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# Non-Lease Agreements Available for Indian Mineral Development

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# NOTES

## NON-LEASE AGREEMENTS AVAILABLE FOR INDIAN MINERAL DEVELOPMENT

MINERAL LEASING: Indian tribes and individual Indians may for the first time enter into agreements for the development and disposition of tribal mineral resources.

On November 30, 1981, Senator Melcher of Montana introduced S. 1894, a bill "to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes."[1] The purpose of S. 1894 was to provide Indian tribes greater flexibility than that afforded by the 1938 Indian Mineral Leasing Act[2] for the development and sale of their mineral resources. The 1938 Act only allowed for leases negotiated and approved by the Secretary of Interior. Agreements such as joint ventures, production sharing agreements, and managerial agreements were foreclosed to Indian tribes unless the Secretary approved them pursuant to his authority to authorize contracts for services rendered by an energy company developing and extracting minerals on Indian lands.[3] The new bill sought to further the policy of Indian self-determination and maximize the financial return tribes can expect for their valuable mineral resources.

S. 1894 became law on December 22, 1982,[4] after it went through numerous changes in both the Senate[5] and the House.[6] The Act is cited as the Indian Mineral Development Act of 1982 (IMDA).[7] This casenote discusses the objectives of the Act and the possible effects it may have on Indian mineral development.

### PRESENT MINERAL DEVELOPMENT ARRANGEMENTS

Leasing has been the predominant arrangement for extraction of minerals from lands owned by individual Indians and tribes. The Indian Mineral Leasing Act of 1938 gave the Secretary of Interior authority to enter into mineral leases for tribal lands. The Department of Interior uses

1. 127 CONG. REC. S14127 (daily ed. Nov. 30, 1981) (remarks of Sen. Melcher).
2. Ch. 198, 52 Stat. 347 (1938) (codified as amended at 25 U.S.C. §§ 396a–396g (1976)).
3. 25 U.S.C. § 81 (1976). This section can be read to authorize a service contract to extract minerals for a tribe, but not as an authorization for the sale of minerals.
4. Indian Mineral Development Act of 1982, Pub. L. No. 96-382, 96 Stat. 1938 (codified at 25 U.S.C.A. §§ 2101–2108 (1983)).
5. *See Indian Mineral Development: Hearings Before the Select Committee on Indian Affairs to consider S. 1894, to permit Indian tribes to develop tribal mineral resources under agreements in addition to leases, subj. to Interior Department approval,* 97th Cong., 2d Sess. (1982) [hereinafter cited as *Hearings*]; S. REP. NO. 472, 97th Cong., 2d Sess. (1982).
6. *See Indian Mineral Development: Hearings on S. 1894 Before the House Committee on Interior and Insular Affairs,* 97th Cong., 2d Sess. (1982); H.R. REP. NO. 746, 97th Cong., 2d Sess. (1982).
7. Pub. L. No. 97-382, § 1.

its basic lease form for Indian trust land for mineral development purposes. The statutory lease term is 10 years and may be extended as long as minerals are produced in paying quantities. Oil and gas leases are offered for sale by advertisement, at public auction, or on sealed bids. The Secretary may reject all bids or determine that it is unwise to accept the highest bid and readvertise the lease offered for sale. If the advertising and bidding procedures are unsuccessful in leasing the land for mineral development, then the Secretary may enter into private negotiations with the consent of the tribal council.[8]

All mineral leases are subject to a regulated competitive procedure[9] and one lease may cover 2,560 acres.[10] Indian mineral owners may negotiate for a lease if they have obtained permission from the Assistant Secretary of Interior in advance.[11] These individually negotiated leases, however, remain subject to approval by the Secretary of Interior.[12]

Before the 1938 Act became law, Indian tribes had been precluded from leasing their lands for mineral development purposes. The Indian Reorganization Act (IRA)[13] had been passed just four years earlier, ending the federal government's policy of Indian land allotment. This Act authorized tribes to establish federally chartered business corporations and gave the elected tribal council, not the tribe, the authority to lease Indian lands for terms of ten years.[14]

Individual Indians who held allotments could and still may lease their land for mining purposes with any terms as may be deemed advisable by the Secretary of Interior.[15] If the heirs or devisees of the interest in the allotment cannot be found, the allotted land is subject to the same advertising and competitive bidding procedures that pertain to tribal lands.[16]

These various statutory schemes are designed to protect Indian tribes and Indian individuals against exploitation of their mineral estates. But they also limit the tribe's and individual's ability to enter into other agreements besides lease agreements. Tribes may not alienate an interest in land except when authorized by treaty or by an Act of Congress.[17] Since unsevered minerals of all kinds are deemed to be an interest, Indian

8. 25 U.S.C. § 396(b) (1976). Regulations may be found beginning at 25 C.F.R. § 211 (1982).
9. 25 U.S.C. § 396(b) (1976).
10. 25 C.F.R. § 211.9 (1982).
11. 25 C.F.R. § 211.2 (1982).
12. *Id.*
13. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1976)).
14. This changed the tribal council from a traditional one where the elders sat because of their status to an elected form resembling the American type government. This has split tribes in the past and has caused discord among the tribal members.
15. 25 U.S.C. § 403 (1976).
16. 25 U.S.C. § 404 (1976).
17. 25 U.S.C. § 177 (1976).

tribes cannot agree to sell their mineral estates without appropriate authorization.

In 1975, the Indian Self-Determination Act[18] was enacted, marking a change in the federal government's attitude towards a tribe's participation in the government and education of its people. Since passage of the Act during the Nixon Administration, there has been a national policy of self-determination for Indian tribes. The Reagan administration has reiterated this policy and applied it to the natural resources development area:

> Natural resources such as timber, fishing, and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.
>
> With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium, and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.[19]

Since 1975, the Secretary of Interior has approved seven mineral agreements other than leases pursuant to his authority to authorize contracts for services rendered by an energy company developing and extracting minerals on Indian lands.[20] Others are pending, awaiting approval under the guidelines set forth in the IMDA.[21]

## THE IMDA

Because of the IMDA, Indian tribes, if permitted by their own internal governing documents and subject to approval of the Secretary of Interior,

18. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

19. Statement by the President, Indian Policy, January 24, 1983, p. 4.

20. The seven approved Mineral Agreements include: (1) Blackfeet–Damson Oil Corp. (approved June 1975); (2) Jicarilla–Odessa Natural (approved May 18, 1977); (3) Navajo–Exxon (approved Jan. 4, 1977); (4) Jicarilla–ARCO (approved March 19, 1979); (5) Wind River–Wesseley Energy Corp. (approved Feb. 21, 1980); (6) Northern Cheyenne–ARCO (approved Aug. 21, 1980); (7) Navajo Tribe–Petroleum Energy, Inc. (approved April, 1981). *Hearings, supra* note 5, at 169.

21. There are three lease or non-lease agreements pending approval: (1) Crow–Shell Oil Corp.; (2) Navajo Resource Inc.; (3) Navajo Tribe–Chuska Energy Inc. In the past six months, seven nonlease agreements have been submitted for review. *Id.*

may now enter into various kinds of commercial agreements for the development of their energy and non-energy mineral resources.[22] An individual Indian may include his mineral resources in a tribal Minerals Agreement if the other parties (i.e., the tribe and the energy development company) concur and the Secretary approves. The Secretary must find that such participation is in the best interest of the Indian(s).[23]

The Secretary must approve or disapprove a Minerals Agreement submitted to him either 180 days after submission or, if an environmental impact statement is required, 60 days after compliance, whichever is later.[24] The Secretary must give the tribe his written findings supporting his proposed decision 30 days before he formally approves or disapproves the agreement. These findings and all other information of a business or financial character relating to such agreements shall be deemed privileged proprietary information.[25]

An affected party may seek a writ of mandamus in the event the Secretary fails to act within the time allotted.[26] A decision of the Secretary to disapprove an agreement shall be considered a final agency action for purposes of judicial review.[27] Federal district courts shall have jurisdiction to review agency action and shall determine the matter *de novo* with the burden on the Secretary to sustain the action.[28]

The United States is not liable for any business losses sustained by a tribe or individual Indian in carrying out the agreement.[29] The Secretary shall continue to have the trust responsibility to protect the interests of the Indian parties involved[30] and shall provide, to the extent of available resources, necessary advice and assistance to the tribes and individual Indians.[31]

Any existing Minerals Agreements shall be reviewed by the Secretary for compliance with the Act,[32] and may be reviewed prior to promulgation of regulations required under the Act.[33] Nothing in the Act will affect the provisions of the 1938 Indian Mineral Leasing Act or any other law authorizing the development or disposition of tribal or individual Indian mineral resources[34] nor impair any independent right which a tribe or-

22. 25 U.S.C.A. §2102(a) (1983).
23. 25 U.S.C.A. §2102(b) (1983).
24. 25 U.S.C.A. §2103(a) (1983).
25. 25 U.S.C.A. §2103(c) (1983).
26. 25 U.S.C.A. §2103(a) (1983).
27. 25 U.S.C.A. §2103(d) (1983).
28. *Id.*
29. 25 U.S.C.A. §2103(e) (1983).
30. *Id.*
31. 25 U.S.C.A. §2106 (1983).
32. 25 U.S.C.A. §2104(a) (1983).
33. 25 U.S.C.A. §2104(b) (1983).
34. 25 U.S.C.A. §2105 (1983).

ganized under the IRA may have with respect to the development of its mineral resources.[35]

The IMDA gives tribes and individual Indians the appropriate authorization to alienate the mineral interest located on their lands. Tribes may now actively participate and choose which arrangement is appropriate for the development of mineral resources located on their lands. One of the problems encountered with the leasing procedures under the 1938 Indian Mineral Leasing Act is that a standard lease form is used. The fixed royalty and severance tax rates remained the same until the tribes began requesting the termination of these leases. The IMDA places no statutory limitations on the terms of the agreement nor restrictions on the types of agreements that may be used by an individual Indian or tribe. By allowing the tribes and individual Indians to negotiate the terms of the Mineral Agreement, one of the objectives—to maximize the financial return tribes and individual Indians can expect for their valuable mineral resources—may be fulfilled.

The other objective of the IMDA is to further the policy of Indian self-determination. The federal government encourages tribes to exercise greater self-government. Tribes and individual Indians may enter into Mineral Agreements if their tribal constitution or charter and the Secretary of Interior approves of such ventures. The tribal constitution or charter limitation was included to prevent the tribal council from agreeing to enter a Mineral Agreement without the consent of the entire tribe.[36] Secretarial approval is required to make sure the agreement is in the best interest of the tribe and/or individual(s).

The IMDA promises many things to individual Indians and tribes in the development of mineral resources. What effect this Act will actually have on Indian mineral development will be discussed in the next section.

## EXPECTATIONS OF THE IMDA

The IMDA allows individual Indians and tribes to negotiate and enter into non-lease type agreements for the development of their mineral resources. Some of the tribes may not be prepared to take on some of the responsibilities mandated in the Act. A joint venture may be suitable for some tribes who have capital to put into the development operations and can bear to take some losses. But for those tribes that are just beginning to develop their own resource management programs, a negotiated lease agreement may be better because of the risks involved (i.e., social impact,

35. 25 U.S.C.A. §2108 (1983).

36. Although tribal councils have the authority to enter into agreements concerning the development of Indian lands, many tribal members believe that this should be voted on by the entire tribe before the agreement is submitted to the Secretary for approval. *See Hearings, supra* note 5.

capital management, etc.). Whichever option a tribe considers for the development of their mineral resources is now available under the IMDA.

The IMDA mandates that the tribe's or individual Indian's best interest be considered before the Secretary approves the agreement. The Secretary is required to consider, among other things, the potential environmental, social, and cultural effects on the tribe, and provisions for resolving disputes that may arise between all parties to the agreement, before approving or disapproving a Minerals Agreement. What basis the Secretary will use in considering all these factors is unclear.

Also, the IMDA does not address what would happen in an energy crisis, when the nation's need for available energy resources may outweigh the tribe's or individual Indian's best interest in the approval of a Minerals Agreement.[37] The Act does, however, provide recourse for tribes and individual Indians in federal district court, if they can show that their best interest was not considered in the approval of the agreement.

The Secretary is also responsible for providing, to the extent of available resources, advice, assistance, and information during the negotiation of a Minerals Agreement. There is nothing in the Act, however, that states when the Secretary shall ensure that assistance is available. The Secretary has the option of not providing any assistance if he does not have the available resources. This may place a tribe or individual Indian in an unequal bargaining position during the negotiation of the agreement.

During the Senate hearings, testimony was given that the Department of Interior did not have the staff to provide the services mandated by the Act.[38] The 1983 appropriations bill for the Department of Interior and related agencies includes an increase of $15 million for the operation of Bureau of Indian Affairs (BIA) programs.[39] The BIA appropriation includes $85 million for natural resources development. The federal agencies responsible for managing mineral development on federal and Indian lands are the Bureau of Land Management and the U.S. Geological Survey.[40] The Department has also started a new agency, the Minerals Management Service, to alleviate some of the Bureau of Land Management responsibilities.[41] By making these changes and appropriating more money to the Department of Interior the assistance should be available when the tribes need it.

One provision that the IMDA has which other mineral development arrangements do not have is recourse to a judicial proceeding if the

37. The Secretary is also responsible for generating revenue for the federal government from mineral development on federal lands.

38. *See Hearings, supra* note 5, at 160.

39. INDIAN NEWS NOTES, BIA Publication, Dec. 30, 1982.

40. 43 C.F.R. §§ 3100, 3300 (1982).

41. The Mineral Management Service was established under the Secretarial Order 3071 which transferred the responsibility of oil and gas royalties from the U.S. Geological Survey.

Secretary disapproves the agreement. The Act places the burden on the Secretary to sustain the action. There is no reference in the Act that there be expedient proceedings, however. The agreement may get bogged down in judicial proceedings and the energy development companies may lose interest in developing the tribe's mineral resources.

## CONCLUSION

S. 1894 was introduced to provide Indian tribes greater flexibility for the development and sale of their mineral resources. The leasing procedure under the 1938 Indian Mineral Leasing Act was not sufficient to validate the non-lease agreements the Secretary of the Interior had been approving since 1975.

The original bill gave the Secretary one year to approve a Minerals Agreement and automatically ratified all agreements made before the Act was passed. Through the legislative process, testimony was heard and amendments made to the bill. The tribes, allottees, energy development companies, and the Departments of Interior and Justice participated in making this a workable scheme. The Secretary, however, still has the power of approval, through the "best interest" and "trust relationship" clauses of the Act. The two objectives of the IMDA—self-determination and maximization of financial return—may be realized by the tribes and individual Indians, if they are allowed to negotiate the agreements for mineral development on their lands as envisioned by the Act.

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