



# Historical Overview of Oil and Gas/Mineral Development on Indian Lands

Margaret Schaff, Attorney  
Margaret Schaff & Associates, LLC

[margieschaff@comcast.net](mailto:margieschaff@comcast.net)

303-443-0182

# Indian Mineral Resources

- Mineral Resources are defined as oil, gas, uranium, coal, geothermal, or other energy or non-energy mineral resources.
- Indian Tribes are collectively, the third-largest owners of mineral resources in the US.
- In 2011, Department of Interior administered 4,795 hydrocarbon leases, 7 coal leases and 56 leases for other minerals.
- According to the Department of Interior, in 2015 Indian mineral production included 59m bbl of oil, 239 BCF of natural gas, and 182 million gallons of natural gas liquids; all with a market value of \$3.6 billion. Indian disbursements were over \$600 million. Indian production accounted for approximately 20% of all federal oil and gas revenue.
- Indian lands contain:
  - 3-4% of known oil and gas reserves
  - 30% of the coal west of the Mississippi
  - 30-40% of the nation's uranium
  - Wide variety of other minerals.
- Current production from Indian Lands:
  - 5% of domestic oil production
  - 8% of domestic gas production
  - 2% of coal production.

# General Background

- Indian Tribes (and allottees on allotments) are the beneficial owners of the natural resources located on and under their lands, unless there was a specific reservation of the resource.
- The Nonintercourse Act (25 USC §177) prohibits the leasing or other encumbrance of Indian lands by non-Indians, except as expressly permitted by Congress.
- Tribes are free to develop their own mineral resources. However, most mineral development has historically been done through agreements with non-Indian parties due to the up-front capital requirements and the technological and resource specialization required to make projects successful.

# Federal Laws - Indian Mineral Development

## (Authorizing non-Indian development of Indian Resources)

- 1891 Act (25 USC §397) 10 year leases requiring consent of the tribe and approval of the Secretary of the Interior. (Amended in 1909, 1919, 1926, 1926, and 1927 causing confusion among types of leases.)
- **Indian Mineral Leasing Act of 1938 (25 USC §§ 396a-396g See also 25 C.F.R. pt. 211)**
- **Indian Mineral Development Act of 1982 (25 USC §§ 2101-2108 See also 25 C.F.R. pt. 225)**
- Indian Energy Resources Act of 1992 (Pub. L. No. 102-486, Title XXVI) Addressed renewable energy and promoted tribal economic self-sufficiency and further tribal control of energy development on Indian lands.
- **Indian Tribal Energy Development and Self-Determination Act of 2005 (25 USC §§ 3501-3506 See also 25 C.F.R. pt. 224)**

# Indian Mineral Leasing Act of 1938

- The majority of current mineral production on Indian lands is under 1938 Act Leases.
- Goals of the act were uniformity, IRA revitalization of tribal governments and promoting tribal economic development.
- Single set of leasing procedures requiring competitive bidding and payment of a bonus (unless private negotiations were authorized).
- Tribe authorized a general lease sale, but not on particular tracts.
- State taxation of Indian minerals continued until 1977 (it was allowed under 1891 Act). State taxes were deducted from tribal royalties.
- Tribal consent and Secretarial approval required for all leases.
- Term: a period not to exceed 10 years and “as long thereafter as minerals are produced in paying quantities”.
- Standard form used:
  - Minimum rents and royalties. But advance rents could be deducted from royalties until 1996.
  - Tribe and BIA allowed access to leased areas “for inspection”.
  - No tribal opportunity to participate in mining/development or management of activities.
  - Very limited ability to terminate or cancel leases, but can sue for damages for breach of contract.
- Serious royalty mismanagement, inadequate accounting and mineral theft reduced already below-market royalty payments.

# Indian Mineral Development Act of 1982 (IMDAs)

- Goal: to further policy of self-determination and maximize financial return tribes can expect.
- Authorized tribal negotiation of joint ventures, operating, production sharing, service, managerial, lease or other mineral development agreements or for sale or disposition of products.
- BIA to provide advice and information during negotiation and determine if the proposed agreement is “in the best interest of the Indian tribe.”
- Tribes may negotiate:
  - Ownership in the production
  - Royalty rates, rents, bonuses
  - Environmental controls
  - Employment and job training
  - Reporting/Accounting
  - Management of development
  - Operator designations.
- Tribes may assume some risk of (and payments for) exploration, development and production for a share of rewards.

# Indian Tribal Energy Development and Self-Determination Act of 2005

- Goal: to promote tribal economic self-sufficiency through energy development and to further tribal control of energy development in Indian lands.
- Energy resources defined as “both renewable and non-renewable energy sources, including, but not limited to natural gas, oil, uranium, coal, nuclear wind, solar, geothermal, biomass and hydrologic resources.
- Authorized grant programs and technical assistance.
- Authorized Tribal Energy Resource Agreements (TERAs) with BIA allowing Tribes to enter into energy agreements without federal approval. TERAs approved after tribe shows capacity to regulate, including environmental review process.

# Environmental Reviews Required for Energy Agreements

- National Environmental Policy Act (NEPA) 42 USC § 4321) requires that an Environmental Impact Statement be prepared for all "major Federal actions significantly affecting the quality of the human environment."
  - Secretarial approval of a 1938 Act mineral lease is a federal action, so BIA must comply with NEPA.
  - IMDA regulations provide that before the Secretary can approve an IMDA, BIA determines that the agreement does not have an adverse impact "sufficient to outweigh its expected benefits."
  - NEPA does not apply to tribal approval of energy development under a TERA, however, TERAs must include an environmental review process mirroring NEPA. (And approval of a TERA is subject to NEPA).

# Management of Hydrocarbon Production on Indian Lands

- Federal Oil and Gas Royalty Management Act of 1983 (FOGRMA)
  - Royalty collection (information gathering and dissemination)
  - Management (inspection and oversight)
  - Enforcement (interest on late payments, civil and criminal penalties)
  - Tribal cooperative agreements allowing inspections, audits, investigations, and other enforcements
  - 2010 Secretary of Interior renamed Minerals Management Service Office of Natural Resources Revenue (ONRR)

# Focus Shifts in Indian Energy since 1992

- From “leasing out” of resources to **participation in resource decisions** during negotiation of agreements.
- From passive receipt of payments to active **management** of tribal resources, including those already leased.
  - Tribal regulations and taxes and staff to enforce
  - Improved accounting of royalties and taxes
  - Improved tribal inspections and enforcement of lease provisions
- Idea of “tribal resources” has expanded to include electricity.
  - Renewable energy generation (solar, wind, biomass, hydroelectric, wave)
  - Existing hydro dams – relicensing and federal processes
  - Power allocations from Western Area Power Administration and agreements with Bonneville Power Administration
- Tribes see themselves as energy consumers, not just sources of natural resources.
  - Energy Efficiency
  - Utility service negotiations
  - participation in utility governance
  - Energy use audits
- Understanding of how tribal resources **participate** in overall energy economy.
  - Rights of ways
  - Fish and wildlife impacts of energy production
  - Air quality issues
- Tribes have had various levels of success in taking **ownership** of the development of their natural resources.
- Tribal energy offices and regulatory programs have been created.
- Importance of audits of land records and improvement of land management practices.
- Science and math and other technology and legal education of tribal members.
- Tribal participation in energy markets.
- Tribal utilities being considered and formed in all regions.

# We still have lots of work to do – Issues are localized!

- **Tribal minerals management regulations and enforcement- Management of existing agreements**
- **Double Tribal/State taxation of energy resources often makes development of tribal resources unattractive**
- **Tribal regulation and governance of utilities**
- **Tribal Utility formation**
- **Renewable energy solutions and generation**
- **Energy efficiency**
- **Education of tribal members in energy industry**
- **Tribal access to affordable energy sources**
  - **To bring tribes to a common standard of living**
  - **For economic development**
- **Poor tribal housing often wastes energy**
- **Flexible options to save energy dollars**
- **Reclamation and clean-up of past environmental damage due to energy development**
- **Coordination and participation with federal, state, local and energy industry participants to avoid conflicts with regional energy projects**
- **Education of energy industry on working with Tribes.**

