Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners

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... Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if the Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have not done this and they have continued their tribal life with a trust in a promise of security from this Government. ... It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful, or their homes the most splendid specimen of architecture. But this is their home—their ancestral home. ... Great nations, like great men, should keep their word.


The treatment of native Americans at the hands of the Federal Government forms one of the saddest chapters in the history of this nation. While the wars of the past have ceased, the battle still rages for control of the lands retained by the Indians. One such battle is unfolding in Montana as preparations begin for a massive assault on the lands of the Crow and Northern Cheyenne Indian Reservations in search of coal. This coal is destined to fuel the proposed North Central Power Project, a development that could dwarf the Four Corners Project in its physical and environmental impact. Electric utilities are seeking fuel for giant electrical generation plants and oil companies are planning to provide gasification plants to convert the coal to gas. Already numerous coal mining companies have moved into the area to obtain prospecting permits and leases.

Because the mineral rights on these two reservations have been separated from the surface ownership in most instances, the environmental and economic hardships resulting from strip mining activities will not be borne equitably. This paper will attempt to provide some proposals for protecting the rights of the Indians. In order to evaluate their mineral and legal rights, it is necessary to understand the legal history of Indian reservations in general and the Crow and Northern Cheyenne Reservations in particular, much of which is hidden in uncodified treaties and statutes which serve only to confuse the issue of land titles and mineral rights.

I

HISTORY OF INDIAN LEGISLATION

The history of the treatment of American Indians by the federal government, from the days of the Revolutionary War to the present, can best be summed up by the following statement made many years ago by an anonymous Indian:

They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.¹

The power of the federal government to control and administer Indian tribes and reservations is based upon the U.S. Constitution. Article I states that Congress is given the power to regulate commerce with “foreign Nations, and among the several States, and with the Indian Tribes,”² thus demonstrating that Indians have a unique legal status.³ That status was defined in an early decision of the United States Supreme Court, speaking through Chief Justice Marshall, in Cherokee Nation v. Georgia as,

... domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.⁴

In 1834 Congress provided that any purchase, grant, lease, or other conveyance of lands or title therein from an Indian tribe would be null and void unless made by treaty pursuant to the Constitution.⁵ That same legislation defined the term “Indian Country” to include all lands of the United States west of the Mississippi River, except for the States of Missouri and Louisiana and the Territory of Arkansas.⁶

Use of the treaty power in dealing with Indian tribes was derived from the established British policy during the colonial period, which was reaffirmed by the Continental Congress.⁷ All negotiations with Indian tribes were conducted by means of treaties until 1871, when Congress declared,

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.⁸

¹Dee Brown, Bury My Heart at Wounded Knee (quote taken from unnumbered page following 222) (1970).
²U.S. Const. art. I, § 8, cl. 3.
⁴Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
⁶Id. at 730.
⁷Kelly, Indian Adjustment and the History of Indian Affairs, 10 Ariz L. Rev. 559, 561 (1968).
Congress also provided that any agreement made by any person with an Indian tribe or an individual Indian not a citizen of the United States involving "money or other thing of value" would not be valid unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs. Thus the Indian became a complete ward of the government.

By 1887 much of the land set aside for Indian reservations had begun to attract the attention of white settlers and miners who wanted access to these lands for their own uses. Under the guise of giving the Indians more rights with respect to their land, Congress passed the General Allotment Act of 1887 (Dawes Act), which authorized the division of reservation land among individual Indians with the goal of eliminating the tribal structure and opening the land up to settlement. This legislation was also an effort to force the Indians to become farmers by issuing patents to individual Indians for parcels containing 40 acres of irrigable agricultural land, 80 acres of agricultural land, or 160 acres of grazing land, with the "surplus" land being made available for white settlement. This legislation resulted in the loss of 86 million acres of the 138 million acres held by Indian tribes in 1887.

While the patents were issued in the name of the Indian allottee, the land was to be held in trust by the United States for a period of 25 years and conveyed in fee to the allottee or his heirs at the expiration of the period unless the President extended such period. Until the issuance of the fee patent, the allottee remained subject to the exclusive jurisdiction of the United States, but afterwards the allottee would be subject to the laws of the state where he resided.

As a result of this legislation, two types of land ownership have developed on Indian reservations. Restricted tribal land consists of real property in which the Indian tribe has a legally enforceable interest. The land is held by all members of the tribe as tenants in common, with the tribal council or other governing body acting as a managing trustee for the whole tribe. Each individual Indian has an ownership interest, but that interest cannot be conveyed or inherited and it terminates if he leaves the reservation. On the other hand, allotted lands consist of real property in which the individual Indian has a legally enforceable interest. That interest can be created either by a patent containing a declaration that the United States holds the land in trust for a period

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*Id. at 570.

**Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, 25 U.S.C. § 331; see also H. Rprt. 1576, 46th Cong., 2d Sess. (1887); Comment, supra, note 3 at 293.

**Act of Feb. 8, 1887, ch. 120, § 16 Stat. 544, 570, 25 U.S.C. § 331; see also H. Rprt. 1576, 46th Cong., 2d Sess. (1887); Comment, supra note 3 at 293.

Kelly, supra note 7 at 564.


of 25 years with the fee conveyed thereafter, or by means of a patent conveying the land immediately in fee but imposing a restraint on alienation for a stated period, usually 25 years. 15

In 1906 Congress passed legislation providing that prior to the expiration of the trust period of an allottee, the President may continue such restrictions for such period as he deems proper. 16

Finally, in 1934 Congress passed the Indian Reorganization Act (Wheeler-Howard Act) which prohibited further allotments of Indian reservation land, extended existing periods of trust restrictions, restored surplus lands to tribal ownership, allowed tribes to incorporate under federal charters, and authorized greater authority for tribal governments. 17

Unfortunately, Congress again changed its policies toward Indian reservations in 1953 with the approval of House Concurrent Resolution No. 108, which stated that the policy of Congress was to make the Indians as rapidly as possible subject to the same laws as other citizens of the United States, to end their status as wards of the government, and grant them all the rights and prerogatives of American citizenship. In 1958 the government officially abandoned this termination policy. 18

Because of the shifting attitudes of Congress in its dealings with the Indian tribes over the years, the land ownership and legal rights of Indians remain uncertain. Many forms of ownership exist today—restricted lands held in trust by the United States for the benefit of the Indian tribe (unallotted lands), allotted lands held in trust for the benefit of the allottee, allotted lands held in fee by the individual Indians subject to a restraint on alienation, and allotted lands held in fee simple. Much of the allotted land is so fractionated through successive generations of heirship that title cannot be determined with any accuracy.

II

FEDERAL PRE-EMPTION

As a general rule, lands to which the United States holds title are not subject to state regulation. As stated in *Utah Power and Light Co. v. United States*,

Not only does the Constitution . . . commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone on the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights

18Kelly, *supra* note 7 at 571-572.
in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them. 19

The Court went on to say that,

... the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. 20

These principles have been held to apply to the authority of the federal government to deal with Indian lands held in trust by it. 21 As early as 1832, Chief Justice Marshall stated in Worcester v. Georgia 22 that state laws can have no force within the boundaries of Indian territory since the exclusive jurisdiction is vested in the federal government. This rule has been applied to both allotted land 23 and unallotted land within a reservation. 24

However, federal laws may not always apply to Indian reservations. The rule is that general acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them. 25 Indian tribes thus still retain some inherent sovereignty, except where it has been specifically taken from them either by treaty or congressional action. 26

As a result of the termination policies of the 1950's, six states gained civil and criminal jurisdiction over the Indian reservations within their borders—Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 27

Leasing of Indian reservation lands has also been a matter that is regulated by federal law, but not under the Mineral Leasing Act of 1920. 28 Such lands may be leased only pursuant to special legislation

19Utah Power and Light Co. v. United States, 243 U.S. 389 (1917).
20Id. at 405.
21Olsen, Surface Reclamation Regulations on Federal and Indian Mineral Leases and Permits, 17 ROCKY MTN. MIN. L. INST. 149, 162 (1971); see United States v. West, 232 F.2d 694, 698 (9th Cir. 1956), cert. denied 352 U.S. 834 (1956).
24United States v. 10.69 Acres of Land, 425 F.2d 317, 318 (9th Cir. 1970).
26Davis v. Littell, 398 F.2d 83, 84 (9th Cir. 1968), cert denied 393 U.S. 1018 (1968); Iron Crow v. Ogalala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956); see Comment, supra note 3 at 295.
from Congress and mineral rights in such lands are generally not subject to state law.\(^2\)

The long established rule of federal pre-emption with respect to Indian reservation lands is now beginning to show some signs of change. The argument is being made that state action based on the police power which does not conflict with federal statutes and regulations will be permitted.\(^3\) In *United States v. Hatahley*,\(^4\) a federal court upheld a state statute which prevented grazing of sheep on federal lands previously grazed by cattle. More importantly, in *Texas Oil and Gas Corporation v. Phillips Petroleum Co.*,\(^5\) the court held that states could exercise their police powers with respect to federal oil and gas leases, saying that state law applies where there is no significant threat to any identifiable federal policy or interest.

Recently the United States Supreme Court has rejected the assertion that the federal government has exclusive jurisdiction over Indian tribes for all purposes in *Mescalero Apache Tribe v. Jones*.\(^6\) The Court there held that state laws may be applied unless they would impair rights granted or reserved by federal law. Thus it is possible that certain state laws would apply to activities conducted on Indian reservations.

III

**INDIAN LEASING LEGISLATION**

Most of the treaties and statutes establishing the boundaries of Indian reservations make no mention of mineral rights. However, where Indian reservation rights arise out of aboriginal possession confirmed by treaty, statute, or other document in which no specific exclusion of mineral rights appear, then those rights do extend to the minerals.\(^7\) In *United States v. Shoshone Tribe of Indians*,\(^8\) the Supreme Court stated:

> The phrase 'absolute and undisturbed use and occupation' is to be read, with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties and the settled policy of the United States fairly to deal with Indian tribes.\(^9\)

The Court went on to say that treaties and other documents are not


to be interpreted narrowly, but should be construed in the sense in
which the Indians themselves would understand them, and that there-
fore,

... the United States granted and assured to the tribe peaceful
and unqualified possession of the land in perpetuity. Minerals and
standing timber are constituent elements of the land itself.30

In some instances, the treaties or statutes have separated the min-
eral rights from the right of occupancy, with mineral rights reserved
to the United States. These rights would then be subject to the general
mining laws of the United States.37

In 1924 the Attorney General ruled that general mining laws,
including the Mineral Leasing Act of 1920,38 have never applied to
Indian reservations, whether created by treaty, act of Congress, or execu-
tive order.39 The opinion stated:

... the treaty provisions for the allotment of reservation lands
all contemplate the final passing of a perfect fee title to the individ-
uals of the tribe. And that meant, of course, that minerals and all
other hidden or latent resources would go with the fee.40

Whether or not the Indian allottee acquires the mineral rights by virtue
of the allotment depends upon the terms and conditions of applicable
treaties, statutes, and allotment legislation.41 When the mineral rights
are reserved to the United States for the benefit of the tribe at the
time of allotment, then the mineral rights represent unallotted tribal land
rights subject to disposition by the tribe under applicable statutes.42
But alienation by Indians of property rights, including minerals, has
always been subject to strict regulation by the federal government.43

The first general mineral leasing legislation for Indian lands was
passed by Congress in 1909. It provides that all lands allotted to Indians
may be leased for mining purposes by the allottee for any term of years
approved by the Secretary of the Interior.44 This legislation would not
apply to allotted lands where the fee had been granted and all restrictions
had been removed, since the allottee has full power over the land.45

In 1919 Congress authorized leasing by the Secretary of the Interior
of unallotted lands in several states including Montana.46

30Id.
31Berger, supra note 34, 10 ARIZ. L. REV. at 680.
3334 Opin. ATT'Y. GEN. 181, 184 (May 27, 1924, reprinted in 4 KAPPLER, INDIAN
AFFAIRS, LAWS AND TREATIES 1056, 1058 [hereinafter cited as KAPPLER]; see also
Noonan v. Caledonia Mining Co., 121 U.S. 393, (1887).
34KAPPLER at 1060.
35Berger, supra note 34, 14 ROCKY MTN. MIN. L. INST. at 96.
36British-American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S.
159, 164-165, (1936).
37Berger, supra note 34, 14 ROCKY MTN. MIN. L. INST. at 94.
The major mineral leasing legislation for Indian reservations is found in the Omnibus Tribal Leasing Act of 1938, which provides that unallotted lands within an Indian reservation may, with the approval of the Secretary of the Interior, be leased for mining purposes by authority of the tribal council for terms not to exceed 10 years and so long thereafter as minerals are produced in paying quantities. All operations under such leases are subject to the rules and regulations of the Secretary of the Interior.

Unfortunately, the regulations promulgated by the Secretary of the Interior pursuant to the provisions of the Indian mineral leasing statutes are grossly inadequate and have failed to provide any real protection for the Indians on the reservations. In 1969 a new regulation was issued stating:

> It is the policy of this Department to encourage the development of the mineral resources underlying Indian lands where mining is authorized. However, interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment—land, water, and air—and to avoid, minimize, or correct hazards to the public health and safety.

Beyond this general statement of policy, however, there is little in the way of specific requirements protecting the surface or requiring any reclamation of strip-mined lands. Even more importantly, this regulation includes a provision stating that it does not apply to exploration, issuance of leases, or mining operations where the surface is not owned by the owner of the minerals. By the language of that provision, all allotted lands would technically be exempted from coverage where the minerals have been reserved to the tribe. That is the situation on the Crow and Northern Cheyenne Indian Reservations.

IV

THE CROW RESERVATION

The history of federal legislation affecting the Crow Indian Reservation in Montana is deeply buried in a series of uncodified laws which have created what can best be described as a land title problem of immense proportions. Appendix 1 contains a listing of the relevant treaties and statutes pertaining to the Crow Indian Reservation.

The Crow Reservation was originally created by the Fort Laramie Treaty of 1851, which created a vast reservation covering much of
Wyoming, Montana, Colorado, Nebraska and Kansas for use by several Indian tribes. By the Treaty of May 7, 1868, the Crow Indians relinquished all claim to this vast territory in exchange for a reservation located entirely within the area that is now the State of Montana. This land was “set apart for the absolute and undisturbed use and occupation of the Indians” and any Indians desiring to commence farming were authorized to select up to 320 acres for their exclusive possession. The grant of this land to the tribe included the mineral rights.

In 1882 a portion of this reservation was ceded to the United States by the Crow Tribe for settlement by white settlers with the remaining land to be surveyed for allotment purposes. Such allotments would not be subject to alienation, lease, or encumbrance for 25 years and until such time as the President removed such restrictions. That same year Congress ratified an agreement ceding a 400-foot right of way through the Crow Reservation to the Northern Pacific Railroad (now Burlington Northern Railroad) which included a grant of mineral rights to the railroad.

Again in 1891 a portion of the Crow Reservation was ceded to the United States and opened for settlement, and illegal white mining claims on the ceded portion were made legal. In 1904 additional reservation lands were opened for settlement, with existing Indian allotments preserved in the ceded area.

In 1917 Congress again reduced the value of Crow land holdings by taking away the mineral rights which had been reserved to the Crow Tribe for surplus lands that had earlier been opened for settlement and homesteading. These lands were already valued for their coal deposits. Mineral claimants were given the right to occupy so much of the surface as was required to mine and remove the coal, after payment for the damages caused thereby to the surface owners.

The major legislation affecting land title came in 1920 with the Crow Allotment Act, which provided for the allotment of 640 acres to each member of the Crow Tribe with the patents issued in fee or in trust at the discretion of the Secretary of the Interior. Section 6 of
this Act reserved all minerals "for the benefit of the members of the tribe in common" with authority in the tribal council (with approval of the Secretary of the Interior) to lease the reservation lands for mining purposes for periods of 10 years each. At the expiration of 50 years the mineral rights to allotted lands would belong to the individual allottees and their heirs. The Congressional history of this legislation contains no mention of the problem of surface rights for the individual allottees.

The Omnibus Tribal Leasing Act of 1938 specifically excluded the Crow Reservation from its provisions. Since the Crow Tribe has never incorporated under the provisions of the Indian Reorganization Act, it had to rely upon the older and more obscure leasing authorities until 1959, when the leasing provisions of the 1938 Act were made applicable to the unallotted lands (mineral rights) of the Crow Tribe.

Finally, in 1968 Congress amended Section 6 of the 1920 Crow Allotment Act to reserve the mineral rights in perpetuity for the benefit of the members of the tribe in common. The tribal council is authorized to lease the land for mining purposes with the approval of the Secretary of the Interior. However, the statute itself and the Congressional history fail to mention anything about surface rights.

As a result of all this legislation, the mineral rights to lands on the Crow Reservation are held by individual allottees (not necessarily Indians) with fee patents, or by the United States in trust for the benefit of the Crow Tribe.

The Indian population on the Crow Reservation is estimated at 4,334 persons. The total land area is 1,558,059.57 acres; of which 340,773.58 acres are unallotted tribal lands, 1,215,885.40 acres are allotted lands, and 1,400.59 acres are owned by the United States for school and administrative purposes. While accurate statistics are difficult to locate, approximately 325,272.60 acres were subject to mineral leases or prospecting permits (other than oil and gas) in 1971. A higher pro-
portion of the Reservation land is believed to be subject to leases or prospecting permits at the present time.

V

THE NORTHERN CHEYENNE RESERVATION

The Northern Cheyenne Indian Reservation was created by Executive Order in 1884 out of lands which had originally been granted to the Crow Tribe by the Treaty of September 17, 1851, and ceded to the United States by the Treaty of May 7, 1868. Additional land was added to the reservation by Executive Order in 1900.

The Northern Cheyenne Allotment Act of 1926 provided for allotment of 160 acre parcels to members of the tribe, with the mineral rights reserved for the benefit of the tribe for a period of 50 years. The tribal council was authorized to lease for mining purposes with the consent of the Secretary of Interior. In 1968 Congress amended the 1926 Act to reserve the mineral rights in perpetuity for the benefit of the tribe, with leasing authorized pursuant to the Omnibus Tribal Leasing Act of 1938.

A compilation of the laws and executive orders relating to the Northern Cheyenne Indian Reservation appears in Appendix 2. It is significant that no mention has been made in these laws of the surface rights of the Indian allottees, and the 1968 legislation was not even debated in Congress before its passage. As a result of this legislation, the mineral rights are held in trust for the benefit of the tribe, with the individual allottees holding no mineral rights.

The Indian population on the Northern Cheyenne Reservation is estimated at 2,926 persons. The total land area is 440,233.53 acres; of which 269,521.54 acres are unallotted tribal lands, 163,911.99 acres are allotted lands, and 6,800.00 acres are owned by the United States for school and administrative purposes. While accurate statistics are again difficult to locate, approximately 241,984.86 acres were subject to mineral leases or prospecting permits (other than oil and gas) in 1971.
higher proportion of the reservation land is believed to be subject to leases or prospecting permits at the present time.

The intent of Congress, both with respect to the Crow and Northern Cheyenne Reservations, has been to encourage mineral leasing on the two reservations by reserving the mineral rights for the tribal councils' disposition and to avoid the possibility of the heirship problems of fractionated mineral rights if the allotment lands were patented out in fee to the individual Indian allottees. Apparently the fractionated title problem has been a major factor deterring economic development of many Indian reservations. But Congress failed completely to consider the problems which would befall the surface owners when strip mining activities begin on these reservations.

VI

APPLICATION OF NEPA TO LEASING ACTIVITIES

With the exception of land patented out in fee, all leases or prospecting permits on lands within either the Crow or the Northern Cheyenne Indian Reservations must be approved by the Secretary of the Interior, whether or not the land is held in the name of the tribe or an individual allottee. While it is still undecided whether the National Environmental Policy Act (NEPA) applies to Indian projects conducted on Indian lands for the benefit of the Indians themselves, approval of prospecting permits and leases by the Secretary of the Interior should certainly require an environmental impact study if the approval pertains to major action involving non-Indian purposes. The presently existing leases and permits issued for coal prospecting and mining on the two reservations have been approved without the issuance of any environmental impact statement, and thus appear to be highly vulnerable to a suit to enjoin coal prospecting and mining activities.

The strongest support for this position is found in the decision in Davis v. Morton, which involved the lease of restricted (unallotted) Indian lands in New Mexico to a commercial land developer. The lease had been approved by the Secretary of the Interior subsequent to the date when NEPA became effective, but no environmental impact study was conducted prior to the approval. The court held that Indian trust lands came within the jurisdiction of NEPA, that the Bureau of Indian Affairs came within the definition of federal agencies, and that the lease in question was a major federal action requiring an environmental impact study.

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).
Id.
Id., at 597-598.
This decision can also be supported by reference to the 1970 amendment of 25 U.S.C. Section 415(a), which provides:

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes. . . Prior to the approval of any lease or extension of any existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to . . . the effect on the environment of the uses to which the leased lands will be subject.

While mineral leases and prospecting permits are not approved pursuant to this statute, it does at least acknowledge that some types of leases for Indian lands require an evaluation of the environmental effects.

In addition to approval of prospecting permits and mineral leases, the Secretary of the Interior must approve any mining plans involving use of Indian lands. Thus, he has full authority to determine the manner and method by which the mining will be conducted, including provisions for reclamation.

Even though some of the prospecting permits and mineral leases were approved prior to the effective date of NEPA, the permits must be exchanged for leases and the leases require submission of mining plans, so at each step where approval is required by the Secretary of the Interior the government is vulnerable to a NEPA lawsuit unless a satisfactory environmental impact study has been completed and evaluated prior to the government action. It is therefore quite possible that the coal mining companies can be required to provide full reclamation for any strip mined lands including the posting of bonds to insure that the reclamation will be carried out. However, any environmental impact study must also consider the effect of strip mining on the surface owners (allottees) involved if such a study is going to be adequate.

On June 13, 1973, the Sierra Club filed suit in the United States District Court for the District of Columbia seeking to enjoin the Secretary of the Interior and other government officials from issuing any coal prospecting permits or mineral leases, or approving any mining plans or other types of permits without preparing and considering a comprehensive environmental impact study for the entire Northern Great Plains region, which includes the area of the Crow and Northern Cheyenne Indian Reservations. The success of this litigation would determine the validity of the existing prospecting permits and mineral leases issued on the two reservations, or at least prevent any further governmental approval of plans and operations until such an impact study was prepared and evaluated.

25 C.F.R. §§ 177.7(b)(3) and 177.3(f) (1972).
Olsen, supra note 21 at 155.
The Indian tribes, however, are not anxious to concede that NEPA applies to reservation lands, since that would restrict “tribal sovereignty.” Since the Secretary of the Interior must approve virtually every step in the coal mining process, the tribal councils really have no tribal sovereignty to lose by the application of NEPA and the NEPA protections would provide a strong weapon for the tribes to use in protecting their lands from exploitation.

VII

LEGAL RIGHTS OF SURFACE OWNERS TO SEEK DAMAGES

The issue of surface rights is a critical one for the Indian allottees who reside on the Crow and Northern Cheyenne Reservations, since vast areas are now in the process of being leased for strip mining of coal resources. The federal laws and regulations relating to mineral rights and leasing of Indian lands remain silent on this subject. Even the Congressional history of the statutes affecting mineral rights gives no clue to any Congressional intent. It almost appears that the Federal Government—legislative and executive—has failed to realize that this conflict exists, even as recently as 1968.

In Northern Cheyenne Tribe v. Hollowbreast, the district court held that individual Indian allottees holding surface rights under the Northern Cheyenne Allotment Act of 1926 had no vested rights in the minerals which would have passed to them in 1976 had Congress not reserved them for the tribe in perpetuity by way of the 1968 amendments. The court also ruled that allottees could not seek damages or an injunction prohibiting exploration, drilling and development of the minerals on surface allotments, citing a Montana state court decision as precedent. General pre-emption rules would invalidate the use of that decision as controlling precedent. However, the court noted in a footnote to the opinion that the Northern Cheyenne Tribe recognized that lessees and permittees would not have the right to enter upon the land and strip mine in a manner which would destroy the surface estate of the allottees without compensation.
In the case of *Appleton v. Kennedy*, a district court held that the Osage Tribe of Indians had the right to allow construction of an oil and gas pipeline across allotted lands where Department of Interior regulations permitted use of the surface for pipelines on that reservation. The court refused to enjoin the pipeline and expressly declined to decide whether the surface owners were entitled to any resulting damages.

Since the regulations relating to leases for mining on Crow Reservation lands contain no definition of the surface rights acquired by the lessee or retained by the allottee, it may be open to question whether the lessee has acquired any rights to use the surface in the absence of express language in the leases. The lessees acquire only such rights and interests in the surface of Indian lands as are specifically granted to them by the federal government. Any provisions in the lease regarding surface rights must be supported by statutory authority and applicable regulations.

It is clear that the allottees should be able to recover compensation for damages caused by any strip mining activity, either against the lessee under the dictum of the *Northern Cheyenne Tribe* and *Appleton* decisions, or against the tribal council under the Indian Bill of Rights, which says that no tribe shall take any private property for public use without just compensation. It has apparently been the practice for lessees to negotiate rights-of-way from the surface owners in such situations. The real question is whether the premittees and lessees have been paying an adequate compensation for such rights-of-way.

All rights-of-way across lands held in trust by the United States for individual Indians or Indian tribes (both allotted and unallotted lands) must be approved by the Secretary of the Interior. No rights-of-way may be granted without the consent of the “proper tribal officials,” except under certain circumstances where the approval is not required.

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89 *Id.* at 24.
100 *Id.*
102 Bennett County v. United States, 394 F.2d 8, 11 (8th Cir. 1968).
106 Rights-of-way over and across lands of individual Indian owners may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain
The granting of such rights-of-way may involve significant federal action requiring evaluation of the environmental impact under NEPA. Any such evaluation must include consideration of the appropriate level of damages for the surface owner and necessary requirements to insure reclamation for all surface areas disturbed by use of the rights-of-way if the NEPA requirements are to be satisfied.\textsuperscript{107}

\section*{VIII APPLICATION OF STATE RECLAMATION STATUTES}

At the heart of the surface rights problem is the conflict between the tribal council holding the mineral rights and the Indian allottee holding the surface rights, with the federal government required to act in a fiduciary capacity with respect to both parties. The result is a substantial conflict of interest, and the absence of adequate regulations relating to surface rights indicates that the Bureau of Indian Affairs has been unable or unwilling to resolve this conflict.

In view of this, a strong argument can be made for applying the reasoning of \textit{Mescalero Apache Tribe v. Jones}\textsuperscript{108} to the issue of surface rights and applying state strip mining laws which do not impair the rights granted or reserved by federal law. Such laws could protect the interests of the surface owners.

In the absence of appropriate federal regulations, the newly enacted Montana Strip Mining and Reclamation Act\textsuperscript{109} should be applied to the lands within the Crow and Northern Cheyenne Reservations, since it provides comprehensive regulations on strip mining, reclamation, and it provides increased protection of surface owners' rights.

The Montana legislation requires a state permit for any strip mining activities, and no permit can be issued without approval of a comprehensive plan for surface reclamation and restoration.\textsuperscript{110} Permit applications are to be denied if the strip mining would jeopardize land areas which have biological productivity, ecological fragility, ecological importance, scenic, historical, archeological, geological, or recreational significance.\textsuperscript{111} It is interesting to note that the statute provides: \ldots

\textsuperscript{107}The applicable regulations require an agreement signed by an applicant for a right-of-way grant promising to pay all damages due to the landowners and restore the lands as nearly as possible to their original condition. 25 C.F.R. § 161.5 (b) and (d) (1972). These regulations are too vague, however, and provide an opportunity for lax enforcement by the Secretary of the Interior.

\textsuperscript{108}Id. at § 50-1035(1).

\textsuperscript{109}Revised Codes of Montana, §§ 50-1034 to 50-1057 (1947) [hereinafter cited as R.C.M. 1947].

\textsuperscript{110}Id. at § 50-1035(1).
particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture.\textsuperscript{112}

The advantage of applying this state legislation in addition to the federal regulations is that the state provisions specify in detail the manner in which reclamation work is to be carried out.\textsuperscript{113} In addition, the state law requires notice and the written consent of the surface owner before commencement of operations.

From the standpoint of the individual Indian surface owners, application of state law to Indian lands would be undesirable because it would represent a precedent for further invasion of the "sovereignty" possessed by Indian tribes. However, as indicated earlier, this sovereignty is in fact a myth if every step of the mining activity requires approval by the Secretary of the Interior. An alternative to the application of the Montana Strip Mining and Reclamation Act would be to take the appropriate sections of that Act and incorporate the language of those sections into all the leases, prospecting permits, and rights-of-way issued for coal mining operations on the two Indian reservations. This would provide contractual protection for the surface owners without the application of state law to Indian activities.

\section*{IX \quad CONCLUSION}

There are indications that the Federal Government is finally awakening to this serious problem. The Department of the Interior recently announced a proposal for a new coal leasing policy for federal lands. Under this proposal, mineral lands would have to be reclaimed after mining, environmental impact studies would be required for proposed leases, pending and future permit applications would be rejected until studies are completed to determine the necessity for such permits, and new regulations would be issued to carry out this proposal. Congress is presently considering strip mining legislation that would regulate such operations on Federal and Indian lands, as well as encouraging state regulation of strip mining.\textsuperscript{114}

However, the damage may already have been done in many respects since substantial acreage on the Crow and Northern Cheyenne Indian reservations is already subject to prospecting permits and leases. The best hope at present is for litigation to invalidate these permits and leases for violation of NEPA requirements. If the permits and leases can be invalidated, then the resulting environmental impact studies will

\footnotesize{\textsuperscript{112}Id. at § 50-1042(2)(d).
\textsuperscript{113}See R.C.M. 1947, §§ 50-1043 to 50-1046.
have to resolve the issue of surface rights and reclamation. The new Montana legislation can be used as an example of what ought to be required for adequate safeguards against the abuses of strip mining.

If the coal mining companies succeed in carrying out their proposed strip mining activities without full reclamation and recognition of surface rights, history will record one more example of how the white man continues to take the lands given in perpetuity to the Indians.