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Lands and Natural Resources

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LANDS AND NATURAL RESOURCES

OVERVIEW

The Tenth Circuit has historically played a major role in the development of Indian law. The cases decided during this survey period were certainly no exception. Among the court's numerous decisions affecting Indians were those involving the standard of proof in cases seeking to disestablish Indian reservations, the duty owed by the Secretary of the Interior to the Indians in the administration of oil and gas leasing on Indian lands, the effect of state gas price control acts on Indian royalties, the necessary standard of compliance with acts allowing non-Indians to obtain interests in Indian real property, the conflict between Indian sovereign immunity and the Federal Rule of Civil Procedure requiring joinder of all necessary parties to an action, and the Indians' power to tax non-Indians who develop the Indians' natural resources. Additionally, this article discusses the enforcement power of Federal Energy Regulatory Commission under the Natural Gas Act; the construction of oil and gas operating agreements as to deep geologic horizons; and finally, the consequences of conveyancing real property when a predecessor in interest has suffered due process violations in the form of defective tax sales or condemnation proceedings.

I. INDIAN LAW

A. *Disestablishment of Indian Lands:* Ute Indian Tribe v. State of Utah

1. Introduction

Since the mid-nineteenth century, numerous acts of Congress have reflected the constantly changing attitude of the United States towards Indians. These congressional acts have far-reaching and potentially devastating effects on the rights of Indians today.[1] During this survey period the Tenth Circuit, in *Ute Indian Tribe v. Utah*,[2] disestablished a substantial portion of the Ute's reservation.[3] Through such decisions,

1. This discussion is limited to "disestablishment" cases involving lands which at some point were part of an Indian reservation. *See infra* note 3.

2. 716 F.2d 1298 (10th Cir. 1983) [hereinafter cited as Utes v. Utah].

3. Disestablishment refers to the process whereby Indian lands are withdrawn from the Indians' control. Disestablishment often resulted from a general allotment act of Congress, which, in an attempt to assimilate the Indians into the agrarian lifestyle of their neighbors, allotted "homesteads" to individual Indians in order to curtail their nomadic lifestyle. The surplus unalloted lands were then "opened" to non-Indian settlement. The typical issue in disestablishment cases is whether the land was disestablished by the mere language of the general allotment act which opened it, or whether additional evidence is necessary to conclusively divest the Indians of title and interest in their lands. The answer to this question, and hence the status of such "opened" lands depends upon the language of the Act and the circumstances underlying its passage. *Compare* Mattz v. Arnett, 412 U.S. 481 (1983); Seymour v. Superintendent, 368 U.S. 351 (1962); and Solem v. Bartlett, 104 S. Ct. 1161 (1984) (all holding that the opened lands retained their reservation status) *with* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) and DeCoteau v. District County

the Indians are threatened with the cummulative disestablishment of their lands.[4] Once a court finds that Congress, at any point in history, intended to disestablish part or all of an Indian reservation, such land is no longer Indian land. In order to prevent the widespread disestablishment of Indian lands, courts generally strictly construe those acts which open Indian lands.

Subsequent to the Tenth Circuit's decision in *Utes v. Utah*, the Supreme Court, in *Solem v. Bartlett*,[5] reviewed a case very similar to *Utes v. Utah* and found the evidence insufficient to support disestablishment. The result in *Utes v. Utah* appears inconsistent with *Solem* because the Tenth Circuit viewed a record that the district court found devoid of the "hard evidence necessary to overcome the construction of ambiguities in favor of the Indians."[6] Nevertheless, the Tenth Circuit disestablished a substantial portion of the Ute Indian Reservation known as the Uintah Reservation.[7]

The district court in *Utes v. Utah*[8] found, inter alia, that the Ute Reservation remained "Indian country,"[9] except to the extent it was specifically altered by Congress.[10] The district court found that the tract

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Court, 420 U.S. 425 (1975) (both holding that the opened lands lost their reservation status). 716 F.2d 1298 (10th Cir. 1983).

4. Congressional acts opening Indian lands are often referred to as "surplus land acts" because they were enacted to appropriate the Indians' surplus lands. These acts sometimes reveal that Congress believed that the Indians' best interests would be served by eliminating the reservation system. Although Congress has since discarded this belief, Indians today nevertheless find themselves bound by these archaic acts, which, though no longer approved by Congress, still constrain courts. *See* Solem v. Bartlett, 140 S. Ct. 1161, 1165 (1984).

5. 104 S. Ct. 1161 (1984).

6. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072, 1155 (D. Utah 1981) (citing United States v. Long Elk, 565 F.2d 1032, 1040 (8th Cir. 1977)), *aff'd in part, rev'd in part*, 715 F.2d 1298 (10th Cir. 1983).

7. It is the Tenth Circuit's disestablishment of the Uintah portion of the Ute Reservation which appears to contradict the Supreme Court's holding in *Solem*. The Tenth Circuit's ruling as to the Uintah portion also sparked the dissent of Judge Doyle. *See* Utes v. Utah, 716 F.2d at 1315-22.

8. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981).

9. 18 U.S.C. § 1151 (1982) (defines "Indian country" for purposes of criminal jurisdiction). The Utes brought this action seeking declaratory and injunctive relief to establish the exterior boundaries of their reservation and to enjoin Utah from asserting criminal jurisdiction. Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1075 (D. Utah 1981).

10. Although the Utes appealed the district court's disestablishment of the following four tracts, the Tenth Circuit found the applicable acts and presidential proclamation effected disestablishment. First, by the Act of May 24, 1888, ch. 310, 25 Stat. 157 (1889), Congress removed a 7,040 acre tract known as the Gilsonite Strip from the Uintah Reservation. *See* Ute Indian Tribe v. Utah, 521 F. Supp. at 1099. Second, Congress extinguished the Uncompahgre Reservation under the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (1899). *See* Ute Indian Tribe v. Utah, 521 F. Supp. at 1104. Third, by the authority vested in him by the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (1905), President Roosevelt withdrew 1,010,000 acres from the Uintah Reservation, which lands were made a part of the Uintah Forest Reserve. *See* Proclamation of July 14, 1905, 34 Stat. 3116, (1907); 716 F.2d at 1313. Fourth, by the Act of April 4, 1910, ch. 140, 36 Stat. 269, 285 (1911), Congress extinguished the Utes' interest in 56,000 acres known as the Strawberry River Reclamation. *See* Utes v. Utah, 716 F.2d at 1314. By the Act of March 11, 1948, ch. 108, 62 Stat. 72 (1949), Congress added the Hill Creek Extension to the Uintah and Ouray Reservation. *See* Utes v. Utah, 716 F.2d at 1301. This discussion is therefore limited to the disestablishment of the portion of the Utes' land known as the Uintah Reservation.

known as the Uintah Reservation had not been disestablished. The Tenth Circuit reversed, and found that the Acts of 1902, 1903, 1904 and 1905 "opening" the Uintah Reservation changed its status to "public domain."[11]

2. The Legislative Basis for Disestablishment

As the basis for its disestablishment holding, the Tenth Circuit relied primarily on the Indian Appropriations Act of 1902.[12] This Act states in relevant part, that "all the unallotted lands within said reservation shall be restored to the public domain."[13] Congress, however, believed that it needed the consent of the Utes in order to open their lands,[14] and the disestablishment sought under the 1902 Act was conditioned upon the consent of a majority of the adult male Utes.[15] The Utes vehemently opposed ceding major portions of their reservation to the government, so the 1902 Act was never effectuated.[16] The Tenth Circuit held that the subsequent Acts carried forward the intent of the 1902 Act, although they did not expressly contain the language restoring the reservation lands to the "public domain."[17] In other words, the majority felt that the 1902 Act established a "baseline purpose of disestablishment" which was consumated by the subsequent acts.[18]

In his dissent, Judge Doyle agreed with the holding of the district court that the 1902 Act did not establish a baseline purpose of disestablishment that was carried out by the Acts of 1903, 1904 and 1905. Nor did he feel that the 1905 Act demonstrated that Congress intended to extinguish all of the Ute's interest in the Uintah Reservation.[19] Judge Doyle argued that Congress intended the opening under the 1902 Act to take effect only after the Ute's consented. Therefore, congressional intent cannot be retroactively inferred where Congress later learned that Indian consent was unnecessary.[20]

In the Indian Appropriations Acts of 1903[21] and 1904,[22] Congress

11. Utes v. Utah, 716 F.2d at 1307-15.

12. Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264 (1903). *See* Utes v. Utah, 716 F.2d at 1308-13.

13. Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64 (1903).

14. It was not until 1903 that the Supreme Court announced that Congress could unilaterally diminish Indian reservations. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

15. Ute Indian Tribe v. Utah, 521 F. Supp. at 1118.

16. In addition to the Ute's resistance there were delays in the funding necessary to execute the Act. 521 F. Supp. at 1116.

17. 716 F.2d at 1310-12.

18. *Id.* (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 592 (1977)). Commentators have criticized the reliance in *Rosebud* on an unratified agreement by the Indians as establishing a "baseline purpose of disestablishment." Rules of strict construction militate against the Court's method of tacking documents together to establish congressional intent. *See* Note, *Indian Law-Boundary Disestablishment Through The Operation Of Surplus Land Acts*, 1976 WIS. L. REV. 1305, 1322-23; *see also* Case Developments, *Indian Land Claims—A Question of Congress' Right to Unilaterally Abrogate Indian Treaty Provisions: Rosebud Sioux Tribe v. Richard Kneip*, 21 How. L.J. 625, 642 (1978).

19. 716 F.2d at 1315-22 (Doyle, J., dissenting).

20. *Id.*

21. Act of March 3, 1903, ch. 994, 32 Stat. 982 (1903).

22. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207 (1904).

reinacted altered provisions of the 1902 Act to dispose of those Uintah lands not already claimed by the Utes.[23] The Indian Appropriations Act of 1905 also intended to open the surplus Indian lands to non-Indian settlement.[24] In drafting the 1905 Act, Congress was concerned that the opened lands would be quickly seized by land speculators rather than homesteaders;[25] therefore, Congress used language which limited the opening to disposition "under the general provisions of the homestead and town-site laws" rather than using the "public domain" language of the 1902 Act.[26] Congress was not concerned with whether the Utes would retain any interest in the opened lands because it assumed the lands would be purchased and settled by homesteaders.[27] Indeed, the distinction between the "public domain" language of the 1902 Act and the restrictive language of the 1905 Act was intended for the benefit of homesteaders, not the Utes.[28]

3. Analysis

In light of *Solem v. Bartlett*,[29] the Tenth Circuit's reliance on the "public domain" language of the 1902 Act is questionable. In *Solem*, the party seeking disestablishment argued that the Cheyenne River Act effected disestablishment.[30] That Act referred to the opened lands as "the public domain" and "the reservation thus diminished."[31] The Supreme Court stated that, while those phrases lended support to the disestablishment argument, when balanced against the rest of the Act's stated goals, those phrases did not "carry the burden of establishing an express congressional purpose to diminish."[32]

Solem, moreover, reaffirmed the doctrine that ambiguous acts of Congress are to be construed in favor of the Indians by requiring clear proof of congressional intent to disestablish. In *Utes v. Utah*, the only evidence adduced to carry this burden was the similarity between the 1902 Act, which contained explicit disestablishment language, and the 1905 Act.[33] Commentators have criticized this method of proving intent because it requires an unproveable assumption of congressional intent, which is contrary to principles of strict construction mandated by

23. The 1903 Act deleted the requirement in the 1902 Act which necessitated the Indians' approval of the disestablishment, based on the Supreme Court's holding in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). Both the district court and the Tenth Circuit found that neither the 1903 Act nor the 1904 Act changed the operative terms of the 1902 Act. *Utes v. Utah*, 716 F.2d at 1310.

24. *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1048 (1905).

25. *See Indian Appropriation Bill, 1906: Hearings before the Subcomm. of the Senate Comm. of Ind. Aff.*, 58th Cong., 3d Sess. (1905); *Utes v. Utah*, 521 F. Supp. at 1128-32.

26. Utes v. Utah, 716 F.2d at 1310-11.

27. Utes v. Utah, 521 F. Supp. at 1127-32.

28. *Id.*

29. 104 S. Ct. 1161 (1984).

30. Cheyenne River Act, ch. 218, 35 Stat. 460 (1908).

31. *Solem*, 104 S. Ct. at 1168.

32. *Id.* at 1169.

33. 716 F.2d at 1308-11.

the courts when construing acts affecting Indians.[34]

In an ineffective attempt to explain the relationship between the 1902 and 1905 Acts,[35] the *Utes v. Utah* court cited its earlier decision in *Hanson v. United States*.[36] In *Utes v. Utah*, the court found that *Hanson* was decided under the 1902 Act, and that the 1905 Act merely extended the date of opening the Uintah lands.[37] Yet, the result reached in *Hanson* is incongruous with the result in *Utes v. Utah*. In *Hanson*, the Tenth Circuit found that the Utes retained the beneficial title to the lands opened under the 1902 Act.[38] Nevertheless, the Tenth Circuit in *Utes v. Utah* cited *Hanson*'s analysis of the 1902 and 1905 Acts to support its holding that the 1902 Act extinguished the Ute's interest in the opened lands of the Uintah Reservation.[39]

Utes v. Utah is inconsistent with *Hanson* in a second way. The Tenth Circuit in *Utes v. Utah*, based on the Supreme Court's interpretation of the legislation involved in *DeCoteau v. District County Court*,[40] found that the term "public domain" in the 1902 Act demonstrated that Congress intended to disestablish the Uintah Reservation.[41] In *Hanson*, however, the Tenth Circuit did not rely on the "public domain" language, but in fact held that the Utes held a beneficial interest in the "public domain," which consisted of opened Ute Reservation.[42] Thus, *Hanson* did not view the term "public domain" as inconsistent with the Ute's interest in the Uintah Reservation. *Solem* has since pointed out that, while isolated phrases are indicative of congressional intent, an act must be read as a whole.[43]

In addition to the language of an act, another factor courts use to determine the intent behind an early surplus land act is the method by which the Indians were paid for the lands opened. For example, in *Rosebud Sioux Tribe v. Kneip*,[44] the Rosebud Sioux agreed to cede unallotted portions of their reservation in return for a lump-sum payment. The Supreme Court found this strongly indicative of congressional intent to extinguish the Sioux's interest in the land. The method of payment pro-

34. *See supra* note 18. In both *Rosebud* and *Utes v. Utah* it was not possible to prove that congressional intent carried through to the subsequent acts. Nevertheless, put in the difficult position of trying to discern congressional intent, both courts found a "baseline purpose of disestablishment" in the acts.

35. 716 F.2d at 1310-11.

36. 153 F.2d 162 (10th Cir. 1946).

37. 716 F.2d at 1310-11.

38. 153 F.2d at 163.

39. 716 F.2d at 1310-11.

40. 420 U.S. 425, 446 (1975) (the Court implied that "returned to the public domain" is synonymous with "stripped of reservation status").

41. 716 F.2d at 1302.

42. "Thus, Congress has recognized the beneficial title of such Indians to lands of such area restored to the *public domain* by the Act of May 27, 1902." *Hanson*, 153 F.2d at 163 (emphasis added).

43. *Solem*, 104 S. Ct. at 1169 ("[R]ead as a whole [the Act] does not present an explicit expression of congressional intent to diminish the . . . Reservation.").

44. 430 U.S. 584 (1977).

vided by the legislation at issue in *Solem v. Bartlett*[45] was perhaps the strongest factor underlying the Court's decision to uphold the reservation status of the opened portions of the Cheyenne River Sioux Reservation.[46] Rather than a sum-certain payment as in *Rosebud*, the Act in *Solem* provided for payment to the Indians only as the lands were subsequently sold.[47] Based on this evidence, the Supreme Court found that the United States served as a guardian and trustee for the Indians, and that the opened, but unsold, lands retained their reservation status.[48]

Utes v. Utah involved the title to several tracts of land[49] and both forms of payment.[50] The majority opinion noted those tracts for which the Utes received sum-certain payments to support its disestablishment holding.[51] The court made no attempt, however, to reconcile the uncertain form of payment provided by the Act opening the portion known as the Uintah Reservation with its disestablishment holding. Judge Doyle, dissenting, found the uncertain form of payment for the Uintah Reservation another indication that the Uintah Reservation was not disestablished.[52]

Courts also consider the subsequent administrative treatment of opened lands to determine the land's status. But, as was the case in *Solem*, such evidence is often "so rife with contradictions and inconsistencies as to be of no help to either side."[53] In *Utes v. Utah*, Congress' subsequent treatment of the opened lands revealed "no consistent, clear and uniform identification of the reservation's status."[54]

In *Utes v. Utah*, the Tenth Circuit's statutory construction appears flawed[55] in ruling that the Uintah Reservation had been disestablished. Both the reasoning of the district court, and Judge Doyle's dissent, illustrate the lack of conclusive evidence to support disestablishment. In light of the doctrine of constructing ambiguous acts in favor of the Indians, and in light of the Supreme Court's recent decision in *Solem v. Bartlett*, the Tenth Circuit's holding is highly questionable.

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45. 104 S. Ct. 1161 (1984). The legislation was the Cheyenne River Act, ch. 218, 35 Stat. 460 (1908).

46. 104 S. Ct. at 1167-68.

47. Section 6 of the Cheyenne River Act, ch. 218, 35 Stat. 460 (1908) provides, in part: "From the proceeds arising from the sale . . . of the lands . . . there shall be deposited in the Treasury of the United States, to the credit of the Indians . . . the sums to which the respective tribes may be entitled."

48. 104 S. Ct. at 1168 (citing Seymour v. Superintendent, 368 U.S. 351 (1962)).

49. *See supra* note 10.

50. 716 F.2d at 1314.

51. *Id.* The Utes were compensated for the 1,010,000 acres added to the Uintah Forest Reserve by presidential proclamation pursuant to the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (1905). *See* Uintah and White River Bands of the Ute Indians v. United States, 152 F. Supp. 953 (1957). The Utes were also compensated for 56,000 acres known as the Strawberry River Reclamation. 716 F.2d at 1314.

52. 761 F.2d at 1318 (Doyle, J., dissenting).

53. *Solem*, 104 S. Ct. at 1170.

54. 716 F.2d at 1313.

55. *See supra* notes 12-34 and accompanying text.

B. *Oil and Gas Leasing on Indian Lands*

The Tenth Circuit, in *Jicarilla Apache Tribe v. Supron Energy Corp.*,[56] sidestepped the issue of the fiduciary duty owed by the Secretary of the Interior to the Jicarilla in administering oil and gas leasing on their lands.[57] In so doing, the Tenth Circuit has approved a passive role for the federal government in protecting the Indian's rights when oil and gas leasing is involved. In *Jicarilla v. Supron*, the Jicarilla Indians brought suit against Supron,[58] an oil and gas lessee under leases executed in the early 1950's. The Jicarilla disputed the amount of royalties they received from the defendant oil and gas companies. The Tribe also named the Secretary of the Interior as a defendant for an alleged breach of his fiduciary duty.[59]

1. Fiduciary Duty of the Secretary of the Interior

The most significant aspect of *Jicarilla v. Supron* was the Tenth Circuit's ruling that the Secretary did not breach any fiduciary duty he may have owed the Jicarilla in the administration of oil and gas leasing on their lands.[60] The district court found that the Secretary had breached his fiduciary duty to the Indians on several counts.[61] The district court found that the Secretary failed to interpret the leases and Interior regulations in the Jicarilla's best interests.[62] The district court also found that the Secretary failed to adequately monitor development of the leases.[63] The Tenth Circuit reversed, finding it unnecessary to decide the fiduciary duty issue. Although purportedly abstaining from deciding the fiduciary duty issue, the court implicitly decided that the Secretary owes no such duty. The result of this decision is contrary to decisions of both the Supreme Court and the Tenth Circuit.[64] Only by avoiding the fiduciary issue was the Tenth Circuit able to reverse the district court. Instead of holding the Secretary to a fiduciary standard, the court based

56. 728 F.2d 1555 (10th Cir. 1984), *reh'g granted*, Mar. 30, 1984 [hereinafter cited as Jicarilla v. Supron].

57. A fiduciary duty, owed to Indians by the federal government, has been recognized in many areas. The litigants in *Jicarilla v. Supron* briefed extensively the applicability of a fiduciary duty to the government's administration of the Indian oil and gas leasing program.

58. Also named as defendants were Southland Royalty Co., Gas Co. of New Mexico and Exxon Corp. The State of New Mexico intervened on the issue of the applicability of New Mexico's price ceiling on natural gas. *See infra* notes 93-109 and accompanying text.

59. *See* 728 F.2d at 1558-59.

60. The breach of fiduciary duty was one of three issues in which Judge Seymour dissented. 728 F.2d 1563-73 (Seymour, J. dissenting). Judge Seymour agreed only with the majority's affirmation of the district court's dismissal of the tribe's anti-trust claims. *Id.* at 1563.

61. 479 F. Supp. at 547-51 (citing Seminole Nation v. United States, 316 U.S. 286 (1942)).

62. 479 F. Supp. at 549-51.

63. *Id.* at 547-48. The Jicarilla alleged a lack of diligent development and failure to drill offset wells to protect against drainage. Although the district court found that the lessees had not failed to develop the leases diligently, District Court Judge Mechem found that the Secretary breached his fiduciary duty by failing to ensure that the lessees diligently develop the leases.

64. *See infra* notes 84-91 and accompanying text.

its review on the less exacting administrative law standard of "abuse of discretion."[65]

The substantive issue which served as the basis of the fiduciary duty question involved the method used to calculate the value of natural gas produced.[66] The Interior regulations set forth the methods used to determine royalties which accrue on Indian lands.[67] The Jicarilla lands produced a natural gas referred to as "wet gas,"[68] for which the regulations give two methods to determine royalties.[69]

On the basis of the Interior's regulations,[70] the district court ordered a "dual accounting" to calculate the amount of royalty due the Jicarilla.[71] Dual accounting requires that both "gross proceeds"[72] and "aggregate value . . . of all commodities"[73] be determined. The royalty due is based upon the greater of the two values.[74] Supron argued, and the Tenth Circuit held, that a production company should not be accountable for the aggregate value of all commodities when the gas is sold at the wellhead to a refinery over which the production company has no control. In her dissent, Judge Seymour argued that such a construction of the regulation would be conducive to "sweetheart deals" between the producer and the refiner, and that the regulation makes no such exception.[75]

The Tenth Circuit based its holding on three factors. First, it found dual accounting to be inconsistent with the interpretation given the regulation by the Interior for many years.[76] Second, when the lessee/producer does not own the refinery, it has no control over the aggregate value of the commodities obtained from the unprocessed wet

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65. 728 F.2d at 1560.

66. This value is in turn used to determine the royalty due.

67. (a) Royalty accrues on the dry gas, whether produced as such or as residue gas after the extraction of gasoline.

(b) If the lessee derives revenue on gas from two or more products, a royalty normally will be collected on all such products.

(c) For the purpose of computing royalty, the value of wet gas shall be either the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all commodities, including residue gas, obtained therefrom, whichever is greater.

30 C.F.R. § 221.50 (1982) (recodified at 30 C.F.R. 206.105 (1984)). To avoid confusion, this comment will cite the 1982 regulations.

68. Wet gas is defined as "Natural gas containing liquid hydrocarbons in solution, which may be removed by a reduction of temperature and pressure or by a relatively simple extraction process." 8 H. WILLIAMS AND C. MEYERS, OIL AND GAS LAW 831 (1982); *see also* 728 F.2d at 1567 n.4 (concerning methods of marketing wet gas and how royalty calculations are made).

69. *See* 30 C.F.R. § 221.50(c) (1982). *See supra* note 67.

70. *See* 30 C.F.R. § 221.50(c) (1982).

71. 479 F. Supp. at 551.

72. That is, the amount paid to the lessee for products sold at the wellhead.

73. This amount includes those products obtained from the gas after it has been refined.

74. 30 C.F.R. § 221.50(c) (1982). *See supra* note 67.

75. 728 F.2d at 1568-69 (Seymour, J., dissenting) (explaining how "sweetheart deals" will be encouraged in the absence of dual accounting).

76. *Id.* at 1559-60.

gas it sells to the refinery.[77] Third, a provision in the leases involved in *Jicarilla v. Supron* vested discretion in the secretary to conclusively determine the royalties due.[78]

In her dissent, Judge Seymour found these three factors unpersuasive. Although the Secretary's construction of Interior regulations is normally given substantial deference, Judge Seymour stated that neither the Interior's former nor present practices can lower the Secretary's fiduciary duty to administer the royalty regulations in the best interests of the Jicarilla.[79]

In response to the majority's exception to dual accounting when the lessee/producer has no control over the aggregate value of products eventually produced, Judge Seymour noted that the regulations do not distinguish or make exception for those situations.[80] She also stated that the majority's interpretation of the regulation made subsections (b) and (c) redundant.[81] Judge Seymour found further support for her position in the Indian Mineral Leasing Act.[82] She noted that "the purpose of the Indian Mineral Leasing Act is to ensure that Indian tribes receive the *maximum* benefit from mineral deposits on their lands."[83]

Prior to the Tenth Circuit's decision in *Jicarilla v. Supron*, both the Supreme Court and the Tenth Circuit addressed the issue of whether the Secretary owes a fiduciary duty to the Indians. Contrary to the result reached in *Jicarilla v. Supron*, both courts found that such a duty exists.

In *United States v. Mitchell*,[84] (*Mitchell* II) the Supreme Court recently addressed the Secretary's fiduciary duty to the Indians. That opinion gave three factors which determine the extent of the Secretary's duty: (1) the pervasiveness of the Secretary's role in the area in question, (2) the extent of the regulations involved, and (3) the intent of Congress.[85] These three factors mandated the imposition of a fiduciary duty upon the Secretary in administering timber sales on Indian lands. In the Indian Mineral Leasing Act, Congress delegated to the Secretary the administration of oil and gas leasing on Indian lands.[86] The oil and gas leasing regulations in *Jicarilla v. Supron* were as comprehensive and pervasive as the timber management regulations in *Mitchell* II.[87]

The Court in *Mitchell* II distinguished *United States v. Mitchell*,[88] (*Mitchell* I) which held that the Secretary owes a duty of only limited trust to the Indians. The Court stated:

77. *Id.* at 1559.
78. *Id.*
79. *Id.* at 1566 (Seymour, J., dissenting).
80. *Id.* at 1568.
81. *Id.*
82. Indian Mineral Leasing Act of May 11, 1938, ch. 198, 52 Stat. 348 (1938).
83. 728 F.2d at 1568 (Seymour, J., dissenting) (emphasis in original).
84. 103 S. Ct. 2961 (1983).
85. *Id.* at 2969-72.
86. *See* 25 U.S.C. § 392 (1982).
87. *Compare* 25 C.F.R. § 163 (1984) (general forest regulations of the BIA) *with* 25 C.F.R. § 211 (1984) (leasing of tribal lands for mining).
88. 445 U.S. 535 (1980).

> In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.[89]

Given the three *Mitchell* II factors, the similarity between the timber sales regulations and the oil and gas leasing regulations should require the Tenth Circuit to impose a fiduciary duty upon the Secretary in his administration of oil and gas leasing equal to the duty imposed upon him in his sales of Indian timber.

In 1982, the Tenth Circuit considered the nature of the obligation placed on the Secretary by Congress in administering oil and gas leasing on Indian lands. In *Kenai Oil and Gas, Inc. v. Department of Interior*,[90] the Tenth Circuit stated that the Secretary has a fiduciary duty as trustee of Indian lands. Reviewing the same statute and regulations that were involved in *Jicarilla v. Supron*, the Tenth Circuit in *Kenai* stated that "[a]s 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."[91] Although *Kenai* invoked the fiduciary standard to justify the Secretary's discretionary action, the fiduciary doctrine should apply to compel the Secretary to act in the best interests of Indians. The Tenth Circuit in *Jicarilla v. Supron* made no attempt to distinguish its earlier decision in *Kenai* because the court found it unnecessary to determine the fiduciary issue. Given the clear language of *Kenai*, however, the court's holding in *Jicarilla v. Supron* is untenable.

Another factor militates strongly in favor of the court reversing itself on rehearing. The majority quoted a provision in the lease which purported to allow the Secretary discretion to determine royalties.[92] The court's reliance upon the lease was unwarranted, given the plain language of the regulations and the Secretary's fiduciary duty.

On rehearing, the Tenth Circuit should follow both *Mitchell* II and *Kenai* and impose a fiduciary duty on the Secretary in administration of oil and gas leasing on Indian lands. After finding such a duty, the Tenth Circuit should require dual accounting, not only in those circumstances where the production company owns the refinery, but also in those circumstances where the production company sells at the wellhead. Only in this way can the court give full effect to the Indian Mineral Leasing Act.

2. Effect of State Gas Price Control Acts on Indian Royalties

In *Jicarilla v. Supron*, the Tenth Circuit also reversed the district

89. 103 S. Ct. at 2972.
90. 671 F.2d 383 (10th Cir. 1982).
91. *Id.* at 386 (citing Gray v. Johnson, 395 F.2d 533, 536 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968)).
92. 728 F.2d at 1559.

court's finding that the New Mexico Natural Gas Pricing Act[93] (NMNGPA) did not place a ceiling on the value of natural gas produced on Indian lands for the purpose of determining the Indians' royalties.[94] The Tenth Circuit held that the NMNGPA does apply to gas produced on Indian lands and can therefore limit Indian royalties.[95] Judge Seymour dissented, and found that federal law preempts the NMNGPA to the extent the NMNGPA attempts to limit Indian royalties.[96]

The resolution of conflicts among federal, state and Indian governments depends on the specific interests at stake of each party.[97] The Tenth Circuit found *Moe v. Salish and Kootenai Tribes*[98] and *Washington v. Confederated Tribes of Colville Indian Reservation*[99] determinative of the preemption issue in *Jicarilla v. Supron*. In both of these cases the Indians operated retail cigarette stores which they claimed were exempt from state taxes because of their sovereign immunity. The resulting lower prices induced non-Indians to travel to the reservations to make their purchases, to the detriment of state tax revenues. In both cases, the Supreme Court found that the states' interest in uniform taxation outweighed the Indians' interest in encouraging business on their reservations at state expense.[100]

The court's reliance on *Moe* and *Confederated Tribes*, however, was misplaced. The direct frustration of the state's interests in these two cases was not present in *Jicarilla v. Supron*. In *Jicarilla v. Supron*, New Mexico admitted that the royalty received by the Indians would not affect its consumers' cost for natural gas.[101] New Mexico therefore lacked a significant interest in the Indian royalty issue, and the *Moe* and *Confederated Tribes* balancing test should have weighed in favor of the Indians.

In *White Mountain Apache Tribe v. Bracker*,[102] the Supreme Court was faced with circumstances very similar to the circumstances in *Jicarilla v. Supron*. In *White Mountain*, the Indians contracted with non-Indians to cut and transport timber within the Indian reservation. The Indians derived substantial revenues from the timber harvest. Arizona attempted to assess the non-Indian enterprise with a motor carrier license tax.[103] The Indians argued that the taxes unlawfully infringed upon tribal self-government. The Supreme Court found three reasons why federal law preempted the state tax.

First, comprehensive federal regulations governed Indian timber

93. N.M. STAT. ANN. §§ 62-7-1 to 10 (1978) (repealed 1984).
94. 728 F.2d at 1561.
95. *Id.* at 1561-62.
96. *Id.* at 1569-72 (Seymour, J., dissenting) (citing White Mountain Apache v. Bracker, 448 U.S. 136 (1980)).
97. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).
98. 425 U.S. 463 (1976).
99. 447 U.S. 134 (1980).
100. *See Confederated Tribes*, 447 U.S. at 1670-67; *Salish and Kootenai Tribes*, 425 U.S. at 481-83.
101. 728 F.2d at 1569 (Seymour, J., dissenting).
102. 448 U.S. 136 (1980).
103. *Id.* at 138-41.

harvesting. The Court found the regulatory scheme "so pervasive as to preclude the additional burdens sought to be imposed."[104] The regulation of oil and gas leasing on Indian lands, at issue in *Jicarilla v. Supron*, was similarly comprehensive.[105] Second, the *White Mountain* Court discussed the general federal policy of encouraging tribes to achieve economic self-sufficiency. The taxes diminished tribal revenues and thereby thwarted this policy.[106] In the same manner, the price ceiling of the NMNGPA diminished the Jicarilla's royalty revenues.[107] Third, the Court found further support for preemption in finding that the Indians received no benefit from the state tax.[108] In *Jicarilla v. Supron*, there was no evidence that the Indians received any benefit from the NMNGPA.

The Tenth Circuit, on rehearing, should follow the principles in *White Mountain* and find the the NMNGPA does not limit the value of natural gas for the purpose of determining Indian royalties. This result is not without practical implications. Production might become unprofitable by limiting the price at which gas can be sold under state price control acts, while simultaneously allowing royalties to be calculated without the restraints of state price control acts. This effect could conceivably reduce oil and gas leasing operations on Indian lands and reduce total royalties to the Indians, thereby effectively thwarting the congressional objective of promoting Indian self-sufficiency.[109] Nevertheless, given the absence of legislative directives to the contrary, the Supreme Court's reasoning in *White Mountain* should compel a finding that state gas price control acts are preempted by federal law to the extent they purport to limit Indian royalties.

C. *Strict Statutory Compliance*

In *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.*,[110] the Tenth Circuit held that Mountain Bell did not acquire a right-of-way from the Pueblo Indians in 1928 for telephone and telegraph lines. The Tenth Circuit so ruled despite the following facts: (1) in 1928, the Pueblo granted Mountain Bell a right-of-way; (2) the Secretary of the Interior approved the grant; and (3) Mountain Bell was dismissed from a pending quiet title action by a court relying on these very facts.[111]

For many years Congress has considered itself guardian of the Indian tribes of this country.[112] As early as 1834, Congress expressed this view in the Nonintercourse Act[113] which prevented alienation of Indian

104. *Id.* at 149.
105. *See* 30 C.F.R. Part 221 (1982).
106. 448 U.S. at 148-50.
107. *See supra* notes 82-83 and accompanying text for a discussion of Congress' intent to maximize the Indians' income from mineral deposits.
108. 448 U.S. at 150-51.
109. 728 F.2d at 1569 (Seymour, J., dissenting).
110. 734 F.2d 1402 (10th Cir.), *cert. granted*, 105 S. Ct. 242 (1984).
111. *Id.* at 1403-04.
112. *See generally* Solem v. Bartlett, 104 S. Ct. 1161 (1984).
113. Nonintercourse Act of 1834, ch. 161, 4 Stat. 729 (codified as amended in scattered sections of 26 U.S.C.).

lands without Congress' express approval. Parts of this Act were unclear, however, and it was held not to apply to the Pueblo by the Supreme Court in *United States v. Joseph*.[114]

In the New Mexico Enabling Act,[115] Congress, in 1910, retained jurisdiction and control over the Pueblo's lands.[116] In order to clarify the status of Pueblo lands, Congress passed the Pueblo Lands Act in 1924.[117] In 1927, the United States filed a quiet title action pursuant to the Pueblo Lands Act[118] to determine the status of the lands claimed by the Pueblos, including the right-of-way involved in the present case.[119] Mountain Bell was named a defendant in that suit.

In an attempt to obtain an easement to construct, maintain, and operate a telephone and telegraph line, Mountain Bell entered into a right-of-way agreement with the Pueblos. Although the Secretary of the Interior approved this agreement, it was not approved by Congress as required by section 17 of the Pueblo Lands Act.[120] Nevertheless, on the basis of the right-of-way agreement, Mountain Bell was dismissed from the 1928 quiet title action.[121]

In 1980, the Pueblo filed an action seeking damages for the alleged trespass of Mountain Bell's telephone and telegraph lines. Relying on the 1928 right-of-way agreement, Mountain Bell sought partial summary judgment on the issue of the alleged trespass occurring since 1928.[122] The district court denied this motion and entered partial summary judgment against Mountain Bell on the basis of the failure to comply with the Pueblo Lands Act.[123]

The Tenth Circuit affirmed the district court, finding that section 17 of the Pueblo Lands Act clearly required the approval of both Congress and the Secretary of the Interior to alienate Pueblo lands.[124] The 1928 right-of-way agreement was not ratified by Congress and therefore did

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114. 94 U.S. 614 (1876). The Supreme Court in 1876 found that the Pueblos were a civilized, Christian, agrarian society, wholly unlike the nomadic "savages" sought to be protected by the 1834 Act.

115. New Mexico Enabling Act of 1910, ch. 310 § 2, 36 Stat. 557, 558-59.

116. This provision withstood a constitutional attack in United States v. Sandoval, 231 U.S. 28 (1913), which distinguished *Joseph*.

117. Pueblo Lands Act of 1924, ch. 331 § 2, 43 Stat. 636.

118. *Id.*

119. The quiet title action, filed in the Federal District Court for the District of New Mexico, was entitled United States and Guardian of the Pueblo of Santa Ana v. Brown, No. 1814, Equity (D.N.M. 1928).

120. The Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress, and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*

Pueblo Lands Act of 1924, ch. 331 § 17, 43 Stat. 636, 641-42 (emphasis added).

121. *Pueblo of Santa Ana*, 734 F.2d at 1404.

122. *Id.*

123. *Id. See also supra* note 120 and accompanying text.

124. 734 F.2d at 1406.

not result in a valid right-of-way.[125]

Mountain Bell also asserted that because of its dismissal from the 1928 quiet title action, the present action was barred by the doctrines of res judicata and collateral estoppel. The Tenth Circuit dismissed this argument because it found that the 1928 dismissal was not a final judgment as required by the doctrines of res judicata and collateral estoppel.[126] The court gave several reasons for this finding. First, the 1928 order dismissing Mountain Bell did not specify whether the dismissal was with or without prejudice. As a matter of law, the court found the dismissal to be without prejudice.[127] Second, in dismissing Mountain Bell, the court in 1928 did not pass on the merits of the agreement. Quoting *National Life & Accident Insurance Co. v. Parkinson*,[128] the court stated that "[c]ourts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."[129] In *Pueblo of Santa Ana*, the Tenth Circuit found that the failure of Mountain Bell to comply with section 17 of the Pueblo Lands Act was not before the court in 1928 and, therefore, did not result in a final judgment for purposes of applying res judicata.[130]

The Tenth Circuit's decision in *Pueblo of Santa Ana* comports with the Supreme Court's decisions regarding alienation of Indian lands.[131] Purported alienation of property interests, like the right-of-way in this case, must strictly comply with the procedures set forth by statute.

D. *Indian Sovereign Immunity Circumscribed by F.R.C.P. 19—Indispensable Parties*

In *Lear Petroleum Corp. v. Wilson*,[132] the Tenth Circuit considered whether Rule 19(b) of the Federal Rules of Civil Procedure, which requires dismissal of any action in which all indispensable parties are not joined, precluded consideration of an interpleader action when some potential parties in interest are Indians.[133]

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125. *Id.*
126. *Id.* at 1407.
127. *Id. See also* Ex Parte Skinner and Eddy Corp., 265 U.S. 86 (1923).
128. 136 F.2d 506 (10th Cir. 1943).
129. 734 F.2d at 1407 (quoting *Parkinson*, 136 F.2d at 509).
130. 734 F.2d at 1407.
131. *See* Solem v. Bartlett, 104 S. Ct. 1161 (1984).
132. 730 F.2d 1363 (10th Cir. 1984).
133. FED. R. CIV. P. 19 states:

> (a) **Persons to be Joined if Feasible.** A person who is *subject to service of process* and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(emphasis added).

> . . .
>
> (b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall

The Lear Corporation held oil and gas leases on lands bordering the Arkansas River in LeFlore County, Oklahoma. Lessors of these lands included the Cherokee, Choctaw, and Chickasaw Indian nations, as well as Wilson and the non-Indian defendants named in the complaint.[134] Due to the movement of the bed of the Arkansas River through erosion and accretion, Lear was uncertain as to who was entitled to the royalties accrued from oil and gas production. To resolve the uncertainty, Lear brought an interpleader action.[135] At trial, no evidence was presented of any attempt to join the Indians, yet it was admitted that the Indians had received royalties prior to the suit.[136] The District Court for the Eastern District of Oklahoma dismissed the action sua sponte, for non-joinder, finding that the Indian nations were indispensable parties.[137]

The Tenth Circuit reversed and remanded, holding that the lower court erred in dismissing the action.[138] The court reasoned that the district court did not sufficiently consider whether the parties would be left without any remedy, and it concluded that "[a] judgment can be entered which will be adequate under rule 19(b)."[139]

Judge Doyle, dissenting, would have affirmed the district court. Judge Doyle reasoned that since the Indians gave Lear a lease for the land, the Indians obviously believe they have a right to it.[140] Furthermore, Judge Doyle found it "impossible" to understand how the lower court could determine royalty rights without first determining ownership.[141] Although he perceived the need to weigh Lear's need for a remedy against the Indian's sovereign immunity, Judge Doyle refused to tip the scale in favor of Lear. He concluded that the implicit result of the majority opinion is to give Lear full and complete title to the land.[142]

While Rule 19(b) has often been applied to bar suits involving Indian sovereign immunity,[143] the holding in *Lear* reaffirms the exception

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determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

134. 730 F.2d at 1364.

135. 28 U.S.C. § 1335 (1982).

136. 730 F.2d at 1364.

137. *Id. See also* McShon v. Sherrill, 283 F.2d 462 (9th Cir. 1960), which ordered the dismissal of a quiet title action where there was evidence that possible claimants were not joined.

138. 730 F.2d at 1364-65.

139. *Id.* at 1365 (distinguishing Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), in which the court approved a dismissal for non-joinder of an indispensable party, finding, inter alia, that there were alternative remedies available to the plaintiff).

140. 730 F.2d at 1365.

141. *Id.*

142. *Id.*

143. *See, e.g.*, Lomayaktwea v. Hathaway, 520 F.2d 1324 (9th Cir. 1975).

to this rule, which was first applied by the Tenth Circuit in *Manygoats v. Kleppe*.[144] In *Manygoats*, the Tenth Circuit stated that "[d]ismissal of the action for nonjoinder of the Tribe would produce an anamolous result" because the Indians had nothing to gain by consenting to the suit, and that by asserting their immunity they could not be adversely affected.[145] The *Manygoats* court found the controlling test under Rule 19(b) to be "whether in equity and good conscience the case can proceed in the absence of the Tribe."[146] Thus, the equities of a particular case may allow a court to proceed despite the failure to join an indispensable Indian party, so long as an appropriate remedy can be fashioned to protect the Indians' interests.[147]

The *Lear* decision allows several desirable results. First, federal courts can quiet title as between all non-Indian parties before them.[148] Second, *Lear* prevents Indians from using their sovereign immunity as a shield to avoid the merits of a controversy.[149] Third, due to the jurisdictional nature of the holding in *Lear*, Indians are not compelled to forgo their sovereign immunity and join a suit because they will not be barred by the doctrine of res judicata from contesting the result at a later date. If the Indians feel injured by such a decision, they can challenge it if and when they see fit.

E. *Indian Taxation of Natural Resources*

In *Southland Royalty Co. v. Navajo Tribe of Indians*,[150] the Navajo had enacted a tax on oil and gas production. The affected oil and gas producers brought suit, claiming that the taxes were invalid because the Navajo failed to obtain the required approval of the Secretary of the Interior. The Navajo tax, unlike the Apache tax involved in *Merrion v. Jicarilla Apache Tribe*,[151] is not expressly subject to approval by the Secretary because the Navajo have chosen not to reorganize under the Indian Reorganization Act of 1934[152] (IRA). Nevertheless, Judge Jenkins of the United States District Court for the District of Utah agreed with the

144. 558 F.2d 556 (10th Cir. 1977). The court used an equitable standard by balancing the parties' interests.

145. *Id.* at 559.

146. *Id.* (citing Wright v. First Nat'l Bank of Altus Okla., 483 F.2d 73, 75 (10th Cir. 1973)).

147. 730 F.2d at 1364.

148. *See id.*

149. *See supra* note 145 and accompanying text.

150. 715 F.2d 486 (10th Cir. 1983) [hereinafter cited as *Southland*]. Other plaintiffs included Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A. Inc., Superior Oil Company, The Union Oil Company of California, Willshire Oil Company of Texas, Anadarko Production Company and Texaco, Inc. The State of Utah, San Juan County, and various state and local individuals and organizations intervened to protect their interests. Several tribal organizations and individuals were named as defendants. The United States and several entities within the Department of the Interior were also named as defendants.

151. 455 U.S. 130 (1982). The Supreme Court in *Merrion* suggested that secretarial approval of Indian taxes would minimize the abuse of the power to tax. *Id.* at 141. *Southland* held that this safeguard may not be available.

152. 25 U.S.C. §§ 461-79 (1982). *See Merrion*, 455 U.S. at 134.

producers and found that the Secretary's approval was a necessary condition to the validity of the Navajo taxes.[153]

The Tenth Circuit, in an opinion written by Chief Judge Seth, reversed the district court, refusing to impute a requirement of secretarial approval where none is explicitly required by law.[154] In so doing, the Tenth Circuit reaffirmed its holding in *Merrion*[155] that Indian sovereignty affords Indians substantial authority in the area of taxation of natural resources. Also consistent with *Merrion*, the *Southland* decision indicates that the Tenth Circuit will defer to Congress when it comes to limiting Indian taxing authority.[156]

The district court's holding would have forced the Secretary to determine appropriate levels of Indian taxation without any statutory guidance. Apart from the legal problems, the practical problems posed by such a requirement would also justify its invalidation.[157] The Tenth Circuit therefore correctly found *Merrion's* implied requirement of secretarial approval repugnant to the federal policy of encouraging tribal independence.[158] *Merrion* indicates the Supreme Court's unwillingness to repress the Indians' ability to tax. This unwillingness is exemplified by the Tenth Circuit's holding in *Southland.* In situations such as the one addressed in *Southland*, guidelines, safeguards, or limitations on the Indians' power to tax must come from Congress, not from the courts.

II. Oil and Gas Law

A. *The Enforcement Power of FERC under the Natural Gas Act*

The Natural Gas Act[159] (NGA) delegates authority to the Federal Energy Regulatory Commission (FERC) to fix rates and schedules, and to order refunds when it finds that unjust or unreasonable rates have been charged.[160] Courts have consistently held that this power to order refunds is purely remedial and does not authorize FERC to impose penalties.[161] In *Southern Union Gas Co. v. FERC*,[162] the Tenth Circuit reversed an order by the FERC which sought to impose a penalty on

153. 715 F.2d at 488-89.

154. *Id.* at 489.

155. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

156. *See Southland*, 715 F.2d at 489.

157. It is unclear what sanctions the Secretary could impose, what tribes and lands would be subject to the Secretary's powers, or what standards the Secretary must use to determine appropriate levels of taxation. While these arguments might be applied to *Merrion* and other situations where Indian constitutions mandate secretarial review and approval, the point is that, in the absence of legislative guidelines, rate setting by the Secretary would be neither appropriate nor effective.

158. *Id.* at 490 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)), to wit: "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

159. 15 U.S.C. § 717 (1982). FERC's predecessor was the Federal Power Commission.

160. 15 U.S.C. § 717c(e) (1982).

161. *See, e.g.*, FPC v. Hope Nat'l Gas Co., 320 U.S. 591, 618 (1944).

162. 725 F.2d 99 (10th Cir. 1984).

Southern Union Gas Company (SUG). In the process, the court provided some guidelines for determining whether FERC action is a proper administrative remedy or whether it serves as a penalty.

In 1973, SUG was unable to provide sufficient quantities of natural gas to its customers in Beaver, Oklahoma. To compensate for this shortage, SUG diverted gas it had available under irrigation contracts to meet the primarily residential needs of Beaver.[163] These diversions technically violated the NGA because SUG failed to file notices of the changes with the FERC as required by statute.[164] However, due to the small amounts of gas actually diverted, no shortages were created, nor were any damages suffered by the gas suppliers' other customers.[165] FERC referred the NGA violations to the Department of Justice which decided not to institute criminal proceedings.[166] FERC then attempted to impose quasi-punitive sanctions by ordering SUG to pay its suppliers for the diverted gas under "emergency rate" schedules rather than at the lower rates under the original irrigation contracts.[167] FERC asserted that its order was a proper administrative action, authorized by section 16 of the NGA.[168] The court disagreed, finding that the Commission's order was actually a penalty and thus beyond its authority.[169]

The court in *SUG v. FERC* indicated two useful factors for determining when an assessment is within the scope of the Commission's powers. The first factor is the purpose and justification for making the assessment. The second and less definitive factor is the evidence adduced to correlate the Commission's reparative order to actual injury suffered by gas customers. The first factor relied on in *SUG v. FERC* was also considered in *Mesa Petroleum Co. v. FPC*.[170] In *Mesa*, the Fifth Circuit reviewed the purposes and goals of the NGA and offered several guidelines concerning reparative orders under the NGA. In *Mesa*, a gas producer violated the NGA by terminating its gas sales to a pipeline company without the approval of the Federal Power Commission (FPC). The FPC assessed the producer for the difference between the pre-termination contract price and the average replacement cost. The Fifth Circuit held that this assessment was not a penalty, but that it was within the broad regulatory powers of the FPC.[171] Citing *Niagra Mohawk Power Corp. v. FPC*,[172] the court in *Mesa* held that the Commission's powers are

163. *Id.* at 100.
164. *See* 15 U.S.C. § 717c(d) (1982).
165. 725 F.2d at 101.
166. *Id.* The court noted that referral to the Dept. of Justice of the FERC complaint was the only remedy contemplated under the Act. *Id.*
167. *Id.* at 101-02.
168. Section 16 provides in pertinent part:
> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

52 Stat. 830 (1938); 15 U.S.C. § 717o (1982).
169. 725 F.2d at 102-03.
170. 441 F.2d 182 (5th Cir. 1971).
171. *Id.* at 186-89.
172. 379 F.2d 153 (D.C. Cir. 1967) (quoted at 441 F.2d at 187-88).

broadest in its role of effectuating the congressional objectives of the NGA and narrower when ascertaining statutory violations.[173] In other words, federal courts afford the Commission much greater deference upon review of remedial action than upon review of action involving deterrent sanctions. Because these two functions often merge or overlap, careful characterization is crucial. In disallowing the assessment in *SUG v. FERC*, the Tenth Circuit noted that the Commission's brief characterized the assessment as a penalty.[174]

The second factor stressed by the Tenth Circuit in *SUG v. FERC* was the complete absence of evidence indicating that any injury was caused by SUG's violation of the NGA. The lack of evidence led the court to conclude that the order could only have been punitive.[175] Although the Commission was not required to prove that violations of the NGA resulted in actual injury before it could take remedial action,[176] SUG used the absence of injury to help prove the punitive nature of the Commission's assessment.[177]

In sum, although section 16 of the NGA vests broad powers in FERC, these powers do not include the imposition of civil penalties.[178] While the distinction between remedies and penalties remains somewhat ambiguous, the Tenth Circuit's decision in *SUG v. FERC* indicates that the purpose and justification for the assessment as well as the actual injury sought to be remedied are both important factors.

B. *Unit Operating Agreements—How Deep Do They Go?*

In *Morgan v. Mobil Oil Corp.*,[179] the Tenth Circuit held that a unit operating agreement[180] is not limited to certain geological formations unless the agreement expressly provides otherwise. Under the Tenth Circuit's ruling, production from any geological horizon will hold unit-

173. 379 F.2d at 159 (quoted at 441 F.2d at 187-88).

174. 725 F.2d at 102-03.

175. SUG offered testimony that the illegal diversions averaged only one-tenth of one percent of each supplier's daily volumes. There was no evidence of any resultant shortage or damage of any type. 725 F.2d at 101.

176. In *Mesa Petroleum*, 441 F.2d 182 (5th Cir. 1971), the court upheld a remedial assessment and noted that it would not require the Commission to prove an actual injury. There was "ample support" in the record that gas customers had to pay a higher price as a result of Mesa's violation. The court therefore deferred to the agency's conclusion that the remedial assessment was appropriate.

177. 725 F.2d at 101.

178. *See* 15 U.S.C. § 717o (1982).

179. 726 F.2d 1474 (10th Cir. 1984).

180. A unit operating agreement, also known as a unit agreement is "an agreement or plan of development and operation for the recovery of oil and gas made subject thereto as a single consolidated unit without regard to separate ownerships and for the allocation of costs and benefits on a basis as defined in the agreement or plan." 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 798-99 (1982). Unit operating agreements are written for two interrelated reasons. First, many states have oil and gas commissions (such as the Kansas Corporation Commission) which require unitization before the state will grant a well drilling permit. Second, unitization eliminates the necessity of drilling unnecessary and uneconomical wells, which would result in physical and economic waste. *See* 6 H. WILLIAMS AND C. MEYERS, OIL AND GAS LAW § 901 (1983).

ized leases past their primary terms.[181]

In *Morgan*, the court decided two cases which were consolidated for purposes of appeal.[182] Both cases resulted from unit operating agreements which were written in response to orders of the Kansas Corporation Commission (KCC) around 1940 regarding unitization of specific geological formations.[183] Although the operating agreements were written in response to the Commission's orders, they lacked any specific language limiting their scope to that of the Commission's orders.[184]

In *Anadarko Production Co. v. Taylor*,[185] one of the two cases consolidated for appeal, the district court found that the parties intended[186] to unitize the leases only to the horizons where the KCC required unitization.[187] Production from other horizons therefore did not hold the leases to all depths but only to the depths where production had been obtained.[188] In *Morgan v. Mobil Oil Corp.*,[189] the same district court found that the intent behind the unit operating agreements was to hold the leases as to all horizons.[190] In reconciling these two opinions, the Tenth Circuit found the leases and subsequent agreements unambiguous and limited its investigation to the four corners of the documents. The court found no indication in either case of an intent to limit the lessees' rights to any horizon, and held that the unitized areas were held under lease to all depths by production from any geological horizon within the units.[191]

The underlying problem in *Morgan* was the age-old difficulty of tailoring a legal document to fit the needs, desires and intent of the parties. The primary purpose of a unitization agreement is to facilitate produc-

181. Oil and gas leases usually contain two terms, a primary term, consisting of a fixed time period in which the lessee must try to find oil and gas, and a secondary term of an indefinite period. To propel the lease from the primary term into the secondary term requires production of oil and gas or certain legal substitutes. *See* HEMINGWAY, THE LAW OF OIL AND GAS §§ 6.1-6.9 (2d ed. 1983).

182. Morgan v. Mobil Oil Corp. 556 F. Supp. 108 (D. Kan. 1983); Anadarko Prod. Co. v. Taylor, 535 F. Supp. 103 (D. Kan 1982).

183. *See* Anadarko Prod. Co. v. Taylor, 535 F. Supp. 103, 105 (D. Kan. 1982) (order of the KCC dated March 21, 1944). The KCC sought to regulate only certain shallow geological formations. The unit operating agreements were written to comply with the regulations and made reference to the specific formations regulated by the KCC. The lessor/plaintiffs contended that the intent behind the unit operating agreements was to unitize only the specified formations, and that the deep horizons were not held under lease by production from the unitized shallow formations. *See* 726 F.2d at 1476.

184. 726 F.2d at 1476-77.

185. 535 F. Supp. 103 (D. Kan. 1982), *rev'd*, 726 F.2d 1474 (10th Cir. 1984).

186. Both *Morgan* and *Anadarko* quoted Jackson v. Farmer, 225 Kan. 732, 594 P.2d 177 (1979), for that case's statement of the law of Kansas regarding oil and gas lease interpretation.

187. 535 F. Supp. at 109-11.

188. Production from "pooled" or "unitized" acreage inures to the benefit of all interest holders in the acreage. Production in one part of the unitized acreage, therefore, legally constitutes production for all interest holders regardless of the lease from which production results. *See generally* HEMINGWAY, *supra* note 181 at § 7.13.

189. 556 F. Supp. 108 (D. Kan. 1983), *aff'd*, 726 F.2d 1474 (10th Cir. 1984).

190. *Id.* at 114.

191. 726 F.2d at 1478, 1480.

tion from an underground oil or gas reservoir.[192] Implicit in this purpose is the idea that only one particular underground reservoir is to be unitized. Otherwise, where several reservoirs overlap vertically but at different horizons, unitization might become unfeasible as to all overlapping reservoirs. Ideally, a unit agreement should be limited to a particular reservoir.[193]

Unitization agreements, however, are often not limited to a particular reservoir or geological horizon.[194] Where the agreement is not so limited, as in *Morgan*, the court's proper duty is not to rewrite the parties' agreement but to enforce what the parties have expressed in their agreement. Because favorable economics have increased interest in deep geological horizons, practitioners need to consider oil and gas rights vertically as well as horizontally when drafting documents concerning oil and gas rights to ensure that such documents truly reflect the intent of the parties.

III. REAL PROPERTY LAW

In *Kemmerer Coal Co. v. Brigham Young University*,[195] the Tenth Circuit considered whether a person has standing to assert alleged due process violations suffered by a predecessor in interest to real property. The court held that a successor does not have standing because such due process rights are personal and can only be asserted by the person allegedly suffering the deprivation.[196]

Kemmerer brought this quiet title action after being deprived of subsurface coal rights by a procedurally defective tax sale in 1936. Kemmerer's predecessor in interest and record-owner of the coal rights received no notice of the tax assessment or sale.[197] Instead, notice was mistakenly sent to the surface owner. In 1975, a tax sale purchaser who had been issued a tax deed in 1954 to the disputed underground rights gifted one half of the rights to BYU.[198]

The District Court for the District of Utah found that no notice of the tax proceedings was given to anyone in Kemmerer's chain of title to the coal rights.[199] The court held that this failure violated the titleholder's due process rights and that therefore Utah's statute of limitations had not run.[200]

Citing the Supreme Court's decision in *Saranac Land & Timber Co. v.*

192. *See* HEMINGWAY, *supra* note 181 at 395.

193. *See generally* Rogers v. Westhoma Oil Co., 291 F.2d 726 (10th Cir. 1961).

194. *But see* the Model Form of Unit Agreement, as propounded by the American Petroleum Institute, which provides: "Describe by geologic name, depth interval or otherwise." WILLIAMS & MYERS, OIL AND GAS LAW § 920.1 at 1.2 (1981).

195. 723 F.2d 54 (10th Cir. 1983).

196. *Id.* at 57.

197. *Id.*

198. *Id.* at 54-55.

199. *Id.* at 55.

200. *Id.* Kemmerer asserted the due process challenge to get around the short statute of limitations imposed by Utah to limit tax title challenges.

Roberts,[201] the Tenth Circuit noted that "a reasonable statute of limitations can constitutionally bar claims based on alleged violations of federal due process rights."[202] But the Tenth Circuit declined to base its holding on *Saranac*, and instead decided the case on the basis of standing. The alleged due process violations were not suffered by Kemmerer but by its predecessors in interest. The court found that due process rights are personal, and held that Kemmerer lacked standing to assert the deficiencies of the tax sale.[203]

Although there is substantial case law which notes the personal nature of constitutional rights in general,[204] *Kemmerer* has considerably extended this doctrine as it applies to a chain of title for real property. The *Kemmerer* court cited numerous cases supporting the proposition that constitutional rights are personal and cannot be asserted vicariously. *United States v. Haddon*[205] involved a chain of title to real property. There, the First Circuit considered a condemnation proceeding in which the record owner was allegedly denied due process for lack of notice. One significant difference between *Haddon* and *Kemmerer* is that the First Circuit expressly limited its holding in *Haddon* to those situations where the party asserting due process violations was not in privity with the party who actually suffered the violations.[206] In *Haddon*, the plaintiffs claimed an interest in the land by way of a tax sale, which occurred subsequent to the earlier condemnation proceeding.[207] Because they acquired their interest through the tax sale, the plaintiffs were not in privity with the persons who owned the land at the time of the condemnation proceeding. The court refused the plaintiffs' due process argument because the plaintiffs were not the owners at the time of the condemnation. Noting the lack of privity between the plaintiff and the owners who allegedly suffered the due process violation, the *Haddon* court qualified its holding by stating "it is questionable to what degree private claims based on defects in notice would pass to a successor in interest."[208] *Kemmerer* has answered this question within the Tenth Circuit. By the court's holding, no successor in interest, bona fide purchaser, or any other person in chain of title has standing to assert due process violations suffered by a predecessor in a chain of title.

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201. 177 U.S. 318 (1900).
202. 723 F.2d at 57.
203. *Id.*
204. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); McGowan v. Maryland, 366 U.S. 420 (1961).
205. 550 F.2d 677 (1st Cir. 1977). The *Kemmerer* court also cited Hewitt v. Glaser Land & Livestock Co., 626 P.2d 268 (Utah 1981).
206. 550 F.2d at 681.
207. *Id.* at 678.
208. *Id.* at 681.