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THE DAWNING OF A NEW ERA: TRIBAL SELF-DETERMINATION IN INDIAN MINERAL PRODUCTION

Peter F. Carroll*

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I. INTRODUCTION

With new federal legislation¹ and the evolution of federal Indian policy,² Indian tribes began to move from beneath the shadow of termination toward self-determination in the early 1970's. Perhaps no area of tribal activity progressed as much since the advent of self-determination as tribal control over Indian lands, including Indian mineral resources. In recent years, significant legislative enactments,³ administrative developments,⁴ and United States Supreme Court decisions⁵ have yielded to self-

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1. See, e.g., Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 78-80 (1968 Amendments to Public Law 280); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77.

2. *President's Message to Congress on Indian Affairs*, 6 WEEKLY COMP. PRES. DOC. 894 (July 8, 1970).

3. E.g., Indian Self-determination and Educational Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); 1982 Indian Mineral Development Act, Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101 - 2108 (1982)); Federal Oil and Gas Royalty Management Act (FOGRMA), Pub. L. No. 97-451, 96 Stat. 2447 (codified at 30 U.S.C. §§ 1701 - 1757 (1982))

4. Such developments include the establishment of the Bureau of Indian Affairs, Office of Trust Responsibility, Energy Minerals Division and the planned improvements in reporting under FOGRMA.

5. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Montana v. Blackfoot Tribe*, 471 U.S. 759 (1985).

determination in the management of tribal resources.

The federal Indian mineral development program in existence at the advent of self-determination was often criticized. One of the more complete reports critical of the program was published by the Federal Trade Commission (FTC) in October, 1975.⁶ The FTC recognized that while some tribes did not permit mineral development on their lands,⁷ dependence upon mineral resources as the chief source of tribal income was typical of the mineral producing tribes.⁸ The FTC criticized regulations and statutes that did not permit negotiated oil and gas leasing.⁹ Further, the lack of geologic and production information created a vacuum which drained productivity from the Indian mineral development program.¹⁰

The FTC report did note that the standard lease terms employed in the program "were compatible with maximum economic recovery."¹¹ The report stressed, however, the need for simplified leasing procedures,¹² increased centralization of lease and lease-sale information,¹³ and pre-sale exploration by tribes of their mineral resources.¹⁴ Another federal report, published in 1976, generally concurred with the findings of the FTC report.¹⁵ The 1976 report then divided the need for improvement into two large categories. First, the report called for changes that would enhance the tribal bargaining position when planning for mineral resource development.¹⁶ Second, the 1976 report espoused the use of non-lease development agreements and increased flexibility for tribes to negotiate mineral development agreements.¹⁷

This article reviews the origin and growth of the Indian mineral leasing program. A principal part of this article will review legislative changes and recent Court decisions which could affect the Indian mineral development program. Administrative changes which may lead to the availability of mineral information and the use of non-lease production

6. Federal Trade Comm'n., Bureau of Competition, *Staff Report on Mineral Leasing on Indian Lands* (1975).

7. *Id.* at 38-9. Tribes that did not allow mineral leasing at the time included the Santo Domingo, San Felipe, and Taos tribes.

8. *Id.* at 10.

9. *Id.* at 77.

10. *Id.* at 93-6.

11. *Id.* at 97.

12. *Id.*

13. *Id.* at 101.

14. *Id.* at 98.

15. TROSPER, AMERICAN INDIAN MINERAL AGREEMENTS: LITERATURE SEARCH AND REFORM PROPOSALS, reprinted in TASK FORCE SEVEN: PRESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMM'N., at 137-47 (July 29, 1976).

16. *Id.* at 141-44.

17. *Id.*

agreements is also discussed.

In no manner does this article pretend to be a complete review of issues within the Indian mineral development program. For example, this article does not discuss environmental protection issues,¹⁸ the problems presented by the fractionated ownership of Indian allotments,¹⁹ or issues in tribal civil jurisdiction affecting mineral production.²⁰ This article's objective is to provide an understanding of Indian mineral development as the program arrives at tribal self-determination.

II. INDIAN MINERAL LEASING BEFORE SELF-DETERMINATION

Beginning in the late 19th century, federal policy sought an ordered assimilation of Indian tribes into an agrarian lifestyle. The General Allotment Act of 1887 became the main vehicle for this federal policy.²¹ Supported by both proponents and opponents of assimilation, the Act allotted each individual Indian a portion of reservation lands to be used for agricultural purposes and opened the remaining lands to settlement.²² Amendments to that act, adopted in 1891, attempted to accommodate the increased demand for access to Indian lands.²³ The 1891 Act provided the initial statutory authorization for mineral leasing Indian lands.²⁴

The federal Indian mineral leasing program matured in a haphazard fashion in the forty years following the adoption of the 1891 Act. Some legislation affecting Indian mineral leasing affected only specific tribes and reservations.²⁵ Other legislation affected only certain classes of Indian lands.²⁶ And still other enactments affected all Indian mineral leasing in a

18. *See Davis v. Morton*, 469 F.2d 593 (9th Cir. 1972).

19. Indian allotments have fractionated through inheritance to the point that ownership interests in allotments have become confused. This confusion has, on occasion, had a negative effect on the mineral development of certain allotments.

20. For example, tribal civil jurisdiction allows, to an extent, tribal zoning, health and safety regulations. How the exercise of such jurisdiction may affect mineral operations is avoided in this paper.

21. General Allotment Act of 1887, ch. 1919, 24 Stat. 388, (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 354, 381 (1982)). This act provided the general framework for assimilation. Over the years allotment acts affecting individual reservations were enacted to govern the allotment process locally. The rights retained by landowners, tribes and settlers often depended on these acts. *See, e.g.*, Act of March 1, 1901, ch. 675, 31 Stat. 848 (An act for allotment of lands of the Cherokee Tribe) and Act of June 4, 1920, ch. 224, 41 Stat. 741 (An act for the allotment of lands of the Crow Tribe).

22. 25 U.S.C. § 331 (1982).

23. Act of February 28, 1891, ch. 383, 26 Stat. 795 (codified as amended at 25 U.S.C. § 397 (1982)).

24. 25 U.S.C. § 397.

25. *See, e.g.*, Act of March 3, 1927, ch. 299, 44 Stat. 1249 (addressing mineral development on the Osage reservation).

26. *See, e.g.*, Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. § 398(a) (1982)) (providing for the leasing of unallotted Indian lands within executive order reservations).

general manner.²⁷ During those forty years, Congress enacted four statutes which had a lasting impact on Indian mineral leasing.

The 1891 Act authorized Indian land leases for mining purposes, but applied only to Indian lands that were "bought and paid for," and either unallotted or allotted and not put to beneficial use.²⁸ Statutory authorization to lease allotted lands for the benefit of Indian allottees was established in 1909.²⁹ The 1909 Act is significant because it did not restrict the lease authority of the Secretary of the Interior to a term of years.³⁰ Instead, the Act permitted leases "for any term of years as may be deemed advisable. . . ."³¹

The next major legislation affecting mining on Indian lands was enacted in 1919. In that year, Congress authorized mining for metalliferous minerals on Indian lands.³² The 1919 was significant to the overall growth of the Indian mineral leasing program for several reasons. First the 1919 Act applied to all Indian reservations in the nine western states.³³ Second, the 1919 Act preserved the states' right to tax assets of mineral lessees.³⁴ Third, the 1919 Act was the first to guarantee a tribe income from each mining claim.³⁵ Although the Act did not authorize the state taxation of Indian mineral income, it paved the way for that authorization a few years later.

In 1924, Congress enacted legislation directed toward oil and gas leasing on Indian lands.³⁶ Several provisions of the 1924 Act would be carried forward when the Indian mineral leasing program was overhauled in 1938. The 1924 Act first required that oil and gas leasing of Indian lands occurred through public auction, which was an apparent effort to maximize lease rental income.³⁷ The Act provided indefinite lease terms to both existing leases and to those leases given effect under the act.³⁸ Finally, the 1924 Act provided for state taxation of mineral production, requiring the

27. See, e.g., Act of June 17, 1919, ch. 4, § 26, 41 Stat. 31-34 (providing generally for the leasing of unallotted Indian lands for the mining of metals).

28. 25 U.S.C. § 391.

29. Act of March 3, 1909, ch. 263, 35 Stat. 783 (codified at 25 U.S.C. § 396 (1982))

30. In an earlier act, the Secretary also had authority to lease unallotted lands without restriction to a term of years but that act only applied to the Osage reservation. See Act of June 28, 1906, ch. 357, 34 Stat. 539.

31. 25 U.S.C. § 396.

32. Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34, (codified at 25 U.S.C. § 399 (1982))

33. 25 U.S.C. § 399. The nine western states were California, Idaho, Oregon, Arizona, Nevada, Washington, Montana, Wyoming and New Mexico. Previous legislation had either been directed toward a specific class of Indian land or to certain reservations.

34. *Id.*

35. *Id.*

36. Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)).

37. 25 U.S.C. § 398.

38. *Id.*

Secretary to assess state taxes against Indian royalty income.³⁹

In 1927, Congress enacted its last major piece of legislation affecting the Indian mineral leasing program during the era of assimilation.⁴⁰ The 1927 Act permitted leasing on those reservations created by executive order under terms and conditions similar to those present in the 1924 Act.⁴¹ Unlike the earlier act, however, the 1927 Act limited state taxation to oil and gas leases.⁴²

The publication of the Merriam Report in 1928 represented the first major criticism of federal Indian policy from within the government.⁴³ While the report disclosed the failures of federal Indian policies, it did not directly address problems within the Indian mineral leasing program.⁴⁴ Thus, when Congress enacted the Indian Reorganization Act (IRA) in 1934,⁴⁵ that program's problems were not given adequate attention. The IRA extended indefinitely the existing trust responsibility and continued restriction against the alienation of Indian lands;⁴⁶ it restored all unused lands within reservation boundaries to tribal ownership;⁴⁷ and, it allowed tribes that reorganized under the act significant autonomy in the use of their lands.⁴⁸ Generally, the IRA attempted to revitalize the tribal sovereignty over Indian lands that had diminished during the assimilation era.

Difficulties existing in the Indian mineral leasing program continued. Principle among these problems was the strict federal supervision of the program,⁴⁹ the differential treatment of Indian lands according to varying classification,⁵⁰ and the state taxation of certain mineral production.⁵¹ Further, some of the rights granted to reorganized tribes conflicted with law that controlled the program.⁵² The tension between the mineral laws

39. *Id.*

40. Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. §§ 398a - 398e (1982)).

41. 25 U.S.C. § 398a.

42. *Id.* § 398c. This act also fixed the exterior boundaries of executive order reservations unless Congress acted otherwise. *See* 25 U.S.C. § 398d.

43. MERRIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928) (reprinted in 1971 by the Johnson Reprint Corp.).

44. *Id.*

45. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461 - 479 (1982)).

46. 25 U.S.C. § 462.

47. *Id.* § 463.

48. *Id.* § 476.

49. The Secretary's consent to lease has always been required. Several acts even permitted the Secretary to enter leases without tribal approval. *See* 25 U.S.C. §§ 396 and 399.

50. These legal classifications included not only allotted and unallotted classes, but executive order and treaty reservations, restricted lands and lands which were "bought and paid for."

51. For example, under the 1927 Act, states could tax only oil and gas leases but not other mineral production.

52. *See* HOUSE COMM. ON INDIAN AFFAIRS, *LEASING INDIAN LANDS FOR MINING PURPOSES*, H.

and the objectives of the IRA—along with the inconsistencies in mineral laws—lead to omnibus legislation that restructured the entire Indian mineral leasing program.

With the blessing of the Department of the Interior,⁵³ Congress enacted the Indian Mineral Leasing Act of 1938 (1938 Act).⁵⁴ The act had three primary purposes: to obtain uniformity in Indian mineral leasing laws, to bring the Indians the greatest return for their property, and to bring all leasing matters into harmony with the IRA.⁵⁵ The 1938 Act granted tribes leasing authority;⁵⁶ adopted indefinite lease term provisions;⁵⁷ required corporate lessees to post security bonds before beginning lease operations;⁵⁸ continued the requirement for competitive oil and gas leasing;⁵⁹ and, repealed all inconsistent acts or parts of acts.⁶⁰ The act did not apply retroactively leaving existing leases unchanged and in place—but it did control all Indian mineral leasing thereafter.⁶¹ The 1938 Act also required the promulgation of rules and regulations under which the program would operate.⁶² Collectively, the 1938 Act and the subsequent regulations fixed a rigid framework for mineral leasing protecting the Indian mineral interest and benefiting the Indian lessor.⁶³

III. PROGRAM ADVANCES SPAWNED BY SELF-DETERMINATION

A. *The Self-determination Policy*

When Congress adopted self-determination as a goal for Indian tribes, it made several findings and declarations important to the growth of Indian controlled mineral development. Congress recognized that federally dominated Indian services programs actually retarded the social

R. REP. NO. 1872, 75th Cong., 3rd Sess. 1 (1938). The Tribal right to lease their lands and to reject mineral leases proposed by the Secretary is not found in mineral leasing acts prior to the 1938 Act.

53. *Id.* at 3.

54. Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a - 396f (1982)).

55. H. R. REP. NO. 1872, 75th Cong., 3d Sess. 1 (1938). *See also* *Montana v. Blackfoot Tribe*, 471 U.S. 759 (1985).

56. 25 U.S.C. § 396a.

57. *Id.*

58. *Id.* § 396c.

59. *Id.* § 396b.

60. Indian Mineral Leasing Act of 1938, ch. 198, § 7, 52 Stat. 347, 348.

61. 84 I.D. 905, 908 (1977) (“[T]he clear intent of the 1938 Act was to *replace* earlier leasing statutes. . . .” (emphasis in original)).

62. 25 U.S.C. § 396d.

63. Interestingly, the regulations governing leasing of Indian lands have been more beneficial to the Indian lessor than regulations controlling mineral leasing on federal lands. For example, the rents for Indian mineral leases have generally been higher than rents on other federal leases. *Compare* 25 C.F.R. § 171.12(b) with 43 C.F.R. §§ 3101.2 - 3101.7.

progress of Indian tribes.⁶⁴ Congress found that the advancement of self-determination lie balanced on educational opportunity.⁶⁵ And the maximum participation of Indians in tribal assistance programs became a declared goal.⁶⁶ Congress recognized, however, that the achievement of that goal would require careful planning and cooperation.⁶⁷

Title I of the Self-determination Act did not create new law; it consolidated and codified existing authority to contract with Indian tribes.⁶⁸ In general terms, Title I established an affirmative duty of the Secretary to review and enter into contracts with tribes to provide services traditionally controlled by the agency.⁶⁹ Title I also authorized contracts with tribal organizations for specific purposes⁷⁰ and it allowed that such contracts be negotiated rather than let out to bid.⁷¹ Thus, while the act propagated an increased interest in tribal self-determination, it also sparked an interest in alternative methods of contracting for mineral production. The interest in tribal self-determination in itself sparked a need for greater mineral revenue.⁷²

While almost every aspect of the mineral leasing program under the 1938 Act allowed agency discretion or required the approval of the Secretary of the Interior,⁷³ this scheme of strict federal control was not unusual. Federal law had long restricted the transfer of Indian lands⁷⁴ and required approval of contracts between Indians and non-Indians.⁷⁵ Tribes that reorganized under the IRA had the opportunity to control some mineral leasing,⁷⁶ but even that opportunity had limited potential.⁷⁷ Not until the policies of self-determination were exposed by the executive

64. Indian Self-Determination and Educational Assistance Act, P.L. No. 93-638, § 2, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450 (1982)).

65. 25 U.S.C. § 450a.

66. *Id.*

67. *Id.*

68. Isreal, *The Reemergence of Tribal Nationalism*, ROCKY MTN. MIN. L. FOUND. INST. ON INDIAN LAND DEVELOPMENT IN OIL, GAS, COAL AND OTHER MINERALS, 10-15 (1976).

69. Indian Self-Determination Act, Title I, § 102, 88 Stat. 2203, 2206 (1975).

70. *Id.* at § 104, 88 Stat. at 2207.

71. *Id.* at § 106, 88 Stat. at 2210.

72. The increased participation in federal programs would not only reduce the federal domination of these programs but also reduce the federal appropriations for them. The tribes, on the other hand, would be required to take up the slack. Some tribes were already largely dependent upon mineral income to fund their social programs. In 1974, for example, over three-quarters of the Navajo budget was provided by its mineral revenues. See Federal Trade Comm'n., Bureau of Competition, *Staff Report on Mineral Leasing on Indian Lands* 10 (1975).

73. The Secretary could designate officials to approve leases in his place. See 25 U.S.C. § 396e.

74. 25 U.S.C. § 177.

75. *Id.* § 81.

76. *Id.* § 477.

77. Such leases were limited to ten year terms under the IRA. See 25 U.S.C. § 477. Secretarial approval of these leases was not required unless also required within the tribal charter or constitution.

branch,⁷⁸ and only after congressional action adopted these policies as law,⁷⁹ did tribal control of Indian mineral production become practical.

B. *Adoption of the Mineral Development Contract*

For smaller tribes, the federally dominated Indian mineral leasing program provided safe and satisfactory results in mineral production.⁸⁰ Tribes with a greater interest in mineral development, however, sought out the control and flexibility needed to make sound mineral management decisions. The manner in which the Self-determination Act revitalized the tribal power to contract and the fact that negotiated leases were not favored, led those larger tribes to mineral production agreements instead of leases. In short time, the types of mineral production contracts in use overseas were adopted for use by several tribes.⁸¹

Generally, there are five types of contractual agreement that could be useful in the production of Indian minerals: these are the joint venture, the production sharing contract, the management contract, the service contract and the limited partnership. There are two varieties of joint ventures. One establishes a distinct corporation whose profits are distributed proportionately according to share holdings. The second avoids the creation of a distinct corporation profits.⁸² The production sharing contract is similar to the joint venture except that the product itself is shared on a percentage basis.⁸³ Both the joint venture and the production sharing contract place the producer at risk since the cost of production is not recovered unless production occurs.

Service and management contracts hold the greatest potential benefit for tribes involved in mineral production. Service contracts are agreements where independent operators are contracted to drill and operate wells for a fee.⁸⁴ In service contract situations the tribe retains ownership of the production equipment and the mineral resource which allows maximum

78. *President's Message to Congress on Indian Affairs*, *supra* note 2.

79. Indian Self-Determination and Educational Assistance Act, *supra* note 3.

80. Ziontz, *Indian Self-determination: New Patterns for Mineral Development*, ROCKY MTN. MIN. L. FOUND. INST. ON INDIAN LAND DEVELOPMENT IN OIL, GAS, COAL AND OTHER MINERALS, 13-15 (1976).

81. *Id.* at 13-16. Mr. Ziontz cautioned that two distinct differences between developing nations and Indian tribes had to be reckoned with. First, mineral reserves in developing nations far exceeded the known reserves on any reservation. Second, tribes were not generally interested in the rapid industrialization that made such agreements effective overseas.

82. Lipton, *The Pros and Cons of Petroleum Agreements*, 6 AM. INDIAN JOURNAL 2 (February 1980).

83. *Id.* at 9.

84. Comment, *Indian Tribes: Self-Determination Through the Effective Management of Natural Resources*, 17 TULSA L.J. 507, 524 n. 107 (1982).

economic recovery from development.⁸⁵ Under management contract, tribes contract with management companies to provide technical services needed in planning, operating and evaluating mineral development operations.⁸⁶ Such contract may be written to provide for tribal-member training programs with a goal toward complete tribal control of mineral development.⁸⁷ Both the management contract and the service contract, however, place the risk of production on the tribes—a risk that may not be acceptable to most tribes.⁸⁸

The limited partnership also holds potential for the development of tribal minerals. Under this arrangement, the tribe contributes its mineral resource and investors contribute the capital needed to begin mineral production.⁸⁹ Such an arrangement gives the tribe complete control of the profits without the financial risk and is, therefore, favored by some. The limited partnership arrangement, however, presupposes that the tribe is capable of monitoring and managing the development project.⁹⁰

Several aspects of contract agreements between Indians and non-Indians must be reviewed and understood. All contracts between Indians and non-Indians affecting an interest in Indian lands must be approved by the Secretary.⁹¹ A tribe's interest in its land cannot be transferred out of tribal ownership without specific legislative authorization.⁹² And, as sovereigns, tribes are restricted from contractually limiting their sovereign authority.⁹³ Ultimately, within these restraints, contracts between tribes, *qua* tribes, and mineral producers will depend on three factors: the degree of tribal control sought, the capital contribution required by the tribe, and the tax consequences of such agreements.⁹⁴

The first mineral development contract approved by the Secretary under the Self-determination Act was the Blackfeet-Damson agreement.⁹⁵ That agreement—a joint venture—provided Damson with certain tax benefits and the tribe with a greater potential economic return through a net-profit arrangement.⁹⁶ The Blackfeet-Damson agreement represented the beginning of tribal interest in developing mineral resources through contract agreements. The Blackfeet-Damson agreement also became the

85. *Id.*

86. Ziontz, *supra* note 80, at 13-14.

87. *Id.*

88. Lipton, *supra* note 82, at 10.

89. *See* Comment, *supra* note 84.

90. *Id.*

91. 25 U.S.C. § 81.

92. *Id.* § 177.

93. Ziontz, *supra* note 80, at 13-34.

94. Isreal, *supra* note 68, at 10-32.

95. Ziontz, *supra* note 80, at 13-16.

96. Lipton, *supra* note 82, at 9.

model for future development agreements.⁹⁷ In approving this agreement, the Secretary tacitly approved the use of the contract agreements in Indian mineral development.

The Department gradually established regulations governing the use of mineral development contracts and to provide the information necessary for the negotiation of such contracts.⁹⁸ In 1976, the Bureau of Indian Affairs, Office of Trust Responsibility, established the Division of Energy Minerals to provide tribes with the best information available on Indian mineral resources.⁹⁹ The Department also proposed regulations which recognized "the authority of Indian mineral owners to negotiate with the minerals industry to develop their natural resources, and to enter into any lawful contractual arrangement which [furthered that goal]. . . ."¹⁰⁰ The proposed regulations required detailed plans where the contract involved both exploration and development,¹⁰¹ established the approval would only occur where a fair and reasonable enumeration was provided to the mineral owner, and required that the benefits under a contract outweighed any adverse cultural or environmental consequences.¹⁰² While these regulations were not quickly adopted, it's likely that these factors were considered when contracts for mineral development were submitted for approval.¹⁰³

Even without approval of proposed regulations, some tribes negotiated and entered into non-lease agreements for the production of their mineral resources.¹⁰⁴ Tribes also initiated service contracts to help assess their potential for mineral production and for the establishment of tribal

97. The Blackfoot-Damson agreement specified the nature of the relationship, the financial interest of the parties, management and control provisions, contractor obligations, production rights, taxation, duration and termination, resolution of disputes, defined the tribal interest in production, and reserved the tribe's right to contract with others.

98. See 42 Fed. Reg. 18083 (to be codified at 25 C.F.R. § 171 (proposed April 5, 1977)).

99. The Division of Energy and Minerals immediately embarked on a three-phased assessment of tribal mineral resources. The first phase included a literary search and records review to determine what is known of the mineral resource within Indian reservations. The second phase includes a review of technical information and on-site inspections (regional exploration) to develop proprietary information on the tribe's mineral resource potential. The third phase includes site specific studies and drilling with the intent to develop a mining plan; these activities occur only at the request of the tribe. At present, phase one of the mineral assessment is nearly complete and this information is available to tribal mineral managers. Interview with Steve Manydeeds, Bureau of Indian Affairs, Division of Energy and Minerals, Golden, Colorado (March 2, 1987).

100. 42 Fed. Reg. 18083 (April 5, 1977).

101. *Id.* at 18089 (to be codified at 25 C.F.R. § 177.5 (proposed April 5, 1977)).

102. *Id.* at 18086 and 18095 (to be codified at 25 C.F.R. §§ 171.5 and 182.13 (proposed April 5, 1977)).

103. By 1980 the majority of the proposed regulations still had not been adopted and the Department was still soliciting comments on them. See 45 Fed. Reg. 24200 (April 9, 1980).

104. *Indian Mineral Development: Hearings Before the Select Committee on Indian Affairs*, United States Senate, 97th Cong., 2d Sess. 169, Appendix (1982).

mineral offices.¹⁰⁵ In the short time after the enactment of the Self-determination Act, Indian mineral development had expanded far beyond the restrictive system established under the 1938 Act.

Serious and disabling questions were soon raised about the validity of such contracts. For example, while the mineral development contracts were effected pursuant to Section 81, that section permitted only the extraction of the mineral—not its sale.¹⁰⁶ Also, since Section 81 did not apply to leases, the limitations imposed by the 1938 Act remained intact.¹⁰⁷ Finally, the Department declined to give the term “lease” a meaning broad enough to include contractual transaction.¹⁰⁸ Although pressure increased to approve non-lease agreements, faced with these issues, the Department became reluctant to take further action without specific authorization.¹⁰⁹ This reluctance confirmed what some observers had already assumed, corrective legislation was needed to resolve these problems.

Following a series of public hearings on the subject, Congress enacted the Indian Mineral Development Act of 1982 (IMDA).¹¹⁰ The objective of the IMDA, broadly stated, was to further the goals of self-determination policies and to maximize the financial return for valuable tribal mineral resources.¹¹¹ The enactment specifically authorized any Indian tribe or Indian to enter into mineral development agreements—subject to the Secretary’s approval.¹¹² The Act established an affirmative duty to approve or to disapprove such contracts within a specified time,¹¹³ provided for review and approval of agreements previously engaged,¹¹⁴ and protected the United States from any liability arising from the employment of such contracts.¹¹⁵ The IMDA also preserved the 1938 Act¹¹⁶ and the provisions

105. *Indian Economic Development Programs: Oversight Hearings Before the Committee on the Interior and Insular Affairs*, House of Representatives, 96th Cong., 1st Sess. 97 (1979) (material submitted during testimony of Edward Gabriel, Executive Director of CERT: “Technical Assistance Projects Undertaken by CERT for Individual Tribes”).

106. *See Hearings, supra* note 104, at 2 (comments of Senator Melcher).

107. *Id.* at 76-77. (prepared statement of Ken Smith, Asst. Sec. for Indian Affairs, Dept. of Interior).

108. *Id.* at 72 (statement by Solicitor Vollman).

109. *Id.* at 77.

110. Indian Mineral Development Act of 1982, Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101 - 2119 (1982)).

111. *See Hearings, supra* note 104.

112. 25 U.S.C. § 2102. A mineral agreement is “any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement, or other modification of such agreement providing for the exploration for, extraction, processing or other development of oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources. . . .” *Id.*

113. *Id.* § 2103.

114. *Id.* § 2104.

115. *Id.* § 2103(e).

116. *Id.* § 2105.

of the IRA related to land use by reorganized tribes.¹¹⁷ The IMDA assured tribes of the flexibility desired for the effective and beneficial management of tribal resources.

Regulations proposed to govern the negotiation of mineral development agreements under the IMDA were initially published in 1983.¹¹⁸ Among many other things the proposals restated the authority to enter into mineral agreements,¹¹⁹ established a fourteen point review of negotiations of such agreements,¹²⁰ adopted standards similar to those in contract regulations for the approval of such agreements,¹²¹ and protected Indian interests by classifying departmental findings as propriety.¹²² Tribes and tribal organizations have communicated closely with the Department of the Interior as these regulations were being developed. These regulations were not finalized and adopted until early this year.

Meanwhile, non-lease mineral agreements have been and continue to be presented to the Department for approval. Some agreements have been rejected.¹²³ Most, however, have been approved following minor modifications.¹²⁴

C. *Additional Acts Aiding the Indian Mineral Development Program*

Two other federal laws, enacted in 1982, will have an impact on the manner in which tribes approach the development of their mineral resources. The Indian Tax Status Act of 1982,¹²⁵ affords tribes essentially the same tax status enjoyed by the states.¹²⁶ Under this act, a tribal

117. *Id.* § 2108.

118. 48 Fed. Reg. 31979, 25 C.F.R. § 211 (proposed July 12, 1983). Interestingly, these regulations do not reflect a competitive posture which was intended by Congress. *Compare with* S. REP. No. 472, *Permitting Indian Tribes to Enter into Certain Agreements for the Disposition of Tribal Resources and Other Purposes*, 97th Cong., 2d Sess. 6 (1982).

119. 48 Fed. Reg. 31979 (to be codified at 25 C.F.R. § 211.4 (proposed July 12, 1983)).

120. 48 Fed. Reg. 31980 (to be codified at 25 C.F.R. § 211.5 (proposed July 12, 1983)).

121. 48 Fed. Reg. 31980 (to be codified at 25 C.F.R. § 211.6 (proposed July 12, 1983)); *compare* 25 C.F.R. § 171.5 (proposed April 5, 1977).

122. 48 Fed. Reg. 31980 (to be codified at 25 C.F.R. § 211.6 (proposed July 12, 1983)).

123. Interview with Mervyn Tano, attorney, Consolidated Energy Resource Tribes, Denver, Colorado (March 2, 1987).

124. *Id.*

125. Indian Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608 (1982) (codified at 26 U.S.C. § 7871). As enacted this Act had a duration of two years but the provision was enacted permanently in 1984. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, Title X, § 1065, 98 Stat. 494, 1048.

126. This paper only skims the potential attraction for investors through the use of tax exempt bonds. The Act also has far reaching benefits for the federal taxpayer. These benefits include possible deductions for tribal taxes, for donations to tribal election campaigns, for charitable contributions and gifts to tribal governments and for various business related assessments. *See* P.H. Taxes 41902 (January 8, 1987).

government (or subdivision thereof) may issue tax-exempt bonds where "substantially all of the proceeds . . . are to be used in the exercise of any essential governmental function."¹²⁷ Here, the phrase "substantially all" is afforded its tradition meaning¹²⁸ and "essential governmental function" is broadly defined by the regulations.¹²⁹

Of course, certain restrictions do apply. The act specifically prohibits tax-exemptions for private activity bonds¹³⁰ and the general exceptions to tax-exempt status within the code may also apply.¹³¹ Notwithstanding these restrictions, careful planning may allow tribes to issue tax-exempt bonds to fund tribal mineral offices or even to finance tribally owned mineral projects.¹³² Ultimately, the usefulness of bond financing will depend on the respective tribe's mineral potential, a tribe's production capabilities and the risk inherent in the bonded project. The potential for raising capital through bond issues to fund mineral development projects cannot be ignored.

The second enactment affecting the future of Indian mineral development is the Federal Oil and Gas Royalty Management Act (FOGRMA).¹³³ Prior to this enactment, federal royalty accounting was in disarray and suggestions of large scale thefts from federal oil and gas leases were prominent.¹³⁴ FOGRMA required the Department of the Interior to establish a comprehensive royalty accounting program that included maintenance of records,¹³⁵ prompt disbursement of royalties,¹³⁶ an explanation for each disbursement,¹³⁷ on-site inspections,¹³⁸ penalties for late payments,¹³⁹ and civil and criminal penalties for violations related to production and royalty accounting.¹⁴⁰ In 1985, more than two years after its enactment, many of the provisions in FOGRMA had not been

127. 26 U.S.C. § 7871(c)(1).

128. Temp. Treas. Reg. § 305.7871-1(c) (1987).

129. *Id.* § 305.7871-1(d).

130. 26 U.S.C. § 7871(c)(2).

131. *Id.* § 103(b). This code section excepts from tax-exempt status arbitrage bonds and requires such bonds be registered to gain tax-exempt status. *Id.* § 149.

132. Apparently, even a joint venture can be funded in this manner provided the venture is principally owned by the tribe, and ninety percent of the proceeds of the bond issue are used in the operations for that venture.

133. Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (codified at 30 U.S.C. § 1701 - 1757 (1984)).

134. See generally General Accounting Office, *Oil and Gas Royalty Collections—Longstanding Problems Costing Millions* (October 29, 1981); LINOWES COMMISSION ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES (1982).

135. 30 U.S.C. § 1713.

136. *Id.* § 1714.

137. *Id.* § 1715.

138. *Id.* § 1718.

139. *Id.* § 1721.

140. *Id.* §§ 1719 and 1720.

implemented.¹⁴¹

The federal agency charged with the royalty management program is the Minerals Management Service. Given the monumental task of repairing the accounting program, it not surprising that the program is not yet fully operational.¹⁴² The Minerals Management Service has, however, adopted an action plan which would eventually make the accounting program assessable to all tribes.¹⁴³ Once assessable, the program will undoubtedly undergo years of fine tuning. The fully operational system, however, will provide valuable and much needed information to Indian tribes and the individual Indian allottee.¹⁴⁴ Such information will become a valuable tool for the evaluation and projection of Indian mineral development, permitting managers to make adjustments as accordingly.¹⁴⁵

IV. STATE AND TRIBAL TAXATION OF MINERAL PRODUCTION

A. *The Historical Right of Taxation*

Early in our history the United States Supreme Court was called upon to determine the status of tribes within our borders. The resulting decisions in *Johnson v. McIntosh*,¹⁴⁶ and the *Cherokee* cases¹⁴⁷ reduced the Indian tribal status to that of a domestic dependent nation¹⁴⁸ while preserving for the tribes the sovereign right to govern its own people. A tribe, as a conquered nation, was restricted from transferring rights in its lands or in making treaties with foreign nations.¹⁴⁹ The tribal sovereignty preserved included the right to restrict occupancy of tribal territory.¹⁵⁰ The sover-

141. COMMITTEE ON GOVERNMENT OPERATIONS, 13TH REPORT, INDIAN OIL AND GAS ROYALTY PAYMENTS: PROBLEMS PERSIST, H.R. DOC. NO. 214, 99th Cong., 1st Sess. (1985).

142. The Minerals Management Service has primary responsibility for the royalty management program but successfully meeting its task requires the cooperation of other federal agencies including the BIA and the BLM.

143. See Mineral Management Service, *Special Report: Management Action Plan for the Royalty Management Program* (1985).

144. Some question has been raised concerning the responsibility of the Service to account for royalty production and disbursement in instances where non-lease mineral contracts are employed. FOGRMA, however, included a statement regarding the enduring trust responsibility and, the Service's own action management plan recites benefits for all Indian producers. Unless the producer has contracted to conduct royalty accounting the responsibility for the task will remain with the Service.

145. "In order for any leasing program to operate with maximum efficiency, a basic assumption must be that accurate information be kept on the past performance of the program. Only by examining and analyzing past performance can future performance be more effective. . . ." See FTC Report, *supra* note 6.

146. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

147. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

148. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

149. *Id.* at 7-18.

150. *Worcester*, 31 U.S. (6 Pet.) at 561; See also COHEN, HANDBOOK OF FEDERAL INDIAN

eighty retained cannot be diminished except by federal statute or treaty, or by implication as a necessary result of their dependent status.¹⁵¹ Chief among the sovereign powers retained was the power of taxation.

The tribal right to levy taxes has historically been recognized. Administratively, at least, the earliest recognition of the tribal power of taxation is present in opinions of the United States Attorney General.¹⁵² Several federal cases also recognized the tribal right of taxation.¹⁵³ In 1934, tribal powers were reviewed by the Department of the Interior. The decision which followed that review recognized that taxation was one of the chief powers of sovereignty retained by Indian tribes.¹⁵⁴ That power "may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions."¹⁵⁵ The opinion recognized that the right "might be curtailed by express language of a treaty or statute, but otherwise remained intact."¹⁵⁶ Written in response to congressional inquiries, the opinion has further significance in that it identifies taxation as a power preserved for the tribes under Section 16 of the IRA.¹⁵⁷

B. Tribal Taxation of Mineral Production

While tribes held that right, it was not until the late 1960's that tribes instituted taxes which affected on-reservation mineral production.¹⁵⁸ In 1968, the Jicarilla Apache tribe effected a constitutional revision permitting the tribal council to impose fees and taxes against members and nonmembers doing business on the reservation.¹⁵⁹ The imposition of taxes against nonmembers required the Secretary's approval.¹⁶⁰ Soon thereafter, the tribal council enacted an oil and gas severance tax and that the tax

Law 252 (ed. 1982).

151. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

152. *See* Choctaw and Chickasaws Permit Laws, 18 Op. Att'y Gen. 34 (1884) (supporting the tribal permit law for occupation within the reservation); *Cherokee Indians—Export Tax on Hay*, 23 Op. Att'y Gen. 528 (1901) (recognizing the tribe's right to levy an export tax on hay).

153. *See* *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Maxey v. Wright*, 3 Indian Terr. 243, 54 S.W. 807 (1900).

154. *Powers of Indian Tribes*, 55 I.D. 14, 46-8 (1934).

155. *Id.* at 46.

156. *Id.* at 48.

157. *Id.* at 17. *See also* *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 544 (10th Cir. 1980).

158. The fact that tribes did not actively pursue their right to tax for several years could be attributed to many factors—no single factor being determinative. At least one commentator has noted that many tribes pursued taxation in hopes of defeating state taxes. Isreal, *supra* note 68, at 10-37. And tribes often had good reason to react in this manner. Often the majority of the mineral income was lost to the states through taxation. *See* *Crow Tribe v. Montana*, 650 F.2d 1105, 1107 (9th Cir. 1981).

159. *Merrion*, 455 U.S. at 135.

160. *Id.*

obtained approval of the Secretary in 1976.¹⁶¹ The mineral producers with current leases on the reservation sued to prevent the assessment of those taxes.¹⁶² The resulting litigation was determined by the United States Supreme Court and the Court's decision marked a turning point in the area of tribal taxation.¹⁶³

The Court's decision in *Merrion* noted several points in support of a tribe's authority to tax nonmembers doing business on a reservation. The Court recognized that the tribe's responsibility to provide protection and other governmental services supported the taxation of nonmembers benefiting from those services.¹⁶⁴ The Court firmly stated that the right arose from the tribe's standing as sovereign and not solely from the tribe's right to exclude.¹⁶⁵ Even if the right to tax was solely related to the tribal right to exclude, the Court would have upheld the tax.¹⁶⁶

In *Merrion* the petitioner's presented a second argument that the right of taxation had been preempted by legislation and federal policy.¹⁶⁷ The Court, however, stated that such a preemption must be express.¹⁶⁸ In the absence of finding an express preemption,¹⁶⁹ the Court rejected the contention that the taxes were invalid.¹⁷⁰ The petitioner's argument that the taxes were invalidated because of the negative implications of the Commerce clause was also rejected.¹⁷¹

The Jicarilla Apache tribe had reorganized under the IRA¹⁷² and, since the revised constitution, required the Secretary's approval of certain taxes, that approval was obtained. A cursory reading of the *Merrion* decision suggests that the Court would require approval of any tribal taxes affecting nonmembers within a reservation.¹⁷³ Whether a tribe which did not reorganize under the IRA could impose taxes, and whether the Secretary's approval would be required before levying such taxes, re-

161. *Id.* at 135-36.

162. *Id.* at 136.

163. *See Merrion*, 455 U.S. 130 (1982).

164. *Id.* at 139-40.

165. *Id.* at 144.

166. *Id.* at 144-48.

167. *Id.* at 149.

168. *Id.* at 150-52.

169. *Id.* at 149. The Court has recognized the need for express language in Congressional preemption of tribal sovereignty. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). In any event, the Court has consistently resolved ambiguities in favor of the Indians. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

170. *Merrion*, 455 U.S. at 152.

171. *Id.* at 152-59.

172. Following the enactment of the IRA, 181 tribes accepted its provisions and reorganized; 77 tribes rejected it. *See Comment, Tribal Self-government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

173. *Merrion*, 445 U.S. at 141, 155.

mained an open question.

In 1978, the Navajo tribal council enacted two ordinances imposing taxes that would affect mineral lessees within its reservation.¹⁷⁴ The Navajo tribe, unlike the Jicarilla tribe, did not reorganize under the IRA. Neither did its constitution require the Secretary's approval of tribal taxes.¹⁷⁵ In fact, when the tribe sought approval of its taxes, the tribe was informed that "no federal statute or regulation required the Department of the Interior to approve or to disapprove the taxes."¹⁷⁶ Before the tribe could implement its tax ordinances, however, the taxes were challenged and a federal district court permanently enjoined the enforcement of the tax ordinances.¹⁷⁷

The United States Court of Appeals for the Ninth Circuit reversed that decision,¹⁷⁸ and the United States Supreme Court affirmed that opinion.¹⁷⁹ In *Kerr McGee*, the court again recognized a tribe's sovereign right of taxation. The Court declared that the "we do not believe that [IRA] reveal[s] Congress limited the Navajo Tribal Council's authority to tax non-Indians."¹⁸⁰ The Court examined provisions of the 1938 Act and found that nothing in the act required the Secretary to approve the tribal taxes.¹⁸¹ The federal government's firm commitment to the goal of tribal self-government was recognized as adding credence to the Navajo's assertion of the power to tax.¹⁸² The Court restated that the "power to tax . . . nonmembers . . . [was] an essential attribute of self-government," and that "neither Congress nor the Navajo's have found it necessary to subject the Tribal Council's tax laws to review by the Secretary of the Interior. . . ."¹⁸³

The Court's decisions in *Merrion* and *Kerr McGee* held to traditional views and reaffirmed that tribes, as sovereigns, possessed the right to tax nonmembers within its borders. As *Merrion* indicates, the only administrative hurdles to be cleared before imposing a tax are present as a result of tribal action.¹⁸⁴ Certainly, the tribal right of taxation may be preempted by federal action but no such preemption exists.¹⁸⁵ Given the important role of

174. *Kerr McGee Corp. v. Navajo Tribe*, 471 U.S. 195-97 (1985).

175. *Id.* at 198-99.

176. *Id.* at 197.

177. *Id.*

178. *Kerr McGee Corp. v. Navajo Tribe*, 731 F.2d 597 (9th Cir. 1984).

179. *Kerr McGee*, 471 U.S. 195 (1985).

180. *Id.* at 200.

181. *Id.*

182. *Id.* at 201.

183. *Id.*

184. *Merrion*, 455 U.S. at 133-36.

185. *Id.* at 149 (citing *Washington v. Confederate Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980)).

tribal taxation in current federal policy, it is unlikely that any federal preemption will soon arise.¹⁸⁶

Today many tribes levy taxes against nonmembers that impact mineral production within their reservations. Such taxes may be placed into one of four general classes: commencement taxes, property taxes, production taxes and environmental protection taxes.¹⁸⁷ Commencement taxes are imposed by some tribes and these taxes require the payment of a tax before a mining operation may begin.¹⁸⁸ Property taxes are often assessed against real or personal property held by a business on tribal lands.¹⁸⁹ Production taxes, such as severance taxes, have been imposed by several tribes.¹⁹⁰ Environmental protection taxes, which are imposed to help fund projects to correct environmental damage caused by mining, have also been enacted by some tribes.¹⁹¹

The increased interest among tribes in taxing mineral production¹⁹² has created some discussion concerning the limitations of tribal taxing authority. In *Merrion*, the petitioner's argued, albeit unsuccessfully, that the tribe's tax violated the "negative implications" of the Commerce Clause.¹⁹³ Some commentators have read that decision to suggest that tribal taxes must pass the tests established under that clause.¹⁹⁴ The Court itself, however, has recognized that such an examination has conceptual difficulties.¹⁹⁵ It simply does not follow that tribes should be subject to the same taxing restraints as states under this clause.

The tribal right of taxation, it must be remembered, is a sovereign right which predates the United States Constitution and is not subject to its restraints.¹⁹⁶ The Indian Commerce Clause, which extends to Congress plenary authority over Indian affairs, has traditionally been interpreted as

186. From time to time, bills are introduced which would affect the Indian power to tax, but such bills are not adopted. *See, e.g.*, 133 Cong. Rec. E1600 (daily ed. April 28, 1987).

187. Neumann, *Taxation of Natural Resource Production on Tribal Lands*, 1985 TAXES 813, 816 (Nov. 1985).

188. *Id.* at 816 n. 25.

189. *Id.* at 816 n. 26. In *Kerr McGee*, the possessory tax at issue was a form of property tax.

190. *See, e.g.*, FORT PECK COMPREHENSIVE CODE OF JUSTICE, § 201 (1983); Blackfeet Tribe Council Resolution 1076 (Oct. 18, 1976). The business activities tax in *Kerr McGee* and the severance tax in *Merrion* are business activities taxes. *See* Neumann, *supra* note 187, at 817-18.

191. *See, e.g.*, APACHE TRIB. CODE, tit. 24, § 2 (1982).

192. The idea that tribes began to impose taxes after realizing the economic benefit of them has some merit. At least one report noted that as much as forty percent of a government's revenue from mineral production may be realized from taxation. Taxation is a more direct source of revenue. *See* Ziontz, *supra* note 80, at 13-33.

193. *Merrion*, 455 U.S. at 152-58.

194. *See* Neumann, *supra* note 187. *See also* Fulwood, *Of Tribes and Taxes: Limits on Indian Tribal Power to Tax Nonmembers*, 1986 UTAH L. REV. 729 (1986).

195. *Merrion*, 455 U.S. at 153.

196. *Id.* at 159.

protective of Indian rights—not restrictive of them.¹⁹⁷ Tribal taxes must have some relationship to the sovereign responsibilities.¹⁹⁸ But nothing suggests that tribal taxes must withstand the full breadth of the *Complete Auto* test.¹⁹⁹ Whether this issue will ever arise before the Court is unlikely.²⁰⁰ If the court faces the issue, however, the tribal right to exclude,²⁰¹ and its sovereign power—subject only to the restraints imposed by Congress²⁰²—must have some impact on any decision concerning the issue.

C. State Taxation of Indian Mineral Production

During the past quarter century, the court has also reviewed the extent of state jurisdiction to tax Indian interests. Early Court decisions drew a rigid line around the reservations and would not permit state taxation of on-reservation Indian interests.²⁰³ By 1960, however, this rigid delineation of state jurisdiction had started to waiver. Instead, the Court sought to determine whether the state action was adversely affecting tribal sovereignty.²⁰⁴ The policies and tests used to determine the extent of state jurisdiction over Indian interests has been refined over the past fifteen years.

The single case determining a state's authority to tax on-reservation Indian mineral development, without express congressional authorization,²⁰⁵ was decided in 1985. In *Montana v. Blackfoot Tribe*, the court held that the state did not have jurisdiction to impose its taxes against mineral leases executed under the 1938 Act.²⁰⁶ The Court noted that "Congress can authorize the imposition of state taxes on Indian tribes and individual

197. *Id.* at 153-154.

198. *See, e.g.*, 55 I.D. 14, 46 (1934).

199. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

200. Tribes are likely to avoid such challenges by enacting ordinances that will withstand such scrutiny.

201. Because of its right to exclude, a non-Indian apparently conducts business on a reservation at the pleasure of the tribe. It follows, therefore, that a tribe may adopt taxes without regard to the impact on interstate commerce. *See* 55 I.D. 14, 48 (1934).

202. *See supra* text accompanying note 151.

203. *See, e.g.*, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

204. *Williams v. Lee*, 358 U.S. 217 (1959). The *Williams Test*, as it became known, sought to determine whether the state activity infringed on the tribal right to govern itself. The Court later refused to apply this standard in a case where the state sought to tax an Indian—as opposed to a non-Indian. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. at 179.

205. Where specific authorization has been given to tax, a state's right to tax on-reservation mineral production is clear. *See British Am. Oil Producing Co. v. Board of Equalization of Montana*, 299 U.S. 159 (1936).

206. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759 (1985).

Indians. . . ,”²⁰⁷ and has done so on occasion.²⁰⁸ The 1938 Act, however, did not expressly authorize the imposition of state taxes against Indian mineral leases. In analyzing the taxes, the Court rejected the state’s argument that the earlier authorization inhered to the 1938 Act.²⁰⁹ The decision expounded the requirement of congressional authorization for states to tax on-reservation tribal interests. States had authority to tax leases under the 1924 and 1927 Acts,²¹⁰ but that authority was not extended in the 1938 Act.²¹¹

Tax questions, unrelated to mineral development, were decided by the Court in the 1970’s. In *McClanahan v. Arizona State Tax Commission*, the Court answered the narrow question whether the state may tax an Indian’s income which was earned exclusively on the reservation.²¹² The doctrine of Indian sovereignty, the Court stated, would provide “a backdrop against which applicable treaties and statutes must be read.”²¹³ The Court then determined that the “appellant’s rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose.”²¹⁴ After *McClanahan*, states were barred from imposing taxes against Indians—their income or properties—for activities within an Indian reservation.

Another decision, *Mescalero Apache Tribe v. Jones*,²¹⁵ resolved whether a state could properly tax Indian interests and activities located outside a reservation. Here, the Court noted at the outset that there was no satisfactory authority permitting states to tax on-reservation Indian activities.²¹⁶ The Court recognized, however, that “Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law. . . .”²¹⁷ In *Mescalero*, the tribe held federal leases off-reservation and operated a ski resort on those lands. The Court rejected the tribes broad arguments of exemption²¹⁸ but recognized that the state’s tax

207. *Id.* at 765.

208. *See supra* text accompanying notes 33 through 36.

209. *Blackfeet Tribe of Indians*, 471 U.S. at 766.

210. *Id.* at 767-68.

211. The Supreme Court’s decision affirmed the Ninth Circuit opinion which left the question that the incidence of the tax falls on the producer and not the tribe undecided. The State of Montana has not yet conceded this issue. At stake is the state’s right to tax over 170 mineral leases on the Blackfeet reservation executed under the 1938 Act. Only 8 leases are in effect that can be taxed under earlier acts.

212. *McClanahan*, 411 U.S. at 168.

213. *Id.* at 172.

214. *Id.* at 181.

215. 411 U.S. 145 (1973).

216. *Id.* at 148.

217. *Id.* at 148-49.

218. *Id.* at 147-55.

authority was restricted under the IRA.²¹⁹ The Court did not permit the state's taxes to effect the tribal property interests but allowed that the state could tax the tribal income.²²⁰

Since the end of the Termination Era, the Court has struggled with the conflict between state and tribal taxation. The exterior boundaries of a reservation are no longer barriers to state jurisdiction. Clearly, on-reservation Indian activities can not be taxed by the states. Indian interests off-reservation, in the absence of preemptive legislation, will be subject to state taxes. But not all tax or jurisdiction issues can be classified as on or off reservation and Indian or non-Indian. Decisions of the United States Supreme Court have developed a balanced approach to determining such issues.

In *White Mountain Apache Tribe v. Bracker*,²²¹ the Court reviewed the state's authority to levy taxes against on-reservation, non-Indian activities. The Court's decision recognized two key concepts in the area of state and tribal tax authority. First, that a state's authority will not be permitted to "infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"²²² Second, that a state's regulatory authority over tribal reservations and tribal members may be preempted by federal law.²²³ The Court went on to state that "these two barriers are independent of each other, and either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation by tribal members."²²⁴

In *White Mountain*, a company organized and operated by the tribe had subcontracted some of its timber harvesting responsibilities to a non-Indian operator engaged in activities within the reservation.²²⁵ The Court recognized that when on-reservation Indian interests are involved, the federal interest in encouraging tribal self-government will likely preempt state tax authority.²²⁶ But where non-Indians engage in on-reservation activities, the situation called "for a particularized inquiry into the nature of state, federal, and tribal interests a stake, an inquiry designed to determine whether, in specific context, the exercise of state authority would violate federal law."²²⁷ Here, the Court noted the extensive federal

219. *Id.* at 155-59. The Mescalero Apache Tribe had reorganized under the IRA and, therefore, the provisions of that act applied to the tribe's activities.

220. *Id.* at 157-59.

221. 448 U.S. 136 (1980).

222. *Id.* at 142 (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

223. *Id.* at 142.

224. *Id.* at 143. The two barriers are independent yet related since tribal self-government is ultimately dependent on and subject to the broad power of Congress.

225. *Id.* at 139-40.

226. *Id.* at 144.

227. *Id.* at 145.

regulation governing timber harvesting, and its underlying policies, far exceeded the state's interest in raising revenue.²²⁸ Federal law and regulation preempted the state's authority to impose its taxes on the non-Indian operator.

The concept that federal law can preempt a state's taxation of non-Indian, on-reservation activities was restated in *Central Machinery Co. v. Arizona Tax Commission*.²²⁹ In *Central Machinery*, the Court allowed that the federal laws governing trade with the Indians preempted state laws imposing an additional burden on Indian traders.²³⁰ The fact that the trader was not licensed and did not reside on the reservation held little significance. The important factor was the existence of federal law affecting trade with Indians on the reservation that preempted state action.²³¹

Both *White Mountain* and *Central Machinery* rested on the preemption principle.²³² Often left unconsidered is the infringement doctrine. Even if a state's authority is not preempted by federal law, a state cannot infringe upon a tribe's interest in self-government.

In *Crow Tribe v. Montana*,²³³ the Court of Appeals for the Ninth Circuit reversed a lower court decision and held that a state's mineral production taxes were preempted under federal law²³⁴ and an infringement on the tribe's right of self-government.²³⁵ The court noted that "the principle of tribal self-government [seeks] 'an accommodation between the interests of the Tribes and the Federal Government on the one hand, and those of the state, on the other.'"²³⁶ Under this principle "a state tax is not invalid merely because it deprives the Tribe of revenues used to sustain itself and its programs."²³⁷ Under the infringement test, however, state taxes must have a legitimate purpose and be narrowly tailored to serve that purpose.²³⁸ Montana's taxes were not narrowly tailored and the court found the taxes to be an impermissible erosion of tribal sovereignty.²³⁹

228. *Id.* at 151-52.

229. *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980).

230. *Id.* at 163-64.

231. *Id.* at 165-66.

232. *See supra* text accompanying notes 223 and 230.

233. *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 108 S.Ct. 790 (1988).

234. *Id.* at 897-902. Here the court recognized that the state's taxes were incompatible with federal and tribal interests, and that the state's interests were not clearly linked to the tax imposed. Thus, the state's taxes were preempted by federal law and policy.

235. *Id.* at 902-03.

236. *Id.* at 902 (citing *Colville*, 447 U.S. at 156).

237. *Id.*; *See Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116 (9th Cir. 1980), *as amended*, 655 F.2d 1309 (9th Cir. 1982).

238. *Crow Tribe*, 819 F.2d at 902.

239. *Id.* at 903.

States may always exercise the authority to tax Indian interests where there is express legislative authorization. However, such authorization is rare and state taxes must, therefore, survive the tests established in common law.²⁴⁰ The principles found in the cases cited create some interesting possibilities for Indian mineral production.

Generally, off-reservation development of Indian owned minerals will be taxable.²⁴¹ State taxes cannot reach the tribal production of on-reservation mineral resources. Contracts with non-Indian producers to develop such minerals are also likely to avoid state taxes.²⁴² An Indian tribe, acting as a mineral producer under the IMDA is likely to avoid state taxation even when moving off-reservation to develop Indian owned minerals.²⁴³ Finally, if a tribe adopts comprehensive mining codes or accepts control of on-reservation mineral development, a strong argument may be made for tribal taxation of non-Indian mineral development on fee lands within a reservation.²⁴⁴ The potential value of mineral taxation causes the tax consequences to be a major factor in adopting tribal mineral development programs.

V. CONCLUSION

The Indian mineral leasing program established under the 1938 Act, although surviving as law, is no longer the single option available to mineral producing tribes. Legislative changes during the past decade have relaxed the rigid mineral leasing framework. The flexibility now incorporated into the Indian mineral development program answers the critics and reflects federal self-determination policies.

The IMDA, which allows tribes to execute non-lease mineral development contracts is a significant improvement in Indian minerals development. Tribes with a great mineral resource are likely to pursue contractual production agreements far more beneficial to the tribe than lease agreements. Federal plans for royalty accounting and increased accessibility to royalty and production information may help tribes make responsible choices in mineral development. Also, the treatment of tribes on a level parallel with the states for federal tax purposes can assist tribes to obtain

240. *Crow Tribe*, 650 F.2d at 1110.

241. See *Crow Tribe v. Montana*, 657 F. Supp. 573 (D. Mont. 1985).

242. On-reservation tribal interests simply will not be taxable without express authorization. See *McClanahan*, 411 U.S. 164 (1973). On-reservation non-Indian producers will likely be protected because of the intense federal control over tribal mineral development. Cf. *White Mountain Apache Tribe*, 448 U.S. 136 (1980).

243. This is because of federal exemptions and federal policies behind the IMDA and general interests in self-determination that would likely outweigh any legitimate state interest.

244. In such a situation, any state interest may be deemed insignificant given the federal interest in self-determination in combination with the tribe's interest as producer, owner and income manager.

programs which enhance their mineral production capabilities.

For decades, Indian tribes have withstood the often crippling effect of state taxation of mineral production. Recent Court decisions, however, have reduced that disability to a mere possibility. In fact, careful planning of tribal mineral development can eliminate most state taxation. Further, the assertion of the tribal right to tax can bring additional revenues for tribal governments. Properly employed, the right of taxation may also be a valuable regulatory tool.

The development of tribal minerals under non-lease mineral agreements is not a viable option for all tribes. For that matter, neither can mineral production become the foundation for tribal self-determination. But legislation and court decisions have resulted in flexibility and yielded greater potential for Indian mineral development. For the Indian mineral development program, more than any other federal Indian program, self-determination has arrived.