *Woods*. If the 7-2 en banc decision in *Woods* may be taken as an indication of the court's position in the future, we can expect further litigation. For until the Bureau of Indian Affairs is relieved of liability for breach of trust, they will continue to be aggressive in asserting their trust responsibility. Institutional inertia and reluctance on part of the Indians themselves in many cases will slow the process.¹⁰⁶

100. Royster, *supra* note 6, at 358-59.

101. *Id.* at 360.

102. See, e.g., Comment, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

103. PEVAR, *supra* note 3, at 8.

104. This period began in 1968. See *id.*

105. *Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development?*, 71 N.D. L. REV. 365, 373-74 (1995) (proceedings from the North Dakota Law Review Symposium Conference, statement of Robert Clinton).

106. CANBY, *supra* note 3, at 50-51.

B. Standard of Review and Role of the Court

As noted, the “all relevant factors” razor has been applied to four different cases to find, under the trust responsibility the United States owes the Indian tribes, what is in the “best interest” of the Indian beneficiary. In all these cases it is recognized that the Secretary has broad discretion in dispatching his trust responsibility, yet contrary to standard administrative law practice, when confronted with a situation where an administrative decision maker has not considered every option, the cases have not been remanded for reconsideration, but instead, as the factor upon which the Secretary did or did not base his decision was known, the court simply substituted the “proper” decision.

This phenomenon was apparent from the beginning of these two lines of cases. In dissenting in *Kenai*, Judge Barrett felt that, where the conservation-development aspects of a communitization plan are justified, the fact that the Superintendent foresees a sizable bonus from another lessee, if he refuses to commit an Indian lease to the unit involved, would be contrary to the public interest. Judge Barrett also felt the lessee was entitled to rely on the pooling covenant in the leases.¹⁰⁷ In the next case on the issue, *Cotton*, Judge Barrett wrote the majority opinion.¹⁰⁸ Judge Barrett used the same arguments in supporting the *Cotton* majority opinion, and elaborated on the conservation aspects of the decision, but ultimately found that “the Secretary simply failed to set forth, discuss and analyze all of the factors his own guidelines and [the] *Kenai* opinion required of him.”¹⁰⁹

Considering the varied outcomes in light of the trust responsibility, it may be questioned whether such a procedural test is the proper tool for review. The trust doctrine has been the source of two opposing visions, one emphasizing federal power, the other emphasizing federal responsibility.¹¹⁰ The effect of this conflicting vision can be seen in the courts. In Judge Seymour’s dissenting opinion in *Jicarilla Apache v. Supron Energy Corp.*,¹¹¹ she noted,

the most significant error the majority makes is its employment of administrative law analysis without considering what role, if any, the Secretary’s fiduciary duty should play in a court’s examination of his administrative action. [T]he Secretary’s actions in a situation like this are constrained by principles of Indian trust obligations as well as by principles of administrative law.¹¹²

107. See *Kenai*, 671 F.2d at 389 (Barrett, J., dissenting).

108. Judge McKay, who wrote the majority *Kenai* opinion, was now in the dissent. See *Cotton*, 870 F.2d at 1529 (McKay, J., dissenting).

109. *Cotton*, 870 F.2d at 1527.

110. CLINTON ET AL., *supra* note 6, at 249.

111. 728 F.2d 1555 (10th Cir. 1984) (Seymour, J., dissenting), *dissent adopted as maj. op. on reh’g en banc*, 782 F.2d 855 (10th Cir. 1986).

112. *Id.* at 1566-67.

Other courts, however, are willing to resolve the issue of the Secretary's duties under principles of administrative law alone.¹¹³ Just such a schism is evident in the four opinions examined in this paper. It is the second school of thought, of course, that has allowed the Tenth Circuit to harmonize the four cases discussed. By working from the premise that administrative principles alone are adequate, the substantive basis behind *Cheyenne-Arapaho* and *Kenai* need not even be addressed, much less explained. The "all relevant factors" analysis of *Cotton* and *Woods* has done just that.

V. CONCLUSION

A conflict exists within the Tenth Circuit. The conflict may be seen as differing views over the concept of the trust relationship or of administrative practice. Until a unified view is adopted, litigation over Indian rights and the federal trust responsibility will continue. Though outwardly conforming to established precedent in their "all relevant factors" test, in substantive reasoning and outcome the Tenth Circuit will continue to speak with a forked tongue.

113. See *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987) (stating in regard to royalty calculation under 25 U.S.C. § 396, "[t]he scope and extent of the fiduciary relationship, with respect to this particular matter, is established by the regulation and leases"), *cert. denied*, 486 U.S. 1032 (1988); see also CLINTON ET AL., *supra* note 6, at 253-55.

