Calendar No. 400

105TH CONGRESS, *2d Session* | SENATE | REPORT 105–205

TO PERMIT THE LEASING OF MINERAL RIGHTS, IN ANY CASE IN WHICH THE INDIAN OWNERS OF AN ALLOTMENT THAT IS LOCATED WITHIN THE BOUNDARIES OF THE FORT BERTHOLD INDIAN RESERVATION AND HELD IN TRUST BY THE UNITED STATES HAVE EXECUTED LEASES TO MORE THAN 50 PERCENT OF THE MINERAL ESTATE OF THAT ALLOTMENT

JUNE 5, 1998.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2069]

The Committee on Indian Affairs, to which was referred the bill (S. 2069) to permit the leasing of mineral rights, in any case in which the Indian owners of an allotment that is located within the boundaries of the Fort Berthold Indian Reservation and held in trust by the United States have executed leases to more than 50 percent of the mineral estate of that allotment, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 2069 is to amend the Mineral Leasing Act of 1909 to facilitate the leasing of mineral rights within the exterior boundaries of the reservation of the Three Affiliated Tribes of the Fort Berthold Reservation.

BACKGROUND

The Fort Berthold Reservation was established for the Arikara, Mandan, and Hidatsa Tribes by the Fort Laramie Treaty of 1851. While the three tribes were once geographically and linguistically distinct and still maintain their separate tribal identifies, they

function as one tribal entity in terms of their relations with the federal government.

Initial contact of the tribes with non-Indians is estimated to be around 1790. At that time, the three tribes lived along the Missouri river, hunting buffalo and growing squash, corn and beans. Contact brought a devastating smallpox epidemic in 1837. To escape the disease, a group of Hidatsa moved up the Missouri River in 1845 and established the village of Like-A-Fishhook. Later, they were joined by the other two tribal bands and by 1862, formal unification of the tribes had begun.

Though the Treaty of Fort Laramie established a reservation of over 12 million acres for the three tribes, subsequently-issued Executive Orders and allotments of tribal land reduced the reservation to its contemporary size of less than one million acres. In 1954, the tribes lost another 152,300 acres, along with an abundance of natural resources, because of the Missouri River Pick Sloan program, and the filling of Garrison Reservoir, now Lake Sakakawea, by the U.S. Army Corps of Engineers.

The flooding destroyed traditional tribal population centers, and families who had sustained themselves by ranching and farming along the fertile Missouri River bottomlands were relocated to dry, windy uplands. The tribal administrative center was moved to New Town, an area that was not part of the reservation. Though the tribes received approximately $12 million in compensation for their flooded lands, the value of the lost land was later placed at $20 million.

The three tribes elected to come under the Indian Reorganization Act of 1934, forming a representative tribal government and adopting a constitution and by-laws, which though subsequently amended, remain the tribes' governing documents. The Three Affiliated Tribes Business Council serves as the governing body, consisting of a tribal chairman, vice-chairman, treasurer, secretary, and three at-large members. The total tribal enrollment is approximately 8,500 members of whom 5,387 reside on reservation lands.[1]

The reservation is located in parts of Mountrail, McLean, Dunn, Mercer, McKenzie and Ward counties. Ownership of the surface and mineral estates on the reservation is diverse, including tribal, federal, state and private lands. There are about 350,000 private acres, and 17,834 state-owned mineral acres on the reservation, but the latter are not leased for oil or gas exploration.[2]

Through 1996, there have been 245 drilling permits issued on the reservation, while statewide, there have been 14,600 permits issued, with 452 permits issued in 1996 alone. From lands located off the tribes' reservation, more than one billion barrels of oil have been produced in North Dakota, with over 32 million barrels produced in 1996. In contrast, there have been 14 million barrels of

[1] The preceding section of the Background was derived in part from information contained in "American Indian Reservations and Trust Areas", a publication of the Economic Development Administration, U.S. Department of Commerce.

[2] Information with regard to oil exploration and production on the Fort Berthold Indian Reservation and on lands outside of the reservation is derived from a briefing book on S. 1079 prepared for the Committee on Indian Affairs by Jim Powers, President, Powers Energy Corporation, and Thomas M. Disselhorst, Staff Attorney for the Three Affiliated Tribes of the Fort Berthold Reservation.

oil produced from the reservation, with less than 52,000 barrels produced on tribal lands in 1996.

Within the Fort Berthold Reservation, Antelope Field is the only field with significant production. It was discovered in 1953, with three of the four producing zones discovered on lands located outside of the reservation's boundaries. A total of 29 successful non-exploratory oil wells were drilled on Indian lands, but 20 of those wells are no longer productive. Outside of the Antelope Field, only 13 oil wells have been drilled on tribal lands within the reservation, 12 of which are no longer producing.

Fifth-seven oil wells have been drilled on fee lands within the reservation, 35 of which are still producing. 353,583 barrels of oil have been produced from tribal lands within the reservation, while 3,684,361 barrels of oil have been produced from fee lands within the reservation, or ten times the production from tribal lands.

In the early 1990's, the Three Affiliated Tribes sought to explore the potential for oil and gas development on tribal lands. In 1995, the tribe approached tribal allottees about making their lands available, through leasing, for such mineral development. A tribal prospectus was developed and submitted to several hundred companies, but few companies responded, citing barriers to development that include: (1) too many mineral interests tied up in probate; and (2) fractionated heirship problems, which is compounded by the requirement of the 1909 Mineral Leasing Act that all persons who have an undivided interest in any particular parcel must consent to its lease.

According to testimony received by the Committee on Indian Affairs in an October 6, 1997 hearing on S. 1079, an earlier but identical version of S. 2069, there are approximately 293 Indian estates involving lands on the Fort Berthold Reservation pending in the process of probate, which may affect as many as 1,200 tracts of land and as many as 12,000 undivided interests in those tracts.[3]

The problem of fractionated heirships arises out of the General Allotment Act of 1887. As explained by the Deputy Solicitor for the Department of the Interior, Edward B. Cohen, in his testimony before the Committee on October 6, 1997:

> The purpose of the statute was to accelerate what was at that time termed to be 'the civilization of Indians by making them private landowners and farmers.' Many Indians sold their land. A few assimilated into surrounding communities, and in 1934, Congress recognized that this policy was fairly unsuccessful. It resulted in 100 million acres being removed from the Indians land base, and it also left us a legacy of fractionation.
>
> The cause of this fractionation was that Congress enacted probate laws which provided that as individual Indian owners died, their property descended to their heirs as undivided fractional interests in the land. So if you do the math quickly, if an Indians owner had a 160-acre allotment and died and had four heirs, the heirs did not inherit

[3] Testimony of Thomas M. Disselhorst, Staff Attorney for the Three Affiliated Tribes of the Fort Berthold Reservation, before the October 6, 1997 Hearing of the Committee on Indian Affairs on S. 1079.

> 40 acres each; each inherited a 25 percent interest in the 160-acres allotment. When they died, assuming that they each had four heirs, each of the sixteen heirs inherited a 6.25 percent interest. If you take that just one generation more, and assuming that each of the heirs had four theirs, each of the 64 owners then had a 1.56 percent share. And this exponential fractionation occurs with each successive generation.[4]

In 1992, the General Accounting Office (GAO) conducted a study of the fraction problem on twelve Indian reservations, including the Fort Berthold Reservation. The GAO study found that of 2,610 tracts of land on the Fort Berthold Reservation, 352 had two Indian owners, 999 had three to ten Indian owners, 675 had eleven to twenty-five Indian owners, 377 had twenty-six to fifty Indian owners, 174 had fifty-one to one hundred Indian owners, and 33 had from one hundred one to three hundred Indian owners.[5]

The Mineral Leasing Act of 1909, 25 U.S.C. 396, provides that:

> all lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect; *Provided,* That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. the Secretary of the Interior shall have the right to reject all bids, whenever in his judgment the interests of the Indians will be served by doing so, and to readvertise such lease or sale.

The Mineral Leasing Act has been interpreted as requiring the Secretary of the Interior to secure the consent of all owners who have an undivided interest in a parcel of land that would be the subject of a mineral lease.[6] Because of fractionated heirship problems associated with the manner in which Indian estates are inherited or devised, there can be hundreds of owners of an undivided interest in a parcel of land.

In contrast, where non-Indian owned mineral acres are concerned, most states allow the mineral acres to be developed with less than 100 percent consent of all interest holders as long as all

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[4] Testimony of Edward B. Cohen, Deputy Solicitor, U.S. Department of the Interior, before the October 6, 1997 Hearing of the Committee on India Affairs on S. 1079.

[5] "Indian Programs—Profile of Land Ownership at 12 Reservations", Briefing Report to the Chairman, Select Committee on Indians Affairs, U.S. Senate, by the U.S. General Accounting Office, February, 1992, GAO/RCED–92–96BR.

[6] Ruling of the United States District Court of the District of New Mexico on *McClanahan, et al.,* v. *Hodel, et al.,* No. 83–161–M Civil (D.N.M., Aug. 14, 1987).

persons who own an interest in the minerals receive an accounting for production from the lease. Partly because of the fundamental difference in leasing procedures between property held by non-Indians and land held in trust by the United States for the benefit of Indians, oil and gas exploration companies have been reluctant to pursue the potential for oil exploration on many Indian reservations, including the Fort Berthold Reservation.

The Fort Berthold Reservation is an otherwise attractive parcel to develop because it falls within the overall geological boundaries of the Williston basin, an area in which more than a billion barrels of oil have been produced to date. The United States holds more than 475,000 mineral acres in trust for the Tribes and its members, or roughly half of the total land area within reservation boundaries. As outlined above, oil has been and is being produced in commercial quantities on the lands within the Tribes' reservation that are not held in trust by the United States.

The area of the Williston Basin in which the Fort Berthold Reservation is located is geologically complex, however it is thought that the area is not likely to contain a single large pool of oil that can easily be developed. Thus, the oil and gas companies seek access to large blocks of land for detailed and thorough exploration to enable both wide-scale and profitable exploration and development of the oil and gas potential on the lands comprising the Fort Berthold Reservation.

Acquisition of such large blocks of land on the Fort Berthold Reservation is made more difficult because of the checkerboard nature of land ownership by the Tribes, tribal members and non-tribal members. This is primarily the result of the allotments to more than 1,000 tribal members under the General Allotment Act of 1887, and the 1910 Act specific to the Fort Berthold Indian Reservation, which allowed non-Indians to settle on unallotted lands within the reservation. There are approximately 3,200 allotments on the Reservation, with each allotment representing tracts of land varying in size from a few acres to 320 acres. Estimates indicate that 30% of these tracts are held by only one individual, but the balance of the tracts have an average of about 20 owners. Some tracts are owned by up to 200 individuals, all of whom would have to agree to lease the allotment in order for mineral exploration to occur.

Unlike other tribes that have been able to develop their oil and gas resources, most of the mineral acres held in trust which are available for oil and gas development on the Fort Berthold Reservation are either held by individual tribal members or are located under Lake Sakakawea. Because large tracts are needed for successful development, few wells have been drilled and little production of oil has taken place except in areas directly adjacent to fields off the reservation that have already been explored.

LEGISLATIVE HISTORY

S. 2069 was introduced on May 12, 1998, by Senator Dorgan, for himself and Senator Conrad, and was referred to the Committee on Indian Affairs. An earlier and identical version of S. 2069, S. 1079 was introduced on July 29, 1997 by Senator Dorgan, for himself and Senator Conrad, and was referred to the Committee on Indian

Affairs. A hearing on S. 1079 was held on October 6, 1997. S. 1079 was reported by the Committee on Indian Affairs on October 23, 1997, and passed the Senate on November 7, 1997. S. 1079 was passed in the House of Representatives on November 12, 1997, with an amendment which is unrelated to the substance of S. 1079. The House amendment, known as the Quincy Library bill, authorizes a logging demonstration project in California. Because of the apparent controversy associated with the Quincy Library amendment, the Senate has not acted on S. 1079. In an effort to overcome the impasse associated with the unrelated amendment to S. 1079, Senators Dorgan and Conrad introduced S. 2069.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On May 20, 1998, the Committee on Indian Affairs, in an open business session, considered an amendment in the nature of a substitute to S. 2069 proposed by Senator Dorgan, and, by unanimous vote, ordered S. 2069 to be favorably reported to the Senate with an amendment in the nature of a substitute and with a recommendation that it do pass.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

The amendment in the nature of a substitute provides authority for the Secretary of the Interior to approve any mineral lease or agreement affecting individually-owned Indian land, if the owners of a majority of the undivided interest in the Indian land which is the subject of the mineral lease or agreement consent to the mineral lease or agreement and if the Secretary determines that approval of the lease or agreement is in the best interest of the Indian owners.

That determination by the Secretary is governed by regulations found at 25 C.F.R. 212.3, which provides that:

> *In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take an administrative action affecting the interests of an Indian mineral owner. In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a lease, permit, unitization of communization agreement), the Secretary shall consider any relevant factor, including but not limited to: economic considerations, such as the date of lease expiration; probable financial effect on the Indian mineral owner; feasibility of land concerned; need for change in the terms of the existing lease; marketability; and potential environmental, social and cultural effects.

The effect of the majority owners' agreement and the Secretary's approval is to make the lease or agreement binding on all owners of an undivided interest in the Indian land, including any interest owned by an Indian tribe, and all other parties to the lease or agreement to the same extent as if all of the Indian owners had consented to the lease or agreement. Proceeds derived from the lease or agreement are to be distributed to all owners in accordance with their ownership interest.

The amendment also authorizes the Secretary to execute any mineral lease or agreement affecting individually-owned Indian land on behalf of an Indian owner who is deceased and the heirs to or devisees of the interest of the deceased owner have not been determined, or if determined, some or all of them cannot be located. The amendment further provides that leases or agreements authorized for approval or execution under this subsection need not be offered for sale through a public auction or advertised sale.

The amendment in the nature of a substitute is intended to supercede the Act of March 3, 1909, to the extent provided in subsection (1) of that Act.

EFFECT ON EXISTING LAW

The substitute amendment to S. 2069 allows mineral leases of lands held in trust or restricted status by the Secretary of the Interior for the benefit of individual Indians on the Fort Berthold Indian Reservation to be approved by the Secretary where persons who hold a majority of the undivided mineral interest in a single parcel of land subject to any lease or agreement have agreed to the terms of the lease or agreement. This applies to all leases or agreements covering lands on the Fort Berthold Indian Reservation regardless of whether the leases or agreements are presented or approved by the Secretary under the 1909 Indian Mineral Leasing Act, 25 U.S.C. 396, or the Indian Mineral Development Act of 1982, 25 U.S.C. 2101–2108, or any other applicable law. The substitute amendment is intended to supercede any contrary requirement or interpretation of existing law, as it applies to the Fort Berthold Indian Reservation, such as that contained in the unreported U.S. District Court case, *McClanahan* v. *Hodel,* 16 Indian L. Rep. 3113, Civil No. 83–161–M, Aug. 14, 1987).

The substitute amendment also changes existing law as it applies to the Fort Berthold Indian Reservation, including those provisions of the 1909 Act and its regulations, which require the Secretary to have a public auction or advertised sale in the case of a mineral lease or agreement affecting individually-owned Indian lands when the owner is deceased and the heirs to or devisees of the interest of the deceased owner have not been determined or cannot be located. The substitute amendment permits the Secretary to execute a lease or agreement in these circumstances without first conducting a sale. The substitute amendment is intended to supercede existing law, including that contained in the 1909 Act, which would otherwise require the Secretary to offer such leases for sale only through public auction or advertised sale in these circumstances.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 (a)(1) sets forth the definitions of the following terms as they are applied in the Act: “Indian Land”, Individually-Owned Indian Land” and “Secretary”. Section 1(a)(2) addresses the effect of approval by the Secretary of the Interior. Section 1(a)(2)(A) provides that the Secretary may approve any mineral lease or agreement that affects individually-owned Indian land if the owners of

a majority of the undivided interest in the Indian land that is the subject of a mineral lease or agreement, including any interest covered by a lease or agreement executed by the Secretary under paragraph (3), consent to the lease or agreement, and the Secretary determines that approving the lease or agreement is in the best interest of the Indian owners of the lands.

For the purpose of determining whether the owners of a majority of the undivided interest in the Indian land consent to a lease or an agreement, the undivided interest of both the Three Affiliated Tribes and the individual owners shall be counted. The interests of the Three Affiliated Tribes and the individual owners need not be covered by the same lease or agreement.

Section 1(a)(2)(B) provides that upon the approval by the Secretary of the Interior under subparagraph (A), the lease or agreement shall be binding, to the same extent as if all the Indian owners of the Indian land involved had consented to the lease or agreement, upon all owners of the undivided interest in the Indian land subject to the lease or agreement, including any interest owned by the Three Affiliated Tribes, and all other parties to the lease or agreement.

Section 1(a)(2)(C) provides that the proceeds derived from a lease or agreement that is approved by the Secretary under subparagraph (A) are to be distributed to all owners of the Indian land that is subject to the lease or agreement in accordance with the interest owned by each such owner.

Section (1)(a)(3) provides authority for the Secretary to execute a mineral lease or agreement that affects individually-owned Indian land on behalf of an Indian owner if that owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined or the heirs of devisees referred to in subparagraph (A) have been determined, but one or more of the heirs or devisee cannot be located.

Section 1(a)(4) provides that it shall not be a requirement for the approval or execution of a lease or agreement under this subsection that the lease or agreement be offered for sale through a public auction or advertised sale.

Section 1(b) sets forth a rule of construction which provides that this Act supercedes the Act of March 3, 1909, 25 U.S.C. 396, only to the extent provided in subsection (a).

The amendment in the nature of a substitute to S. 2069 amends the title of the Act to read: "A bill to permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease.".

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2069, as developed by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 2, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2069, a bill to permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kathleen Gramp (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

JUNE E. O'NEILL, DIRECTOR.

Enclosure.

S. 2069—A bill to permit the mineral leasing of Indian land located within the Fort Berthold Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease

S. 2069 would modify the conditions under which the Secretary of the Interior may approve a mineral lease or agreement that affects individually owned Indian land within the Fort Berthold Reservation in North Dakota. Under current law, approval of such leases requires the consent of all of the individuals that have an undivided interest in a property. This bill would ease that requirement by making the Secretary's approval contingent upon the consent of a simply majority of individual owners. Once approved by the Secretary, an agreement would be binding on all owners of the property, and any receipts would be distributed in proportion to each owner's interest in the property.

CBO estimates that implementing S. 2069 would have no effect on direct spending or receipts, because any income resulting from agreements approved under this legislation would be paid directly to the Indian owners or to the Fort Berthold tribal government. Hence, pay-as-you-go procedures would not apply to the bill. Although the Bureau of Indian Affairs would incur additional costs if S. 2069 results in more leasing activity on the reservation, we estimate that any effect on discretionary spending would be insignificant.

S. 2069 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. The Fort Berthold tribal government might receive additional income if these changes lead to increased leasing activity on the reservation.

On October 30, 1997, CBO transmitted a cost estimate for S. 1079, an identical bill that was ordered reported by the Senate Committee on Indian Affairs on October 23, 1997. The CBO estimate for S. 2069 is identical to the estimate provided for S. 1079.

The CBO staff contacts are Kathleen Gramp (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal gov-

ernments). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2069 will have a minimal impact on regulatory requirements and that the enactment of S. 2069 will reduce the amount of paperwork associated with the leasing of lands on the Fort Berthold Reservation.

EXECUTIVE COMMUNICATIONS

The testimony of Edward B. Cohen, Deputy Solicitor, U.S. Department of the Interior, on S. 1079, is set forth below:

STATEMENT OF EDWARD B. COHEN, DEPUTY SOLICITOR, THE DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am here today to present the views of the Department of the Interior on S. 1079, a bill "To permit the leasing of mineral rights, in any case in which the Indian owners of an allotment that is located within the boundaries of the Fort Berthold Indian Reservation and held in trust by the United States have executed leases to more than 50 percent of the mineral estate of that allotment."

We support enactment of S. 1079 if amended. Before detailing our proposed amendments, we appreciate the work of the sponsors in introducing S. 1079 which is a positive step that, if enacted, would complement the Department's current legislative proposal dealing with the issue of fractionated ownership of Indian trust and restricted lands. The issue of fractionated ownership of land is a problem caused by peculiarities in Federal Indian law. As each generation passes, their heirs continue to own interests in land which are undivided; i.e., parcels of land which are not separately identified to a specific owner. In 1992, the General Accounting Office issued a report profiling the ownership of 12 reservations, one of which was the Fort Berthold Reservation. The Fort Berthold Reservation has the fourth highest number of fractionated ownership interests.

As the number of owners increase in these tracts of land, the administration of the land becomes increasingly more difficult. Approximately 80 percent of the Bureau of Indian Affairs' real estate services budget goes to attempting to administer less than 20 percent of the lands under its jurisdiction.

The Act of March 3, 1909 (25 U.S.C. 396) provides that consent of all owners of a tract of trust or restricted land must be obtained prior to approval of a mineral lease by the Secretary of the Interior. As a consequence of this statutory requirement, firms engaged in mineral exploration

and development are less likely to lease Indian lands because of the costs associated with locating and acquiring the consent of all owners to a parcel of Indian land. The result is that the Indian owners do not gain maximum economic benefit from their ownership. This 100 percent consent requirement is not found in other laws governing the use of Indian lands. For instance, rights of way across Indian land can be granted by the Secretary when a majority of the interests consent; and surface leases, i.e. agricultural, may be granted by the Secretary when the owners of the land are unable to agree upon a lease. In addition, we cite 25 U.S.C. § 406 which states,

> Upon request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land." (Sale of Timber on Lands Held Under Trust)

While agricultural and timber uses are renewable resources in contrast to mineral resources which are not renewable and are non-replaceable, the rationale for majority consent still applies. The Department believes the 1909 statute did not contemplate the ownership of Indian land becoming as highly fractionated as it now exists and, unlike other existing statutes, it has not been amended since enactment to conform with contemporary times.

Turning to our amendments, first, we believe that the title should be amended to read, "To permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation when there is a majority interest in the parcel of land under consideration for lease consent." Second, Subparagraphs (A) and (B) of (a)(1) should be deleted in their entirety and the following should be added in lieu thereof, "The Secretary of the Interior may approve any mineral lease affecting individually owned trust or restricted land that requires approval by the Secretary, if the owners of a majority interest in the trust or restricted land consent to the mineral lease and the Secretary determines that approval of the lease is in the best interest of the Indian owners. Upon such approval the lease shall be binding upon the minority interests in the trust or restricted land, including any interest owned by an Indian tribe, and all other parties to the lease to the same extent as if all of the Indian owners had consented to the transaction. Proceeds derived from the lease shall be distributed to all mineral interest owners in accordance with the interest owned by each owner." Third, in subsection (a)(2) delete the words "ALLOTMENT—An allotment described in this paragraph is an allotment that—," and in lieu thereof add "INDIAN LAND.—Indian land described in this paragraph means land that," and in (a)(2)(B) delete "is held in

trust by the United States," and in lieu thereof add "is held in trust or restricted status by the United States."

We understand that the government of Three Affiliated Tribes of the Fort Berthold Reservation also supports S. 1079. The Bureau of Indian Affairs encourages the Committee to consult with the allottees of the Reservation.

This concludes my prepared statement. We look forward to working with the Committee to develop the desired changes to the bill. I will be happy to answer any questions the Committee may have.

CHANGES IN EXISTING LAW

The amendment in the nature of a substitute to S. 2069 will establish a new section of Title 25 of the United States Code, modifying the manner in which 25 U.S.C. 396 applies to the approval by the Secretary of the Interior to leases of Indian land on the Fort Berthold Indian Reservation.

APPENDIX A[7]

United States General Accounting Office

GAO

Briefing Report to the Chairman, Select Committee on Indian Affairs, U.S. Senat

February 1992

INDIAN PROGRAMS

Profile of Land Ownership at 12 Reservations

GAO/RCED-92-96BR

[7] "Indian Programs—Profile of Land Ownership at 12 Reservations", Briefing Report to the Chairman, Select Committee on Indian Affairs, U.S. Senate, by the U.S. General Accounting Office, February, 1992 GAO/RCED–92–96BR.

Section 1

Background

The Secretary of the Interior administers land for Indian individuals and tribes.[1] This land is generally managed for the Indian owners by the Department of the Interior's Bureau of Indian Affairs (BIA). Key components of BIA's management responsibilities are maintaining land ownership records and title documents, negotiating and awarding leases and permits for use of the land, and distributing to the Indian land owners the income generated by leases and permits.

BIA's land management responsibilities were significantly affected by the Indian General Allotment Act of 1887. Under the act, as amended (25 U.S.C. 331), individual Indians were allotted tracts of land, generally in tract sizes of 40, 80, or 160 acres. Prior to this, Indian land within designated reservation boundaries was, for the most part, owned collectively by tribes. As a result of the act and the subsequent allotment process, ownership of a significant amount of a reservation's land transferred from the tribe to individual Indians; another major portion, about two-thirds of the original land, was transferred to non-Indians. With certain exceptions, the allotment of land to individual Indians ended in 1934 with the passage of the Indian Reorganization Act (25 U.S.C. 461, 478). Much of the land allotted under the 1887 act, as well as the land that remained under tribal ownership, continues to be administered by Interior.

The 1887 allotment act, as amended, provided among other things that the heirs of an Indian who had been allocated land would inherit the decedent's ownership interests in the land (25 U.S.C. 348). Because of this provision of the act, the ownership of some allotted land has continually changed and become fractionated as ownership interests have passed from generation to generation. These ownership changes have made BIA's land management activities, such as leasing of surface and subsurface resources, more complex due to the additional recordkeeping required to account for the growing number of owners and ownership interests in individual tracts of land.

Land held for individual Indians and tribes includes both surface and subsurface (oil, gas, and mineral) components. The components are accounted for as separate tracts when their ownership differs; otherwise they are treated as one tract. BIA maintains land records according to a tract identification number. In the historical pattern of changing ownership in the land, some tracts have been sold or transferred to non-Indian ownership. As this has occurred, such land has been removed from Interior's responsibility and ownership records are no longer maintained.

[1] Indian land administered by Interior consists of trust land and land in restricted status.

In the early 1980's, BIA reiterated its continuing concerns to the Congress about the extensive number of undivided ownership interests[2] that characterized Indian land ownership. In 1983, the Congress enacted the Indian Land Consolidation Act, 25 U.S.C. 2201, et seq., as amended. One purpose of the act was to reduce extensive fractionation of individual Indian ownership. The act authorized any tribe to establish inheritance codes to govern the inheritance of real property and develop plans to consolidate the ownership of Indian land. The act also provided that, under certain conditions, an individual Indian ownership interest of 2 percent or less in a tract would be transferred to the respective tribe upon an owner's death, instead of being transferred to the decedent's heirs. This transfer of ownership to the tribe is referred to as "escheatment". As currently specified in the act, such ownership interest will transfer, or escheat, upon the owner's death if (1) it is not willed to another owner in the same tract and (2) the interest is incapable of earning an annual income of $100 in any one of the 5 years following the death of the owner. This provision is hereafter referred to as the small ownership escheatment provision.

BIA's computerized land records data base is its official source of ownership data for land held for Indians. The data are categorized by tract and include information such as tract identification number and resource code. The resource code identifies whether a tract's ownership applies to the surface resources, subsurface resources, or both.

Objectives, Scope and Methodology

The Chairman of the Senate Select Committee on Indian Affairs asked us to obtain descriptive information for 12 reservations on (1) the ownership of Indian land administered by Interior, (2) BIA's workload in maintaining ownership records, and (3) the Indian Land Consolidation Act's effect on the degree of ownership fractionation.

The reservations included in our work were the same ones cited as examples of extensive land ownership fractionation in 1984 congressional hearings on amendments to the Indian Land Consolidation Act. The 12 reservations are administered by 3 different BIA Area Offices: under the Aberdeen, South Dakota Area Office were Fort Berthold and Turtle Mountain in North Dakota, Standing Rock in North and South Dakota, and Pine Ridge, Rosebud, and Cheyenne River in South Dakota; under the Portland, Oregon Area Office were Colville and Yakima in Washington; and under the Billings, Montana Area Office were Blackfeet, Crow, and Fort Peck in

[2]Undivided ownership interests refers to multiple owners sharing ownership in a tract of land without dividing the actual land among the owners.

Montana and Wind River in Wyoming. Table 1.1 shows the 12 reservations' tribal affiliations and the number of enrolled tribal members.

Table 1.1: Tribal Membership

		Enrolled tribal members		
Reservation	Tribal affiliation	Residing on reservation	Residing off reservation	Total tribal membership
Blackfeet	Blackfeet	7,217	6,623	13,840
Cheyenne River	Cheyenne River Sioux	3,690	5,970	9,660
Colville	Colville	4,170	3,475	7,645
Crow	Crow	6,210	2,382	8,592
Fort Berthold	Arikara, Mandan, Hidatsa	4,600	4,500	9,100
Fort Peck	Assiniboine, Sioux	5,146	4,485	9,631
Pine Ridge	Oglala Sioux	12,107	7,000	19,107
Rosebud	Rosebud Sioux	10,973	1,810	12,783
Standing Rock	Standing Rock Sioux	4,799	8,611	13,410
Turtle Mountain	Chippewa	4,420	22,080	26,500
Wind River	Arapahoe, Shoshone	5,003	2,278	7,281
Yakima	Yakima	5,595	2,514	8,099
Total		73,889	71,728	145,648

To determine the current land ownership on the 12 reservations, we obtained computerized land records information from BIA's National Technical Support Center in Albuquerque, New Mexico. The data were obtained as of April 29, 1991, for reservations under BIA's Billings Area Office, and as of May 7, 1991, for reservations under BIA's Aberdeen and Portland Area Offices. Data for each reservation included information such as the reservation and owner identification, owner type (Indian, non-Indian, tribe, etc.), ownership interest size, tract number, tract resource, and tract size. We sent the four computerized BIA tapes to the National Institute of Health Computer Center, where they were uploaded to a mainframe computer for our use.

We used DTL-380 II software to access and write programs for the files uploaded to the mainframe. We wrote programs to define the variables within the files and to produce a variety of charts and tables describing land ownership situations for the 12 reservations.

For each of the 12 reservations, table 1.2 presents information on the number of tracts, and the corresponding acreage, managed by BIA. As the

table shows, the number of acres in a tract varies significantly. For most reservations, however, tracts are generally 40 acres or larger, and many are at least 160 acres.

Table 1.2: Tracts and Acreage Managed by BIA[a]

			Number of tracts			Acreage of tracts		
Reservation	No. of acres	No. of tracts	Less than 40 acres	40-159 acres	160 acres or more	Smallest tract	Largest tract	Average tract acreage
Blackfeet	1,238,021	7,036	792	3,434	2,810	0.001	5,365.7	176
Cheyenne River	2,004,773	10,474	449	2,830	7,195	0.001	2,800.0	191
Colville	1,233,098	5,482	1,195	2,027	2,260	0.050	6,133.0	225
Crow	1,680,246	6,810	957	2,899	2,954	0.030	23,025.0	247
Fort Berthold	1,190,544	8,708	728	4,192	3,788	0.010	827.5	137
Fort Peck	1,390,345	6,896	1,204	2,355	3,337	0.001	2,994.4	202
Pine Ridge	2,050,492	10,661	694	2,744	7,223	0.001	1,000.6	192
Rosebud	1,134,906	6,410	197	1,242	4,971	0.001	1,735.7	177
Standing Rock	1,244,016	9,267	3,018	1,854	4,395	0.010	2,290.0	134
Turtle Mountain	42,453	917	528	335	54	0.145	471.5	46
Wind River	2,158,925	4,228	1,256	2,437	535	0.310	662,515.2	511
Yakima	1,149,734	6,089	1,212	2,658	2,219	0.060	3,200.0	189
Total	**16,517,553**	**82,978**	**12,230**	**29,007**	**41,741**			**199**

[a]Because BIA maintains separate tract records for surface and subsurface resources when ownership is different, the number of acres shown in the table does not always represent surface acres.

Table 1.3 shows, for the 12 reservations, whether tract ownership applies to surface resources, subsurface resources, or both. For nearly half the tracts, ownership is the same for both the surface and subsurface resources. But the situation varies among the reservations. At Fort Berthold, for example, tract ownership for most of the reservation land is different for the surface and subsurface resources, while at Yakima, tract ownership is, for the most part, the same for those resources.

Table 1.2: BIA-Managed Tracts for Surface and Subsurface Use

Reservation	Tracts			Total tracts managed[a]
	Surface only	Subsurface only	Both surface and subsurface	
Blackfeet	3,204	1,417	2,412	7,033
Cheyenne River	2,457	3,801	4,816	10,474
Colville	880	1,369	3,231	5,480
Crow	3,195	1,406	2,205	6,806
Fort Berthold	2,169	5,436	1,103	8,708
Fort Peck	1,717	2,405	2,774	6,896
Pine Ridge	1,282	1,713	7,686	10,681
Rosebud	870	1,375	4,165	6,410
Standing Rock	1,473	3,911	3,883	9,267
Turtle Mountain	193	186	556	917
WindRiver	1,414	1,394	1,417	4,225
Yakima	252	289	5,531	6,062
Total	19,106	24,304	39,489	82,899

[a]Excludes 19 tracts for which the BIA data base did not specify the resource type (i.e., surface, subsurface, or both).

To obtain additional information, we interviewed officials at the Aberdeen Area Office and the BIA agency office for the Standing Rock reservation. We discussed issues concerning current ownership patterns and fractionated ownership of Indian land. During our work at the Standing Rock reservation, we observed the intricate detail and accountability required for each record associated with the distribution of one decedent's land interests. We noted that the vast majority of the recordkeeping at the agency level is manual and extremely time consuming.

As agreed with your office, we did not verify the completeness, accuracy, and reliability of the data maintained in BIA's computerized land records data base. Such a verification would require a significant effort of time and resources because of the immense volume of data contained in the data base. We did, however, select 12 ownership interest records from the computerized data for one land tract and compared them to ownership records for the same tract that BIA maintains manually. This comparison showed no discrepancies.

To determine the impact of the Indian Land Consolidation Act, we identified ownership interests that had escheated and the extent to which tribes have developed plans and established inheritance codes to consolidate Indian land. We interviewed BIA officials and obtained documentation of

any actions taken by the tribes. In examining the impact of the small ownership escheatment provision, we asked about the economic activity and land value associated with Indian land. Because records are kept manually, difficulties arose in obtaining timely responses to our inquiry. Consequently, agency officials provided us their best estimates of economic activity associated with land of the six tribes under the Aberdeen Area Office. We did not verify the estimates provided.

We conducted our work between March and December 1991. We discussed the data presented in this report with BIA officials at the Aberdeen Area Office and the BIA Central Office. They generally agreed with the data as presented and we made changes as appropriate on the basis of their comments.

Section 2

Ownership of BIA-Managed Land

Ownership of land managed by BIA can involve various entities—Indian individuals, tribes, non-Indian individuals, corporations, and federal government agencies. Individual tracts of land can be owned by one or more of these entities.

Table 2.1 provides a general profile of ownership for the 82,978 tracts of land at the 12 reservations. As the table shows, the tribes own a substantial portion of the tracts at most reservations. Most of the remaining tracts are either entirely owned by one Indian or have multiple owners, with at least one of them being an Indian.

Table 2.1: Ownership Profile of BIA-Managed Tracts

	No. tracts owned solely by			No. tracts with multiple owners		
Reservation	One Indian	Tribe	Others	At least one Indian owner	No Indian owners	Total tracts
Blackfeet	1,640	1,800	18	3,571	7	7,036
Cheyenne River	2,103	5,549	11	2,809	2	10,474
Colville	771	2,744	17	1,884	66	5,482
Crow	2,244	823	44	3,696	3	6,810
Fort Berthold	1,831	4,243	16	2,610	8	8,708
Fort Peck	1,928	1,232	7	3,702	27	6,896
Pine Ridge	2,409	3,435	85	4,726	6	10,861
Rosebud	629	2,766	7	2,961	47	6,410
Standing Rock	1,463	2,363	6	5,402	13	9,267
Turtle Mountain	401	101	5	409	1	917
Wind River	845	1,186	22	2,128	47	4,228
Yakima	916	2,892	15	2,236	30	6,089
Total	17,200	29,134	253	36,134	257	82,978

The fractionation of land ownership on Indian reservations results from the inheritance provisions of the Indian General Allotment Act of 1887, which prescribes what happens to the land ownership interests upon the death of an Indian individual. Consequently, the potential for further fractionation of ownership is limited to land with at least one Indian owner.

Table 2.2 shows the ownership mix for those tracts characterized by multiple ownership, including at least one Indian individual. On most of the reservations, the ownership for the majority of such tracts is shared only by Indian individuals. After that, the most common arrangement has Indian individuals sharing ownership with the tribe.

Table 2.2: Ownership Mix on Tracts with Fractionated Ownership

	Number of tracts owned by				
Reservation	Indians only	Indians and the tribe	Indians and non-Indians	Indians, tribe, and non-Indians	Total tracts
Blackfeet	1,830	646	534	561	3,571
Cheyenne River	2,097	430	241	41	2,809
Colville	741	533	404	206	1,884
Crow	2,564	631	285	236	3,886
Fort Berthold	1,543	646	206	215	2,610
Fort Peck	2,265	294	826	317	3,702
Pine Ridge	2,546	1,672	176	332	4,726
Rosebud	1,120	1,166	177	496	2,961
Standing Rock	3,000	1,072	683	647	5,402
Turtle Mountain	258	23	70	58	409
Wind River	979	565	176	406	2,126
Yakima	1,141	972	42	81	2,236
Total	20,084	8,982	3,882	3,906	36,134

Table 2.3 provides information on the extent ownership fractionation has already occurred. The table shows the number of tracts where varying numbers of Indian individuals share ownership.

Table 2.3: Tracts with Fractionated Ownership, by Number of Indian Owners per Tract

	Number of tracts with							
Reservation	Two Indian owners	3-10 Indian owners	11-25 Indian owners	26-50 Indian owners	51-100 Indian owners	101-300 Indian owners	Over 300 Indian owners	Total tracts
Blackfeet	381	1,141	960	667	351	71	0	3,571
Cheyenne River	535	1,416	645	177	30	6	0	2,809
Colville	476	753	435	163	52	5	0	1,884
Crow	490	1,403	933	481	261	122	6	3,696
Fort Berthold	352	999	675	377	174	33	0	2,610
Fort Peck	635	1,447	987	422	179	31	1	3,702
Pine Ridge	634	1,840	1,234	588	283	145	2	4,726
Rosebud	296	1,021	770	468	266	135	5	2,961
Standing Rock	411	1,958	1,640	858	414	111	10	5,402
Turtle Mountain	81	139	102	40	25	21	1	409
Wind River	169	561	611	371	270	145	1	2,128
Yakima	297	875	636	332	86	10	0	2,236
Total	**4,757**	**13,553**	**9,628**	**4,944**	**2,391**	**835**	**26**	**36,134**

As previously discussed, the Indian Land Consolidation Act generally provides that ownership interests of 2 percent or less will transfer, or escheat, to the tribe upon the death of an Indian. Table 2.4 provides data on the number of tracts with individual Indian ownership interests totaling 2 percent or less, as well as the number of such interests for those tracts. Using figures provided by the table, 16,850 (36,134 less 19,284) of the fractionated tracts (about 47 percent) have ownership interests of 2 percent or less.

Table 2.4: Tracts with Fractionated Ownership, by Number of Consolidated Indian Ownership Interests of 2 Percent or Less per Tract

	Number of tracts with Indian interests of 2 percent or less								
Reservation tracts	None	One	2-10	11-25	26-50	51-100	101-300	over 300	Total
Blackfeet	1,722	42	602	468	453	247	37	0	3,571
Cheyenne River	2,055	26	381	258	68	20	1	0	2,809
Colville	1,237	18	306	226	69	27	1	0	1,884
Crow	2,013	41	690	389	280	189	91	3	3,696
Fort Berthold	1,501	28	394	335	236	91	25	0	2,610
Fort Peck	2,159	53	669	481	214	103	22	1	3,702
Pine Ridge	2,570	46	847	559	374	214	115	1	4,726
Rosebud	1,256	40	534	506	292	216	113	4	2,961
Standing Rock	2,594	41	1,126	787	523	240	85	6	5,402
Turtle Mountain	235	4	67	38	25	22	17	1	409
Wind River	731	64	416	360	253	212	91	1	2,128
Yakima	1,211	45	446	320	169	37	8	0	2,236
Total	**19,284**	**448**	**6,478**	**4,727**	**2,966**	**1,618**	**606**	**17**	**36,134**

We analyzed data for 6 of the 12 reservations to determine whether tracts with 11 or more small ownership interests were characteristic of surface, subsurface, or both. We used 4,752 tracts in our analysis. We found that about 40 percent of the tracts were subsurface tracts, about 27 percent surface tracts, and about 33 percent were both.

To illustrate how extensive ownership fractionation can become on a single tract of land, table 2.5 shows the most extreme example of fractionation at each of the 12 reservations. Because Indian individuals can own interests in tracts on reservations that are not affiliated with their own tribes, the last column in the table shows the total number of tribal affiliations represented by the owners.

Table 2.5: Largest Number of Owners on a Single Tract, by Reservation

Reservation	Indian owners	Other owners	Total owners	Indian interests of 2 percent or less	Tribal affiliations represented
Blackfeet	242	43	285	240	3
Cheyenne River	223	10	233	214	9
Colville	120	18	138	112	6
Crow	345	2	347	338	4
Fort Berthold	243	23	266	229	7
Fort Peck	335	10	345	326	12
Pine Ridge	407	12	419	406	9
Rosebud	367	7	374	364	6
Standing Rock	531	11	542	523	16
Turtle Mountain	335	27	362	331	6
Wind River	317	5	322	310	5
Yakima	160	2	162	148	3

Indian individuals can retain ownership in more than one tract. This situation has evolved as ownership interests of deceased Indians have passed on to heirs. Table 2.6 shows the extent to which Indian individuals have ownership interests in more than one tract.

Table 2.6: Individual Indian Ownership in Multiple Tracts

	Number of Indians with ownership in								Total Indian owners
Reservation	1 tract	2 tracts	3-5 tracts	6-10 tracts	11-25 tracts	26-50 tracts	51-100 tracts	Over 100 tracts	
Blackfeet	794	464	730	939	1,260	787	217	30	5,221
Cheyenne River	1,282	635	1,391	973	717	90	5	0	5,093
Colville	1,408	623	878	562	568	40	1	0	4,080
Crow	618	303	405	295	568	569	441	85	3,284
Fort Berthold	494	309	456	555	985	471	112	0	3,382
Fort Peck	1,585	1,001	1,080	660	1,392	463	50	2	6,433
Pine Ridge	4,346	2,066	3,229	2,791	2,597	366	13	0	15,400
Rosebud	3,025	2,196	2,582	2,036	1,808	373	12	0	12,034
Standing Rock	2,741	1,296	2,523	1,426	2,160	1,241	165	6	11,680
Turtle Mountain	2,120	1,314	1,052	163	1	0	0	0	4,650
Wind River	728	668	842	728	1,066	644	158	6	4,840
Yakima	982	439	599	626	798	294	15	0	3,733
Total	20,191	11,394	15,767	11,998	13,989	5,349	1,189	131	79,710

To illustrate extreme cases of an Indian individual having ownership interests in many tracts, table 2.7 shows both the number of tracts and the number of separate ownership interests held by an Indian individual at each of the 12 reservations. It also shows the number of tracts where the Indian individual's interest is 2 percent or less.

Table 2.7: Indian with the Most Ownership Interests, by Reservation

Reservation	No. of tracts	Ownership interests	Number of tracts with ownership of 2 percent or less
Blackfeet	113	301	68
Cheyenne River	41	93	23
Colville	19	75	3
Crow	241	616	151
Fort Berthold	82	203	30
Fort Peck	73	191	2
Pine Ridge	44	199	19
Rosebud	50	150	36
Standing Rock	112	195	70
Turtle Mountain	2	58	0
Wind River	194	413	98
Yakima	95	121	34

Table 2.8 provides data on ownership fractionation in terms of the size of ownership interests held by Indian individuals in separate tracts. In cases where an Indian individual held more than one interest in a single tract, we consolidated these interests to show the individual's total ownership in that tract. As the table shows, 431,074, or over 60 percent, of the Indian individuals' ownership is represented by interests of 2 percent or less.

Table 2.8 Individual Indians' Consolidated Ownership Interests, by Size of Interest

	Number of consolidated ownership interests totaling						
Reservation	100 percent	61-99 percent	26-60 percent	11-25 percent	3-10 percent	2 percent or less	Total
Blackfeet	1,709	416	1,935	6,306	20,983	48,899	80,248
Cheyenne River	2,119	194	2,188	5,386	9,402	10,257	29,546
Colville	854	249	1,066	2,093	5,787	10,160	20,229
Crow	2,189	755	2,225	6,941	18,503	48,094	78,707
Fort Berthold	1,981	340	1,384	4,813	11,890	26,494	46,902
Fort Peck	2,062	513	2,394	6,076	15,606	29,789	56,440
Pine Ridge	2,324	451	2,884	7,339	20,845	60,986	94,829
Rosebud	612	190	1,238	3,819	12,993	55,552	74,404
Standing Rock	1,444	371	3,008	9,852	32,140	70,372	117,187
Turtle Mountain	432	103	242	734	1,685	6,437	9,633
Wind River	892	255	891	3,078	11,325	46,437	62,878
Yakima	1,057	271	1,259	3,550	9,845	17,577	33,559
Total	**17,675**	**4,108**	**20,714**	**69,987**	**171,004**	**431,074**	**704,562**

Table 2.9 shows extreme examples of fractionated ownership at each reservation in terms of the size of the ownership interest. For each reservation, it shows the smallest ownership interest held by an Indian individual and identifies the land equivalent of that ownership interest. In some cases, the land size equivalent is smaller than the dimensions of this page.

Table 2.9: Smallest Indian Individual Ownership Interest, by Reservation

Reservation	Tract acreage	Percentage ownership of tract	Land equivalent of ownership interest	
			Square feet	Inches
Blackfeet	80.00	0.0002900	10.11	38.1 x 38.1
Cheyenne River	647.21	0.0004962	139.89	142.0 x 142.0
Colville	160.00	0.0006955	48.47	83.5 x 83.5
Crow	160.00	0.0000100	.70	10.0 x 10.0
Fort Berthold	80.00	0.0002624	9.15	36.3 x 36.3
Fort Peck	40.00	0.0001200	2.09	17.4 x 17.4
Pine Ridge	474.14	0.0000047	0.97	11.8 x 11.8
Rosebud	320.00	0.0000047	0.66	9.7 x 9.7
Standing Rock	320.00	0.0000025	0.35	7.1 x 7.1
Turtle Mountain	7.50	0.0000192	0.06	2.9 x 2.9
Wind River	80.00	0.0000100	.35	7.1 x 7.1
Yakima	80.00	0.0001929	6.72	31.1 x 31.1

Note: Smallest ownership share represents the smallest share that is at least one ten-millionth of one percent. We did not attempt to identify ownership interests smaller than one ten-millionth of one percent.

APPENDIX B[8]

[8] Ruling of the United States District Court of the District of New Mexico in McClanahan, et al., v. Hodel, et al., No. 83-161-M Civil (D.N.M., Aug. 14, 1987).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

McCLANAHAN, et al. v. HODEL, et al.

No. 83-161-M Civil (D.N.M., Aug. 14, 1987)

Summary

In 1972, Mobil Oil Corporation obtained uranium mining leases on a number of allotments in the Crownpoint, New Mexico area. The leases provided for a primary term of 10 years with a provision for an additional 10 years if uranium was in commercial production by the end of 1982. Mobil sought a two-year extension on the primary term when it realized it could not reach commercial production by 1982. The Bureau of Indian Affairs approved a plan by which a new 10-year lease would be negotiated with the allottees. The lease provisions, which provided a minimum annual royalty of $20 per acre, an annual rent of $5 per acre, and a $16,000 bonus, were identical to Mobil's offer for a two-year extension of the original 1972 leases. Mobil was unsuccessful in securing the consents of all the allottees, including the McClanahans, who owned 31.25 percent of two allotments. On advice of the Department of the Interior's Solicitor's Office, the Bureau of Indian Affairs determined that the leases could be approved pursuant to 25 U.S.C. § 396 without the consent of all the owners. When the consents of the allottees owning 66⅔ percent of the interests in the allotments had been obtained, the

Assistant Secretary approved the leases. The McClanahans sued seeking to void the action of the Assistant Secretary in approving the leases.

The district court holds that the Assistant Secretary had no authority to approve the leases in the absence of unanimous consent of the allottees. The court rules that neither 25 U.S.C. § 396 nor the common law of co-tenancy authorizes the Assistant Secretary to approve the leases without 100 percent allottee consent. The court further holds that in approving the leases, the Secretary breached trust responsibilities to the Indian owners.

Full Text

Before MEACHEM, District Judge

MEACHEM, District Judge

Memorandum Opinion and Order

This matter comes on for consideration on cross-motions for judgment on the administrative record. Having considered the motions, the responses thereto, the voluminous administrative record, and being otherwise fully advised in the premises, I find that the motion of the plaintiffs-in-intervention (the McClanahans) is well taken and it will be granted. The motion of the government and Mobil Oil Corporation is not well taken and it will be denied.

The plaintiffs are five Navajo Indians who hold undivided, inherited interests in three Indian allotments in Crownpoint, New Mexico. They ask me to declare void the action of the Secretary of the Interior in approving uranium leases in favor of Mobil in the three allotments. The McClanahans contend that this administrative act violated federal statutes and regulations governing the leasing of Indian allotments as well as the federal trust responsibility of the Secretary with respect to the management of Indian-owned mineral resources.

Several of the original defendants no longer hold the offices they held when this action was filed. The new officeholders have been automatically substituted pursuant to Fed. R. Civ. P. 25(d)(1).

Background

Lands allotted to individual Indians pursuant to the Indian General Allotment Act of 1887 (25 U.S.C. § 331 *et seq.*) may not be leased in the absence of congressional authority. *Miller v. McClain*, 249 U.S. 308 (1919). Accordingly, Congress authorized allottees to lease their lands for mining purposes in 1909. *See* 26 U.S.C. § 396 (incorporating 1955 amendment). In 1972, Mobil obtained uranium mining leases by competitive bid for 64 allotments in the Crownpoint, New Mexico, area of the Navajo Reservation. CR II-177 (referring to document No. 177 in volume II of the chronological administrative record). The leases provided for a primary term of 10 years subject to requirements of diligent development. Located more or less in the center of the Crownpoint project area were and are the nine allotments in dispute. This "South Trend" area includes the McClanahan allotments. CR III-245.

The leases provided for a secondary term on the same conditions as the primary term if Mobil could get the project into commercial production by the end of the primary term in 1982. Failing this, the leases would be put up once again for competitive bid. *Id.* By 1977, Mobil had spent roughly $13,000,000 on exploratory drilling and testing on the nine tracts constituting the South Trend logical mining unit. CR I-30. It would expend more than $30,000,000 before the leases were approved in 1981. *Id.* Mobil estimated that the South Trend tracts could yield at least 10,000,000 pounds of uranium ore with a market value, in 1977, of $350,000,000. Mobil's problem was that it feared it could not reach commercial production by 1982. *E.g.*, CR III-249. If it did not, the leases would be offered once again by competitive bid.

Mobil responded to this dilemma by approaching the Navajo Area Office of the Bureau of Indian Affairs (BIA) with a proposed amendment of the 1972 leases. CR III-249. Mobil's proposed amendment extended the primary term of the leases by two years, increased the minimum royalty from $4.00 to $20.00 per acre, increased the annual rental from $1.00 to $5.00 per acre, and added a $16,000.00 bonus. *Id.* In September of 1977, Mobil advised the BIA that it was concerned with the leases on the nine-tract South Trend area only. CR III-247.

The Navajo Area Office passed the Mobil proposal to the Commissioner of the BIA in Washington. The Navajo Area Director asked the Commissioner to waive the competitive bid requirement of 25 C.F.R. § 172.6 (now codified at 25 C.F.R. § 212.6) and allow Mobil to negotiate the amendment with the Indian allottees. CR III-245. He also requested a waiver of 25 C.F.R. § 172.12 (now section 212.12), which limits leases for mining purposes to ten-year primary terms. *Id.*

By December 8, 1977, the Commissioner had approved an approach to Mobil's problems. Mobil was to agree with the Area Director at Window Rock, Arizona, on a new lease form and then negotiate *a new ten-year lease* with the allottees. CR III-240, 249. The new lease was to include incentives to the allottees and a new royalty clause providing for a review of the royalty rate two years after the commencement of production and every five years thereafter. Finally, the Commissioner delegated to the Area Director the authority to approve the leases for the Department of the Interior as soon as the lease form should be approved and the consents of the allottees obtained. The Area Office objected that this plan would give Mobil a 16-year lease and probably be upsetting to the allottees. CR VII-354. Nothing came of these objections.

The Navajo Area Office had approved Mobil's proposed lease form by June of 1978. CR III-233. It showed a minimum annual royalty of $20.00 per acre, an annual rent of $5.00 per acre and a $16,000.00 bonus. CR II-249. Hence, the Area Office approved the same lease provisions for a new ten-year term which Mobil had proposed for a two-year extension of the original 1972 leases. Nothing in the administrative record suggests that the Area Office made Mobil a counter proposal at any stage.

The Washington office of the BIA now told the Area Director to meet with the Indian allottees and explain the renegotiation process. CR III-226. On August 7, the Area Office sent registered letters to all the owners of the nine allotments informing them of a meeting to be held but four days later. CR III-225. Predictably, only nine of the 59 owners attended this meeting. CR III-221. Thomas Lynch, a BIA official, discoursed on the history of the 1972 leases and on Mobil's desire to renegotiate. Mr. Lynch noted afterward that "[i]t was agreed that an in depth explanation of the royalty provisions was not necessary because of the technical nature, but would be handled by Mobil on a 'one-on-one' basis." CR III-222. With that, the BIA gave Mobil officials the go-ahead to "negotiate" with the Indians.

All the parties agree that the Indian owners generally are poor and undereducated people. They could not be expected to negotiate effectively "one-on-one" with Mobil representatives. Further, allottees complained early of questionable practices by Mobil landmen. *E.g.*, CR III-220. Two allottees reported being told they must sign immediately or lose the chance of receiving any money. As a practical matter, no such deadline existed in either instance.

Still, Mobil was having trouble getting the consents of the South Trend area allottees. CRII-213. Accordingly, by the spring of 1979, Mobil agents had convinced the BIA to schedule another meeting in early May to explain the lease terms. CR II-209. Mobil also told the BIA of its plans to make direct cash payments to allottees in connection with the negotiations. CR II-209. Further, the BIA repeatedly and routinely granted Mobil extensions of time to negotiate, even though 25 C.F.R. § 172.6 appears on its face to allow Indian owners only, and not potential lessees, to ask for permission to negotiate or for an extension of that permission. *See, e.g.*, CR II-174, II-163, II-161, II-153. Representatives of some of the allottees objected to these activities of Mobil and the Area Office, but to no effect.

The meeting was held in Crownpoint in the late April. BIA officials went over much of the same ground as at the August meeting. One heir asked if the lease on her allotment could be approved without her approval. According to BIA notes, "[s]he was advised that the lease would not be approved unless the consents of 100% of the land owners was [sic] obtained...." CR II-191. Counsel for the McClanahans appeared and advised the allottees that the lease terms were sorely inadequate. *Id.*

The BIA gave Mobil permission to begin negotiating with the allottees on May 5. Later in the month, Mobil unilaterally raised the bonus from $16,000.00 to $24,000.00 and began making cash side payments to the allottees. CR II-181. Mobil informed BIA in Washington that these payments were "working well; the allottees are very pleased to have immediate access to much needed money...." CR II-180. However well the system appeared to be working, Mobil would request, and the BIA routinely grant, ten more extensions of time in which to negotiate over the next 19 months.

Representatives of allottees repeatedly pleaded with the BIA to condition its permission to negotiate upon Mobil providing raw drill logs on the Crownpoint project to the allottees. The BIA never required this in connection with the South Trend allotments, even though it recognized that the information was necessary to allow for equal bargaining. *E.g.*, CR II-96.

In the autumn of 1979, the uranium industry in the San Juan Basin, which includes the South Trend allotments, was at an all-time high. The *Albuquerque Journal* reported a record lease sale of 640 acres of state land near San Mateo, New Mexico. CR II-145. The bonus on the sale exceeded $10,000,000 or roughly $15,000.00 per acre. *Id.* The section was believed to contain 6,000,000 pounds of uranium ore. *Id.* By contrast, Mobil expected to recover no less than 10,000,000 pounds of ore from the South Trend allotments and was offering but $216,000.00 in bonuses. *Id.*

Counsel for the McClanahans pointed these facts out to the Deputy Assistant Secretary for Indian Affairs on November 15, 1979. *Id.* The Deputy Assistant had stated two weeks earlier that the proper bonus need not be addressed through an economic analysis since the allottees were free to seek "more favorable terms." CR III-240. The BIA's position never changed in connection with the South Trend allotments.

By the beginning of 1980, Mobil still lacked the consents of some of the heirs, including the McClanahans. On February 1, Mobil proposed a new rule to the Department of the Interior whereby the BIA would have the power to execute leases on behalf of heirs "who have failed or refused to sign such lease after the lapse of three months following written notification to them...that a majority of the ownership interests have signed such lease...." CR II-131. Mobil noted that its 1972 lease had but two years to run, that the BIA had always required 100 percent allottee consent to the new leases and that the new rule was necessary in light of the unreasonable financial demands of the nonconsenting heirs. *Id.* Consistently with earlier representations, the Assistant Area Director told plaintiff Rosalind McClanahan, on May 13, that all leases required 100 percent allottee approval. CR II-92.

The Office of the Solicitor at the Interior Department was analyzing Mobil's proposed "majority rule" in August of 1980. An associate solicitor for Indian Affairs suggested in a letter to the Assistant Secretary that "a rule of 75% would be a reasonable compromise." CR I-55. The associate solicitor gave no reason for this percentage. The fact was, however, that the McClanahans owned and own 31.25 percent of two of the South Trend allotments. CR I-23. Again offering no particular explanation, the BIA ultimately adopted a 66⅔ percent rule.

On January 5, 1981, the Solicitor of the Interior Department advised the BIA in Washington that "common law principles of co-tenancy" provided a legal basis for approval of leases without the consent of all owners. CR I-7. The Solicitor stated that this approach was unprecedented and unprovided for in statute or regulation but that he knew of "no legal impediment." *Id.* He noted, among other things, common law principles that "[e]ach co-tenant holding an undivided interest" in property may develop that property as long as he accounts to his co-tenants. *Id.*

By memorandum of January 14, 1981, the Office of Trust Responsibilities recommended to the Commissioner of Indian Affairs that the South Trend allotment leases be approved. CR I-2. The nonconsenting heirs, including the McClanahans, were not notified. *See* CR V-284. On January 15, the Assistant Secretary approved the leases. CR I-1 at 172. On the following day, the Assistant Secretary approved the unit agreement which allowed Mobil to suspend operations for as much as ten years without losing the lease for lack of diligent development. CR V-269.

Discussion

I. Requirement of Unanimous Consent

To this day, 25 U.S.C. § 396 is the only act of Congress authorizing the leasing of allotted lands for mining purposes. It is the statute upon which the Secretary of the Interior expressly relied in approving the South Trend allotment leases. I hold that section 396 does not authorize the Secretary or his delegates to approve the lease of allotted lands in the absence of unanimous consent on the part of the Indian owners of the tract to be leased.

I note at the outset that the Secretary has no *inherent* power to lease allotments without the owner's consents. He is not the lessor. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). If the Indian owners disapprove a proposed lease, it makes no difference that the Secretary considers the lease to be in their interest. *Mott v. U.S.*, 283 U.S. 747 (1931); *see also Tooahnippah v. Hickel*, 397 U.S. 598 (1970) (because the Indian is the testator, Secretary cannot disapprove Indian's will because he believes provisions unfair to family member). It follows that the Secretary simply cannot approve leases without (1) the unanimous consent of the Indian owners; or (2) some specific statutory authority to approve leases without unanimous consent.

Section 396 reads as follows:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carry-

> ing the provisions of this section into full force and effect: *Provided*, That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

The proviso, added in 1955, gives the Secretary the authority to sell leases by competitive bid even though all the Indian owners of a tract do not consent. Congress limited this authority to the two enumerated circumstances, namely, when heirs or devisees are undetermined or when heirs or devisees cannot be found. By dispensing with the need for unanimous consent in these particular circumstances, Congress deliberately refrained from dispensing with that need in other circumstances. *See Coast Indian Community v. U.S.*, 550 F.2d 639, 650 n.25 [4 Indian L. Rep. L-13] (Ct. Cl. 1977).

In this case, the Assistant Secretary approved the leases not because the McClanahans were undetermined or unlocatable, but because the McClanahans refused on principle to consent. Section 396 did not and does not authorize the Secretary's act.

Until the present controversy, the Department of the Interior and the BIA adhered to this position. For example, the Navajo Area Director of the BIA wrote in an internal memorandum, on June 10, 1980, that "[a]ll leases approved require[] 100% of allottee signatures." C.R. II-92. Similarly, BIA officials, at the April 1979 meeting at Crownpoint, told the heirs that no lease would be approved unless 100 percent of the Indian owners consented. C.R. II-191. Again, in a letter to the Solicitor in November 1980, the Assistant Secretary acknowledged "past Departmental Policy requiring unanimous agreement." C.R. I-23. This interpretation of the limits of the Secretary's authority under section 396 has long been the position—publicly articulated—of Interior and the BIA. Because these are the agencies entrusted with the administration of the General Allotment Act, their interpretation is entitled to, and has received, great deference. *Udall v. Tallman*, 380 U.S. 1 (1965).

Finding no authority in section 396, the BIA ultimately looked to "the common law" for justification for approval of the South Trend allotment leases. On January 5, 1981, the Solicitor of the Department of the Interior stated:

> [W]here an overwhelming majority of the owners of allotted lands have expressed a desire to develop the known uranium deposits underlying their allotments, and the owners of a fractional minority refuse to execute leases, I am of the opinion that resolution may be achieved by application of common [law] principles of co-tenancy.

C.R. I-7. The Solicitor went on to note that no precedent—statutory, judicial or otherwise—existed for this resolution but that no such principle had ever been rejected. This was the same solicitor who five months previously stated to the Assistant Secretary of Indian Affairs that "[l]ands allotted pursuant to the General Allotment Act . . . may not be leased without *statutory* authorization to do so." C.R. I-60 (emphasis added).

Moreover, common law principles of co-tenancy cannot provide a legal basis for the Secretary's approval of the leases because the leasing of allotted lands is a field fully occupied by Congress. *Bledsoe v. U.S.*, 349 F.2d 605 (10th Cir. 1965); *see also Wilcox v. Omaha Indian Tribe*, 442 U.S. 653 [6 Indian L. Rep. A-61] (1979) *and Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 [1 Indian L. Rep. No. 2, p. 11] (1974). Further, recourse to federal common law, as opposed to the common law of property as developed in states, is forbidden where Congress has addressed the particular issue through legislation. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). Here the particular issue is the circumstances under which Interior may approve leases in the absence of unanimous allottee consent. Congress addressed the issue in the 1955 amendment to section 396.

In conclusion, then, 24 U.S.C. § 396 is not authority for the approval of the South Trend allotment leases. Neither is the common law of co-tenancy. The only other authority urged either by Mobil or the government for the Secretary's action is 25 U.S.C. § 380. The Secretary did at one time consider the applicability of section 380 to the facts of this case. *See* C.R. I-90. However, the Assistant Secretary rested his decision squarely on "common law principles of co-tenancy," C.R. I-7, and the government stands on that ground. I must judge the Assistant Secretary's action on that basis.

II. Trust Obligations

The Secretary's lack of statutory authority for the challenged action is, of course, enough to render that action void *ab initio*. At the same time, though, the Assistant Secretary's approval of the leases—over the heads of a significant minority of lessors—was but a single instance in Interior's broad failure to discharge its trust obligations on behalf of the Indian owners. I will first identify the scope of this trust obligation.

The Supreme Court of the United States has recognized the unique trust obligation of the federal government in its dealings with the Indians. *See, e.g., U.S. v. Kagama*, 118 U.S. 375 (1886); *Seminole Nation v. U.S.*, 316 U.S. 286 (1942); *U.S. v. Mitchell*, 463 U.S. 206 [10 Indian L. Rep. 1066] (1983). In addition to this general trust relationship, particular statutes and regulations create specific trust obligations of varying depth and scope. *Id.* Thus, pervasive federal regulation of timber management on Indian lands led the Court in *Mitchell* to conclude that "the Federal Government [has] full responsibility to manage Indian resources and land for the benefits of the Indians." 463 U.S. at 224. Where the federal government controls tribal land, a fiduciary relationship normally exists with respect to that land, even if Congress has not expressly created a trust fund. *Id.*

The Tenth Circuit recently had occasion to review the broad authority of the United States over mineral leasing of tribal lands in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 [13 Indian L. Rep. 2066] (10th Cir. 1986) (adopting *en banc* the opinion of Seymour, J., 728 F.2d 1555 at 1563 [11 Indian L. Rep. 3047]), *cert. denied*, 107 S. Ct. 471 (1986). The Tenth Circuit held that the federal government's pervasive role and comprehensive responsibilities in mineral leasing gave rise to a relationship of the highest trust. The court noted that the specific provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), set the terms and conditions of leasing and approval of leases, establish lease sale procedures, require performance bonds, and so forth. In view of the broad regulatory scheme, the court concluded that the "evident purpose of the statute is to insure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing."

I conclude that section 396 has much the same "evident purpose" and for much the same reasons. The federal government controls the leasing of allotted lands for mining purposes in much the same way it controls the leasing of tribal

lands. Section 396 and the regulations promulgated thereunder (now codified at 25 C.F.R. § 212) set forth a comprehensive scheme, including method of lease sales, requirements of corporate lessees, terms of leases, acreage limits, payment of rent and royalties, and so forth. Indeed, neither Mobil nor the government has indicated how *Jicarilla Apache Tribe* significantly differs from this case. The purpose of section 396 and the regulations promulgated thereunder is to insure allottees that same "maximum benefit from mineral deposits" adverted to in *Jicarilla Apache Tribe*. *See also Hallam v. Commerce Mining & Royalty Co.*, 49 F.2d 103 (10th Cir. 1931); *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968); *Bailey v. Bannister*, 200 F.2d 683 (10th Cir. 1952). The Interior Department has on occasion conceded as much. For example, the Solicitor at the Interior Department wrote to the Assistant Secretary of Indian Affairs on July 30, 1980, that "[i]t is the duty of the Superintendent [of Indian Affairs] to provide for the greatest economic return to the Indian owners." C.R. I-60 (citing *Hallam*, *supra*).

In identifying this heavy trust obligation, I am mindful of three principles pointed out by the federal defendants. These are (1) that the Secretary is not responsible for mere errors in judgment; (2) that the Secretary is not an insuror of trust assets; and, most important, (3) the Secretary's decision cannot be judged with hindsight, that is, his decision must be judged on the basis of the facts available to him at the time of the decision. *See Navajo Tribe of Indians v. U.S.*, 9 Cl. Ct. 336, 400 [13 Indian L. Rep. 4027] (1986). The question is whether, given the Secretary's trust obligations, his decision was made in good faith and within the realm of acceptable discretion. *Id*. With these cautionary principles in mind, I turn to the facts of this case.

I begin with the fact that the Secretary and his delegates at Interior and the BIA never so much as made a counter offer to Mobil. The Secretary not only accepted with minor changes the terms Mobil offered for a two-year extension of the lease, he approved a new ten-year lease form *on the same terms*. Given the Secretary's trust obligations to the Indians, given the fact that the Indian allottees looked to the Secretary and the BIA for guidance and support in their dealings with energy companies, I find this fact disturbing. The record contains no indication that anyone in the BIA so much as tried to determine how high Mobil was willing to go.

Counsel for the McClanahans state that if the Secretary had "so much as made a counter-offer to Mobil for, say, a $50,000.00 bonus instead of $16,000.00, this would be a harder case." McClanahan's response brief at 6. I agree. I will indicate below particular ways in which the Secretary and his delegates fell short of their trust obligations. I stress here that any of these failings pales before this arbitrary and continuing refusal to exact of Mobil one jot more than Mobil originally offered. When Mobil approached the BIA, it had expended upwards of $13,000,000.00 in exploration and had located a uranium deposit worth $350,000,000.00. Its investment and its hopes of tremendous profits hinged on the consents of the Indian owners. As counsel for the McClanahans have argued, "[A]nyone truly interested in protecting the allottees' interests could see that it was time for some hard bargaining with Mobil." McClanahan's response brief at 3.

The Secretary has repeatedly justified his inaction by the two facts that certain landowners, including the McClanahan's, were represented by sophisticated lawyers and that the allottees were at all times free to pursue better terms with Mobil. Neither of these justifications will do.

The unrepresented landowners simply lacked the sophistication to negotiate on an even footing with Mobil representatives. This is not even to consider sworn allegations noted above of Mobil representatives eliciting signatures with false threats concerning nonexistent deadlines. Even if such a deadline had existed, it would have been meaningless given the ease with which Mobil obtained extensions of time within which to negotiate.

On the other hand, the hopes of the landowners represented by counsel were severed at the knees when Interior concocted a dubious legal theory by which the leases could be approved by the Secretary in the absence of unanimous allottee consent. In the end, Interior simply approved the leases over the heads of those landowners who were in the process of negotiating better terms. To repeat, the Secretary had justified his easy approval of Mobil's terms by the fact that the allottees were free to negotiate better terms with Mobil.

The record discloses many lesser instances of the BIA's unwillingness to assist the Indian owners. Requests by the allottees' lawyers that permission to negotiate be withdrawn to give their clients time to prepare a coherent position were ignored. Requests for technical assistance went unanswered. Nothing came of requests to the BIA that Mobil approach certain allottees only through counsel. A lawyer for the McClanahans received no response when, late in 1979, he apprised the Deputy Assistant Secretary of Indian Affairs of the record lease sale for unexplored land a few miles away that had been reported in the *Albuquerque Journal*. Finally, despite the availability of raw-drill data on the South Trend allotments and despite BIA's recognition that the allottees would be in a better negotiating posture with an economic study of the leases, the BIA steadfastly resisted allottee requests for such an economic analysis. The BIA's own manual refers more than once to the fact that a well-supported economic appraisal is essential to meaningful evaluation of any transaction involving Indian lands. *See, e.g.*, 52 BIAM 1.3.

I close this discussion with a too typical instance. On June 16, 1980, the Assistant Navajo Area Director sent a memorandum to the Area Director. C.R. I-88. The memo referred mainly to some objections to the lease form that had arisen inside the Area Office itself. The Assistant Area Director wrote that he did not "consider a lease modification necessary" and that to make a modification at this late date would put "those of us who have been previously negotiating with Mobil in a highly untenable position." The Assistant Area Director considered any further objections to the lease form to be "nit-picking...which would render Tom Lynch and I somewhat ineffective in future dealings with Mobil."

The BIA and Interior generally seem to have been more concerned throughout the leasing process with their relationship with Mobil than their relationship with the Indian owners. The entire process of lease renegotiation was set in motion by Mobil, despite the fact that 25 C.F.R. § 172.6 (now 212.6) plainly contemplates the Indian owners in that role. Shortly after the process began, the BIA approved Mobil's amendment to the lease form. The Indian owners, at this stage, did not even know that Mobil had approached the BIA. The BIA later called two meetings to "explain the lease terms" to the Indian owners, apparently because Mobil was dissatisfied with the rate at which it was obtaining consents. Still, in neither case were the lease terms "explained" at all. That was to be left to Mobil because of "the technical nature." In the end, all else having failed, the Secretary simply found a means of securing Mobil its leases despite the wishes of nearly one-third of the Indian owners of the South Trend allotments. Arguments by the government and Mobil that these events somehow benefited the consenting majority do not merit discussion.

Under these circumstances, it is not possible to conclude that the Secretary acted to ensure the Indian owners the maximum benefit from their mineral resources. The Secretary

therefore approved the leases in breach of his trust responsibilities to the Indian owners. Further, as explained above, allotted lands simply cannot be leased in the absence of statutory authority, and no statutory authority exists for leasing allotted lands in the absence of unanimous approval by the Indian owners. Either one of these reasons, standing alone, would compel me to void the South Trend allotment leases.

Counsel for the McClanahans will submit an appropriate mandate.

It is so ordered.