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Decisions, Decisions: Indian Control of Indian Resources

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DECISIONS! DECISIONS!

INDIAN CONTROL OF INDIAN RESOURCES

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INTRODUCTION

Suppose you were just elected Chairman of your tribe. Unemployment on your reservation is somewhere between twenty-five and eighty-five percent. Between fifty and seventy-five percent of your tribal members are living in substandard housing. The size of your tribe is kept to a minimum because your babies are dying four times as often and your adults are dying thirty years sooner than those in the larger society. Your children are dropping out of school and those who don't are forced to leave your reservation to seek higher educational opportunities and job skills and are prevented from returning because there is no way to use those new found skills if they want to come home. Under government policy, your children have been arbitrarily terminated because they have become "Urban Indians." And you and your whole tribal council are up for reelection in twelve short months!

Now, suppose one day you are visited by a delegation from a large multi-national company who's profits for one year exceed the total profits of the Organization of Petroleum Exporting Countries (OPEC). They tell you that thanks to a government project to photograph the earth using sensory devices that are so sensitive, they can tell the difference in the varieties of corn growing in Iowa, they know that your reservation is sitting on a major copper deposit. (Your trustee, the federal government, has neglected to tell you

this, of course, though they supplied the technology that provided the information to the company. And, incidentally, your trustee has been managing your resources under the trust responsibility for well over a hundred years). The company has a deal for you. They'll give you an up-front bonus which can be distributed to your tribal members on a per capita basis for signing a lease which will allow them to come in, do test drilling and determine where they want to put their mine. The tribe will be expected to participate in an unspecified amount of the exploration costs and will ultimately receive a royalty on the copper produced if and when the company decides to develop.

You don't have any idea whether you have mineable copper. You don't know what the value of copper is, what the market potential is nor what the environmental or sociological impact would be on your people. All you know for sure is that they've got a check which would mean that every member of your tribe could have some money in their pockets before Christmas or the annual tribal celebration - and incidentally, before election day.

If you lose the election, you lose your job (it may or may not be paying you a nice salary) which gives you a chance to do good things for your people and, incidentally, offers some prestige in the community, allows you to see

that your brother-in-law has a job under your patronage with which he can support your sister and eight nieces and nephews, and pays your travel and per diem to Washington, D.C. several times a year and to the NCAI convention.

Hard choices? Yes, indeed. But typical of the dilemmas that tribal decision-makers face every day. Sometimes it is offers from developers; other times it is a decision as to whether to accept a factory or a government program of doubtful long-range benefits.

Tribal decision-makers have the hardest jobs in the world. The outside pressures come from the most sophisticated organizations - federal, state and local governments, developers from local traders or ranchers to multinational corporations, "Do-gooders," universities, religious institutions, environmental groups, etc. The inside pressures come from tribal members who are generally underfed, under housed, under educated (by non-Indian standards), under employed and distrustful because of past experiences with all those listed in the outside pressure groups plus some of the earlier tribal leadership.

Another pressure that tribal decision-makers must deal with is the knowledge that often the decisions they make will affect not only their own tribes but every other tribe. Suppose a tribe makes a decision to bring a court

case to test some area of jurisdiction. Suppose the case is not a good case or the lawyer does not do his work well and the case is lost. The result is that a precedent is established that may take years to overcome (or may never be overcome) and which will be used against every other tribe. Suppose a developer makes a bad deal with one tribe and it sets the pattern for their dealings with other tribes with the same resources. The bad deal has been approved by the trust officer so you can't expect help from that source - they aren't going to admit they failed to act in the best interests of their trustors, are they? Suppose a piece of legislation has been introduced in the Congress which affects all Indians. Sounds easy, perhaps, but suppose it's an appropriations bill which earmarks money for a particular tribe.

Yet, Indian tribal decision-makers have the most rewarding jobs in the world. They are working for their people - their children, their aunts and their cousins and their grandmas who raised them. And those people have survived as a people every kind of hardship that can be imposed upon the hearts and minds and bodies. They have maintained a strength and dignity and cultural integrity that has never been equaled.

This document is not intended to be a how-to-do-it manual for economic development. It is intended to be an

articulation of problems that tribal decision-makers must deal with, to supply information that may be useful in making future decisions, and hopefully to suggest some options or new ideas for Indian control of Indian resource development.

CREATING AN ENVIRONMENT FOR SUCCESS:

THE IMPORTANCE OF LONG RANGE PLANNING

"The key to developing your own resources, whether they be industrial or business endeavors or natural resources is creating an environment for success."

David Lester
President
United Indian Development Association

Creating such an environment is the job of Indian tribal decision-makers. Planning for economic development cannot be done in a vacuum. The total needs of the community must be considered. Successful Indian projects are those that come from within the community itself. The history, tradition and experience of the tribe must be considered. It takes more than a training program to prepare a community's social fabric to accept what hasn't been done before. One of the reasons for the failure of so many industrial park projects is that they are basically geared to manufacturing enterprises. For many Indians and Indian communities, manufacturing is not within their experience, as a result, most manufacturing efforts have not only failed, they have been disruptive to the community.

What is Economic Development?

Economic development is not education, health, housing, manpower training, etc., though all of these are related. Economic development is not just creating jobs. Many programs have been devised and millions of dollars have been spent to

create jobs for Indians. Creating jobs does not change the economic relationship between Indians and society. During the period when there was slavery in this country, there were no unemployed Blacks. Slavery is the only system that guarantees 100% employment.

Economic development is the production of wealth for owners. Indian economic development is Indian ownership of the economic activities taking place in the Indian community. The classic approach is to take outside capital, outside technology, outside management and concentrate them in an area for profit. This is not acceptable in the Indian community because the process ceases to be developmental and commences to be exploitive in nature.

The primary ingredient necessary to gaining control of resource utilization and development is the determination to do it. Basic knowledge is the key to making basic decisons. Economic development on Indian reservations is not truly successful unless the dollars from the basic source of income are turned over again and again in the community. In the average non-Indian community a dollar turns over, that is, is respent, seven times before it leaves the community. In the average Indian community, it turns over less than once. In a city, for instance, where the basic industry is an automobile manufacturing plant, the major income and

profits go to the owner.

The majority of the dollars that go into the pockets of the workers in that plant go back into the community where the workers live; where they buy their housing, clothing, groceries, health care services, automobiles, gasoline, washing machines, school supplies, etc. It's where they see their movies, do their bowling, buy their softballs, pay their green fees, eat their hamburgers, drink their beer, do their laundry and buy their kids icecream cones and fried chicken.

In turn, the money spent on all these things pay the salaries of the people who build the houses; who sell the automobiles, golf balls, clothing, groceries, school supplies; who run the beer joints and movie houses and icecream parlors.

They, in turn, buy housing, clothing, groceries, play golf, drink beer and buy their kids icecream cones. The cycle continues until the dollar has turned over within the community seven or more times. In a typical Indian community, the paycheck comes in, whether it be from federal programs or a factory or a coal mine. There are no Indian-owned services available. You drive off the reservation to the nearest community which provides the services needed, pay your money and the dollars are gone into the economy of that community.

There is another aspect to the above example also.

The manufacturing plant will never be totally self-sufficient. That is, they must buy supplies, materials, equipment, etc.., from somebody. They buy everything from toilet paper and typewriter ribbons to computers. Is there any reason why they shouldn't be buying their supplies from Indian vendors?

Informed decision-making is the key to gaining control of the resource utilization and economic growth of your community. Questions that should be answered include the following:

1. What are the long range goals of my tribe?

Are they to provide opportunities for all members of your tribe to live on your reservation to maintain tribal traditions to have good jobs, decent housing, good health care, educational opportunities which will give the children the option of staying or leaving?

2. What are our human resources? How many people live here? How many live somewhere else because they can't make a living here? How old are they?

3. What is the potential for development? What skills do they possess? What would it take to attract those people away from the reservation back again?

4. What are the natural resources of my reservation? How much land? What are our replenishable resources - timber, agricultural or rangelands, water, etc. What are our non-replenishable resources - minerals such as coal, copper, sand

and gravel, etc?

5. <u>What is the potential for the development of those resources?</u>

6. <u>What is the decision-making structure within my tribe?</u>

Are we living under a government imposed constitution which does not allow us to excercise tribal sovereignty to the maximum? How can it be changed?

It would seem that all that information would be readily available and easily accessible. Unfortunately, most often that is not the case. Census information, though tribal rolls should be up to date, is rarely complete and accurate. Inventories of natural resources are non-existent. Though the Bureau of Indian Affairs has been responsible for the prudent management of Indian resources for many years, only recently have they attempted to provide actual resource inventories. When the tribes who now make up the Council of Energy Resource Tribes began to deal with energy development questions, they recognized their most pressing problem as a lack of information about the resources they owned.

Long range goals must be established by the total community. The tribal decison makers have the responsibility of taking the leadership and of insuring total community participation. The struggle for survival has been so accute

in the past that there has been little thought given to deciding on ultimate goals and a systematic approach to achieving them. Indian communities do not have to pattern themselves after non-Indian communities either in establishing their goals or in their plan to accomplish them. Before the European invasion of this continent, Indian tribes had their own systems of government, of economic development, of international trade - in other words, their own methods for achieving self-sufficiency. We are not recommending, for instance, that the Comanches satisfy their transportation needs, as they once did by stealing horses, by raiding the closest Ford dealer but rather that those needs be recognized and planned for. Long range planning and goal setting relieves the pressure on tribal councils to take the first opportunity that comes along. There are many opportunities. The key is to find one that will succeed because it fits into your overall plan. This rule applies to government programs as well as to natural resource or industrial development. Once you have established your goals and agreed on a procedure to attain them, you have taken the first step toward creating an environment for success.

PARALLELS WITH DEVELOPING FOREIGN NATIONS:

LEARNING FROM THE EXPERIENCES OF OTHER NATIONS

"About a year and a half ago, when LaDonna and others from AIO came to the Overseas Development Council to talk about the relationship between the actions of raw materials exporting countries in Africa, Asia, and South America, and Indian nations, it was very clear to all of us that there were certain parallels between events in those nations and the problems facing Native Americans. We have received confirmation of the existence of such parallels from a Civil Rights Commission report entitled, "The Navajo Nation, An American Colony." The Navajo Nation has more in common with an underdeveloped country than it does with the rest of the United States."

Guy Erb
Senior Fellow
Overseas Development Council

Developing countries have been largely dependent on major industrial countries such as the United States, Britain and France for development of their resources just as Indian nations have been dependent on the Bureau of Indian Affairs and other government agencies. That is, they have been in a position of responding to the needs of the industrialized nations in order to try to meet the needs of their people rather than being in a position to decide what the needs of their own people are and the ways they are willing to respond to outsider's needs in order to satisfy their own. They obviously want to change that just as Native Americans do. Many are beginning to recognize that money or "aid" will not help much if the total relationship of rich countries and poor countries stays the same. Changes in developing countires came about largely as a result of the internal pressures

from the people themselves. The people decided they were no longer going to tolerate outsiders saying "Here's what we want you to do" and began to say "No. We want to set our own priorities, then we'll come to you."

Both Indian nations and developing foreign nations are striving to gain control over their lands, their natural resources, and their destinies. One problem that both have encountered in their pursuit of economic development is the uncontrolled transfer of technology and capital which in many cases creates more problems than they solve. Harry Magdoff addressed this problem in an article, "Capital, Technology and Development," published in a economics journal, Monthly Review (Jan. 1976, New York). Magdoff points out that to place all of one's faith in technology or the pouring in of large amounts of capital as the means to solve development problems is misguided. Developing countries must look to their most valuable resource - the people - and must rely on their ingenuity, resourcefulness and competence. Magdoff does not dismiss the usefulness or the necessity of technology or capitol to development nor should be. But technology and capitol should be and, in fact, must be controlled by the people of the area in question so that its introduction corresponds with their development goals and objectives and proceeds at a pace which will be the most

into wage subsidies - enough so that every man, woman and child on the reservation could have been trained for periods far exceeding the maximum recognized training period of nineteen weeks. Perhaps that would have been forgiveable had there been another market for their skills within half a day's drive, but there wasn't. Workers were paid less than the minimum wage, had no control over their working conditions and were generally exploited. The Bureau of Indian Affairs finally got around to notifying the company that people were beginning to ask questions and that both the BIA and the company would have to clean up their acts. Shortly, thereafter, the plant was taken over by disgruntled workers and members of the American Indian Movement. During the occupation, documents were found indicating that the company had started negotiations to move the operation to Korea, thus becoming a "run away plant." Run away plants are not a new phenomenon. Runaway plants are commonly thought of as being a manufacturing plant which moves into a particular area because of the availability of cheap, unskilled labor. They stay as long as it is profitable and then move out without any regard to the impact on the community they leave. Many examples can be found in the South and in the inner cities. They are a particular danger to Indian nations and developing foreign nations.

beneficial for them not only economically, but culturally as well. In order for development to be an asset rather than a liability, it must be controlled by the Indian people rather than by outside interests.

One example of this kind of economic development which turned out to be a liability was the introduction of a manufacturing plant on one large reservation. The need for jobs on the reservation was critical. In order to attract industry--jobs--to the reservation, the tribe, with government assistance, provided the building and equipment for an electronics assembly plant to be built on the reservation. In this case, there was a comparatively minimal capital investment on the part of the company. For their part of the deal, the company provided management, raw materials and marketing. They also agreed to hire tribal members on the condition that the Bureau of Indian Affairs provide wage subsidies for them during their training period. The plant was located on the edge of the reservation. Transportation was not readily available. The result was that employees had to locate temporary housing in the vicinity where they lived during the week because they did not move their families to the job site. Further, many were women. The cultural and sociological patterns of the tribal members affected were totally disrupted. The Bureau of Indian Affairs poured hundreds of thousands of dollars

How do developing nations become developing nations rather than colonial extensions of industrialized nations?

The process begins in colonies when the people begin to see themselves as oppressed victims. They begin to question who the oppressors are. The "enemy" first is recognized as the local government personnel with whom they deal directly. Leadership develops. Communication develops between isolated groups of citizens. Rhetoric increases. The mood in the country changes to an attitude of self-determination. Political action begins. This may take the form of anything from demands for participation in the political process to work stoppages to armed revolt and bloody coups. If the colony has resources valuable to the Mother Country, there will be some effort at appeasement. As in the case of Nauru (the case study at the end of this chapter), there may be an influx of social programs designed to treat the <u>symptoms</u> of oppression - poor housing, poor health, unemployment, lack of education, etc. This is often a holding tactic - the people who are the immediate recipients of the services and the new jobs are reluctant to risk the new found improvement in their life-styles. Foreign developing nations have found a new and useful but dangerous tactic to use since World War II. That is the struggle for a balance of power between the major military powers. They are able to play one against the other

the Cubans did in the early sixties. Eventually, world opinion forces the Mother Country to make concessions and in most cases, small unindustrialized countries remain under-developed or undeveloped for many years. The hard process of understanding the new found political independence as opposed to their continued economic dependence on the outside world must be undertaken. There are continuing internal power struggles as a once powerless people exercises its new found power. The most successful countries begin to develop their own technology. Japan is perhaps the best example. They closed the door to foreign investment while they learned Western technology themselves. This learning process is slow and mistakes are made in the process but it is the best and perhaps only way to master technology. Developing nations invest in the education of their best and brightest to form a nucleus of highly educated young people. This kind of elitism is offensive to some of us who think everyone should have the option of maximum achievement. Nevertheless, most of us understand the principle of playing "catch-up ball." Developing nations begin to assert their ownership and control over the development of their natural resources - particularly minerals which are almost totally held in common. This brings them to the point of dealing

with outside developers.

The parallels to Indian nations are fairly obvious. Indian tribes have experienced all the frustrations of colonies seeking independence and are undergoing the same kinds of growing pains. Indian nations are, however, seeking to compel the Federal Government to live up to its treaties and promises through which large areas of land were ceded in exchange for protection and services in perpetuity. Further, they are seeking return of land illegally taken. And they must move toward self-sufficiency with the knowledge that the threat of termination and abrogation of the treaties is very real.

Developing foreign nations dealing individually with multinational corporations and large industralized nations have found that they are dealing generally from a position of weakness, just as Indian nations have. In many cases, developing foreign nations are dealing with the same developers that Indian tribes are - and they are getting better deals. The reasons for this are hard to fathom. In these days of revelations about the activities of the Central Intelligence Agency and United States interference in the internal politics of foreign countries, one might be tempted to think our own government is providing the incentives. And they may be. There is a federally funded Overseas Private Investment

Corporation which provides support for U.S. based corporations investing in developing countries. But if that worked, you would think the BIA would work for Indians.

More likely, the reason is that the developing foreign nations are dealing directly with the corporations and they are asserting their rights not only as owners but as government entities with taxing and regulatory powers.

There is a trend among developing nations to organize around economic issues. The most well known is, of course, the Organization of Petroleum Exporting Companies (OPEC). This group of countries realized that they control a large portion of the worlds oil supply. By forming an alliance, they have been able to negotiage better deals bringing more money into their treasuries and generally scaring the daylights out of the rest of the world.

Indian tribes who own energy resources have realized that they own as much as one-third of all the coal in this country plus much of the uranium, and a considerable amount of oil and gas, oil and geothermal resources. They have formed their own organization called the Council of Energy Resource Tribes. Through information exchange, exchanging experience and expertise and developing collective expertise to provide technical assistance to their membership, they

hope to prevent exploitation and secure better deals for their people. Also important, by presenting a unified front and using their collective strength, they will be better able to affect government policy and to protect their resources should they decide against development.

Tribes can learn from international associations such as OPEC, Inter-Government Council of Copper Exporting Countries (CPEC), the International Bauxite Association (IBA) and others. They have the same diversity, the same traditional rivalries and the same internal governmental problems that tribes have. Some work better than others. There may be a point in the future when tribes or tribal associations will want to establish direct contact with those organizations.

There are other less eyecatching but equally important developments going on in developing nations which should not be overlooked and which fit with the earlier discussion of technology transfer.

Interestingly, it was Congressional impatience with the obstacles caused by many of the American AID officials that led to the creation of a new - and the most promising - institution to assist Latin America called the Inter-American Foundation. The Congress felt that U.S. aid was not reaching the poor people in the countries they were providing aid to. Dams and factories were being built but the poor people were not being helped. The Congress short-circuited the complex of institutions and created a relatively unbureaucratic, almost anti-bureaucratic, institution with the specific objective to contribute to social change.

A Bolivian cooperative has the specific objective of breaking from traditional approaches by placing the decision making in the hands of the people to benefit from the project.

The justification for the project is its wide membership, and general participation in decision making. It reallocates ownership and decision making, and shows that the means of achieving real social, economic, and political development is for the people to get involved in the project. This is quite an unusual approach to a development project, but one that was insisted upon by the Congress. This type project stresses leadership, land distribution, diversification, and creative cooperation between normally competitive groups. In other words, attempts to forge unity among a

variety of otherwise competing peoples.

Other examples of efforts financed by the Inter-American Foundation are small scale projects which have been set up to fabricate bricks, woodcrafts, woodworking, and rural development. Each one of these small scale projects aims to maximize the employment of the people affected. They minimize capital intensive machinery because they want to employ as many people as they can. They attempt to utilize what credit is available directly for the benefit of the people in the project or to be affected by the project. They try to use local sources of raw materials and incorporate the technical advice that is appropriate for that level of project. There is a whole school of thought on what levels of technology are appropriate for community development. It's very interesting that they are not using large machinery in most cases, but rather machinery that is cheap and easily accessible. But above all as the people develop skills in managerial techniques, they become interested in the decisions, in where the power resides, and in who is going to control new projects. The power then tends to shift to those communities that are affected by the money that's being disbursed.

No peoples will ever be truly free unless they themselves control the development of their own resources

whatever they are. Those in power will never give it up easily; it must be taken and it must be exercised wisely. Or it will be lost.

AIO CASE STUDY

ECONOMIC SELF-SUFFICIENCY
AND SOVEREIGNTY

THE PACIFIC ISLAND OF NAURU:
A PARALLEL FOR INDIAN NATIONS

by: Sherry Horosko
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ECONOMIC SELF-SUFFICIENCY AND SOVEREIGNTY
The Pacific Island of Nauru:
A Parallel for Indian Nations?

Nauru Fact Sheet

- Nauru is an oval-shaped island about 12 miles in circumference containing 8.2 square miles (5,263 acres). It lies by itself 33 miles south of the equator, at E. Longitude 166.6 degrees.

- Nauru is one of the three great phosphatic rock islands of the Pacific. The value of this phosphate rock is beyond computation.

- Approximately four-fifths of Nauru is phosphate bearing.

- Temperature in the shade ranges between 76-93 degrees F., and the average humidity is between 70 and 80%. The average rainfall is 80 inches.

- Population totals approximately 7,000 of which 3,300 are indigenous Nauruans.

Education: It is compulsory for all children between 6 and 17, if Nauruan. There is only 5% illiteracy.

Religion: 43% of the Nauruans are members of the Nauruan Protestant Church.

Political Status: Nauru is a republic with special membership in the Commonwealth of Nations, and may partake in all commonwealth activities, except attendance at meetings of Commonwealth heads of government.

Government: Nauru has a unicameral Parliament, which is composed of 18 members popularly elected for a three year term. The Parliament selects the President from its own members for a term corresponding to the life of Parliament itself. The President in turn appoints four of five members of Parliament to serve with him as a Cabinent. The Judiciary consists of a Supreme Court and a District Court. The Island is administratively divided into 14 districts, which are re-grouped into eight districts for electoral purposes.

Foreign Relations: No formal diplomatic representatives abroad except for representatives in Australia and the Untied Kingdom. It has declined to apply for membership to the U.N., but is a member of the U.N. Economic Commission for Asia and the Far East.

There are certain similarities that exist between developing nations and American Indian tribes in terms of natural resources and violations of trust responsibility. By studying what emerging nations have done, we can often gain a better understanding of what options exist and what tribes can demand and recieve in terms of developing their resources.

The Pacific Island of Nauru is very similar to many Indian reservations in terms of area, population, and resources. How this nation has achieved economic self-sufficiency and consequently, sovereignty, could offer many hints to Indian tribes in achieving the same goals.

> "The attainment of independence by the Nauruan people has a wider signifigance, for it shows that where economic and social circumstances are favorable, the attainment of legal sovereignty need present no insuperable problems."
>
> -Nancy Viviani

After a twenty year struggle for sovereignty the tiny island of Nauru achieved its goal, thus becoming the world's smallest republic. Without the determination of the Nauruan people, and their perserverence in controlling the development of their multi-million dollar phosphate deposits, these people would still be exploited by foreign nations today. The obstacles Nauru surpassed serve as an example to other peoples who are rich in mineral resources and who hold sovereignty as their ultimate goal.

In 1947, Nauru was made a trust territory under the protection of the Trusteeship Council of the United Nations. Australia, Great Britian, and New Zealand were designated as the Administering Authorities, Australia having direct responsibility for Nauruan growth in matters of political and economic concern. The trusteeship agreement stated:

> "The interests of the inhabitants should be of paramount importance ... that the Administering Authority, accept as sacred trust the development of self-government of the people of the Trust Territory."

Australia was required to educate the Nauruan people on administrative and economic development. However, Australia chose to postpone if not stultify such development for purposes

of continued exploitation of the Island's phosphate by the British Phosphate Commission (B.P.C.). The welfare of the Nauruans was superseded by Australian self-interest, thus flagrantly violating the trusteeship responsibility. The incalculable worth of Nauru's phosphate rock did not provide the Nauruans with any of the social or fiscal benefits that such a valuable resource should render.

Most Nauruans were employed in minor clerical positions or as student teachers. All administrative positions were held by Europeans. The Public Service Board on Nauru was controlled by the Public Service Board in Australia, and every position of executive importance was managed by an expatriot. These men served two or three year terms without knowing anything about Nauruan affairs. The Nauruan people were aware that nothing significant could be accomplished unless they began to assume administrative positions. Nauru requested that the U.N. visiting the mission conduct an inquiry into the matter. Shortly thereafter, at the recommendation of the U.N., the Nauru Local Government Council Ordinance was enacted (1951).

This Ordinance did not afford Nauru any real political power. The Council was permitted to appoint district constables to keep the peace among the Nauruan people, to enter into contracts and businesses, and to provide social and public services on Nauru. Under the Ordinance, the Council was empowered to advise the Australian Administrator on Nauruan affairs, but the Administrator had no obligation to accept such advice, to supply reasons for his refusal, nor to approve rules made by the Council to conduct its business. Also, the local government's estimates of revenue and expenditure were subject to administrative approval. The Nauruans complained about their lack of power, but the Australians replied that the Nauruans did not have the capacity to comprehend the full powers of the ordinance.

By 1956 the Nauruan people were still without any major voice in their own affairs. There were, however, some very significant strides made through Nauru's determination in other areas. The Nauru Royalty Trust Fund, established in 1951, was accredited to the Local Government Council's expenses when the administering authorities agreed to pay for Nauruan education. The Council used these extra dollars to take over the administration of the Nauruan Housing Plan and increase social services. In 1953 the first strike in Nauruan history took place; this resulted in the formation of the Nauru Workers Organization, a trade union aimed at improving wages and working conditions. In three short months the union succeeded in nearly doubling the basic wage.

Indigenous peoples have nearly always been victims of the superiority mentality of their host "benefactors." The Australia - Nauru relationship was no exception. There were substantial differences in rates of pay received by Nauruans and Europeans for the same kind of work. Nauru petitioned the U.N. Visition Mission in 1956, charging that working hours were discriminatory and general wage conditions unsatisfactory. They demanded that equal pay for equal work should be adopted by employers. Australia tacitly asserted that Nauruans did not work hard enough. The Nauruan's efforts had their partial reward in 1961. A uniform working week of forty hours for administrative employees was introduced. The basic wage was raised from $12.20 to $18.70 per day. Some of the conditions persisted: there were no margins for skill or length of employment, and no sickness benefits. These concerns coupled with a growing dissatisfaction with miserably low royalty rates for phosphate provided the impetus for a full scale push for a new Nauruan identity.

To understand the significance of Nauru's attainment of independence it is necessary to examine Nauru's role in the phosphate industry. Following World War II phosphate land was leased to the British Phosphate Commission. The Nauruans received 13¢ per ton for their phosphate, of which 6¢ per ton was a direct payment to surface landowners. The remaining 7¢ per ton was invested by the Administering Authority in various Nauruean Trust funds. The 13¢ per ton royalty rate was perposterous in light of the fact that the value of phosphate had risen by 200% without a comparable increase in costs since 1940. Despite the rise in value, Nauruan royalties had increased as a result of pressure exerted by the Phillipine and Soviet representatives to the Trusteeship Council. The royalties were increased from 13¢ per ton to 16¢ per ton which was still less than 6% of the total value of the phosphate.

The argument for such low royalty rates was apparently based on the trustee's belief that payments to Nauru should be governed by present and future needs and not by any fluctuations in the price or value of phosphate. This viewpoint implies two things about the trustees. First, Australia's assessment of Nauru's needs was apparently based on the belief that an "aboriginal" people is not concerned with altering the status quo or improving social and economic conditons. Second, so long as Australia could determine Nauru's future needs, the trustee was able to establish the royalty for phosphate that it viewed as beneficial to the trustee and not necessarily to Nauru.

Australia's vision of the Nauruans as a primitive people with little motivation for change or advancement was not well founded. By 1956, the concern with royalties intensified. The f.o.b. price of phosphate exported had increased 2½ times since 1939, being $4.20 per ton. The royalty increase had not been proportionate. Between 1922-1955 the Nauruans received $1,652,256 while the total value was $54,630,993. In 1959, Nauru asserted that the only manner of getting the best terms possible for phosphate was to put Nauru in a position in which they owned the phosphate and developed it in their own interest; that is to say, no leasing to other companies, no minimum royalty payments, but control over their own industry!

In 1963, at another royalty conference, the Australians offered a 50% increase in royalty rates, but Nauru refused this offer (without the aid of legal cousel) holding to the principle that royalties should form a fair share of phosphate proceeds. Nauruean phosphate was about half the f.o.b. price of Makatea (French Polyneian) phosphate, which was very similar in quality and geographic situation. As a result of this, Nauru maintained that their fair share of phospate proceeds should amount to a royalty in the region of $7.14 per ton.

At the 1964 conference, Nauru asked that formal steps be taken to transfer legal ownership of the phosphate to the Nauruan people. This, of course, was rejected by Australia. A year later Nauru engaged legal help. It was determined that the British Phosphate Commission was charging $5.36 per ton rather than the market price of $14.76 per ton. The failure of the B.P.C. to charge a proper price resulted in loss for the Nauruans. The exposure of the trustee's colonialist policy in a world sensitive to actions of imperialism and neo-colonialism resulted in public embarrassment for Australia, Great Britian, and New Zealand. Royalty rates were thus increased with a future plan to give the Nauruans a 50% interest in the phosphate industry. The fixity of Naurean purpose was beginning to pay off. In 1966, Nauru had its first general election for the legislative and executive council. Their first business was to examine avenues of independence. The target date for sovereignty was set for January 31, 1968.

The Nauru Phosphate Agreement of 1967 marked the beginning of Nauru's economic independence. Phosphate was to be supplied exclusively to the partner governments (Australia, Great Britian, and New Zealand) at the rate of 2 million tons a year while the governments undertook to supply an assured market for this output at the agreed price of $11.00 per ton for three years, at which time the rate would be subject to market price fluctuation. More importantly, the Nauru Local Government Council was to buy capital assets of the industry

for approximately $20 million, of which $9 million would be paid in 5 years beginning July 1, 1967. For the three years following 1967, the B.P.C. would manage the phosphate operations and prepare to transfer management to the Nauru Phosphate Corporation. The net profit of the industry would be paid to the Nauruans.

In the three years since the 1964 talks when the Naurans had rejected the 50% royalty increase, they had attained total control of the industry. Previous to control of their phosphate deposits, Nauru had leased the land for a royalty rate of 13¢ per ton. After assuming control, Nauru received $12.00 per ton for its phosphate. The capital assets of the B.P.C. were purchased and an investment fund for Nauru was established that will total 400 million dollars in 30 years.

Despite the fact that Nauru probably has the highest per capita income in the world, the lonely island in the Pacific is not without its problems in the years ahead. The phosphate deposits on Nauru will be entirely depleted by 1990, leaving the island with the possibility of no further natural resources for development or prosperity. The remaining areas may be insufficient to support its growing population, and reclamation of the island is believed to be more expensive than the money obtained from phosphate sales will provide. Nauruans face the options of assimilation into Australian life, finding a new island on which to live, embarking on a costly process of relaiming Nauru, or using their present assets to develop other economic options on the Island.

Sovereignty is more than precious to the Nauruan people. The years of determination have been rewarded with independence, control of their internal affairs, and management of their own natural resource. In turn such economic self-sufficiency has enabled the Nauruans to maintain their heritage, culture, and identity; all gifts which will not be easily sacrificed to the "assimilation alternative." But if the past achievements of this nation are any reflection of the strength and character of a people, then the Nauruans may find their way through this foreboding dilemma. Whatever the outcome, the people of Nauru will shape their own destiny, giving hope to other peoples with a dream of independence.

BARRIERS TO DEVELOPMENT

"Federal Indian Policy is much like Columbus. He didn't know where he was going. When he got there, he didn't know where he was. And when he got back, he didn't know where he had been."

Anonymous

In a society where land ownership has traditionally been synonymous with wealth, the group which holds the largest blocks of privately owned land are the poorest, American Indians. Why?

From the beginning of the European invasion of this continent, the control of the development of the land and its natural resources quickly passed from the control of the Native Peoples to a series of outside governments. Even after the establishment of the United States government and the subsequent recognition of Indian nations as domestic sovereign dependent nations under a special trust relationship, Indian nations have been under the domination of outside control. Development has been permitted only at the discretion of--and often, the whims of--federal officials. The attitude most often reflected has been that of a dictator, sometimes benevolent, with a series of social welfare programs designed, first to isolate, and then, to assimilate Native peoples.

Tribes have learned through experience that dollars are more likely to come through the art of learning what granting agencies are funding rather than in new innovative programs and long range planning to meet the particular needs of their community. For instance, a few years ago, industrial parks were heralded by several government agencies as the answer to economic development on reservations. As is common, the responsibility for making

Indian programs work was spread over more than one agency. In this case, the Department of Commerce Economic Development Administration was responsible for building the parks and the Department of Interior, Bureau of Indian Affairs, was generally responsible for attracting industry to them.

According to a report to the Congress by the Comptroller General of the United States entitled "Improving Federally Assisted Business Development of Indian Reservations" dated June 27, 1975:

"To induce businesses to locate on Indian Reservations, EDA spent about $16 million from 1966 through 1973 to provide industrial parks on 33 reservations. According to EDA statistics, on May 30, 1973 the average occupancy rate of the 26 completed parks was about 17 percent of the total improved acreage. Only 2 parks exceeded 50 percent occupancy, 5 parks had no tenants and 11 parks had only 1 tenant."

The Report, which discusses the effectiveness of Federal efforts to improve economic conditions on Indian reservations by four agencies, Department of Agriculture, Commerce, Interior and the Small Business Administration, concludes that a lack of coordination between the various agencies is a major stumbling block to development on Indian reservations. Though it does not specifically say so, the implications are that the agency efforts deal almost exclusively with non-Indian developers.

In fairness to the agencies involved, it should be noted that the building of industrial parks is a standard practice for attracting industry to states and cities. As is true in many other areas, what is good and acceptable in a non-Indian community is not necessarily good for Indians.

Federal Policy

The policy of the Federal government itself (or its lack of a consistent or coordinated policy) has tended to prevent Indian tribes from controlling the development of their own resources. The following is a compilation of problems identified by tribal leaders:

1. There is a basic conflict of interest within the Department of Interior which pits the trust responsibility to Indians against the other agencies within the Department with missions for development which conflict with the best interests of Indians. This conflict is recognized and reiterated in the Federal Trade Commission's Bureau of Competition *Staff Report on Mineral Leasing on Indian Lands*, published in October 1975.

2. There is a lack of basic information about tribally owned resources. Most tribes lack any real resource inventories. At the same time, outside developers seem to have access to or from technological means not known or not available to tribes. For instance, the National Aeronautics and Space Administration has developed an Earth Resources Observations System with a Data Center and Applications Assistance Facilities located around the country. EROS is a program of the U.S. Department of Interior, administered by the U. S. Geological Survey. The U.S. Geological Survey is also the agency charged with providing expertise and technical assistance to the Bureau of Indian Affairs and Indian tribes. Data is collected from satellites and aircraft aerial photography and fed into computers. The equipment used is so

sensitive that it can distinguish between different varieties of corn being grown side by side as well as for pinpointing mineral deposits. The value of this data for both the BIA and the tribes is obvious both in resource inventory and in management of resources such as water, timber, range and agricultural lands. It is paid for with Federal money and administered by an agency which includes in its mandate "a major responsibility for American Indian Reservation communities." The information is available at a relatively minimal price to the general public. Yet, it has not been furnished to the tribe nor, it seems, to the BIA, which furnishes the U.S. Geological Survey with a sizeable amount of money each year to provide expertise and technical assistance to Indians. Further, since the Department of Interior and the Bureau of Indian Affairs have been charged with the trust responsibility for prudent management of Indian lands for many, many years, it is inexcusable that they are only recently seeking to provide inventories of resources on Indian lands. Even more reprehensible is the fact that tribal resource inventories presently being done by the U.S. Geological Survey are largely being done without the knowledge and participation of the tribes. Further, the tribes who are aware are distrustful of the accuracy of the information being collected and understandably concerned that it will become public information rather than proprietary information for their use.

3. Government Funding programs are not coordinated to work together. Each agency touts its own programs to those tribes

it wants to fund or pushes those that seem "too hard" or have no appeal, to other agencies. For example, one tribe reported that they had been told that the Economic Development Administration would not fund a farming project because it was the Agriculture Department's job; Agriculture would not fund it because they considered tribal operations as corporate operations; the Bureau of Indian Affairs would not fund it because they said the Economic Development Administration was supposed to fund that kind of project; the tribe couldn't get a loan from the bank because they couldn't use the land as collateral. There seems to be a "territorial imperative" involved in that each agency wants to get credit for successes and point their fingers at "failures". This is understandable when you realize the competition for funding at appropriations time. Related to this syndrome is the tendency of agencies to respond to "successes". If a tribe is able to get something going that looks like it is going to succeed, as in the case of the Mescalero Apaches, Mississippi Choctaws, Quinnaults, or the Colorado River Indian tribes, have a nationally visible leadership and muster some political support along the way, the agencies will fall all over themselves to pour money in. Everybody wants a piece of the action. Those groups who lack a track record and need the most help or who want to try a totally new approach, are up the proverbial creek without a paddle.

4. Feasibility studies are either inadequate or nonexistent. If an agency wants to fund a project and the feasibility report

shows it to be impractical, it may fund it anyway, then the tribe is blamed for its failure. Specific examples were cited by the tribes. Those cases usually were when a tribe had gone to an agency with a small project and were encouraged to expand it beyond their capabilities, or when they went with a large project and reduced it at the direction of the agency to meet funding limitations. The Comptroller General's Report referred to earlier also gives specific examples.

5. There is a lack of expertise within the Bureau of Indian Affairs to deal with new forms of development. That is, if a tribe proposes anything outside the scope of the standard lease agreement, there's no one who can deal with it. Consequently, the burden of selling a new idea is always on the tribe, which often lacks the experience, expertise and the dollars to fight the bureaucracy of agency, area and national offices. Since the likelihood of having expertise needed is less at the lower levels, agency and area offices often act as stumbling blocks either out of fear of change or out of lack of knowledge. An example of this problem is the Navajo-Exxon uranium agreement. The tribe negotiated its own agreement with the company without prior BIA approval in 1972. Four years later, they are still awaiting final approval by the Trust Officer. Standard lease form agreements, on the other hand, have been routinely approved. The Commissioner of Indian Affairs addressed this problem at the Great Lakes Seminar.

The Commissioner pointed out that many changes in ideas about resource development on Indian reservations are coming about.

Whenever change is created, both anxiety and hope are created. Such is the case in the Indian community and in the Bureau of Indian Affairs. As tribes develop an increasing awareness of the alternatives for development of their resources and a growing sophistication in understanding the trust responsibility, the federal government is challenged to change its responses. As tribes explore the meaning and ramifications of self-determination, the federal government is called to account for its past actions and is forced to gear up to meet an expanded view of its responsibility as a trustee, a responsibility not only to protect tribal resources but to insure that they are managed prudently and in such a way that the tribes receive maximum benefits. For example, while some tribes are handling their own negotiations with outside developers, the other tribes are suing the federal government for previous actions which are now recognized as harmful to their interests taken under waivers of regulations. An example which illustrates this point is that of the Navajo and Northern Cheyenne tribes. While the Navajo are attempting to get a tribally negotiated contract for development of their uranium approved which would require a waiver of the regulation requiring competitive bidding, the Northern Cheyenne are attempting to void leases for coal development partially because the leases violated the government's own regulations. The Federal Trade Commission report referred to earlier recognizes this problem also.

6. <u>An inordinate amount of time is spent processing proposals through government agencies</u>. How quickly you get an

answer depends on the efficiency and dedication of the individual who is assigned to your project, the personal interest of the administrator in charge, your policical clout and your "nuisance potential". Whether you get an approval or not depends a great deal on your skill at establishing a relationship with the administrator and the project officer, your ability at using political pressures carefully and wisely, and your persistence.

7. <u>Money from government programs does not come in on time</u>. Getting your program approved is only the first of many problems. After approval, you go through another series of frustrations while you wait for the money to arrive. You may have a starting date for a project--the date you are expected to begin work and a time for which you must report on progress toward your goals, but your first cash may not arrive until three to six months later. If you don't have available unrestricted cash, that is, money not specifically allocated for another government program, how can you start your program? If you "borrow" money from other government programs, you are in trouble for co-mingling funds. Your alternative is to borrow money from the bank against the money which will be received; however, when your government money does come in, you can't use it to pay the interest on the money you had to borrow.

The time lag between funding cycles for on-going programs is a related problem. Suppose you have a project which will run for two, three or five years. Often you are not notified whether it will be renewed until very late in the funding year or until

your final report for the first year works its way through the bureaucracy. Though you are expected to continue your work, beginning your second year's obligation, your new funding again may be delayed for three to six months. The government officials responsible for processing your papers may not recognize the urgency of your needs because their paycheck comes every two weeks regardless.

8. Efforts of the Federal agencies dealing with economic development have focused on non-Indian developers whether it be industrial development or development of natural resources such as land, timber or minerals. A prime example of this phenomena occurred two or three years ago when the Department of Commerce and the Bureau of Indian Affairs became concerned about the empty industrial parks on Indian reservations. They invited a group of industrialists in to discuss the problem. Indians were not invited. A corporation president with some sensitivity to Indian self-determination asked why, both at the meeting and later in correspondence; he was ignored.

Another particularly blatant example is recounted in the chapter on Parallels to Developing Nations, the case of the runaway manufacturing plant. The report on the use of On-the-Job Training funds attached as Appendix also shows a concentration of support to non-Indian developers. The large amount of farming and agricultural lands leased to non-Indians is another indication.

The standard lease form used for mineral leases and the timber sales contracts are, according to our experts, "lessee's

leases"; that is, written to the advantage of the lessee rather than the owner.

9. Regional and area offices often act as stumbling blocks rather than as facilitators for Indian programs. Tribes are reluctant to report troubles because of the threat, real or implied, of termination of funding. Further, policies are not consistent from region to region or area to area. The Indian Self-Determination Act, which was meant to make contracting for tribal provision of presently BIA and Indian Health Service provided services easier, is the subject of many new concerns. Bureau of Indian Affairs personnel understandably see tribal contracting as a threat to their jobs, yet they are the same people charged with the responsibility to help tribes contract. It takes a very generous and dedicated person to resist the hope that tribal contracting will fail and to resist the temptation to make it as difficult as possible. Perhaps it is too much to ask. There are provisions, of course, for including those people in the tribal contracts. Here again, human nature comes into play because, for years, those people have had power over the tribes they serve simply because they controlled the services they received. Reversing the positions of power is bound to cause great emotional conflict--in other words, do a real number on your head! There is no doubt that some individuals will be hurt in the process. They should not be the people of the tribe.

10. There is a lack of legal advice and technical expertise from experts that tribes can trust. Tribes have no confidence in government provided legal and technical expertise. Past experience

has proved that it is not in their best interests to trust advice from these sources. If it were, then the problems would not be so great today. There is a great need for money to be provided with which tribes can purchase their own expertise. This problem will be addressed further in the chapter on "Choosing your Advisers."

11. The relocation program of the 1950's wherein tribal members were encouraged and, in effect, forced off reservations and into urban areas has caused great internal pressures within the tribes as tribal members reassert their Indianness and return to reservation communities. The Federal Government, in its infinite wisdom, devised a program to relocate reservation Indians into urban areas in response to the poor economic situations on reservations. Rather than improving the economics of Indian families, they were thrust into a foreign community without the reinforcement of their tribes and quickly moved from being economically poor on reservations to being the poorest in the inner cities. Again, the Federal government, in its infinite wisdom, decided that since those Indians had left the reservation, they were no longer Indians and terminated services to them. They then set about creating an artificial conflict between tribal members in urban areas and those who stayed on the reservation by setting into motion an intense rivalry for already scarce funds for social services programs. The injustices of Federal policy and the new indignities forced upon Indian people in the cities, gave rise to a new political force in the Indian community. Organizations such as the American Indian

Movement, for example, were first formed as a method of mutual protection in urban areas. Groups such as this began to call attention to the injustices that have been perpetrated against all American Indians. This new consciousness-raising movement deserves a great deal of credit for the Indian renaissance of the last few years. As Indian people began to read in newspapers and see on television Indian people asserting themselves and putting the blame for their poor economic conditions, discrimination, etc., on the society and the Federal government, Indian people began to turn their feelings of anger and frustration outwardly rather than inwardly. They began to express themselves as a people of value and with values worth keeping and nurturing, and a rekindling of spirit and a new determination was born.

On the reservations, there also developed an understandable resentment of the attention being received by this group of "upstarts" on the part of leaders who had been saying the same kinds of things for many years, and who had worked diligently and largely without recognition within the system, to bring about change. Many of this new group had left the reservation at a very early age with their parents or perhaps were born in the cities. How dare they purport to speak for Indian people--they had been assimilated. A third group, Indian people who had been "assimilated"; that is, had "made it", perhaps through non-Indian educational systems, and were functioning as members of the larger society, also began denouncing their so-called assimilation and reasserted themselves as Indians.

The larger society then played another trick on Indian people. Any act of assertiveness was called militancy. Any act of militancy immediately identified you as a trouble maker. The Federal government and the larger society, no longer able to ignore the conditions Indian people had to live in, began to look around for more conservative voices to deal with. And they began to play Indians off against each other. As usual, the method is money. When the Office of Economic Opportunity was created in the early sixties, the government, after much pushing, established an Indian Desk (now the Office of Native American Programs in the Department of Health, Education and Welfare) to address the needs of Indians living in urban and off-reservation areas. Truly militant and sometimes violent actions of some off-reservation Indian people began to scare the Feds. Reservation leadership, anxious to reassert their leadership roles, were angered by this new recognition. There were pressures from those people still on the reservation to improve conditions at a faster pace. Tribal leadership began to demand access to these new programs in addition to the inadequate old programs of the Bureau of Indian Affairs. The Indian people living off reservation began to say "Okay. You share ours. We share yours." The fight was on--divide and conquer rides again.

Perhaps the exposure to the larger society has taught those living off reservation to read the trends more quickly. Perhaps being thrust into a survival situation outside the Indian community sharpened their sense of survival. Perhaps the continual frustration

of dealing with an alien society has simply made them tired. Perhaps it is a reborn sense of identity and a seeking of reinforcement from family and friends. Whatever it was or is, there is an overwhelming urge to go home. The urge to go home is accompanied by a knowledge that going home does not have to mean that you accept unacceptable living conditions--that you can be Indian without accepting poverty, poor health, poor housing, etc., as an unchangeable way of live. They go back determined to make things happen.

Meanwhile, back on the reservation, they are often treated with fear and disdain. What has happened to these children of ours, forced out of the nest and raised in an alien society? Are they still Indian? Can we trust them? Are they going to bring down a new reign of terror from the white community as the "renegades" of the past did? And does their desire for change mean that they do not understand and value the hard work and dedication we have devoted to the survival of our people?

Thus, once again the tribe has to find a way to deal with problems they did not create.

Perhaps it is small comfort to tribal decision-makers who must deal with this complex problem, but there is, however, a similar phenomena in developing nations which is described in the chapter on Parallels with Developing Nations. Perhaps it is most important to recognize it as growing pains that come when any "powerless" people begin to exercise power.

Tribal decision makers should take the lead in healing those wounds inflicted by the Federal government's divisive policy. There is strength in numbers. Government programs are often based on numbers. Recognizing that tribal governments have a responsibility to their members wherever they are for the provision of the basic purposes of government, protection and provision of services, and acting accordingly is in the best interest of the tribe. Some tribes have faced up to this issue and have worked hard to maintain contact with their people off-reservation. They have made provision for them to participate in tribal elections. They have helped establish and supported efforts to establish service centers for their people in urban areas. Some have made arrangements for their off-reservation tribal members to receive health and scholarship benefits. They have had the courage to defy the Federal government's policy of termination through administrative decision.

Tribal decision-makers should recognize the problems that have been created by the Federal government in classifying Indians to suit their own purposes. Urban, state-recognized, unrecognized, and federally-recognized classifications were not created by Native Americans. They were created by the Federal government and have been used to set Indians against Indians, draining their energies rather than allowing them to concentrate and spend their energies to fight their common enemies and solve their basic problems. There are not enough dollars to go around now, but if

the same energy that is spent fighting over them was spent fighting for enough dollars for everybody, who can guess what could be accomplished. Tribal decision-makers have been smart enough in the past to deal with problems created by outsiders and to survive as a people. They must recognize the new ones, face up to them and find their own solutions.

Internal Barriers

There are internal tribal barriers to Indian control of economic development as well. Some may be directly traced to federal policies; however, tribal decision-makers must not make the mistake of simply pointing their finger at someone else and ignoring the steps they must take to clean up their own nests.

1. Many tribes are still operating under tribal constitutions that were imposed by the Federal government years ago. Though they are primarily non-Indian in design, and bear little relationship to the traditional methods of government, they have become "sacred cows" and any attempt to amend them is met with great hostility. Often tribal constitutions are simply ignored until one faction or another decides to use it against the other. Tribes had systems of governing themselves long before Columbus stumbled on to this continent. Some of those systems may seem repugnant in these days of "democracy" and stress on individual rights. However, we should not forget the purpose of government--why people join themselves together in bodies--that is, to provide protection and opportunity for a better life. It is unrealistic to think that tribal systems of governing or tribal cultures would

have been the same today as they were in 1492 had the white man never set foot on this continent. They would have changed as the needs of the people changed. The good things, the things that worked for the people, would have been retained and built upon.

It is important to remember that tribal governments were evolving, living structures. They dealt with protection and preservation while at the same time, they dealt with providing opportunities for each member to be a contributing valued member of the society. There were punishment systems. There was international trade and cooperation or warfare between Indian nations. These systems were disrupted by the influx of Europeans. It is difficult to project where natural evolution would have led because of that disruption.

Though there is no way to go "back to the buffalo" there is no reason not to hold on to or go back to the basic tenets that helped your tribe survive as a people. If there is one basic assumption that can be made about tribal governing systems before Columbus, it is that everybody in the tribe knew what it was. That is not true today and it should be. Tribal governments should not be drawn into the governance in secret syndrome.

The Secretary of Interior must approve tribal constitutions; however, in these days of self-determination, he will be hard pressed to disapprove one that has the support of the tribe. And, there's always the tricky way--a clause that says failure to disapprove within a given period of time, thirty days, sixty days, ninety days, constitutes approval.

2. <u>There is a lack of stability in tribal governments which may be real or may be perceived by potential developers</u>. This causes a reluctance on the part of the developer to invest in development on Indian reservations. Tribes must re-examine their own structures considering such questions as continuity, length of terms of office, personnel policies, business structures protected from political interference, etc.

3. <u>There is a lack of separation between the government and the business development administration</u>. Should tribal councils be engaged in setting policies and procedures or should they be involved in the day to day operations of a tribally owned business? These are inherent conflicts of interest that should be dealt with openly. One argument is that while it makes ultimate good sense to elect your tribal council, it hardly makes sense to elect the manager of your sawmill or your grocery store or your motel. On the other hand, a person who might be an outstanding member of the council might be the person best qualified to manage your sawmill or your grocery store or your motel. One rule of thumb that should be kept in mind is that any business that is run like a governmental agency is doomed to failure whether it be tribal or federal. The post office is a prime example. This is not a criticism of tribal governments--they are not businesses, they are governments, and should operate as governments. Neither can businesses be run like federally or state funded programs or foundation programs.

This problem will become even more complex as tribes actually begin to develop their own resources. It is one thing

to supervise the implementation of a coal lease and quite another to run a coal mine. The local community must devise its own method for insulating their business enterprise from the political process.

4. There is a lack of trained Indian personnel to run tribal enterprises from the technician through the management levels. Educational programs, vocational and professional, must be re-examined to insure that the kind of expertise needed by tribes will be available and tribal members must be enticed to secure those kinds of skills.

5. Tribal codes and infrastructures are largely inadequate to deal with new problems associated with economic development. Any major development, whether it is tribally owned or operated by outside developers, is apt to bring in an influx of non-tribal members. This is true whether it be a motel or recreational facility or a uranium mine. Does your code cover jurisdiction over non-Indians or non-members of your tribe? Are your courts and detention facilities adequate for dealing with them? Does it cover criminal misdemeanors, civil matters such as repossessions of property, marriage, divorce, juvenile justice, zoning land use, and environmental protection? Care should be taken that tribal codes are not so adapted to the non-Indian system that it simply makes it easy for those trained in non-Indian law to disrupt your system. If the time comes when non-Indian attorneys come in to Indian courts, there is something to be said for having them as confused by Indian law as Indians are in non-Indian courts.

6. <u>There is a lack of capital for tribal investment</u>. Too often tribes are prevented from exercising control over the development of their own resources by a lack of capital. This is an overwhelming but not insurmountable problem. This will be discussed further in the chapter dealing with Sources of Financial Assistance.

7. <u>There are monumental heirship and ownership problems with allotted lands</u>. How do you deal with the problems caused by the Allotment Act when you are dealing with development questions? This is the area where individual rights come most often into conflict with tribal rights. There is legislation under consideration by the Congress now. Tribes should carefully consider whether they can handle the question themselves under their tribal constitutions. It would seem that there would be a possibility to use "eminent domain" even as distasteful as that might be. Tribally chartered corporations of allottees which contract with the tribes for management might be another possibility. This government created problem will no doubt be the most difficult to deal with.

8. <u>There is both a fear of failure and a fear of success</u>. Change is frightening and past bad experiences tend to make tribes fear trying anything new because it might not work and they will be criticized for failure. On the other hand, there is a fear that if you are successful in making your tribe self-sufficient you will be terminated, as the Menominees and others were. Consideration must be given to whether it is better to effectively terminate your children by making it economically

impossible for them to survive on your reservation or to make your reservation self-sufficient and face the possibility of termination of government services when and if it comes.

9. <u>There is a lack of fiscal accountability in many tribes. That is not to say there is a lack of fiscal responsibility, although in some cases, that, too, is true</u>. What is fiscal accountability? Very simply, it is an organized method of documentation of the way you spend your money and a reporting system to those you are accountable to. Your first responsibility is, of course, to your people. They have a right to know how much money the tribe receives and how it is being spent. So do the people who fund you. That does not mean that the tribe should meet in a general session to decide how much you should spend on paper clips and toilet paper. It merely means that a budget should be established and approved and that documentation of expenditures within those guidelines be maintained and made available to your membership. In the case of government programs or foundation programs, you have to document that your money was spent within the guidelines to accomplish the things you said you would when you took the money.

Fiscal responsibility is, simply put, acting in a responsible way to see that the money available is maximized in the best interests of your people. For example, on a personal basis, if you take your paycheck and tell your spouse and your children you are going to spend it all in the local tavern and do so and take home a receipt for it, you have maintained fiscal accountability, but you could hardly be called fiscally responsible. By

the same token, if a tribal council is able to get approval of the tribe to spend $200 a day for per diem and does so, they are open for serious criticism.

More often the choices are not so clear cut. It may be, for instance, that there is no money in the budget for buying such things as food or clothing for people in need. A child has no shoes and it's wintertime. It's cold. It may be that the family has had a run of bad luck. Or it may be that his parents are just shiftless or alcoholic. The child needs shoes. The tribe is poor, too. There's no money except in an ONAP program, which is supposed to be used to "develop management". If you spend the money on a pair of shoes, you are certainly acting responsibly, but you lost your accountability. Hard choices.

As you move to take over the control and development of your own resources, establishing both your fiscal accountability and fiscal responsibility become increasingly important. Government and foundations are becoming much more adamant about accounting systems. Congressional appropriations Committees are demanding assurances from funding agencies of both fiscal accountability and responsibility. There is some room to criticize government agencies in this regard. There was a tendency in "Great Society" programs in general and Indian programs in particular to ignore fiscal accountability requirements in the early days because of a lack of experience on the part of the grantees. This was

justifiable. However, no real efforts were made on the part of the agency or on the part of the grantee to develop accounting systems as they developed their programs. Both are at fault.

At any rate, neither "the poor" nor Indians are in vogue any longer. Programs and appropriations will be cut off for the slightest excuse. This must be recognized and dealt with.

Another angle of this problem must be considered. As tribes begin to look for financing for resource development, they will be dealing with large multinational corporations and financial institutions with the most sophisticated accounting systems in the world. Tribes must not only be able to demonstrate their own competence, they must develop the knowledge and ability to judge the accuracy of the accounting data of their would-be partners or investors.

<u>Perceptual Barriers</u>

There is an attitudinal barrier to Indian control of Indian resource development on the part of non-Indian investors. The larger society is accustomed to thinking of Indian reservations as welfare communities with their needs supplied by the Federal government. The American business community is not much more enlightened. The Federal government has contributed to rather than dispelled this misconception. It has poured millions of dollars into programs to subsidize non-Indian businesses on Indian reservations. Industrial parks, wage subsidies, lessee

favoring leases, etc., would tend to make the business community look on Indian tribes as somewhat less than business entities. Imagine their consternation as they are suddenly brought face to face with the idea of tribes as private owners of vast stores of raw materials which they need for their businesses. And, at the same time they must deal with the fact that tribes are not only the owners with ownership rights, they are the governmental entity with taxing and regulatory power. With the added layer of federal trust responsibility, with its inadequate, incompetent and antiquated procedures with which they must deal, it is small wonder that the business community is undergoing culture shock.

This perceptual barrier is being rapidly overcome as tribes assert themselves as sovereign developing nations and the business world sees them in this new light. Further, as the business community comes to understand that tribes are the owners of the vast mineral resources they need, and that tribes will refuse to be sold out by their trust officer, the business community will become highly innovative in finding ways to work with tribes. There is a real and immediate danger that they will try first to align themselves with the federal government rather than with the tribes. For this reason, it is imperative that the tribes move quickly to develop their own sophistication and form their own alliances to withstand the pressures.

While instability of tribal governments and the threat of dissident groups taking action against them is often offered by

developers as an excuse for not investing in tribal enterprises, it is laughable compared to the uncertainties they face in foreign developing nations with whom they are making more favorable agreements.

DEALING WITH FINANCIAL INSTITUTIONS

"There are eight types of banks in this country and we are all in the business of buying and selling money for profit. If you substitute the word "value" for money, then you pick up every type of financial intermediary. Always remember that the key word is profit in our business just as it is in any business."

-Jack Rushing
Assistant Vice President
First City National Bank
of New York

"As Chairman of the Board of about ninety-five Native owned businesses in the United States and Canada, I will tell you that the main problem I see with any type of business development is that very, very few Native Americans -- in fact, very few Americans -- understand finance, the business of buying and selling. More importantly, of all the companies I have seen, only those companies who really understand the banking and financing function can reasonably expect to be successful," began Jack Rushing, Assistant Vice President, First National City Bank of New York.

In order to understand how to deal with financial institutions, it is important to understand who they are, what they are and how they affect the money supply.

What is Money?

Many people think of money simply as the currency (paper money and coins) which the government funnels into general circulation, no matter where it ends up. Bankers and economists regard money in terms of how it is used, and say it must perform three functions to be real money:

1) A means of payment for goods and services that is accepted by everyone.

2) A standard value.

3) A store of purchasing power.

At any given time, the U.S. supply of money -- the only kind that meets all three standards -- is generally considered to be the total of all the currency people carry in their pockets plus what they have deposited in bank checking accounts. This is active money -- what economists call M_1 -- readily available for spending. At the end of 1973, the money supply totaled $270.4 billion, of which 77 percent was in checking accounts and the rest in cash.

Another $570.7 billion held in savings accounts is called "near-money" because it is not a readily available means of payment, since a financial institution can require a certain number of days notice to withdraw money from a savings account, although this notice requirement is seldom imposed. Money held in savings accounts still is a store of purchasing power, but it cannot be easily converted into spendable cash.

It is through the nation's banks, with their power to accept checking accounts and to make loans and investments, that virtually all the U.S. money supply flows.

Next to Indians, the banking industry is probably the most regulated entity in the United States. Three federal agencies and 50 state banking authorities supervise the banking industry to see that it is financially sound and serves the needs and convenience of the public. The Office of Comptroller of the Currency was created in 1863 as an arm of the U.S. Treasury Department. It charters and supervises the 4,600 "national" banks and examines each of them at least twice a year. The Federal Deposit Insurance Corporation was created in 1933 and insures each bank account for up to $40,000 in the event of bank failure. All national banks must carry FDIC insurance and virtually all the 14,000 banks do. Only 206 banks, all of them state chartered, and is the most powerful economic control arm of the federal government.

<u>What is the Federal Reserve System?</u>

The Federal Reserve System was established in 1913 following a series of bank panics that resulted from recurring heavy demands for funds held by a few large banks in the financial center of New York and Chicago, where banks in smaller cities and rural areas kept their reserves and excess deposit funds. The system was designed to correct this chaotic situation by serving as a central pool of funds and an elastic supply of bank credit and money to meet fluctuating demands.

The Federal Reserve System is composed of 12 district banks with 24 branches coordinated by a seven-member, policy-making Board of Governors in Washington. It regulates the flow of bank credit and money for member banks, monitors U.S. economic conditions, provides currency and loans to member banks, helps all banks collect and clear checks written elsewhere in the country, transfers funds among cities, and acts as banker for the federal government.

Fewer than 6,000 banks are members of the Federal Reserve System. All 4,600 national banks must belong, but only 1,100 of the more than 9,000 state-chartered banks have chosen to become voluntary members of the system. Altogether, Federal Reserve System member banks account for only about 40 percent of all U.S. banks, but they control nearly 80 percent of all bank deposits. This gives the Federal Reserve commanding influence over the bulk of the nation's money supply.

While national banks are examined by the Comptroller of the Currency, the Federal Reserve has the power to examine both its national and state-chartered members. In practice, however, it regularly supervises only state-chartered members, which are also examined by the appropriate state regulatory authorities. Insured state banks outside the Federal Reserve System are examined by the FDIC and state bank supervisors. Thus, only the 206 uninsured state banks are regularly examined by state authorities alone.

<u>How Does It Affect the Money Supply?</u>

1) The Federal Reserve's most important task is to help keep the economy healthy and growing, with production and employment high and the dollar stable, by using its control over the flow of money and credit to head off the disruptive extremes of excessive expansion or recession, inflation or deflation. To do the job, it has three important tools:

a) Reserve requirements. The Fed requires member banks to keep a certain percentage of their deposits in reserve. Those reserves are set aside in the form of cash in the bank's own vaults or in a reserve account -- similar to a checking account -- with the nearest Federal Reserve bank. The average requirement right now is 15 percent for checking account deposits (the actual percentage depends on the size of the bank) and four percent for the more stable savings account deposits.

b) Discount rate. This is the interest rate member banks must pay to borrow money from the Federal Reserve, currently eight percent.

c) Open market operations. This is the buying or selling of government and non-government securities on the open or "money market," where banks and businesses also trade in debt instruments of various kinds.

To understand the Federal Reserve's clout in using these tools, it is necessary to consider how the banking system uses money. Suppose the Fed's reserve requirement is 20 percent. When Bank A receives a $10 deposit, it must set aside 20 percent or $2 in reserve, but can lend or invest the remaining $8. Now suppose a customer borrows that $8 and uses the money to pay a creditor, let's say a grocery store. The grocery store deposits that $8 in its bank, Bank B. After meeting the 20 percent reserve requirement by setting aside $1.60, Bank B still has $6.40 to lend to someone else. This rippling "multiplier" effect means that the original deposit of $10, after repeated loans and deposits, will have grown to nearly $50 before it is all used up, assuming no one decides to put his or her money under a mattress along the way. In other words, $40 was "created" by the banking system and added to the U.S. money supply from an initial $10 deposit. (Note: It's important to recognize that money is "created" by the banking system as a whole through a series of transactions, not by an individual bank in one fell swoop. No bank can lend more than it receives in deposits, minus the reserve requirement. If we go back to that original deposit of $10, it's obvious that Bank A could not lend out nearly $40 based on the $10 deposit.)

This "multiplier" effect enables the Federal Reserve to stimulate or restrict growth of the money supply to maintain economic stability. If money is scarce or "tight," competing demands from borrowers will drive interest rates higher and eventually borrowing will become too expensive. Business will forego plans to invest in new equipment or hire more employees, individuals will put off buying that new car or television set, and the economy will begin to slow down. If the situation persists, it can lead to economic recession.

If money is too plentiful or "easy," interest rates drop. Plentiful money increases demand, which in turn outruns the economy's ability to produce more goods and services. Consumers start bidding up prices on increasingly scarce goods and the result is inflation.

The Federal Reserve System can counteract both situations. In a recession when the economy needs stimulating, the Federal Reserve System can buy securities on the open market, and the money it spends will flow into checking accounts to be multiplied in loans and investments. If easy money threatens to cause inflation, the Federal Reserve System can sell securities, soaking up money from private dealers who pay for them out of their checking accounts. The money supply then contracts; interest rates begin to rise, and the economy cools down.

Likewise, by raising discount rates, district Federal Reserve Banks can make it more expensive for member banks to borrow. This tends to discourage banks from borrowing to meet heavy demands for loans, or to help force them to pass their higher costs in the form of increased interest rates to their loan customers.

Finally, a change in reserve requirements affects money supply growth. Lowering reserve requirements permits member banks to increase the amount of money they lend -- with the ripple effect of "creating" new money. And increasing the requirements forces them to cut back on the amount of money they lend with the opposite effect.

The Federal Reserve has found open market operations and occasionally changes in reserve requirements much more effective than the discount rate in adjusting the money supply faucet. Consequently, discount rate changes -- which are at the option of each district Federal Reserve Bank, but usually rise or fall uniformly -- generally follow rather than lead the ups and downs of commercial interest rates as determined by supply and demand. Thus we see how banks are controlled.

What Is a Bank?

A bank is a business, making profit by attracting funds from some customers and lending those funds to others. Its basic function is to serve as a financial middleman who arranges contracts between one person who wants to put his idle cash to work earning more money, and another who wants to borrow cash for his personal and business needs. The bulk of the money banks use for loans and investments comes from demand deposits (checking accounts) and time deposits (savings accounts), which totaled $687.5 billion at the end of 1973. The rest, bringing the total to $776.6 billion, came from their shareholders and from the banks' own borrowings.

Interest is nothing more than a price. It is the price banks pay for the use of money in savings deposits and the slightly higher price banks receive for lending or investing their deposits elsewhere. Payment of interest on checking accounts is illegal, but a growing number of banks give customers an implicit return on those funds by not charging a service fee for checking accounts. In 1973, banks earned $53 billion in revenues, mostly from loans and investments, against $46.7 billion in expenses, including savings account interest, taxes and salaries, with net operating earnings totaling $6.3 billion (or $10.2 billion before taxes.)

While other kinds of institutions attract and lend savings money, in most states, banks are unique in their right under law to establish checking accounts, the linchpin of commerce and trade. Moreover, the nation's 14,000 banks stand unrivaled in their "department store" variety of financial services. Those range from reconciling a depositor's checkbook balance to handling complex international transactions for corporate customers, from managing a widow's inheritance to serving as banker for other smaller banks.

Competing with banks in wooing the depositor's dollar are three other types of financial institutions:

Savings and Loan Associations: The nation's 5,448 Savings and Loans were organized to obtain funds for home construction, and nearly all their deposits are tied up in mortgages. Some are owned by their depositors while others are owned by shareholders whose investments got them started. Situated in every state, about half the Savings and Loans are federally chartered, and the rest are chartered by states.

Credit Unions. These 23,000 -- plus nonprofit savings institutions -- have member-depositors with a common bond, usually the same employer. Their dividend-earning savings are loaned to other members needing money for consumer purchases or home improvements.

Mutual Savings Banks. Operating in only 17 states, mainly in the Northeast, the approximately 500 Mutual Savings Banks are mutually owned by their depositors, who receive interest on their savings accounts from bank profits. Most loans are made to persons buying a home, either in their immediate area or in other parts of the country. Mutual Savings Banks also hold sizable corporate and tax-exempt bond portfolios.

In addition, a small number of Morris Plan or industrial banks operate in about two dozen states, generally in the Middle and Far West. First established in 1910 to provide short-term personal loans to blue collar workers, these institutions and their imitators grew to a peak of more than 400 in the late 1930's. Those remaining vary in name and activities according to their state charters, but they generally specialize in consumer installment loans financed from customer deposits, sale of investment certificates, or both.

How Do Banks Use Their Money? Loans are the heart of the banking industry, taking up a little more than half of its total assets (total assets were $835.7 billion at the end of 1973) and yielding nearly two-thirds of its entire revenues. Another one-fourth of those assets is invested in interest bearing government securities. The rest represent cash in vaults or held elsewhere on reserve, building's furniture, and other equipment needed to conduct business.

Loans.

Business Loans. The biggest share (52 percent) of all bank loans, business loans are used primarily by commercial and industrial forms to invest in business expansion. They also help other financial enterprises -- stock brokers and finance companies -- carry out their business. The classic business loan is short-term, meaning it is repaid within one year, and usually meets seasonal needs. For example, a toy manufacturer will borrow to buy raw materials and pay his workers for months before he makes his heaviest sales for the Christmas season, and then repays the loan. So-called "term" loans are repayable in more than a year.

The big business "prime rate" is the interest banks charge their largest and most creditworthy corporate customers, and is one of the sensitive measures of the economy. In 1973, the now-defunct Federal Committee on Interest and Dividends published guidelines for a lower prime rate for loans to small businesses and farmers with assets of less than $1 million. Traditionally, during periods of tight money, most banks have made it a practice to lend money to small business farmers, and others at rates lower than those charged large corporations.

Mortgages. Accounting for about one-fourth of all bank loans, mortgages are extended to help people and businesses buy real estate. More than half of bank mortgages are for home purchases, followed by purchases of business properties such as factories and office buildings, apartments, and farm property. In mortgage holdings, banks rank second to savings and loans associations, which boast one-third of all mortgages by any lender. But banks account for nearly half of all home construction loans, more than half of all home improvement loans, and the bulk of all lending for mobile home purchases. Banks also hold $90 billion in municipal securities, more than any other group of lenders. About $67 billion of that amount was issued to finance residential support facilities, such as transportation, utilities, schools and public services.

At the end of 1973, Americans owned $346.1 billion in mortgages on single-family homes. About 60 percent of all such homes in the United States were mortgaged in 1971, according to the Census Bureau. One-third of all outstanding mortgages were underwritten by the Federal Housing Administration (FHA) or the Veterans Administration (VA), both of which insure repayments to the lender within statutory interest rate limitations. The other two-thirds are "conventional loans" with no such guarantee and with interest rates pegged to market conditions.

Consumer loans. These loans represent 21.7 percent of all bank loans. Although banks did not enter this field until the early 1930's, they greatly expanded their consumer loans operations after World War II. Today banks lead all other lenders with nearly half of the market. Most such loans are for installment purchases, repaid with interest on a monthly basis, and the bulk of those are for cars, boats, furniture, and other expensive long-life durable goods.

In 1972, automobile loans led the list, accounting for 45 percent of all bank installment loans, followed by loans for consumer goods, personal cash (bill paying) loans, and home improvement loans. Personal cash loans include more than $2 billion in credit extended for college tuition, and the increasingly popular "overdraft checking," a form of loan automatically triggered by overdrawing a checking account. Interest charges on all consumer loans vary according to length of payment and type of purchase.

Bank Cards. Bank cards such as Master Charge or Bank Americard are also forms of consumer loans. In 1973, over 11,000 of the nations 14,000 banks were involved in some aspect of the banking card business. At the end of 1973, outstanding card balances amounted to $6.7 billion.

Farm Loans. At the end of 1973, almost 12,000 of the more than 14,000 banks in the United States held $22.7 billion in outstanding farm debt - more than one-fourth of the nation's total farm debt of $81.7 billion. Banks accounted for $6 billion in farm real estate loans and $16.7 billion in agricultural operating loans. An estimated two-thirds of the nation's 2.8 million farmers borrow money during the year to pay expenses before crops are harvested or cattle sold, or for heavy-duty equipment repayable on a long-term basis.

Investments

The next biggest source of banking income, making up about 20 percent, is investments. All are in various state, local, and federal government securities. Banks are generally forbidden to purchase corporate debt or equity securities except on behalf of customers. Nearly half of bank-held securities are long-term state and municipal bonds which local governments sell, usually to finance schools, roads, sewerage, and other expensive construction projects which direct tax assessments cannot cover. Interest earned on these securities is tax-free and for that reason is lower than taxable interest paid on securities offered by corporations or other debt issuers of equal credit standing. The net result is a wide, ready market for government securities - a market which frequently means that tax assessments to the average taxpayer increase more slowly than inflation.

Better than one-third of banks' investments are short-term U.S. Treasury bills and notes with constantly fluctuating interest rates, and the rest are various government agency and public corporation debt notes. Altogether, these securities account for about one-fourth of all bank assets. They are nearly default-free. Unlike most loans, and except for some long-term issues, they can be sold off quickly if a bank finds it needs cash in a hurry for other purposes.

Trusts

Banks receive less than five percent of their revenues in trust fees for managing other people's assets for their benefit or the benefit of their heirs, friends, or employees. Once commonly regarded as a protective haven for the very wealthy or the widow and her children, the trust has become an increasingly popular financial tool to help people of moderate means make the most of their property, starting while they are still alive.

What Banks Are Not.

"Now that we understand what banks are," Rushing said, "it is just as important to understand what banks are not."

1) Banks are not in the business of solving your problems; they may help you but only if you can show them it is in their own interest to do so.

2) Banks are not in the business of solving social problems; they man help solve some but only if they can see that it is in their own self-interest.

3) Banks are not in business to take unwarranted risks.

4) Banks do not understand the different kinds of problems related to Indian business development and will not make the effort to learn unless they can be shown that it is in their self-interest to do so.

So What Are Your Options?

There are not many. The first and perhaps most enticing is to forget the whole thing. Just decide it can't be done and it's not your fault because financial institutions are unconscienable, racist opportunists. Hope that the Congress or the Bureau of Indian Affairs or the Economic Development Administration or somebody will, in their infinite wisdom, provide you with a magic answer. Never mind that it has never happened before to any major extent. Some people don't believe the buffalo will return either.

The second option is more difficult. Learn to make the system work for you.

The largest influences on a banker's credit judgment of a business venture are quality of management, earnings history, long-range prospects for profitable operation and assets pledged as collateral. In a presentation to a financial institution, the burden of proof is on the borrower whether it be a tribe, a corporation or an individual. The better you are prepared to make your presentation, the better your chances are in receiving fair consideration.

1) <u>Quality of Management</u>. A banker will want to know how your tribe is organized - who are your elected officials, how and when they are elected, what has the tribe's past history been in managing its own business. Is there a good accounting system with provisions for checks and balances to insure fiscal accountability. True, it is technically no outsider's business to know the internal workings of a tribe but if you want to borrow money (or if you want a contract or grant from a foundation or government agency these days) the lender has a right to know what to expect or to say no. A banker will want to know how the business enterprise will be managed, who will manage it and how the structure relates to the tribal council. If the track record of the tribe has not been good, be honest about it and state straight forwardly what measures have been taken to insure future success. Your business plan must be clearly stated. What is the proposed business and what will the loan be used for? How will it be structured - a tribal corporation perhaps? Who will manage it and how? What is the product? How much will be produced? How will it be marketed? You will need financial statements not more than ninety days old - your assets minus your liabilities equal net worth. You will need cash flow projections - beginning cash plus income minus cash paid out by month for one year and by quarter for two years. You must prepare a profit and loss projection - gross sales minus cost of goods sold minus expenses equal net profit or loss. You will need an analysis of your debts and proposed debts compared to your net worth. The services of a good accountant to prepare financial documents will be an excellent investment, however, the persons responsible for seeking the loan must have a complete understanding of the documents and must be able to present them well.

2) <u>Earnings History</u>. If you have been in business before, your records must reflect accurately your profits and losses and the difference you expect the loan to make. If yours is an initial effort, you must project your earnings based on reasonable expectations or past records of similar endeavors.

3) <u>Long-range Prospects for Profitable Operation</u>. The ability to repay an installment loan is based not on liquidation of assets, as a short-term credit would be, but rather on the cash flow of the business.

It is essential that your receipts over the term of the loan be sufficient not only for loan repayment but also for operating expenses and net worth expansion.

It is less complicated to predict earnings of a going concern than for a new venture, as past records are good indicators of future performance. Even if you are experienced, however, don't be careless or complacent about projecting earnings.

Basically, the banker will want to know what will be left from your sales dollar after your expected expenses. The expenses -- rent, raw materials, payroll, taxes, maintenance, etc. -- can be determined easily, but sales can be elusive.

Try to gather data on sales margins, projected local markets for your foods, level of competition and general economic trends.

Combine the results in projected financial statements and remember again that there can never be too much information; the more detailed it is, the sooner a decision on your loan application will be reached.

4) Assets Pledged as Collateral. Here the tribe must be particularly imaginative and knowledgeable. While trust land is not mortgageable, crops, cattle, machinery, inventory, minerals, sales contracts for delivery of merchandise, or a lease-hold[1] interest may be. Here again tribal structure and code is very important. A lender must have confidence that any liens will be enforceable; otherwise he simply won't take the risk.

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[1]Lease-hold interest means that, in the case of an agricultural enterprise, for instance, the banker would have the right to assume the lease for the land they were financing development of for a certain length of time or until the value of the loan was received. The mortgage or lease-hold value would normally be based on the amount the tribe (or the banker) could expect to lease the land for were they not developing it themselves.

Choosing Your Source of Credit.

The purpose for which the loan is sought, the amount and the length of time for which the loan is sought all must be considered when you decide which financial institution to approach.

1) Your Local Bank. Your local bank should be your best source of credit because hopefully you will have an already established relationship through their handling of your tribal accounts. There are several reasons why this is not necessarily so, however. One, the bank may be too small; that is, it may not have enough assets to carry a loan of any considerable size. Two, local bankers often share community prejudices and consciously or unconsciously will not give Indian requests impartial consideration. Three, your local bank may be financing your leaseman who is making money for both of them already off your resources. Four, the bank may not be familiar with the type business you are trying to finance and may not be willing to expand into that area. Five, he may be reluctant to enter into a deal with an Indian tribe because of fear of additional federal regulations or complications of dealing with the Bureau of Indian Affairs or other government agencies without any clear cut understanding of what their role in tribal transactions are.

2) Large Banks in Your Region. Tribes have a better chance of securing loans from larger institutions which are apt to have both more assets and more expertise to draw on. Banks in your region are more apt to be familiar with the natural resources, industries and marketing potential in your area which makes it easier for them to evaluate proposed projects. Again, community prejudices and pressures may affect efforts to deal with banks in your region.

3) Large Eastern Based Commercial Banks. Because of size, assets and expertise are more apt to be available. Decisions are less likely to be influenced by local prejudices. On the other hand, major banks give first consideration to major corporations. Competition for loan dollars will be more acute. Accessibility because of distance is also a problem.

4) Insurance Companies. Long-term financing is available in some cases from large insurance companies. Again competition with major corporations and distance may be a problem.

5) Minority Enterprise Small Business Investment Companies. MESBIC's are easier to approach because of the special nature of their mission - to assist minority businesses. Unfortunately, few if any have adequate assets and expertise to make then a likely source of funds.

6) <u>Specialized Lending Agencies</u>. One of the best examples of a specialized lending source is the Farm Credit Association. This system is comprised of the Federal Land Bank System, making long-term real estate loans; the Bank of Cooperatives which provides credit to farmer owned coops; and the Production Credit System.

The Federal Land Banks, established in 1917, provided a reliable long-term credit source for agriculture. But as the country plunged deep into the agricultural depression of the 1920's, Congress saw the need for a solid, dependable source of short and intermediate term notes of farmers and ranchers given to various other financial institutions. Because of bank failures during the depression of the 1930's, the need for the establishment of a dependable credit source at the farmer's level became apparent. Production Credit Associations were set up to fill the credit gap. Since that time, the Production Credit Associations have loaned billions of dollars to farmers and ranchers. Today, all government capital has been repaid with interest and the system is owned by its members - the borrowers themselves. Through the fact that Production Credit Associations are owned by members and therefore Indians may be subjected to local prejudices, they are still a good source for crop loans including aquaculture projects.

The Bank for Cooperatives is an excellent source of funding for Inter-tribal Cooperatives. As tribes begin cooperative efforts with each other, this source should not be forgotten.

Another specialized lending source might be referred to as "the company store." Here, again, the best examples are found in the field of agriculture though the principles could apply to any product. Large companies, say a cotton company, for instance, is dependent on the cotton grown in the area for the operation of its gins and mills. Often, the company will finance the production of a cotton crop in return for an agreement by the farmer that all the cotton produced will be sold to the gin. Some agreements may include a fixed price to be paid for the product. Others may stipulate market price at the time of the sale. The company would recoup its loan from the proceeds when the cotton is sold to the gin and the profit would go to the producer. This kind of arrangement can be tricky, however, they can work well for both parties. The key is to remember that you've got something the company needs - the product - and they've got something you need - financing. The negotiating necessities, then, are obvious.

Tribal funds are also an excellent source of funds for tribal enterprises. If a tribe has capital, then there is no reason why you can't borrow from yourselves to finance new enterprises. Care should be taken to insure that the quality of the project and the background work is as thorough for a loan from the tribe as it would be for a loan from any other source.

7) The American Indian National Bank. This bank has been established by Indians for Indians and will, therefore, be more receptive to Indian needs. Two things should be remembered. One, the American Indian National Bank is federally chartered and therefore is subject to the same regulation as any other bank. Two, they are hampered by a lack of assets and expertise.

8) The Indian Financing Act (P.L. 93-262). The Indian Financing Act of 1974 was signed into law on April 12, 1974. The Act authorizes the appropriation of an additional $50 million to the Indian Revolving Loan Fund presently administered by the Bureau of Indian Affairs. These funds are used to make loans to Indian tribes and individuals for economic development projects and business ventures on or near Indian reservations and for educational purposes. When the full amount authorized is appropriated, the Indian Revolving Loan Fund will total approximately $75 million.

The Act creates a new Indian Loan Guaranty and Insurance Fund which will be used to guarantee or insure loans made by private lenders to Indian tribes or individual members of tribes for up to 90 percent of the unpaid principal and interest due. $20 million is authorized for appropriation in each of the Fiscal Years of 1975, 1976 and 1977. The Act also authorizes the payment of an interest subsidy on those loans guaranteed and/or insured.

The Act establishes the Indian Business Development Program under which non-reimbursable grants may be made to Indians for profit-making economic enterprises on or near Indian reservations. 1977.

The Bureau of Indian Affairs will administer the programs established by the Act and only Indians who qualify for Bureau services are eligible. Following are brief descriptions of the programs authorized:

Title I - Indian Revolving Loan Fund - U.S. Direct Loans

This Loan Fund is a consolidation of existing revolving loan funds already administered by the Bureau of Indian Affairs under three different Acts of Congress: Indian Reorganization Act, Oklahoma Welfare Act, and the Navajo-Hopi Rehabilitation Act. Whereas, there were restrictions on eligibility for loans under each of the Acts listed, Section 101 makes the total revolving loan fund equally available to all Indians having a form of organization satisfactory to the Secretary of Interior. Direct loans to Indian individuals may be made in cases.

The Secretary of the Treasury determines the rate of interest on loans under the Act taking into account the average yield on marketable government securities. Loans will be made only where there is a reasonable prospect of repayment and only after the applicant has exhausted all avenues of reasonable financing from other lenders. Loans will not be made for a term of more than 30 years. Loans may be made for business and educational purposes.

Land purchased with a loan may be taken in trust unless it is outside an Indian reservation or tribal consolidation area. Land outside such areas may still be taken in trust if the purchaser owned a trust or restricted interest in the land before the purchase.

Title II - Loan Guaranty and Insurance

The Secretary of the Interior is authorized to insure or guarantee loans to eligible Indians from private money sources. The Secretary may guarantee up to 90 percent of unpaid principal and interest on a loan. He may also insure 90 percent of the loss on a loan, but only to a maximum of 15 percent of aggregate of loans made by a lender under the Act. No loan to an individual Indian may ge guaranteed or insured which would cause the total unpaid principal indebtedness to exceed $100,000. No loan to an economic enterprise in excess of $100,000 shall be insured unless prior approval of the loan is obtained from the Secretary. The term of insured or guaranteed loans may be no more than 30 years.

Land purchased with a loan insured or guaranteed under this Title may also be taken in trust with the same qualifications imposed by Title I. The aggregate of loans insured or guaranteed under this Title may not exceed $200 million. The appropriation authorization for insurance and guarantee is under Title III.

Title III - Interest Subsidies and Administrative Expenses

This Title authorizes a subsidy on loans insured or guaranteed under Title II so that the borrower will have to pay no more interest than the rate set by the Secretary of the Treasury for loans from the Indian Revolving Loan Fund. It also authorizes an appropriation of $20 million each for the Fiscal Years of 1975, 1976, and 1977 to cover interest subsidies, administrative expenses of the Act, and loan guaranties and insurances.

Title IV - Indian Business Grants

This Title sets up an Indian Business Development Program which can make grants of up to $50,000 to Indians or Indian tribes to start or expand businesses for profit on or near Indian reservations. The grantee must obtain at least 60 percent of the total financing for his business from some other source and must invest his own money in the business, if he is able to. $10 million in each of the years 1975, 1976, and 1977 is authorized to be appropriated under this Title.

Title V

Title V is concerned with providing management and technical assistance to borrowers and grantees under the Act. The Secretary must provide such assistance utilizing Federal Agencies such as S.B.A. or ACTION or may contract with private organizations. The Secretary can use up to five percent of money appropriated under Title III so the maximum amount that can possibly be available for contracts in any one year is $1 million.

A Final Word.

"In short," Rushing concluded, "don't count on banks as being easy sources of funds. You can't use the same song and dance you use for charities or foundations - it just won't work. On the other hand, it can be done by understanding their system, preparing yourself well and showing them that it is in their mercenary self-interest to deal with you. For too long we have listened to white men talk to us and we have watched them have a dialogue between themselves without us. We must now talk for ourselves - and we can do it!"

CHOOSING YOUR ADVISERS:

WHO CAN YOU TRUST?

One of the major decisions that tribal decision-makers must make is that of choosing their advisers. The general incompetence of Bureau of Indian Affairs and other government agency personnel in the field of resource development is admitted to by everybody from the Commissioner himself to the Comptroller General to the Federal Trade Commission. While it is fashionable to kick the Bureau of Indian Affairs around, it is neither particularly satisfying nor is it productive. Further, it causes us to overlook many individuals in those agencies who are both competent and sensitive to the complexities of problems with which tribes must deal. They have an added value because they know how the bureaucracy works and why things happen or don't happen. If they are smart, they learn to share information with people they can trust in the Indian community. A tribal decision-maker quickly learns that information is your most valuable commodity. If you know what's happening nationally in the Congress and in the various government agencies, if you know what's happening in your area and agency offices, then you have a much better chance of making proper tactical decisions. That doesn't mean that you should be governed by the trends; merely that you know where the lines are drawn. It is important to establish relationships with people you can trust and those relationships should be built slowly and carefully, and with an understanding of the mutual benefits that can be derived. While it is important to know decision-makers, never underestimate the value of the poeple who actually do the work--the secretaries, the clerks, the support staff for the decision-makers. For

instance, there ain't no way the decision-maker will ever return your calls if the secretary doesn't pass them on. Those of us with good secretaries quickly come to value their opinions and advice as well as to rely on them for mechanical operations of the office--for making us look good.

Another source of advice and expertise that is often overlooked is that available in other tribes. The Quinnaults, for instance, have devised a whole new technology for fish hatchery development. They have been very generous in providing assistance and advice to other tribes. The Lummis have the most successful aquaculture program in the country, including industrial fish farm operations. The Colorado River Indian Tribes and Ak Chin have highly successful tribal farms. Some of the best received parts of our training sessions during the past year were those in which individual tribes shared their experiences and expertise. If your tribe has a particularly successful project or special expertise in a certain area of natural resource development, perhaps you could share that with another tribe. In return, they may be doing something very well that you need help with.

There are both profit making and non-profit making Indian organizations who have expertise in various areas of management, business development, tribal code development, etc. The Office of Native American Programs, the Economic Development Administration, the Office of Minority Business Enterprises and various foundations have funded organizations to provide certain kinds of technical

assistance. This document, for instance, is based on a series of regional training seminars for tribal decision-makers partially funded by the Economic Development Administration.

The business community is another source of expertise. Establishing contact and finding someone you feel comfortable working with is a problem, but it can be done. The Equitable Life Assurance Society of the United States, the First National City Bank, Merril, Lynch, Pierce Fenner and Smith, have all furnished consultants for our seminars, for instance. There are various reasons why the industrial community is interested in providing assistance to Indian tribes. The community as a whole is under pressure to provide assistance to minorities to improve their corporate image. It is good public relations. It may be in their financial best interest as well. They may want to make a deal with you. Or there may be a person in their hierarchy somewhere who is Indian or who has a strong personal interest in the Indian community for one reason or another. Just a good person. In some cases, you can learn a great deal just from studying the way a successful enterprise in your area works. Wayne Sprawls, for instance, who assisted Ak Chin and Colorado River Indian Tribes in starting their tribal farms, learned to be a highly successful farmer himself by picking out the most successful farmer in the area and copying his methods. He leased Indian land and farmed it himself. He became acquainted with members of the tribe who asked his advice about maximizing their agricultural lands--how would he do it if he were the tribe.

He advised them to quit leasing it and farm it themselves. (You won't find many Wayne Sprawls--). When the tribe had trouble getting started with financing and Bureau of Indian Affairs regulations, Wayne took it as a personal challenge, used his personal reputation as a selling point and helped the tribe secure financing. As soon as the project proved itself and they were able to find a business manager, Wayne got out. A rare case, yes, but proof that it happens. Wayne made money and the tribe made money. Wayne didn't need the money; he was making money anyway. He incurred the wrath of his neighbors who lost their leases. Why? He is a good man with a basic sense of justice. And he had Indian friends. When you seek help from the business community, know where they are coming from and assess their advice accordingly. Remember, the final decisions are yours.

In the past, legal advice was the kind of advice most often sought from outside expertise. Most people view lawyers and "the law" with a kind of awe that inhibits the kind of questioning necessary to explore a legal question or the qualifications of a lawyer thoroughly. It must be remembered that there is very little "Indian law"; that is, interpretation of the laws of the United States applied to Indian rights. Most issues have not been decided by any court, and only very few issues have been decided by the Supreme Court. Even after decisions are made, the Congress may pass new laws which modify or make them meaningless, or the Court's order may not be enforced. There are few lawyers trained in "Indian law" and even fewer Indian lawyers. While the number of Indian lawyers has increased dramatically during the last five years largely due to the efforts of the American Indian Law Center at the University of New Mexico, there are still not nearly enough, and for the most part, they are young and inexperienced.

There is a tendency among Indian tribes who can afford it to choose large, prestigious law firms who built their reputation in the Indian community by handling claims cases. There is some value in making that kind of choice, but there are some things to keep in mind in that regard.

Claims cases, in nobody's mind, have ever been considered pure legal cases because of the political ramifications involved. Thus a claims lawyer had to not only be well versed in claims law but had to be politically knowledgeable and able to assist in lobbying the settlement through the Congress. They had, of course, the added incentive of a percentage of whatever they finally won, usually, plus expenses. There was a certain amount of risk involved. There were usually large up-front expenses involved that only a wealthy law firm could afford to incur. If the tribe had no money, then the lawyer had to assume the risk that if he lost the case, he would have to wait out the cumbersome process of BIA payment and be subject to its limitations. That risk was usually balanced by the fact that those attorneys only took the cases they were pretty sure of winning. Many of these same firms provide pro bono (that is, "for the public good") services to Indian tribes. This may happen because they are extraordinarily good folks with a soft spot in their heart for Indian people. Or it may be because they can take the amount they would have charged as a deduction on their income tax; they can get some good experience for a young attorney who will be assigned to the case without risking offending one of their paying clients; or they will build up "good will" for potentially more lucrative relationships. Usually, it is a combination of all of the above. They are basically good people who understand long range benefits.

The value of these large and prestigious law firms should be recognized. However, it should be remembered that expertise in

one field does not necessarily mean expertise in another. If you want a divorce, you don't go to a corporation attorney.

There are public service Indian law firms such as the Native American Rights Fund and California Indian Legal Services Program, who provide legal services to Indian tribes without fee. The American Indian Law Center, The American Indian Lawyer Training Program, the National Indian Youth Council and various other Indian organizations provide services to Indian tribes and individuals as well. Those organizations suffer from a lack of funding and from limitations placed on them in restricted grants and contracts as do most non-profit organizations. Heavy case loads require that they make choices about the kinds of cases they handle. Non-profit Indian organizations, legal or otherwise, are subject to the same temptations that tribes are--that is, to seek and accept funding that does not necessarily fit into the best long range purposes of their organization or the best interests of their constituencies, in order to keep the wolves away from the door.

Perhaps the most satisfactory way to secure legal services is for each tribe to have its own full time attorney that answers only to that tribe. Unfortunately, this is not an option for most tribes. Even if it were, the tribe would have to understand that attorney's limitations and to seek specialized expertise when necessary.

As tribes move into the development of their own resources, they face a whole new set of problems in finding the expertise

they need. One of the problems is recognizing what you need and then locating it. Many of the fields of expertise are totally outside the experience of the Indian community and almost everybody else. For instance, as Colorado River Tribes expanded their tribal farms, they found that the technology related to pest control and the associated federal regulations were so complicated that they needed the full time services of an entomolygist just to identify the kinds of bugs that were attacking their crops, to prescribe legally acceptable and appropriate chemicals, and supervise their application. That may sound funny, but when you think of the ramifications of choosing to let your crops die or using the many potentially lethal chemicals in a way which might be hazardous to your tribal members through direct contact or throught pollution of your air and water, it makes ultimate good sense. Similarly, when you begin to negotiate with large multinational corporations about developing your minerals, it doesn't make much sense to go into those negotiations without the benefit of the advice of experienced negotiators.

There are a few basic rules to remember when you choose your advisers.

1. If you are paying, they work for you, whether they are lawyers, negotiators, management specialists, or whatever. They are being paid to provide you with advice and not to make your decisions for you. If they are being supplied by a firm or organization with government or other funding for the purpose

of providing you with technical assistance, they still work for you and serve at your pleasure.

2. If you are paying, you should know in advance what it will cost. Professional people have prices for their services and should not be hesitant about telling you what they are and putting it in writing. Beware of attorneys or negotiators who work on a percentage basis or who want a "piece of the action".

3. Know your adviser's background. Check it out. Do not be shy about asking questions or checking references. You have a right to know. Make your own judgments. The best advisers are those who recognize their own limitations. For instance, highly competent claims or civil rights attorneys may not know beans about negotiating a joint venture development agreement. But he might know someone he could recommend. If he wants to learn to negotiate, there would be nothing wrong with letting him work with the pro at his own expense, not yours.

4. If you have any doubts about the advice you've received, check with another source. Yes, it's expensive, but if you are making million dollar decisions, it's cheaper in the long run. You don't often get second chances on decisions of that magnitude.

The best long range plan is to develop your own tribal expertise. Start identifying the kinds of expertise you are going to need five, ten and fifteen years down the road. If your reservation has timber, for instance, you know that if you manage it yourself you are going to need foresters, marketing specialists, engineers to build the necessary roads, etc. Then start looking

at your young people and encourage them to get the kinds of training they are going to need to handle those jobs. If you have a scholarship program, there is nothing wrong with saying what skills they go for and establishing a repayment system in service to the tribe. When you do your planning, don't forget that your tribe is going to need new tribal council members, someone to replace you.

You pay for what you get. Be sure you get what you pay for.

DEALING WITH DEVELOPERS

"A great many American Indian tribes own extremely valuable natural resources--water, timber, and minerals. The trouble is that government policy has encouraged the use and development of these resources by non-Indians, and has simultaneously encouraged tribal members to move to the cities for outside employment. The result is that our reservations have the highest unemployment and the lowest family income of any ethnic group of Americans.

Native Americans can realize more from their resources than just a lease payment. They can also choose development alternatives which avoid the presently threatened destruction of their culture and environment. The challenge before us is to discuss and decide how Indian tribes can conserve and develop their own resources at their pace and in a manner which is economically, culturally, and environmentally sound."

LaDonna Harris, President
Americans for Indian Opportunity

Dealing with developers is the most complex and perhaps the most frightening part of Indian control of Indian resource development. The energy shortage and impending worldwide shortages of other minerals, of food, timber and water, have brought us all to the realization that tribes are the largest private owners of all those resources in the United States, and perhaps, in the world. In the case of non-replenishable mineral resources the decisions you make now may be the last ones ever made by your tribe. If you choose to develop, when your coal is gone, it's gone. When your copper is gone, it's gone. And the pressure is on to develop. Now. If you choose not to develop, there may not be a market for it a few years down the road as alternative sources of energy are developed. Hard choices.

The following is a report of a presentation given by Charles Lipton at the Great Lakes Seminar, prepared by this author, but edited for accuracy by Mr. Lipton. Following that

are a series of papers written by Charles Lipton and Stephen Zorn, both of whom have considerable experience working for developing foreign nations dealing with developers.

PART VII: DEALING WITH DEVELOPERS

"I have advised many developing countries on natural resource agreements. The Indian leases in this country are among the worst that I have seen; they can only be compared to the old colonial agreements of thirty and more years ago," began Charles Lipton, an international attorney and negotiator.[1]

"The Tribes have been pretty well taken," he said. "One Tribe, for example, entered into a coal lease where all they get is a fixed royalty of 17½¢ per ton, without any relationship to what kind of coal it is -- how high grade, or how low the sulphur content -- and more importantly, without any relationship to the value of coal. When coal prices go up, the Tribe won't get anything more; the lessee gets it all. And we all know what has happened to the value, the purchasing power, of the dollar in the last few years." Lipton pointed out that 17½¢ will buy only half an ice cream cone today. "What will it buy in five years time?" he asked.

"And the story is even worse than that and not far back in history either. In May of 1971, the Tribe entered into a lease agreement after advertising and presumably competitive bidding, with a Billings lawyer -- a speculator. Just six months later, he assigned the lease to Chevron. For that assignment, he received $1,380,749.50. The Tribe did not receive one penny. In addition, that Billings lawyer and his descendents will receive a 9¢ per ton royalty, more than half the royalty the Tribe gets for each ton of coal mined."

Lipton cautioned the participants, as Price had earlier, to be wary of their advisers. He said that he had a phone call a few months back from a Tribal Chairman in South Dakota who had heard him speak once before. The Chairman just wanted a reaction to a proposition. A fast dollar artist was going to help the Tribe lease their land to petroleum companies -- and he was going to be damned reasonable about it; he wasn't even going to charge them for his time. All he wanted was 2% of the royalty. That is to say, if the royalty was 12½%, he would get 2% and the tribe would get the remaining 10½%.

"I told him that it was just about the worst thing the Tribe could do. After all, that character wanted 1/5 of what the Tribe would get. It could be many millions of dollars," Lipton said.

[1] Lipton has advised 22 governments overseas on the negotiation and drafting of natural resource agreements, legislation and regulations and is a consultant to the World Bank and to the United Nations.

"There are many lawyers and advisers around -- some of whom are experienced and quite prepared to give their time and advice for a fee on a time basis. Don't give up any interest in anything to anybody," he said. "That's been the trouble, the Indians get a few cents and the big companies, the speculators and the rip-off artists get all of the profits."

"Deciding what the Tribe wants to do and resolving to do it is the most important step in controlling resource development. You may be told that the law or the regulations won't allow this or that. The object of the exercise is to decide what you want and figure out a way to do it. There are not only more ways than one to skin a cat -- there's more than one cat to skin," Lipton said.

The approach should be positive, not negative. For instance, if the Bureau of Indian Affairs regulations require that a Tribe advertise for competitive bids on a lease form (or ask for an exemption) it need not be the Federal lease form. You should be able to draw up your own lease form, provided that it meets the minimum requirements of the Federal Regulation. Those are supposed to be minimum provisions to protect the Tribes, not maximum provisions to exploit them. In any event, Lipton maintained that a lease is not the most advantageous form of agreement for a Tribe to use.

The Federal Lease Form

Lipton pointed out that the Federal lease form is a lessee's deal -- that is on balance the clauses favor the developers, rather than the owner. The Federal lease form has routinely been used for public lands and for Indian land under Federal trusteeship. "We must recognize," said Lipton, "that what is good for the Federal government on federally owned lands is not necessarily good for the Tribes on Indian owned lands."

Lipton went into the reasons for this. The Federal government is going to get its financial return not only from the lease itself but also from taxing the profits made by companies using the raw materials from the Federal lands. The Federal government also has some interest in subsidizing the needs of the country as a whole -- energy, for instance. Leasing coal owned by the public for 17½¢ per ton can also be rationalized on the basis that cheap energy is badly needed, that the companies developing coal deposits will pay taxes on their profits to the Federal government, and that jobs will be created and employees will pay taxes to the Federal government. Leasing Tribal coal cannot be rationalized that way. There can be no justification for some of the poorest people in the country subsidizing the needs of the rest of the country, much less the wealthy multinational corporations. Nor can the failure of the Tribes to get a fair share of the profits from their natural resources be justified either.

Worst of all, under the Federal lease form, the Tribes have no control over the development of their resources.

"Control means who makes the basic decisions regarding a project," Lipton said -- It is very important that before negotiations are undertaken, the basic decisions are identified and a determination is made as to who will make them. For instance, timber owners may determine what the annual cut will be, the reforestation cycle, the species of wood to be grown, etc. Mineral owners may determine how much mining there will be and where; at what rate; what factories are going to built, if any; where they are to be located, how and when the land will be restored, etc. They may decide to what extent the raw materials will be processed before it passes from their control. Timber may be cut; a saw may be established; a chipping plant; pulp and paper mill; a plywood plant; veneer plant; furniture factory. The more you upgrade, the more you add to the value, the more you add to the deal in terms of money, jobs and the "Multiplier Effect" - the creation of new local services, small business and feeder enterprises.

Owners may set conservation standards, environmental standards, training programs and employment and promotion quotas. Developing countries no longer settle for "employment preference" clauses. They set out schedules, for instance, that after five years 90% of the employees in each job category will be local people; in ten years 100% execept for certain specified jobs. They don't accept a clause that provides for employment of local people only "if qualified people are available". The developer must qualify them. There may be a requirement that for every ten outsiders, one local person will be sent to school; or for every five outsiders, one local person will be put in a training program. Owners may decide where housing projects will be built and how they will be built. "Many don't go this far yet," Lipton said, "But they will. That is what control is about."

"Many of the same American corporations who are dealing with Indian Tribes are giving better terms to the governments of foreign countries where they are further away from markets, where transportation costs are greater and above all, where their risks are greater," Lipton said. Tribes must come to the negotiation table knowing this and insist on better deals.

What are the forms of agreement that have been used by developing countries?[1]

Concession agreements. Concession agreements are one of the early forms of agreement. A concession agreement gave title, ownership of the resource, to the foreign investor and allowed

[1]In speaking of developing countries, the words "government" and "owners" are used interchangably. All mineral rights are owned by the government in developing countries.

the foreign investor to come in with his own law or froze the local law so that it couldn't be changed. These concessions were justified on the basis that it was the investors of the mother country, the colonial administrative country, whose interests were to be protected, not the local people. They had no control over the development of their resources at all.

Lease agreements. Lease agreements were used before World War II. They usually provided for a fixed number of cents per ton for minerals or per acre of timber cleared. As the value of the raw material went up, the increased profits went to the lessees, and the owners got nothing more. As the value of the currency went down, or depreciated, the owners got less and less for giving up more and more. The local people remained the owners, but they had no control over the development of their resources, until later, with political independence, when they enacted their own legislation. The lease term was usually ninety-nine years, but really longer as the term ran until the mineral deposit was mined out. The lease form usually did not include meaningful provisions for the employment of local people, or for the development of local business - the Multiplier Effect. The Indian coal and petroleum leases of today are very much like those old lease agreements. Leasing is not development.

What are the forms of agreement that are now being used by developing countries?

1. Joint ventures. Joint ventures are agreements where the parties form a kind of partnership and agree on a sharing of the risks and the profits, and agree on how the basic decisions are going to be made. Lipton stressed that most developing countries now insist on structuring their resource agreements so that their financial return, sometimes called "the government take," comes in three ways:

    (a) they collect a royalty which is not fixed in cents per ton or trees cut; the royalty is a fixed percentage of the market value. This guarantees a cash flow, whether projects prove to be profitable or not, and insures that the payment is in proportion to the value and will increase if inflation raises the value of the resource.

    (b) they collect their own profits tax; and their auditors make that calculation.

    (c) they obtain a participation in the net profits.

Lipton explained why developing country officials like joint ventures. "They say, we want to eat out of the same pot the foreigners do. That's why we want a joint venture and want to share in the net profits. We know they've got good engineers; we know they've got good accountants; we know they've got many different ways of moving money around. The raw material is ours, and that's our contribution to the joint venture. The developers who are contributing capital know how to use their marketing ability. But the basic value is ours; we want to have a share of the profits from it."

Joint venture agreements are complex and you have to know what you are getting into. Lipton said "if you think you have been skinned before, when you go into joint ventures, the opportunities of getting skinned again are increased immeasurably if you don't watch what your partners are doing." Once a joint venture is entered into, as in any other partnership, you must be sure that partners act and continue to act properly. What is won at the negotiating table can be lost later on if you don't watch out for your own interests.

2. Production sharing agreements. The production sharing agreement is a variation of the joint venture. The owner's take is in-kind rather than in a percentage of profits, like a share cropping arrangement. The owners can then market their share themselves. This works well for certain resources like petroleum, timber, or gold; often to the advantage of the owners because you can't be sure that developers are selling to the best advantage. They may be selling at reduced rates to their own subsidiaries or to others who will reciprocate. This could make the profits lower and thus the owner's share lower.

3. Service contracts. The newest form of agreement is a service contract under which the owner hires a company to develop the raw materials for a fee. This is similar to employing a contractor to build a road or a building. The fee could be a percentage of the value of what's produced, a percentage of the profits, or a fixed amount of dollars. While the owner has complete control, the owner also bears the total risk, but gets all of the profits.

The Venezuelan government, for instance, hired an American mining company to mine an iron ore deposit, deliver the ore to a port and load it on a ship. They paid so many cents a ton for it. The Venezuelan government has hired a second company to market the iron ore for them, and they are paid a marketing fee.

The government of Iran has hired an American mining company, Anaconda, to mine a copper deposit for them for a fixed fee. Both are very large projects and in both cases, the owners -- the governments of Venezuela and Iran -- are bearing the total risk. You cannot expect 100% of the profit if you are not willing to take 100% of the risks -- but there are ways of minimizing those risks.

An example of a small scale service contract is the development of a kaolin deposit in Swaziland. (Kaolin is a kind of clay -- one kind is used for making dishes; another is used to coat paper with a slick finish. Swaziland is a small country in Southern Africa). The Swazi discovered that one foreigner was mining kaolin under a lease and had simply hired fifty or sixty Swazi to do the work and he was making the money. The Swazi decided not to renew his lease and to run the mining operation themselves. They hired an expert to tell them where to find the best grade of kaolin, hired a mine manager and took over the total operation.

<u>What does an investor look for when he considers a deal?</u>

1. <u>Discounted cash flow rate of return</u>. The calculation of a discounted cash flow rate of return (DCF) can be complicated, but basically it is a method to show how much money an investor will get out of the deal compared to how much money he must put into it over a period of time, based on the present value of a dollar. A dollar today is obviously worth more than a dollar a year from now. An investor will want to determine what he can reasonably expect over the life of a project expressed in terms of today's dollars. If he sees he can only expect a 6% or 8% DCF rate of return on his investment, he'll probably put his money in a savings bank or government bonds -- it's easier and safer. He decides on a minimum amount of return he'll settle for or he won't make an investment. To the extent that he can get more than that, a Tribe has not made its best deal. At this point, predictability and stability come into play.

2. Predictability and stability. A company which would in all likelihood invest in an operation in the United States with an expected DCF rate of return of 15% would never invest in the same operation with the same return in an unpredictable, unstable country. Indian reservations face the same kind of scrutiny. If a tribe is together and there's relatively little internal dissention, then an investor might settle for a smaller rate of return. On the other hand, if they throw their tribal chairman out every year, an investor will look for a higher rate of return because of the unpredictability. That means tribes will get less -- the price of uncertainty must be paid. "There is no free lunch" as Lipton stresses several times.

How can tribes know if they are making a good deal? Lipton said, "If you've got as much as you can and given as little as possible, then you've made a good deal. In order to negotiate with an investor, you've got to put yourself in his shoes, and to the extent possible, know what he knows, otherwise you are in a very poor bargaining position."

The feasibility report is a very important negotiating tool. It is a report prepared for the investor which sets out a complete plan for the organization of a project, how it is to be done and how it is to be financed. It also includes a projected DCF rate of return. It therefore contains the basic information on which a developer bases his decision to invest. Without it, a Tribe doesn't know what the real situation is. You are negotiating in the dark. You may not know the value of your coal or your timber, but you can be sure the investor knows. He knows it very well. He's done it many times in many different places. "Compared to you, they are standing in flood-lit rooms and you don't even have a flashlight," Lipton said.

It is very hard to get good feasibility reports. You can insist on seeing the developer's report and you must be sure it's the real one -- the one they show their Boards of Directors. You must have some method of verification and a sophisticated Tribe would make sure they got the right advice from experts to check it out.

What should a tribe look for when it considers a deal? Basically, the same things an investor does: what will the Tribe get out of it compared to what they put into it? The Tribe must consider both the negatives and the positives:

1. Cash revenues.

2. Jobs.

3. Training people in skills that can be used in other enterprises.

4. Service and feeder enterprises - How can the Multiplier Effect of an enterprise be increased? If it's a timber operation, can we start a plywood plant or a furniture factory? If it's a hotel, for instance, can we start supplying the meat to the hotel? Can we start our own grocery stores, service stations, etc. to keep the new dollars in the community? (According to a report prepared by the Secretarial Commission of the Department of Interior, on the Pine Ridge Reservation the average payroll dollar turns over less than once on the reservation. In a well-rounded, fully developed economy, the "original" dollar of the foundation industries characteristically turn over from five to seven times through local services. In a report prepared by the University of Oklahoma in the late sixties, economists found that on an average, for every seven new out of town students at the University, one new job was created in the service enterprises in the community. It would seem to follow that the creation of new jobs on the reservation should be followed by an increase in employment in service industries.)

5. Alternative uses for the resources - Strip mined land cannot be farmed or ranched.

6. Effect on other resources - A mining enterprise, for instance, will require water. Water is a resource with a price on it, too.

7. Environment - If it is a factory or industrial operation, there may be pollution. Your water and air may be polluted. Strip mining has devastating effects on the land unless properly controlled with tough restoration requirements.

8. The impact on the community - Will the enterprise bring in an influx of outsiders? If so, what about cultural disruption and the costs of outsiders such as schools?

Cost/Benefit Analysis

Cost-benefit analysis is a method of comparing the quantified costs of a project to its economic benefits.

There are costs to a government or an owner which may be indirect but which must be considered and evaluated against future benefits. Such costs include the value of water used in the project, alternative uses for land, the costs of road maintenance and providing schools and facilities for new workers. Then one has to consider the effect of inflation which seems to follow a large scale project unless controlled. Of course, one must take into account factors that are difficult to quantify, such as environmental damage, credit limitations and the impact of a large project on the traditional way of life of the local people. "For example," Lipton said, "in Switzerland, the government will not allow a coal deposit to be explored. It's under a game reserve. They say, 'It's very important to our people that game be here. We don't care how much money is going to come out of the land from a coal mine because a hundred years from now, that will all be gone. A hundred years from now, game is still going to be important to our people. We're going to keep this a game reserve.' When I say - let's find out what's under the land, maybe there's a billion dollars of coal there and we'll just move the game reserve, the government answers: 'No, we don't even want to know. We might be tempted.' That government has made a cost-benefit analysis and to them the cost is more that the benefits."

Negotiations

So far, there is a tremendous imbalance of information and experience between the developers and the Tribe's side of the negotiating table. There is usually nobody in a Tribe with commerical experience equivalent to that of an executive in a big corporation. On one side of the table, you may have the Vice-President of a corporation making $100,000 a year with his lawyer making $150,000 a year, who may have done this fifty times all over the world. On the Tribe's side, they've just never done it before. Developing countries now seek advice from outsiders and they have begun to train their own people. "The first time maybe they don't make such a good deal, but they learn, and the second time, they make a better one and the third time around, they know what to ask for and the experience to know how to get it," Lipton said. But the difficulty with the Tribes is that some just cannot afford to make mistakes, or all their resources could be leased out.

Information is power. Developing nations have begun to exchange information. In many respects that is what the producers associations are about -- the Organization of Petroleum Exporting Countries, the International Bauxite Association, the Iron Ore Producers Association.[1]

In many cases, information on the kinds of agreements negotiated by others can be learned through research. Outsiders with expertise may be hired out, but they should only be hired -- they get paid for their time and their experience but they should never get a piece of the action in the form of royalty payments or percentages of profits.

There are many, widely varied issues that come up in dealing with developers. Each project must be undertaken carefully and considered from every possible angle before, not after, an agreement is made. Expertise must be sought when necessary and used early. But the overriding considerations in every case must be control and a fair return to the Tribe. As Lipton put it, "In the last analyses, nobody really cares whether you get a good deal but you."

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[1] Indian nations have also begun to form producers associations. The Council on Energy Resource Tribes is a coalition of the tribes with producing or identified energy resources such as petroleum, coal, oil shale, and uranium.

FORMS OF AGREEMENT

By: Charles J. Lipton

The term "concession" in the mineral industry today is an all embracing term, covering any agreement between the government and an operator for the exploration and production of mineral resources. This is not its traditional meaning.

The traditional concession was a grant of a property right in minerals, usually for a very long period; 99 years was by no means unusual. The investor had an almost complete property right in the minerals minerals in the ground, that is to say all the interest but the bare legal title. In the Anglo-Saxon system, it was a mining lease which conveyed the property right. In the Old British colonial mining legislation, a patent was issued confirming the property right.

Concession agreements granted exceptions to the investors from the laws of general application. The early concessions actually created enclaves, a form of extra-territoriality in which the government's writ did not quite run. The enclave became in a sense a foreign country: They did things differently there.

The operators were assured that government would not interfere with what they termed "management prerogatives". It was for the investor alone to determine how the minerals would be mined, at what rate, at what cut-off grade; the extent to which they would be processed in the host country if at all, where they would be sold, on what terms and conditions and prices; where the revenues would be kept, in fact, complete discretion unhampered by any view that government had an interest or concern in these basic decisions.

In part, however, and in the context of that period, this was the result of the law and the regulations of the host country not being sufficiently developed into a system to regulate the mining industry. The concession agreement itself often filled the void or vacuum which then existed. It goes without saying that seldom was the concessionaire a legal entity organized under the laws of the host country, but almost without exception a foreign legal entity.

In the concession, the government usually agreed to give more favourable treatment to the investor, with respect to the fiscal regine, than it would have given to one of its own nationals.

In the early concessions, the government revenue was based solely on a royalty, usually expressed as a fixed amount per ton of the mineral extracted and sold. The value of the minerals or the profit made on the sale of the mineral became, therefore, irrelevant to the government under such a concession. In turn, the investor provided all the capital for the mining project, not just for

the plant and equipment, but for the infrastructure as well. Railways, port facilities, roads, townships, power and water supplies were proved at the concessionaire's expense, operation, except to the extent that excess capacity existed which could be made available to the public or to third parties on specified terms. Having contributed all of the capital, the concessionaire expected to receive all of the profit.

It should be recognized however, that governments have to a large extent participated in the financing of the mining industry, both directly and indirectly; directly through provisions of public roads, ports and the like, and indirectly by providing for tax free treatment of interest payments and their complete deductibility as well as capital allowances and accelerated depreciation.

A good many of these concessions were granted by colonial administrations. Their concern was usually to make profits for the investor from the "home country". Those profits were to be brought home, and so a good many of the issues that concern us now were not only irrelevant, but they were unthought of in those days.

The times changed and operators were made subject to income taxes as the colonial administration sought to generate its own revenues to meet its own expenditures.

After the breaking of the waves of political nationalism after the Second World War which resulted in the independence of most of the former colonially administered countries, there came a recognition that political independence did not necessarily mean real independence. As long as new governments depended on subsidies for their recurrent expenditures from their former colonial administrators, real independence was doubtful. The developing countries then entered into a new era, one of asserting economic independence. It is clear that the waves of economic nationalism have not subsided. In some countries this took the form of giving their nationals preference in operating certain types of business. It also led to nationalizations.

Economic nationalism has affected the older independent countries as well as the newer. The Prime Minister of Australia, in a speech at this year's Commonwealth Conference, referred to the multinational companies and said that Australia would not be master of her own house as long as the Australian mining industry was dominated by such companies.

In July of this year, the government-owned Canadian Development Corporation (CDC) tendered to acquire about one third of the shares of Texasgulf, Inc., sufficient to give CDC working control of this American company. Texasgulf derives more than fifty percent of its income from Canada, including the famous Kidd Creek copper mine in Timmins, Ontario. CDC was organized by the Canadian Government which is concerned about the extent to which foreign companies control or influence its economy.

In negotiating mineral development agreements, governments, particularly those of new independent countries, were negotiating in unfamiliar areas of technology, law and economics. Information was difficult to obtain. Traditionally the terms and conditions of concessions were kept secret. It was rare that government negotiators knew of the terms and conditions in comparable agreements. Hence, they were at a disadvantage in negotiating alternatives to proposals made to them by investors.

However, governments increasingly became aware of the terms and conditions of exploration and mining agreements negotiated in other countries. In part, this was a result of the establishment of the Organization of Petroleum Exporting Countries (OPEC) and the shift in the pattern of supply and demand in the petroleum industry. OPEC publicized negotiating positions and the terms and conditions of agreements. Governments that were not members of OPEC nonetheless began to appreciate that they had a source of information with respect to agreements which have their definite counterparts in hard minerals. OPEC became a significant force in changing the concession pattern in the petroleum industry and this in turn, with a time lag that still exists, is affecting the mining industry.

There have been a comparative information explosion in the last ten years. Articles appeared in the magazines and journals as academic specialists (economists and lawyers particularly) interested themselves in mineral agreements. Increasingly the technical journals began to report the terms and conditions of new agreements. International and national organizations provided governments with experts and advisers who themselves had information about comparable terms and conditions and were able to draw on their own experience and sources of information to advise governments in mining negotiations. Lawyers and other experts became available to advise governments in the very negotiations themselves.

At the same time, governments are sending their own officials and promising students to study mineral economics, marketing, finance, law and business organization so as to be able to obtain their own counterparts to the investor's negotiating team. Government in-house expertise in most countries is still limited however, and usually not equivalent to that available to mining companies; nor is their information nearly as complete as that available to them.

Other more fundamental, technological and economic factors have become increasingly important. Improved technology allowed relatively low-grade deposits to be economically mined. These deposits, because they are low-grade, inevitably have to be large deposits to be economically viable. In turn this requires enormous capital expenditures, often too large for any mining house. This leads to the formation of consortia and often multinational consortia, as a method of raising necessary equity capital and to enlarge potential sources of loan capital.

One of the post-war developments has been the extent to which capital has been made available to developing countries under multilateral and bilateral arrangements on advantages and soft terms. This has not only resulted in the savings in the cost of capital to a mining venture through the government contribution of infrastructure but sometimes in the supply of a part of the loan capital itself which is a very significant contribution to large-scale mining projects.

Such funds have been obtained from the International Bank for Reconstruction and Development (World Bank). Industrial countries themselves recognized responsibility to assist the developing countries and many aid agencies were established, such as the United States Agency for International Development, the British Overseas Development Administration and similar agencies and institutions by Canada, Sweden, France, the Federal Republic of Germany and others. Governments thus have a source of finance for infrastructure as well as for the mining operation itself. At the same time, government sought the ownership of infrastructure so as to be in a position to control railways, ports, roads, and power and water facilities to further development plans unconnected to the mining sector..

Proposals by foreign investors into joint venture agreements were attractive, particularly to developing countries anxious to find new revenues to finance their development plans. Governments did not wish to increase the rate of company income tax beyond a certain level, and this in part accounted for the relative attractiveness of the joint venture form of agreement as a method of increasing revenue through profit participation without increasing the income tax rate. Governments which only had a fixed per ton royalty and a generally applicable company income tax rate of 25.40 percent found that a 50-50 joint venture proposal was most attractive. Operators, on the other hand, were interested in limiting government's take to 50 percent of the gross profits.

Sometimes these joint ventures were not necessarily what they appeared to be. Political pressures often resulted in the government negotiating joint venture agreements in which the government would have 50 or 51 percent of the equity of the operating company. However, this was sometimes not a real 50 percent as dividend and voting restrictions operated to make such participation apparent but not real.

Management agreements with compensation set as a percentage of gross profits also operated to substantially change the apparent distribution of revenues in a mining joint venture between an investor and government.

The psychological attractiveness of a 50-50 partnership cannot be exaggerated. It had domestic political value. Newly independent

countries were also particularly anxious to participate in the development of their own mineral resources. They saw the joint venture as a way by which the operation of mining companies could be harmonized with the development objectives of the government.

In a classic case, a government completely abrogated its position as a government and elected to be treated as a commercial partner in a 50-50 partnership. This government gave up its right to tax and even to inspect the books and records. It is or should be apparent that a tax of 50 percent of taxable income calculated by a Collector of Internal Revenue in accordance with a Fiscal Code and established procedures will yield more revenue to a government than a 50 percent interest in dividends when and as declared with no taxes otherwise payable.

The development of the joint venture form did inevitably lead to the establishment of operating mining companies under the law of the host country instead of under foreign law and this is proving to be of great benefit. Where the operator is organized under local law, it is then subject to all of the applicable company laws including reporting and record keeping requirements. It is also easier to understand the organization and structure of a company and its records if they are in a form that is familiar to government officials rather than in a foreign form frequently unfamiliar.

Governments had become aware of the importance of having access to the books and records of the operators. Unless they have such access, it is difficult to be sure that a complete picture of the operations is obtained. This is especially the case in understanding the accounting treatment of operating costs, inter-company transactions and sales realizations which result in taxable income. Moreover, increasing sophistication with respect to the variations possible within the formula of generally accepted accounting principles even when "consistently applied" has resulted in a greater interest in examining the actual books and records of operators.

The use of a local company in a joint venture avoids the issue of extra-territorial treatment and limits the extent to which a mining company is treated differently from any other type of business.

Operators themselves recognize the difficulties inherent in being foreign companies and its disadvantages. One of the complicating factors in this regard is undoubtedly the tax treatment afforded a foreign subsidiary by the investor's company with respect to losses and profits abroad. There are problems with regard to the use of consolidated balance sheets and the ability to take advantage of certain tax benefits at home when operating as a foreign company abroad.

Investors indeed were trying to look less like foreigners and more like local companies. To this end, in the early joint ventures, they sometimes encouraged private local participation, not only because it to some degree ameliorated the foreign image, but also because the local shareholders became an influential lobby group to

insure the profitability of the venture itself. Those joint ventures sometimes were with private individuals or locally organized mining companies. Citizens of the host country went on the board of directors of the joint venture company, though almost invariably taking only a minority of the seats. Management committees were established with the foreign investor having the dominant role, or management agreements entered into, insuring that the foreign investor would still continue to enjoy its "management prerogatives".

Governments now seek to retain as many of the benefits from the development of their minerals within their own borders as they can. Provisions in agreements to ensure this result include:

- preference for local goods and services,
- preference for nationals in employment and promotion,
- minimum plant size and processing commitments,
- the establishment of air market value for purposes of royalties and taxation,
- the limitation on the loan to equity ratio,
- taxing interest payments and dividends remitted and outside of the country,
- limitations on the repatriation of capital, interest and profits, and
- limitations on the extent to which revenues generated by the minerals can be kept outside of the country.

Governments retaining these benefits would of course increase the multiplier effect of foreign investment. Another way of referring to it is for the mining industry to have "backward and forward linkages" with the rest of the country's economy.

Insistence on a preference for local goods and services is a method of ensuring the development of small manufacturers, material supply industries and the service agencies. Unless agreements contain provisions requiring such preferences, there may be a tendency for operators to remain with the suppliers and agents with whom they are familiar. Indeed there is a case in Southern Africa of a mine which imports everything from an adjoining country, even to the extent of virtually all of its food supplies. The development of small industries and service organizations would yield not only jobs but increase government revenues.

It has become increasingly apparent that without an adequate provision assuring nationsl of preference in employment and promotion, mining companies seldom localize as quickly as governments desire. This must be an unavoidable conflict as operators wish to minimize expenditure for training and promotion and at the same time be assured of efficiency which only experienced employees can provide. At the same time there is an element of foreign control which must be appreciated. Agreements increasingly contain a formula for localization on a time-table so as to reduce friction between government and the operators in this regard.

Plant size is usually determined by technical and financial considerations. However, in dealing with multi-national corporations, governments sometimes encounter problems where such corporations want to have several alternative sources of supply. It is the interests of government to negotiate agreements which contain appropriate assurances for the optimum utilization of mineral deposit.

Processing minerals within a country results in added value to the minerals and perhaps more than any other requirement will have the greatest multiplier effect. However, within a country this is realistically possible only if shown to be economically viable. In part this is a function of size and location of markets, the extent to which there is available capacity in already-existing processing facilities the costs of operating processing facilities and, not least, the political risks involved.

Provisions in agreements can provide for periodic review of the viability and the extent of processing in the event that the circumstances do not permit such a commitment at the time an agreement is negotiated.

OPEC has probably sensitized most governments to the problem of determining prices of minerals for purposes of royalties and taxes. Undoubtedly, the use of the transfer price device has been abandoned in almost all countries. That was a device to limit the amount of royalties and taxable profit in the host country by selling the minerals at an artificially low priceto an affiliated company, which would then resell at a higher price. The OPEC Response was to establish under agreements a government determined price, usually called the "posted price". Within these two extremes of the spectrum most hard mineral agreements refer to a "fair market price" or less favourably a "realized price" with protection against affiliated company transactions. One method of avoiding the difficulty in constantly monitoring the determinations of market value or the fairness of realized prices is to adopt a reference price formula utilizing appropriate deductions to an agreed computation point.

It is only recently that governments have realized the extent to which their revenues from mining are reduced as a result of unconscionable loan to equity ratios. Where the amount of loan capital is unreasonably high in relation to equity capital, there is an unfairly large interest deduction in the calculation of taxable income and the profits available for divident distribution to government in a joint venture. To the extent that the withholding tax on interest is not equal to the tax on company profits (which it rarely ever is), governments will lose revenue and may in effect finance the loan capital in part. Moreover, such large interest payments can be a serious balance of payments drain. Some modern agreements, therefore, have established limitations on the extent of the loan to equity ratio (or the deductibility of interest payments) and provided formulae for their adjustment in appropriate circumstances. The number of agreements with blanket exemptions from withholding taxes on interest and dividends appears to be decreasing.

Taxing interest payments is a method of recouping to some extent the loss to government revenues resulting from interest payment deductions for loan capital. It is also frequently used as a device, together with a withholding tax on dividends, to permit a host country to obtain the benefits of foreign tax credits or double taxation agreements with the investor's country. Here elaborate claims have sometimes been included both to take advantage of such provisions by the host country and provide for compensatory arrangements if this results in a decrease in the total net profits available to the investor.

Those countries with severe balance of payment problems and shortages of hard currency have been acutely aware in recent years of the benefits of providing for the repatriation of revenues from the sale of minerals to the maximum possible extent. The use of the float of such hard currency by a host country can be a major economic benefit. This has led to agreements which have limited previously automatic rights to send abroad, without restriction, capital, interest and dividends, and provided for agreed upon formulae to determine the amount of such payments that can be made at any given time so as to lessen their adverse balance of payment consequences.

Governments seem now to be preoccupied with the "multiplier effect" of mining agreements and their employment possibilities, even though it is well known that mining enterprises are capital intensive rather than labour intensive particularly the large-scale low-grade mines that have been developed in the last decade. This, coupled with the concern for infrastructure, has led one observer to suggest that the negotiation of a mining development agreement is not the zero sum game of the old concession. In a zero sum game, one side loses and the other wins, in the new development game, everyone wins.

Stripped of the fancy combinations and permutations, it is suggested that what is still happening is that basically governments are selling their minerals in the ground to the operators. A mineral development agreement is little more than a sales agreement. Governments do not seem to conceive of themselves as sellers. They think they are using mining agreements as part of their five-year development programme. There is thus a pre-occupation with the investment aspect, of brining in new capital, the multiplier effect, the balance of payment benefit and the infrastructure which could be used for other development. This accounts for the pioneer industry legislation and foreign capital investment incentives which are made applicable to mining ventures.

If governments recognize that they are a seller of minerals, then their attitude might be different with respect to tax holidays, customs exemptions and the like. Governments should attempt to quantify the benefits from a mining project so as to sell their minerals for the highest return possible. It is the "bottom line" figure which really counts. Any seller, whether it be of automobiles, shoes or houses, tries to get the highest price for what is being sold. Governments should do the same. Integrated mining companies do the same,

for their basic tool is not just the discounted cash flow rate of return on investment; they also determine the projected cost of a mineral on a per ton basis.

Most concessions and early joint venture agreements are negotiated prior to the start of exploration. Investors usually insist on negotiating the terms and conditions for the production stage before beginning exploration. It is argued that no substantial exploration funds can be committed unless the investor is assured of the precise terms and conditions applicable to mining operations in the event that a discovery is made. It is always stated that mineral exploration, being a notoriously uncertain venture, involves commitment of substantial funds which are completely at risk. Hence, the acceptance of this exploration risk by the investor requires that they have as a reward the opportunity to obtain substantial profits in return.

Developing countries have found it very difficult to be able to carry out their own exploration. However, the United Nations has conducted an exploration programme in certain developing countries in the past ten years which has resulted in the discovery of mineral deposits. These countries in turn have been able to negotiate agreements in which they have not been required to compensate an investor for the exploration risk. At this stage, the level of United Nations mineral exploration activities falls far short of being able to affect the negotiating positions of most developing countries.

However, it is not unreasonable to anticipate that developing countries in future may find methods of financing their own assumption of the exploration risk, directly or indirectly. In this connection, perhaps the proposed United Nations Revolving Fund for Natural Resources Exploration, if it comes into being, could make a significant contribution to changing the relationships and the terms and conditions of agreements between mining houses and developing countries.

There is, in any event, an increasing reluctance for governments to enter into agreements prior to exploration in which all of the terms and conditions, especially the fiscal regime applicable to the mining stage, are agreed in advance of any discovery. Governments now wish to examine feasibility reports so as to negotiate fiscal regimes with knowledge of their economic results. It is claimed that it is difficult to give exemptions when it is not known whether exemptions are really necessary.

Moreover, the investor must always have a better concept of the projected costs and expected revenues of a project, than do government negotiators. Few such negotiators have the tools and techniques for projecting success and profitability and so are at a disadvantage in assessing their relative bargaining strengths and weaknesses.

As a result a few governments are now refusing to enter into mining agreements per se but only exploration agreements. In some cases there is attached to the exploration agreement, as an annexure, a form of production agreement to be entered into when a discovery is made and a satisfactory feasibility report presented to the government. The salient features of the fiscal regime during the production stage are frequently left blank in the annexure for insertion after the feasibility report has been reviewed and the regime thereafter negotiated.

One or two governments recently have decided not to agree even to the form of such mining agreement. In their vew all negotiations for such agreements are premature until after a discovery has been made and the feasibility report rendered.

Naturally investors have been reluctant to enter into such exploration agreements without any commitment with respect to the mining state. This has sometimes been met by an assurance of first refusal or exclusive rights to negotiate for a specified period of time.

No doubt only countries with very great mineral potential will be able to maintain such a negotiating position.

Most of the infrastructure made available to the mining companies such as power, water, railroads and port facilities because of their location are frequently basically single facilities. It is only seldom that these facilities are substantially used other than by the mining operation itself. In those circumstances, it should be recognized that the financial risk for the mining enterprises is no longer just on the operator, but is shared by the government itself. The government through guarantees of loans to the mining company or directly under bilateral and multilateral loan arrangements, has accepted the financial risk. On that basis it may be well to inquire what the reward to a government is for the total financial risk accepted, compared to the reward to the operator for the total financial risk that he has accepted.

The actual equity contribution of the operator compared to the total capital involved in a mining project (including plant, equipment and infrastructure) is becoming smaller, yet the rewards to the operator are sometimes disproportionately greater for his equity contribution (even including parental guarantees of loans to an operating company) than a government receives for its contribution, discounting the return that the government may obtain on its infrastructure resulting from the spread between user charges and the costs of obtaining the capital through soft loans and other favourable terms.

At least one government may have come to the conclusion that the joint venture agreement form is an illusion, in that it did not give a government any greater revenue or greater control over the basic decision making process that was obtained in the traditional concession, and developed a form of mining development agreement sometimes

called a "contract of work". Under such a format an investor was not given any of the property rights or extra-territorial rights of the old form of concession. The investor was subject to the general laws of application of the country, the only exception being with respect to the fiscal regime. Government asserted its control over the development of its mineral resources under law, giving the investor only the specified rights of the contract of work. Generally, title to the minerals does not pass from the government under such a contract until that point when they are loaded for export.

Most importantly, in a contact of work, the government revenue is obtained through the conventional system of surface rentals, royalties and taxes. The government does not take shares, or agree to accept its taxes partly or wholly in the form of dividends which are under the control of the operator's board of directors as in the usual joint venture.

The logical extension of the contract of work is the service contract. In many respects, the service contract is more analogous to a public highway construction contract and those are generally oil rich countries. It is an agreement where in effect the government hires the foreign mining company to develop a specified mineral deposit at a fixed price with the government maintaining complete control over the basic decisions affecting the deposit. All profits belong to the government and the government supplies all of the necessary capital. Title to the minerals are sold to the buyer, the service contractor having no property right or interest in the mineral whatsoever. Needless to say, only governments with substantial revenues available to invest in mining enterprises are able to enter into service contracts.

In some respects one can expect that service contracts will come full circle when governments, as an incentive to the service contractor, offer a 10-15 percent equity interest as a "kicker" to encourage efficiency and economy. This would be almost the mirror image of the early forms of the joint venture agreements.

All commentators would now probably agree that the relationship between investors and host governments is in the process of changing. This is a function not only of economic nationalism, but of the continuously improving technology and the new forms and methods of finance. Legal and financial terminology will parallel these changes and adapt themselves so that the relationships between a government and an investor and the forms of agreement which embody those relationships will change in tandem.

The process can be seen more vividly in the petroleum industry than in hard minerals but the hard mineral industry will be looking into the future when they examine the host government and investor relationships and the forms of agreements in the petroleum industry.

GOVERNMENT NEGOTIATING TECHNIQUES AND STRATEGIES

By: Charles J. Lipton

Negotiation is the process by which an agreement is reached reconciling or compromising conflicting interests put forward as specific proposals. There are a few accepted assumptions: the process is supposed to be non-violent, based on mutual good faith and the intention is to reach an agreement.

It has become fashionable lately to apply games theory to negotiations. In an era of computer technology, there is a tendency to try to reduce almost every human process to numbers which can be programmed for the computer. There are still, however, some areas of human experience which defy the computer, including among others, the art of negotiation.

The choice of title does imply, however, that this is an adversary type of art form, a series of conflicts and confrontations.

Governments should approach negotiations with a thorough understanding of their own interests and those of the other side. It is necessary to determine the objectives of the negotiation and decide how important each point to be discussed really is to the government. These can be ordered as a set of priorities. There will be areas which will be of such importance that the government cannot compromise and other areas in which there will be considerable room for compromise. The art of negotiation is to obtain one's own objectives to the maximum extent possible and compromise in those areas which are of least importance to your side. This in turn depends upon an appreciation of those objectives which are most important to the other side.

Most governments use a team approach in negotiating mining agreements. It is common to have on the negotiating team, members with relevant financial and technical knowledge. A negotiation will usually affect more than one ministry or department of government and it is therefore not unusual to have representatives from the different departments on the negotiating team. Occasionally governments believe that there is political safety in numbers. However, too many members make for an unwieldly team and in such cases one discovers that the real negotiation takes place between the team leaders when they meet outside the negotiating room. With too large a group, the negotiation becomes a form of staged play in which roles are acted, there is sound and occasionally fury, but the meaningful discussions are held elsewhere.

In organizing a team, it is important to decide who is to speak for the government. Only one person should be responsible for putting forth the government's arguments, posing alternatives and agreeing to compromises. Others may speak in their own area of competence, but only the team leader should be empowered to commit the government.

It is non-productive to have too many people speaking. While members of the negotiating team should act as advisers to the leader, they should not all be authorized to speak. Speaking parts should be carefully limited and assigned to two or three and seldom more than four persons. Usually technical areas may be assigned to the specialists on a negotiating team, but the parts should be assigned in advance in the rehearsal, not at the negotiating table.

It should go without saying, but it seldom does, that only one person at a time should do the talking and that there should never be dissension demonstrated in the ranks of one's own team. Arguments among team members should be reserved for private sessions and never take place in front of the other side.

Selection of the team leader is often of crucial importance. Some governments make the mistake of considering that this is one of the perquisites of a particular government position, be it minister, permanent secretary, director or attorney general. Regardless of title, the leader should be the best negotiator available to the government. This in part is a function of his experience but most importantly his personality. The leader should be a strong personality, able to make decisions and take the responsibility for them to the extent that authority for such decisions has been delegated to him. He must be a man of intelligence, ability and experience and he must be effective. The leader should be articulate, both flexible and tough, practical, perhaps a bit of an actor, quick minded and impersonal, in short professional. While it is always a mistake for a negotiator to attempt to curry favour with the other side, to seek to be popular or liked, it is important that he establish the other side's respect, both for himself as an individual and for the positions that he is advocating.

Senior government officials must understand the importance of supporting their negotiating team. Attempts to undercut a government negotiator by the investor's negotiating team leader

seeing the president, the prime minister or the minister alone should never be permitted. The only position to take such an event, if the other side's team or leader must be received, is to arrange for the government's team leader to be present as well. Senior officials should refuse criticism of their negotiators and should always take the position that they speak for them and are following their instructions.

Each side in a negotiation will be trying to seize the initiative, to make its proposals the basis of discussions. Here the government has an inherent advantage. As a government, it should control the agenda, determine the procedure, have its negotiator "chair" the meeting. In this way the order of the presentation of points will be that selected by the government and the other side will then be forced to negotiate the government's proposals, not their own. This is particularly important in making compromises and trading off one point for another.

I find that all too frequently government officials are not adequately prepared for negotiations. Fall back positions should be determined in advance, compromise possibilities worked out in advance, arguments and counter arguments should be rehearsed in advance. No argument, position or compromise not previously considered by the negotiating team should ever be expressed for the first time by a government official at the negotiating table. It could be a particularly weak argument, open to an easy rejoinder and could well adversely affect other points. One should be especially careful in putting forth alternatives which have not been thought through and the ramifications carefully

considered. It is disconcerting if not surprising, how frequently this happens. A negotiation usually has a number of surprises, but a government official should never surprise the members of his own team. The government team leader should not offer a compromise unless this has been discussed in advance with members of the negotiating team.

In short, a script or scenario should be outlined before the government negotiators reach the table and no departures should be made unless there is discussion beforehand by the members of the negotiating team. As a consequence, this may mean that recesses must be taken so as to allow team members to discuss any new point which had not been previously considered. The team leader should not offer any compromise or concede any point unless this is part of the script or unless he calls a recess in which the compromise is considered and weighed and he is given appropriate advice as to its consequences and its effect on the other points in the negotiating position.

There should be a parity between the leaders of the two negotiating teams. If the investor's representative must report back to his president or board of directors to obtain approval, then it is essential that the government retain the flexibility of having its negotiating team leader report back to the minister to obtain such approval. Therefore, the government team leader should be careful to determine the authority of the chief negotiator on the other side. There may be an advantage in representing that the government team leader has no greater authority

This may avoid the problem of premature commitment and avoid the tactic of finding the government committed only to have another side advise that its board insists on one additional point.

It is good practice for the government's negotiating team to meet in advance of each negotiation session to conduct a post mortum on the last session and to decide on modifications of the overall strategy and any changes in position. I have, however, seldom seen that good practice followed.

In orchestrating a negotiating session it is of value to provide opportunities for the team leaders to meet alone over lunch, dinner or during coffee breaks. It is those times when compromises are frequently reached. The informality and face saving possibilities of such meetings may lead to compromises which are more difficult to reach in the confrontations of the large plenary sessions.

There is sometimes advantage on occasion in asking the other side to speak first. At the end of a negotiating session, it is frequently a good tactic to ask the other side to consider overnight the government's position and determine whether and how they may be prepared to meet it. At the next session, wait for the answer before volunteering concessions to meet the other side's position. It may be that the other side is prepared to surrender some points without further concessions on the government's part.

One can never over-emphasize the importance of listening carefully. Listening is sometimes more important than talking. One must look for the signals of where areas of compromise lie.

The importance of language is frequently overlooked. It is necessary to realize that the language of the negotiation may be a second or third language of some of the participants. One well-known negotiator has referred to psycho-linguistics -- the effect of language on cultural sensitivity and the "psychology" of a negotiator. Some words really do have different meanings in different cultures, even (or especially) in translation.

Incidentally, never assume that because a man is not speaking your language that he does not understand it. Frequently, he may understand a language better than he speaks it.

Using interpreters sometimes has advantages, particularly when one knows both languages - it gives additional time to evaluate arguments and form counter-arguments. And don't forget that the other side may know your language when you hold whispered conversations on your own side of the table.

Negotiating experience is most important: there is simply no substitute for it and it is always difficult to obtain. Recognizing this, some academics have attempted to devise courses on negotiation and even stage mock negotiations patterned after the mock trials and appellate arguments which are used in the training of lawyers. I suppose this academic experience is better than no experience at all. But again, as in other areas of human relations, there is just no substitute for actual experience

One method of providing a government with experienced negotiators is to assign bright young men to negotiating teams just so they listen, get the feel of negotiation and in that way acquire experience. One must recognize, however, that to be an observer

without responsibility for decisions is not quite the same as to be involved in negotiations with that responsibility. In academic negotiating exercises, it is difficult to reproduce in a vacuum the economic, political and personal factors which are at work in a real negotiation and determine its outcome.

Governments usually put their best people on a negotiating team, particularly for an important negotiation. In some of the least developed among the developing countries, where there is a shortage of trained and experienced officials, the same team members move from one negotiation to the next. The cream of the government's personnel is used in the negotiation, and the administrators who then follow up after the agreement has been made are often not of the highest calibre. The result is that what is won at the negotiating table is frequently lost in administration. It will prove to be of great value to include on a negotiating team at least one member who will be responsible for the administration of the agreement after it has been placed in operation.

One must recognize that there is frequently an imbalance of information between governments and major mining companies. The investors invariably have more detailed and accurate cost and revenue information. They are in a better position to make realistic estimates and projections. After all, they have their own experience in other places to use as a yard stick.

At the same time, the investors have a greater understanding of the industry and the market forces which will be at work. They best know how to measure the government's projected revenue and know

where to make their compromises and trade offs at the least cost to themselves.

The investors are usually much better informed about the terms of comparable agreements made by other governments. They are constantly presenting themselves as having to compete with investors in other countries and thus asking for concessions on the basis that they cannot afford to pay more to country "X" than their competitor pays to country "Y" for the same minerals in comparable markets. Governments should exert every effort to obtain information on the terms and conditions of comparable agreements entered into by the investor across the table with other governments.

Of course, I could be accused of prejudice, but I find that there frequently is a role to be played by the outside adviser. In part, such an adviser redresses the imbalance of experience and information. At the same time, such an outsider can frequently serve as a lightening rod in negotiations. He can be the cutting edge, taking the hard positions. If they are not successful, they can of course be easily disowned by the government. The outside advisor is particularly useful in providing information on similar agreements entered into by the same investor that is on the other side of the negotiating table.

One must be careful in the selection of outside advisers to make sure that there is no conflict of interest in their advice to government and that they really have relevant expertise and experience.

Frequently the outside adviser becomes a form of political insurance, used to forestall an opposition party which may criticize an agreement and even within a government as a screen to avoid criticism by other ministries and departments.

It is most important to obtain as much information about the investor as possible. At the minimum, governments should insist on having annual financial reports containing balance sheets and profit and loss statements. They should check on the credit rating of the potential investor and its performance in other projects in other countries.

Here it is important to recognize that a government may be dealing with only the very thinly capitalized subsidiary of a major mining house whose assets may not be sufficient to meet contingent liabilities. In such an event, it is in the government's interest to ensure that the investor will be in a position to meet its financial obligations under the agreement which is eventually reached, through parental guarantees or through performance bonds.

One technique which is of considerable use in negotiation is to put yourself in the other fellow's shoes. What does the investor actually want; what are his own tax laws; what points are most important to him; what alternative proposals will he find most attractive. The object of such an exercise is to find those areas in which government can offer something which will benefit the investor without necessarily being detrimental to the government. An understanding of the investor's tax laws can frequently produce several such attractive possibilities.

It is very helpful to have a record of the negotiation. I am not a believer in tape-recording negotiating sessions because I feel that this inhibits the negotiating process. I prefer that each side take its own notes and that there not be an agreed upon record of the proceedings. It should suffice to record only the agreements reached between the parties themselves. The note taking should never be done by the team leader but one team member should be assigned as secretary for that purpose. A draft of the notes should then be prepared and circulated to the team members for comments before the minutes are placed in final form. The minutes should be carefully treated as a confidential internal document and be used for that purpose only.

The side that takes the drafting intitative has a definite advantage. It has been obvious since the very beginning that it is better to fight a battle on one's own territory rather than on the stranger's. The side that prepares the draft agreement forces the other side to negotiate its proposals, its concepts, its language. The only effective equalization is for the other side to produce its own draft too and insist that the two drafts be considered side by side.

Logically, it would appear sound to agree on general propositions before going to specific ones. Obviously it is better to agree on principles before one comes to discuss the actual text to reflect such an agreement. There is therefore some virtue in attempting to work out first an agreement on principles which can then be refined in a text setting out in detail the specific agreement of the parties.

I find that faster progress can be made if negotiations deal first with principles rather than with the specific language to be used in the final agreement. The British practice to use "heads of agreement", a statement of the agreed upon principles, is very useful in negotiations. There are of course frequent drafts of the "heads" or the "principles" but the negotiation will move faster if such a document is agreed before considering the final definitive agreement.

The extent of the detail in an agreement is a function of the practices of individual governments and the nationality of the investor. The American practice is to be extremely detailed, while British and Continental practice is to use general clauses. The objective course is to spell out the agreement that has been reached in sufficient detail so that it is clearly understood and as many potential points of misunderstanding eliminated as possible.

Someone once said that the best drafting committee is a committee of one, and of course we are all familiar with the old adage that a camel is a horse designed by a committee. In my view the optimum number to have on each side of the table in a drafting session is two.

Publicity in the course of negotiations should generally be avoided. Premature publicity almost always works to the disadvantage of the government officials who are conducting the negotiations; it tends to expose them to criticism. Advance publicity forces them into negotiating positions which may not be advantageous to their government. Occassionally it frightens the investor, leads

to public criticism, to expectations which can only end in disappointment and is frequently used to embarrass government officials. Progress reports may be useful and the texts of press releases agreed upon by both sides could be issued. Generally speaking, however, it is best to turn the light on only after a final agreement has been reached.

It may be well at this stage to briefly review some of the better known techniques or "gambits" used in negotiations.

There are a number of cultural gambits which depend on so-called national characteristics. There are some that maintain that one should negotiate with Japanese in a different way than with British and similarly, with Germans in a different way than with Americans or Italians. Needless to say, I shall side-step such national gambits for purposes of this paper.

One of the best known gambits is the divide and conquer tactic. This is a tactic increasingly used by governments in negotiating recent mineral development agreements. As the projects get larger and require more capital, the risks become too great for just one or two companies. In addition, various national and international sources of finance must become involved in order to provide large loan capital. For these purposes, a multinational consortium is frequently created with companies of two, three and sometimes four or five countries represented. In dealing with such a consortium, a government should be knowledgeable about the tax laws, investment strategies and marketing requirements of the

different members of the consortium. As a result, there are frequently built-in conflicts of interest among the consortium members and it is possible to take advantage of them in negotiations.

Curiously enough, the most frequent gambit that I have encountered in advising governments on mineral development agreements is the "marginal project". I say curiously, because I have never been in a negotiation where the project has been described by the mining company other than as a marginal project. It is fantastic the amount of time, energy and money that will be committed to the negotiation of marginal projects by investors. It is obvious that the investor refers to the project as marginal only in hopes of obtaining added financial inducements from the government. One method of dealing with this gambit is to enquire what the investor believes is a reasonable return and to ask what the projected return is on the basis of the negotiations to that point. This information is seldom forthcoming, but if it is, a government can offer to increase the incentives to reach the reasonable return level but that any higher profit must either be shared with or go entirely to the government. I have found that this frequently leads to an abandonment of the marginal project gambit.

A variation on the marginal project gambit is the walk-out, or "we have finally reached a breaking point". This can be very effective, particularly when the government negotiating team is led by a civil servant who is then faced with the unhappy prospect of having to explain to his minister just why this large project might never materialize and how the loss of a large hard currency investment will affect the development plan. One needs good

nerves and a strong stomach to combat this particular gambit. Frankly, I never believe in the seriousness of walk-out threats until the door is actually closed behind the other side's negotiator. There are those, however, who quickly offer increased incentives when the hand is on the doorknob: others wait for the VIP lounge at the airport. I usually advise to let them go. If it is a good enough project, they will be back. In any event, it is always possible to begin talks again. Remember, the other side wants the projects, or they wouldn't be negotiating for it.

I am not very fond of the "let's be partners" approach. There are those who feel that a negotiation should not be an adversary proceeding. Mining negotiations, they maintain, are an attempt by both sides in a spirit of reasonableness to work out the rules for an arrangement by which the government and the investor will live together for an agreed upon period in the future. It is, they suggest, a marriage, and one should enter into such a state with understanding, love and affection. My own view is that a mining development agreement is basically a contract for the sale of minerals, with the government as seller and the investor as buyer. I have elaborated on this view elsewhere. Such a negotiation is more of a "horse trade" where the government as seller attempts to get the highest price for its minerals and conversely the investor seeks to obtain them for as little as possible. This is no romance to it.

Investors, and frequently governments, many times present their chief negotiator in the role of "nice guy" in the hopes perhaps that the other side will not wish to appear rude. I have

been doubtful of the value of this approach. A negotiation is not a popularity contest. The basic economics will out in the end and I suspect that it is only wishful thinking to believe that by playing the nice guy role the other side will be more forthcoming than it would otherwise be.

A variation of the nice guy gambit is the tactic to refer to the senior officials, to whom the government and the investor's negotiating team report, as being very difficult. The intention is to make the other side believe that it is more advantageous to negotiate with the man across the table than those really impossible people who will come to the negotiating table if agreement isn't reached with the nice guys presently sitting there.

Another use of this tactic is to ask for the concession of a point just to be able to convince these difficult senior people of the seriousness and reasonableness of the other side. It is amazing how many company chairmen and boards of directors have thus been slandered by their negotiators and, on the government's side, how many ministers and cabinets have been so maligned by their own officials.

More successful is the "good guy/bad guy" gambit. A lawyer is usually cast as the bad buy and the chief negotiator as the good guy. There are a good many advantages to this particular gambit. A bad guy is aggressive, hard, tenacious and unyielding. The good guy appears to be reasonable, is willing to compromise and is usually the chief negotiator or the administrator who must live with the other side after negotiations are completed. This of course

pre-supposes a continuing relationship, as is the case with a mining development agreement, rather than the one-shot contract. The successful use of this gambit depends on a good understanding between the role players through experience or through rehearsal.

Governments frequently meet with success using the "it must be seen to be fair" gambit. The script here calls for the government's chief negotiator to point out that the real assurance of the stability of the agreement is whether it is accepted by the general public as a fair agreement. Like Caesar's wife, it is not enough to be virtuous; it has to be seen and appreciated as being virtuous. This of course also carries the complication that there is some possibility of instability, even in the face of all the assurances that the investor has extracted from government. The gambit must, therefore, be used with some sensitivity and restraint.

The "split the difference" gambit is of course one of the oldest known. The standard defense to this particular technique is to always ask for more than you are willing to take and keep one's distance in the bargaining. Do not get committed to a figure in compromise only to have the other side move to split the difference. Flexibility, and the use of the package or tie-in compromise are the best defenses.

In the package or tie-in compromise gambit, two or more points are negotiated together: for example, combining the depreciation schedule with the loss carry forward provision or the limitation on the loan to equity ratio with the percentage of the withholding tax on interest. In part, this is also a

a method of insuring that nothing is ever conceded without obtaining something in exchange.

The great difficulty with the deliberate delay tactic is that it frequently cuts both ways. It is to the government's advantage, particularly after significant exploration costs have been incurred and a feasibility report obtained and paid for, to put pressure on the investor by stringing out the negotiation while the investor watches the anticipated costs escalate beyond his projections, including inflation factors and contingencies. On the other hand, government may have already planned for the use of the expected revenues from the project so that it is sometimes the investor rather than the government that utilizes this pressure tactic.

Several years back in the United States it was quite popular for one side in a negotiation to make what was termed a "non-negotiable" demand. The popularity of this approach seems to have waned, but tagging certain positions as non-negotiable is still a fair tactic, particularly when the government negotiators are bound by principles enunciated by the head of state or embodied legislation.

The precedent gambit is a favourite among lawyers, and this particular argument has been used by both sides. The investor maintains that if it agrees to a particular government demand, then it will find itself in a position of having to do so in all the other countries in which it has comparable investments. Government, of course, makes the same argument on its side. One then spends considerable time drawing the distinctions. The quintessence of this particular gambit is the most favoured company or the most

favored government position. Investors have in the past been able to obtain most favoured company treatment by arguing that otherwise they would be discriminated against. I find that when the investor asks for most favoured company agreement, the most effective reply is to point out that this should be a two-way street. The government must then obtain in exchange most favoured country treatment, so as to have the benefit of any better terms that the investor may have offered to any other government. After all, the investor would not want to discriminate against this government, would it? This almost always ends the negotiation on the particular point without either provision being included.

The precedent argument is sometimes met through the use of that pernicious instrument, the side letter. This is a useful device if one side or the other is concerned that the inclusion of a particular provision in a public agreement would cause other investors or other governments to ask for parity treatment. Such a provision can be excluded from the public document and placed in a private one. This is usually in the form of a letter or exchange of letters and hence termed a side letter. Some particularly scrupulous observers have commented a government should not enter into such secret covenants, secretly arrived at.

Negotiators find that the most difficult problem that they face in negotiations is one of timing: deciding at just what point to be reasonable and give in or how long to maintain one's position. There really are no guidelines that can be handed down because in many respects this is the essence of the negotiating process. All

I can suggest is that one does not give in too easily, too quickly and certainly not unless it is part of the script agreed upon in advance or after consultation among the members of the negotiating team. As I have indicated before, my rule is to give up nothing unless something is obtained in exchange. Some believe that it is important to make concessions in order to keep up the tempo of a negotiation or to keep a positive atmosphere. Economic realities and other pressures dictate at what point a negotiator compromises. Here I suspect is the real mystery of the art of negotiation, and the relative experience of the negotiators will have its greatest effect.

The lawyers I know have won and lost cases in the courts but I have yet to meet a lawyer who has lost a negotiation. Needless to say, when a point is conceded, it is considered significant by the side conceding and trivial to the side accepting the concession. But it is well recognized that each side has almost an obligation to attempt to convince the other side that they have in fact got the better of the deal. This is no doubt another tactic to ensure the stability of the agreement once made, though others may say it is just good manners.

In conclusion, perhaps it would be well to list some of the pitfalls that should be avoided:

(1) Never threaten, unless you are prepared to carry out the threat. Don't permit any credibility gaps; once your bluff is called, credibility is difficult to regain.

(2) Don't lose control over the negotiation. The government should negotiate on its own ground, frame the issues and determine the procedures.

(3) Ask for more than you are prepared to accept and don't get committed to an inflexible position. Always leave room for the bargaining process and don't be timid in putting forth knowingly unacceptable proposals.

(4) Never allow a mistake to go uncorrected. Sooner or later it will be discovered and result in mistrust.

(5) Protect your side's intersts: let the other side worry about theirs. But an agreement to be stable must be fair and reasonable to both sides.

(6) Never give anything without getting something in return.

Finally, remember that negotiation, like politics, is supposed to be the art of the possible.

Fiscal Aspects of Negotiating Third World Mineral Development Agreements

by Charles J. Lipton

Third World countries have lately taken a variety of actions to improve their revenues from the development of their mineral resources. Increasingly, their governments seek to negotiate production agreements on the basis of feasibility studies and discounted cash flow projections. Developing countries are now more selective in giving incentives to encourage investment in the mining sector. They recognize the value of their contributions to mining projects by way of guarantees and the provision of infrastructure. Third World governments now seek to participate in the basic decision making which determines profitability, such as loan-equity ratios, plant capacity, and processing and sales arrangements. They are alert to the benefits of large-scale development and appreciate their risks. They seek to increase their benefits from foreign exchange earnings and the multiplier effect of mining projects. New forms of arrangements are being used to insure that the mining sector is developed in harmony with the national objectives of the Third World.

The most significant recent event affecting the attitude of Third World countries in negotiating mineral agreements is the increase in the price of petroleum brought about by the Organization of Petroleum Exporting Countries (OPEC). The success of OPEC has lead to rising expectations by Third World countries and it has also stimulated the development of other producer associations. CIPEC,* the copper producers' association, has been in existence for some time. The International Bauxite Association was formed in March 1974 and the International Association of Mercury Producers in April 1975. The Association of Iron Exporting Countries was formally organized in September 1975. As a consequence, the developing countries will have more information than before and become increasingly knowledgeable about mineral economics. The result will be that the Third World will seek to improve the terms for the development of their mineral resources.

It should not be surprising if hard-rock mining agreements follow petroleum agreements with a time lag so that the hard-rock agreements of 10 or 15 years from now look more like the petroleum agreements of today.

But this should not be viewed as a zero sum game. It is not necessarily a case where one side wins and the other side loses; one at the expense of the other. There are still quite acceptable profits to be made by mining companies in the Third World countries. Mining companies now should adopt a negotiating position which would allow them to meet the objectives of the Third World countries.

Third World Objectives

What are these objectives? Of course primarily, to get a fair share of the revenue. And the Third World perception of a fair share is changing.

Their governments will also seek to have some degree of control over the basic decisions that determine what that revenue will be or, otherwise put, the size of the pie which they seek to share. Obviously sales prices and operating costs are going to be most important, but Third World countries now recognize that other, less obvious factors also influence the size of the pie, such as the loan-to-equity ratio and the plant capacity.

Governments of Third World countries will watch loan-to-equity ratios closely because they will wish to know the extent to which government revenues will be offset by interest deductions and the effect both the interest expense and a relatively small equity will have on the discounted cash flow (DCF) return to the investor.

They understand that processing in the investor's existing plants will improve the DCF to the parent company, but would not increase the multiplier effect for the country.

Third World countries will put greater emphasis on processing in the host country. The mining companies will have the burden of proof to demonstrate that it is not economically viable to process. Governments may also insist on periodic reviews to ensure that processing will be undertaken locally when it becomes economic to do so.

They are aware that the rate of operations will affect the DCF. They also know that the cutoff grade determination, the overburden ratio, and the mining method selected may maximize profits to the investors, but may not necessarily maximize the economic return to the government as the owner of the mineral deposit.

The Third World is now more sophisticated about sales arrangements, particularly long-term sales contracts. To some degree this has been an educational process through OPEC itself. Most government officials appreciate the hazards of uncontrolled transfer pricing and understand the use of credit arrangements in intercompany sales to increase the return to the parent organization.

They are alert to various methods by which a parent organization may increase the DCF on its investment through affiliated company charges such as shipping and insurance fees, buying and selling commissions, the rate of interest charged or paid on intercompany loans, licensing charges for technology, and, of course, management fees. It should be expected that Third World countries will consider the multiplier effect for the investor as well as the multiplier effect for the host government.

Foreign Investment Incentives

In future it will be important to segregate out those areas which are the most significant to the investor in

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Table 6. Investment According to Type of Service, National Department of Mineral Production, 1970-1974

Service	Investment, U.S. $	%
Basic Geology	18 234 147	45.97
Aerogeophysics	11 412 143	28.77
Drilling	5 320 766	13.41
Specific Geology	3 559 476	8.97
Others	1 139 926	2.88
Totals	39 656 468	100.00

1974. It is interesting to note that normally after two or three years of intensive aerogeophysical surveys there is a slowdown which is necessary to make it possible to digest, through the use of more detailed geophysical methods, the data that has accumulated.

The Brazil-Germany Geophysics Agreement (CGBA) which will terminate in December 1974, still has to carry out about 45 000 linear km of aeromagnetometry and aeroscintillometry in the State of Goiás. In 1974, most of the work will concentrate on land geophysics, as already noted, to investigate and assess the magnetic anomalies discovered in the first stage.

After the conclusion of CGBA, CPRM intends to set up a Geophysics Center using all the personnel, materials, equipment, laboratories, and aircraft, with the hope of maintaining the continuity of the geophysical investigations in Brazil, in this way making full use of the experience accumulated during the course of the current agreement.

The work of the Global Survey Program of the Brazilian Coast should be completed by February 1975.

Table 4 shows CPRM technical personnel at present employed in geophysical work.

Table 7. CPRM Technical Personnel Employed in Geophysical Work

Service	Geophysicists	Geologists	Engineers	Technicians	Totals
CGBA	6	8	3	6	23
Logging	—	1	1	10	12
Ground Geophysics	1	2	—	—	3
Marine Geophysics	1	4	—	—	5
Inspection	—	10	—	—	10
Advisory Body	4	—	—	—	4
Total	12	25	4	16	57

Table 8. Available Resources, in Millions of Dollars

Year	DNPM	CNEN	DNPM + CNEN	Geophysics (Forecast 30%)
1970	4.33	3.33	12.26	—
1971	6.85	5.41	15.05	—
1972	8.51	6.54	17.70	4.5
1973	9.19	8.51	19.61	5.3
1974	9.90	9.71	34.28	5.9
1975	25.71	8.57	7.66	10.3

The resources coming from the tax on gaseous and liquid fuels (1.3% DNPM and 1% CNEN) to be put at the service of the National Department of Mineral Production and the National Commission of Nuclear Energy offer excellent prospects for the use of sophisticated geophysical techniques in the next few years. If the rate of 30% of the total resources is maintained as it was up to July 1974, this will mean an estimated U.S.$ 10 300 000 for geophysical work in 1975, considering the figures given in Table 6.

Royalties

As a result of OPEC, it should be anticipated that the Third World will experiment with the mix of royalties and taxes. Certain of the Third World countries have imposed export taxes as one method of increasing their return quickly. Production and severance taxes cannot be ruled out.

The fixed royalty of so many cents a ton, is probably completely obsolete now because governments believe that the value of their raw materials, particularly minerals, is bound to rise in the long term. Where a royalty is denominated in U.S. dollars, Third World countries are concerned that the value of the dollar will be eroded by inflation and other factors, so that a fixed royalty per ton may work out to be the worst of all possible arrangements for a developing country.

Royalties will be keyed to a percentage of market value as most recent agreements provide, or to profits, but in future it is more likely that this may escalate or be on a progressive basis.

Developing countries now understand the DCF concept to the degree that one has now put forward a "variable royalty" formula which would assure the investor an agreed upon DCF. The royalty is increased so that the government takes all profit above that which would result in the investor realizing the agreed DCF return each year. The royalty would therefore vary in accordance with profitability. Note that this concept did not originate in a Third World country, but in Western Canada.

If the OPEC countries have done nothing else, they have made it more difficult for other governments to accept prices on a realized basis in calculating royalties. There has been a great deal of publicity about transfer prices, but some governments are also now aware, through producer associations, of swap outs and transfer arrangements between mining companies. This may result in suggestions to establish posted prices for hard minerals and this will undoubtedly create tremendous difficulties.

Governments in the Third World frequently insist on using reference prices for royalty purposes. For example, it is quite common in copper agreements for the London Metal Exchange (LME) quotations to be used as reference prices. However, some have questioned whether the LME price is really a fair market price for copper. Producer prices on a weighted or formula basis have been used as an alternative to the LME. If there is a proliferation of reference prices, the result must be negotiated prices with each government for the purpose of royalty payments. Such prices might then be used for the determination of taxable income as is now the case in certain agreements. Ironically, this could be considered a parallel to the old Jamaican agreements, which taxed on an assumed or negotiated profit per ton of bauxite.

There may also be pressure to push back the pricing point in the calculation of royalty. Governments of developing countries may not accept in future the traditional net back-to-mine pricing point and seek to establish the pricing point f.o.b. port, so as to increase the amount of the royalty.

As a result of OPEC, it should also prove to be increasingly difficult to negotiate a royalty payment as a credit against income tax rather than as a deduction in the computation of taxable income.

Third World governments may seek minimum royalties, not so many cents per ton, but a minimum annual royalty amount keyed to a minimum operating rate and a projected floor price. This could be the reaction to the multisource strategy of certain mining companies. Governments will be cautious when they find the same mining company or group of mining companies mining the same mineral in different countries. A developing country would not want the rate of operation of a mining project fixed lower than the rate of operation in another country where the same group may have an investment in the same mineral and the cost of operation may be lower.

Similarly, they are concerned that plant capacity may be arbitrarily reduced in one country so as to limit the capital investment and exposure in that country, while saving capital for similar projects in other countries. The response to protect national interests may be to establish a minimum plant size and rate of operation or a minimum royalty, or both.

Exemptions and Preferences

Exemptions which have been negotiated in the traditional concession agreement will probably be limited or reduced in future. One such example is bound to be the exemption from import duties. A good number of countries now only exempt imports which are necessary and unique to a mining operation. As there is tremendous interest in the Third World in encouraging local enterprise, both goods and services, there is a disincentive to encourage the import of anything which can be supplied at home. Some developing countries argue that import duty exemptions are really hidden subsidiaries to the mining sector which they claim should do without them.

For the same reasons, it will be harder to convince Third World governments to give mining companies preferences in user charges for infrastructure such as port facilities, or lower tariffs for water and power, or lower freight rates. They will maintain that a company mining a nonrenewable resource should pay its own way and should not expect to be subsidized by a developing country in the form of concessionary freight rates, or lower water and power charges.

In the past, governments have charged a surface rental per acre or hectare, regardless of the use of the surface. These charges have usually been very low and this may change. While mining surface areas may continue to be subject to a relatively low surface rental charge, it should be expected that there will be higher charges for those surface areas which will be used for plant and equipment, housing, infrastructure, and for access and rights-of-way. Commercial rents are being charged for such use by some developing countries.

Third World countries are, almost by definition, chronically short of hard currency. This situation, if anything, has become more critical than before in the last year. As a consequence, exchange control provisions are bound to become more stringent.

Some developing countries will insist on full repatriation, but it may be possible in others to negotiate agreements to set up arrangements to permit hard currency earnings to be kept abroad to service loans or pay for equipment which must be bought overseas.

One mining company made an arrangement to deposit funds in a bank owned by a host country but located in a third country. This gave the host country the benefit of the hard currency float and, at the same time, allowed the investor to meet its hard currency obligations, subject to certain restrictions, without going through the usual exchange control procedures and encountering the usual delays.

With respect to exchange control, Third World countries will readily give assurances on nondiscriminatory treatment on procedures, but resist assurance of a particular rate of exchange.

More developing countries will place limitations on

the ability of investors to bring profits home. Many such countries have already limited such payments in a given period to a percentage of the equity investment or imposed similar restrictions.

In the past, investors asked for "most favored company" treatment. Now one hears of governments asking investors for "most favored nation" assurances. Mining companies should consequently be very alert to any precedents that may be established in negotiating agreements. It will be more difficult than ever to keep agreements confidential, even by resorting to the side letter device. Information will be exchanged in producer associations. Indeed, that is a principal reason given for their organization. Of course this only parallels the practices of mining companies in exchanging information about particular countries.

The traditional concession agreement was designed in part to "freeze" the host country's legislation. This is being resisted more strongly than before in the light of the United Nations Declaration on Permanent Sovereignty over Natural Resources. Such freezing is considered by some Third World countries as incompatible with their sovereignty. Mining companies are being assured by such countries of nondiscriminatory treatment.

Perhaps the most sensitive areas in negotiating mineral development agreements lately are renegotiation and reopener provisions. In the past, investors have steadfastly maintained that concession agreements were not subject to renegotiation. We are all familiar with recent history in that regard, particularly with antiquated agreements which were not in keeping with expectations or current practices.

Some investors and developing countries have thought that it would be to their mutual advantage to negotiate clauses in mining agreements which would allow for reviews periodically or when the expectations of both parties have not been realized with respect to revenues and the return on the investment that were the basis for the agreement. Some believe that this is asking for trouble, but this does provide a mechanism to ensure that precipitous actions are not taken. This kind of flexibility adds appearance to reality and may prove exceptionally useful.

Joint Ventures and Service Contracts

It has been suggested that the form or structure of a development agreement may reduce the risk of nationalization and may even increase a mining company's profitability. Two such forms of agreement are the joint venture and the service contract.

A joint venture company is consistent with the national aspirations of developing countries, but their governments recognize that taking shares in a company is not going to change the "bottom line" figure to an investor. Whether a mining company pays a government in the form of dividends, royalties, profit taxes, bonuses, or surface rentals, such payments must come out of the "bottom line"—the return to the investor, its DCF. Thus joint venture agreements, with government participation in the equity, may be useful to obtain certain fiscal advantages which a mining company might not otherwise be able to negotiate.

For example, as we all recognize, there are advantages to trading off a tax for a dividend payment. Then the company determines what the profits are, how much will be available for distribution and when dividends are paid. This is a far cry from paying taxes where it is the government's tax collector who determines what taxes are paid and when they are going to be paid.

The joint venture form may also be useful to trade off "free shares" against payment of a bonus or to reduce tax or royalty rates.

There are of course many methods for government participation and many levels of government equity participation. There probably has been too much emphasis on whether a government has 51% of the equity, or 50%, or 49%. Where a government has control of an operating company, no mining company is going to make an important capital investment unless this is also coupled with a management agreement.

One is reminded of the country that insisted on 51% ownership and so 100,000 shares of stock were issued. Class A, 51,000 shares, all went to the government. Class B, 49,000 shares, went to the foreign consortium. It was a 51-49% split and all shares ranked pari passu, or equally, except in two respects: the 51% government shares were nondividend participating and nonvoting.

Of course this cannot be negotiated any longer, but it is suggested that joint venture agreements can be negotiated in which the bottom line figure won't be lower than the levels experienced using other forms of agreement, and where the investor still has control to a large degree over its capital investment through a management agreement.

That leads to the service contract. It is being used now for a copper deposit in Iran where a large American mining company was retained to carry out the project. It has also been used by Venezuela, where a smaller American company was hired to mine an iron ore deposit.

Under a service contract, a mining company is hired for a fee to carry out the mining operations. Under this kind of arrangement, there is no capital contribution by the mining company. There is nothing to nationalize, because there is no property interest that is held by the investor. It is management know-how and marketing ability which is sold. Compensation can be paid in different ways: on a fixed fee basis, percentage of sales, or percentage of profits, or a combination of the above. The result in terms of profits cash flow or the bottom line may not be radically different from that found in the traditional concession agreement. But the investment and the risks are much smaller. At the same time, Third World countries will be assured that their objectives will be met.

In future, it may be more advantageous to negotiate joint venture or service contract types of agreements rather than the traditional concession. While the legal arrangements may be different, the return could be the same, or even significantly better.

AIO RED PAPER

GETTING A FAIR DEAL IN MINING PROJECTS

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1. TIME FOR A FAIR SHARE

In the past ten years, the governments that have sovereignty over mineral and energy resources around the world have greatly increased their returns from the exploitation of these resources. The most obvious example is the action of the OPEC countries in raising the price of oil. But the same pattern exists for other minerals as well. Bauxite producers like Jamaica and Guyana have sharply increased prices and taxes. Copper producing countries like Chile, Peru and Zambia have increased taxes or, more often, taken over direct ownership of mining operations from foreign investors. Even in industrialized countries like Australia and Canada, national and provincial governments have imposed royalties and insisted on higher export prices for their minerals.

There is a common theme that runs through all these efforts to increase the return to the owners of minerals. That theme is that the owners of resources are entitled to a "fair share" of the final value of the resource. There may be arguments about how much is a fair share, but such a share is certainly more than one or two cents out of every dollar of the final sales price of mineral products. Yet, under the mining concession agreements that were in force in many countries around the world until recently, and under the mineral leases that are still in effect for many Indian-owned mineral deposits, one or two cents in each dollar was often the maximum that the true owner of the resource - the government or the tribe - could expect to receive.

The situation is changing, though. Resource owners, whether they are governments or Indian tribes, are now able to find out much more about the terms under which mineral deposits similar to their own are being developed. In addition, many (but by no means all) of the mining and oil companies have become more flexible in their dealings with resource owners and more willing to accept a long-term arrangement that is fair both to the investor and to the owner of the resource. In the case of some minerals, including oil and copper, there is a world market price that can be used in calculating a fair distribution of the profits between a mining company and the resource owner. All these developments have increased the bargaining power of resource owners; but it is still necessary to have the determination to use that increased bargaining power. If an Indian tribe - or, for that matter, a developing country's government - has the determination to insist on a fair deal, the

negotiating tools are now available to help achieve that objective.

The remainder of this paper looks at how to achieve a fair deal in practice. The paper concentrates on one mineral - copper - and on the recent experience of the developing countries that are major exporters of copper on the world market. Butthe conclusions, modified to fit the different economics of different minerals, would apply also to other minerals and to groups like Indian tribes that have effective ownership of their natural resources. The paper looks in detail at financial questions but also deals with issues like local employment and training, conservation, management and control.

2. HOW MUCH IS A RESOURCE WORTH?

In the case of a mineral like copper, which is widely traded throughout the industrialised world, it is usually fairly easy to determine the final value of the mineral, in a form ready to be used by industry. For example, copper in international trade is usually valued at the price set from day to day on the London Metal Exchange. In the United States, prices are determined by the major producing companies (Kennecott, ASARCO, Anaconda) for most copper, although small amounts are traded on the commodity exchanges. In all these cases, the final price of a pound of refined copper can easily be established.

In the long term (ignoring temporary price variation caused by market speculators and crises such as strikes), the final price of copper will tend to be related to the supply of and the demand for the metal. Demand is affected by the overall level of industrial production. In particular, demand for copper is related to the level of activity in the electrical and construction industries, which are the major consumers of copper. During the recent recession in the United States, for example, copper consumption dropped from 2.2 million tons in 1973 to 1.4 million tons in 1975. Demand can also be affected by the substitution of other materials for copper. Recent examples of substitution include the use of aluminium instead of copper in car radiators and the development of glass fibers to replace copper wire in telephone cables. Despite the steady substitution of aluminium for copper during this century, however, copper consumption has maintained a steady upward trend.

The supply of copper come from mines and from the re-use of copper scrap (which accounts for about one-quarter of the total supply). Because there is usually a long time between the decision to go ahead with development of a mine and the time the mine actually comes into production (three to five years is normal), there may be time when supply from the mines is either greatly in excess of demand or greatly inadequate. This inability of suppliers to respond quickly to market conditions helps to account for the very wide price changes that occur for copper within relatively short periods of time. When thereis a shortage, buyers will bid up the price very rapidly, and when there is a surplus, it will take a long time before suppliers reduce production to an appropriate level (which means in practice that some mines will have to shut down).

The long-term average price of copper, expressed in 1976 prices, is a little less than $1 per pound. But the price can vary widely; for example, in 1974, the international price of copper reached nearly $1.40 per pound in April and dropped to 55 cents per pound by December. But even if we know the market price for refined copper which is ready to use for making wire or copper tubing, for example, we do not necessarily know how much of that price represents the real value of the copper ore in the ground, before it is mined and transformed into copper metal. To find out that value, we have to look at what happens to the ore from the time it is in the ground until it is sold to the final user.

First, the ore must be mined. This may involve deep underground workings or a huge open pit. In either case, large amounts of capital are required for the mine and related facilities, including roads, towns, power stations, and so on. Mining also involves operating costs for wages, fuel, supplies and other necessary items.

Next, in most copper production, the ore has to be concentrated. Most copper ore mined today, especially in the United States, contains very little copper - in many cases less than one half of 1 percent. At the mine, this ore is treated to produce a concentrate that is about 30 percent copper.

Costs for these two stages of copper production average about 40 cents per pound of copper. In addition, the capital cost of opening up a new mine and concentrator averages about $4000 per ton of annual production

capacity, or about 15 cents per pound, over the life of the mine.

After concentration, the copper is smelted and refined, to produce metal that is 99.9 percent pure copper. These operations cost about 20 cents per pound or more, and costs have risen rapidly recently, reflecting the need for increased pollution control in smelter operations.

Taking into account all these costs, we can calculate how much is left after the copper ore has been transformed into metal. The average cost of that transformation is about 60 cents a pound. So that if the market price of copper is $1 a pound, there is a surplus of 40 cents left over (if we dont allow anything for paying back capital costs.) But if the market price is only 60 cents (and in the U.S. it was just barely above this level all through 1975), then there is no surplus at all.

The same kinds of calculations can be made for other minerals. In each case, it is necessary to work back from the final market price to the value of the resource in the ground by subtracting all the costs associated with transforming that resource into something that can be sold.

Once the size of the surplus has been determined, there is still the question of how that surplus is to be shared among the various people with calims on it.

3. WHO GETS A SHARE OF THE SURPLUS?

Bascially there are five different groups with some sort of claim on the surplus produced by exploitation of mineral resources: the owner of the resource, labor, suppliers of capital, suppliers of technological expertise, and the government. In some cases these groups may be combined - for example in a developing country where the government is also by law the owner of the resource, or where a mining company supplies both the capital financing and the technological expertise to develop a mine. But for clarity we will look at the different groups separately.

(a) the resource owner: bascially the owner's share is whatever he can get after the claims of all other groups to a share of the surplus are met. In most cases this depends on the owner's bargaining power. In the United States most resource owners have accepted arrangements that give them a relatively certain income, by way of a royalty of so

much per ton or a certain percentage of the value of the resource, and left the mining companies to take the major risks and also the chances of massive profits if things work out well. As is discussed later in this paper, there are approaches that guarantee a resource owner some minimum income, but also allow him to participate more fairly in high profits. Where the resource owner is also a government with taxing powers, taxes often provide an effective way of claiming a greater share of the surplus.

(b) labor: in most cases, especially in the United States, the labor used in mining will be paid at competitive rates and will thus not take a share of the surplus, but simply be part of the costs associated with mining. In some cases, though, labor unions acquire so much bargaining power over a mine that they are ableto win wages that are well above any national scale. In this case, the wage increase will in effect use up part of the surplus thatwould otherwise be available to the resource owner.

(c) capital: In the simplest case, where a mine is financed entirely out of loans from banks, the loans have to be repaid, with interest, out of the earnings of the mine. In copper repayment of principal and interest, averaged over the life of the mine, could add 15 cents per pound to annual costs. And if the money for mining is supplied by mining companies instead of banks, they will usually expect even higher returns on their investment than the banks get on their loans.

(d) technology: the mining companies that have the experience, skill, and technology to develop mineral deposits will expect a return in one of two ways - either by earning a high profit on their investment (most copper mining companies now say they want returns of from 15 to 20 percent) or by charging directly for their services. Such charges are often used where the resource owner also owns the mining operation. For example the government of Zambia nationalised its mines in 1969, but kept the previous owners under management contracts. And Anaconda is supplying technical and management services to the government of Iran, which is opening up a major new copper mine.

Whether a mining company simply charges for services or expects a high rate of return on the capital that it invests, it will expect some part of the surplus as its share.

(e) government: at a minimum, governments will expect to earn the same kind of tax revenue from mining that they earn from other business operations by taxing the profits of a mining company. Where a government also is the owner of the resource, it will usually combine taxation with royalties and equity participation to try to earn a greater share of the surplus from mining than it would from businesses whose operations do not involve use of a natural resource. For example, many countries have special tax rates applying to oil companies, at much higher levels than the ordinary company tax rates, reflecting the governments view that it is the original owner of the oil. In the United States, the national government makes no claim to most mineral resources, and the tax can be expected to be at the same rate as for other businesses, and possibly less because of special deductions.

The example on the following page indicates how one imaginary copper mine might operate, showing how the surplus is produced and how it would be divided - if the resource owner received nothing. Using the figures in the example, the total available surplus is $44 million. Of this, about $12 million would be paid in federal taxes, under current law, leaving $32 million for the mining company, or a return of about 10 percent on the total investment over time. The question for the resource owner - whether an Indian tribe or a developing country - is to determine how much of that surplus it can win for itself, and then to negotiate arrangements that ensure that it will in fact receive that amount.

4. Financial Alternatives

There are four basic ways in which the owner of a mineral resource can get his fair share of the value of that resource - taxation, a share in the ownership of the mining project, royalties, and rentals of other specific payments.

Taxes are normally the most effective way of taking a share of the surplus produced by mining operations. Unfortunately, from the point of view of Indian tribes in the United States, the most lucrative taxes,

EXAMPLE OF COPPER MINE FINANCES

ORIGINAL CAPITAL INVESTMENT	\$200 MILLION
ANNUAL PRODUCTION	50,000 TONS
OPERATING COST	\$ 44 MILLION (40¢ PER POUND)
SMELTING AND REFINING CHARGES	\$ 22 MILLION (20¢ PER POUND)
VALUE OF COPPER (@\$1.00 PER POUND)	\$110 MILLION
OPERATING SURPLUS	\$ 44 MILLION

THIS \$44 MILLION CAN BE SPLIT UP INTO:

(A) TAXES - \$12 MILLION (ALLOWING FOR TAX DEDUCTIONS

(B) CASH FLOW TO MINING COMPANY - \$32 MILLION

NOTE: EXAMPLE ASSUMES (I) THAT RESOURCE OWNER GETS NO RETURN AND; (II) THAT ALL FINANCE WAS ORIGINALLY PROVIDED BY MINING COMPANY.

based on company income or profits, are a monopoly of the federal, state and (in some cases) city governments. The sorts of taxes that can typically be levied by Indian tribes - even in those rare situations where the tribal authority may exercise local government powers - do not get at the surplus from a resource exploitation project. Some minimal tax revenue may be available in some cases, through license fees or property taxes, but this cannot be the major avenue of approach to a fair share.

In the long run, ownership of a share in the resources project may well be a major way for an Indian tribe to ensure that it gets a fair share of the revenue. In addition, ownership of even a reasonable minority share (or the order of 20 to 30 percent) is often enough to allow a substantial impact on the management and control of the project. There are several different ways in which even a group with very little money can acquire a substantial share in the ownership of its resource developments. These are discussed in some detail later in the paper, along with ways in which groups can use their ownership to have some impact on the plans and operations of the mining project. Ownership provisions can provide a reasonable income for the mineral-owning group, in a way this income is not really a payment for the value of the minerals; it is simply the same profit margin that goes to everyone else who puts investment money into the mining project (although in the case of Indian tribes, it may be possible to avoid putting up any actual cash, through the arrangements outline below). Even if a tribe owns 50 percent of a mining project and, after it has repaid the money that was used to develop the project, earns a large return, it is still not being paid anything that reflects the basic value of the minerals. The only way to secure this payment, as well as a return on investment, is through a royalty that adequately reflects the worth of the minerals.

A royalty is really a sale price for the minerals. It is a price charged by the owner - in this case the developing country government or the Indian tribe - to a buyer, the mining company, which then processes and sells the mine products. The question for the resource owner is how to set a fair price on the minerals. In practice, there are three different bases for calculating royalties - as a flat rate per ton (or per barrel for oil), as a percentage of the sales price, or as a percentage of profits.

Mineral leases on Indian land in the United States have most often included a flat rate royalty - so many cents per ton of coal, copper, or whatever. Even in those few cases where flat rate royalties may have seemed fair at the time the lease was signed, inflation has made them, almost without exception, grossly unfair and inadequate. A royalty of 10 cents per ton of coal, for example, at a time when coal is selling for $20 per ton, is just one-half of one per cent of the value of the mineral. This is not a fair return. The major difficulty in negotiating fair flat rate royalties is that mining companies will normally insist on a very low rate, to guard against the possibility of low market prices for the minerals. Once a tribe or a government has agreed to these low rates, it then becomes very difficult to change the royalty to keep in step with inflation and changing market prices.

A more common form of royalty in developing countries is one based on a percentage of the market price of the mineral at the time of production. Many petroleum concessions provide for royalties of 12½ percent of the value. This means that if the price of oil increases rapidly, as it did in 1973-74, then the amount of the royalty also increases. Percentage royalties are also commonly used for other minerals, usually at rates ranging from 2 to 5 percent of the value of production. While percentage royalties are much more flexible than flat rate royalties, and likely to give the resource owner a larger proportion of the value of the resource, they still have certain drawbacks. If, for example, a mine makes very high profits, reflecting the difference between its operating and capital cost and the price of a mineral on the market, even percentage royalties will usually return only a small proportion of that profit, or surplus, to the resource owner, yet most of the high profit actually reflects the basic value of the mineral itself, not any special skill on the part of the mining company.

A third type of royalty that has been introduced recently by some Canadian provinces and Australian state governments (whose mineral rights are roughly similar to those of Indian tribes) is a royalty based on profits. To collect this kind of royalty, the tribe or the provincial government would have to become a tax collector, assessing the income and expenses of each mining project. This involves much more work than collecting a flat rate or percentage royalty, where all that is involved is a measurement of how much has been produced and a

determination of the market price. But the profit-based royalty does not have the advantage of relying directly on the surplus produced by mining, which is reflected in the profits.

An approach that the government of Papua New Guinea has taken recently, and that has been widely praised around the world, has been to combine a minimum level of returns to the resource owner (in this case the government) through royalty and basic taxation with a system for taking a very large proportion of "excess" profits produced by temporary high prices for minerals or a particularly rich deposit. In Papua New Guinea's case, this is done through an "additional profits tax", which takes for the government 70 percent in the case of minerals, and 75 percent for oil and gas of all profits once a "reasonable return" has been achieved by the mining company. Although Indian tribes do not have the taxing powers of governments, they could apply the same principles to mining projects on their land by combining two different kinds of royalty - a percentage royalty to provide some income all the time, and a profit-based royalty that would come into effect once a company had earned a reasonable return on its investment.

The example on the next page show how this system could work. In this example, a "reasonable return" for the company is assumed to be about 10 percent. This is in fact better than most companies achieve (after correcting for the effects of inflation). The example provides two kinds of revenue to the resource owning tribe - $2.5 million per year from a percentage royalty, and then, beginning in the 7th year of production, an additional $12 million per year based on a 50 percent additional profits royalty. In this example, the "reasonable" profit was calculated according to the "discounted cash flow" from the project, which is a measure of the total financial return over time, and is the measure most commonly used by the mining companies themselves to evaluate projects. Although this example is based on a big project, with total investment of $100 million, the same principles would apply to much smaller projects. It is the percentage return on investment, not the total number of dollars involved, that determines when the additional royalty would be payable.

EXAMPLE OF ADDITIONAL PROFITS ROYALTY

	- YEAR -											
	1	2	3	4	5	6	7	8	9	10	11	12
CAPITAL INVESTMENT	50	50										
VALUE OF PRODUCTION			50	50	50	50	50	50	50	50	50	50
OPERATING COSTS			10	10	10	10	10	10	10	10	10	10
DEPRECIATION			10	10	10	10	10	10	10	10	10	10
PERCENTAGE ROYALTY (5%)			2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
COMPANY PROFIT			27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5
FEDERAL TAX			13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5
COMPANY CASH FLOW (PROFIT AFTER TAX PLUS DEPRECIATION)	-50	-50	+24	+24	+24	+24	+24	+24	+24	+24	+24	+24
ADDITIONAL PROFITS ROYALTY (50% OF "EXCESS" CASH FLOW)			-	-	-	-	-	-	12	12	12	12

The final source of money to a resource owner comes in the form of various fixed payments. Most mineral leases on Indian land, and most concessions in developing countries, provide for a small rental payment for the area of the mining lease or concessions. These payments may be useful for providing a mimimum flow of income, but they are invariably at a very low level, completely unrelated to the value of whatever minerals may be produced.

Other fixed payments often used in developing country contracts are bonuses, either at the signing of the contract, or on the attainment of given levels of production. For example, some of the Indonesian oil contracts provide for bonus payments of $1 million to the government when a production level of 50,000 barrels per day is achieved. Relatively small bonuses payable on signing of the contract may be useful to help the tribe or government meet some of the costs it has incurred for lawyers or other consultants in negotiating the agreement.

5. Ownership and Control

Most developing countries' governments have decided that merely getting more money from their mining and oil projects is not enough; almost all of these governments now insist on a significant share of ownership in the projects as well, and many of them insist on majority ownership. Some recent examples include the takeover of 51 percent ownership of its copper mines by the Zambian government, the Venezuelan takeover of 100 percent of oil operations, and a new copper project in Panama in which the government has an 80 percent interest. Even very poor countries, without the money to pay for their share of a project at the start, have insisted on some ownership. Botswana in southern Africa, and Papua New Guinea in the Pacific each hold a 20 percent share in their copper projects.

One reason for wanting ownership is simply to increase the revenue that the government (or the Indian tribe) gets from the project. This is not so important for governments, which always have the option of raising taxes instead, but it is an important reason for Indian tribes to concentrate on ownership. The dividends paid by a resource project can be important source of money for the tribe.

Another reason for having an ownership share is to learn about the mining business from the inside. Ownership can be used to guarantee that the tribe or government gets its representatives onto the bodies that make the important decisions about the project. These bodies may be boards of directors or operating committees, or merely management groups for the particular project, but whatever they are, participation in them will give the resource owners a way of learning about how the business is managed, how its economics work, and what happens to the money that it produces. If the resource owners simply sit back and wait for reports to be presented to them by the companies, it may never be possible for them to know enough about the way the industry works to evaluate the reports.

Another reason for ownership by a tribe or government is that it can help assure employment and training opportunities for local people and assure the use of locally produced goods and services to the greatest extent possible. Unless there is strong representation by local interests within the management of a mining project, considerations of employment, training, and purchasing are likely to be dominated by the often short-term financial outlook of the companies. Ownership gives the tribe or government the authority it needs to raise and to press these issues.

An ownership share in the project also gives the tribe or the government some voice in deciding how its natural resources are going to be managed. The best way to learn a quick profit for the company in a mine, for example, may not be consistent with the best long-term use of the resource. In many mining projects, companies can make their biggest profit by "high-grading" or mining the rich parts of the deposit first and leaving the lower-grade parts till later - or never. This often means that a large part of the resource cannot be used at all, because once the high-grade ore is gone, it will be uneconomical to mine the rest. A tribe or government with a voice in the management of a project could try to assure a long-term mining plan that made the most efficient use of the whole resource.

Finally, a share in ownership and mangement gives the tribe or government a means of influencing mining decisions that may have broader effects on the whole community - especially decisions on land use and protection of the environment. It is usually much easier to block a mining company's plan for dumping waste in the wrong place by defeating the plan inside the company than to go through expensive and time-consuming court action later.

Once a tribe or government decides that it wants a share of the ownership in a project, there is still the problem of how to pay for it. Most Indian tribes - and most developing country governments - do not have the cash available to meet even a small proportion of the capital costs involved in a major mining project. And most companies will not welcome the idea of giving away a share of their projects for nothing. But in recent years, the governments of many developing countries have worked out a variety of ways in which they can acquire ownership without having to pay cash for it. Most of these methods are equally applicable to Indian tribes.

The easiest way to simply to get ownership for free - to require a company to give the resource owner a percentage of the project for nothing. In effect, this is the same as imposing a royalty; the price that the company pays for access to the minerals is the value of whatever share in the project it gives to the owner. And while companies will normally strongly oppose giving away an ownership share - because it means giving away both money <u>and</u> some control - it may be possible in some cases to negotiate this free share. But it will rarely be possible to negotiate a very big ownership share for nothing; in most cases, it would be limited to perhaps 5, or at most 10, percent of the project. Any greater share would almost certainly make most mining projects uneconomical from the company's point of view and will ve very strongly resisted. And a small ownership share of, say, 5 percent will not normally be enough to give the tribe or government an effective voice in how the project operates.

A more common approach is for the government or tribe to take a "carried interest" in the project. Under this arrangement, the mining company pays <u>all</u> the costs of dev elopment, and the tribe or government then pays back the company after commercial production begins, out of its share of production. The example in the next page shows how this arrangement would work for a small mine, with an initial capital cost of $10 million, and annual production with a sales value of $5 million, in which the tribe had a 30 percent carried interest. This kind of arrangement has been used very often in the oil industry between companies and governments,

EXAMPLE OF CARRIED INTEREST ARRANGEMENT

	- YEAR -										
	1	2	3	4	5	6	7	8	9	10	11
Capital Cost (paid by company)	10										
Value of Production		5	5	5	5	5	5	5	5	5	5
Operating Costs		2	2	2	2	2	2	2	2	2	2
Company Loan to tribe	3										
Tribes 30% share of production		1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5
Tribe's 30% share of operating costs		.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
Net available to pay off loan		.9	.9	9.	.9	.9					
Interest payable on loan from previous year		.3	.2	.2	.1	-					
New loan balance		2.4	1.7	1.0	.2	-					
Net cash to tribe after loan is paid off						.7	.9	.9	.9	.9	.9

NOTES:

In this example, the mine is developed in one year at a total cost of $10 million and then produces minerals valued at $5 million a year over a 10-year period. The tribe has a 30 percent "carried interest", under which it borrows the $3 million for its share of capital costs from the company, and then uses its 30 percent share of production, after operating costs, to pay of the loan. Interest on the loan is assumed to be 10 percent.

but it can also be applied to other kinds of mining projects. The advantage of a carried interest is that it gives the tribe or government an immediate ownership position in the project, usually with full rights to participate in decisions, without using any cash. In addition, once the loan is paid off, the tribe or government will normally receive a reasonable income from its ownership share. Carried interest agreements usually also contain provisions requiring the company to sell the other party's share of production on its behalf, if the tribe does not want to go into the copper or coal marketing business itself. A carried interest arrangement can often be the most effective way for a poor group, whether a tribe or a developing country government, to participate in the ownership of its own mineral resource projects.

Another way for a tribe or government to acquire ownership in mineral projects is simply by borrowing the money directly from the company, but without entering into a carried interest agreement. This is what Zambia did when it obtained a 51 percent interest in its copper mines by issuing bonds, repayable over 8 years. The disadvantage of direct borrowing, compared to carried interests, is that a loan will usually require repayment of a certain amount every year, no matter how much the mine produces. In a year when, for example copper prices are low and operating costs are high, this might mean that the tribe's share of production was less than the amount it was required to repay. In contrast, most carried interest arrangements match the amount of repayment to the value of production, so that the tribe never has to dig into its own pocket for money. This also ensures that the loan is paid off as fast as possible, since all available income from production is used to pay off the loan. On the other hand, a carried interest agreement could provide for only a part of the value of production - say 50 percent - to be used to pay off the loan, with the restto go directly to the tribe from the first year of commercial production. This would ensure some revenue flow to the tribe as soon as possible, although it would mean that it would take longer topay off the loan.

Finally, a tribe or developing country government could arrange to finance its share of a mining project by borrowing from some outside source of finance. One source, of course, would be the commercial banks. Banks have in fact financed the governments' ownership share in many mineral projects around the world. But a loan from a commercial bank has many

of the same disadvantages as a loan from the mining company; it must usually be paid back in a set number of years, and there is always the possibility that the revenue from mining production will not be enough to meet the repayments.

An alternative for developing country governments is foreign aid, or low-interest loans from agencies like the World Bank, to pay for their share of equity in projects. While these sources are not available to Indian tribes, there is one international approach which might be adapted for use by tribes. This is the idea of a revolving fund for mineral exploration and development. The United Nations has recently established this sort of fund for its members, and, on a smaller scale, a fund could be set up for Indian tribes. The fund would advance money for projects, then paid back from each tribe's share of production. In effect it would be a carried interest arrangement, with the money for the tribe's interest provided by the fund instead of the companies. As each project paid off the money that had been advanced to it, funds would become available again for new projects. Money to start the revolving fund operating could be obtained from grants or from those few tribes that already have substantial income from oil and gas projects on their land. This would be a concrete way in which different tribes could cooperate to improve all of their positions in relation to the mining companies.

After a tribe or government has worked out a way to pay for a share in the ownership of a project, there is still the problem of how it can exercise its ownership rights most effectively. If ownership does not mean anything more than sitting back and waiting for dividends to flow in, it is hardly worth the effort; in most cases there are alternative ways to get as much money out of a project, for example through profit-based royalties in the case of a tribe or taxes in the case of a government. The real value of ownership is in the opportunity it provides to exercise real control over the way the project is planned and run. And to exercise this control, the tribe or government must be represented in whatever body exists to make the key decisions. If the mining project is set up as a separate corporation, then there should be members of the board of directors representing the tribe. If the project is to be run as part of the overall operations of alarge mining company, without establishing a new corporation - and this is the way most projects are likely

to operate - then the most effective way to ensure representation in decision making is probably for the resource owner (tribe or government) to insist that the project be set up as a "joint venture" with the company and the tribe retaining their separate identities. Under this sort of arrangement there will normally be an operating or management committee to direct the project, on which all parties with a share in the ownership will be represented. Arrangements for mineral projects should guarantee the right of tribal representatives to sit on the board of directors or the management committee, as the case may be, and should also ensure that these representatives have complete access to all information about the project, including all accounts, so that they are in a position to look at issues effectively.

One difficulty many governments have found is that their representatives on boards or management committee are not useful and effective spokesman for government interests. This happens not only in developing countries but even in countries like England, where for example the government has never been able to exercise effective control over the giant oil company British Petroleum, even though it owns more than 50 percent of the shares and has two government directors on the board. In many cases the reason for this failure to exercise control is that there is no clear links from the directors back to the group they are supposed to represent. This is a particularly important issue for Indian tribes, where mining development will actually take place on the tribe's own land, and will have results that may affect the future of the tribe for generations. In these circumstances it is essential that the tribal representatives on the board or operating committee be directly and regularly responsible to the tribe as a whole, through whatever communications devices seem sensible. The tribal or government representatives should report back regularly, and, where necessary, should delay crucial project decision until the people whom they represent have had an adequate opportunity to consider the issue and arrive at a point of view on it.

6. Non-financial issues

In addition to maximizing their financial returns from mining projects, the governments of developing countries have been very anxious to use the mines for other purposes as well. Many of the provisions that developing countries have insisted on for training and employment of their citizens, purchasing of locally produced goods and supplies, and support for local business development can easily be adapted to fit the needs of Indian tribes.

Most new mining projects require a variety of skilled employees, ranging from geologists and engineers to electricians, pipefitters, heavy equipment operators and so on. There are few projects any more that require men simply to go down under the ground and dig out the ore. Mining has become a highly technical industry, and the same skills that are useful in mining operations can very often be used in other jobs as well)especially in the construction industry).

Even though mining projects require skilled employees, there is no reason why the great majority of these employees should be be from the immediate area - in particular, in the case of mining projects on Indian land, there is no reason why training programmes cannot be set up so that virtually all jobs can be held by Indians within a reasonable time. An example of what a mining company can do to provide training if it wants tois the big Bougainville copper mine in Papua New Guinea, with a total work force of more than 4000. This is one of the most modern, most highly technical mining projects in the world, yet it is located in a country with one of the lowest levels of education and literacy. But the company, by starting training programs as soon as it started development of the mine, has been able to hire Papua New Guinean citizens in more than 80 percent of all jobs, and in 100 percent of such jobs as equipment operators, welders, electricians and otherskilled trades within three years of starting operations. This record is in marked contrast to the situation in many other mining projects in developing countries, where foreigners often make up the bulk of the work force for many years. But it does show what can be done if the resource owner (in this case the government) insists on a vigorous training program and strict controls on employment.

Similarly, agreements for the development of mining projects often provide for the maximum possible use of locally produced goods and services and for mining company encouragement and support of local businesses. The typical "company town" arrangement, in which housing food stores, taverns, gas stations and everything else are owned by the company is a model that has been rejected in many developing countries. An agreement for a mining project could in fact require the mining company to assist local residents in setting up these kinds of businesses to service the mining community. This sort of arrangement would also provide the possibility of jobs for people unable to work directly on the mining project.

7. Changing Old Agreements

The idea in this paper can be applied both to new mining projects and to those where there is already a lease or an agreement in force. It is of course easier to negotiate many of these points with the mining company in an agreement for a new project. In the case of existing projects, usually operating under leases negotiated by the Bureau of Indian Affairs, the companies will try to claim that they have a binding contract that cannot be broken or altered. But this is exactly what the companies have been saying for years to the governments of developing countries, when these governments sought to change the mineral concession agreements that had been negotiated by the old colonial powers. In practice, if a tribe or a government wants to change the conditions under which mining takes place - whether by increasing its financial return from the project or by imposing new requirements for training and employment, or by acquiring a share in the ownership of the project - it will be able to do so if it has the determination and will power to stand firm in negotiations with the companies.

On purely legal grounds there are often good reasons to insist on a change. Often the circumstances have changed so much since the original lease was issued or the original agreement signed that a tribe will be legally justified in seeking to change the terms of exploitation. The idea that a fundamental change of circumstances is adequate grounds for reviewing and changing contractual commitments is one that is widely accepted in legal circles. Even where there are no purely legal grounds for change, though, there are oftengood moral grounds. In most cases, the mining company

will have long ago recovered its original investment and earned a reasonable profit. An Indian tribe should feel fully justified in such a case in taking a very strong stand in favour of getting a much greater share of the proceeds. And even in relatively new projects, the tribe, if it has the determination, can win a better deal. For example the new government of Papua New Guinea renegotiated the concession agreement for the Bougainville copper mine in 1974, only two years after the mine began production and before it had fully repaid the original investment. The key to renegotiation is not the legal situation, but the desire to secure a fair deal.

8. Summary

This paper outlines a number of different ways in which resource owners, including both Indian tribes and developing country governments, can obtain a fair share of the value of these resources when they are exploited. Any particular project will have its own special problems, and will need to have an agreement and mining lease tailored to its special needs. As a general model, though, something like the following might be expected to produce a fair return:

(a) a small bonus payment from the mining company to the tribe to cover the actual cost of negotiating the agreement;

(b) area rental or lease payments beginning as soon as the agreement is signed;

(c) a percentage royalty, paying the tribe a certain share of the market value of whatever minerals are produced;

(d) an additional profits royalty, to come into effect once the mining company has earned a "reasonable return" on its investment;

(e) provisions for a carried interest arrangement, through which the tribe can acquire a share in the ownership of the project (or alternatively, financing of this ownership share through an Indian revolving fund for mineral development); and

(f) appropriate provisions for training and employment of Indians in the mining project, and for promoting the development of Indian-owned businesses serving the mining community.

Achieving all this will not be easy for any group; the mining companies are tough opponents, concerned with keeping the maximum profit they can. And much of the existing law is on the side of preserving existing arrangements, not changing them. But once a group has made up its mind to get a better deal (and, if necessary, has secured whatever outside technical advice it needs), that group can exercise a great deal of power. Events of the last few years around the world have made it clear how much the industrialised countries depend on supplies of energy and mineral resources, and how big a share of the value of those resources their owners (most notably the developing country governments and the OPEC countries) are able to obtain. There is no reason why Indian tribes should be left out of this pattern of change.

<u>INDIAN RESOURCE PROJECTS -- A NOTE ON POSSIBLE FORMS OF TAXATION</u>

The general power of Indian tribes to levy taxes on persons and property within the territorial limits of the tribe's authority is well established in law. And at first it might seem that taxation would be an effective method for tribes to use to assure themselves adequate financial returns from the exploitation of their natural resources. Certainly many developing countries have used tax systems effectively. In some cases, taxation has been more efficient than actual government ownership of mining and oil projects as a means of gaining revenue. But there are two important reasons why taxation may not be the best approach for Indian tribes. First, there are great administrative difficulties in setting up a tax system and enforcing it against a large, financially sophisticated company. Second, there are difficult legal problems which make taxation by Indian tribes of U.S. companies less satisfactory than taxation of these same companies by the governments of developing countries in other parts of the world.

The remainder of this note first describes one possible tax system -- which has in fact been put into effect in the country of Papua New Guinea for mining and oil projects and which is widely regarded as one of the more sophisticated and effective tax systems in the world -- and then goes on to indicate the extent of the administrative and legal difficulties that would be involved if an Indian tribe wished to apply this sort of taxation to natural resource projects on its

land.

1. Taxation Systems

The minerals and energy resources tax system adopted in Papua New Guinea has three basic objectives: (1) to ensure that the people of the country, through the government, receive a fair price for their resources; (2) to capture the lion's share of any excess profits, resulting from high prices on the world market or other factors beyond the control of the mining or oil company; and (3) to allow a reasonable rate of recovery of funds by the people who originally put up the money for the project, so that it can be financed.

Part of the "fair price" that Papua New Guinea receives for its copper and oil is in the form of a royalty. But this is deliberately kept at a very low level -- $1\frac{1}{4}$ percent of the market value -- because a high royalty can often prevent the development of a project entirely or, even more serious, can lead to the mining of a deposit in a way that takes only the rich, high-grade ore and ignores the lower-grade minerals, which may just be left behind forever.

The main element in the "fair price" in this tax system is a basic income tax applied to the mining or oil company. In the case of copper, this tax is at a rate of 43 percent of income; in the case of oil the rate is 50 percent. In addition, the deductions which companies can claim are strictly limited. Only amounts actually spent

for operating expenses, interest on loans, and for capital equipment can be deducted. There are no extra deductions for "depletion" of the resource; after all, the resource belongs to the people of the country, not to the company that is permitted to mine it. Capital expenditures in copper mining are amortized over 15 years and those in oil over 10 years. This means that in normal circumstances a company cannot avoid taxes at the start of a project by taking large deductions for capital spending.

The second objective of the tax system is to capture the lion's share of any excess profits. In both mining and oil, profits may be very high for reasons completely beyond the control of the companies involved. For example, when the Organization of Petroleum Exporting Countries (OPEC) raised oil prices in late 1973 and 1974, one result was that the profits of the oil companies increased substantially. And in copper mining, the price that companies receive can vary greatly, depending on movements on the world market. For example, between April 1974 and mid-1975, the market price of copper fluctuated between $1.40 and 50 cents a pound. The Papua New Guinea tax system takes account of these possibilities for high profits by imposing an "additional profits tax" over and above the basic income tax. This additional profits tax comes into action when a mining or oil company has earned what is considered to be a reasonable return on its investment. There has naturally been disagreement between the government and the companies over what is "reasonable," but the standards that the go-

vernment has adopted are a return of 20 percent for copper mining and 25 percent for oil, reflecting the greater risk usuallyvassociated with oil exploration. (These figures are calculated on the basis of a "discounted cash flow" rate of return, which is a way of measuring the total profitability of the project over a period of years, not just in any one year. Discounted cash flow is also the method used most often by the companies themselves to evaluate their projects.) Once these threhhhold rates of return have been reached, the companies pay both the basic income tax and an additional tax. The effect of the additional tax is to raise the total tax rate to about 64 percent in the case of copper mining and 75 percent for oil. In this way a project that is highly profitable in its early years, because of high market prices, will quickly move to paying a high rate of tax, while a project that is less profitable at first will only pay the basic tax rate.

The third major element in this tax system is an allowance for a reasonable rate of payback to the people who put up the money for the project. In most mining and oil projects, especially those in developing countries, the bulk of the money is provided by commercial bank loans to the mining or oil company. Usually the banks will insist on some fairly sure way of getting their money back. The Papua New Guinea tax system takes this into account by allowing speeded-up deductions for tax purposes in each of the first four years of a project

if the normal after-tax income would not be enough to pay back the sources of finance. In effect, a mining company can reduce its taxes in the early years if it needs the money to pay back the banks. But if this happens, then the deductions are no longer available later on in the project's life, and taxes after the first four years will be higher.

Thus even without royalties or a share in the equity of a project, a government using this kind of tax system would receive very substantial amounts of money from a reasonably profitable mining or oil project. But there are important readons why it may be difficult to adapt the same kind of tax system for use by Indian tribes.

2. <u>Administration</u>

Even a fairly simple tax system requires a large and highly trained bureaucracy to administer and enforce it. This is especially true when the taxpayer is a large, sophisticated corporation, like most of the mining and oil companies. It is often very easy for corporations to distort their financial results -- for example, by inflating the cost of goods and services that it uses, or by borrowing money from an affiliated company at unreasonably high rates of interest -- in order to avoid reporting large amounts of what should be taxable income. Many developing nations -- even some with large and well-edu-

cated staffs of tax collectors -- have been cheated out of tax revenue by large American corporations. If a country or an Indian tribe adopts taxation as its major source of revenue from natural resource projects, it must be fairly certain that it has, or can hire, the administrative skills to assess and collect the taxes.

In some cases, it may be possible to get a fair assessment of taxable income by relying on the companies U.S. federal tax returns. But in the case of a single project on Indian land that is undertaken by a large company with a variety of other interests, this may be unproductive. What an Indian tribe would want to know is: how profitable is this one project? But the federal tax returns would group that project with all the company's other business, and so would still require additional expert work to sort out. In addition, the Indian tribe might want to allow different kinds of deductions, or different rates of deduction, than are allowed under federal tax law, and this would require an entirely new tax return, together with the administrative apparatus to assess and enforce the tax system.

Establishing a large, sophisticated tax system for a single taxpayer -- a mining or oil company on Indian land -- would be difficult and expensive. And most Indian tribes might prefer to use the services of their educated members in other, more immediately productive ways. While some of the same administrative problems exist in connection with other forms of revenue from resources, including Indian owner-

ship of a share in the project or profit-based royalties, the administrative issue is most severe with respect to taxes. Where an Indian tribe has an active ownership role, it can expect that some of its members will gradually become experts in the business and will be in a position to protect the tribe's interest. And even in the case of determination of profits for royalty purposes, it is normally easier to hire appropriate expertise (for example a major accounting firm) than in the case of taxation. Unless the natural resource involved is so large that it can pay for setting up and staffing a sophisticated tax collection system, it may do little good for an Indian tribe to adopt tax measures of the kind discussed above.

3. Legal Issues

A major difference between taxes levied by developing countries and those that might be levied by Indian tribes is their effect on the federal tax liability of a U.S. corporation. Under Section 903 of the Internal Revenue Code, most income taxes imposed by foreign governments on U.S. corporations give rise to a "tax credit." This means that every dollar paid by a corporation in tax to the foreign government (within certain limits) has the effect of reducing the corporation's U.S. tax bill by one dollar. In effect, the bulk of taxes collected by the foreign government are really paid by the U.S. authorities, who would otherwise have taxed the corporation. No si-

milar provision exists in respect of taxes that might be levied by Indian tribes. At most (and even this does not appear absolutely certain) taxes paid by a corporation to a tribe would give rise to a deduction for federal tax purposes, instead of a tax credit. The corporation would still have to pay federal tax on the income remaining after the Indian tax was imposed. The following example shows how this affects the corporation. In each case income before all taxes is $100, and both the Indian or developing country tax rates and the U.S. federal tax rate are assumed to be 50 percent:

	Indian Tribe	Developing Country
Income before tax	100	100
Indian or dev. country tax	50	50
Amount subject to federal tax	50	100
tax credit	0	50
actual federal tax	25	0
amount left to company	25	50

This means that, from the point of view of a company considering an investment project on Indian land, a tax system like that described above would have a very severe impact indeed. And in order for that impact to be reduced to the point where a company would consider it acceptable, the rates of tax imposed by the tribe would have to be reduced to very low levels. When combined with the administrative

problems associated with setting up and enforcing a new tax system, these legal issues make taxation a less attractive alternative for Indian tribes than it is for developing country governments.

Kinds of taxes other than income taxes do not need to be discussed separately, since in fact levies like sales taxes or severance taxes are no different from royalties. The basic question for the tribe to ask in looking at any of these devices as a possible source of revenue is: is this the most effective way of gaining revenue from the mining project, and is it consistent with the best long-term use of the tribe's natural resources?

Stephen Zorn
September 1976

TRIBAL SOVEREIGNTY VS. ECONOMIC DEVELOPMENT?

"Today, Indian tribes are at a point of opportunity. I think there's going to be a tremendous change in Indian country in the next generation and by the time your grandkids are running the tribal government, we will be in the 21st Century. I can envision Indian tribes which are not only economically self-sufficient but also independently and culturally Indian. I don't see economic development as an Anglo-Saxon perogative. I think that the Anglos in this country who say, "But, the Indians can't live in teepees forever, can they?" have an almost childish perspective on cultural development. To turn it around: When Europe was in the Dark Ages, ready to explode culturally into the Renaissance, Marco Polo wandered into China and found a culture far more advanced than his own. But it wasn't necessary for the Europeans to assimilate into Chinese culture in order to develop. It was possible for them to grow and develop as <u>Europeans</u>, not as Chinese; and in the same sense it's possible to grow and develop as <u>Indians</u>, not as Europeans. I know there are problems in trying to find an Indian way to develop economically without becoming a white man, but I say it's there to be done, and it's possible."

Leigh Price
Attorney at Law

There is a myth that economic development is not "Indian" and, therefore, neither Indians nor Indian tribes will be good business people. It is just that, a myth. It is a misunderstanding about what economic development is. Economic development is the production of wealth for owners. Indians had economic systems and trade systems before the advent of the white man and the subsequent disruption of those systems. Tribes were economically self-sufficient. They were able to secure food, clothing, housing--the necessities of life--and the "finer things of life"--art, music, literature and religion. They created the wealth they needed and planned for the future. The thing that sets Indian people apart is their method of distributing their wealth--their wealth-sharing systems.

Developing your natural and other resources in order to create wealth to provide both the necessities of life and the opportunity to enjoy the finer things of life to your tribal members is, no doubt, a goal of every tribal decision-maker. Tribes assuming the control and development of their own resources and reassuming the control over their own lives and destinies shatters the myths and stereotypes the Federal government, society as a whole, and some Indians have come to hold as truths. Tribes have come to be seen as welfare states where Indians sit around on their assets waiting for a benevolent "great white father" to pass out the goodies. Never mind that the goodies most often don't come at all or if they do they are of doubtful value, maybe smallpox laden blankets. Never mind that the government services which should be provided were bought and paid for with a large sum of Indian lives and vast areas of lands and natural resources and put into trust for Indian people to perpetuity--a living legacy to be passed from generation to generation. Never mind that the tribal decision-makers bargained desperately against insurmountable odds and in their wisdom, were able to make agreements so sophisticated in their simplicity that tribes today retain their sovereignty as nations in the midst of a nation. True, some tribes never made treaties. They were simply over-run and brought to the brink of extinction. Nevertheless, there is a valid argument that they

never gave up their sovereignty because there was never a conscious act of saying "Okay, you guys, here it is. I give you my rights as a sovereign nation." In those days, it was simply a matter of being in the wrong place at the right time. (Many of those Indian people are struggling to re-establish themselves as nations. Great controversy rages both within and without the Indian community as to whether those people should be accorded "federal recognition" and receive services. It is a hard question. One attitude that might be considered is "There but for the grace of geographical location go I.")

<u>What is tribal sovereignty</u>?

Sovereignty is a legal concept of western European international law which defines the existence of a nation-state. Whatever political definitions the various Indian tribes had applied to themselves before the European colonization, the relationship established between the Indian tribes and the European powers--one characterized by treaties--was based on the concept of sovereignty![1]

There are three fundamental principles, according to Felix Cohen in the American Jurisprudential view of tribal powers of jurisdiction:

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1 Task Force #4 Report, American Indian Policy Review Commission, July 1976.

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and in substance terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal duly constituted organs of government."[2]

Jurisdiction, in its simplest terms, is the legitimate power of sovereignty over people and property.

The American Indian Policy Review Commission's Task Force #1's Report in its recommendation on General Indian Policy Principles and Objectives makes the following recommendations which restates the relationship of the concept of tribal sovereignty trust responsibility, jurisdiction and the necessity for economic viability.

"Task Force One recommends that the United States recognize the following principles, objectives, and understandings, as the foundation, and as imperatives, of the modern and future National Indian Policy:

(1) Indian people possess an inalienable right to maintain an independent societal, and distinct tribal community, existence within the American system.

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2 Cohen, F. Handbook of Federal Indian Law, (University of New Mexico, Ed), at 123, (1942)

(2) The rights of Indian tribes and Alaskan Natives to a secure political existence as self-governing communities of a distinct polity and societal character shall be guaranteed the promise of permanance, and shall not be denied, in the life of the United States of America.

(3) The dependency and trustee relationship between the United States and Indian tribes is not one of governance and plenary control over Indian existence, but was to be, and yet should be, one of protection against injuries and losses to the Indian people, and one of material and economic assistance to the tribes as a matter of mutual advantage and advancement.

(4) From its formative stages, and until relatively recent date, relationships between the United States, including its European and colonial predecessors, and the several Indian tribes were founded upon a mutuality of rights and a mutuality of interests, common to all mankind and to all the world's nations. Treaties were a measure of those rights and of Indian sovereignty, but also treaties were the contract form by which Indian rights might be altered; some were to be diminished, while the remainder were to be protected by the superior power which came to the United States. The contracting, by treaty and agreements, relied upon the willing, or otherwise ultimate consent, of the separate national parties. Indian treaties should not now be changed except through negotiations with the tribal people contracted by the particular treaty and with their consent. As well, the principles that are seen employed in international conventions--and in the labor unions' bargaining in this country--should prevail; namely, seeking a new contract primarily to secure better terms, or to satisfy broader interests of mutual benefit.

(5) National policy should foster commitments designed to restore the Indian tribes to a level of viable economic independence in context with the modern national and complex world economy. "Complete economic independence" for the Indian tribes, together with the goal of revitalized and creative self-government and "self-determination", was the declared national policy in the depths of The Great Depression; the Nation can better afford its requisite commitments now."

Court cases will be brought from now to doomsday interpreting the laws of the United States as applied to Indian rights. Most

conflicts have not been decided by any court and very few issues have been decided by the Supreme Court. Even after decisions are made, the Congress may pass new laws which modify or make them meaningless, or the Court's order may not be enforced. It is difficult to separate a right from an enforceable right.

One prime example of how legislation has affected tribal exercise of sovereignty and the exercise of jurisdiction in control and development of resources is the case of the Osage tribe related by Charles Lohah at the Great Lakes Seminar:

"I'm from the Osage tribe in Oklahoma," said Lohah, "our so-called tribal government was established and is presently maintained by Federal statute. Congress said, here's your tribal government! At the time (1906) we had large and undeveloped areas of coal and oil. The statute was totally intended for our exploitation--I won't dignify it by calling it development.

Times changed. We have a per capita distribution system which made everybody happy during the oil boom of the twenties. No one worried about our tribal government system until it became unworkable as a tribal government.

We've tried to alter its structure. Very simply, what we tried to do was split the business functions from the tribal governmental functions and make what is now the "Minerals Exploitation Council" into a subsidiary of a <u>tribal</u> council. It seemed very rational to us, but since it was established by a Congressional enactment, it had to go to Congress to get approval. It writhed around in the committee rooms and died like a dog on the floor. So we still have a "tribal" government restricted to functioning like a wholly owned subsidiary of a multinational oil company."

Jurisdiction is perhaps the most crucial issue facing Indian nations today--who has the jurisdiction--the power: over what, over whom, and where.

One of the most disturbing pieces of legislation passed during the "termination era" of the Eisenhower administration was the Indian Law Enforcement Improvement Act (P.L. 280), which was designed to give states jurisdiction over local tribal governments and thus assimilate Indians totally into the non-Indian governmental structure. (Legislation has been introduced in the Congress which would reverse some of the effects of P.L. 280. Recent court cases have also narrowed its effects.) Some states have been hesitant to assume jurisdiction over reservations because of the expense involved for police salaries, welfare, etc., which would not be supported by taxes from the reservations. Some states have now decided that there is a lot of money to be made through taxation on Indian reservations. Since 1968, however, states have been unable to assume jurisdiction over tribes without the agreement of the tribe. Some states, (Montana and New Mexico, for instance) have worked out what they hope will be a loophole. They are arguing that jurisdiction amounts to the right of <u>self</u>-government--i.e., that Indian tribes have jurisdiction over Indians (self-government) but not over non-Indians on the reservations. "They figure that the non-Indians have the cash and if they can tax Peabody Coal or Westmoreland, they've got most of the money anyway," according to Leigh Price. "There are two problems with this. One is that they are trying

to create a theory of jurisdiction based on race. Traditionally, the sovereign has jurisdiction of power, it has the power over everyone within the boundaries of the jurisdiction. For instance, if you are a citizen of Wisconsin and you drive into Michigan, you have to obey the traffic laws of Michigan. Michigan has power over the driver of anybody in the state, not just the citizens of Michigan. But states such as New Mexico are arguing that the tribes have authority only over tribal members, not over everybody on the reservation. They're hoping that the Supreme Court will give its blessing to a new form of racially-based sovereignty--and they may win."

Next to this question is the question of civil and criminal jurisdiction over non-Indians within the reservation. Can the tribal police arrest a non-Indian for speeding on the reservation, try him in tribal court and throw him in tribal jail?

Court cases can be won. Laws can be passed, or as in the case of P.L. 280, repealed. Tribal constitutions and codes can be perfect. There could be a referendum where the entire world voted "Yes, tribal governments are sovereign. They have unquestioned jurisdiction over their people and their resources and anybody who enters their reservation limits." But unless a tribe behaves like a sovereign nation and exercises its jurisdiction, what good will it do? Like a miser who hoards his money and starves to death,

there's no point having it if you don't use it. But also like a miser, if you run out and blow everything you've got, you will also starve.

Tribal sovereignty and the exercise of its powers goes hand in hand with economic development, with the creation of wealth for owners. You cannot have one without the other.

SOMETHING FISHY

Utilization and development of fish as an economic resource is an accustomed way of life to many tribes. Sound management of these resources is economically and culturally important. Further, fishing and hunting rights have become a leading issue in questions of jurisdiction over the control and development of Indian resources. Many of the cases involving Indian tribal jurisdiction over non-Indians and vice versa have been predicated by fishing and hunting rights. The leading edge of the several white back-lash organizations forming throughout the United States has been organizing around the issue of fishing rights in the state of Washington. There is a great effort to make the question of fishing rights a question of civil rights. Nothing could be further from the truth, yet this misconception may well be the greatest threat to tribal sovereignty and treaty rights today. The "good old boys" who would never dream of stealing Indian coal and who would be highly incensed if anyone else did, simply don't believe that Indians own the fish and that they were bought and paid for by the lands that were ceded in return for the treaties which provided protection and an ongoing trust responsibility.

The Bureau of Sports Fishing and Wildlife, Department of Interior, is charged with the responsibility for natural resource management on Indian lands when assistance is requested by the Bureau of Indian Affairs by the Fish and Wildlife Coordination Act (16 USC 661-667E) and by a 1953 Memorandum of Understanding with the Bureau of Indian Affairs (D.M. 501.1-5). According to a 1972 report prepared for the National Council on Indian Opportunity by J. M. Engel the Bureau of Sports Fisheries and Wildlife is involved in the following activities:

1. Management of land and waters on Indian Reservations for commercial and recreational hunting and fishing.

2. Production of hatchery fish for management of waters on reservations.

3. Management of fisheries (commercial and sport) not on reservations lands but having an economic impact on Indian people.

4. Training of Indians (formal and on-the-job) so they may assume management of their own fish and wildlife resources.

5. Providing technical expertise for grant projects (Economic Development Administration, Office of Economic Opportunity, and Emergency Administration) that involve Indian fish and wildlife resources.

6. Assisting Indians (and Federal agencies concerned) on legal matters and treaty rights dealing with fish and wildlife resources.

In 1972, the Bureau reported that they were working with seventy-five reservations containing 167,000 acres of standing water and 2,400 miles of streams on Indian reservations. At that time, nineteen other reservations were waiting for assistance. As is the usual case, the Bureau claimed it could not adequately meet its responsibilities to Indian people because of low funding levels and personnel ceilings.

In spite of the joint responsibilities of the Bureau of Indian Affairs and the Bureau of Sports Fisheries and Wildlife for administering the trust responsibility in regard to Indian resources and despite the fact that many members of traditional fishing tribes have depended on fish for basic survival both physically and fiscally for many years, the advent of tribally owned fishing enterprises is relatively recent. It didn't happen until tribes themselves decided to do it and began to start projects on their own. Dr. Wallace Hea~~l~~th, President of the American Indian Development described two tribal enterprises to the participants:

LUMMI INDIAN AQUACULTURE PROJECT

When the Lummi Indian Aquaculture Project was conceived in 1968, the tribe was faced with difficulties encountered by many reservations. The tribe was in debth to the BIA and did not have enough income to pay normal operating costs. While the Lummi Tribe had a fishing culture in which nearly everyone fished at some time in their lives, there was no tribally financed fishery to take advantage of their water resources. There was a small handful of people employed on a CAP program on the reservation as the sum total of tribal employment, even though there were about 2,500 people in the tribe. Housing was 92% sub-standard. Many homes had not water other than what was carried and services for education and health were generally inadequate with high drop-out rates among the Indian students.

The tribe had very limited resources for fisheries since the river water that arrived at the reservation was too low in quality for a fish hatchery. None of the adjoining salt water bays could support large fishery operations in the natural state. Therefore, new ideas were developed to make use of the tribal tideflats in Lummi Bay to produce both shellfish and salmon.

The proposals were developed to separate federal agencies to provide (1) training in aquaculture for 18 Lummi Indians, (2) to provide technical assistance to carry out the research necessary to grow the fish and oysters in a new kind of environment, and (3) a construction proposal to build a dike area creating artificial salt water ponds in which to culture salmon and oysters. These were approved in early 1969 and work began immediately.

It was unusual at the time that all three proposals resulted in grants controlled directly by the tribe such that the tribe did the construction, controlled the training, and had its own people involved in the research along with professionals hired by the tribe. Within one year, they had completed the research facilities, trained a group of their own personnel, and carried out the first important stages of research.

The second year resulted in another training program for 64 people using graduates from the first year as teachers the second year, built a three-mile dike to form a 700-acre sea water production pond, now known as the "sea pond", and began the work resulting in a new oyster hatchery and a salmon hatchery. By 1972, all of the research and production facilities were in their first phases of test operation. By 1973, commercial crops were under way in the production facilities.

In each part of the project, very difficult and unforeseen obstacles rose by the truck load. A small handful of tribal leaders were fully engaged at all times with more problems than they would even want to handle one at a time. This meant there were several full-time commitments, yet the tribe had no funds to pay councilmen for the time necessary to handle the problems. This resulted in a very leavy load of volunteer effort on the part of tribal leaders over an extended period, as is true of many reservations, and this condition to some extent continues to exist.

One of the first problems that appeared was that the Army Corps of Engineers claimed jurisdiction over the Lummi Indian Tideflats even though the treaty clearly gave the tribe jurisdiction.

Since it would require years to go to the Supreme Court for a resolution of the dispute, and since a confrontation would have stopped the project, the tribe quietly found friends in the highest levels of government who helped facilitate a permit from the Corps of Engineers that would not jeopardize the tribe's claim for sole jurisdiction.

Yet hundreds of hours of valuable staff time went into resolution of this problem, and had it not been handled properly, the aquaculture project might never have been started. A non-Indian opposition developed which attempted to utilize the Army Corps' jurisdiction to terminate the project and they came very close to accomplishing their objective. Tribal leaders had to make strong efforts to get congressional backing which helped solve many problems throughout the entire period of tribal development. Without the strong congressional support, probably few, if any of the tribal programs would have succeeded.

The fishery restoration on the Nooksack River was another problem. It was discovered that the state had allocated most of the water in the river at low water to non-Indian users which endangered the salmon runs during low water. Yet the tribe discovered in 1969, accidently, that 60 years before a Supreme Court case known as the Winter's Doctrine gave the Indians prior and paramount rights to the flow of the river. The tribal leaders immediately put the State on notice that no more permits to water from the Nooksack River could be allocated and that in fact those given previously were illegal.

Since the water quantity and quality of the river at the reservation was uncertain, the tribe had to look for locations upstream and off the reservation for a salmon hatchery site. One was discovered on timber company lands, and after six months of negotiation, the tribe had a 20-year lease with option for renewal at a very low cost. The hatchery now produces three million salmon fingerlings per year and is operated by 10 Lummis.

Several problems resulted in the development of the Lummi Bay sea pond resource. A previous study by the State Fisheries Department concluded that oysters would not grow in Lummi Bay and several authorities did not feel that the concept of building a dike to form a sea pond was feasible. There was also professional opposition to the idea of an oyster hatchery in Lummi Bay.

In spite of these and other opposition to the Lummi Bay project, the tribal leaders and their staff convinced federal agencies to support the program. Perhaps for the first time in history, an Indian tribe was given a major construction contract to build a $10 million dike different from any other kind of construction done in North America. The tribe completed it successfully after five months construction time. The research programs resulted in the first commercial oyster hatchery on the West Coast in full operation by 1973. By 1975, record oyster seed production resulted and very successful oyster culture in Lummi Bay was demonstrated on a very large scale. At the present time, 80 million seed oysters were produced from the oyster hatchery in 1975 (nearly twice the original planned capacity) and a total of 250 million seed oysters have been planted in the Lummi Bay and sea pond.

The oyster hatchery is resulting in a stable supply of oysters which is new to the region. This will result in easier marketing and more income from selling seed oysters to other oyster growers in the region. Thus, the hatchery will be a self-supporting part of the project by itself. It is managed by one of the first Lummis to work in the project who with his staff of 10 have been trained over a four-year period. Each month, they bring about three dozen adult oysters in the front door and carry about 10 million seed oysters out the back door three or four weeks later. Even the design of the hatchery is Indian in the shape of a traditional longhouse with modern technology added for the oyster culture.

After solving many problems associated with the sophisticated technical training that was carried on for three years to provide a trained Lummi technical workforce, the tribe formed the Lummi Indian School of Aquaculture (LISA) to make such training available to other tribes. Now LISA is attended by 70 students from 25 tribes. Each student will return to the home reservation to assist in its water resource development.

As a result of the construction of the dike and other facilities, the tribe formed its own construction company. Since then, it has built over 100 homes, laid 12 miles of water line, built sewer facilities, and is now bidding on other construction projects in the area.

The overall impact of the project has been significant. While the number of full-time people employed by the tribe in 1968

was three, now over 200 are employed directly in tribal projects, 125 of these in aquaculture. Due to the increasing salmon planting and the improvement of the fishery, over 100 Lummi fishermen are also benefiting indirectly from the project. Once the tribal leaders learned the process of obtaining grants for aquaculture, they were able to use the same methods to obtain grants to satisfy other tribal needs, including those in HEW, Department of Labor, and BIA programs.

One of the biggest set-backs in the project turned out to be one of the best advances. In 1973, 500,000 small salmon weighing a total of about 50,000 pounds escaped through small holdes in the nets of the Lummi sea pond and went away to sea. There was no reason to expect them to return to the salt water pond since they normally return to fresh water. However, in 1974 just a year and a half later, 200,000 pounds of salmon returned to the Lummi Bay area and were captured by Indian fishermen. At that point, the project changed from a "sea farm" to a "sea ranch", whereby the fish are released, fed in the open sea and return to be caught by the tribe.

Another side-effect of the project and tribal development has been the increase in the number of students in higher education which went from four in 1968 to over 50 in 1973. Perhaps this is because that getting a college education previously meant leaving the reservation to get a job. Now that tribal development is underway, there is a need for college graduates to assist the tribe in future development. Higher education now means coming home.

PYRAMID LAKE PAIUTE TRIBAL FISHERY RESTORATION

The Pyramid Lake Paiute Reservation is located north of Reno about 30 miles and includes a large lake which is 12 by 25 miles in area. It is a desert lake which has been drying up for thousands of years from an area that included about 8,000 square miles. The lake water now is about one-sixth as salty as sea water and the fish that live in it have become especially adapted to its water quality. Because of its saltyness and other factors, it is perhaps one of the most productive bodies of water in the United States.

In about 1900, there were over 4,000 Pyramid Lake Paiute Indians living around the edges of the lake and along the river that enters it. They harvested over a million pounds of fish a year that served as food for their families, and the fish were also sold to provide cash for their economic needs. The most

important fish at that time was the Lahanton cutthroat trout which was world famous as being one of the largest trout ever caught, exceeding 60 pounds in weight. But in 1905, the government built a dam with no fish ladders and diverted water from the lake to irrigate the desert. By 1937, the lake had dropped over 50 feet and the last cutthroat, trout disappeared. The population of the tribe dropped to less than 500. In recent years, the government and the state have begun replanting the lake with a similar cutthroat trout, but in small numbers. The lake has been under the management of the state of Nevada by contract with the tribe.

In recent years, the tribe has been in litigation with both the federal government and the state in an effort to return water to the lake and also to restore the fishery of the lake. In 1956, Congress gave a mandate to the Department of the Interior to restore the fishery. However, by 1972, relatively little had been accomplished and no significant improvement was seriously planned for many years to come. Tribal leaders visited the Lummi Indian project and some of the Lummi technical staff visited Pyramid Lake at the tribe's request.

By 1973, a plan was developed and federal funding was obtained to provide the tribe with its own hatchery and provide training to Pyramid Lake Paiute personnel at the Lummi Indian School of Aquaculture. The hatchery was completed in 1974, and by 1975, approximately one million fish will be produced by the hatchery for plant in the lake.

New hatchery and fishery production techniques were developed specifically for Pyramid Lake and the conditions that the tribe has to meet in that location.

It is estimated by the Bureau of Outdoor Recreation that restoration of the fishery will bring an additonal $10 million per year to the area, and an important percent of this will go to the tribe. The tribe will also experiment with the raising of fish in floating pens for commerical harvest and processing.

The tribe has now been funded for a processing plant and a research laboratory to improve production. Also, planning money for a new and larger hatchery has been provided by Congress such that eventually about 10 million fish will be planted each year in the lake. The tribe has also developed its own ranger patrol program and will take over the management of the lake as well as the rest of the reservation. Tribal employment has already gone from one to 25 in just two years.

The project has also strengthened the water rights case since if restoration of the lake fishery and its water supply will bring $10 million to the area, many new friends will be made from commercial interests. It is conceivable that the returns to the area from restoring the lake fishery with the river water will exceed the value of the irrigated crops that were created by diversion of the river.

Many specific problems were encountered during the project. Foremost was the difficulty of getting support behind the project when there was litigation over the river water. There were far more non-Indians than there were Indians involved in the litigation. However, the tribe and its staff made it clear that the fishery issue was being separated from the river water issue by placing the hatchery on a well-water site far away from the river. Thus, as they put it, in terms of issues they were separating the fish from the water. Very strong congressional support was forthcoming and resulted in large-scale funding directly from Congress as well as from the agencies.

Among other things, this aspect of the project demonstrates that it is possible to develop a technical solution to a legal and political problem. Thus, by designing the hatchery so that it would function on well water, recycled several times through the hatchery instead of relying on river water, the legal and political problems were avoided.

As in any new development story, there are many growing pains and many of these are associated with the development of management capability. But enormous progress has been made and if the forward motion continues, a classic story of successful development will result.