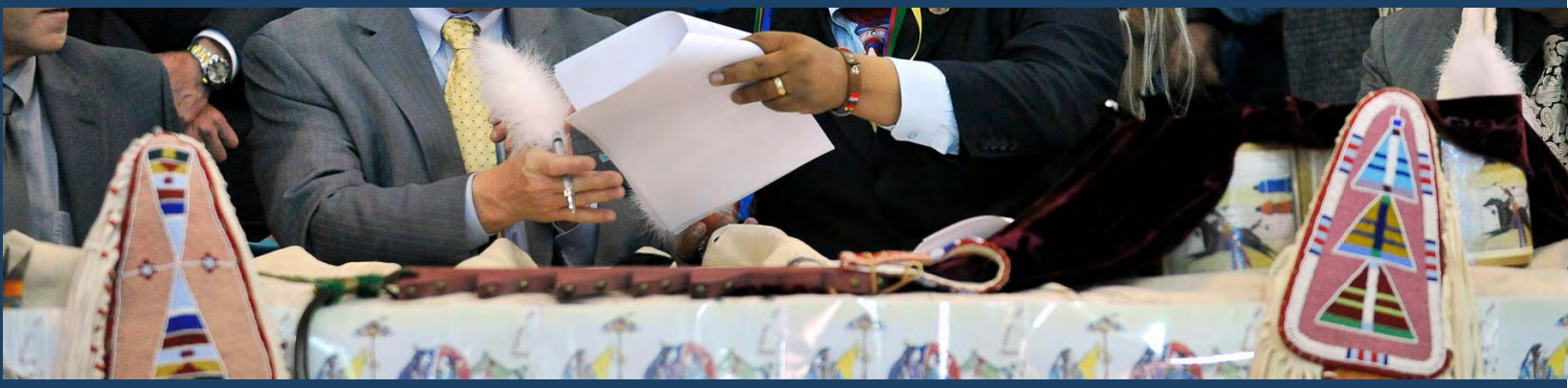
ON IMPROVING TRIBAL-CORPORATE RELATIONS IN THE MINING SECTOR



A White Paper on Strategies
for Both Sides of the Table

by

The Harvard Project on
American Indian Economic Development

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THE HARVARD PROJECT ON
AMERICAN INDIAN ECONOMIC DEVELOPMENT
John F. Kennedy School of Government
Harvard University
79 John F. Kennedy Street, Cambridge, MA 02138
http://www.hpaied.org

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ABOUT THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT

Founded in 1987, **The Harvard Project on American Indian Economic Development** (Harvard Project) is a program of the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, Harvard University. Through applied research and service, the Harvard Project aims to understand and foster the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. The Harvard Project's core activities include research, advisory services, executive education, and the administration of *Honoring Nations,* a national recognition program for best practices in tribal government. In all of its activities, the Harvard Project collaborates with the Native Nations Institute for Leadership, Management, and Policy at the University of Arizona. For further information, see http://www.hpaied.org.

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FOREWORD

Mining everywhere is inherently controversial. By its very nature, it poses hard economic, environmental, and social tradeoffs. Depending on the nature of the resource and its location, to greater or lesser degrees, the mining process necessarily disturbs environments, alters landscapes, and changes communities. On the other hand, the products that mining can yield, from aluminum to zinc, are valuable because they are useful in meeting peoples' material needs. It goes without saying that the result of these tradeoffs is often strident conflict in the public and political arenas.

Mining that affects indigenous communities—because they own or govern targeted minerals or because they are culturally, economically and/or environmentally affected by the development of targeted minerals—is especially controversial. Indigenous people have borne a long history of exploitation of their resources without their consent and to their detriment. But times are changing. At least in the Lower 48 United States, tribes increasingly have the legal and institutional capacity to assert rights of local self-government that can make or break a mining project. It is fair to say that, in today's environment, the tribe that wants to block minerals development on at least its own reservation, if not across its entire traditional territories, most likely can. By the same token, the tribe that wants to develop its mineral resources is hard to stop.

The guiding presumptions of this study are that: (i) as federally-recognized sovereigns within the United States' federalist system of layered national and local government, the U.S. American Indian tribes have the right and the obligation to their citizens to determine whether they will undertake development of the minerals they govern and, if so, with whom; and (ii) tribes and the mining companies that are generally needed to undertake large projects each

have the concomitant right to choose whether, when and where they will engage with each other. It follows that it is in tribes' and mining companies' interests to each be equipped with the information, tools and strategies they need to make informed decisions as to (i) whether they should work with each other and (ii), if so, how to strike and structure the long-lived relationships that mining entails so as to sustain those relationships *because* they yield net benefits to each party. This study is intended to add to the information, tools and strategies that serve these ends.

This White Paper grows out of a research study performed at the request of the international mining firm, Rio Tinto plc, by two Native graduate students—Jackson Brossy and Christopher Kolerok—in the Harvard University Native American Program's *Nation Building* course in 2010. This initial project focused on *Building Successful Business Partnerships: The Tribe's Side of the Table*.[1] Rio Tinto provided funding for continuation of that work in the form of this White Paper. While providing funding, Rio Tinto had no editorial control of this study or its content, and this study does not specifically focus on any projects that Rio Tinto may have under way or under consideration in the Lower 48 United States. The first draft of the study was released to Rio Tinto for review at the same time it was first released to the other participants in the first *Harvard Forum on Major Development Projects On and Near Indian Lands: Best Practices in Tribal-Corporate Relations*, May 16–17, 2013; and a revised draft was released under the same conditions for purposes of the second *Forum* held on October 30–31, 2013. Neither Rio Tinto nor any forum participants have reviewed or exercised approval or other editorial discretion with respect to this final version of the study. Finally, this study is in no way an endorsement of Rio Tinto, its management, its plans, or its past, present or future projects. Rio Tinto personnel have been interviewed on the same basis as other tribal and industry professionals in the course of our work, with the objective of understanding best *and* worst practices affecting productive and counterproductive tribal-corporate relations.

As noted, during the drafting of this White Paper, the Harvard Project on American Indian Economic Development hosted two forums on *Major Development Projects On and Near Indian Lands: Best Practices in Tribal-Corporate Relations*. These forums consisted of roundtable discussion among tribal, industry, and policy peers, and provided opportunities for informative exchange of perspectives and experiences. The research team for this project also interviewed professionals with experience in the development of large, land-using projects

on and near tribal lands. These interviews provided valuable perspectives. However, specific items of information of a factual or opinion nature brought out in interviews and the forums have not been relied upon here unless independently confirmed as factual. Hence, no attribution of particular facts, opinions, or perspectives to specific individuals or organizations is made or implied. Any remaining errors or omissions are the sole responsibility of the authors and do not necessarily reflect the views and opinions of the forum participants, interviewees, the authors' institutions, or those institutions' funders. We are grateful to all who invested their time and energy in this project.

1. INTRODUCTION

The federally-recognized American Indian tribes on the more than 300 reservations in the Lower 48 United States are *governments*. Under the U.S. system of layered federalism, the tribes (or Indian nations) are much like the states. They exist under and are subject to U.S. federal law, but they exercise considerable local sovereignty—operating under their own constitutions, with their own police, tax, judicial, and regulatory systems. They also commonly are the owners of surface resources, as well as subsurface minerals and water on their reservations and, in some instances, in traditional areas outside reservation boundaries.

This fundamental fact—that tribes are governments—conditions everything about tribal-corporate relationships in the mining sector and beyond. From the tribes' perspective, governing and governing well means "walking the walk" of effective local self-governance: Having the capacity to say "no" to mining opportunities that, in fact, fail to serve the overall interests of the citizens, and having the self-determined capacity to exercise sovereign powers by saying "yes" when doing so promotes the tribal public's interest. And if and when "yes" is the right answer for a community, effective self-rule is the key to striking and sustaining beneficial relations over the long haul with the companies that often bring the capital and expertise that mining requires.

From companies' perspectives, miners that seek to explore and/or develop mineral deposits subject to tribal ownership or cultural value without understanding and institutionalizing the fact that they are dealing with *governments* when they deal with tribes proceed at their own peril. The sovereignty of tribes over their own lands and resources is strong enough that proceeding with tribal minerals development without the consent and support of the tribal government is becoming wholly untenable. Sustaining a successful development, without

it being blown apart somewhere along the way, in the presence of unstable, illegitimate, or ineffective tribal government is vain hope in the face of high risk. Even the most responsible and responsive of companies is likely to find that strategies, techniques and even personnel that have proven effective in dealings with indigenous or other disenfranchised communities elsewhere in the world are poorly matched to the tasks of dealing with U.S. tribes.

These themes form the core of this report. A great deal has been written, much of it just common sense, about such matters as the need for companies that would engage with indigenous communities to respect and understand those communities' cultures and values, to provide tangible benefits to communities, to be forthcoming with information that affects community members, and the like. Little is added by repeating those messages here. Instead, we emphasize the implications of such precepts when tribal *governments* sit across from the mining company, on the community's side of the table.

Discussions of community-corporate relations in the indigenous context seem to invariably place their emphasis on the corporate side of the setting: If the company wants to be successful, it must understand the community's history and values; it must develop trusting relationships with community leaders; and so forth. This focus on what a company has to do reflects the imbalances of wealth, power, and business experience that have historically conditioned community-developer negotiations and relations. The presumption is that the developer is the initiator and driver of any possible mining venture. The developer's problem is then portrayed as one of trying—hopefully responsibly—to coax something out of the tribe, and the tribe's problem is one of preventing itself from being coaxed out of something without losing on net.

But the balances are starting to right themselves. At least with the Lower 48 States' self-governing tribes, it is increasingly the case that tribes are developing the people and institutions that can hold their own as equals across the table. This means that the tribe that wants to proactively initiate mining or other large projects and to be in the driver's seat in negotiations and relationship management starts to think of itself as coaxing something—a lot—out of the developer. Tribal decision makers then find that they need to understand the company's values and culture; they must develop trusting relationships with the company's leaders; and so forth. There are two sides to the table. Both companies and tribes need to

know how to conduct themselves; to know what works and what doesn't work in negotiations and the structuring of relationships; when to stay and when to walk away.

The Setting: The Native Resurgence

The timing of this study is revealing. Why the focus on tribal-corporate relations here in the early 21st century? Why the focus on the capacities on "both sides of the table," when history is marked by tribes worrying more about federal and state government—tribal relations and project developers focused on perhaps keeping the communities happy, but striking deals with the federal authorities that historically exercised control over tribal resources? The answer is that Indian Country—the lands and resources of the Lower 48 States' tribes—is undergoing rapid and massive change that is showing up as the growth and empowerment of tribes.

For decades, the American Indian population, both on-and off-reservation has been growing much more rapidly than the general U.S. population. Beginning sometime in the late 1980s, after a decade of declining standards of living, both gaming *and* non-gaming tribes began growing economically about three times more rapidly than the U.S. economy. This was sustained into the 2000s.[2] In addition to casinos (which drove the growth of the relatively small number of tribes located near major cities), increasing numbers of tribes are finding income and jobs in destination resorts, manufacturing, consulting businesses, small business development, oil and gas extraction, and the like.

Along with economic development have come increased capacities for tribes to invest in the institutional capacities and human skills of their communities. A growing cadre of increasingly experienced Native leaders and managers is now running police departments, operating enterprises, delivering social services, and regulating commercial and environmental affairs on reservation. While the competition is often not particularly stiff (owing to budget cuts, politics, and so forth), tribes long thought of by "outsiders" as dysfunctional now are popping up as better run, or no worse run, than their local non-Native county and city neighbors.[3]

While these are positive developments and the proverbial "glass" is filling, the "glass" started out close to empty and is still only about half full. Despite many strides in development there is still major underdevelopment and poverty among tribes. Progress is highly asymmetric across tribal reservations, and often the rural locales where minerals are located are among the

poorest. Overall, the 2010 census indicated that 28 percent of American Indians were legally "poor" compared to 15 percent of the whole U.S. population. Native median household income in this regard was $36,062, compared to $50,046 for all Americans. A majority of Indians now live off reservation in cities with higher income. Thus, poverty on some reservations is often far more than even these statistics may indicate.

Decades of research across many dimensions by the Harvard Project on American Indian Economic Development keeps finding that the overall resurgence going on in Indian Country is the product of the formal policies of *self-determination*, or local self-government, that began with an Executive Order under President Richard Nixon in the early 1970s and that have been codified since (see the discussion of the legal and regulatory powers of tribe in Section 3 below). But as the data noted above indicate, the resurgence is uneven. Where things are turning around for the better on reservations, the secret is repeatedly revealed to be tribes backing up their federally-protected rights of local self-rule with the capacity to govern well. In fact, tribes are like cities, states, and nations elsewhere in this regard: If you can govern well, people are productive and communities prosper; if you govern poorly, everything seems to fall apart—from the local schools to the contract with the big mining company.

As we discuss in Section 2 below, a substantial number of Lower 48 tribes own and control substantial oil, gas, coal, and hardrock resources. In addition, many tribes' treaty territories, which commonly extend well beyond their reservations, contain substantial mineral resources. These include oil, gas, and coal, as well as a wide array of hardrock resources. If development can be done well—culturally, environmentally, and economically—many tribes are quite receptive for expanded development to occur. Thus, we see the Crow Nation of Montana aggressively seeking partners for coal, coalbed methane, and oil and gas development.[4] The Navajo Nation has formed its own company and taken over the Navajo Mine from BHP Billiton.[5] And the Southern Ute Tribe of Colorado is a fully formed, vertically integrated "player" in the San Juan Basin natural gas fields. On the other hand, for some tribes, such as the copper-owning Tohono O'odham in southern Arizona, the answer on mining under the federal policies of self-determination has been a clear *no* for quite some time.[6] And for some tribes, such as the coal-owning Northern Cheyenne in Montana, long enunciated "no's" are hotly debated by tribal leaders as they wrestle with tensions between persistent poverty and disruption of culture and the environment that they see accompanying mining.[7]

Of course, in these decisions and debates, Indian tribes do not differ from mainstream American culture, which wouldn't think of turning a cultural heritage site like Yellowstone Park into a world class geothermal factory or even subjecting such an idea to a quantitative cost-benefit analysis; would debate fiercely over a new iron mine in Michigan; and would think hard before expanding offshore oil and gas drilling in an effort to find substitutes for very expensive imported energy. Indian Country, however, confronts decisions on minerals development in a unique context. Tribes have endured long histories of *de facto* and *de jure* taking and/or development of their resources, historically without their real consent and often with far below fair market value compensation and highly destructive impacts on their cultures and environments.

When compensation has been paid, little or no account has been accorded non-market cultural and lifestyle values that were adversely impacted.[8] Yet values attached to historically or spiritually significant sites and landscapes, fresh and healthy water where wild rice can continue to be harvested, the peace and quiet of undeveloped rural areas, and myriad similar amenities can readily trump the desire for jobs and income that mining might bring—just as the same kinds of values trump minerals development in mainstream society's national parks, National Historic Monuments, wilderness areas, and so on. Tribes do not differ from the rest of the American public in wanting to protect cultural, spiritual, historical, and environmental values. They only differ in that they have long had little or no say when it comes to treading on such values.

The tribal context is unique even where the tribal community does have decision control and does decide it would like to develop—as we see in the case of the Crow Tribe's current push to develop its minerals (see profile below). The particular legal and regulatory gauntlets that projects on or near Indian lands must get through are described in Section 3. They form an overlapping, sometimes inconsistent, morass. Moreover, they create structures that enhance the ability of third-party players, from environmental groups to the press, to affect the course and outcome of project initiation and operation. Both tribes and companies, watching out for their own respective interests, are required to manage and adapt to the third-party players. We examine various approaches to this and related problems in Section 4.

For their part, mining companies and other developers of large, long-lived, tribal resource-using projects in and near tribal lands are in the midst, proactively or reactively, of figuring out how to successfully deal with the U.S. tribes. As we stress in Section 4 below, the challenge is to "thicken" their corporate institutional capacities with knowledge, structures and strategies that recognize that the setting in the Lower 48 States of sovereign and increasingly sophisticated tribes is different from their experiences elsewhere, and that they have little choice but to respect and learn to deal responsibly with the governing powers of the tribes. While they may at times be young, poor and struggling, more than one would-be developer has found out the hard way that tribes are real governments and they have the power to make or break otherwise attractive projects. Indeed, just as for tribes, the proper answer for a prospective developer of an otherwise attractive investment may well be *no* or, at least, *not now* when a tribe lacks the necessary capacity on its side of the table. When the answer is *yes,* as we set out in Section 5, the striking of durable relationships entails investments by tribes and companies in relationships with identifiable structures and payoffs for mutual benefit.

2. THE RESOURCES: TRIBAL MINERALS IN THE LOWER 48 STATES

As we have noted, indigenous communities in the United States—i.e., the 567 federally-recognized American Indian/Alaska Native tribes on the 300+ reservations and in the 200+ Alaska Native villages—have operated since the mid-1970s under formal policies of *self-determination*.[9] For at least the several hundred tribes in the Lower 48 United States, these translate into extensive powers of internal self-government. These U.S. tribes are similar to U.S. states, subject to federal law, but operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes. Vis-à-vis other federal, state, and municipal governments, tribes expect and demand government-to-government relations, rather than the earlier role of a dependent subject to overbearing paternalism by non-Indian governments. The policies of self-determination result in extensive tribal government control over natural resource development on and near tribal lands.

Not surprisingly and like nations all over the world, U.S. Indian tribes vary considerably in their capacities and success in governing themselves, with Indian Country marked by the extremes of economic and social prosperity and despair. Particularly in sectors such as natural resources, one of the frontiers of development for tribes that are making their way toward self-sufficiency is the management of productive and sustainable relationships with corporate partners. At the same time, in sectors such as minerals development, non-Native corporations are attracted by opportunities for large scale resource extraction and typically bring with them capital, specialized expertise and organizational structures that are otherwise lacking, but necessary, for mineral and other large project success in Indian Country.

The potential for natural resource development on Indian lands is substantial. In terms of land area, agriculture is the most important use of Indian lands. Of the 56 million acres of tribally-held land in the continental U.S., approximately 47 million acres are used for grazing and other agriculture. Indian lands also have significant energy resources. At current prices, oil and gas production in Indian Country generates on the order of $3.2 billion in revenues annually, with associated royalties to tribes and individual Indians totaling approximately $400 million per year.[10] The potential for further development is immense: Over 2 million acres of Indian lands have been actively developed for oil, gas, and coal resources, but another 15 million acres hold potential.[11] Other minerals are similarly concentrated, with, for example, 40 percent of U.S. uranium reserves and 30 percent of known U.S. coal reserves estimated to be in Indian Country. Detailed data on other, hard rock mineral reserves are difficult to compile, but the resources on Indian lands appear to be similarly substantial.

As a general matter, U.S. tribes are not hostile to development of their resources, and they commonly recognize that the levels and types of capital investment, organizational infrastructure, and technical and business expertise required to undertake and to sustain major minerals development mean that they must turn to major corporations as partners. Tribes do want to be in the lead in governing development on their lands, and they seek development that yields both market-level economic returns and protection of environmental and cultural values and amenities. When the latter are at stake, tribal control is sought most arduously, since an affected tribe is quite likely to be in a much better position than a private company or a federal or state bureaucracy to minimize and mitigate damage to the *tribe's* environmental and cultural values.

Yet, tribes are relatively inexperienced in dealing with major corporations, and they are generally only part way down the path to developing their own governing and business capacities needed to interface effectively with corporate partners. Moreover, when it comes to major minerals development, tribes operate under an overlay of federal (and some state) legal structures that must be managed effectively if development is to occur. Finally, third party interests from, for example, environmental organizations are commonly called into play when tribes undertake consideration of minerals and other natural resource development. Inexperience and inadequate capacity in navigating and managing in these areas readily thwarts development and turns relationships sour.

For many U.S. tribes with requisite resources, major minerals development is unrealized potential, rather than productive actuality. Appendix 1 compiles known mineral interests of tribes across the Lower 48 States. In terms of ongoing production, oil and gas operations are the most common. Reservations such as Osage (OK), Fort Berthold (ND), Fort Peck (MT), Crow (MT), Navajo (AZ/NM/UT), Southern Ute (CO), Chickasaw (OK), and Jicarilla Apache (NM) have substantial production. In coal, the Crow Nation is one of the largest owners of coal in the world, holding an estimated 9 billion tons of recoverable coal, with a 15,000-acre single pit surface coal mine complex operated by Westmoreland Resource Inc. that has been in operation since 1974. In addition, the Nation has entered into major new contracts for the development of additional coal resources, including a potential major coal-to-liquids project.[12] The Navajo and Hopi Nations were the site of Peabody Energy coal mining operations at the Black Mesa mine from the mid-1960s until recent suspension of operations; the neighboring Kayenta mine continues to operate. Hardrock minerals development is quite spotty. Uranium mines, now closed, dot Indian Country. Much current activity and proposals are focused on copper near reservations in Arizona and nickel, iron, copper, zinc, and other ores in the Upper Midwest. Sand and gravel aggregate operations are present at reservations such as Salt River, Gila River, the Colorado River Indian Tribes, and a number of other reservations.

The array of resources detailed in Appendix 1 suggests that Indian owned, controlled, and/or impacted hardrock and other minerals represent substantial opportunities for development. But pursuit of that development by companies or tribes could turn out to be either positive or negative in any given case. Wisely getting to "yes" and mutually beneficial development, or wisely getting to "no" and walking away from prospects that would likely be net harms to Native communities and/or net losses for developers will turn significantly on the quality of the tribal-corporate relations that are pursued in any particular case.

Resources:

Tribal Energy & Mineral Data

United States Tribal Mineral Data at http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/TT/MTD/index.htm

Further Information:

http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/WIL/index.htm

http://www.onrr.gov/About/FreqAQ.htm

Brossy, Jackson and Christopher Kolerok, *Building Successful Business Partnerships: The Tribe's Side of the Table,* report to Rio Tinto in "Native Americans in the 21st Century: Nation Building II," Harvard University Native American Program, 2010.

3. THE LEGAL AND REGULATORY SETTING

Introduction: American Indian Nations, History, and Sovereignty

The history of the United States' relations with its indigenous peoples has much in common with the histories of other nations throughout the world, and in particular with the former commonwealth countries. Commonalities include the settler nation's efforts to dispossess indigenous peoples of their land and resources, eradicate their political and cultural structures, and assimilate them into the dominant society. Within this shared historical narrative, however, each country took a unique path in terms of developing laws and policies to address the rights of indigenous peoples within its borders, and ultimately to reconcile a history of attempted dispossession with current policies of self-determination. The United States' approach was to enter into numerous treaties with the many tribes within its original and expanding territory, and then to subject those treaties to varying interpretations depending on the dominant policy of the times. The body of law known as "American Indian law" consists of those treaties as well as the proliferation of statutory and case law justifying, interpreting, elaborating on, and sometimes undermining treaty terms. At the core is a government-to-government relationship between American Indian nations and the United States, established in the treaties and never relinquished notwithstanding the many fluctuations in federal policy.

Further, in U.S. law, Indian nations are recognized as sovereigns whose rights of internal self-governance derive from their own pre-contact status. This feature—retained inherent sovereignty—sets American Indian tribes apart from almost all other indigenous peoples. While American Indian tribal sovereignty is not unqualified, it encompasses the

right to govern tribal territory and tribal members, and also includes some powers over the actions of non-Indians. Some of the exceptions to these general rules are described in more detail below. As a starting point, however, it is crucial to grasp that American Indian tribes are governments separate and apart from the federal government (they are not arms of the federal government), and certainly separate and apart from states, which have only very limited powers to exert their laws within Indian tribal territory.

Since the late 1960s, the federal government has formally embraced a policy of supporting American Indian tribal self-determination. Many federal statutes encourage tribal governments to adopt and run their own programs, generate their own revenue, and provide their own services. Federal laws, including several environmental laws, have been amended to allow tribes to enact regulations and engage in environmental enforcement. As a result, for the 567 tribes that are recognized by the federal government, this is an era of nation building. American Indian nations have taken advantage of self-determination policies to restore their land bases, rejuvenate their languages and cultures, and chart their own paths within the contemporary economy.

Yet the policies of the past complicate the picture considerably. In order to understand the current regulatory and jurisdictional situation, an overview of previous policy periods is necessary. Legal historians and American Indian law experts generally agree on the following periodization for U.S. Indian policies:

(1) Treaty, Trade and Intercourse Period (1790 to 1820s)

Treaties and other forms of intergovernmental agreements drew boundaries between sovereigns and memorialized rules for interaction; trade and intercourse statutes consolidated control over tribal relations and tribal property acquisition in the federal government.

(2) Removal Period (1820s to 1840s)

Tribes were relocated, typically by coercion or force, from their Aboriginal territories to areas west of the Mississippi. East coast tribes were most heavily affected, but many western tribes were also displaced and required to consolidate on smaller landholdings.

(3) Reservation Period (1840s to 1880s)

Tribes were concentrated on reservations where their actions could be monitored and influenced by federal agents. In 1871, Congress passed legislation purporting to end treaty making with tribes. Despite the end of

treaties as a formal matter, Congress and the Executive Branch continued to enter into arrangements with tribes, through legislation or executive orders, recognizing their claims to land and self-governance.

(4) Allotment and Assimilation Period (1880s to 1920s)

Congress passed forced assimilation measures and the Supreme Court sanctioned these actions, ratifying broad and unilateral federal powers in Indian affairs. The Dawes Act, also known as the Allotment Act, authorized the break-up of tribal lands into individual "Indian allotments," with the ultimate goal of privatizing all reservation lands and converting tribal members into yeoman farmers. The policies of this period were largely a failure, causing widespread poverty, land loss, and accompanying negative effects on health and welfare throughout Indian country. To cite just one figure, allotment reduced the tribal land base from 138 million acres to 48 million acres.

(5) Indian Reorganization Act Period (1820s to 1940s)

The federal government sought to reverse the negative effects of the Allotment and Assimilation Period by restoring tribal governments and economies. Federal legislation (the Indian Reorganization Act) put an end to allotment and provided technical assistance for tribes wishing to restore their governments. Congress also passed legislation defining "Indian country" for jurisdictional purposes.

(6) Termination Period (1940s to 1960s)

The federal government, in an abrupt reversal from the IRA Period, undertook to terminate the federally recognized status of several tribes and to impose state law in Indian country. In 1953, Congress enacted Public Law 280, which extended state jurisdiction into Indian country in several states and gave others the option to assume jurisdiction.

(7) Self-Determination Period (1960s to present)

Congress and the Executive Branch embraced a policy of "self-determination without termination." Statutes were passed that restored powers to tribal governments, gave tribes the option to run their own programs, and recognized tribal control over natural resources. Initially, federal courts also embraced the revival of self-determination, recognizing inherent tribal sovereignty and reviving treaty rights in contemporary cases. More recently, the period has also been characterized by what some describe as a judicial backlash, in which federal courts have relied on prior discredited policies to deprive tribes of control over land and resources.

Tribal self-determination today is enacted against the backdrop of all the previous historical periods. Many tribes have had to adjust their cultures and economies to dramatically

smaller homelands. Even more challenging, some tribes have had to adapt to homelands geographically distant from their Aboriginal territory. In addition, allotment policies have left many tribes with a checker-boarded territory, with corresponding gaps in regulatory and judicial jurisdiction. These are just a few ways in which the history of inconsistent, and often unjust, federal policies have left their marks on American Indian law and politics today. Nonetheless, American Indian nations are working their way through the past to engage in diverse, contemporary, and culturally relevant forms of governance to meet the social and economic needs of their people today.

Tribal Sovereignty and Treaty Rights: Sources and Limitations

The legal status of American Indian nations is unique in domestic and international law. At the heart of this status is American Indian tribal sovereignty. American Indian nations have attributes of sovereignty that entitle them to govern their members, their lands, and, with qualifications, their interactions with non-tribal members. The source of American Indian tribal sovereignty is tribes' own pre-contact status as governments. In the early period of European arrival to North America, European nations consistently adopted a foreign policy of entering into treaties with the indigenous nations of North America. North American Indian nations were, as a legal matter, viewed as sovereigns for the purpose of ensuring peaceful and orderly settlement by the arriving nations. After the Revolutionary War, the U.S. continued to treat American Indian peoples as nations, rather than aggregations of individuals, and early post-colonial policy and the Indian Commerce Clause of the U.S. Constitution reflect this understanding.[13]

Against this historical and constitutional backdrop, the U.S. Supreme Court, in a series of three decisions authored by Chief Justice John Marshall during the first half of the nineteenth century, defined American Indian tribes as "domestic dependent nations," retaining attributes of sovereignty that they possessed before the arrival of Europeans.[14] The sovereignty retained, according to Justice Marshall, was necessary to govern internal matters, including control of tribal members and tribal territory. The sovereignty that was lost upon the arrival of Europeans included the power to enter independently into international agreements with other foreign nations and to transfer property title cognizant in U.S. courts to non-Indians.

These decisions, known as the Marshall Trilogy, continue to inform the basic legal status of American Indian nations, though federal statutes, executive policy, and subsequent judicial decisions have altered, refined, and, depending on the era, affirmed or restricted tribal powers of self-governance.

Treaties and treaty-substitutes (in the form of legislation or executive orders recognizing tribal status and territory) provide the textual acknowledgment for inherent tribal sovereign status. The great variety of treaties and the distinct geographies and histories of the 567 federally recognized tribes make it difficult to generalize about treaty rights. In addition, the Alaska Native Claims Settlement Act created a different regime for the rights of Native Alaskans. Still, it is possible to make some broad observations.

First, treaties typically identify the territorial boundaries for American Indian nations. The tribal land base serves as the cultural and political homeland for Indian nations, and the related treaty and statutory rights often stem from the size and potential of the reservation.

Second, treaties often include both implied and express rights to natural resources on and near the reservation. Many American Indian nations have "reserved" rights to water and other natural resources, which give them powerful bargaining chips to use with non-Indians in circumstances of present or future scarcity.[15] Third, treaties establish a consensual ongoing political relationship between the U.S. and particular Indian nations.

Tribal sovereignty provides a legal and political basis for tribes to maintain their distinct status as peoples, and to govern their land and resources in ways that preserve at least some degree of independence. The U.S. Constitution does not impose any limits on the character, structure, or nature of tribal governing institutions, but federal legislation and federal judicial decisions have limited tribal powers over non-Indian land and some non-Indian activities, as well as shaped tribal institutions through direct and indirect means.

Tribal Government and Tribal Laws

The 567 federally recognized American Indian tribes have a great variety of governmental structures and legal systems. The Navajo Nation, which has over 260,000 members and governs a territory as large as Ireland, has a tri-partite government with an executive, legislative, and judicial branch. The judicial branch has several judicial districts, a trial and appellate

GLIFWC – Tribal Treaty Defense and Implementation

Formed in 1984, the Great Lakes Indian Fish & Wildlife Commission (GLIFWC) represents the eleven Ojibwe tribes in Minnesota, Michigan and Wisconsin who reserved hunting, fishing and gathering rights in territories they ceded to the United States in Treaties entered into in 1836, 1837, 1842 and 1854. As the members of GLIFWC stress:

> "The exercise of these rights was and continues to be fundamental to the tribes' culture and way of life, and explains their insistence on explicitly reserving them in the treaties. The tribes share a traditional and continuing reliance upon fish, wildlife and plants to meet religious, ceremonial, medicinal, subsistence, and economic needs. Therefore, to maintain this lifeway and meet these needs, the tribes reserved the right to hunt, fish, and gather in the ceded territories. In proper perspective, this reservation of sovereign rights is part of the Ojibwe's ongoing struggle to preserve a culture—a way of life and a set of deeply held values—that is best understood in the terms of the tribes "relationship to *AKI* (earth) and the circle of the seasons."[1]

GLIFWC and its individual member tribes carry out their mission of treaty enforcement through court litigation when they feel it is necessary, but GLIFWC is widely recognized for entering into collaborative and cooperative agreements and memorandums of understanding with non-tribal governments to regulate hunting, fishing and gathering seasons and to protect the resources of the Ojibwe's ceded territories. With its mission grounded in fish, wildlife and gathering, GLIFWC works to combat the ecological harms of closed mines and its "Environmental Section staff participate in the environmental review or proposed mines [in ceded territory] by interacting with federal and state regulatory agencies and advocating for thorough analyses of the environmental impacts…".[3]

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1. http://www.glifwc.org/Recognition_Affirmation/affirming.html, accessed March 19, 2014.

2. Harvard Project on American Indian Economic Development, "Treaty Rights/National Forest Memorandum of Understanding Tribes of the Great Lakes Indian Fish and Wildlife Commission," *Honoring Nations 2000*, at http://hpaied.org/images/resources/publibrary/Treaty%20Rights%20National%20Forest%20Management %20MOU.pdf, accessed March 19, 2014.

3. http://www.glifwc.org/Environmental/mining.html, accessed March 19, 2014.

level, as well as a peacemaking branch committed to traditional alternative dispute resolution. On the other end of the spectrum, some pueblos in New Mexico have unitary governments with combined judicial and legislative functions, all of which remain strongly influenced by traditional political, religious, and cultural norms. It is therefore difficult to generalize about the structures and workings of American Indian political systems. The most important caveat is that each American Indian nation should be approached as a sovereign government, and outsiders should take the time to learn as much about the particular history, culture, and laws of that nation as possible before embarking on economic or other transactions.

American Indian nations generate their own laws that may apply to non-Indians depending on the nature of their activity, the terms of any individual transaction, and the land status involved. The general jurisdictional rules that govern when tribal laws may apply are discussed in more detail below, but given the variety of tribal legal systems, it is crucial to retain and consult with an expert in American Indian law who is also able to conduct research into the particular tribe's laws when engaging in any proposed transactions in Indian country.

Tribal Sovereign Immunity from Suit

Like other sovereigns, American Indian tribes are governments whose sovereignty derives from their status as nations that pre-dated European arrival and settlement. Like other sovereigns (including, for example, each of the fifty U.S. states), tribes are immune from being sued in their own tribunals or those of any other government unless, for example, their immunity has been waived explicitly by legislation or the tribal constitution. The Supreme Court affirmed the tribal sovereign immunity doctrine in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, which was decided in 1998.[16] There is reason to suspect, however, that the doctrine is vulnerable due to the Court's own statements in that case as well as changes in Supreme Court personnel since *Kiowa*. There is one case currently pending before the Supreme Court that could result in a modification or retrenchment of *Kiowa*, but for now the tribal sovereign immunity doctrine remains the law.[17] In its current contours, it protects tribes from suit for actions both on and off their reservations, and for suits on contracts of either a governmental or commercial nature.

Tribal sovereign immunity can be waived either by clear congressional action, or by a tribe itself. Congress has authorized suits by states against tribes for failure to comply with negotiated state-tribal gaming compacts, and has also required waivers of tribal immunity for suits arising out of federally funded self-governance activities for which liability insurance is required. Clear tribal waivers of immunity have been found in the context of tribal consent to arbitration clauses and, like a number of the fifty U.S. states, tribes can self-legislate limited waivers (up to, for example, amounts consonant with tribal insurance coverage).

Tribes' immunity from suit can pose barriers to economic activities when tribes are acting in a commercial capacity and the other parties' normal expectations include the ability to seek legal redress for contractual breaches. Many tribes therefore consent to waive their immunity from suit for the purposes of enforcement of commercial contracts or leases. This can be a difficult issue for tribal governments, many of which remain concerned that waiving immunity from suit is akin to giving up their hard-fought sovereign status. For many other tribes, however, the power to consent to being sued for engaging in high-level economic activity is perceived as an important exercise of tribal sovereignty. It allows the tribe to control the terms on which it will be sued, instead of courting the risk of further federal court diminishment of tribal sovereignty, and includes the potential to include forum selection and choice of law provisions that the tribe might prefer. As with all business negotiations, the issue of waivers of immunity from suit is appropriately approached from the perspective of knowledge of the broader risks for tribes as well as respect for their internal decision-making processes.

Not surprisingly, long histories of ill and racist treatment in non-tribal courts have left many, many tribes less than sanguine about consenting to such courts' jurisdictions in commercial and other disputes. At the same time, even the best-intentioned developer often has little understanding and even less experience with tribal courts. Thus, while politicization, lack of commercial expertise, and overcrowded dockets often earn federal and state courts low marks from business interests,[18] developers and investors are commonly leery of tribal courts. Impasse and/or delay in reaching commercial agreements, however, can be avoided by innovative use of neutral arbitration provisions (of the common "each side selects a party arbitrator, and the party arbitrators select a third neutral arbitrator" variety).

Arbitration provisions alone, however, leave open the question of the venue for enforcement of arbitration awards. Here, we see tribes and their commercial counterparties employing innovative approaches, such as:

- Limited waivers of immunity from suit in tribal court for contract disputes involving tribally-owned enterprises (as distinct from disputes involving the tribal government itself).
- Limited waivers of immunity from suit in state court for contract disputes involving tribally-owned enterprises (as distinct from disputes involving the tribal government itself).
- Waivers of immunity from suit of a tribal enterprise and/or a tribe in tribal court for the limited purpose of enforcing otherwise duly entered arbitration awards.
- Waivers of immunity from suit of a tribal enterprise and/or a tribe providing for enforcement of otherwise duly entered arbitration awards by first bringing suit for enforcement in tribal court, with provision for subsequent appeal in state court.

These approaches highlight tribes' clear preferences for use of their own courts in the event of commercial disputes. In pursuing such preferences, however, tribes operate in a highly competitive environment, as jurisdictions all over the world find that attracting and holding capital and human capital investment means development of capable, stable, and politically independent commercial court systems. Indeed, research on Indian Country repeatedly finds that tribal success in economic development rides on the back of depoliticized tribal systems of dispute resolution, whether such systems are courts modeled after "western" institutions or are longer-standing, traditional tribal systems.[19]

The implications for "both sides of the table" are clear: The tribe seeking to uphold its sovereignty by exercising waivers of sovereign immunity into its own courts must meet the challenge of building and sustaining its own rule of law. At the same time, the responsible non-tribal commercial partner should be expected to respect such efforts and to judge each tribal nation's court on its merits. In the process, it may well be found that a tribal court outperforms its non-tribal counterparts.[20]

Minerals Extraction and American Indian Tribes

A key threshold question with respect to tribal legal interests in minerals extraction is the status of the land. Almost all of the 567 American Indian tribes have their own land bases, often within formal or informal reservations but sometimes also including lands outside of those

boundaries. In addition, the ownership status of lands within a tribe's territorial boundaries can vary. Finally, many tribes have legal interests in lands outside of their reservations. When the federal government owns those lands, tribes may have treaty or statutory rights that affect the minerals extraction process. This part therefore first summarizes the categories of land in which tribes may have legal interests, and then provides an overview of the legal frameworks that apply to minerals development in each context.

Land Status Overview

American Indians nations have rights and interests in minerals development both on and near their lands. Land status, and in particular the jurisdictional characterization of the land, will determine the regulatory framework. Tribal land status has often been described as a patchwork quilt of ownership and jurisdictional patterns. Because of these complexities, it is critical for minerals developers to have at least a basic understanding of the legal implications of the land types found within and around tribal land bases. Given the somewhat confused and imprecise state of the legal vocabulary, this Section uses the term "tribal lands" to refer to lands over which the tribe and the federal government have primary jurisdiction, even though that term masks a variety of complications, which are described in summary fashion below.

Indian Country: The Statutory Definition

"Indian country" is defined, for federal criminal jurisdictional purposes, as including lands within Indian reservation boundaries (including any non-Indian fee lands and rights-of-way), Indian trust allotments (also including rights-of-way), and a third catchall category, "dependent Indian communities."[21] Until fairly recently, the Indian country criminal statute was also relied on to determine civil jurisdiction. The Supreme Court diverged from this approach, however, and therefore while the term "Indian Country" is still used generically to refer to lands, whether in or outside of formal reservations, that are subject to tribal or federal jurisdiction, the statute and the term are no longer directly applicable to questions of civil regulation or jurisdiction.[22] Nonetheless, it is prudent to assume that tribes and the federal government remain the primary regulators for minerals development activities that occur within formal Indian reservation boundaries, regardless of ownership of those lands, as well as on trust lands that may be outside of reservation boundaries. Circumstances in which this may not be the case are described later in this section. Outside reservation boundaries, courts

also continue to apply the "dependent Indian community" provision and associated judicially created tests to determine whether tribal, federal, or state jurisdiction applies, although this area of law is in some flux.[23]

Trust Land (Tribal Trust Lands and Trust Allotments)

Trust lands are those lands that the federal government holds in trust for American Indian tribes or individual Indians. Trust lands are subject to restrictions on alienation, and are withdrawn from the General Mining Law as well as other public lands statutes. Trust lands held for a tribe (Tribal Trust Lands) are generally, though not always, within the outer boundaries of an Indian reservation. Individual trust lands (Trust Allotments) are holdovers from the Allotment Period, and may be found within or outside of reservation boundaries. Trust Allotments are owned by individual tribal members (often many of them, due to inheritance and probate consequences).

For jurisdictional purposes, Tribal Trust Lands and Trust Allotments are treated similarly. The tribe has criminal and civil jurisdiction over actions by tribal members on these lands, and the tribe and the federal government, exclusive of the states, have primary civil regulatory jurisdiction (with exceptions discussed below).

Non-Indian Fee Land

"Non-Indian fee lands" (or simply "fee lands") are lands owned by non-Indians within reservation boundaries. Within many Indian reservations, there are pockets of land that were removed from trust status, typically during the Allotment Period. Allotment statutes carved up reservations into individual Indian allotments and declared much of the remaining lands "surplus" and open for homesteading. Non-Indians moved onto these allotments and acquired them in fee simple under the Homestead Act or its various successors. While tribes and the federal government retain some jurisdictional authority over Non-Indian Fee lands within reservation boundaries (and as mentioned above, it is therefore prudent to assume that the federal and tribal governments are the primary regulatory authorities for any minerals development activities within reservation boundaries), the Supreme Court has restricted tribal authority over some non-Indian activities on these lands (discussed further below).

Tribal Use Rights on Non-Indian Lands

Lands with reserved usufructuary rights are the most complicated in terms of regulatory systems. Usufructuary rights are non-possessory interests in land that provide for the right to enter another's land and remove a resource from it. Tribes reserved these usufructuary rights in treaties in order to guarantee continued access to traditional hunting, fishing, and gathering grounds. The important question for lands encumbered with usufructuary rights is whether these rights may impact mining or extractive operations on them. If there were a short answer, it would be yes. However, there is no short answer to this complicated question. The context and factual situations of each case will ultimately determine the outcome.

Tribal Rights to Consultation on Federal Lands

Many tribes ceded or had taken from them vast areas that were part of their aboriginal territory. As a result, tribes often have cultural and religious interests in lands that are owned by the federal government or by private parties. When private parties own the land, the tribes' rights are very limited (unless the tribe has reserved usufructuary rights, as described above). When the lands are owned by the federal government, however, federal statutes and executive branch policies require various forms of consultation. More importantly, where treaties are involved, the courts and the Congress have increasingly held that the United States has treaty obligations to fulfill.

Minerals Development on Tribal Lands

Statutory Framework for Minerals Development

The minerals development process on tribal lands is governed by a series of federal statutes. The first, the Indian Mineral Leasing Act (IMLA) of 1938,[24] was passed during the Indian Reorganization Act Period. The IMLA authorized Indian lands to be leased initially for ten years, and then as long thereafter as minerals are produced in paying quantities. IMLA leases require tribal consent as well as approval by the Secretary of the Interior. Congress' intent in passing the IMLA was to increase tribal control over the leasing process, and to ensure that tribes received the greatest return on their property.

The IMLA achieved some of its goals, but the requirement of Secretarial approval and the limited role for tribes often resulted in unfair terms.[25] To address some of these

problems, Congress passed the Indian Mineral Development Act (IMDA) of 1982.[26] The IMDA provided that tribes could enter into a wider range of mineral agreements, including joint ventures, production sharing, and service, managerial, or other arrangements. The IMDA did not eliminate the requirement of Secretarial approval, however. As a result tribes and their partners continued to complain of excessive bureaucratic oversight and delay. Congress' most recent reform effort for mineral leasing in Indian country attempted to address this and other issues. The Indian Tribal Energy Development and Self-Determination Act (ITEDSA), which was passed as part of the Energy Policy Act of 2005,[27] allows tribes to develop Tribal Energy Resource Agreements (TERAs) which, if approved by the Secretary of the Interior, would allow tribes to enter into leases and mineral agreements without seeking Secretarial approval for each one. The compliance requirements under ITEDSA are fairly detailed, including that tribes demonstrate technical and scientific capacity to regulate the minerals developers. To date, no TERAs have been approved, although several tribes are in the process of preparing their applications.

Environmental Regulatory Framework

Minerals development on tribal lands is subject to various forms of federal environmental regulation, and may also be subject to the tribe's environmental laws. A very basic outline of the federal environmental regulatory scheme is provided below.

The National Environmental Policy Act (NEPA) establishes a national policy of considering the environmental effects of all major federal actions.[28] NEPA is limited to actions taken by the federal government, and does not apply to actions taken by a tribe. However, as a practical matter, NEPA will apply to some or all of the minerals development process on Indian lands since mineral leases, IMDA minerals agreements, and surface leases of trust lands must be approved by the Secretary of the Interior acting through the BIA. These approvals are federal actions that trigger NEPA analysis.[29] (Projects conducted pursuant to a TERA may not require individual NEPA analysis.)

NEPA requires extensive review of the proposed action's effects on the environment in an Environmental Assessment (EA), or a more in-depth Environmental Impact Statement (EIS).[30] In addition to the federal version of NEPA, some tribes have passed their own environmental policy statutes. As with any proposed action in Indian Country, project proponents should

be sure to consult with experts on the tribe's laws and regulations to ensure compliance from the outset.

NEPA's public involvement and consultation requirements are discussed in more detail below, in the context of minerals development on non-tribal lands. One aspect of consultation that tribes and minerals developers should be aware of is the inclusion of tribal members and tribal grassroots groups in the scoping process. Even if the tribal government is supportive of a minerals development project, NEPA allows for others with interests at stake to participate and raise concerns. NEPA is procedural in nature and does not require the most environmentally protective outcome, but those with concerns about the environmental effects of a proposed project can take advantage of NEPA's procedural requirements to air their concerns and shape the process.

The Environmental Protection Agency (EPA) is responsible for implementing and enforcing the nation's environmental statutes. Since the 1980s, the EPA has embraced a policy of working with tribes on a government-to-government basis and maximizing tribal involvement and control. The EPA has articulated its goals and practices in three important documents. The first, issued in 1984, was a guidance document for EPA programs intended to promote cooperation between federal agencies and assistance to tribes.[31] The second was a 1991 State/Tribe Concept paper that reaffirmed the 1984 Policy.[32] The third, published in 2011, is a final tribal consultation policy that includes standards for the tribal consultation process, designated roles for EPA personnel, and accountability and transparency mechanisms.[33]

With respect to the three major statutes most likely to apply to minerals development projects—the Clean Air Act (CAA),[34] Clean Water Act (CWA),[35] and Safe Drinking Water Act (SDWA)[36]—each have provisions that authorize tribes to be the primary regulator. These provisions, known as "Treatment as an Affected State" (TAS) provisions, create a cooperative federalism structure for environmental regulation in Indian country similar to the one that exists in the federal-state context.[37]

The TAS provisions for the CAA, CWA, and SDWA are uniquely worded, and authorize varying degrees of authority. The CAA's TAS provisions have been interpreted as express delegations of authority.[38] Tribes with CAA TAS status may therefore regulate entities within

reservation boundaries, regardless of land status, as well as tribal lands (including tribal trust lands and trust allotments) outside of reservation boundaries.[39]

The CWA and SDWA provisions do not include express delegation language, and the EPA has therefore interpreted them as recognitions of tribal inherent authority to regulate. Tribes may regulate all entities (including non-Indians) affecting water quality within their jurisdiction if they can show that impairment of the reservation's waters would have a "serious and substantial" effect on the "political integrity, the economic security, or the health or welfare of the tribe."[40] (The EPA's wording tracks the language from a Supreme Court case, *Montana v. United States*,[41] which articulated standards for tribal regulatory authority over non-Indians. *Montana* is discussed in more detail later in this section.) Minerals developers working on or near tribal lands should therefore familiarize themselves with the tribe's environmental programs, including the types of TAS status that have been conferred, and the territorial scope of the tribe's regulation and enforcement authority.

Minerals Development on Non-Tribal Lands

Non-Indian federal lands constitute nearly one-third of the nation's lands. Many sites with cultural, religious, or spiritual significance to tribes are therefore located on lands owned and managed by the federal government. Federal statutes and executive orders create a framework that requires consultation with tribes regarding minerals development projects that may affect these tribal sites. The four agencies that manage federal lands—the Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), the National Park Service (NPS), and the Forest Service (FS)—therefore have obligations to consult with tribes concerning proposed projects.

In the case of reservations of rights (e.g., to hunt, fish or gather) on lands ceded by treaty, the federal government is obligated to fulfill the rights of the treaty at issue. In practice, this can improve the leverage tribes have in securing consultation requirements. Thus, for example, the Great Lakes Indian Fish & Wildlife Commission's (see further above) binding co-management agreements and memorandums of understanding with state and federal agencies provide explicit consultation requirements.[42] Such requirements arise, however, under the broader umbrella of federal obligations to uphold treaty rights, often with tribes having secured court rulings or settlements that recognize those obligations.

Tribal citizens will generally be under state or federal jurisdiction on ceded lands, but non-tribal governments are effectively under treaty jurisdiction. Not surprisingly, such "cross-jurisdiction" webs, when it comes, for example, to land use and development that would threaten tribal rights to treaty resources, often end up in litigation or in co-management/collaborative management arrangements. And, as noted above, it is not surprising for tribes who are fiercely protective of their sovereignty, but who have treaty-reserved resources which are now under non-tribal jurisdiction, to seek more, rather than less, federal regulatory intervention so as to protect reserved resources.

Duty to Consult under NEPA, NHPA, AIRFA and Executive Orders

Two statutes, NEPA (discussed above) and the National Historic Preservation Act (NHPA), require federal agencies to consult with tribes concerning projects on federal lands. NEPA's consultation process takes place in the context of an environmental assessment or environmental impact statement, and is triggered by any major federal action affecting the environment.[43] The NHPA creates a national policy of encouraging historic preservation and protection of cultural sites. It established the National Registry of Historic Places (NRHP), and a process requiring federal agencies to consult with affected parties concerning any "undertaking" that may affect NRHP-eligible property.[44]

Two executive branch statements—Executive Order 13,175, *Consultation and Coordination with Indian Tribal Governments*,[45] and President Obama's Memorandum on Tribal Consultation[46]—provide guidance to agencies concerning the NEPA and NHPA consultation process. These policies adopt the standard of "meaningful consultation," which is defined as requiring regular and meaningful consultation and collaboration with tribal officials concerning federal policies or actions that have implications for tribes. NHPA and NEPA, as guided by the standard of "meaningful consultation," therefore require regular and meaningful consultation and collaboration with tribes concerning any minerals development projects on federal lands that implicate tribal concerns.

In addition, the American Indian Religious Freedom Act (AIRFA)[47] and Executive Order 13,007[48] embrace a federal policy of accommodating American Indian access to sacred sites, including avoiding adverse effects to their physical integrity. The consultation process should therefore include inquiry concerning the presence of sacred sites, whether minerals

development will affect access to those sites, and whether there is a risk of physical damage to sacred sites.

None of these procedural requirements require substantive outcomes, but the process should allow for the possibility that development plans will be modified or even halted altogether. For consultation to be "meaningful," what tribes say should have at least some chance of affecting how and even whether a proposal is carried out. If consultation proceeds with that assumption, it will be more likely to achieve its goals. If, on the other hand, agencies and developers view the task as simply checking off a series of mandatory requirements before moving ahead with a foregone outcome, conflict and adversarial proceedings will be more likely.

Compliance with UNDRIP and Free Prior and Informed Consent

The United States endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), in December 2010.[49] The UNDRIP articulates a policy of self-determination for indigenous peoples, encourages indigenous control over lands and resources, and includes a requirement of free, prior and informed consent (FPIC) for actions that affect indigenous rights or interests.[50] For actions on American Indian tribal lands, discussed above, tribal consent is required. Tribes, as sovereigns, have authority to accept or reject minerals development on their lands, even if federal agencies conduct some of the oversight. Therefore, unless federal agencies or minerals developers are intentionally flouting the law, FPIC should be a normal part of the process for development on tribal lands. For development on federal lands, however, the question is whether the U.S. policy of meaningful consultation meets the requirement of FPIC. Where tribes have expressed strong interests in a development project on federal lands, the best practice might be to operate under the higher standards of UNDRIP and ensure that tribes are consenting, and not just being consulted, irrespective of whether U.S. courts would require FPIC compliance.

Tribal Civil Jurisdiction over Non-Indians

American Indian tribes have civil jurisdiction over their members and their territory, but this simple statement belies many complicating circumstances. While it would solve many problems if we could analogize the reach of tribes' civil powers to the territorial reach

of state governments, the U.S. Supreme Court has decided several cases that limit tribal civil jurisdiction over nonmember activity to certain categories, which depend in some circumstances on the nature of the activity and in others on the nature of land status.

First, before elaborating on the reach of tribal civil jurisdiction, it is useful to review the types of inherent powers that tribes retain. Tribes have the power to tax activities, including non-Indian activities, within tribal territorial boundaries[51]. Tribes also have the power to subject non-Indians to tribal judicial jurisdiction.[52] Finally, tribes have regulatory authority over non-Indians, and can therefore impose a variety of restrictions on non-Indian activity in the natural resource, employment, and other contexts.[53]

In recent years, the Supreme Court developed a doctrine, emerging first in the case of *Montana v. United States*, which limits tribal civil jurisdiction over nonmembers depending on the type of nonmember activity, the land status, and the degree of effect on the tribe. In *Montana*, the question was whether the Crow Tribe could impose its hunting and fishing regulations on non-Indians who owned non-Indian fee land within reservation boundaries. The Court concluded that tribes have jurisdiction over non-Indian activity on non-Indian fee land only in two sets of circumstances. The first, known as the "consensual relationship exception," is when the non-Indian enters into a contract, lease, or other consensual arrangement with the tribe or tribal members. The second, known as the "direct effects" exception, is met when the non-Indian activity has a direct effect on tribal health, welfare, or economic security.[54]

Montana also concluded, however, that the Crow Tribe could apply its hunting and fishing regulations to non-Indian activity on tribal lands. Since *Montana*, there has been uncertainty concerning the role that land status plays. Some cases indicate that the *Montana* exceptions are now the only way for tribes to assert civil jurisdiction over non-Indians, even when the activity occurs on tribal lands[55]. Yet the Supreme Court has yet to say this directly, so some lower courts take the defensible view that tribes presumptively have jurisdiction on tribal lands.[56]

For the purposes of minerals development, the land status question will seldom be problematic. Whether analyzed under a presumption of jurisdiction or the *Montana* exceptions, mining and mineral leasing will almost always trigger tribal jurisdiction to regulate. First, in the environmental regulation context, the EPA's TAS determinations, described above,

include a *Montana* "direct effects" analysis. This provides a "pre-clearance" for tribal CAA, CWA, and SDWA programs, allowing them to regulate non-Indians as well as tribal members. Second, most minerals development projects that take place within reservation boundaries occur on tribal lands, rather than exclusively non-Indian fee lands. In those circumstances, tribes either have presumptive jurisdiction, or will always be able to procure consent, triggering the first *Montana* exception and therefore the ability to tax, regulate, and so forth. While it is theoretically possible that a minerals development project could take place exclusively on non-Indian fee lands, and would have so little effect on air, water, or other tribal resources that the direct effects exception would not apply, it is extremely unlikely. Best practices therefore include assuming tribal civil jurisdiction over aspects of minerals development projects within reservation boundaries regardless of land status, as well as on tribal lands outside of formal reservations.

Conclusion

Several key points can be drawn from the whirlwind tour through federal Indian law, environmental law, and minerals development law provided above. First, American Indian tribes are sovereign governments with inherent authority to regulate their resources. Rather than seeing tribal authority as an obstacle to overcome, minerals developers should work within the tribal legal framework, just as they would in the context of national or state governments. From the tribal side, the more transparency that tribal governments can provide to prospective development partners, the greater the likelihood of instilling confidence in tribal systems and compliance with tribal and federal laws.

Second, when development projects occur off of tribal lands, they may nonetheless implicate tribal interests. Federal agencies and minerals developers should take seriously their legal obligations to consult with tribes concerning cultural properties, sacred sites, and adverse environmental impacts.

Third, tribes, federal agencies, and developers should also be mindful of the varying opinions of tribal members and grassroots groups. For consultation to be truly meaningful, tribal members who may have knowledge or views distinct from the tribal government's also need to be heard. But because tribes are sovereigns, this primarily stands as a responsibility of

the tribal government, itself. Particularly when dealing with on-reservation matters in which the tribe as a political entity is the prospective partner, "outsider" engagement of dissident factions within a tribe can constitute meddling in internal affairs and can represent disrespect for a tribe's right to make and manage its own collective decisions.

Finally, the wide variety among the 567 American Indian tribes in the United States calls for a particularized and context-sensitive approach to all of these questions. If nothing else, this analysis should serve as a reminder to seek the best localized expert advice with respect to each tribe and every project.

Resources:

Selected Relevant Federal Statutes

The exact language of these relevant federal statutes can be found in the U.S. Code (http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE):

- Clean Air Act (CAA) 42 U.S.C. § 7401 et seq.
- Clean Water Act (CWA) 33 U.S.C. § 1251 et seq.
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA – 'Superfund') 42 U.S.C. § 1906 et seq.
- Energy Policy Act 42 U.S.C. § 13201 et seq.
- Federal Oil and Gas Royalty Management Act (FOGRMA) 30 U.S.C. § 1701 et seq.
- Indian Mineral Development Act (IMDA) 25 U.S.C. §§ 2101-2108
- Indian Tribal Energy Development and Self Determination Act (ITEDSA), 25 U.S.C. §§ 3501-3506
- National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321 et seq.
- National Historic Preservation Act (NHPA) 16 U.S.C. § 470 et seq.
- Safe Drinking Water Act (SDWA) 42 U.S.C. §§ 300f et seq, 6939b; 15 U.S.C. § 1261 et seq.
- Solid Waste Disposal Act (SWDA) 42 U.S.C. §§ 6901–6992k
- Tribal Energy Development and Self-Determination Act (TERA) 25 U.S.C. §§ 3501-3506

The United Nations Declaration on the Rights of Indigenous Peoples

The full text of the UN Declaration is available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

4. PRIMARY IMPEDIMENTS TO AGREEMENT

Tribes in the United States have the negotiation status of subnational governments. The overarching impediment to reaching agreement is often a lack of corporate appreciation for this reality. Thinking of tribes simply as another "stakeholder" and failing to recognize their governmental status is certain to derail relations. This is particularly the case with on-reservation development but also pertinent in cases where there is an impact on the cultural and environmental rights of tribes. Devolution of authority in tribal government varies considerably. While negotiations are generally handled between tribal councils and company executives, some larger tribes give more authority to local governance institutions. For example, in the Navajo Nation, local chapter Houses have considerable authority and mining companies often have had direct contact with them to ensure maximum acceptance of a project. Tribes in the United States are increasingly getting involved with establishing their own companies and any on-reservation activity should consider opportunities for collaboration with tribal enterprises. For example, the Southern Ute Tribe and the Navajo Nation both have their own oil and gas development companies.

Companies also need to appreciate that tribes are always considering multiple development paths and need to be provided a cogent case for why minerals development would be in their best interest. Numerous tribes have other highly lucrative opportunities, especially in the service sector. Casinos have been a literal "game changer" in the development alternatives available to tribes in the Lower 48. Estimates from a recent study indicate Indian casinos generate around 43.5 percent of all U.S. casino gaming revenue, amounting to revenues of $27.4 billion in 2011.[57] Even tribes that previously were focused on minerals extraction and for years had resisted gaming are now pursuing this development option.

These considerations are linked to several common impediments to tribal-corporate agreements for extractive resource development. This chapter discusses these and other impediments in an effort to help tribes and companies minimize them.

Misuse and Misunderstanding of Legal Powers

As the legal "primer" of Section 3 above makes clear, tribes in the U.S. have substantial legal powers with respect to minerals extraction on and near tribal lands that indigenous communities elsewhere do not have. For mining companies and tribes, more certainty in on-reservation resource ownership and greater clarity about the appropriate parties to any negotiation or contract are among the positives of this greater authority. But stronger legal powers for tribes also can create impediments to agreement if tribes and companies misunderstand the limits on exercising or challenging such powers.

Overlapping or Ambiguous Off-Reservation Jurisdiction

Tribes' powers on land to which they have clear title are much stronger than their powers on lands they do not own. Nonetheless, all tribes have a degree of off-reservation authority, through blanket national laws that recognize the importance of protecting tribal cultural resources (such as the National Historic Preservation Act and Native American Graves Protection and Repatriation Act) or through specific intergovernmental agreements that provide tribes' increased authority on ancestral or other lands. Examples of the latter include off-reservation treaty rights and "Treatment as an Affected State" status in environmental regulation.

These legal powers mean that for nearly any mining development near Indian Country (where "near" is a term that depends on geography, history and tribal influence) tribes will have a degree of jurisdiction that overlaps the jurisdiction of other governmental authorities and landowners. Thus, for example, the Fond du Lac Band of Lake Superior Chippewa is asserting Treatment as an Affected State (TAS) status in seeking to deal with PolyMet's proposed development of a copper, nickel, and precious metals mine that would affect water quality in ceded treaty territory (see profile below).

While the question (for tribes) of when and how to exercise off-reservation jurisdiction and (for nontribal minerals developers) of when and how to engage tribal governments embody a number of strategic considerations, the fact remains that *not* acknowledging the existence

of overlapping or ambiguous jurisdiction is problematic. In ceded treaty territories such as historic Ojibwe (Chippewa) lands around the Great Lakes, for example, the authority and power to say "yea" or "nay" is limited, and it is easy for tribes to feel that they get overrun by companies attempting to influence and control state and federal permitting processes. It is not a contradiction of the overriding drive of tribes to assert their sovereign powers for those tribes who are owed treaty obligations over reserved resources which are now under non-tribal jurisdiction to seek more, rather than less, federal regulatory intervention so as to protect reserved resources.

Promises of jobs or the kinds of community impact payments provided (in limited cases) by Wisconsin[58] do not provide a viable substitute "benefit" for tribes who see the defense and exercise of their sovereignty as paramount. When those tribal values are tread upon, even with limited jurisdiction, tribes that have not been brought into the decision-making process appropriately are in a position, and are very likely, to protest any development—and to do so up to the very last moment and even long after development is underway.

Improving economic conditions for many tribes, in fact, provide them increased wherewithal to exercise power and control. A case in point was the proposed—and never developed—nickel and zinc Crandon mine near the Mole Lake Ojibwe Reservation in Forest County, Wisconsin. After 27 years of opposition, utilizing income from casino and other enterprises, the Mole Lake Ojibwe and the Forest County Potawatomi tribes purchased the mine property in 2003 with the intention of never letting it be developed.[9]

The Limits of Litigation and Political Leverage

Especially in the U.S., where litigation is a common approach to problem solving, mining developers may view litigation as a straightforward next step should negotiations with tribes proceed less favorably than desired. Experience suggests, however, that the attitude of "we can always sue them" impedes fruitful progress at least as often as it facilitates it.

For mining companies, the temptation is to let opinions about the success of litigation color shorter-term behavior. In particular, a company's compliance with the letter of the law, experience in court with mining cases, and deep pockets for data gathering and litigation support can give rise to the mindset that when it becomes necessary to go to court, the

company *will* win. The attitude can diminish corporate representatives' motivation to seek a negotiated agreement with a tribal government. The positions they put forth on the company's behalf may harden, and they may tend to reserve options from the negotiating table. When this occurs, a litigation strategy transitions from "an option the company would consider" to "the planned next step."

This is not to dispute the fact that it may be good business practice for mining companies to plan for litigation while at the same time negotiating with tribes concerning mineral access, rights, royalties, and impact-benefit concessions. Rather, the point is that the threshold for litigation should not be too low—more than *this* mining proposal and *this* tribe should be taken into account when calculating the threshold for legal action. Given the longevity of tribes (which can be credited in large part to their standing not only as communities but as governments), the long memories of tribal citizens, and the fact that tribes own most of the land in the United States that is unexplored for mineral deposits, there is no guarantee that any lawsuit is a one-shot, win-lose interaction between the company and the tribe. While unknown at present, the company may desire more interactions with the tribe over time. Moreover, given strong networks of communication between tribes, any legal action should be viewed as having an impact on the relationship between the company and this tribe *and* between the company and all tribes in the United States. These considerations suggest that even if a mining developer won an individual case, that win could have large opportunity costs.

While the principals are at different points in the processes of negotiation and litigation, such considerations go a long way toward describing the situation between Peabody Energy and the Navajo Nation in their dispute over coal royalties, water use, and environmental protection—which reached a turning point when Peabody ceased operations at the Black Mesa Mine. We also note that when corporations pursue the political strategy of working with state and federal agencies or elected officials as a means of subverting tribal governmental authority, the results can be quite similar. Native nations view this strategy as corporations using politics to override tribal rights—and take a very dim view of it. A mining developer may succeed with respect to a particular project, but in so doing, may risk the corporation's reputation in a way that impedes future work with the tribe or with other Native nations.

Tribal Sovereign Immunity and Tribal Courts

Sovereign immunity is the legal concept that a government cannot be subject to suit (by its citizens, by corporations with which it does business, by other governments) without its consent. A series of U.S. federal court decisions affirm that in the United States, not only the federal government but also state and tribal governments enjoy this privilege. The logic of sovereign immunity is that assets held in common for a government's citizens should not be vulnerable to a judgment against that government.[60]

Yet the privilege for tribal governments can become a deal-breaker for corporations attempting to do business with them if a tribe refuses to enter into a contract under which it (or its constituent part, such as its business corporation) could be sued. Corporations are wary of such contracts given the possible losses of corporate income and profit when a contract is breached or a liability claim arises. While *not* representative of all tribal governments, a few well-publicized cases in which tribal governments used sovereign immunity to avoid seemingly reasonable claims reinforce this wariness. In fact, concerns about sovereign immunity and the related difficulties of pursuing on-reservation mining agreements have caused some extraction companies to unequivocally refuse to pursue development on tribal lands.

The way forward is for the tribal government and the corporation to negotiate a limited waiver of sovereign immunity—a compromise at which an increasing number of tribes, corporations, and Indian law experts have become adept. The challenge is to balance the tribal government's need to protect its citizens' assets with the corporation's need to protect the value of its investment and to appropriately parse liability should things go wrong. Clear waivers of this sort have proven to be effective means of generating economic benefit for both corporations and tribes. Typical elements in tribal waivers of sovereign immunity include specification of eligible claimants, the types of claims allowed, the choice of forum, the choice of law, an allowable limit on the judgment amount, type of damages allowed, and the duration of the waiver.[61]

For some tribes and corporations, a particular sticking point in these agreements is the choice of forum. Tribes often will insist on using their courts to hear disputes, while corporations may prefer the jurisdiction of the state in which the project is located or in which the company is headquartered. At present, a common compromise position is to rely on

arbitration and to specify an arbitration forum. But as tribal court capacities develop and track records emerge, even this position may be overly cautious. Berger's research on civil cases brought before Navajo appellate courts shows that in the 35 years up to 2005, non-Navajos won 47.4 percent of cases involving Navajos and non-Navajos. "The decisions, moreover, appear to be qualitatively balanced, even with respect to cases and issues that might appear particularly vulnerable to bias."[62]

For hard-rock mining projects—which tend to have long, multi-phase timelines, significant, potentially expropriable installed capital, and somewhat uncertain long-term environmental impacts—other elements of the waiver agreement (the allowable limit on judgment amount, types of allowable damages, and the waiver's duration) may be even more challenging than choice of judicial forum. If insurmountable, tribal sovereign immunity will remain a barrier to project development even when both parties deem them worthwhile.

Institutional "Thinness" of Tribes

Perhaps the greatest impediment to constructive and durable tribal-corporate relations in minerals extraction and other large, tribal resource-using projects is the institutional "thinness" of many tribal governments. Anxious to protect and exercise their sovereignty, but relatively new to the game, they struggle to manage their jurisdictional powers; understand the technical details of contracts, mining plans, and the regulatory overlay of federal policies; negotiate multi-million dollar investments; explain the benefits and costs of prospective deals to their citizens; and build their own regulatory, accounting, and business systems. Moreover, they commonly undertake these challenges with few resources and in the face of pressing social problems of poverty and legacies of deprivation and cultural distress.

To the other side of the table, these problems can be seen as frustrating organizational disarray, inconsistent and vacillating decisions, and lack of professional standards. The reality is that these problems are manifestations of the institutional "thinness" of tribes as they push to build themselves into increasingly competent governments. In fact, tribes lie along continuums of institutional capacity of the form illustrated in Figure 1.

The starting point of institutional "thickness" is *values*. Tribal agencies and officials are not immune from shortsighted thinking and self-serving behavior. At the same time, case after

case of well-run tribal programs and agencies find the secret to success lies in systems that are designed according to tribal values and which are staffed by people that are committed to their respective tribal communities. In fact, the strength that the shared history of implicit and explicit attacks on Native communities and their values brings to today's tribes is at the heart of why more and more tribal programs meet or exceed the performance of their U.S. state, local, and federal counterparts.[63]

Figure 1
The Tribal Continuum of "Institutional Thinness"

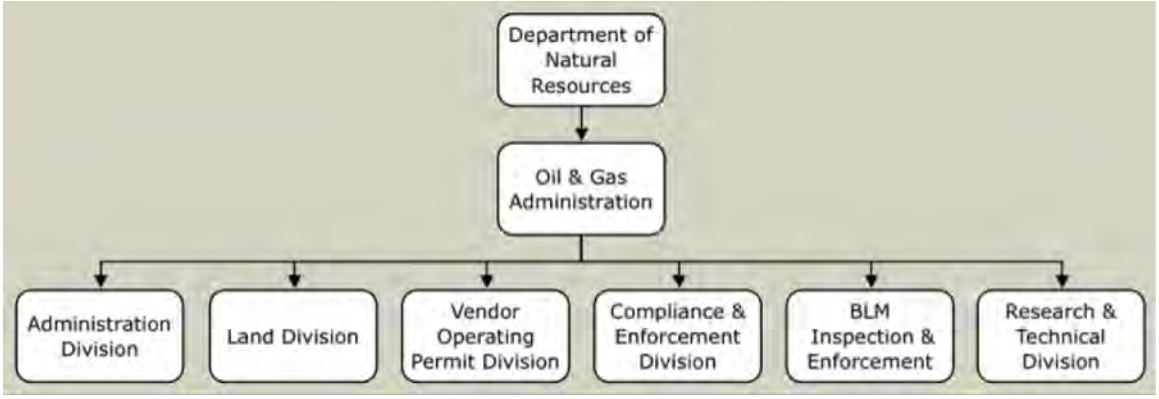
Consider, for example, the delegations of tribal authority for engaging with outside developers, negotiating binding deals, and regulating post-contract administration. Reflecting a history in which almost all resources emanated from federal programs and were channeled by the federal government to tribal councils of elected representatives, tribal governmental affairs are frequently organized around subcommittees of the tribal council, perhaps augmented by non-elected, appointed citizen representatives. When the federal government effectively

called the shots, the tribal council's Natural Resource Committee (or equivalent) may have been adequate to interface with and advise or complain to federal officials. As mechanisms of business and regulatory decision making, however, tribal council committees are, at best, impediments and, at worst, destroyers of sustainable interactions, negotiations, and agreements with large corporate counterparties. As fundamentally political bodies, such committees find the hiring and retention of expert, professional staff virtually impossible. Developing and holding onto institutional memory about what was said at the last round of negotiations, why a particular concession was or was not granted, and so on is compromised by inevitable political turnover.

The alternative is seen at tribes like Jicarilla Apache. There the tribe has created a full Department of Natural Resources, with responsibilities for each of the functions that effective management and oversight of some 2200 gas wells requires. As seen in the Tribe's organization chart for its Oil and Gas Administration below, from well site permitting to research and technical support, Jicarilla has invested in a "thick" administrative capability. While "bureaucracy" is generally an unpopular term, effective bureaucracy is a necessity. The papers need to be filed, the properties need to be inspected, monies need to be collected, … and so forth.

Figure 2

Institutional "Thickness": Organization of the Jicarilla Apache Oil and Gas Administration



SOURCE: Jicarilla Apache Tribe at http://jicarillaoga.com/overview/, last accessed May 12, 2013.

Similar lessons apply to other critical functions of effective tribal governments illustrated in Figure 1. Many tribes now are drafting, adopting, and implementing their own commercial, business permitting, zoning, building, insurance, and health codes, both to put themselves in the driver's seat when it comes to directing the course of economic development and to strengthen their own laws so that their own courts are in position to serve as primary dispute resolution mechanisms. Similarly, tribes' effectiveness and viability as counterparties in engagements with minerals developers, whether such engagements result in consummated or rejected proposals, rise, for example, as the tribe moves from regulatory oversight via one-off tribal council resolutions or letting federal authorities fill vacuums to fully developed systems of minerals law and assumption of federal powers through TAS status.

Tribes are in trouble as negotiators and potential partners in minerals development when their legal capacity consists of a single, all-purpose tribal attorney or two, politically appointed patronage-driven department heads, and courts staffed by politically appointed judges that lack protection from tribal council politics. Relations with developers are at risk when the tribe cannot sustain in-house expertise and relies, instead, on federal advisors for technical contract, mining, and environmental support. They may be tougher negotiators, but they are more likely to be able to reach and sustain agreements when they are supported by in-house expertise and competent, experienced, and (therefore) expensive lawyers and consultants.

But where does "thick" institutional capacity come from? For many tribes, it has started with reform of their constitutions. Tried and true mechanisms of stabilizing policies, retaining personnel, and de-politicizing appointments, decisions and dispute resolution systems are being found in such reforms as staggered terms of office for council members; separations of powers between executive, legislative, and judicial functions; and civil service protection for administrators. In fact, without such reforms corporations can quite reasonably find themselves saying "not now" and stepping away from prospects until a tribe's institutional capacity is up to the task of handling major minerals developments. The "thick" tribal administration of Figure 1 is ultimately the ally of sustainable relationships. Investments are at their greatest risk when tribal government is in disarray.

In undertaking constitutional reforms and rebuilding their governing institutions according to their own values and systems of authority and power, American Indian nations are teaching an important lesson for all nations. The institutions that stabilize a rule of law by putting in separations of powers, that protect day-to-day business and public administration from politics, and so forth do not have to look like U.S. or other "western" forms of government. Indeed, hundreds of U.S. tribes had such government effectively imposed upon them in boilerplate fashion in the first half of the 20th century—typically, with disastrous results. But today we find the Navajo Nation enforcing *Navajo* common law in the Navajo Nation Supreme Court; various New Mexico pueblos operating successfully under long-standing spiritually-derived quasi-theocratic structures which enforce the rule of *Pueblo* law; and tribes like the Citizen Potawatomi Nation succeeding with outwardly western-looking three-branch democracy founded on a Potawatomi history in which such structure fits today's *Potawatomi* culture.[64] Coming in with some other society's structures as the one-size-fits-all way of "thickening up" this tribe's capacity is a recipe for political and civic disarray.

Institutional "Thinness" of Corporate Partners

If tribes are under pressure to thicken up their capacities when it comes to minerals and other large project development, so too are their corporate counterparts who would propose to strike and sustain viable business relationships with tribes. The corporate continuum of institutional "thinness" is illustrated in Figure 3. Companies at the "thick" ends of the continuum are far more likely to be seen by their tribal counterparties as acceptable business partners and minerals developers.

Figure 3
The Corporate Continuum of "Institutional Thinness"

It is "Management 101" that effectiveness in an arena such as tribal minerals development begins with a company's corporate culture, or values. It is no less elementary that a company's values or culture emanate from the top. When those values permeate the organization and its business planning, both large (e.g., "If we disrespect this tribe's sovereignty by trying to do an end run around it to get to the state legislature for help, we're more likely to lose") and small (e.g., remembering in public that the tribal chairwoman needs to be addressed as a head of state) strategies, decisions, and behaviors are more likely to stay on a path toward productive relationships.

Moreover, merely "talking the talk" is unlikely to be sufficient; policies and systems need to be in place to provide consistency to strategies of engagement across the layers and silos of large organizations. Best practices entail explicit mechanisms for institutional learning regarding "what's worked and what hasn't" when dealing with tribes, including documenting case experiences, filtering those with experience through the organization, and dedicating

personnel to the task of internally taking responsibility for managing tribal engagement procedures and policies. In the same vein, the company that is serious about and focused on succeeding in Indian Country "thickens" up its approach by holding employees' feet to the fire through development of evaluation and accountability standards that carry consequences for career advancement.

The alternative of ad hoc, crisis-driven responses and/or treating the need to learn about and focus on tribal engagement as a set of business skills and strategies as a nuisance can only reinforce corporate cultures that produce the kinds of companies that tribes don't want to deal with. The same applies to relegating the management of tribal relations to an HR ("Oh, we'll solve things by hiring some tribal workers") or PR function ("Make us look good in the eyes of Indian Country"), instead of building the necessary technical knowledge about tribal government and tribal communities throughout the organization and making it senior management's responsibility to create, implement and monitor company policies of engagement.

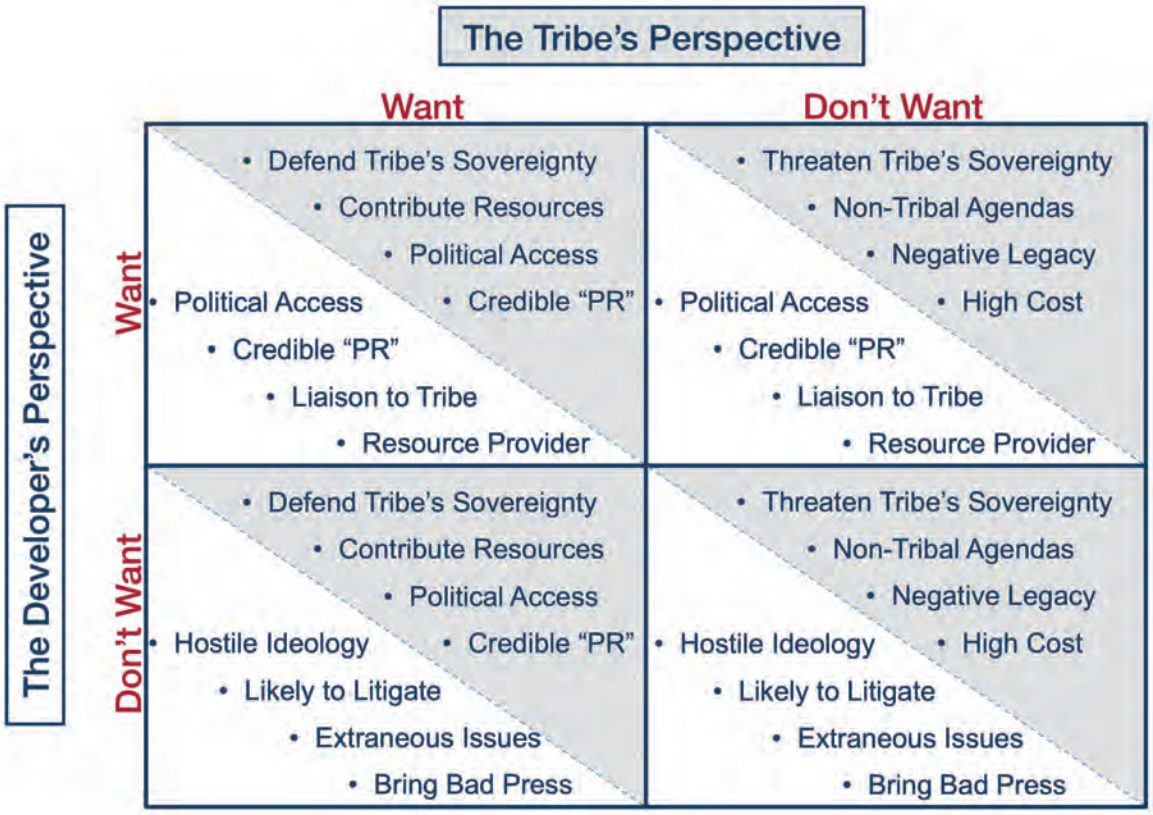
Third Party Interactions

Tribal governments' strong preference is for tribal sovereignty over resource development decisions.[65] In exercising that sovereignty, however, tribes sometimes form alliances with third parties, be they interest groups, more formal non-governmental organizations (NGOs), or other governmental bodies. Reasons for these alliances vary, although a common one is expanded capacity: an ally might provide scientific expertise on complex environmental impact issues, legal support, guidance in extractive development oversight, skills concerning cultural heritage conservation, or information about alternative community development paths (such as support for small business enterprises).

On the other side of the table, companies' primary concern is with profit making. They, too, may work together with third parties if these interactions have the potential to improve political access, generate credible public relations, provide assistance in liaising with relevant tribal governments and communities, provide resources useful in these processes, or otherwise assist in solidifying and maintaining a company's notional "license to operate." For example, a developer may work with a local Chamber of Commerce because of the Chamber's ability

to conduct targeted public relations concerning local employment and the multiplier effects of mine development. Figure 4 portrays the nature of these issues.

Figure 4
Engaging (or Not) Interest Groups, NGOs, and Intervenors



As the figure suggests, despite the logic of third-party engagement for both companies and tribal governments, each may be wary of the other's third-party interactions and alliances—often because they can impede progress toward agreement. A mining company may have previously encountered Native-led environmental groups whose position was that *any* extractive activity is unacceptable and whose involvement seemed to obstruct corporate-tribal communication concerning mine development.[66] Tribes will have previously encountered developers who afford NGOs the same respect and standing as a tribal government or, worse, privilege supportive third-party interests ahead of tribal government concerns—and this disrespectful treatment creates a hard-to-remove sticking point for tribes in further negotiation.

Nonetheless, a reflexive reaction is less useful than individual, case-by-case examination of tribal governments' and companies' third-party relationships. A closer look gives tribes and developers a better understanding of the bearing third parties may have on the tribal-corporate interaction. Notably, not all third-party interactions reflect differences in tribal and corporate preferences. But where there are differences (see the lower left and upper right quadrants of Figure 4), third-party activity can frustrate the tribal-corporate relationship, diminish opportunities for effective communication, and impede agreement. Several examples are demonstrative.

Environmentalists with Value-Based Goals

Tribes and environmentalists often are thought to have similar interests in proposals for natural resources development. Key areas of congruence between the objectives of most environmental NGOs and tribes include:

- Traditional ecological knowledge (e.g., the desire to conserve botanical elements and biodiversity related to tribal heritage and lifestyles);
- Food resources (e.g., the desire to protect such resources for both their economic and cultural value);
- Subsistence values and their cultural significance (e.g., when the Ojibwe Tribes of Minnesota and Wisconsin oppose mining that they fear will threaten wild rice harvests);
- Water quality and access (e.g., the desire to protect rights that tribes have considered an inherent part of their overall property rights);
- Normative views on particular minerals (various minerals but especially uranium because of its legacy of harms, such as those experienced by the Navajo Nation).

While companies may not agree with the conclusions tribes and environmentalists draw on these matters, they remain key touch points for alliance building and negotiation.

Beyond these areas of collaboration, however, an environmental interest group's alliance with a tribe may be a means of leveraging resistance—and for groups whose existence is predicated on resistance, there is little reason to engage with companies. These are the more problematic alliances for corporate-tribal communication and negotiation. They are problematic for both companies and tribes.

Tribes certainly are aware of the typologies of environmental NGOs. In some cases, tribes have distanced themselves from specific groups, especially if they conclude that there is

more at stake in *not* engaging with a corporation, or that the NGO's own agenda will override tribal sovereignty if the tribe exercises its powers by doing something other than opposing development. In other cases, tribal relationships with absolutist third parties are sustained as one of several tribal-NGO alliances, where engagement is viewed as democratic representation of tribal citizens' views. In still other cases, resistance is the tribal government's stance, too. Distinguishing among these types of tribal-interest group alliances is valuable: Only in the last case does tribal engagement with a highly values-driven interest group signal that agreement concerning development is unlikely. In the other cases, the third-party relationship may slow development talks down, but not rule them out altogether.

Lack of Scientific Consensus

Scientific evidence can help delineate the parameters of corporate-tribal conversations about minerals development—but it also can be a source of contention and confusion. Some tribes—those who have invested in their institutional "thickness"—address the scientific arguments made by development companies' external experts with their own external experts' evidence. The Fond du Lac Band of Lake Superior Chippewa, for example, is accomplishing this through a National Science Foundation (NSF)-funded study of wild rice proliferation conducted by the University of Minnesota's Department of Geology and Geophysics. (And this is not the Tribe's only effort to encourage independent researchers to produce scientific evidence concerning water quality, habitat, and ecological systems.)[67]

In other cases, tribes may appear to challenge the validity of scientific arguments altogether, being highly conscious that in the past, science was used to justify actions or prejudices contrary to tribes' best interests. Yet companies and the third parties they rely on for a scientific understanding of development impacts ought not interpret this stance as a rejection of science or an inability to understand scientific evidence. Instead, a tribe's socially and politically constructed response to scientific arguments typically reflects a complex amalgam of opinions and ideas, which can readily include ideas based in academic natural science research.

For example, the Mi'gmaq (whose traditional territory is in the northeastern U.S. and eastern Canada) have taken a position on the protection of their fishery that is based on indigenous knowledge and injected that information into science-centered discussions.

While the issue they face is competition with sport and non-Native commercial fishermen, not natural resource extraction, the style of argument is comparable and noteworthy:

> "In Mi'gmaq I say, 'the salmon is my brother.' If the salmon is my brother, then he's no different than my uncle, my cousin, my aunt's husband who has passed away. …They taught my father everything that he knows about salmon fishing… and he taught me… We continue to give back to people through the salmon so that we can continue to acknowledge and strengthen that we are connected."[68]

> "In the management of the wild Atlantic salmon, modern conservation policies relied on Western scientific data and were primarily geared towards protecting wild Atlantic salmon populations. These policies, however, have largely been unsuccessful. The salmon populations are still threatened—[by] dams, roads, infection and disease, etc. Further, fisheries policies have not adequately considered the cultural, spiritual and social importance of land, waters, and the natural resources…For the Mi'gmaq the salmon signifies more than a 'resource', rather it symbolizes a way of life and a deep connection with the land and waters…The relationship between culture and the resource is important to consider when developing programs, strategies and/or polices…"[69]

This is simply a different kind of "battle of expertise"—and one with more dimensions—than external scientific experts may be used to, but it is one that sovereign tribal governments increasingly expect developers and their allies to understand. When presenting research data, third-party scientists should show an appreciation for the way scientific arguments historically have been used against indigenous communities, demonstrate an ability to listen to and show respect for other sources of knowledge, and utilize a hybrid approach for understanding the impacts of development that combines objective scientific assessments with subjective value-recognition. If they instead fall back on arguing the primacy of science or, worse, tribes' "inability to understand" science, they will indeed become an impediment to progress on any development agreement.

Organizations such as Centre for Science and Public Participation[70] are playing an important role in such "knowledge empowerment" of mining-impacted communities, particularly in tribal areas. Companies should engage early with such groups to gain an understanding of the kind of scientific knowledge that is most appropriate for the community and also the limits of data in changing perceptions.

Media's Role

Media is a third party unlike any other. Neither companies nor tribal governments choose to "ally with" the media in the same way they might seek out or respond to an overture for engagement from other third parties. Instead of supplying a developer or tribe with information, data, capacity, or resources, media is the recipient of information and ideas, which it then interprets and packages for broader public consumption. While a company or a tribe may feel that certain types of media coverage are friendly to their position, news cycles mean there is little guarantee of sustained support for any given position. More uncertainty arises from the fact that a news story can be presented in a way that ultimately compromises a tribe's or company's resources and negotiation options.

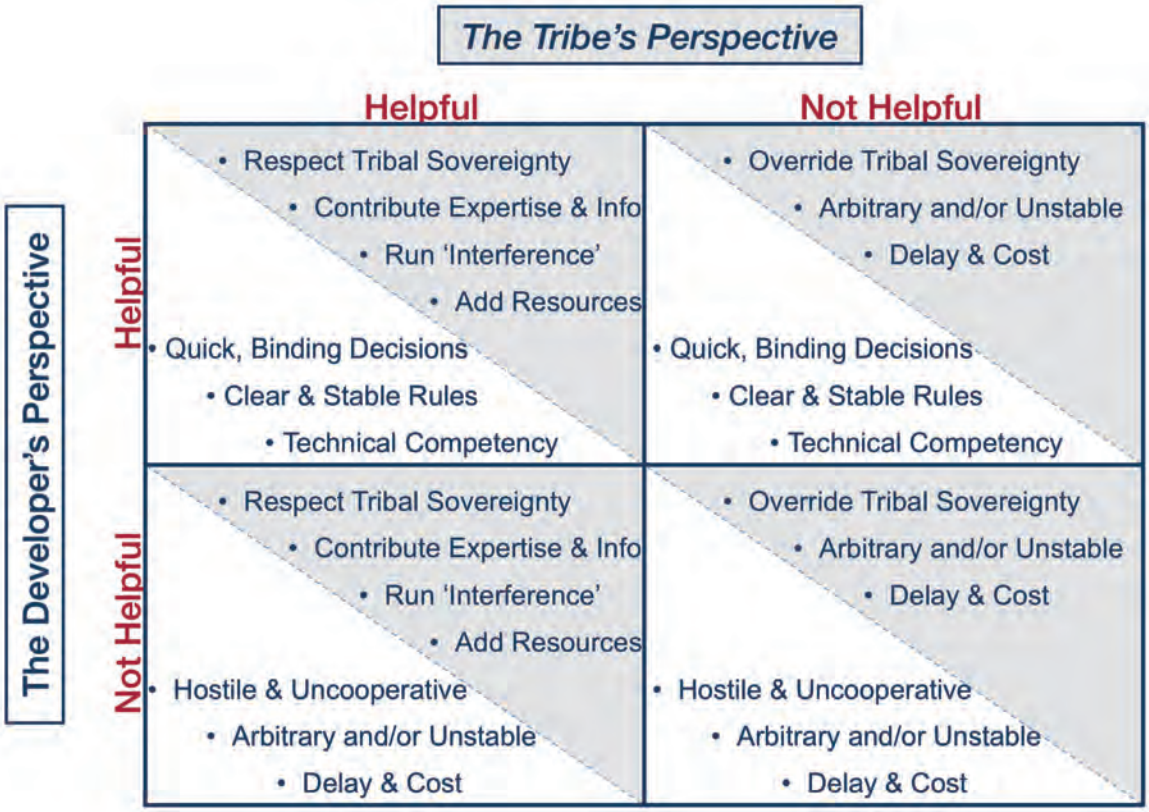
Given these characteristics, media third parties can easily disrupt the opportunities for negotiation and communication concerning development. With coverage that distorts the position actually held by a company or a tribe, for example, the parties may harden their views and become more resistant to agreement. Especially where media coverage is intense and debates concerning resource use heated, tribes and developers do well to focus on their bilateral relationship rather than allowing (however accidentally) media to become a go-between. (After all, it may be in a media outlet's best interest to sustain *disagreement* in order to ensure an ongoing news story.)

Legal and Regulatory Players as Third Parties

Legal and regulatory players at the federal and state levels are another type of third party to the corporate-tribal relationship. Agencies and authorities such as the federal Environmental Protection Agency, the Bureau of Land Management, the U.S. Forest Service, state mining or environmental agencies, local counties and cities, and even members of Congress commonly have had roles or stakes in major land-using developments on or near tribes' reservations. Sometimes these roles or stakes arise pursuant to legal requirements; in some instances, putatively legal/regulatory players may be pursuing political agendas or even slices of the pie.

As with interest groups, the input and engagement of legal and regulatory players may be helpful or unhelpful to tribes and companies, given their interests and objectives. Figure 5 below explores key determinants of whether the interventions of these third parties are likely to be seen as helpful or unhelpful by tribes and developers, respectively.

Figure 5
Managing the Legal and Regulatory Players and Process



The Environmental Protection Agency, for example, may be an important regulatory ally for tribes with "Treatment as an Affected State" status under the Clean Water Act or Clean Air Act and, at the same time, be viewed as an intransigent supporter of tribal privilege by corporations seeking permits for watershed use. State and federal courts that strictly interpret off-reservation treaty rights claims may be viewed as allies of corporations that want clear and stable rules for land use and viewed by tribes as entities hostile to tribal sovereignty.

On the other hand, both tribes and corporations might welcome the expertise of the Bureau of Land Management in organizing and sustaining multi-government monitoring bodies for the ongoing protection of public lands, or find frustration in the Bureau of Indian Affairs' limited capacity to process complex lease agreements for land use and minerals extraction. Indeed, in the case of tribes with treaty-reserved resources in off-reservation ceded territories,

the only sovereign authority they may be able to enlist in support of their efforts—whether those efforts are to stop or to promote a mining development—is likely to be the federal government when it is obligated to uphold its treaty obligations.

Significantly, corporations must realize that *they* are the third party in critical government-to-government relationships that a tribal government has with federal, state, and local governments. For example, while a developer might feel frustrated by timeline delays in the BIA's approval of a mineral lease agreement struck under the terms of the Indian Mineral Development Act, delay typically is associated with the Bureau's desire to appropriately implement the trust responsibility, and this is a government-to-government concern of tribes and the federal government in which the corporation should not intervene. There may be numerous government-to-government issues that arise in the course of a major minerals development—whether on-reservation or off, concerning everything from land use, to cultural property protection, water regulation, endangered species, taxation, and road building—that meet this criterion, and companies must be prepared to stand aside, let the governmental processes happen, and always remember that their partner is not just another special interest but a government with unique relationships across the public sector.

Breakdown in Community Trust and Engagement during Project Development

Once a mining project starts to develop, there is a tendency for companies to think that all issues have been resolved and trust has been established. However, trust is a process that needs constant reinforcement, particularly with tribal communities who over the past few centuries have endured innumerable violations of treaty obligations by governing authorities over the past few centuries. Several common reasons for trust erosion during project development follow.

Communication Failure Due to Cultural Misunderstanding

The most common failing that erodes trust is the perception of insensitivity by tribal members about their culture. This misunderstanding can often come out of a well-intentioned effort to be cautious just as much as it can from lack of concern. For example, the assumption that tribes have proclivities that match those of environmentalists may lead

to errant assumptions about the environmental values of tribes. At the very least, tribes and non-Native environmentalists are likely to have very different ways of communicating concerns about environmental harm.[71]

The pace of communication at meetings often causes disconnect between companies and communities. Tribal members are often reticent about matters and listen patiently until they see trust developing. The silence and slow pace of meeting progression often frustrates corporate negotiators who can show impatience that in turn further erodes trust.

Prayer ceremonies and other culturally significant displays of tribal culture can be considered by some corporate negotiators as a distraction and often the perceived solution is to send a consulting anthropologist to intervene. However, U.S. tribes are quite intent on not just having a researcher who knows their culture interacting with them as an intermediary, but a collective process of corporate acceptance of their traditions. This being said, it is important to note that culture is itself an evolving phenomenon and the range of cultural adherence across tribal members and subgroups should be appreciated at an individual level and no assumptions made about the degree of cultural adherence within the community overall.

Even more generally, tribes should not be stereotyped as being all of one mind when it comes to a matter as contentious as mining on reservations or in ceded territories. As with any other communities, there may be disagreements, even deep divisions, within tribes. The wise developer, seeking to engage in productive engagement potentially leading to sustainable agreement, recognizes that such disagreement is fundamentally the tribe's business. Playing surreptitious politics to enlist the support, or even the coming to power, of pro-development individuals and groups within a tribe is profoundly disrespectful of the one value that is likely to be a universal value within a tribe—respect for the tribe as a self-governing sovereign. Tribes are appropriately dealt with as governments, not as mere communities, and certainly not as conglomerations of factions and views that can be manipulated. While the latter approaches may seem to hold prospects for short term gain, they are recipes for long-term destabilization, mistrust, and even expulsion.

Changes in Personnel

Both companies and tribes experience turnover in decision making and other professional personnel. Yet, continuity in communication through established relationships is an essential ingredient of developing trust. Career trajectories at mining firms generally lead to high turnover of staff from one site to another as a reward mechanism. As tribal communities worldwide are very kin-centered in their communications, the rapid change of individual negotiators can unsettle relations even if the new-coming individual has considerable experience on substantive matters. Thus it is essential for the Human Resources department of a company to carefully evaluate employees for positions in Native American settings based on a longer-term commitment to a site.

Often this may require far more investment in recruitment searches and local hiring networks. It is important to also consider that just having an indigenous employee in a community relations role might not be the solution since there are also specific rivalries and lack of trust which may historically exist between tribes. For example, Navajo and Hopi, while living in close proximity to each other, have highly conflicted histories and although professional interactions may be civil, a community relations role reciprocally might not be advantageous or may require more considered recruitment.[72]

Legacies of Resource Loss and Uncompensated Damage

It is difficult to overstate the negative, even traumatic, legacy that past takings and uncompensated or undercompensated appropriations of tribal lands and resources has left across Indian Country. Tribe after tribe has its well-remembered story of how big the reservation used be, how wide the rights to resources in ceded territories extended, how the people had no say in whether that mine was developed, and so on. These stories are not mythical or mere rhetoric; they have been affirmed in the last few decades time and again in U.S. courts and the Congress.[73]

The term "moccasin telegraph" refers to the ease with which information, particularly information concerning negative or positive reputations of non-tribal individuals and organizations travels across Indian Country. This very efficient "telegraph" reflects the fact that, ultimately, Indian Country is quite small and attune to protecting itself from violations of sovereignty and loss or damage to natural and cultural resources and values. The consequence

is that reputation is critical. Leaving a legacy of the mine that was abandoned or closed without due protections of the tribe's market and *non-market* values can only make the next proposed development, maybe thousands of miles away, nigh impossible to start. Earning a reputation for heavy-handed politicking of federal and state agencies or end runs around tribal regulatory institutions can only make it that much more difficult to even get in the door with responsible tribal leadership.

Different Discount Rates and Time Horizons

All mining projects have clear discounting mechanisms for accounting for project benefits and costs. The discount rate is a means of operationalizing risk in a project and the value that future benefits may present compared to the present. A high discount rate suggests that there is a greater risk and hence longer-term benefit accrual is going to be under-valued more steeply. The pace of resource extraction is often calculated through such bases considering commodity price fluctuation changes and political risk.

For tribes longer-term relationships are often more important than short-term extraction ventures. Mining operations on indigenous lands need to have a different time horizon in terms of project planning and interruptions than conventional operations. This needs to be built into the income generation scenarios to avoid unrealistic expectations by shareholders and investors. Depending on the community buy-in for a project, tribes may have a fast pre-project development time expectation and a slower post-project extraction pace. It is important for resource companies to realize that in many ways they are in an advantageous position whereby their finite resource base will most likely increase in value with greater scarcity and leaving material in the ground until the social acceptance to operate has been granted is not necessarily a financially disadvantageous position. However, accounting mechanisms should be refined within the company and properly note such long-term assets.

Not Knowing When to Stop

A significant number of Native nations have experience with mining and other extractive industries, and for at least some of them, the experience no longer meets their expectations for appropriate community development or an appropriate tribal-corporate relationship. For

these tribes, the question is not how to reach an agreement that is acceptable concerning the initiation of mining but how to reach an agreement that can provide for its cessation.

For tribal governments, Navajo Nation's struggle with Peabody Energy over the Black Mesa mine stands as a warning of how difficult this process can be. Beginning in 1979, the tribe began to petition Peabody for a more appropriate royalty rate—to increase the 2 percent rate set in the 1960s to at least 12 percent, the federal minimum for Indian coal established in 1977. By the early 1980s, experts at BIA agreed that a higher rate was indicated, but rather than work with the Navajo Nation to establish a fairer rate, Peabody Energy sought an alternative solution. It lobbied then-Secretary of the Interior Donald Hodel to keep the royalty rate low—and he did. As the tribe's frustration with the royalty agreement grew, so did their indignation concerning environmental damages, aquifer depletion and excessive water use, and the illegal taking of cultural patrimony. Years of litigation later, the tribe won a partial victory on the rate; it also succeeded in seeing the mine closed, in 2006, 27 years after it began to question its relationship with Peabody.[74]

Lack of Education and Training

Typically, minerals developers—and even their critics—point to the lack of science, technology, engineering, and mathematics (STEM) skills among tribal citizens as a key impediment to the realization of community economic benefits. As one prominent national conservation organization has noted:

> "The primary local economic benefit of minerals development is the creation of jobs and the payment of wages. Many local tribal members do not have the training or the education necessary to fill the high-paying managerial and skilled jobs that come with mining. Outside labor is generally brought in to fill these jobs."[75]

If importing labor is not an option, this skills deficit can become an impediment to mine development itself. It is easy to imagine how this situation could arise with respect to an on-reservation development (in which the tribe is presumably a part-owner) or a development off-reservation in which a tribe has a significant stake through treaty rights. An assurance of tribal member employment in the project would be, at least in part, a matter of sovereignty. If there simply is not an adequate skill base in the population and no plan in place to increase

that base, the development could quickly become a non-starter. With this in mind, hard rock mine developers are adding long-range skill training programs (starting as early as grade school) to their mine development plans.

But other education and training-related stumbling blocks to mine development are less visible. For one, tribal citizens may need quite broad education in how to be good employees. For example, after its casino enterprises had been open for several years, the Sisseton-Wahpeton Oyate noticed that some tribal citizens had difficulty maintaining employment even though they had skills that would be valuable to the tribal business. The tribal government responded by developing a "Professional Empowerment Program," a therapeutic intervention that provides participants with the necessary individual and interpersonal tools for maintaining employment. One Western mining company helped fund a tribe's domestic violence prevention program with the understanding that the program was helping create healthier tribal citizens and, ultimately, better private sector employees.

Another deficit is the limited number of Native skilled professionals who have experience and training in managing mines (and managing the politics of mining) in and near Indian Country. As noted, when a tribe has made a positive decision to pursue mine development on or near its lands, its governmental and managerial structure can be a limiting factor in the success of that development. The additional point here is that the tribe's institutional structure also needs to be filled with employees skilled in public sector management and politics as they relate to mining. The absence of such staff can be an impediment to mine development that far precedes the need for skilled employees to work in the mine itself. Among other things, these individuals are needed to negotiate leases, monitor contract compliance, liaise with partner corporations and governments, and conduct public relations. While such talent may be contracted early in the process, the scale and longevity of mining projects soon makes longer-term arrangements and greater capacity necessary. The tribe most likely to be able to move down such a path is the institutionally "thick" tribe. Thus, managerial and administrative education is another important target of developer investment.

5. ELEMENTS OF SUCCESSFUL AGREEMENTS AND RELATIONSHIPS

Tribes recognize the costs and benefits of mining development in general but are very conscious of the detail in each particular case. Successful agreements have some generic ingredients around sharing of benefits and recognition of impacts but must be carefully calibrated with due diligence to each individual case. Agreements that involve on-reservation mining will require clear negotiations as if with a government entity, given the unique status of tribes as sovereign subnational jurisdictions.

A vast amount of mineral exploration is taking place on Native land and mining companies will undoubtedly need to consider the on-reservation negotiation process with care in coming years. In some cases, there can be a waiver of sovereign immunity granted by the tribe to facilitate the negotiation and risk management of a project. However, this should by no means preclude the treatment of tribes as subnational governments in terms of other respect and agreement development. For off-reservation development, the tribe can still exert considerable influence under U.S. law, given, for example, treaty rights to natural resource access (see Section 3 above). Some of the key factors that constitute a successful agreement with tribes that are impacted by mining are as follow:

Promoting Community Development

As with many other indigenous communities worldwide, tribes in North America are still relatively disadvantaged in terms of human development indicators compared with the general population. Despite the enormous improvement of some tribal economies, there is still massive unemployment, lack of educational access and poor health indicators on

tribal lands. Thus any extractive resource investment must be seen as a means of improving community development indicators, and a successful agreement will endeavor to incorporate clear development targets.

Establishing a Sensible Community Fund

As with other resource-rich countries which may have "sovereign wealth funds,"[76] tribes consider responsible financial management in congruent terms. Tribal funds can be a long-term asset base for diversification of the economy after mining stops. Native Americans have more experience with management of these funds than most indigenous people worldwide. The Navajo Nation Permanent Fund and Southern Ute Tribal Growth Fund are good examples in this regard. Independent and professional management of these funds is an essential part of depoliticizing their usage. Both Navajo and Southern Ute can be important touchstones in planning for the establishment of similar funds. The scale of both tribes is very different, and yet both have been able to administer these funds fairly well. The Navajo are among the largest tribes while the Southern Ute are among the smallest, but they share a common vision for intergenerational resource planning.

Strategies for Sustainable Livelihoods

Although they still may grow food and use natural resources for cultural connectivity and supplementary sustenance, all tribes in the Lower 48 United States have moved away from subsistence lifestyles and are integrated into the market economy. Given this dynamic, supporting livelihoods is going to be an essential part of any effective agreement. Employment directly at mine sites may seem like the most straightforward goal, amenable to clear indigenous workforce targets. However, tribes are commonly more interested in a longer-term vision of "employability," rather than merely "employment."[77] This trajectory is in sync with overall social management within major mining companies worldwide. It entails the development of transferable skill sets and vocations that could be utilized after the mining ends.

Sourcing through indigenous businesses and creating indirect employment opportunities for businesses to develop that could invest even outside the local setting is a worthy goal. The Southern Ute's Red Willow Production Company is an example of such a business enterprise. It developed from local extractive investment, but has subsequently moved on to invest far

beyond the reservation. For relatively small tribes, the governmental infrastructure that is commonly needed around large development projects, including everything from police services and fire protection to road paving and environmental monitoring, can generate substantial employment for tribal citizens—if the tribe has the governing capacity to sustain such infrastructure.

At the Tulalip Tribes north of Seattle, for example, the confederated Tribes have created a chartered township in order to support two major shopping malls and a resort hotel. The mall and resort enterprises employ some tribal citizens, but the civil infrastructure that supports the enterprises is the dominant source of tribal-citizen jobs. In fact, the Tulalip Tribes are also noteworthy for their creative approach to job creation, with the tribal government looking for opportunities from landscaping to office maintenance to contract out for services from small businesses started by the tribal citizens.[78] The Diavik project in Canada illustrates a similar strategy of supply chain development and business incubation, but on a much larger scale. There, the developer (Rio Tinto) has effectively seeded and partnered to create substantial development support enterprises, including Aboriginal-owned construction, food services, medical services, airline, and trucking businesses (i.e., the trucking operation of "Ice Road Truckers" television fame).

One reality of supply chain development in tribal communities is that many workers may be gaining their first experience as employees—low workforce participation and limited workforce skills are part of the toll of long-term economic distress. The upside is that first-job work experience is often the most effective form of job training and a key moment for interventions to boost employability. Standard, often federal or state, job training programs have generally poor records in terms of output of sustainably employable workers. Consequently, success is being found in more direct investment in training institutes and curriculum by developers and tribes, with instruction specifically targeted at skills needed in mining or ancillary support services. At Diavek, for example, a tailored curriculum provides leadership training and mentoring; an apprenticeship program provides on-the-job education; and a community-based committee guides workforce educational efforts.

In the U.S., reservation primary and secondary schools are often quite poor. There are, however, 34 tribal colleges and universities on or near reservations across the country.

These are community colleges, chartered by tribes and generally offering two-year degrees, with a handful offering four-year degrees. These colleges are typically anxious for funding and funding partners. They provide a natural platform for developers willing to invest in local workforce improvement. Merely throwing money at a tribal college (or similarly situated local state institution), however, is unlikely to be productive. The institutions and their faculty are commonly understaffed, or staffed with resources that do not match the employment needs of a major development project like a mine. Accordingly, investments in skill-based, work-oriented education and training require joint tribal-company workforce assessment and human resource planning.

Tribes bear critical responsibility in this area. The more institutionally "thin" a tribe is, the more likely it is to be plagued by extremely high unemployment and low workforce participation. And in those conditions, elected tribal officials can be under heavy pressure to create "jobs, jobs, jobs". When this is channeled into political demands for employment, whether workers are ready and qualified or not, as conditions for giving a developer the go-ahead on a project, the company obviously loses. But so does the tribe, for such tribal strategies perpetuate legacies of dependence and, in the extreme, can threaten project viability.

In fact, the demand for "jobs, jobs, jobs" as political payoff (as opposed to smart investment in project viability and workforce advancement) commonly translates in practice into tribal political control of the allocation of training dollars, the determination of the beneficiaries of workforce development efforts, and, ultimately, who gets hired. Such outcomes consistently harm tribes' reputations and drive away investors. The politicization of project employment, if it is successful, also may end up tying tribal leaders' hands: Once dependent on the proffered jobs, the company is armed with the argument that steps which the tribe might like to take that would be within the four walls of the parties' contracts, but which imply some element of higher costs for the developer, "threaten the company's ability to keep hiring your citizens."

Realistic Risk Management for Closure

Closure of mine sites can be a traumatic process for communities that have become accustomed to the financial benefits of a project. At the same time, concerns about

environmental repercussions after closure and inadequate monitoring and contingency planning can further challenge corporate-community relations. Tribes in the United States have been exposed to serious environmental risks after the closure of mines, and the harms they experienced have led to landmark settlements.

One of the largest such post-closure torts settlements—$263.4 million plus interest—was granted to the Coeur d'Alene Tribe, the U.S. federal government, and the state of Idaho to resolve claims stemming from silver mining. The case sought damages for injuries to "water, fish, and birds" caused by millions of tons of mining wastes that had been released into the South Fork of the Coeur d'Alene River and its tributaries.[79] The experience of such cases shows that risk management of spills after closure needs to be articulated by mining companies at an early stage of negotiations with tribes. There should be clear comparisons drawn with past cases and how the current project is qualitatively different from legacy mines. A spectrum of scenarios presented for containment of any spills or leakages from infrastructure after closure should be presented to the community beforehand.

The upfront financial commitment for the reclamation plan needs to be tangible and enforceable. At the Diavik mine, for example, Rio Tinto makes security deposits with Environment Canada for performance of its reclamation commitments, which vary from year to year along different phases of the reclamation but can be as much as $123 million (Article XV and Schedule 1 of the Diavik agreement).

Similarly, peer-reviewed academic research has found that the Ridgeway mine in South Carolina had a relatively successful closure plan.[80] This was aided by an educational process that was in place from the start of the mining operation (which was expected to last only eleven years). The establishment of a Center for Ecological Restoration was part of the memorandum of understanding signed by the company, which was a positive way of leaving an educational legacy to study and manage the site for generations to come.[81] Although this mine did not involve an indigenous community, the lessons concerning educational engagement during the closure process are broadly applicable.

In general, successful closure plans are a result of effective financial planning for the process. In contrast, the closure of the Gay Mine on the Shoshone Bannock's Fort Hall Reservation in Idaho required intervention by the U.S. Environmental Protection Agency

because of inadequate resourcing, let alone adequate planning for such post-closure capacity building. The institutional memory of such cases stays with tribes across the country, and it is important to glean lessons from these cases to prevent errant planning.

Creating Institutional Bridges

A Native professional organization to support the larger-scale development of mineral resource development professionals—individuals skilled in the management and politics of resource extraction—would be of significant benefit to tribes and developers. It would be an important step toward evening the scales in expertise, reducing tribes' reliance on outside experts, facilitating sharing across Native nations concerning practices and problems, and generating broader scope for the recruitment of new Native professionals. And, as noted above, such individuals are the human aspect of reducing the "institutional thinness" that can hamper minerals development, even after a tribe has made the decision to pursue it. It would also be an organization with which developers could liaise on issues of policy (national, state, and tribal) and practice.

In the energy sector, the Council of Energy Resource Tribes (CERT) has served such functions for decades, but CERT has deliberately not strayed into the arena of mineral resources.[82] The CERT model does, however, provide a starting foundation for a possible new organization focused on non-energy mineral resources. Such an organization could be tribally funded, or could explore tribal-corporate funding models similar to those used by the Canadian Aboriginal Minerals Association (CAMA). The growth of tribal professional organizations and societies has made substantial contribution across a wide array of fields and disciplines. To mention but a few, examples here include: the Native American Finance Officers Association; the Association of Tribal Archives, Libraries, and Museums; the Native American Fish and Wildlife Society; the National American Indian Court Judges Association; the National Indian Child Welfare Association; the Native American Contractors Association; the National Native American Bar Association; and the Intertribal Timber Council.

As a long-term strategy, it could be wise for non-Indian resource development companies to invest in the creation of such an organization—not with an intent to control it, but with the intent of helping develop a cadre of professionals who can work effectively on

behalf of tribes and bring the highest level of indigenous resource management expertise to the negotiating table. Remedying imbalances in capacity on the two "sides of the table" can only enhance prospects for healthier, long-term tribal-corporate relations in the minerals sector.

Nurturing Relationships

It goes without saying that in tribal-corporate relations, as in just about any other context of negotiation and partnering, the development of personal relations is important, if not "make or break". No written contract is ever complete; it can never cover all contingencies. During negotiations, parties with opposing interests have sound reasons to question the motives and even the "facts" of their respective counterparties. Letting such natural mistrust go too far kills deals and blows up contracts. Again, the Peabody/Navajo experience here carries the lesson.

Much has been written, advised, and even codified when it comes to strategies for developing and sustaining trust in relationships that require long-lived stability for mutual benefit to accrue, and much of what has been written has focused on corporate-indigenous relationship building. We have little to add to what has become common wisdom of a generic nature: Tribal cultures are often imbued with oral traditions, and that means that genuine and repeated face-to-face contact is important. Transparency is critical; legacies of real and perceived dishonesty means that tribes are typically hyper-vigilant when it comes to insincere or, worse, deceitful conduct.

The U.S. Tribal Context

While much of what makes for good relationship building is ultimately common sense and common decency, U.S. tribes' status as governments creates particular pressure points. As noted above, a tribal chairperson is a head of state, like the governor of a U.S. state, and expects to be recognized as such. The tribal council member is an elected representative of the people, charged by law with the same tasks of promoting the tribal public's interest that a legislator, city council member, or county commissioner is charged with in mainstream America. In the same vein, tribal officials and citizens are likely to be little impressed that "the CEO is coming," if that is the perfunctory one-off "parachuting" in and helicoptering out. Tribes expect consistent presence of senior managers.

This frame of reference appropriately imparts a degree of formalism to relations with the institutionally "thick" corporate developer. As noted in Section 3 above, tribes have become accustomed to, and now demand, formal government-to-government relationships when dealing with state, local, and federal counterparts. They expect the same in their tribal-corporate relationships. Accordingly, measures such as the creation of equally-balanced study and planning bodies, the institution of formal protocols for keeping each other informed, the mutual designation of specific offices and individuals as the acceptable channels for communication on sensitive matters, and transparent and detailed mutual reporting on pressure-point financial, operational, social, and environmental concerns are all part of the "thick" and sustainable tribal-corporate interface.

The vast majority of teachings and writings on the development of personal and institutional relationships between "outsiders" and indigenous communities focuses on what the "outsider" needs to do to gain the trust and sustain engagements with the indigenous counterparty. Again, this is not surprising given the histories so many indigenous communities have experienced and the frequent imbalances of wealth, power and expertise that arise. But particularly in the U.S. tribal context, the tribes and tribal leadership are wise to address prospective imbalances by righting the balance and being proactive about the development of trust with the other side of the table. In this regard, there is apparently no better strategy than coming to the relationship armed with equal or better information; equal or better technical capacity in the law, the technology, and the economics; and equal or better negotiation skills. "Talking the talk" of an "equal" across the table, but not being able to "walk the walk" breeds cycles of mistrust and perceptions of low competency.

Of course, being "equal to or better than" experienced, well-financed and staffed corporate counterparties is easier said than done for any government. As we have seen, for tribes, the solutions lie in "thickening" their institutional capacities. For tribes not already with a modicum of success in the economic arena this can create the chicken-and-the-egg problem of needing money to build capacity, but not having money because of deficits of capacity. This situation not uncommonly leads to tribes seeking financial support in their dealings with companies from those very companies. This funding can be critical to forward progress. Best practices here require assiduous self-restraint on the part of funding companies:

to avoid conflicts of interest, they must stay out of decisions concerning the allocation of funds. This is a challenging reality of successful engagement with economically stressed tribes.

Some Lessons from International Efforts

ICMM Initiative on Indigenous People

The International Council on Metals and Mining (ICMM) remains the key industry organization focused at a global level mandated with promoting collective learning of best practices in social and environmental performance. Established in 2002, following the World Summit on Sustainable Development and an extensive multi-stakeholder review of industry performance (The Mining, Minerals and Sustainable Development Initiative, or MMSD), the organization quickly identified indigenous peoples concerns as a priority.

A review was commissioned in late 2002 and a was report published in 2005 calling for "more meaningful industry engagement in this area and the promotion of better relationships with the communities involved." Subsequent collaborations between ICMM and the International Union for Conservation of Nature (IUCN) focused on the issue of "Free Prior and Informed Consent" (FPIC) for operations on indigenous lands. A final Position Statement on Mining and Indigenous Peoples was approved in May 2008 by ICMM governance and affirms ICMM's vision for "constructive relationships between the mining and metals industry and Indigenous Peoples."

Representatives from the United States National Mining Association were interviewed for this report in May 2012 and indicated that there is currently no active program that they are involved in which focuses on indigenous people and mining in the United States. They recognized that there is a need for more specific programming at the cross-industry level.

Other Initiatives

In addition to the ICMM Initiative, several other cross-cutting international efforts regarding engagement with indigenous people have relevance in the United States. In 2010, the United States announced its support of the United Nations Declaration on the Rights of Indigenous Peoples, which paves the way for more multilateral engagement on best practices and norms in this domain. While this is arguably the most well known of the international mechanisms for addressing indigenous rights, two others are the United Nations Permanent

Forum on Indigenous Issues and the Sustainability Framework articulated by the International Finance Corporation (part of the World Bank Group). The latter conveys the Corporation's strategic commitment to, among other goals, the well-being of indigenous peoples. Under the Framework of the IFC Guidelines on Indigenous People:

> "Performance Standard 7 recognizes that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalized and vulnerable segments of the population. Their economic, social and legal status often limits their capacity to defend their interests in, and rights to, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. They are particularly vulnerable if their lands and resources are transformed, encroached upon by outsiders, or significantly degraded.
>
> Their languages, cultures, religions, spiritual beliefs, and institutions may also be under threat. These characteristics expose indigenous peoples to different types of risks and severity of impacts, including loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and disease."

The current version of the standard released in January 2012[83] requires IFC clients to apply FPIC under the following circumstances when projects may adversely affect indigenous peoples:

- Impacts on lands and natural resources subject to traditional ownership or under customary use;
- Relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; or
- Significant impacts on cultural resources that are critical to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives.

Dispute Prevention and Resolution through Effective Monitoring

Even after agreements are effectively negotiated, there can be unforeseen circumstances that are not covered in the terms of reference of an agreement. Given the history of legal battles they have endured with the federal and state governments, U.S. tribes are quite used to litigation as a means of dispute resolution. But litigation is always costly and rarely constructive. Thus, it pays for tribes and companies to have an organizational infrastructure in place that may prevent a minor dispute from escalating into a conflict.

One option is to form a grievance committee composed of respected community members who can hear concerns and begin constructive engagement early on.

Legally binding environmental and social monitoring boards may be another effective means of ensuring discipline and efficiency for both the community and the company. The diamond mines of northern Canada provide a rare example for institutional learning across companies. In comparison to Diavik, the BHP Billiton Ekati mine has a legally binding environmental agreement and an "independent environmental management agency" that is directed by a seven-person board of directors (four nominated by Native communities and three jointly nominated by the federal government, the territories government and the company in consultation with community members). Such a practice is particularly appropriate in cases where there are complex and capricious environmental impact conditions.

The composition of such review boards needs to be carefully determined. The Ekati agreement has a very different board structure than the environmental monitoring advisory board (EMAB) set up by Diavik, which required one member to be a project operator. Interviews with various stakeholders in the Diavik agreement conducted by O'Faircheallaigh revealed that the presence of a Diavik employee tended to "stifle debate and lead to a muting of criticism, especially since many of the members are Yellowknife residents and know each other."[84] Having an effective dispute resolution system is imperative for such agreements to be resilient to changes in local politics. Part of the resilience of agreements emerges from a recognition of mutual dependence and security of ownership of the process (just as much as the asset itself).

The Eagle Mine in Michigan illustrates one innovative approach to dispute management. Prior to sale of the mine to a third party in mid-2013, Rio Tinto implemented an environmental monitoring agreement, which is administered by the surrounding, largely non-Native community through a series of organizational partnerships.[85] A community scorecard tool has also been developed which allows for a rating by community members using remote wireless technology. This permits quick feedback that helps keep conflict from escalating. In addition, there is a detailed peer-review based consultative dispute resolution process enshrined into the agreement which is publicly available. The Eagle Mine, however, is not accessing tribal lands and minerals; and whether such measures can be successfully adapted

so as to garner tribal support remains to be seen. At Eagle, for example, members of the Keweenaw Bay Indian Community continues to protest what the Community sees as threats to water quality posed by the mine.[86]

The attention to dispute resolution and monitoring is critical. The world over, cooperation breaks down not so much when problems arise (i.e., no relationship is perfect) as when problems are perceived, especially by the "loser," as being resolved illegitimately. This means that, for tribes and companies that see mutual benefit in working together, creating, funding and staffing mutually agreed upon institutions of dispute resolution and monitoring is critical. Entire relationships hang in the balance.

CASE PROFILES

The drive by American Indian nations for expansion of their powers of self-governance under the federal policy regime of tribal self-determination extends to decision making authority over large land-using on-reservation developments, as well as to interventions into large land-using projects off-reservation in traditional land areas. Below, we present profiles of selected instances of these settings.

The profiled cases span the range of recent engagements and interactions among tribes, companies, and federal and state officials.

- The Navajo (Diné) Nation of Arizona, Utah, and New Mexico has a long history of on-reservation mining, and has gone through transitions from royalty owner and tax and regulatory authority to, now, coal mine owner.
- The Southern Ute Tribe represents an example of an Indian Nation investing heavily in both its governmental and business capacities—and now more than holding its own in the oil and gas industry in Colorado, New Mexico, and beyond.
- The Fond du Lac Band of Lake Superior Chippewa and a developer, PolyMet, are engaged in contentious consideration of a copper, nickel, and other precious metal project that is off-reservation in Minnesota, but that would release contaminants into waters encompassed by the Chippewa (Ojibwe) Treaty of 1854.
- The Crow (Apsaalooké) Nation of Montana is seeking economic development through mining of its massive coal reserves, yet the Nation and its mining company partners confront a relatively soft demand for coal and environmental opposition to plans to reach Asian markets through export.
- The Tulalip Tribes north of Seattle, Washington have entered into large, land-using development in the form of a city that the Tribes created, govern, and manage, providing extensive "supply chain" employment and income by supporting the infrastructure of two major shopping malls.

- The Shoshone-Bannock Tribes in southern Idaho have suffered contamination from phosphate mining on their reservation lands. They are working to address this issue, both on their own and through an intergovernmental regulatory team. This legacy of harms is one reason the Tribes requested direct engagement with the Monsanto Company when it sought to develop a new phosphate mine on land the Tribes ceded in the late 1800s. Respectful engagement contributed to a permitting process free of litigation.
- The Council of Energy Resource Tribes (CERT) in the United States and the Canadian Aboriginal Minerals Association (CAMA) serve as models for two approaches to providing technical assistance, research, and policy support to indigenous communities engaged in, or potentially engaged in, minerals development.
- Although as-yet little used in the U.S. (in part because of tribes' status as governments), lessons can be learned from the international use of Institutional Benefit Agreements (IBAs), which are contracts setting out the benefits indigenous communities are to receive in return for their support and cooperation in the development of a local resource.

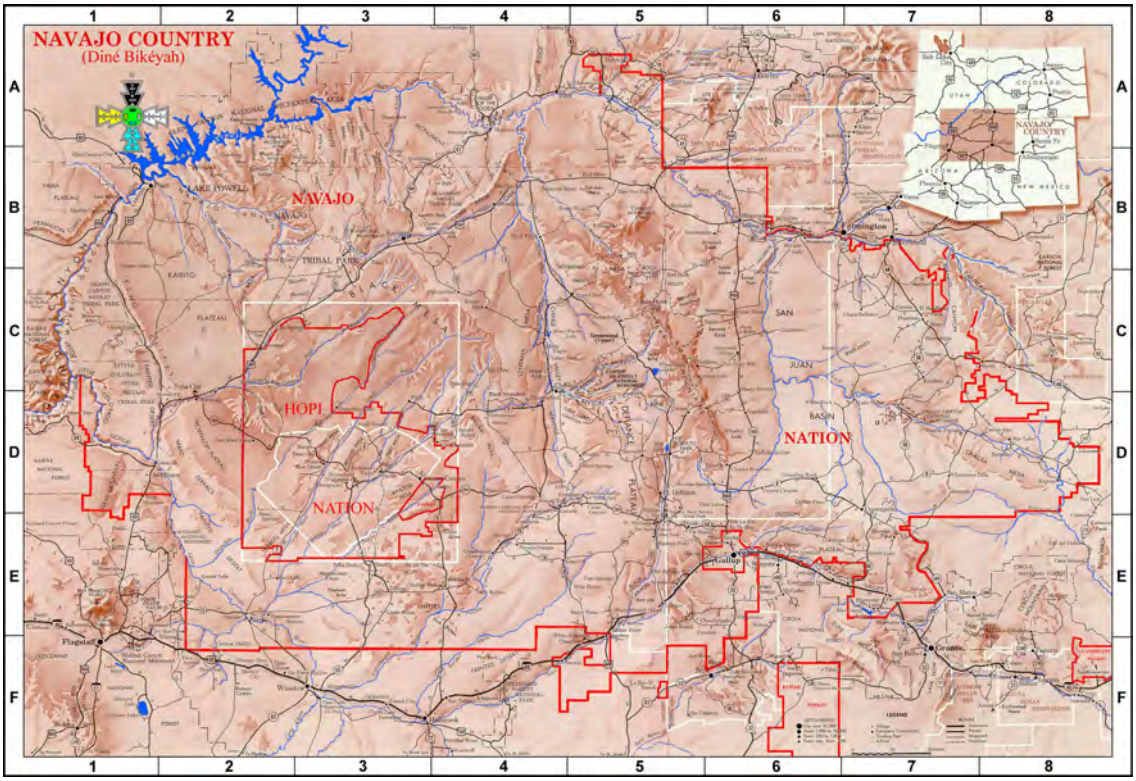
In exercising their sovereignty, U.S. tribes increasingly operate under institutional review boards (IRBs) or research review committees charged with approving the publication and use of research materials acquired from tribal sources. Respecting that sovereignty, the following case profiles rely entirely on already published, publicly available information (see citations therein).

Profile

The Navajo (Diné) Nation: Coal and Uranium Mining

Filling most of the northeast quadrant of Arizona and reaching into the states of Utah and New Mexico, the Navajo Nation spans 27,635 square miles, or approximately 17.6 million acres. Geographically, it is by far the largest U.S. Indian reservation, exceeding the size of ten of the fifty United States. With approximately 300,000 citizens in total and 200,000 in residence on the reservation, the Nation is also the largest tribe by population (according to current U.S. Census estimates).[87] The Navajo reservation totally encompasses the reservation of the Hopi Nation and is dominated by arid deserts and alpine forests distributed between mountains, mesas, and high plateaus. The unique culture and geography of the Navajo Nation annually attracts about 5 million tourists.[88]

The Navajo Nation[89]



The Navajo reservation is located in a geologically rich mineral area, with notably large reserves of uranium, coal, oil, and natural gas. With these resources, relationships between mining companies and the Nation go back a century or more. Thus, legacy questions loom large at Navajo. This is particularly the case with uranium mining and attendant health concerns, where the Nation has taken a clear and absolute normative position by banning all future uranium mining on the reservation by statute under the *Diné Natural Resources Protection Act of 2005*.

The Navajo exemplify an advanced, "thick" legal structure for mining activities that currently or might take place on their land. This is especially true around coal mining, which still accounts for a substantial part of the Navajo economy. As of 2007, coal mining and coal fired plants provided about 1,500 Navajo jobs,[90] and minerals extraction overall accounted for 3.77 percent of people employed in the Navajo Nation.[91] All new development projects must go through a review process known as the "Signature Authority Sheets" (SAS) review, as set forth and stipulated by the Navajo Nation Code (2 N.N.C. § 164). Once all of the required documents for the SAS are compiled, the review process as outlined in the Code may begin. In this process, projects are put through a series of reviews by different Navajo Nation departments and the Executive Branch.

Each step of the SAS process requires a signature and includes the relevant departments' recommendations for the project. The departments involved in the SAS review process include:

- Division of Economic Development
- Department of Justice
- Controller
- Legislative Counsel
- Office of the President and Vice-President

Recently, the process has been streamlined to reduce delays and enforce the intent of the review process to focus on "reviews" and not on "authorizations" by Navajo Nation departments.[92] Submitted SAS reviews can currently be tracked online at sas.nndcd.org.

Devolved Governance

The Navajo national government consists of three branches—an executive branch headed by the Nation's president, a 24-member legislature (down from 88 following recent constitutional reform), and a multi-layered judicial system of trial and appeals courts and a supreme court. The judicial system is widely recognized for its professionalism and its award-winning embedding of Navajo common law into its decisions.[93] Regionally and locally, five Agencies and 110 Chapters provide organizational infrastructure. Each Chapter is administered by a local council and, under the Nation's Local Governance Act (LGA) of 1998 (26 N.N.C. § 1), chapters are able to apply for "LGA" certification and assume devolved authorities from the Nation.[94]

While the LGA does not extend local governance to mineral contracts and negotiations, the Nation asks that mining companies secure a resolution from each Chapter that would be materially affected by the mine before the Navajo central administration will permit mine development. This, of course, implies the need for developer-chapter interaction during the permitting phase. Chapters are allowed to "[e]nter into intergovernmental agreements with federal, state, tribal entities and/or their agencies, subject to the approval of the Intergovernmental Relations Committee of the Navajo Nation Council."[95] Other authorizations of relevance to mining development are the mandate to establish a peacemaking system or administrative procedures for resolving disputes.[96]

Economic Diversification

For several decades, the Navajo Nation was highly reliant on mining revenues for their operations. In 1958, 93 percent of the Navajo Nation's total revenues came from coal mining, although by 1975 revenues from coal had dropped to 70 percent.[97] At the peak of production in the 1980s, coal mining royalties accounted for about 60 percent of the Nation's general fund budget. As recent as 2008, coal-related revenues exceeded $64 million and combined revenue from oil, gas, coal, and associated taxes contributed 79.7 percent ($157,229,000) of the total revenue for the year.[98]

The Nation has long been cognizant of the value of diversification. In 1980, the Navajo Nation Permanent Fund was established by tribal statute, which requires that at least

12 percent of "any and all projected revenue, but not limited to, revenues from taxes, oil and gas, mining/minerals, timber, land rentals, interest/dividends, [and] gain on sale of securities" be transferred to the fund for future economic investment (8 N.N.C § 901). To date, the Nation has focused primarily on building this savings trust until appropriate opportunities arise for diversification that require capital injection. During the period when mineral revenues dominated the Nation's budgets, the Nation had elected not to enter into the casino gaming business. However, with closing of a major coal-fired power station in the late 1990s, the Navajo moved to diversify and decided to enter into the gaming industry in 2004. In that year, the Nation also established the Diné Development Corporation "as a holding company to establish, invest in, own, and operate subsidiary corporations" with a specific goal of "creat[ing] private sector job opportunities for Navajo Nation members."[99] In addition, the Nation has pursued major wind farm development.[100]

Economic diversification is particularly critical for a large tribe like Navajo. It can not only help a tribe weather business cycles with reduced risks to employment and income, but it can also relieve pressures to seek and hurry to single, large "home run" projects, such as a mining operation, when such development warrants deep consideration that can lead reasonably to project rejection. From a developer's perspective, a tribe's diversification plans and objectives warrant attention and the search for synergies with the goal of diversification.

The Employment Imperative

Creation of employment for its citizens is a critical goal of the Navajo Nation. With an unemployment rate of approximately 50 percent,[101] the Navajo nation is in a predicament faced by many North American tribes regarding employment generation. This results in tough choices. Thus, for example, despite concerns about environmental impacts which have been the subject of separate ongoing lawsuit by environmental conservationists, in March 2011 the Navajo Nation signed a 25-year extension of its lease agreement with the Four Corners Power Plant, satisfying the Nation's environmental standards, securing additional environmental controls, and raising lease payments from approximately $1.5 million per year to $7 million per year. In signing the lease extension, the President of the Navajo Nation noted that it was his "priority to protect over 700 Navajo people employed at both the Four Corners Power Plant and [plant owner] BHP Billiton …, including their families who rely on a steady income."[102]

Overall, the Nation estimates that the Plant generates $175 million annual economic activity for the Navajo (with $72 million going to the general fund).[103]

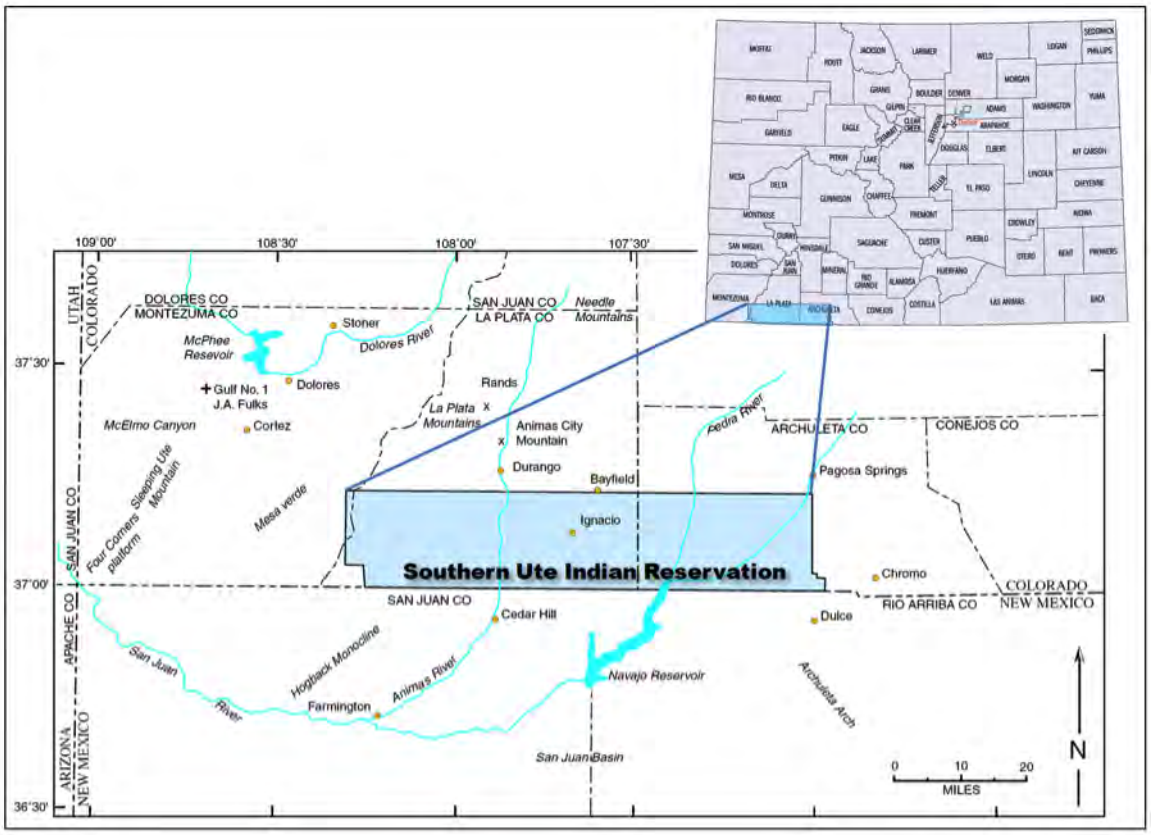
In April 2013, the Navajo Nation formed the Navajo Transitional Energy Company, LLC (NTEC) with the goal of acquiring the Navajo Coal Mine on the reservation from BHP Billiton. The acquisition was completed in December 2013 and now puts the tribe in the role of both resource owner and mine operator. While controversial within the Nation, the Nation's leadership took this major step in order to better insure continued employment and to enable the Nation to exert great control over future coal and renewable energy development.[104] To improve the feasibility of NTEC's acquisition, the Navajo Legislature approved legislation providing for limited waivers of the Navajo Nation's sovereign immunity to enable NTEC to issue performance and reclamation bonds. In taking these steps, as in so many non-Indian jurisdictions, the Nation has had to push its own capacities to deal with everything from financing to local protesters of mining activity.[105] While it is for Navajos to determine the wisdom of the decisions the Nation is making as it exercises its sovereignty, the case of the Navajo Nation illustrates tribal sovereignty in action.

Profile

The Southern Ute Indian Tribe: Oil and Gas Production

The Southern Ute Indian Tribe is located on the Southern Ute Reservation in southwestern Colorado. The reservation covers an area of 1,059 square miles, with the tribal headquarters located in Ignacio, Colorado.[106] The Tribe is relatively small, with only slightly more than 1,400 tribal members, 1,000 of whom reside on the reservation. Unemployment is lower than the national average for Native residents of reservations, and at $20,400, per capita income is sharply higher than the national Native reservation resident level of $11,400. Half of the 1,500 tribal government employees are enrolled Southern Ute tribal citizens.

The Southern Ute Reservation[107]



The Southern Ute Tribe is among the most successful tribal natural resources developers, estimated in 1994 to produce 82 percent of the nation's coalbed methane gas within the borders of the Tribe's southwestern Colorado reservation.[108] In leveraging their role as both mineral titleholder and regulatory authority, the Southern Ute have cultivated "thick" internal capacity and diversified their business interests. Deliberate financial forethought and independent leadership have solidified a degree of "financial sovereignty" yet unrealized by any other major extractive tribe; the self-created Growth Fund and Permanent Fund are reported to have had combined unrestricted cash and investments as of 2012 of $1.88 billion, with a AAA rating by Fitch Ratings.[109]

Such extraordinary success is by no means formulaic. The leadership of Chairman Leonard Burch, who, when first elected, was the youngest leader to hold that office, set a vision and laid a path by which the Southern Ute were able to transition from a passive relationship with the federal agencies in which the Tribe acted merely as a mineral lessor for tribal trust minerals. The alternative path taken by Southern Ute has been to be the active and authoritative force in the development of reservation resources, a force that private companies have come to respect and work with to build long-term, mutually beneficial relationships. As one observer has put it: "The Southern Ute have achieved cultural, environmental, and economic self-determination through energy self-determination—a feat rarely accomplished, whether by Indians or non-Indians".[110]

Overcoming Inertia

Like many other Native nations, the Southern Ute were once subject to aggressive federal policy and management of their land and resources. The 1895 Ute Allotment Act assigned much tribal acreage away, and while the subsequent 1934 Indian Reorganization Act returned all non-allotted acreage to the Tribe, it was held in trust by the federal government (some 330,000 of the reservation's 1 million resource-rich acres). By 1951, all viable trust acreage had been leased to mineral developers and the Tribe realized royalties as the only return on its resources. Royalty rates were typically set at 12.5 percent of value at the point of production, and leases were often held past their term by purposely stalled production.

Upon his election in 1966, Chairman Burch hired an external party to audit these relationships. In 1974, concerned that the Tribe was receiving sub-par royalty rates, Burch and the Southern Ute tribal council called for a moratorium on all leasing. The Bureau of Indian Affairs was surprised by and opposed to this decision, but the Tribe's refusal to enter into new agreements held.

By 1980, the Southern Ute had established their own Tribal Department of Energy, tasked to build a comprehensive geologic database of the San Juan Basin, collecting all existent data, and building a body of knowledge surpassing any private or federal resource. The Tribe also began to use tax credits and their governmental authority by, for example, granting 42-year rights of way (ROWs) instead of typical 10-year ROWs. This greatly increased the Tribe's leverage in negotiations. By 1982, the Tribe enacted its own severance tax, which has since resulted in more than $600 million in revenue. Six years later the Tribe had enough of a revenue base to initiate a new development plan and established Red Willow Production Company to extract hydrocarbon resources on tribal land.

Under the leadership of Leonard Burch, Southern Ute then began to buy back interests in previously-leased tracts on the public market. To make this feasible, per capita payments to tribal members were phased out beginning in 1992 in favor of five years of reinvestment into the Growth Fund. Meanwhile, many coalbed methane producers were not interested in increasing production to meet the boom that the Tribe foresaw. In the mid-1990s, Amoco leased numerous oil and gas interests on Southern Ute lands, though it elected to operate only half of the wells. The Southern Ute Tribe filed suit against Amoco, its partners, and the federal agencies responsible for the administration of the oil and gas interests on their lands.[111] The case was eventually settled outside of court, with the Southern Ute receiving a 32 percent stake in coalbed methane deposits on their lands.[112]

Once the Southern Ute had successfully asserted their jurisdiction over the coalbed methane wells, and thus became participants in private oil and gas production, the economics of development changed drastically. Interests that were gained from settlements became the funding vehicle for the Growth Fund. In addition, prior to taking ownership the Tribe could impose taxes only after the federal government, state, and county had taken their cuts, which

reduced the overall profits left available for taxation. As the Tribe is, itself, a government and exempt from many of these taxes, overhead was reduced by 30–40 percent. This left more income available for use and reinvestment by the Southern Ute Tribe.[113]

In short, by adopting a strategy of self-management and eschewing reliance on federal decision makers, Southern Ute demonstrated to itself and to the general investment and business community that the institutionally "thick" tribe can readily be fully capable of managing and protecting its own affairs in the minerals arena. The establishment of the Red Willow Production Company also gave the Tribe a much greater sense of connection with the resource base and strong stakes in making it productive.

Go Forth and Diversify: The Southern Ute Growth and Permanent Funds

In recognition that their economy was wholly dependent on a finite resource, by 1999 the Southern Ute developed a comprehensive financial plan. This plan divided tribal revenues into two funds: a Permanent Fund, to provide for the functions of government, and an independent Growth Fund which would serve as the tribe's business arm.

With sound advice from their investment managers, the Tribe also developed a plan and systems to officially separate governmental operations from the operation of the Growth Fund. The Growth Fund is thus managed by highly qualified professionals and is able to make decisions independent of tribal electoral politics.

Initially, revenues from natural resource extraction were split 75/25 (75 percent to the Permanent Fund, 25 percent to the Growth Fund). This ratio was set to flip once the Permanent Fund was resourced sufficiently, but tribal leadership has now settled on a 50/50 division to give tribal leaders increased room to build the Tribe's governmental capacity. At startup, the Growth Fund was provided $8 million by the Tribe to "go forth and diversify."[114] Today, the Growth Fund manages and operates the Southern Ute Tribe's businesses and business investments, overseeing a portfolio of companies and investments in energy, construction, real estate, and private equity. The late David Lester, long-time director of the Council of Energy Resource Tribes (CERT), accurately described the Southern Ute model: "They've converted

a non-renewable resource into a renewable financial resource because of the way they are investing and because of their strategy."[115]

Tribal members have a direct stake in the business equity, and each of-age member receives dividends structured as follows (with actual dollar amounts being confidential): From the Growth Fund's net income, all tribal members age 55+ receive a pension, with 10 percent of the remaining net income paid out as "shareholder" dividends on a sliding scale to tribal members age 21 and above. This approach leaves substantial net income in the Fund for reinvestment and growth. Moreover, notwithstanding the payment of dividends to the adult owners of the Fund (i.e., the tribal citizens), strong and sustained investment by the Southern Ute Tribe in education and the social fabric of the Tribe has encouraged gainful employment of tribal members. As of 2010, the unemployment rate among Southern Utes on the reservation was reported as 14.5 percent. This was lower than the national rate of 19 percent for Native residents of reservations.[116]

Profile

The Fond du Lac Band of Lake Superior Chippewa: Off-Reservation Authority

The Fond du Lac Band of Lake Superior Chippewa is one of the six member bands of the Minnesota Chippewa Tribe. Each band is also separately recognized and retains its own government-to-government relationships with the United States, the State of Minnesota, and other governments.

The Fond du Lac Band's 101,150-acre reservation (nearly 160 square miles) is located in northeastern Minnesota. Tribal operations are headquartered in Cloquet, approximately 20 miles west of Duluth and 135 miles north of Minneapolis-St. Paul. Established by the LaPointe Treaty of 1854, the reservation secured a homeland for the Fond du Lac Band. Yet the cost was great: Fond du Lac's ancestral territory includes invaluable wetlands, forests, wildlife resources, and mineral deposits.[117]

The Fond du Lac Reservation and Ojibwe Ceded Territory[119]

Economic Overview

Today, 40 percent of the band's 4,100 citizens live on the reservation. Over the period 2006-2010, the unemployment among these residents was 24 percent, the family poverty rate was 39 percent, and per capita income $13,169—a figure just under half the level for the U.S. as a whole.[118]

Throughout the twentieth century, the Minnesota "Iron Range" (the northeastern quadrant of the state) was a premier source of iron ore for the U.S. steel industry (producing large amounts of both hematite and lower-grade taconite), and mining generated significant employment and income. But globalization, tapped out deposits, and economic fluctuations eventually led to the closure of many Iron Range mines, and by 2000, the region had plunged into economic distress. Only recently have changes in federal Indian policy generated new opportunities for the Fond du Lac Band. In particular, the band has become a major economic engine and regional employer through its two casinos, Black Bear Casino Resort in Cloquet and Fond-du-Luth Casino in Duluth.

Off-Reservation Authority

Tribes in the lower 48 U.S. states have decision-making authority over mining development on reservation lands. Many, including the Fond du Lac Band of Lake Superior Chippewa, also have substantial authority over off-reservation mining decisions. For the Fond du Lac Band, this authority derives from tribal, federal, and international law. It is bolstered by a highly developed and competent tribal administrative system focused on promoting the band's interests. For example, the website of the Fond du Lac Reservation Resource Management Division declares, our "skilled and dedicated staff devotes their time to researching and implementing both cutting edge and time-honored practices to protect and manage the Fond du Lac Band's natural resources."[120]

"Treatment as an Affected State"

The band's Treatment as an Affected State (TAS) status under the Clean Water Act is one means by which the band exerts off-reservation authority.[121] The band's TAS status was established in December 2001 through the U.S. Environmental Protection Agency's approval

of standards set in Fond du Lac ordinance #12/98, "Water Quality Standards of the Fond du Lac Reservation."[122] Where development affects reservation waters, Fond du Lac's TAS status means that developers are responsible to abide not only by the state of Minnesota's water quality standards but also by the band's water quality laws and regulations.

Off-Reservation Treaty Rights

In the 1980s and 1990s, a series of federal court decisions reaffirmed the Ojibwe tribes' treaty-guaranteed hunting, fishing, and gathering rights in their ceded territories. In response, the Fond du Lac Band of Lake Superior Chippewa (along with other treaty tribes in the region) developed formal means to uphold these rights, including regulations, law enforcement services, and scientific monitoring.

Much of the band's scientific work in support of its off-reservation treaty rights aligns with its regulatory responsibilities under TAS. For example, the RMD tracks the productivity of on- and off-reservation wild ricing waters; conducts research on contaminants such as lead, mercury, and PCBs; and monitors point-source emissions. Related work considers the health of the off-reservation subsistence resources more broadly; for example, the RMD assesses the sustainability of migration pathways, forests, and fish populations.

Increasingly, the band is using treaty rights as means to engage with off-reservation mine developers. Its position is that treaty violations will arise if mine operations impinge upon the breadth, intensity, and health impacts of subsistence activities. Notably, such arguments are in line with the aspirations of the U.N. Declaration on the Rights of Indigenous Peoples, especially Articles 26, 29, 32, and 37, which pertain to land use, resource conservation, and treaty enforcement.[123]

Tribal Historic Preservation

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take account of the effects their actions will have on historic properties and, in particular, to consult with tribal governments where proposed actions may affect properties with cultural and religious/spiritual significance—even if these properties are off-reservation. Consultation is intended to identify historic properties potentially affected by the undertaking, assess effects, and seek ways to avoid, minimize, or mitigate adverse effects.

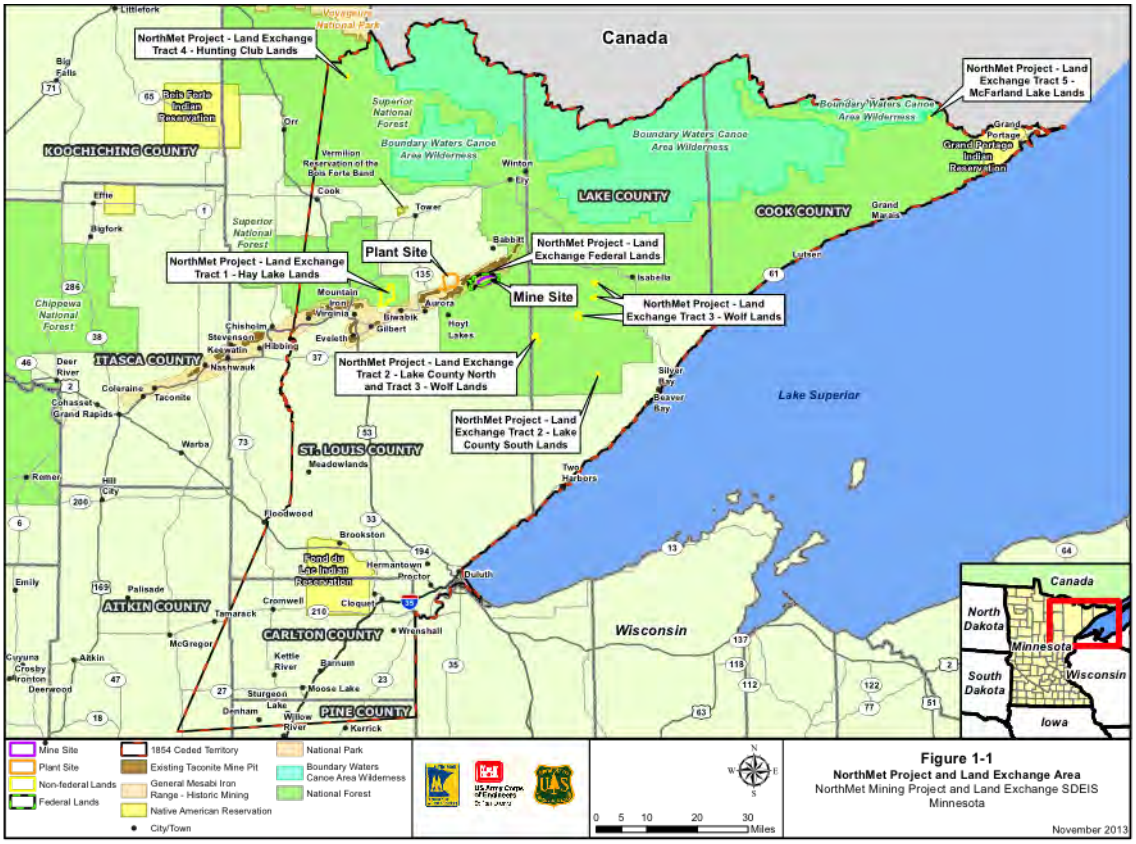
The Fond du Lac Band, like many other tribes, addresses its rights under NHPA through its Tribal Historic Preservation Office. It is the point of contact for consultation, and it identifies experts within and beyond the community, as needed, to advise on the location and cultural and spiritual significance of properties that may be affected by federal action. Just as TAS and Ceded Territory monitoring are intertwined, there are connections between these activities and THPO actions. For example, one recent cultural landscape study noted that "impacts to features associated with cultural practices and spiritual beliefs that do not qualify for the NRHP—such as plant and animal species—are addressed in light of federal tribal trust responsibilities and treaty rights within the 1854 Ceded Territory."[124]

Ultimately, these three tools—TAS status, ceded territory treaty rights, and NHPA Section 106 consultation requirements—together with the band's technical capacity, give the Fond du Lac Band more authority outside reservation boundaries than it has had for nearly 150 years. As Nancy Schuldt, Fond du Lac water-projects coordinator, puts it, "Today, tribes are exercising environmental authorities to a greater extent. [And] there has been a tremendous amount of capacity building in terms of tribal staff and expertise to actually follow up on our request for a seat at the table."[125]

PolyMet Mining, Inc.

New technologies and increased worldwide resource scarcity have renewed opportunities for mining in northern Minnesota. One project well into the development pipeline is NorthMet—a proposed copper, nickel, and precious metals mine on state and federal land just southeast of the historic Iron Range. The project, which is wholly owned by PolyMet Mining, Inc., would refit a former taconite processing facility and promises significant economic benefits for the region. It also would release sulfates into a watershed that is critical to wild rice production, is connected to the Boundary Waters Canoe Area in Superior National Forest, is part of the 1854 Treaty Ceded Territory, and whose rivers and streams ultimately feed into Lake Superior.

NorthMet Project[126]



To gain approval for the new mine, PolyMet must follow a state- and federally-required environmental review process, which includes submission of a wide-ranging and detailed Environmental Impact Statement (EIS). The Minnesota Department of Natural Resources (DNR), U.S. Army Corps of Engineers (ACE), and U.S. Forest Service (USFS) are the lead agencies responsible for the NorthMet project EIS. The Bois Fort, Fond du Lac, and Grand Portage Bands of Chippewa are invited Cooperating Agencies; as such, they are recognized as more than mere "stakeholders" and have an opportunity to make substantial contributions to the EIS. Once finalized, however, the Minnesota DNR will determine whether the EIS is adequate (or not), and federal participants (the ACE and USFS) will render a "record of decision." In the event of positive determinations by all three agencies, a permitting process, which sets specific performance standards for the mine developer, would follow.[127]

A Draft EIS on the NorthMet project was filed in October 2009. However, because public review identified several deficiencies in the document and because PolyMet made significant changes to the project (including an exchange of PolyMet-owned private land in Superior National Forest for USFS land near the mine site), the lead agencies began work on a Supplemental Draft EIS (SDEIS) in 2010. Completed in November 2013, the SDEIS drew stark criticism from the Cooperating Agencies, whose 18 "Major Differences of Opinion" are included as an entire chapter of the report and address issues as wide-ranging as hydrology, air and water quality, water flow, biodiversity, cumulative effects.[128] Predictably, the SDEIS also drew criticism from environmental activists and support from boosters of economic development.[129] Strikingly, Minnesota State Auditor Rebecca Otto spoke out against the project; in an op-ed in the Minneapolis Star-Tribune, Otto wrote, "I am charged with looking out for taxpayers' financial interests. Based on the evidence I have seen so far, I am not convinced that we know how to accurately quantify the size of the financial risk of this type of mining."[130] The public comment period on the Supplemental EIS closed in March 2014.

Looking Ahead

At the time of writing, it is unclear whether the NorthMet project will proceed to the permitting phase. If it does, the Fond du Lac Band of Lake Superior Chippewa Indians will have another opportunity to insert itself into the conversation. If mining operations begin and environmental monitoring demonstrates that the Band's resources have been harmed, Fond du Lac has further recourse through the federal courts.

Yet none of this regulatory and rights picture means that the Fond du Lac Band is anti-mining. As Karen Diver, chairwoman of the Fond du Lac Band, says, "The band has not taken an anti-mining stand. We have not passed any anti-mining resolutions. It's really about what can be done responsibly, sustainably. …Anything that would affect the ecology of the ceded territory, that might diminish tribal members' ability to hunt, fish, or gather, that's a huge issue to our people."[131]

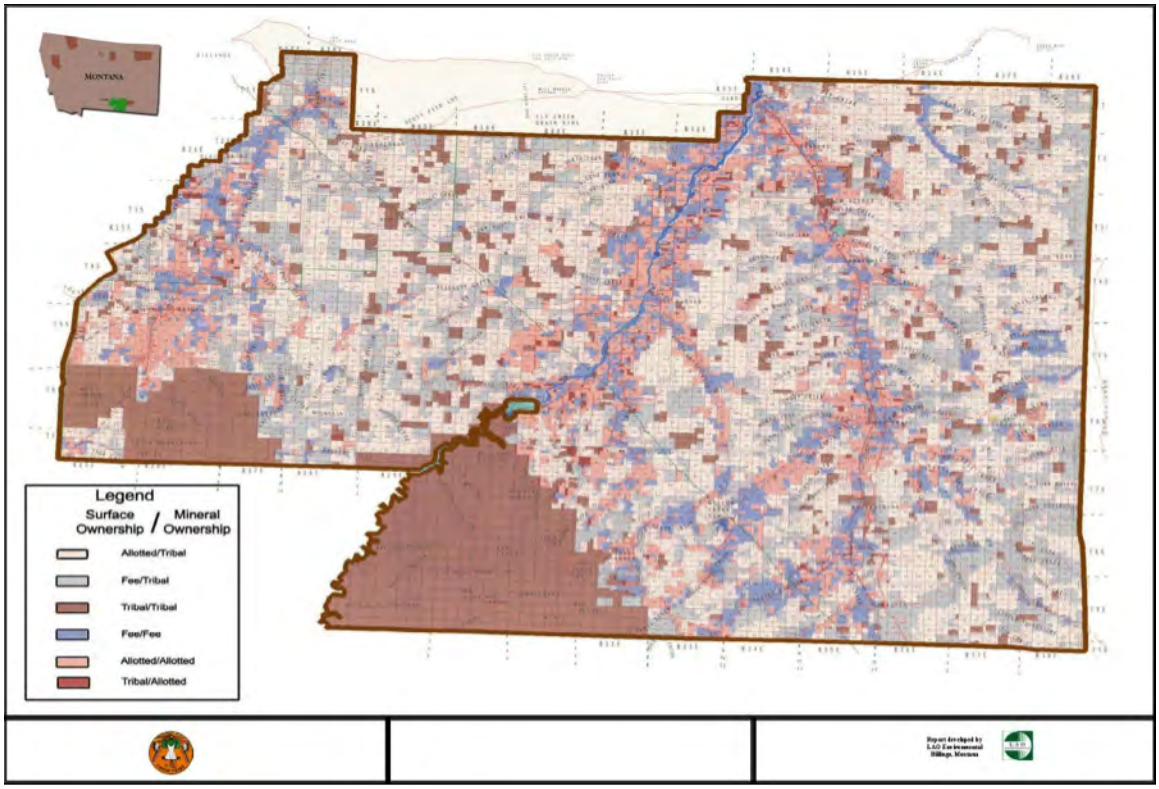
Profile

The Crow (Apsaalooké) Nation: Coal, Oil, and Natural Gas Production

Overview

The Crow, or Apsaalooké, Nation is located in southeastern Montana. Its reservation currently encompasses 2.3 million acres,[132] having been reduced to approximately 8 percent of its original size, as established in several treaties in the 19th century. The Nation is endowed with extensive coal, oil, gas, coalbed methane, limestone, bentonite, sand and gravel, and wind energy resources.[133]

The Crow Nation: Surface and Mineral Ownership[134]



The land base is extensively checkerboarded, consisting of 45 percent Crow allotments, 20 percent Crow Nation trust land, and 35 percent non-Indian fee land. Ownership of

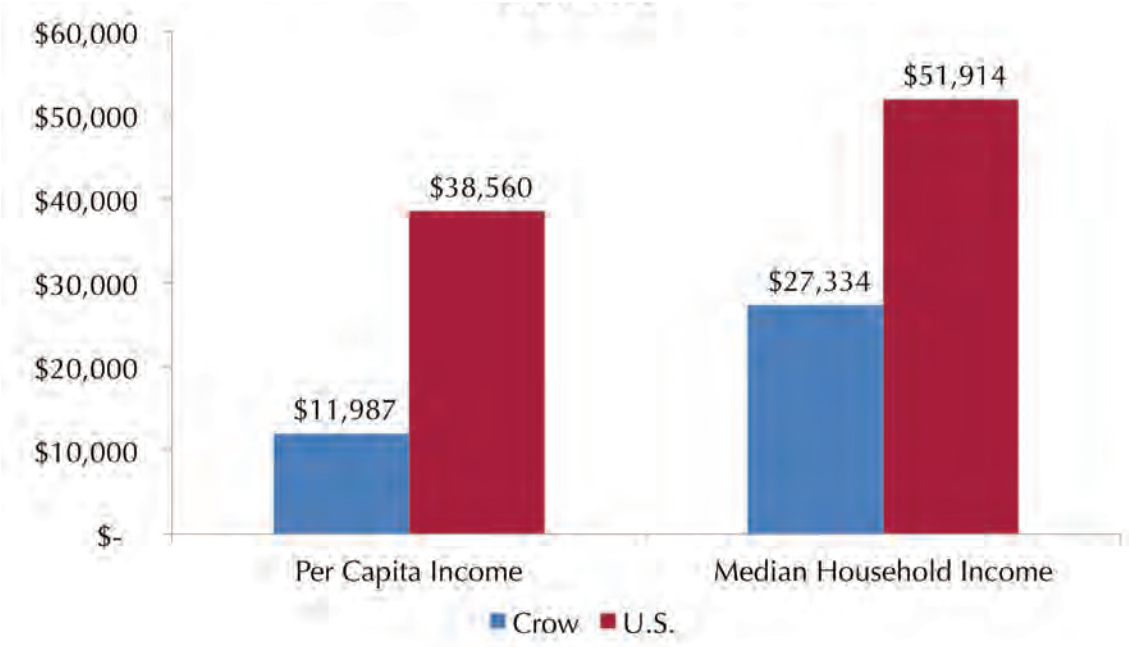
mineral acres is also variegated: 20 percent tribal, 41 percent allotted, and 39 percent private fee. Under the federal Crow Allotment Act of 1920, as amended in 1968, all minerals and oil and gas are reserved in perpetuity for the benefit of the entire Tribe. Thus, while there is checkerboarding of mineral rights, the subsurface mineral resources are owned primarily by the Crow Nation. Indeed, the Nation's ownership of subsurface minerals extends beyond the surface boundaries of the reservation.

The Crow Nation reports its population as slightly more than 13,000, with approximately 9,000 Crow citizen's residing within the reservation boundaries.[135] The Tribe is known for its strong commitment to education and is home to Little Big Horn College, one of the 35 tribal colleges in the U.S. Native language use compared to the average for U.S. tribes is relatively high, with approximately 50 percent of adults and children reporting bi-lingual, Crow and English, proficiency.[136] The annual Crow Fair and Rodeo each August are major events and convey the enduring strength of Crow culture and families.

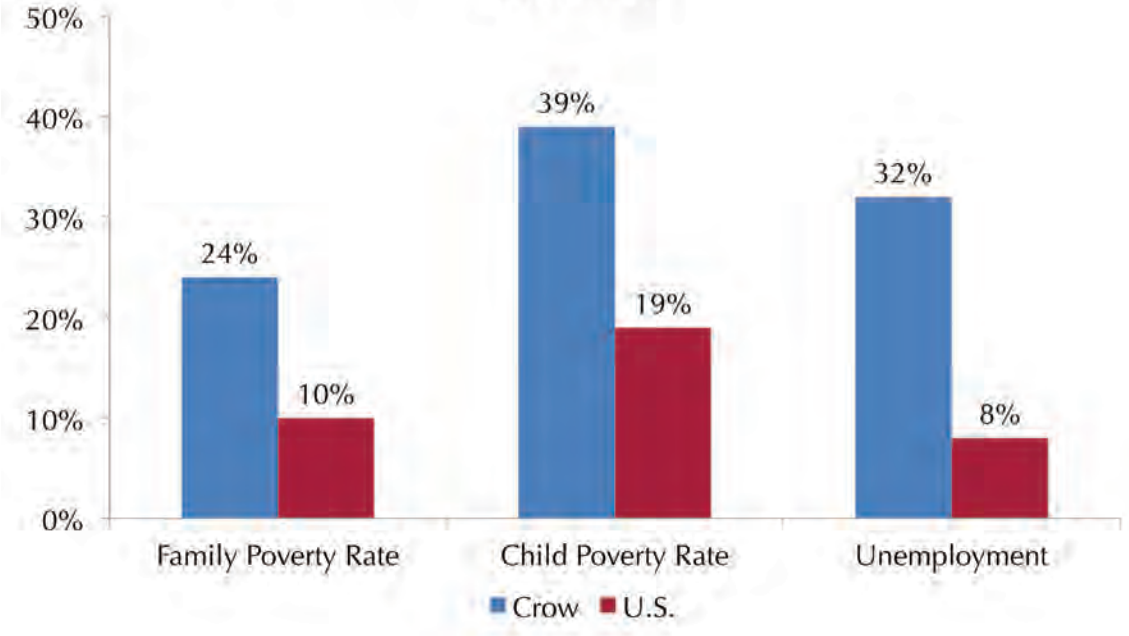
Economic Conditions

These cultural strengths speak to the resiliency of the Crow people, for the Nation has long struggled with poverty and the stresses that come with it. The U.S. Census estimates that in 2006-2010, the annual per capita income of American Indians on the Crow Reservation ($11,987) was less than half that of the U.S. as a whole ($27,334). The median household income for Crows ($38,560) was markedly lower than that reported for U.S. households ($51,914), and the Crow family poverty rate (24 percent) was more than double that of the U.S. population as a whole (10 percent). The poverty rate for Crow children (39 percent) was also twice that of children throughout the U.S. (19 percent). Official unemployment at Crow (32 percent) in 2006-2010 was four times that observed in the U.S. economy as a whole (8 percent). Recognizing that official unemployment only counts a would-be worker as unemployed if the worker is looking for work but cannot find it, actual unemployment—including workers who have given up looking for work in a setting of such economic distress—is much higher than officially reported. The Crow Nation reports that current unemployment is fully 47 percent.[137]

Crow v. U.S. Per Capita and Median Household Income, 2006-2010



Crow v. U.S. Poverty Rates and Unemployment, 2006-2010



SOURCE: U.S. Census Bureau, American Community Survey 5-Year Estimates; at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml, accessed on January 9, 2014.

Economic development was long hindered by political strife until reform of the Nation's constitution in 2001. With a three-branch government and constitutional separations of powers, the last decade has been marked by improved stability and reduced administrative and electoral turnover. This has resulted in consistency in the Nation's economic development goals and strategies, with minerals development—especially coal, oil, and gas—as a linchpin. To date, however, minerals development at Crow has been relatively limited.

Minerals Development

Oil and gas development on the Crow reservation began as early as the 1920s, with substantial production coming on line only over the last decade. An uptick in oil and gas leasing to independent oil and gas companies in the last 5–10 years has turned out to be most successful in promoting natural gas development at Crow. In August 2009, Ursa Major (an independent production company based in Oklahoma) began delivering the first Crow natural gas into the interstate pipeline system from the northeastern portion of the Reservation. Further full-field development of Ursa Major's gas field has been slowed by low natural gas prices, limited pipeline infrastructure, and the $6,500 per well Application for Permit to Drill (APD) fee charged by the BLM.[138]

Coal is the centerpiece of the Crow Nation's economy and going-forward development objectives. It is estimated that the Nation has mineral rights to 17 billion short tons of coal.[139] Recoverable tons are estimated at 9 billion, amounting to approximately 3 percent of the total U.S. coal resource. The Absaloka Mine, owned and operated by Westmoreland Resources Inc. Coal Company, is a 15,000-acre single pit surface coal mine complex located near Hardin, Montana and adjacent to the Crow Indian Reservation land area. The Mine began operation in 1974 and has produced approximately 175 million tons of low sulfur coal over its life.[140] It is the largest private employer on or near the reservation, with approximately 70 percent of the Mine's 163 member workforce identifying as Crow or Crow-related.[141] In 2010, the Absaloka Mine generated more than $20 million in royalties and taxes for the Crow Nation, amounting to about two-thirds of the Nation's non-federal budget.[142]

The Absaloka Mine was expressly developed to supply Powder River Basin coal to a group of Midwestern utilities, including Xcel Energy's Sherburne County Station near

Minneapolis, Minnesota. The mine enjoys a proximity advantage to these customers relative to its main competitors. Over the years, it has sold coal to several other upper Midwest utilities as well. Coal is shipped via a 38-mile rail spur to the main line of the Burlington Northern Santa Fe Railroad near Hysham, Montana.[143] In March 2013, the Nation and Westmoreland entered into a lease agreement to extend the life of the Absaloka mining operation, accessing approximately 145 million tons of Rosebud-McKay seam coal.[144] Counting both the direct and multiplier effects, it is estimated that keeping the Absaloka Mine in operation will annually generate approximately $20 million in royalties and taxes for the Crow Nation, as well as 500 total jobs, $30 million in labor income, and $120 million in gross regional product for the State of Montana.[145]

In an effort to reduce its dependence on the Absaloka Mine, the Crow Nation has recently entered into an option-to-lease agreement with Cloud Peak Energy (CPE) to potentially expand operations of CPE's off-reservation coal mines onto the reservation. Approved by the Bureau of Indian Affairs in June 2013,[146] this long-term project is anticipated to result in incremental production of 15 million tons per year when brought into full operation. Annually, this corresponds to expected royalty and tax revenues for the Crow Nation of more than $85 million, and would represent a massive contribution to the Crow economy and the Nation's budget. The State of Montana would be expected to realize an employment gain of more than 1000 jobs and labor income and gross regional product gains of more than $60 million and $260 million, respectively.[147] Whether these gains will be realized, however, depends critically on Cloud Peak Energy's ability to price attractively and find customers. These prospects (as well as Westmoreland's ability to continue operation of the Absaloka Mine), in turn depend on whether Congress reinstitutes the federal Indian Coal Production Tax Credit (ICPTC). Cloud Peak Energy's efforts—and, hence, the Crow Nation's supportive efforts—also focus on overcoming regulatory barriers to permitting and operating coal export facilities.[148]

Beyond conventional coal mining, the Crow Nation has been working since 2008 to develop the Many Stars Coal-to-Liquids (CTL) project within the Crow reservation. The Project has been stalled by the Great Recession, relatively soft petroleum prices during the recession, uncertainty about government policy towards CTL, and permitting requirements for carbon sequestration. The Project would consist of a new surface coal mine and a direct coal liquefaction process plant which sequesters carbon dioxide (CO_2). The Many Stars CTL

Project would target conversion of up to 2 billion tons of Crow coal over its life and ultimately produce up to 50,000 barrels or more of ultra-clean fuels (such as synthetic jet fuel and diesel fuel) at an estimated yield of 1.5 to 2 barrels of liquid product per ton of coal.[149]

Impediments to Development

The Crow Tribe's reform of its constitution in 2001 has enabled the Nation to move considerably closer to the "thick" end of institutional development. The Nation is increasingly seen as willing and, importantly, able to move forward with minerals development. It finds, however, that the field on which it must play is not level.

Although pricing and recession have slowed minerals development at Crow, the Nation and its mineral lessees describe substantial regulatory and bureaucratic impediments to operating and expanding Crow resource development. Westmoreland, for example, finds that it typically takes approximately twice as long, and costs twice as much, to re-permit operations once they cross over the reservation boundary.[150] The Nation describes an oil and gas lease that was approved by the Nation in January 2005, but had development blocked until September 2007 because of an extremely slow BIA approval process. The Nation also reports that BIA records for surface and mineral ownership are often erroneous, missing, or out-of-date. The result is delay in preparation of environmental documents and overall land records necessary for business transactions. Finally, the Nation finds that federal policies which limit the duration of commercial leases on tribal lands also impede development of large long-term projects such as the Many Stars CTL project.[151]

Profile

The Tulalip Tribes: Supply Chain Innovation & Job Creation

As was the case for so many other tribes in the U.S. over much of the last century, the Tulalip Tribes struggled under high unemployment, poverty and related social ills, insecure personal and property rights, deficits of infrastructure and services, and cultural and social stress. Today, however, the Tribes are in the midst of an economic, social, cultural, and political renaissance. The foundations of this renaissance are the Tribes' commitment to core Salish values and culture, a strategy of "thickening" their governing capacity across all public functions, and leadership that continually expands the abilities of the Tribes' to exercise their legal powers of self-governance in responsible pursuit of a self-sufficient and self-determined future for the community.

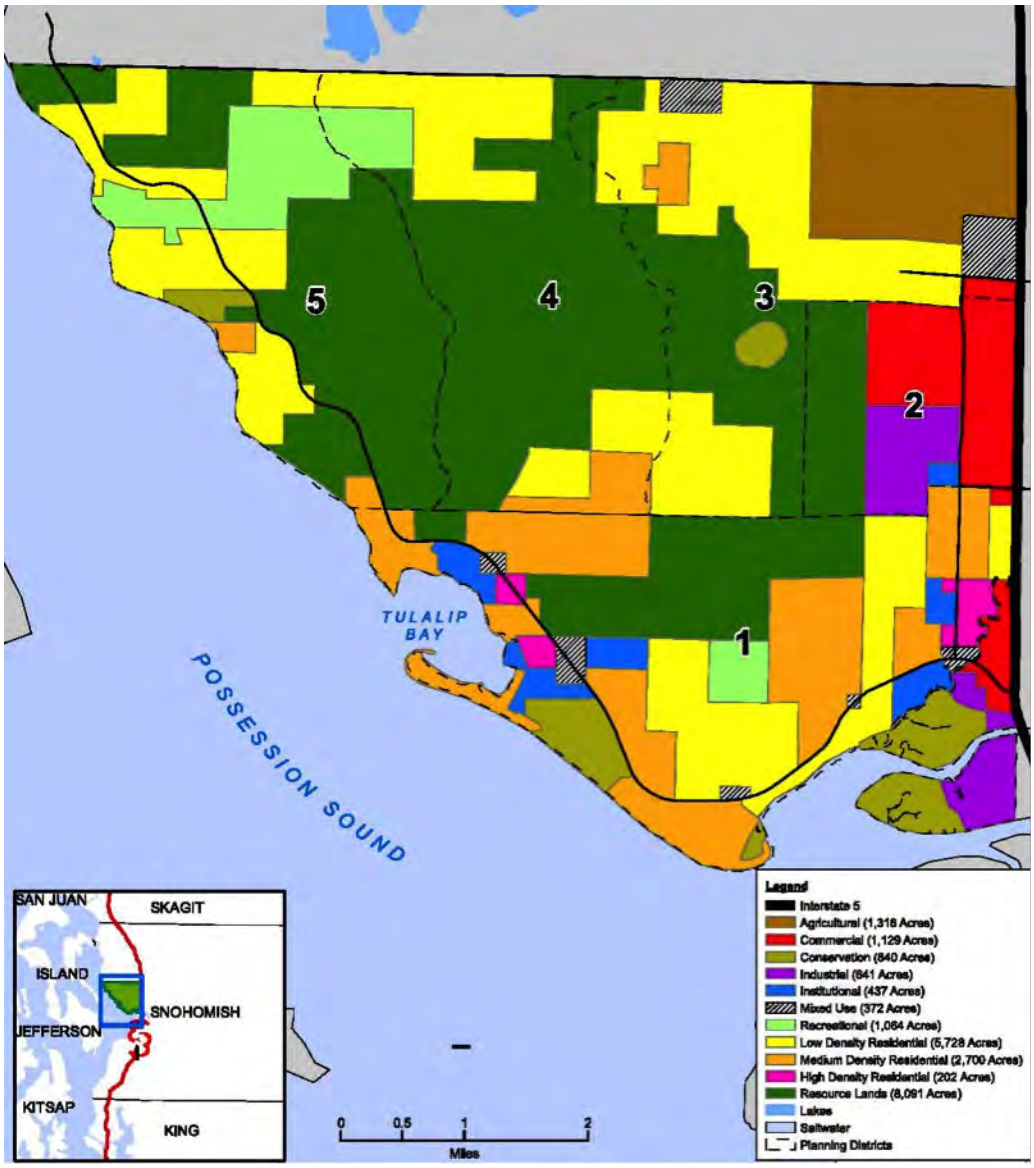
The economic centerpiece of the Tulalip renaissance is Quil Ceda Village. While not a minerals development, the Village nevertheless entails a long-lived commitment of tribal resources to large scale land development in conjunction with non-Indian businesses. Specifically, capitalizing on the familiar adage in real estate that "location is everything," Quil Ceda Village is a tribally-chartered city created and serviced by Tulalip tribal government. Its economic anchors are two major retail shopping malls and a hotel and casino resort. The myriad municipal services required by the Village now generate employment and income for thousands of tribal and non-tribal citizens. Backed by the Tribes' very conscious strategy of thick and capable self-government, Quil Ceda Village has made Tulalip a dominant economic and political force in its region and raised the economic, social, and cultural standard of living for all Tulalip citizens.

Overview

The Tulalip Tribes of Coastal Salish Indians hold a 22,000-acre reservation in the heart of the densely packed Interstate 5 corridor north of Seattle. Just more than. Just more than half of the reservation is tribal trust land or individual tribal member land.[152] Approximately 2,500 of the Tribes' 4,000 citizens reside on the Tulalip reservation.[153] Notwithstanding their proximity to the growing Seattle/Everett metropolitan area, the

Tulalip Tribes long had little success in developing a robust tribal economy. Having opened, first, a commercial bingo hall in 1983 and then a modest gaming casino in 1992, the concept of what is now Quil Ceda Village began to take shape in 1998, when the Tribes took control of reservation land that had been leased years earlier to the Boeing Company.

The Tulalip Reservation – Land Use[154]



Starting in 1998 with a small business park on the parcel along Interstate 5 and seeking to diversify their enterprises away from reliance on gaming, the Tribes quickly found themselves needing to expand and improve the types of municipal services that cities are called on to provide—police, fire, roads, water and sewer, lighting, sidewalks, trash collection, and so on. In 1998, the Tulalip Tribes created the institutional and physical blueprints for Quil Ceda Village, to be located on 2,000 acres of trust land. In 2001, the Village became a tribally-chartered federal city—the first such tribal city and only the second (after Washington, D.C.) federal city in the United States.

The Tribes had correctly anticipated that its assertion of powers of municipal government would remove barriers to attracting tenants and investment, and its first shopping area quickly took place with the opening of "big box" retailers such as Wal-Mart and Home Depot. The Tribes were finding that a administrative capable Indian tribe could out-compete neighboring municipalities—which so often struggle with politics, permitting disputes, and the like. By 2005, the Village opened Seattle Premium Outlet Mall. Today, the mall is home to Wal-Mart, BestBuy, Home Depot, Bank of America, Cabela's, and more than 150 other stores, boutiques, and restaurants. In the midst of this development, substantial acreage has been set aside as open space and as support for extensive efforts the Tribes are making in recovering salmon runs.

The Tribes opened an upgraded casino in 2005, along with the (now) 2,500 seat Tulalip Amphitheater. A resort hotel was added to the complex in 2008. Combined, the hotel-casino, shopping, and entertainment "city" that is Quil Ceda Village is the largest such complex in the Pacific Northwest.[155] As of 2010, the Village was generating approximately $720 million in annual business revenues, not counting the resort casino.[156] In servicing the Village as a municipal government, the Tulalip Tribes' directly employ (i.e., not counting the employees of the hundreds of businesses operating in the Village) approximately 3,500 people, ten times the number they employed in 1990.[157]

Whereas tribal unemployment typically ran in the range of 60 to 70 percent in the early 1990s, the data for 2010 indicate an unemployment rate of 17 percent.[158] State of Washington tax collections from Village economic activity are on the order of $25 million per year, and the Tribes contribute millions each year to hundreds of regional charitable

organizations.[159] The positive impact on the local region is symbolized by the fact that Quil Ceda Village is now home to the Marysville/Tulalip Chamber of Commerce, the first tribal/non-tribal chamber partnership in the United States. A growing number of the Chamber's members are Indian.

Municipal Services as "Supply Chain" Economic Development

In short, the Tulalip Tribes have gone into the business of being a city. By providing the necessary municipal infrastructure and services—from trash collection and police protection, to water treatment and street maintenance, to fiber optic lines and emergency services—the Tribes are demonstrating a unique approach to the kind of supply chain economic development that large land-using projects often can support. In Tulalip's case, the Tribes have succeeded in servicing the "mine" (where non-Indian miners go prospecting for retail dollars) that is Quil Ceda Village by placing the governance of a new municipality under the jurisdiction of the Quil Ceda Village Council and delegating the power of taxation, policing, and even eminent domain to the Council. The Village employs a council-manager form of government, with a three-member Council, a municipal charter, and tribal ordinances that govern the city.[160]

The municipal infrastructure and services developed by Quil Ceda Village have been entirely funded by the Tribes, working with approximately $5 million per year in lease revenues, water and sewer fees, tribal taxes on tribal businesses, and direct investment of tribal funds.[161] The key to Quil Ceda Village's success, however, is not solely the provision of first-quality municipal services. The Village also displays first class management, manifesting few of the hindrances to economic development that reservations—in fact, many non-Indian municipalities, as well—too frequently exhibit. By avoiding murky and/or politicized zoning policies, inadequate land-use planning, and sluggish business permitting processes, the Quil Ceda Village has steadily and rapidly attracted economic activity. The Village's streamlined permitting, zoning, and planning processes allow businesses that have negotiated their place within the Village to begin operations quickly. The Village Council is keenly aware that businesses tend to shy away from cumbersome and politicized bureaucracies, and it prides itself on being lean and efficient.[162]

The success of the Quil Ceda Village model of supply chain economic development is not confined to business and employment creation. The Village has also been directed to the promotion of tribal community, environmental, and cultural values. In fact, the Tulalip Tribes selected the Village location in order to protect the natural, cultural, and rural character of the overall reservation. During early planning stages, the Tribes adopted a holistic approach to the environment and set aside substantial land within the Village for a park, trails, and wetland. A state-of-the-art wastewater treatment facility maintains clean surface water for the fish, wildlife, and plants within the Village areas. The Tribes also designed the Village to promote their cultural history and traditional practices, with provision for a cultural education center and museum. Together, the Tribes and Village fully fund a Montessori School, as well as a Boys and Girls Club. These institutions provide needed support for the children of parents who now have jobs.[163] As such, they build the kind of community infrastructure that is required to ensure the Tribes' long-term staying power in its business relationships and development strategies.

The example of Quil Ceda Village illustrates options that tribes and companies can capitalize on in maximizing the benefits of minerals development. Minerals extraction inherently involves commitments of large blocks of reservation lands or lands with substantial tribal value; and mining activity cannot help but put strains on a tribe's infrastructure and service provision. Workers need to be accommodated, roads need to be built and maintained, water needs to be provided and treated, police and fire protection never goes unwanted, and ancillary support businesses need to be hosted. The Tulalip case shows how meeting these needs can become a tribe's primary business, bringing employment, income and community development and putting a tribe in the position so often sought—a government capably exercising its sovereign powers.

Profile

The Shoshone-Bannock Tribes: Phosphate Mining, Past and Present

The contemporary territory of the Shoshone-Bannock Tribes is the Fort Hall Reservation in southern Idaho. The reservation covers an area of 544,000 acres, or 850 square miles.[164] Tribal headquarters are located eight miles north of Pocatello, Idaho in the town of Fort Hall.

Historically, both the Shoshone and Bannock peoples traveled the vast western expanses of what is now the United States. The modern Shoshone-Bannock Tribes of the Fort Hall Reservation descend from several northerly Shoshone and Bannock bands that were forced to the Fort Hall Reservation between 1860 and 1875. Today, 97 percent of reservation lands remain under Indian ownership (that is, either the tribal government or individual Indians hold title).

The Fort Hall Indian Reservation[165]

The majority of the Tribes' 5,700 citizens live on or near the Fort Hall Reservation.[166] Unemployment and per capita income for Native Americans living on the reservation are on par with national averages, although labor force participation, especially among women, lags the comparison group.

Shoshone-Bannock Economic Conditions, 2006-2010

	American Indian and Alaska Native Residents of:	
	Fort Hall Reservation	All Reservations, excluding Navajo
Per Capita Income	$12,458	$12,142
Unemployment	19%	20%
Labor Force Participation: Men	60%	59%
Labor Force Participation: Women	42%	55%

SOURCES: U.S. Census Bureau, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml, accessed March 14, 2014; Akee, Randall K.Q., and Jonathan B. Taylor, *Social & Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey, 1990-2010*, Taylor Policy Group, September 13, 2013.

Tribal Mining History

Idaho is a state rich with mineral resources—gold, molybdenum, copper, silver, vanadium, phosphorus, among others—and a long history of commercial extraction. Phosphorus, found in phosphate ore, is particularly useful for fertilizer and other agricultural compounds. In the mid-1940s, J. R. Simplot, a large-scale potato farmer, negotiated a lease with the Bureau of Indian Affairs to open a phosphate mine on the Fort Hall reservation. Ore from the Gay Mine (named for Simplot's daughter) was processed at Simplot's facility west of Pocatello. Later, ore also was processed on the reservation at a plant owned by the Food Machinery Corporation (now FMC Corporation).[167]

For a time, the tribal community and government supported the mine and plants. Citizens gained jobs and the tribal government earned revenues, especially as its oversight capacities developed. "The Shoshone-Bannock tribes were among the first in the country to enact a percentage royalty rate tied to the value of the ore, tax the mining operations, and force the mining companies to hire Indians according to TERO [Tribal Employment Right Office] regulations."[168] Beginning with an arsenic scare in the 1970s, however, concern began

to build, and by the 1980s, the U.S. EPA began to look at the FMC and Simplot properties as a potential Superfund site. Unlined waste ponds contained elevated levels of selenium, arsenic, phosphorus, cadmium, chloride, chromium, copper, fluoride, lead, potassium, silica, vanadium, and organic solvents. In 1996, the Shoshone-Bannock Tribes installed air quality monitors and were able to demonstrate that the FMC plant was causing air pollution as well.[169]

The Gay Mine closed in 1993, and the FMC plant closed in 2001, although the Simplot plant is still in operation. Today, the mine sites and plants constitute the 2,530-acre Eastern Michaud Flats Superfund Site. On Jun 10, 2013, the U.S. Environmental Protection Agency issued an administrative order for the FMC Corporation to address contamination at its former plant on the Fort Hall Reservation. The estimated price tag is $57 million.[170]

For the Shoshone-Bannock Tribes, remediation of the closed mine sites and plant on their reservation is top priority. However, they are not satisfied with the EPA plan, which is to cap the contamination rather than remove it.[171] EPA's scientists argue that containment is the safest option, given that some of the phosphorus is combustible when exposed to air. But tribal citizens remain concerned about the risks to fish, wildlife, and cattle. Selenium (a by-product of phosphate mining that can leach into soil and groundwater) has been linked to abnormalities in local fish populations; air-borne fluoride pollution has poisoned Bannock Creek; and birds and wild animals often feed in contaminated areas. Because many areas of the reservation remain unsafe for human use, certain ceremonial and dance sites also cannot be used.[172]

Intergovernmental Regulatory Infrastructure

In 1997, responding to growing public concern over selenium contamination from phosphate mining, representatives from land management, environmental, and resource management agencies and representatives from five leading companies involved in phosphate mining (including Simplot and FMC) formed a "Selenium Working Group" to investigate the sources and impacts of selenium pollution.

By 2000, the need for regulation was clear, and a broad group of federal, state, and tribal government bodies—the U.S. Forest Service, U.S. Bureau of Land Management, U.S. EPA, U.S. Fish and Wildlife Service, U.S. Bureau of Indian Affairs, Idaho Department of

Environmental Quality, and the Shoshone-Bannock Tribes—formally agreed to a "Memorandum of Understanding Concerning Contamination from Phosphate Mining Operations in Southeastern Idaho" (MOU). The MOU established protocols and processes for addressing the investigation and remediation of mined sites in Idaho's phosphate mining region. The agencies further agreed, with the responsible corporate parties, to an Administrative Order on Consent (AOC) to enforce and finance activities under the MOU.

Through the MOU and AOC, government signatories asserted their regulatory authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) "to take charge of the regional contamination impact investigations… and eventually conduct whatever site-specific studies were necessary to thoroughly investigate all the 15 major operating and inactive phosphate mines for the release or threatened release of hazardous substances."[173] Notably, the mining companies see the MOU and AOC as being in their own best interest: "Without a mechanism offering proof that lessees could eventually relinquish their mined leases in a condition suitable for the management of other sustainable resources, permitting future phosphate mining operations on public lands in the region could become impossible."[174] In other words, while the MOU and AOC focus on past mining activity, the regulatory environment they create has an important indirect effect on future phosphate mining.

The MOU is one of the mechanisms through which the Shoshone-Bannock Tribes engage with Simplot and FMC concerning remediation on reservation lands. But more than that, the Shoshone-Banncock Tribes' equal standing with other governments under the MOU is a clear signal to resource developers that the Tribes are a regulator to which attention must be paid.

Monsanto's Blackfoot Bridge Mine

Like Simplot and FMC, the Monsanto Company has long been involved in phosphate mining in southeastern Idaho. Phosphorus is a key building block in its Roundup® agricultural herbicides and other consumer products. Monsanto Company's newest mine, Blackfoot Bridge, is operated by its subsidiary, P4 Production, LLC, on land ceded by the Shoshone-Bannock Tribes in the late 1800s.

To develop the mine, Monsanto was required by law to engage with all relevant governments—federal, state, and tribal. But Monsanto also engaged with the Shoshone-Bannock Tribes for another reason: the Tribes asked them to. Because the mine was on historical treaty land, the Tribes maintained that they continued to exercise traditional hunting and fishing rights over the territory.

Monsanto made a key decision in response to the Tribes' request. It might have ignored or even challenged the Tribes' claim. The land had not been part of the reservation for 120 years, legal title rested with other parties, and hunting and fishing rights were referenced only briefly in the Fort Bridger Treaty of 1868 (as "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians"[175]). Instead, Monsanto determined that opening a dialogue with the Tribes' environmental staff would be more productive. In particular, it focused on the Tribe's interest in protecting fish and wildlife resources. The mine was approved and permitted without recourse to litigation.

This is not to say that each party walked away from discussions concerning Blackfoot Bridge development satisfied that its concerns had been met. Rather, despite the Shoshone-Bannock Tribes' difficult history with phosphate mining and present struggles to achieve appropriate local remediation, respectful engagement between the Tribes and a developer has at least pointed to a way forward.

Profile

Council of Energy Resource Tribes & Canadian Aboriginal Minerals Association

U.S. American Indian tribes and Canadian First Nations have organized and are served by two distinct associations whose purpose is to aid their members in navigating tribal minerals development for economic and social development.

CERT

In the United States, the Council of Energy Resource Tribes (CERT) was founded in 1975 by 25 U.S. Tribes. Currently, 53 U.S. tribes and four Canadian Treaty First Nations with significant energy and mineral resources belong to CERT.[176] It serves as an inter-tribal organization with a mission to help tribes protect and exploit their energy and mineral resources,[177] as well as develop expert information independent of the Bureau of Indian Affairs.[178] CERT's major financial support is from its member tribes,[179] and its focus has been on meeting its internal members' needs for energy resource exploration and development.

CERT has been noted for the role it has played in advocacy on behalf of its membership.[180] In the 1970s, a review of CERT reports shows it focused almost exclusively on developing tribal resource inventories and legal/technical reports.[181] Today, as tribes have acquired greater control over their resources and many have begun to build their own institutional capacities, expertise and personnel, CERT has turned to more of an advisory role with tribes,[182] providing assistance with strategic planning, national-level policy development, technical assistance (such as energy use audits and tribal regulatory designs), and consultant networking.

CAMA

The Canadian Aboriginal Minerals Association (CAMA) was formed much more recently (1992) as an Aboriginal-led initiative to establish relationships between corporations and First-Nations communities. CAMA "… acts as an instrument for the advancement of Aboriginal community economic development, mineral resource management and environmental protection."[183] CAMA believes that increased understanding benefits all parties and actively

engages both First Nations and corporate stakeholders in networking, and focuses its development efforts on a combination of economic, technical, and strong social capacity building in member First Nation communities. Unlike CERT, over 50 corporate donors, carefully selected to represent a range of sectors with a mutual interest in land, mineral, and environmental issues, support CAMA.

Comparison

Considering the vast tribal resources in both the U.S. and Canada, both organizations have had mixed success since their inceptions.[184] CERT enjoyed a high level of success in the 1970s through to the mid-1980s. During this period, it focused very heavily on litigating and supporting the legal rights of member nations, as well as on helping them develop strong technical reviews and reports on the resources available for possible development.[185] During the 1980s, some tribal members began to criticize CERT for advocating too heavily for developing natural resources at the expense of tribal capacity building, environmental issues, and other concerns of member tribes. This led to a number of tribes turning elsewhere for services CERT might provide.[186] In response, CERT became more aggressive at seeking to serve all of its members and to provide more attractive services. At present, CERT's capacity is limited and its future uncertain, due in part to the untimely passing in 2012 of its long-serving and visionary executive director, A. David Lester.

CAMA has been relatively successful in achieving longer-term community "buy-in" of its activities through its sustained networking activities, as well as through community capacity building efforts that complement economic development. Like CERT, CAMA also functions on the premise that First Nations are stronger as a block of nations than as individuals. Unlike CERT members, Canadian First Nations involved with CAMA seem more willing to cede certain individual rights to work towards a collective end via CAMA. This likely reflects legal differences between U.S. tribes and Canadian First Nations, as nations in Canada do not hold the same sovereign status as U.S. tribes. CERT aggressively emphasizes its respect for tribal self-government.[187] In Canada, there is likely an incentive for Canadian First Nations to become more engaged in developing networks through CAMA and accepting services and common objectives than there is for U.S. tribes via CERT, as the U.S. tribes fiercely guard their powers and prerogatives of self-rule. From a U.S. tribal perspective, this is an appropriate

transition by CERT to the role of "how to" service provider in light of the reality of rising in-house tribal capacities for self-governance.

Resources

CERT online: www.certredearth.com

CAMA online: http://www.Aboriginalminerals.com/

Profile

Impact Benefit Agreements: A Role for IBAs in the U.S. Context?

Institutional Benefit Agreements (known as IBAs) are negotiated, private and legally-binding agreements between corporations and Aboriginal/First Nations communities, which record the benefits communities will receive as a result of their cooperation with the development of a local resource.[188] These agreements are normally not required by law; therefore taking the step of negotiating legally binding agreements with Aboriginal groups is seen as a sign that companies are now willing to seriously engage, to give these communities a say in development decisions, and to share the wealth of the development with the Aboriginal community which is being engaged.[189] IBAs have become common Canada and Australia, and are seen by many as the current best practice or "gold-standard" in resource development agreements in these countries. Recent findings suggest that in general, IBAs are meeting their objectives, especially when it comes to delivering benefits to Aboriginal and First Nations Communities.[190] IBAs are seen by many as the only mechanism in these jurisdictions by which a corporation can gain a social license[191] to proceed with resource development.

IBAs are not often seen in the U.S. due to the fact that, as sovereign governments, U.S. tribes can and do directly negotiate contracts as they see fit. But that doesn't mean that IBAs do not have anything to offer the U.S. situation. In fact, IBAs can play a role as an innovative force in development. When properly prepared and faithfully executed, they can fill regulatory gaps, involve parties that are not traditionally involved in development agreements, address resource extraction concerns on non-reservation lands, address tribal aspirations which are often not captured in standard contracts, and introduce innovative cultural/environmental monitoring institutions.[192]

What Do IBAs Typically Cover?

Most often the specific terms of IBAs remain as confidential agreements between the community and the developer, and typically, all or some of the terms of agreement are revisited on a set, mutually agreed-to schedule. The content of IBAs varies from community

to community, based on each community's needs and aspirations. Some early and successful models of IBAs in North America are those for the first three diamond mines opened in the Northwest Territories of Canada (Ekati – BHP Billiton, Diavik – Rio Tinto, and Snap Lake – DeBeers). Today, the use of IBAs in Canada has expanded to the point that the Canadian Government has a map listing 182 IBAs signed by communities, and there are numerous websites with IBA listings, performance analysis, and resources (a link to this map is provided below). Many IBAs contain provisions addressing[193] (but not limited to):

- Recognition of First Nations and Aboriginal rights
- Profit-sharing and/or royalties from resource development
- Preferential employment and training agreements linked directly to resource development
- Community and socio-economic development opportunities, for example:
    - Wellness programs, mental health, and social programs
    - Community centers, elder care and day care, education opportunities
- Preferred community contracting/sourcing and vendor agreements
- Protection of environmental, social, and cultural features (jointly/in-consultation with community)
- Acknowledging and incorporating Traditional Ecological Knowledge and developing "non-traditional" indicators
- Monitoring of these elements
- Joint leadership of boards overseeing the implementation and monitoring of the agreement

How Can the Best of IBAs Be Translated to the Lower 48?

The legal jurisdiction in the United States is very different from countries where IBAs are being used currently. In the U.S., tribes are sovereign governments, and therefore they can negotiate and sign contracts as they see fit. In situations where resource development is on the reservation and the tribe has the capacity to set favorable contract terms, this is a straightforward deal. In cases of off-reservation development or tribes who are not in a good position to negotiate terms (e.g., immediate financial or employment pressures), standard contracts may let the tribe down. Also—contracts often focus heavily on finances, resources, allocations, and hard numbers. They can easily miss the less tangible and more aspirational

desires of tribes for their resource and tribal development. Tribal aspirations for capacity building, social services, training and education, and environmental sensitivity often do not fit tidily into standard contracts. Here is where impact benefit agreements, or a derivative of, can be useful.

IBAs give the flexibility of including the "contractual intent" that can sometimes be lost in a standard contract negotiation between a corporation and a tribe and the IBA model can quickly act as a solution to problems of concern to the tribe. They honor a tribe's aspirations and because they are binding agreements, they also provide a social license and longer security to developers that issues are going to be negotiated and dealt with using an agreed-to mechanism.

There are a few ways that IBAs can be used in the U.S. context: elements of IBAs could be incorporated into standard contracts; IBAs can be signed as separate agreements; or in the case of progressive corporate-tribal partners who have developed high levels of trust, IBAs can be negotiated completely outside of standard contracts and agreements as a best practice which grants a strong social license to operate.

Words of Caution

For all of the stated potential benefits of IBAs for tribal, Aboriginal, and First Nations communities, there are associated constraints to be considered. IBAs often contractually prevent signatories from objecting to the issuing of government permits and licenses for the development project. IBAs can also prevent communities from pursuing legal avenues (claims, etc.) that would normally be available to them. Many IBAs include dispute resolution mechanisms that must be fully pursued prior to seeking external legal recourse, and confidentiality agreements that prevent parties from disclosing details of negotiations and agreements.[194] These concerns are matters that parties in the U.S. should be aware of, but could be dealt with easily in on-reservation situations through carefully written contracts that preserve tribal sovereignty in these areas.

Further Information: IBA Community Toolkit

"The IBA Community Toolkit is a free resource for First Nation, Inuit and Métis communities in Canada considering impact and benefit agreements, such as those with mining companies. While the toolkit focuses on the mining industry, many of the issues and processes addressed in the toolkit are relevant to agreement making in other industry sectors and contexts, including protected areas, oil and gas, hydro, and forestry. Our goal is to help communities, negotiators, and consultants to achieve positive agreements for Aboriginal communities."

Resources

IBA Tool Kit: http://www.ibacommunitytoolkit.ca/

The Impact and Benefit Research Network: http://www.impactandbenefit.com

Map of All Known IBA Signatory Communities: http://www.nrcan.gc.ca/minerals-metals/sites/www.nrcan.gc.ca.minerals-metals/files/files/aam-eac-e2012.pdf

Appendix 1: TRIBAL ON-RESERVATION MINERAL RESOURCES

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
Arizona	Ak-Chin		Sand/Gravel Aggregate
	Colorado River	Copper, Gold, Sand/Gravel Aggregate	Gypsum, Manganese
	Ft. Apache	Coal, Iron, Manganese, Asbestos, Gypsum, Clay, Limestone, Gold, Sand/ Gravel Aggregate	Oil, Gas
	Ft. McDowell	Sand/Gravel Aggregate	
	Ft. Yuma	Gold, Sand/Gravel Aggregate	Copper, Uranium
	Gila River	Sand/Gravel Aggregate	Copper, Gold, Mica
	Havasupai	Lead, Zinc, Silver, Vanadium, Travertine, Sand/Gravel Aggregate	Uranium
	Hopi	Coal Developed, Oil & Gas Undeveloped, Clay	Uranium
	Hualapai	Copper, Limestone, Sandstone, Gypsum, Travertine, Uranium	Vanadium
	Kaibab-Paiute	Uranium	
	Navajo	Oil, Gas, Coal, Uranium, Sand/Gravel Aggregate	
	Quechan		
	Salt River Pima-Maricopa	Sand/Gravel Aggregate	
	San Carlos	Coal, Uranium, Copper, Peridot, Gold, Silver, Lead, Zinc, Iron, Manganese, Sand/Gravel Aggregate	Oil, Gas
	Tohono O'odham	Copper, Gold, Silver, Magnetite, Iron, Silica	
	Yavapai Apache	Gold, Sand/Gravel Aggregate	Copper, Lead, Silver, Zinc

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
California	Agua Caliente	Tungsten, Corundum, Limestone, Sand/Gravel Aggregate	
	Barona	Gold, Quartzite	Copper, Garnet, Kaolin
	Campo Kumeyaay	Sand/Gravel Aggregate	
	Chemehuevi	Copper, Sand/Gravel Aggregate	Uranium
	Cold Springs Rancheria		
	Fort Mojave		Uranium, Gold
	Hoopa Valley	Sand/Gravel Aggregate	Copper, Zinc, Lead, Chromite, Mercury, Manganese, Platinum, Silver
	Jackson Rancheria		Gold
	Los Coyotes	Tungsten	Gold, Gem minerals, Feldspar, Limestone
	Morongo		Uranium, Tungsten, Limestone, Peat
	Pala	Lithium, Tourmaline, Other Gemstones	
	Pauma		
	Ramona	Gemstones	
	Round Valley		Manganese
	Soboba	Sand/Gravel Aggregate	
	Tule River	Tungsten	Gold, Limestone, Dolomite
Colorado	Southern Ute	Oil, Gas, Coal	Uranium, Sand/Gravel Aggregate
	Ute Mountain Ute	Oil, Gas, Coal, Uranium	Titanium, Selenium
Florida	Seminole	Sand/Gravel Aggregate	Oil, Gas

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
Idaho	Coeur d'Alene	Lead, Zinc, Silver, Iron, Clay	
	Fort Hall	Phosphate rock, Limestone, Sand/Gravel Aggregate	Fluorite
	Shoshone-Bannock Tribes		
	Nez Perce	Limestone	
Maine	Penobscot		
Michigan	Saginaw-Chippewa		Oil & Gas
Montana	Blackfeet	Oil, Gas, Coal	
	Crow	Oil, Gas, Coal, Limestone, Bentonite, CBM, Sand/ Gravel Aggregate	
	Confederated Salish & Kootenai (Flathead)	Copper, Sand/Gravel Aggregate	Uranium
	Gros Ventre & Assiniboine (Ft. Belknap)	Sand/Gravel Aggregate	Oil, Gas, Coal, Gold
	Assiniboine & Sioux Tribes (Ft. Peck)	Oil, Gas, Coal	Uranium, Sand/Gravel Aggregate
	Northern Cheyenne	Oil, Coal	Gas
	Chippewa Cree (Rocky Boy's)	Oil, Gas, Coal, Uranium, Vermiculite, Iron sulfides	
Nebraska	Santee Sioux		Sand
Nevada	Western Shoshone (Elko Colony)		
	Paiute & Shoshone of Ft. McDermitt	Gold, Silver, Uranium and other mining off reservation	
	Pyramid Lake Paiute		

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
New Mexico	Acoma	Uranium	
	Cochiti	Gold & Silver (Low Grade)	
	Jemez		Oil, Sand/Gravel Aggregates
	Jicarilla Apache	Oil, Gas, Coal, Uranium	
	Laguna	Coal, Uranium	
	Mescalero Apache	Yttrium, Zirconium	Coal
	Ohkay Owingeh		Sand/Gravel Aggregate
	Picuris		
	San Felipe		Oil, Gas, Coal, Uranium, Sand/Gravel Aggregates
	San Ildefonso		Sand/Gravel Aggregate
	Sandia	Sand/Gravel Aggregate	
	Santa Ana		Sand/Gravel Aggregate
	Santa Clara		Sand/Gravel Aggregate
	Kewa (Santa Domingo)	Silver	Oil, Gas, Coal, Uranium, Sand/Gravel Aggregates
	Taos		Sand/Gravel Aggregate
	Tesuque		Sand/Gravel Aggregate
	Zia		Gypsum
New York	Seneca	Oil, Gas	
	St. Regis Mohawk		

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
North Dakota	Spirit Lake (Devils Lake Sioux)		Sand/Gravel Aggregate
	Standing Rock Sioux		
	Three Affiliated (Ft. Berthold)	Oil, Gas, Coal	
	Turtle Mountain Chippewa		
Oklahoma	Absentee Shawnee	Oil, Gas	
	Caddo	Oil, Gas	
	Cherokee		Gas, Coal
	Cheyenne-Arapaho	Oil, Gas	
	Chickasaw	Oil, Gas	
	CPN		Oil, Gas
	Eastern Shawnee		Oil
	Iowa		
	Kaw		
	Muscogee Creek		
	Osage	Oil, Gas	
	Otoe Missouria		Oil, Gas
	Pawnee		
	Ponca		
	Sac and Fox		
	Wichita		
Oregon	Umatilla	Sand/Gravel Aggregate	
South Dakota	Cheyenne River Sioux		Oil, Gas, Coal
	Lower Brule	Sand/Gravel Aggregate	
	Oglala Sioux	Gold	Uranium
	Pine Ridge Sioux		Oil, Gas, Uranium, Sand/Gravel Aggregate
	Rosebud Sioux		Coal, Uranium

	Reservation/Tribe	Confirmed Resources	Unconfirmed Resources
Texas	Alabama-Coushatta	Gas	
Utah	Ute (Uintah and Ouray)	Oil/Oil Shale, Gas, Coal	Uranium, Sand/Gravel Aggregate
Washington	Confederated Tribes (Colville)	Molybdenum	
	Confederated Tribes of the Yakama Nation	Copper	
	Lummi	Sand/Gravel Aggregate	
	Makah	Sand/Gravel Aggregate	
	Muckleshoot	Sand/Gravel Aggregate	
	Spokane	Uranium	
	Tulalip	Sand/Gravel Aggregate	
Wyoming	Northern Arapahoe & Eastern Shoshone (Wind River)	Oil, Gas, Coal, Uranium, Gypsum, Gold	Bentonite

THE RESEARCH TEAM

Saleem H. Ali
Director
Center for Social Responsibility in Mining
The University of Queensland
&
Professor
Rubenstein School of Environment & Natural Resources
The University of Vermont

Miriam Jorgensen
Research Director
The Harvard Project on American Indian Economic Development
John. F. Kennedy School of Government
Harvard University
&
The Native Nations Institute
The University of Arizona

Joseph P. Kalt
Co-Director
The Harvard Project on American Indian Economic Development
&
Ford Foundation Professor (Emeritus) of International Political Economy
John. F. Kennedy School of Government
Harvard University

Sarah Krakoff
Professor, Wolf-Nichol Fellowship
University of Colorado Law School

Anthony McInnis
Assistant Professor
Rubenstein School of Environment & Natural Resources
The University of Vermont

Amy Besaw Medford (Brothertown)
Research Affiliate
The Harvard Project on American Indian Economic Development
John. F. Kennedy School of Government
Harvard University

April Youpee-Roll (Assiniboine and Sioux)
Research Assistant
The Harvard Project on American Indian Economic Development
John. F. Kennedy School of Government
Harvard University

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The Harvard Project on
American Indian Economic Development

79 John F. Kennedy Street
Cambridge, MA 02138

Tel: 617-495-1480
Fax: 617-496-3900
www.hpaied.org

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for Social Policy