INDIAN MINERAL INTEREST — A POTENTIAL FOR ECONOMIC ADVANCEMENT

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The American Indian has a lower average income per family than any other group of Americans.[1] One method of increasing that income is by the Indians' capitalizing on their mineral interest in Indian lands. While the differences in quantity and quality of Indian mineral resources are great,[2] even those Indians located on what appears to be unproductive land are beginning to realize that economic progress is possible through imaginative planning and development.

Between 150,000 and 200,000 Indians have benefited from the development of oil, gas and mining enterprises on their lands.[3] Excluding benefits from oil and gas operations on lands owned by some 5,000 members of the Osage Tribe of Oklahoma, from 1924 to 1965 production royalties of 271 million dollars were reported for all minerals extracted from Indian lands.[4] While the problem of economic growth is many faceted, it is submitted that increased emphasis on development of mineral resources will be a major factor in placing reservation Indians on an economic plane with other Americans.[5]

Since the Indians themselves have neither the capital nor the expertise required to make the needed effort, reliance, at least for now, will have to be placed on large non-Indian companies. Consequently, the purpose of this article is to suggest revision of leasing procedures so that Indians, when leasing their mineral rights, will realize the greatest amount of income possible. In order to fully understand the present method of leasing, it is necessary to explore the nature of Indian land rights, the extent of their interest in mineral deposits, and the alienability of that interest.

NATURE OF INDIAN LAND TITLES — MINERAL RIGHTS

Aboriginal Title

At the time of European exploration and colonization of North

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[1] 114 CONG. REC. 1708 (daily ed. Mar. 6, 1968) (President's message to Congress on the American Indian).

[2] *See* Bennett, *Problems and Prospects in Developing Indian Communities*, p. 649 *supra*.

[3] H. HOUGH, DEVELOPMENT OF INDIAN RESOURCES 115 (1967).

[4] *Id.*

[5] *See* Taylor, *Indian Manpower Resources: The Experiences of Five Southwestern Reservations*, p. 579 *supra*, for statistics on Indian economic deprivation.

America the only inhabitants were Indians. This original Indian occupancy is termed aboriginal possession, which gives rise to aboriginal title to the land occupied. From the beginning, Indian aboriginal title was considered subject to the title which vested in the encroaching sovereignty by discovery;[6] the power to define aboriginal rights of use and occupancy was held to be a political matter.[7] Thus, the vesting in the United States of the fee to North American land left the Indians with only an enforceable right of occupancy as against parties other than the Government.[8] A taking of this right by the Government, while not compensable under the fifth amendment,[9] is compensable under an act of Congress.[10]

Thus, aboriginal title is not sufficient to give Indians a possessory right to mineral resources, unless Congress recognizes such a right, either by treaty or congressional enactment, or the President acts to recognize a possessory right, pursuant to congressional authorization.[11] *Tee-Hit-Ton Indians v. United States*[12] illustrates the point. Congress, by joint resolution, had authorized the Secretary of Agriculture to sell certain Alaskan timber. After execution of a contract of sale by the Government, the Tee-Hit-Tons brought suit in the United States Court of Claims contending that the sale constituted a taking of the tribe's proprietary interest in the land, and as such was compensable. The petition was dismissed, and the Supreme Court affirmed. Although the Court recognized the existence of aboriginal title in the tribe, this title by itself was not deemed sufficient to give the Indians possessory or "permanent" rights in the lands.[13] While *Tee-Hit-Ton Indians* was concerned with Alaskan timber, the reasoning of the decision undoubtedly covers mineral rights.

Allotted Lands

Before the white man came, Indians regarded their land as something for everyone to use and enjoy. "Uncivilized" Indians could not understand the European system of buying and selling land. As the population moved westward, however, Indians were soon exposed to

[6] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
[7] Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886).
[8] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); *see* United States v. Santa Fe Pac. Ry., 314 U.S. 339 (1941); Cramer v. United States, 261 U.S. 219 (1923).
[9] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). *But see* Cohen, *Original Indian Title*, 33 MINN. L. REV. 28 (1947).
[10] 60 Stat. 1049, *as amended* 25 U.S.C. §§ 70-70(v) (1964).
[11] Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) (recognition by executive order).

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-79 (1955).

[12] 348 U.S. 272 (1955).
[13] *Id.* at 279.

the white man's concept of land ownership. Various tribes were rounded up and located on reservations, which action was legitimatized by either treaty, congressional enactment or executive order.[14]

The basis of the federal government's power to regulate Indians stems from the commerce[15] and, treaty[16] clauses of the United States Constitution and was judicially recognized in the case of *Worcester v. Georgia*,[17] where Chief Justice Marshall deemed Indian tribes as domestic dependent nations.[18] As such, the Indians are regarded as "wards" of the Government,[19] whose affairs are subject to governmental "guardianship." Moreover, since Indian "lands were but part of the domain held by the tribe under the ordinary Indian claim — the right of possession and occupancy — with fee in the United States . . . . [t]he power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled."[20] Thus the fee to Indian lands remains in the United States unless relinquished by Congress. And while Congress has broad powers over tribal lands, if Congress takes "vested rights" (*i.e.*, recognized rights) in land from the tribes without their consent, the fifth amendment requires compensation for the taking, including payment for minerals.[21]

In the latter half of the nineteenth century, new policies of the federal government led to the temporary dissolution of the reservation system. Americans of that time were small farmers, and the "ideal" family owned a small plot of land. To encourage settlement of the public lands, the homestead idea was adopted and widely publicized. This same plan was advanced as a solution to the perennial "Indian problem." As could be expected, Congress moved to break up the reservations; under the General Allotment Act[22] each Indian living on a reservation was given a tract of land amounting to 160 acres of grazing land, 80 acres of agricultural land, or 40 acres of irrigated land; the remaining land was to be sold at public auction.

The Act provided for issuance of a certificate of allotment to individual Indians, vesting in each holder the right to exclusive possession and equitable title to the land. The fee simple title was held in trust by the United States for a period of twenty-five years. While it was originally intended that the fee was to vest in the equitable holder upon termination of the stated trust period, the periods were from time to

[14] Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 238 (1965).
[15] U.S. CONST. art. I, § 8. *See* Perrin v. United States, 232 U.S. 478 (1914).
[16] U.S. CONST. art. VI.
[17] 31 U.S. (6 Pet.) 515 (1832).
[18] *Id.* at 555.
[19] United States v. Kagama, 118 U.S. 375 (1886).
[20] Nadeau v. Union Pac. R.R., 253 U.S. 442, 445-46 (1920).
[21] United States v. Shoshone Tribe, 304 U.S. 111 (1938).
[22] 25 U.S.C. § 331 (1964).

time extended, and Congress, in 1934, provided that the then existing periods of trust were to be continued until otherwise directed.[23] As a result, even though individual allottees were given an interest in subsurface mineral rights, alienability of those lands for which fee simple title had not vested prior to 1934 remained subject to congressional control. This same condition exists today except on lands where the Secretary of the Interior has removed restrictions in the patents covering specified allotted lands.[24]

In 1934, the year the Act was superseded,[25] it was obvious the plan had not worked. Many Indians were without land and without the skills needed to sustain themselves in an alien society. The reason the system failed was simple; very few Indians wanted to become farmers — a basic fact Congress never grasped. Within a few decades, many of the Indian allotments had been lost to mortgage holders, or the Indian owners had sold the land, usually at ridiculously low prices. As a result the Indian land holdings were reduced from some 138,000,000 acres to roughly 52,000,000 by 1934.[26] These facts are astonishing when one considers that most of the dissolved reservations originally were held by the Indians under clear and undisputed titles described in treaties ratified by the United States Senate.

Tribal Title Lands

The drastic reduction in Indian land holdings was halted by a guilt-ridden New Deal Congress in 1934, through the vehicle of the Indian Reorganization Act.[27] In substance the Act eliminated the allotment system, if the tribe so desired, and the Secretary of the Interior was authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation previously opened for sale. Since this Act partially re-established the reservations which existed prior to the General Allotment Act, an examination of the various methods initially employed to create reservations is helpful in understanding the present status of tribal ownership.

Aboriginal title, when expressly recognized by the federal government, can be said to create a reservation.[28] Reservations are also established when the United States sets aside or assigns a specific portion of the national domain for use by a certain tribe; the Government holds the fee in trust, the Indians receive the beneficial interest.[29] Lands set

[23] 25 U.S.C. § 462 (1964).
[24] 25 C.F.R. § 121.2 (1968).
[25] 25 U.S.C. § 461 (1964).
[26] W. HAGAN, AMERICAN INDIANS 147 (1961).
[27] 25 U.S.C. § 461 (1964).
[28] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).
[29] Healing v. Jones, 210 F. Supp. 126 (D. Ariz.), *aff'd*. 373 U.S. 758 (1962); United States v. Certain Property, 1 Ariz. 31, 25 P. 517 (1871); Opinion, *Regulation of Hunting and Fishing on Wind River Reservation in Wyoming*, 58 I.D. 331, 343 (1943).

apart as a reservation cease to be part of the public domain,[30] and until the Indian title is expressly extinguished by Congress, no private rights may be acquired on the land, nor can Congress give or convey to others lands granted to an Indian tribe, without first compensating the tribe.[31]

At one time the President could act freely to withdraw land from the public domain by executive order for the purpose of creating Indian reservations.[32] In 1919, Congress declared that no public lands of the United States should be withdrawn by executive order, proclamation or otherwise, for or as an Indian reservation, except by act of Congress.[33] In 1927, Congress added a further restriction that any future changes in boundaries of an existing executive order reservation should be made by Congress alone.[34] The Indian Reorganization Act of 1934, however, specifically authorizes the Secretary of the Interior to acquire any interest in any lands, including federal trust land or restricted allotments, for the purpose of providing land for the Indians.[35] While this provision does not authorize the Secretary to appropriate land from the general public domain, it does give him the authority to proclaim new Indian reservations on lands acquired under the Act.[36] Since Indian title in these new lands is limited to that which the seller had and which was transferred under the particular purchase, it is important to examine the entire history of land so acquired to verify the title.[37]

In brief, Indian reservations include: (1) land to which *recognized* aboriginal title has never been extinguished; (2) all land lawfully set aside by the federal government out of the public domain for Indian reservations; and (3) land acquired by the Secretary of the Interior pursuant to the Indian Reorganization Act. It should again be pointed out that enjoyment of reservation land by the Indians is always subject to congressional control since Indians are considered "wards" of the

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[30] United States v. Bennett County, 265 F. Supp. 249 (D.S.D. 1967).

[31] United States v. Shoshone Tribe, 304 U.S. 111 (1938); Chippewa Indians v. United States, 301 U.S. 358 (1937); *see* A. McLane, Oil and Gas Leasing on Indian Lands 42-44 (1955). For a thorough discussion of litigation resulting from land disputes between tribes and the federal government, see Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L.J. 511 (1966). *See also* Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28 (1947).

[32] Although Congress, under the U.S. Const. art. IV, § 3, has exclusive power over the territory of the United States, the President, prior to 1919, was deemed to have impliedly received authority to create reservations since Congress had taken no steps to halt withdrawal of the public domain by the Chief Executive. Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942). Whether tribal title to land set aside by executive order is equal in all respects to that normally vested by congressional action depends upon the provisions of the order. *Compare Sioux Tribe of Indians, supra, with* Spalding v. Chandler, 160 U.S. 394, 403 (1896), *and In re* Wilson, 140 U.S. 575, 577 (1891).

[33] Act of June 30, 1919, 43 U.S.C. § 150 (1964).

[34] Act of March 3, 1927, 25 U.S.C. § 398(d) (1964). An exception was made by Congress as to Alaskan lands. 48 U.S.C. § 358(a) (1964).

[35] 25 U.S.C. § 465 (1964).

[36] 48 Stat. 986 (1934), 25 U.S.C. § 467 (1964).

[37] Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

Government. A major consequence of this status has been a general restriction on alienation of property rights, including those in minerals.

Whether the possessory rights to tribal land include mineral deposits depends upon the treaty, statute, or executive order upon which the rights are based. Where Indian tribal property rights are predicated upon a treaty or statute in which no specific exclusion of mineral rights appears, the Indians' rights extend to the minerals.[38] Supreme Court application of this doctrine is illustrated by *United States v. Shoshone Tribe*,[39] where it was held that a treaty provision by which designated lands were "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians" conveyed to them full mineral rights.

At the same time, specific provisions of a treaty or statute have separated the mineral rights from the right of occupancy, in some cases, the minerals being reserved to the United States.[40] In others, statutes authorizing the purchase of lands for Indian tribes have specified that title thereto shall not extend to the mineral rights.[41] In either situation the mineral rights will be disposable under the general mining laws of the United States.[42]

Conversely, the general mining laws are not applicable to Indian mineral rights — rights recognized by the federal government.[43] However, rights of those who locate mineral claims upon portions of the public domain prior to the establishment thereon of an Indian reservation take precedence, provided the claimant can prove a valid claim existed prior to the establishment of the reservation.[44] Further, when the federal government terminates the wardship of a particular tribe, the land once again becomes part of the public domain subjecting it to entry and location under the general mining laws, unless the mineral rights are specifically reserved to the Indians.[45]

The plenary power of the federal government over Indian mineral

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[38] The doctrine does not apply to executive order reservations. *See* Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942). A treaty or statute may also provide that an Indian tribe shall have specified rights of mining or quarrying land belonging to the United States. *See* Yanktown Sioux Tribe v. United States, 61 Ct. Cl. 40 (1925).

[39] 304 U.S. 111 (1938).

[40] Papago Indian Act, 46 Stat. 1202 (1931), *as amended* 25 U.S.C. § 463(a) (1964).

[41] Act of Feb. 15, 1929, ch. 218, 45 Stat. 1186 (Alabama and Coushatta); Act of June 22, 1936, ch. 698, 49 Stat. 1806 (Walker River).

[42] 17 Stat. 91, *as amended* 30 U.S.C. §§ 21-47 (1964).

[43] *See* Noonan v. Caledonia Min. Co., 121 U.S. 393 (1887); Gibson v. Anderson, 131 F. 39 (1904); McFadden v. Mountain View Min. & Mill. Co., 97 F. 670 (1899).

[44] 1 C. LINDLEY ON MINES § 185, at 394 (3d ed. 1914).

[45] Noonan v Caledonia Min. Co., 121 U.S. 393 (1887). If recognized mineral rights are not reserved, Congress would be required to compensate for the taking. United States v. Shoshone Tribe, 304 U.S. 111 (1938); *see* Menominee Tribe v. United States, 391 U.S. 404 (1968) (involving hunting and fishing rights). *See generally* Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511 (1966).

rights is convincingly illustrated by the case history of the Papagos of Arizona. The Papago Reservation encompasses approximately three million acres in the State of Arizona; the territory was originally acquired by the United States from Mexico in 1853 under the Gadsden Purchase.[46] Both the executive orders and the acts of Congress establishing the reservation excepted the mineral deposits and provided that the reservation was to remain open to entry and location.[47]

Following unsuccessful litigation, the Papagos, in 1934, took their case to the Department of the Interior, claiming the minerals as well as the surface in fee, either by virtue of the aboriginal title vested in them before the area came under the sovereignty of the United States or, alternatively, through lapse of time vesting in them a perfect title.[48] The Solicitor answered the claim in the following manner:

> In 1853 the United States acquired title to the land in question subject to an Indian right of occupancy of an area not exactly determined; that whatever surface rights the Papago Indians may have enjoyed, no interest in minerals was accessory or incidental to those surface rights; that complete and unencumbered title to the minerals in the land was vested formally in the Mexican states and passed to the United States upon cession of the territory . . . .[49]

The Solicitor's opinion was not challenged further.

On May 27, 1955, Congress passed a statute which provides:

> That the provisions with respect to the subjugation of mineral lands within the Papago Indian Reservation to exploration, location and entry under the mining laws of the United States and the executive order dated February 1, 1917, creating the Papago Indian Reservation . . . are hereby repealed . . . and all tribal lands within the Papago Indian Reservation are hereby withdrawn from all forms of exploration, location, and entry under such laws, the minerals underlying such lands are hereby made a part of the Reservation to be held in trust by the United States for the Papago Indian Tribe, and such minerals shall be subject to lease for mining purposes pursuant to the provisions of the Act of May 11, 1938; provided, that the provisions of this Act shall not be applicable to lands within the Papago Indian Reservation for which a mineral patent has heretofore been

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[46] Treaty with Mexico, Dec. 30, 1853, 10 Stat. 1031 (1854).

[47] Papago Indian Act, 41 Stat. 1202 (1931), *as amended* 25 U.S.C. § 463 (1964). The Papago Tribal Council has jurisdiction of the Sells, Gila Bend and San Xavier Reservations. Jurisdiction was established by executive orders as follows: Gila Bend, Dec. 12, 1882, modified June 17, 1909; San Xavier, July 1, 1874; and the Sells Papago Reservation, by Executive order of Feb. 1, 1917.

[48] After the Papagos' demurrer was overruled in the first case, and defendant was allowed to answer, the Papagos' complaint was dismissed in the second case for want of counsel's authority to bring the action. Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927).

[49] Opinion, *Lands of Papago Indians*, 54 I.D. 359, 370 (1934). *See also* Opinion, *Lands of Papago Indians — Character of Land as Mineral or Non-Mineral Affecting Indian Right of Occupancy*, 54 I.D. 437 (1934).

> issued or to a claim that has been validly initiated before the date of this Act and thereafter maintained under the mining laws of the United States.[50]

Thus, the Papagos of Arizona now have mineral rights, but only as a result of congressional action.

The Pueblos of New Mexico — A Special Situation

The Pueblos of New Mexico are situated on land granted to them initially by the Spanish, and then Mexican Governments.[51] Under these grants the Pueblos owned the land in fee and for many years were not considered Indian tribes within the meaning of then existing United States law.[52] In fact, by 1871, the year Congress terminated treaty making with Indian tribes,[53] no agreement was ever negotiated with the Pueblos.

The admission of New Mexico to statehood in 1912 marked the beginning of a new era in the federal government's relations with the Pueblos. A brief chronicle of the events which led to this result follows:

1. The New Mexico Enabling Act contains a specific provision that "the terms Indian and Indian Country shall include Pueblo Indians of New Mexico and the lands now owned or occupied by them."[54] Thus the Act pulled the Pueblos within the scope of United States Indian legislation.

2. The constitutionality of the extension of federal control was sustained shortly thereafter in *United States v. Sandoval*,[55] where the Court held that neither the Pueblos' outright ownership of land granted by Spain and Mexico nor their claim to United States citizenship presented any obstacle to the exercise of federal guardianship. In 1926, in *United States v. Candelaria*,[56] the Supreme Court held that the acts of Congress of 1834 and 1851, imposing restrictions upon alienation of Indian lands, applied to the Pueblo Indians. In the Pueblo Lands Act of 1924,[57] Congress in effect confirmed the rule laid down in *Sandoval* and, anticipating the rule in *Candelaria*, provided the means of resolving the thousands of non-Indian claims to lands of the Pueblo Indians. This Act set up the "Pueblo Lands Board," consisting of the Secretary of the Interior, the Attorney General, and a third member appointed by the President, and directed the Attorney General to bring suit to quiet title to all lands listed as Pueblo lands by the Board. The Act permitted

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[50] 25 U.S.C. § 463 (1964).
[51] U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 889-91 (1958).
[52] *Id.* at 892-902.
[53] Act of March 3, 1871, 25 U.S.C. § 71 (1964).
[54] Act of June 20, 1910, ch. 310, 36 Stat. 557.
[55] 231 U.S. 28 (1913).
[56] 271 U.S. 432 (1926).
[57] Act of June 7, 1924, ch. 331, 43 Stat. 636.

the non-Indian claimants to validate their claims if they could, but required governmental reimbursement of the Pueblos for the fair market value of such lands where through timely action by the federal government, they might have been recovered.

Thus, the power of the Pueblos to dispose of real property is subject to administrative control by the executive branch of the federal government by virtue of both the Pueblo Lands Act and decisions of the Supreme Court. In addition, those Pueblos who voted to accept the Indian Reorganization Act of 1934 are bound by its prohibitions against alienation of tribal land.[58]

Federal supervision of Pueblo land seems inconsistent when one considers the Pueblos do not claim the land by reason of recognized aboriginal possession; rather, they owned at least part of the land in fee prior to formation of the Republic. Yet, the result may be consistent, at least today, since most Pueblos voted to be governed by the provisions of the Indian Reorganization Act. At the time the vote was taken it was meaningless, however, since the Pueblos were already by law wards of the federal government.

MINERAL LEASING BY TRIBES

Allotted Land

The first general authorization for leasing of allotted Indian lands for mining purposes was contained in the Indian Appropriation Act of March 3, 1909:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and the Osage Indian tribes in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior, and the Secretary of the Interior is authorized to perform any and all acts and make rules and regulations as may be necessary for the purpose of carrying the provisions of this paragraph into full force and effect.[59]

This Act, of course, does not apply to leases made by an allottee of land on which all restrictions have been removed, since the allottee is the owner in fee.[60]

Although the Secretary's regulations provide for differences in formalities when leasing restricted allotted lands[61] and those required

[58] 25 U.S.C. § 461 (1964); *see* U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 911 (1958).
[59] 25 U.S.C. § 396 (1964).
[60] 25 C.F.R. § 172.26 (1968).
[61] 25 C.F.R. §§ 172.1-.33 (1968).

when leasing tribal lands,[62] basically the procedures are the same, and the objections to the latter apply to the former.

Tribal Lands — Problems with Present Leasing Procedures

The Indian Reorganization Act of 1934 provides that the Secretary of the Interior should issue charters of incorporation to any tribe applying therefor.[63] Such a charter was intended to give the tribe comprehensive powers of management and disposition of its property, but since very few tribes elected to secure charters under which they might lease lands for mineral purposes, Congress enacted the Omnibus Tribal Leasing Act of May 11, 1938,[64] section 1 of which reads:

> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group or band of Indians under federal jurisdiction, except those specificially exempted from the provisions of this Act, may with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Section 7 of the Act provides that "all acts or parts of acts inconsistent herewith are hereby repealed." Section 6 excepts from its coverage the Papago Reservation in Arizona, the Crow Reservation in Wyoming, the Osage Reservation in Oklahoma, and the coal and asphalt lands of the Choctaw and Chickasaw tribes in Oklahoma. Subsequently, in 1955, legislation brought the Papago Reservation under the Act of 1938.[65] The Act of 1938 also safeguards the rights of those tribes who elected to receive charters under section 17 of the Indian Reorganization Act of 1934.[66]

With the exceptions set forth above, the Act of 1938 controls the leasing of mineral rights for all unallotted Indian lands. Leases under this Act are made by the Indian tribes, bands or groups with approval of the Secretary of the Interior or his authorized representative, the Commissioner of Indian Affairs.[67]

1. Advertised Bid v. Private Negotiations

The basic philosophy underlying the Secretary's regulations is one of requiring all Indian lands to be advertised for competitive bidding

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[62] 25 C.F.R. §§ 171.1-.30 (1968).
[63] 25 U.S.C. § 477 (1964).
[64] 25 U.S.C. § 396(a),(b) (1964).
[65] Act of May 27, 1955, 25 U.S.C. § 463 (1964).
[66] 25 U.S.C. § 396(a),(b) (1964).
[67] 25 U.S.C. § 1 (1964). There is still in force under Title 25 a provision authorizing the Secretary to make mineral leases of tribal lands to cover lands "on any Indian reservation reserved for Indian agency or school purposes in accordance with existing law applicable to other lands in such reservation," subject to at least one-eighth royalty to be used in the payment of expenses and administration of the agencies or for education among the Indians. 25 U.S.C. § 400(a) (1964).

rather than allowing the equitable owners, the Indians, to enter into private negotiations with prospective lessees. Title 25 *Code of Federal Regulations* section 171.2 (1966) provides:

> Leases for minerals other than oil and gas shall be advertised for bids as prescribed in Section 171.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. . . . The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

Section 171.3(a) requires leases to be awarded to "the highest responsible bidder for a *bonus consideration,* in addition to stipulated rentals and royalties." (emphasis added). It can readily be seen that as a general rule mineral leases "shall be advertised for bids" with the award going to the bidder offering the highest bonus,[68] no matter what other benefits a lessee may be willing to offer.

This general rule often works against the Indian's best interest. While the possibility of a negotiated lease is not precluded under the code, it has been my experience that the Commissioner of Indian Affairs feels compelled to "go by the book" and presumes in favor of the advertised lease. A better system would be to take each situation on its own merits, keeping in mind that each mining property is different, each having its own specific advantages as well as disadvantages, not only from the lessor's but also from the lessee's viewpoint.

It would be fair to say that where interest is keen by prospective lessees, whether they be large mining companies or small operators, a competitive situation is presented which would require an advertised bid. From the Indian lessor's viewpoint, the ultimate aim of advertising for competitive bids of a particular tract of land is to obtain the largest possible bonus. An example of the successful use of advertised bidding occurred in May, 1967, at the San Xavier Indian Reservation located near Tucson, Arizona. Bids were solicited for mineral prospecting permits for two tracts of land on the San Xavier Indian Reservation totaling approximately 29,403 acres, of which 13,379 acres were tribal land and 16,023 acres restricted allotted land. The advertised bid consisted of an exclusive prospecting permit for all minerals "other than oil and gas and other hydrocarbons, sand, gravel and building stone," with an option to lease.

The combination of Phelps Dodge Corporation and Tidewater Oil Company was the high bidder for the 24,934 acre tract, offering a bonus

[68] The "stipulated rentals and royalties" represent the basic bid amount. The award is made to the highest "bonus bidder" over and above the basic bid.

of $501,938. Pima Mining Company was the high bidder for the second tract (4,468 acres) offering a bonus in the amount of $256,000. The tracts are located in the Twin Buttes area south of Tucson, which is one of the major copper areas of the world. In this situation, advertised bidding proved to be highly successful. Of course, one can never anticipate what might have occurred if negotiations had been carried on separately with each of the companies. But the fact that the area in question is surrounded by proven ore bodies certainly played an important role in the companies' desire to bid for the right to drill the area and ultimately, if desired, to exercise the option to lease.

An example of *unsuccessful* advertised bidding occurred on the Papago Reservation this last summer. The mineral prospecting permits on six tracts of tribally owned land on the main Papago Reservation, totalling 41,914 acres, were put up for bid. The bid again was for exclusive prospecting permits with an option to lease. Only one company bid, and that was on tract No. 6, for a bonus of $8,962. Why the tremendous differential? In the first example there were known ore deposits adjacent to the area under consideration, and the respective companies wanted to protect their interests. In the second bidding, the area was virgin, its assets unknown. As a result, the interested company was able to pick up the tract for a pittance. Had negotiations been allowed, the tribe could at least have secured more favorable lease terms, such as a development commitment higher than the $10.00 per acre per year minimum under 25 *Code of Federal Regulations* Section 171.4.

The Papago Reservation presents another situation where negotiated bids would be more desirable than advertised bids. Numerous valid mining claims were established on the reservation prior to 1955, the year mineral rights were "given to the Papago tribe."[69] Many of these claims can and are being used for the purpose of developing a mine on Papago land and it may become necessary for these companies to expand and seek additional Indian lands for development. Should leases on the area adjacent to or within the proximity of claims on the reservation be negotiated with the owners of these claims or should the general rule, as set forth in the code, be followed and the area put to an advertised bid? Two rather striking examples on the Papago Reservation answer the question. In both situations companies had claims and needed additional lands to explore, develop and begin mining.

EXAMPLE A. A lease for over 2,362 acres was negotiated for a $50,000 bonus plus an additional $50,000 premium for certain mining claims on the reservation owned by the lessee. In addition the tribe received a royalty on all the leased land plus royalties on the lessee's

[69] Act of May 27, 1955, 25 U.S.C. § 463 (1964).

original claims. Hence, the tribe not only received a large bonus and royalties for its own minerals, it received an additional sum, and will receive future royalties for minerals that were never in tribal ownership. Negotiation, instead of advertised bidding, without question resulted in a better financial arrangement for the tribe.

EXAMPLE B. The tribe negotiated a lease for 2,517 acres, excluding certain mining claims, wherein the tribe received $100,000 bonus money paid on execution of the lease. In addition the lessee gave the tribe an overriding royalty on some 25 mining claims owned by the lessee. As it turned out, this property appears to be one of the largest mineral discoveries in the Southwest for many years.

Thus, in both situations, because of the lessee's need for expansion, the tribe was able to obtain not only a substantial bonus, as it would under the advertised method, but additional benefits, such as royalties from minerals owned by the lessees and development commitments greater than that required by section 171.4; *e.g.*, the lessee in example A is required to spend one-half million dollars per year over the next three years for operations and improvements, exploration, development, mining and processing, an amount which exceeds the code's $10.00 per acre per year minimum.

2. Related Problems — Lease Terms

The *Code of Federal Regulations* sets forth some of the basic terms that must be included in a mineral lease on tribal or allotted land. A review of some of the more important provisions follows:

> Acreage Limitation:
> A lessee may acquire more than one lease, but no single lease shall be granted for mining purposes on Indian tribal or restricted Indian lands . . . (a) For oil and gas and all other minerals, except coal, 2,560 acres.[70]

The amount of acreage under this provision should be increased to avoid the necessity of preparing, in some instances, two and even three leases.

> Term of Lease:
> Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the terms are produced in paying quantities.[71]

The lessee should not be permitted to hold the land in reserve and wait until the last year of the lease to begin serious development and

[70] 25 C.F.R. § 171.9 (1968).
[71] 25 C.F.R. § 171.10 (1968).

production of minerals on the property. The lessee is required in most instances to expend $10.00 per year per acre for development,[72] but this amount is not enough, and the only incentive for full-scale development now present is that the lessee produce specified "substances," or minerals, in paying quantities by the tenth year. Obviously this vague standard leaves much to be desired as an enforcement device.

Some of the recent leases approved by the Secretary of the Interior contain the following language:

> The land under this lease shall not be held by lessee for speculative purposes, but for mining the minerals specified. Lessee agrees it will not treat any ore reserves developed in the lands as a reserve to be held in reserve for some future exploitation, but will bring the reserves and any commercially profitable ore body as it shall be developed into production in an orderly manner and consistent with sound business practice.

This language is sufficiently vague to allow "stalling" on the part of the mining companies, and at most the code's development requirement[73] is all that the above language would probably require. The following language is preferable:

> The lessee agrees to expend on or for the benefit of the leased premises in actual exploration, development, mining and processing operations and improvements, at least $20.00 per acre during the first lease year for each acre included under this lease; at least $30.00 per acre during the second year for each acre included under this lease; at least $40.00 per acre during the third year for each acre under this lease; and commencing with the fourth lease year and each lease year thereafter, to expend at least $100.00 per acre for such purposes for each acre included under this lease.[74]

Royalty Rates:

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than oil and gas are as follows:

> (b) . . . and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale.[75]

The flat ten percent royalty rate as set forth above is unrealistic and should be modified where necessary to fit the needs of the specific mining property in question.[76] For instance, ten percent royalty on a low grade porphyry copper deposit is too costly and impedes develop-

[72] 25 C.F.R. § 171.4 (1968).

[73] *Id.*

[74] *See* 25 C.F.R. § 171.27 (1968) for procedure to be followed by a lessee to obtain cancellation of a lease on unproductive land.

[75] 25 C.F.R. § 171.15 (1968).

[76] The most recent leases contain the following language in reference to advance minimum royalty:

ment of the mineral. This rate does not take into consideration the high mining cost of the copper. A royalty schedule in a recently proposed lease reads as follows:

> A royalty calculated on a monthly weighted average on the basis of tonnage of the ore mined and milled . . . on the net smelter returns as hereinafter defined, and abbreviated as NSR, as follows:

Market Value Per Short Ton[77]	*Royalty**
$3.00 or less	5%
$3.00 to and including $3.25	6%
$3.25 to and including $3.50	7%
$3.50 to and including $3.75	8%
$3.75 to and including $4.00	9%
$4.00 and up	10%

* Percentage of NSR for ore with NSR (per short ton).

This schedule was approved by the Commissioner of Indian Affairs based upon the specific area in question where low grade porphyry copper would be mined, but the Commissioner's approval should not be required in every instance.

It can thus be seen that across the board application of the ten percent rate will force the lessee to extract only the higher grade minerals, leaving the lower grades in place and the land underdeveloped. Also, a lower royalty rate on larger tonnage will produce greater economic benefits for the tribe.

Conclusion

From the foregoing it can be seen that the current leasing procedures have not worked in the Indians' best interests. Indians have not realized the benefits they should from the leasing of their minerals.[78] The problem of advertised bidding as against negotiated leases has created the greatest stumbling block. Again the Commissioner of Indian Affairs has constantly "looked to the book," which, as stated, is not always in the best interests of the tribes. In order that this, and other problems, may be solved, it is extremely important that Secretary of the Interior Walter J. Hickel reexamine applicable provisions of the *Code of Federal Regulations* or that legislation be introduced in the 91st Congress to alter leasing procedure.

> An advance minimum royalty of $20.00 for each acre under this lease provided all such advance royalties paid shall be credited against production royalties only for the year in which it is paid. If the lease is surrendered or cancelled the advance minimum royalty accruing to the lessor will not be refunded.

[77] This schedule is based on current market prices. Should the market value of copper appreciate, resulting in the price of the lowest grade copper increasing to $4.00, the royalty rate would in turn increase to 10 percent, but in no event would exceed 10 percent.

[78] The importance of Indian mineral development to Arizona is apparent when one considers that Indian reservations comprise some 25 percent of the state's area. *See* Bennett, *Problems and Prospects in Developing Indian Communities*, p. 649 *supra*.