

## WHEN DID CONGRESS DEEM INDIAN LANDS PUBLIC LANDS?: THE PROBLEM OF BLM EXERCISING OIL AND GAS REGULATORY JURISDICTION IN INDIAN COUNTRY

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**Synopsis:** Oil and gas development in Indian Country is unlike energy development anywhere else in the nation. Tribes and operators must navigate a labyrinthine regulatory process that entails nearly fifty steps and requires approvals from four Department of Interior agencies. This regulatory process creates unnecessary delays and costs tribes critical income when developers choose to develop elsewhere to avoid navigating the many regulatory requirements.

The Bureau of Land Management (BLM) is one of the agencies currently exercising regulatory authority over oil and gas development in Indian Country. The BLM requires and processes Applications for Permit to Drill (APDs) submitted by oil and gas operators on Indian lands. These APDs contribute to the extreme delay in tribal energy development. Additionally, as a “major federal action” under the National Environmental Policy Act (NEPA), the BLM’s involvement also triggers NEPA analysis.

While the BLM has been asserting regulatory jurisdiction over oil and gas development on Indian lands for approximately twenty years, it should not be. Congress charged the BLM with regulating oil and gas and other activities on public lands, specifically for multiple use and sustained yield in accordance with land use plans the agency develops. Indian lands are not public lands. This article seeks to address whether Congress charged the BLM with regulating oil and gas development on Indian lands. After an exhaustive legal analysis, the authors found that the BLM likely lacks statutory authority to regulate oil and gas on Indian lands. This is

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significant because the BLM's congressional mandate and implementing regulations to manage public lands contain restrictive management standards and requirements that Congress did not intend to apply to Indian lands, while adding another layer of regulatory requirements to an already complicated and extensive regime.

This article analyzes the relevant (I) statutes, (II) agency regulations and orders, and (III) administrative case law to determine whether the BLM has authority to regulate oil and gas on Indian lands. The article concludes with a discussion of the significance of this research and how tribes and the federal government can improve the regulatory process for oil and gas development in Indian Country.

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## I. BACKGROUND

There has been much congressional testimony recently regarding the approximately fifty-step process of regulatory approvals from four Department of Interior agencies for oil and gas development in Indian Country.<sup>1</sup> Notwithstanding tribal sovereignty and the decades-long

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1. See, e.g., *Oversight Hearing on Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on*

congressional policy of tribal Self-Determination, multiple federal agencies are involved with energy development on Indian lands. Multiple agencies mean multiple sets of regulations, NEPA analyses, and, ultimately, delay.

This delay is not a mere inconvenience: delay in developing energy resources costs tribes critical income, particularly for tribes in states where gaming is illegal, such as Utah. For instance, as expressed in testimony to the House Subcommittee on Indian and Alaska Native Affairs, the Ute Indian Tribe does not have the gaming option in Utah; as a result, the Ute Indian Tribe's primary source of income is oil and gas development.<sup>2</sup> But, the extreme delay on Indian lands causes oil and gas operators to choose not to develop on Indian lands and to seek development in places where the approval process is much more streamlined, such as fee lands located within states, which lack the multiple layers of regulatory requirements present on Indian lands.<sup>3</sup>

As Senator Daniel K. Akaka, Chairman of the Committee on Indian Affairs, stated when announcing that he would cosponsor Senator Barasso's Indian Energy Bill,<sup>4</sup> "Indian reservations make up approximately five percent of the United States land base, and it is estimated that those reservations contain about ten percent of the country's energy resources."<sup>5</sup> This great percentage of U.S. energy resources on reservation lands includes oil and gas. According to the Department of Interior, "the production of energy and mineral resources in 2007 generated \$524 million in royalty revenue to Indian individuals and Tribes."<sup>6</sup> Oil and gas plays are abundant and rich on Indian lands, including the now-renowned Bakken shale on the Fort Berthold Reservation in North Dakota and the Uintah Basin shale on the Uintah and Ouray Reservation of the Ute Indian Tribe in Utah. The Department of Energy, Office of Energy Efficiency and Renewable Energy estimates "that the Bakken has generated hundreds of billions of barrels of oil."<sup>7</sup> Oil and gas development on Indian lands has been on the rise and does not appear to be slowing any time in the near future. These oil and gas resources provide critical "jobs, royalties, and other benefits for members of the tribes that own" those energy resources.<sup>8</sup>

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*Natural Resources*, 112th Cong. (Apr. 1, 2011) (Statement of Irene C. Cuch, Ute Tribal Business Comm. Member, Ute Indian Tribe of the Uintah and Ouray Reservation) [hereinafter *Oversight Hearing Testimony*], available at <http://naturalresources.house.gov/UploadedFiles/CuchTestimony04.01.11.pdf>.

2. *Id.* at 2.

3. *Id.* at 4, 6.

4. Indian Tribal Energy Development and Self-Determination Act Amendments of 2011, S. 1684, 112th Cong. (2011).

5. Press Release, Senator Daniel K. Akaka Cosponsors Indian Energy Bill (Oct. 12, 2011), available at <http://indian.senate.gov/news/pressreleases/2011-10-12.cfm>.

6. *Senate Subcommittee on Indian and Alaska Native Affairs*, SENATE NATURAL RESOURCES COMMITTEE, <http://naturalresources.house.gov/Subcommittees/Subcommittee/?SubcommitteeID=5066> (last visited Jan. 16, 2012) [hereinafter *Senate Subcommittee*].

7. DEPARTMENT OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, FORT BERTHOLD RESERVATION REPORT 16 (Oct. 17, 2006), available at [http://www1.eere.energy.gov/tribalenergy/guide/pdfs/fort\\_berthold.pdf](http://www1.eere.energy.gov/tribalenergy/guide/pdfs/fort_berthold.pdf).

8. *Senate Subcommittee*, *supra* note 6.

Two of the federal agencies that regulate Indian energy development are the Bureau of Indian Affairs (BIA) and the BLM. Because of the trust responsibility the federal government owes to tribes, the BIA exercises jurisdiction in Indian Country over surface energy development as well as many other matters. However, the BLM, too, regulates oil and gas operations on Indian lands. The BLM requires and processes APDs for oil and gas operators on Indian lands, thereby permitting the commencement of drilling.<sup>9</sup> Operators, not tribes, submit APDs to the BLM, in accordance with the BLM's regulatory process for APDs, which involves also submitting a drilling plan, a surface use plan, and evidence of bond coverage, at a minimum, in order to obtain permission to drill.<sup>10</sup> The APD process does not result in or involve an agreement between the tribe-landowner and the BLM, typically.<sup>11</sup> The BLM generally delegates authority to approve APDs to the BLM Field Offices.<sup>12</sup> The BLM includes various terms and conditions upon approving an APD; the BLM onshore oil and gas regulations, discussed at length below, define the general terms and conditions for each APD approval, and site conditions are applied on each APD, including both downhole engineering standards as well as surface mitigation requirements.<sup>13</sup> No drilling operations nor surface disturbance may be commenced prior to approval of the permit—that is, the granting of the APD—pursuant to the BLM's onshore oil and gas regulations, which are discussed at length below. As such, exploration without an APD is considered mineral trespass, subject to fines.<sup>14</sup>

The APD step is one of the regulatory hoops that contribute to the extreme delay in tribal energy development.<sup>15</sup> The BLM not only requires and processes APDs, but also, as a “major federal action” under NEPA, the BLM's involvement triggers NEPA analysis.<sup>16</sup> While BLM APDs do not take up a particularly long time in the nearly fifty-step regulatory process of oil and gas development on Indian lands, if the other aspects of the process were expedited, such as BIA right-of-way approval, then there would be more APDs processed, resulting in more delay. In addition, each APD carries a \$6,500.00 fee, which is deposited in the General Treasury Fund, rather than a BIA or tribal fund.<sup>17</sup> The BLM's APD requirement adds to the regulatory process and, thus, delay, inserts an additional agency into the

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9. 43 C.F.R. §§ 3161.1(a), 3162.3-1 (2011).

10. 43 C.F.R. § 3162.3-1.

11. Email from Jeffrey Hunt, Indian Energy Office Manager, BIA, Fort Berthold Agency Office (Jan. 10, 2012) (on file with author). Mr. Hunt is considered an expert on Indian oil and gas regulatory approval processes, as the Indian Energy Office Manager at the BIA Fort Berthold Agency. He has headed the revolutionary “One Stop Shop” for energy regulatory approvals there, which is discussed in the final section of this article, Recommendations for Future Action.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Oversight Hearing Testimony*, *supra* note 1, at 4-7.

16. *Id.*

17. Press Release, U.S. Dep't of Interior, BLM, At Direction of Congress, BLM Will Collect \$6,500 Processing Fee for Each New Oil and Gas Drilling Permit Application (Nov. 4, 2009), available at [http://www.blm.gov/or/news/files/APDFee\\_Nov2009\\_v2.pdf](http://www.blm.gov/or/news/files/APDFee_Nov2009_v2.pdf).

process, and comes with a cost of several thousand dollars, which burdens the oil and gas developer while failing to benefit the tribal mineral owner. While a \$6,500 fee may not seem high initially, these fees cumulatively become significant, in particular when viewed as a lost cost for the mineral-owner tribe. After all, if the BIA on behalf of the mineral-owner tribe or the tribe itself received all APD fees, these funds could accumulate into a significant fund for the tribe's use, especially for tribes whose sole source of income is energy development on a geographically isolated reservation.

While the BLM has been asserting regulatory jurisdiction over oil and gas development on Indian lands for approximately twenty years, it should not be. Congress charged the BLM with regulating oil and gas and other activities on *public lands*, specifically for multiple use and sustained yield in accordance with land use plans the agency develops.<sup>18</sup> *Indian lands*<sup>19</sup> are not *public lands*.<sup>20</sup> Plus, it is clear that congressional policy, since at least the 1975 Indian Self-Determination and Education Assistance Act,<sup>21</sup> has been to support Indian self-determination in tribal programs and services. Self-determination lends more toward tribal management of Indian lands than a second layer of federal management—that is, BLM subsurface jurisdiction in addition to BIA surface jurisdiction—on Indian lands.

This article seeks to examine whether Congress charged the BLM with regulating oil and gas development on Indian lands. After examining statutes, agency regulations and orders, and an agency tripartite memorandum of understanding, the authors have determined that Congress did not explicitly or implicitly charge the BLM with this power and that, therefore, the BLM likely lacks authority to regulate oil and gas on Indian lands.

The BLM's apparent lack of statutory authority is significant because the BLM's congressional mandate and implementing regulations to manage public land contain restrictive management standards and requirements that Congress did not intend to apply to Indian lands. In other words, the BLM regulates public lands according to the multiple use sustained yield principle, which involves utilizing land use plans and best management practices as well as managing public land to avoid unnecessary or undue

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18. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976); *see especially* 43 U.S.C. § 1702(c) (definition of multiple use), (e) (definition of public lands), (h) (definition of sustained yield) (1976).

19. Land status in Indian Country is complex. In this article, the term "Indian lands" refers to "trust or restricted lands," which the Indian Land Consolidation Act defines as:

lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and . . . "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, the title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 2201(4) (Supp. 2011).

20. 43 U.S.C. § 1702(e)(2) (excluding "lands held for the benefit of Indians, Aleuts, and Eskimos" from the definition of "public lands").

21. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.

degradation. Allowing the BLM to enforce its public land regulatory regime on Indian lands contradicts the federal government's nearly forty-year-standing policy of self-determination for Indian tribes, which would support tribal determination of Indian land policy, not federal imposition of public land policy on Indian lands. Yet, tribes, industry, and government alike appear to have accepted the BLM's assertion of jurisdiction on Indian lands at face value for years.

This article discusses the relevant (II) statutes, (III) agency regulations and orders, (IV) tripartite memorandum of understanding, and (V) administrative case law. In Part VI, the article then addresses recommendations for further action. An analysis of these authorities shows that, while the BLM may purport to assert authority over Indian lands based on BLM and BIA regulations, Congress did not vest the BLM with authority over Indian lands. In fact, Congress explicitly provided that the BLM does *not* have regulatory authority on Indian lands, which results in the BLM not having statutory authority over Indian lands.

## II. STATUTES

As a first step, the BLM has promulgated and applies its onshore oil and gas regulations at 43 C.F.R. Part 3160 to require and process APDs for Indian oil and gas operations. These regulations, administered by the BLM, cite for their authority:<sup>22</sup> the Mineral Leasing Act,<sup>23</sup> the Mineral Leasing Act for Acquired Lands,<sup>24</sup> 25 U.S.C. § 396, 25 U.S.C. §§ 396a-396g, 25 U.S.C. § 397, 25 U.S.C. § 398, 25 U.S.C. §§ 398a-398e, 25 U.S.C. § 399, 43 U.S.C. § 1457, Attorney General's Opinion of April 2, 1941,<sup>25</sup> the Federal Property and Administrative Services Act,<sup>26</sup> the National Environmental Policy Act,<sup>27</sup> the Combined Hydrocarbon Leasing Act,<sup>28</sup> the Federal Oil and Gas Royalty Management Act,<sup>29</sup> the Indian Mineral Development Act,<sup>30</sup> and Secretarial Order 3087<sup>31</sup> "under which the Secretary consolidated and transferred the onshore minerals management functions of the Department, except mineral revenue functions and the responsibility for leasing of restricted Indian lands, to the [BLM]."<sup>32</sup> Yet, these sources do not contain the requisite statutory authorization for the BLM to exercise regulatory jurisdiction over Indian oil and gas.

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22. 43 C.F.R. § 3160.0-3 (2011).

23. 30 U.S.C. §§ 181-287 (2006).

24. 30 U.S.C. §§ 351-360 (2006).

25. Authority to Protect Oil Deposits Against Drainage, 40. Op. Att'y Gen. 41 (1942).

26. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (1949).

27. 42 U.S.C. §§ 4321-4347 (2006).

28. Combined Hydrocarbon Leasing Act, Pub. L. 97-78, 95 Stat. 1070 (1981).

29. 30 U.S.C. §§ 1701-1759 (2006).

30. 25 U.S.C. §§ 2101-2108 (2006).

31. Order No. 3087, Organizational Restructuring of the Department of Minerals Management Functions, 48 Fed. Reg. 8,983 (1983).

32. 43 C.F.R. § 3160.0-3 (2011); *see also id.* § 3160.0-2.

A conclusive search for the source of BLM's authority to exercise its public land regulatory authority on Indian lands, including the BLM-cited authorities above in addition to other potentially relevant Indian energy statutes, has uncovered no such source of statutory authority. The following thirteen statutes were assessed to determine whether, through those statutes, Congress vested the BLM with authority to regulate oil and gas on Indian lands. All shed light on the public land regime and Indian energy development, but none confer jurisdiction over Indian lands to the BLM. Relevant regulations are addressed subsequent to this statutory analysis because statutory authorization is the first step before regulations may be promulgated to implement the statute's mandate.<sup>33</sup> In other words, validity of the regulations based on statutory authorization demands a statutory analysis prior to any regulatory analysis.

An important context for statutory analysis here is the canon of construction applicable to the interpretation of any treaty or statute where Indians are involved. From nearly two-hundred years of U.S. Supreme Court precedent, it is a long-established canon of construction and fundamental Federal Indian law tenet that treaties and statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.<sup>34</sup> This canon of construction is rooted in the unique trust relationship between the United States and Indians, presuming congressional intent to assist Indians to overcome the disadvantages the U.S. government has placed on them.<sup>35</sup> The canon applies equally to both ambiguous statutory and treaty provisions. In light of the fact that the relevant statutes in this case may be deemed ambiguous, the canon of construction requires that those ambiguous provisions be interpreted in favor of the Indians.

The statutory analysis occurs in the order of logical relevance and likelihood of locating the BLM's jurisdiction authority in that statute. Thus, the statutory analysis begins with the BLM's Organic Act, as it vests the BLM with jurisdiction to regulate public lands, and then continues by assessing the various relevant statutes where one may potentially find the BLM's congressional authority to regulate energy development on Indian lands, namely the most relevant Indian energy development statutes, then the Bureau of Indian Affairs statutes, the more logically remote Indian energy development statutes, and concluding with the Indian Self-Determination and Education Assistance Act, as a background of congressional policy for Indian self-determination.

#### A. *Federal Land Policy and Management Act*

The Federal Land Policy and Management Act (FLPMA) is the enabling act for the BLM, in which Congress gave the BLM its mandate to regulate

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33. Ronald A. Cass, Colin S. Diver & Jack M. Beermann, *ADMINISTRATIVE LAW* 15-16 (5th ed. 2006) [hereinafter *ADMINISTRATIVE LAW*].

34. *See, e.g.,* *Worcester v. Georgia*, 31 U.S. 515 (1832); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

35. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

activities on public lands.<sup>36</sup> FLPMA also officially brought an end to the Era of Disposal in U.S. public land law. From the 1976 passage of FLPMA forward, the United States eliminated its long-standing policy of giving away public land and closed the public domain.<sup>37</sup> In addition to maintaining its existing public land base, Congress mandated multiple use and sustained yield management and regulation of public lands.<sup>38</sup>

The BLM regulations for oil and gas activities on public land, which contain APD and other requirements, cite the following three provisions in FLPMA for the BLM's authority to regulate oil and gas on Indian lands: § 1732, § 1733, and § 1740.

1. § 1732: Management of use, occupancy, and development of public lands

This section provides that the "Secretary [of Interior] shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title."<sup>39</sup> Thus, in this section, Congress set out the guiding management principles for public lands, including multiple use and sustained yield as well as the requirement that the Secretary, "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."<sup>40</sup>

2. § 1733: Enforcement authority

This section provides that the "Secretary [of Interior (Secretary)] shall issue regulations . . . to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands."<sup>41</sup> It also provides for civil penalties and actions for enforcement by the Attorney General at the Secretary's request.<sup>42</sup>

3. § 1740: Rules and regulations

This provision provides that the "Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands."<sup>43</sup>

Each of the above sections of FLPMA expressly refers to the Secretary's authority over and management of public lands. Hence, the definition of

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36. 43 U.S.C. §§ 1701-1782 (1976).

37. *See, e.g.*, 43 U.S.C. § 1701(a)(1) ("The Congress declares that it is the policy of the United States that . . . the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in [FLPMA], it is determined that disposal of a particular parcel will serve the national interest.").

38. *Id.* § 1701(a)(7).

39. *Id.* § 1732(a).

40. *Id.* § 1732(b).

41. *Id.* § 1733(a).

42. *Id.* § 1733(a)-(b).

43. *Id.* § 1740.

public lands is the threshold provision to assess the applicability of the aforementioned provisions that the BLM cites for its authority to regulate oil and gas activities on Indian Lands.

4. § 1702(e): Definition of “public lands”

FLPMA defines public lands as follows:

The term “public lands” means any land and interest in land owned by the United States within the several States and administered by the Secretary of Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, *except*—

- (1) lands located on the Outer Continental Shelf; and
- (2) *lands held for the benefit of Indians, Aleuts, and Eskimos.*<sup>44</sup>

Thus, in defining public lands in FLPMA and thereby establishing the BLM's authority to regulate activities on public lands, Congress explicitly excluded Indian lands. The definition of public lands includes BLM lands and explicitly excludes Indian lands. Congressional intent was clearly to *not* vest the BLM with any authority to regulate activities on Indian lands.

This definition of public lands, which evidenced congressional intent in determining the scope of the BLM's regulatory authority, is the widely accepted definition of public lands. It is well established that both the terms “BLM public lands” and “federal lands” do not encompass lands held in trust for tribes.<sup>45</sup>

Notwithstanding the clear language of FLPMA, the authors reviewed twelve other statutes and determined that Congress did not vest the BLM with statutory authority over oil and gas on Indian lands in any of the statutes so reviewed.

*B. Indian Mineral Development Act*

The Indian Mineral Development Act requires Secretarial approval of Indian minerals agreements, defined as “any joint venture, operating, production sharing, service, managerial, lease or other agreement.”<sup>46</sup> This Act requires Secretarial approval of mineral agreements but, otherwise, does not impose any additional obligation or confer jurisdiction. In practice, the BIA fulfills this obligation of the Secretary to approve mineral agreements—a matter separate and apart from the APD requirement. Nothing in this statute vests the BLM with authority over oil and gas on Indian lands. The closest section is that the Secretary shall provide “advice, assistance, and information during the negotiation of a Minerals Agreement” upon a tribe's request.<sup>47</sup> But, that provision does not confer regulatory jurisdiction to the BLM at the request of a tribe.

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44. *Id.* § 1702(e) (Emphasis added).

45. GEORGE COGGINS & ROBERT GLICKSMAN, 1 PUBLIC NATURAL RESOURCES LAW § 1:13 (2d ed. 2010) (explaining that Indian lands are not public lands and that Indian Country is “quasi-private, not public, land”).

46. 25 U.S.C. § 2102(a) (1982).

47. *Id.* § 2106.

Plus, this statute provides that it shall have no effect on or be limited by any other statute.<sup>48</sup> There is no conceivable argument that this statute conferred jurisdiction on the BLM to regulate oil and gas development on Indian lands.

### C. *Indian Mineral Leasing Act*

The Indian Mineral Leasing Act requires mineral leases on Indian lands to be approved by the Secretary.<sup>49</sup> The Act applies to allotted and unallotted lands.<sup>50</sup> Public auctions of oil and gas leases on unallotted lands are required, with Secretarial oversight.<sup>51</sup>

In more detail, 25 U.S.C. §§ 396 to 399, the statutory provisions covering mineral leases on the various types of land in Indian Country, apply to Indian mineral leases.

25 U.S.C. § 396d provides:

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.<sup>52</sup>

While this statutory provision vests the Secretary with authority to promulgate regulations relating to any act affecting restricted Indian lands, the Secretary is still bound to only promulgate regulations within the Department's congressional mandate. Because Congress did not authorize the BLM to exercise jurisdiction on Indian lands, the Secretary may not do so.

In fact, 25 U.S.C. § 396e even provides that the Secretary "may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted."<sup>53</sup> Clearly, the Secretary may authorize BIA officials to approve leases, as Congress has authorized the Secretary to delegate to the BIA Indian affairs matters.<sup>54</sup> But, the bottom line in these statutory provisions is that they do not confer jurisdiction to the BLM on Indian lands.

### D. *Mineral Leasing Act*

The Mineral Leasing Act of 1920 established the authority of the Department of Interior to oversee oil and gas operations on federal land.<sup>55</sup> However, the Mineral Leasing Act aimed to "promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain."<sup>56</sup> Indian

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48. *Id.* § 2105.

49. 25 U.S.C. §§ 396a-396g (2006).

50. *Id.* §§ 396, 397.

51. *Id.* § 398.

52. *Id.* § 396d.

53. *Id.* § 396e.

54. *Id.* § 1a.

55. 30 U.S.C. § 181-287 (2006).

56. *Id.* (full title of the Mineral Leasing Act, Pub. L. No. 66-146, 41 Stat. 437).

lands are not the public domain. And, the Mineral Leasing Act applies to those mineral “deposits owned by the United States.”<sup>57</sup> Unless the United States reserves a tribe’s mineral rights via statute or treaty, the mineral rights on a reservation belong to the tribe.<sup>58</sup> Where the United States has reserved minerals, the mineral estate would, of course, be managed by the BLM. But, where a tribe continues to own the minerals as Indian land, the mineral estate is Indian-owned and not within the public lands definition. In the case of Indian lands, the focus of this analysis, the Mineral Leasing Act does not apply to tribes who retain mineral rights on the reservation.

#### *E. Mineral Leasing Act for Acquired Lands*

The Mineral Leasing Act for Acquired Lands extended the Department of Interior’s authority over oil and gas operations to federal “acquired lands.”<sup>59</sup> Acquired lands are defined as “lands acquired by the United States.”<sup>60</sup> But, most Indian lands were not “acquired” by the United States. While the United States holds land in trust for Indians, “acquired lands” should refer to lands acquired for use by the United States. To the extent that the United States did “acquire” lands for tribes, these lands are held in trust for the benefit of tribes. Indian lands are for the beneficial use of Indians, not the United States. To the extent this language is ambiguous, it should be read in the light most favorable to the Indians—that is, Indian lands do not fall under the acquired lands category.<sup>61</sup>

#### *F. Commissioner of Indian Affairs Organic Act*

The Organic Act for the BIA tersely established a Commissioner of Indian Affairs under the direction of the Secretary of War, with direction and management over all Indian affairs.<sup>62</sup> Nothing in this statute confers jurisdiction on the BLM. In fact, this 1832 statute preceded the BLM, as the BLM was created during a 1946 government reorganization that combined the General Land Office and U.S. Grazing Service into one agency, the BLM.<sup>63</sup>

#### *G. Bureau of Indian Affairs Organic Act*

This statute established the BIA and its duties, fleshing out the terse 1832 creation of the Commissioner with a more detailed congressional mandate. This statute also transferred the BIA to the then newly created Department of Interior.<sup>64</sup>

This statute provides that the Secretary may delegate duties and powers under the statute to the Commissioner, and the BIA Commissioner

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57. *Id.* § 181.

58. *See, e.g.*, *United States v. Shoshone Indian Tribe*, 304 U.S. 111 (1938).

59. 30 U.S.C. §§ 351-360 (2006).

60. *Id.* § 351.

61. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515 (1832).

62. Act of July 9, 1832, ch. 174, 4 Stat. 564.

63. *The BLM: Yesterday and Today, History of the BLM*, BUREAU OF LAND MGMT. (Jan. 4, 2008), [http://www.blm.gov/ca/st/en/info/about\\_blm/history.html](http://www.blm.gov/ca/st/en/info/about_blm/history.html).

64. 25 U.S.C. §§ 1-17 (2006).

may delegate *within* the BIA, with Secretarial approval.<sup>65</sup> And, this section provides that “[n]othing in this section shall be deemed to abrogate or curtail any authority to make delegations conferred by any other provision of law, nor shall anything in this section be deemed to convey authority to delegate any power to issue regulations.”<sup>66</sup>

Thus, while the Secretary may delegate to the Commissioner and the Commissioner may delegate to subordinates within the BIA, nothing in this act provides that BIA may delegate authority to one of its sister agencies, like the BLM, assuming *arguendo* the BIA has authority to even require APDs on Indian lands. No statute has been found to date that (a) allows the BIA to impose the FLPMA multiple use sustained yield regime on Indian lands or (b) allows the BIA to delegate its authority over Indian lands to another agency, like the BLM. After all, Congress exercised its plenary power over Indian Affairs to vest the BIA, not any other agency, with authority over Indian affairs. Nothing in this statute could have served as the congressional mandate for the Secretary to promulgate the BLM regulations that apply to Indian lands.

A second section to which the BIA often points for its authority over Indian lands is 25 U.S.C. § 2: “The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.”<sup>67</sup> The BIA Commissioner does have management of all Indian affairs. But, as just discussed above, section 1a limits the Commissioner’s delegation of that authority to within the BIA.<sup>68</sup> Plus, Congress confined the BLM’s public land management to public lands, which exclude Indian lands.<sup>69</sup>

Finally, the BIA Organic Act at section 9 provides that “[t]he President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.”<sup>70</sup> To the extent that this provision may relate to the BLM having any authority on Indian lands, there is no regulation or other authority that references this provision. However, if this provision were cited for the BLM’s authority on Indian lands, it would have to refer to regulations prescribed by the President. None have been identified. The Secretary of Interior promulgated the regulations that relate to this matter.

But, the President cannot promulgate regulations that exceed the bounds statutorily established by Congress.<sup>71</sup> Via 25 U.S.C. § 9, Congress delegated to the President “the power to prescribe regulations for carrying

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65. *Id.* § 1a.

66. *Id.*

67. *Id.* § 2.

68. *Id.* § 1a

69. 43 U.S.C. § 1702(e).

70. 25 U.S.C. § 9.

71. *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

into effect statutes relating to Indian affairs.”<sup>72</sup> Therefore, under the plain language of the statute, the President is still bound to stay within the congressional mandate of the relevant statute in promulgating regulations. As a result, the President could not promulgate regulations that allow the BLM to exercise regulatory jurisdiction on Indian lands, contrary to Congress’s mandate that the BLM’s FLPMA-based regime *not* apply on Indian lands.

#### *H. Federal Oil and Gas Royalty Management Act*

Through the Federal Oil and Gas Royalty Management Act, Congress aimed to improve royalty collection, management, and enforcement for oil and gas leases on federal and Indian lands.<sup>73</sup> There is nothing conferring the BLM regulatory authority on Indian lands in this statute, nor is there anything regarding oil and gas permits on Indian lands. The only delegation involves that of royalty collections and related activities, without any mention of permits or their equivalent, to states and tribes through either a delegation or cooperative agreement, respectively.<sup>74</sup> Yet again, there is nothing in this statute that confers jurisdiction over Indian lands to the BLM.

#### *I. Indian Energy Resources Act*

The Indian Energy Resources Act was aimed at promoting tribal economic self-sufficiency through energy development and to furthering tribal control of mineral development on Indian lands.<sup>75</sup> If anything, these overarching policy goals cut against any grant of jurisdiction over Indian lands to the BLM. Similar to the Indian Mineral Development Act, the closest provision requires that the Secretary make available regulatory, technical, and management expertise at the request of the tribes.<sup>76</sup> This provision cannot be construed, though, to confer broad regulatory jurisdiction on the BLM at the request of the tribes. Again, this statute does not support the BLM jurisdiction over oil and gas on Indian lands.

#### *J. Energy Policy Act of 1992*

The Energy Policy Act of 1992 amended the National Energy Conservation Policy Act and established several energy management goals in such areas as water conservation, energy efficiency, and fleet management, amongst others.<sup>77</sup> Title XXVI, Indian Energy Resources, mandated tribal consultation on energy resource development, authorized grants and assistance to tribes for energy resource regulation, established the Indian Energy Resource Commission, and established a tribal

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72. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) (citing *United States v. Candelaria*, 271 U.S. 432, 442 (1926)).

73. 30 U.S.C. §§ 1701-1757 (1982).

74. *Id.* §§ 1711-1723.

75. 25 U.S.C. §§ 3501-3506 (2006).

76. *Id.* § 3503.

77. Energy Policy Act of 1992, Public L. No. 102-486, 106 Stat. 2776.

government energy assistance program.<sup>78</sup> Nothing in this Act confers jurisdiction over Indian lands to the BLM.

*K. 2005 Amendments to Energy Policy Act*

The 2005 amendments to the Energy Policy Act established a number of energy management goals for Federal facilities and fleets.<sup>79</sup> Title V, Indian Energy, directs the Secretary of Interior to establish and implement an Indian Energy Resource Development Program under the Department of Interior, which would provide grants and technical assistance to tribes.<sup>80</sup> Title V also provides for grants to tribes for tribal energy resources regulation, for items such as resource inventories, feasibility studies, development and enforcement of tribal energy laws, and development of technical infrastructure.<sup>81</sup>

The Energy Policy Act of 2005 also provided Tribal Energy Resource Agreements (TERAs), which eliminate Secretarial approval and NEPA analysis, delegating that analysis to the tribe, for leases, business agreements, and rights-of-way involving energy development or transmission.<sup>82</sup> At § 3505, the federal power marketing administrations are directed to encourage tribal energy development by providing technical assistance for transmission and conducting a power allocation study and a wind and hydroelectric feasibility study.<sup>83</sup> In sum, nothing in this statute confers jurisdiction upon the BLM or addresses the issue at hand.

*L. Indian Self-Determination and Education Assistance Act*

The Indian Self-Determination and Education Assistance Act is certainly not a source of BLM authority to regulate oil and gas on Indian lands. This Act does not even directly touch on oil and gas or similar activities. The Self-Determination Act does, however, provide the important context of the federal government's self-determination policy for tribes that has been in place at least since the Act's 1975 enactment.<sup>84</sup>

The congressional statement of findings, in part, follows:

**(a) Findings respecting historical and special legal relationship, and resultant responsibilities.**

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) The prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop

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78. §§ 2601-2606, 106 Stat. at 3113-18.

79. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

80. 25 U.S.C. § 3502 (2006).

81. *Id.* § 3503.

82. *Id.* § 3504.

83. *Id.* § 3505.

84. 25 U.S.C. §§ 450-450e-3 (2006).

leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.<sup>85</sup>

Accordingly, the congressional declaration of policy, in part, follows:

**(a) Recognition of obligation of United States**

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

**(b) Declaration of commitment**

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.<sup>86</sup>

Therefore, it is clear that congressional policy, since at least 1975, has been to support Indian self-determination in tribal programs and services. Certainly, management of Indian lands should, under a policy of self-determination, allow for Indian standards to guide that management, notwithstanding the federal government's trust responsibility. Self-determination lends more toward tribal management of Indian lands than a imposition of a second layer of federal management—that is, BLM subsurface jurisdiction in addition to BIA surface jurisdiction—on Indian lands.

Finally, a review of the 2009 updated Cohen's Handbook of Federal Indian Law, the foundational Indian Law resource, specifically its chapter on mineral development on Indian lands, revealed no statutory source of authority on Indian lands for the BLM.<sup>87</sup> But, BLM regulations and, to a lesser degree, BIA regulations purport to confer BLM jurisdiction over oil and gas on Indian lands. As such, the relevant regulations are discussed below.

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85. *Id.* § 450(a).

86. *Id.* § 450a(a)-(b).

87. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 17.03 (2005 ed. & Supp. 2009).

### III. ADMINISTRATIVE CASE LAW: FRAMEWORK FOR REVIEW OF AGENCY REGULATIONS

Understanding the administrative case law regarding agency regulations and their congressionally mandated limits and conditions is a necessary background prior to reviewing the relevant agency regulations in this case.

To start, Congress has plenary power over public lands and U.S. property as well as Indian affairs.<sup>88</sup> Congress creates and empowers administrative agencies through statute.<sup>89</sup> Administrative law by definition governs the creation and operation of administrative agencies.<sup>90</sup> A statute that provides for the creation of an agency or confers upon it a particular set of powers and responsibilities is usually called an “authorizing act” or “enabling act.”<sup>91</sup> Agencies are bound to only regulate within that congressional mandate.<sup>92</sup>

As a result, the constitutionality of agency regulations depends on the scope of the congressional mandate. In interpreting its congressional mandate, an agency’s regulations promulgated pursuant to that statute “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>93</sup> Put differently, if the statute is ambiguous, courts will defer to an agency’s reasonable interpretation of that statute as expressed in its regulations, but if it is unambiguous, then a court will not defer to the agency’s interpretation and will find the agency bound by that clear mandate.<sup>94</sup> Even where the statute is ambiguous, the U.S. Supreme Court has consistently held that “[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.”<sup>95</sup>

A related administrative law concerns agency delegation of congressionally mandated duties. Delegation of an agency’s administrative responsibilities to other sovereign entities is not per se improper.<sup>96</sup> However, delegations to an entity without an independent jurisdictional basis are impermissible.<sup>97</sup> “Limitations on delegation are ‘less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.’”<sup>98</sup>

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88. U.S. CONST. art. 4, § 3, cl. 2 & art. 1, § 8, cl. 3.

89. ADMINISTRATIVE LAW, *supra* note 33, at 15.

90. *Administrative Law*, CORNELL UNIV. LAW SCH. LEGAL INFO. INST. (Aug. 19, 2010, 5:10 PM), [http://topics.law.cornell.edu/wex/administrative\\_law](http://topics.law.cornell.edu/wex/administrative_law) (last visited May 2, 2011).

91. ADMINISTRATIVE LAW, *supra* note 33, at 15-16.

92. *Id.*

93. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

94. *Id.* at 844, 865.

95. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969)).

96. *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986).

97. *Id.* at 795.

98. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)).

In other words, just as the statute confines the agency's rulemaking authority, the statute also determines the permissibility of delegation. "Without express congressional authorization for a subdelegation, [courts] must look to the purpose of the statute to set its parameters."<sup>99</sup> In a case where the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation challenged the Secretary of Interior's delegation of his authority under the Indian Mineral Leasing Act to the Board of Oil & Gas Conservation of the State of Montana via a Cooperative Agreement, the Ninth Circuit refused to "read broad authority to subdelegate into [the] statute[], absent clear proof of legislative intent to relieve the Secretary of a portion of his duties and proof that such a delegation would be in the Tribe's best interests."<sup>100</sup> Although the delegatee there was a state agency and although "subdelegation of administrative responsibilities to other sovereign entities is not per se improper[,]," the Court explained that the delegation there was improper as a "subdelegation to an entity that has no independent jurisdiction" over Indian affairs.<sup>101</sup> The State of Montana had no independent statutory authority or congressional authorization over Indian affairs there; plus, the State was not a subordinate officer to the Secretary of Interior.

Similarly, regarding delegation to a subordinate officer or agency, the U.S. Court of Appeals for the D.C. Circuit has held that a fundamental tenet of administrative law is that "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."<sup>102</sup> Again, congressional intent, which may evidence an explicit and intended want of jurisdiction, may prevent otherwise permissible subdelegation to a *lower* agency or office. Furthermore, although delegation may take the form of an agreement, deviations from an agency's statutorily established mandate cannot be upheld based upon an agreement, contract, or consent of the parties.<sup>103</sup> Agencies and officers cannot "contract around" their statutory authorization and jurisdiction.

Finally, a federal district court has also held that even where Congress has generally encouraged reduction of costs and increasing efficiency by interagency collaboration in the statute itself, it does not follow that Congress has provided "authorization to reallocate the statute's express delegation of *enforcement authority*."<sup>104</sup> Thus, even where Congress has mandated interagency coordination for efficiency, as in the case of the Clean Water Act, Congress did not authorize the delegation of enforcement authority by that agency congressionally charged to another agency. On the

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99. *Id.*

100. *Id.* at 796 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765-68 (1985)).

101. *Id.*

102. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (2004) (citing *United States v. Giordano*, 416 U.S. 505, 512-13 (1974) and *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121-22 (1947)).

103. *See, e.g., Gulf Am. Corp. v. Florida Land Sales Bd.*, 206 So. 2d 457 (Fla. Dist. Ct. App. 2d Dist. 1968); *Rice v. Adam*, 254 Neb. 219 (Neb. 1998).

104. *United States v. Hallmark Const. Co.*, No. 97 C 3682, 1998 WL 433774, at \*4 (N.D. Ill. July 23, 1998) *opinion vacated on reconsideration on other grounds*, 14 F. Supp. 2d 1065 (N.D. Ill. 1998).

other hand, where a delegation would run counter to congressional policy as clearly expressed in the statute, the clear language must be followed.

In cases where the text of a statute is clear and explicit, the U.S. Supreme Court has admonished the judiciary and federal agencies to apply the statute in accordance with its plain text:

Our role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S.Ct. 1146 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)) ([internal] citations omitted). We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.<sup>105</sup>

These principles of administrative law apply squarely to the situation at hand. As a first step, the BLM's enabling act, FLPMA, is unambiguous on its face. It clearly concerns and applies to management of public lands, and the definition of public lands explicitly excludes Indian lands. Therefore, the statute explicitly does *not* vest the BLM with authority to regulate activities, such as oil and gas, on Indian lands. In fact, congressional intent was clearly the opposite: that the BLM should not have any authority to regulate activities on Indian lands. As a result, a court would not defer to agency interpretations of FLPMA, as evidenced in their regulations. BLM regulations that interpret FLPMA as granting it regulatory authority over oil and gas on Indian lands would not receive deference. It is clear that regulations implementing FLPMA, which only concerns public lands, do not apply on Indian lands.

Regarding delegation, the BIA may have purported to delegate authority it may have over Indian oil and gas development to the BLM in its regulations, and it certainly purported to do so in the Tripartite MOU.<sup>106</sup> But, as discussed above, agencies cannot deviate from their congressional mandate to confer that jurisdiction on another agency by agreement. Congress explicitly confined the BLM's jurisdiction to public lands here, not to Indian lands. As such, the BLM and the BIA cannot agree to impose the FLPMA regulatory regime, which includes more restrictive standards not required on other lands, to Indian lands. That imposition runs counter to explicit congressional intent.

Furthermore, the BLM has no independent basis of jurisdiction on Indian lands. Without express congressional authorization for a delegation,

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105. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002).

106. BUREAU OF LAND MANAGEMENT, BUREAU OF INDIAN AFFAIRS, & MINERALS MANAGEMENT SERVICE, TRIPARTITE MEMORANDUM OF UNDERSTANDING BETWEEN THE BUREAU OF INDIAN AFFAIRS, THE BUREAU OF LAND MANAGEMENT, AND THE MINERALS MANAGEMENT SERVICE REGARDING WORKING RELATIONSHIPS AFFECTING MINERAL LEASE ACTIVITIES, BLM MOU WO600-9111, at 2 and Attachment E (August 1991) [hereinafter MOU].

a court would look to the purpose of the statute. Again, here, FLPMA concerns public land management. Indian lands are by definition *not* public lands. Congress exercised its plenary power over public lands and Indian affairs and determined that Indian lands are not public lands, for purposes of application of the FLPMA regulatory scheme. Not only did Congress not mandate the BLM to regulate oil and gas development on Indian lands, Congress also did not allow for the BIA to delegate any authority it may have over Indian oil and gas development to the BLM in any of the statutes enabling the BIA. Furthermore, although the BLM is a federal Interior agency, unlike the State of Montana agency in the Fort Peck case above, the BLM and the BIA are both sister Interior agencies, meaning that the BLM cannot be construed as a subordinate agency to which the BIA may delegate its authority. The two agencies operate under entirely different regimes, with different jurisdiction, authority, and purposes, and the BIA may not delegate authority to the BLM as though the BLM is subordinate. Similarly, the Secretary may not transfer responsibilities and jurisdiction that would belong to the BIA, if any agency, based on the relevant statutes, to a separate Interior agency with its own established statutorily based responsibilities and jurisdiction, the BLM.

Finally, unlike the Clean Water Act case discussed above,<sup>107</sup> here, Congress did not mandate interagency cooperation for increased efficiency, although even that would not be enough to delegate enforcement authority. While both agencies here fall under the Secretary of Interior's overarching authority, Congress limited the BLM's authority over oil and gas to public lands, excluding Indian lands, and, even if the BIA maintains jurisdiction over oil and gas permits and other non-lease or -agreement requirements on Indian lands, congressional intent in FLPMA was clearly to prohibit BLM jurisdiction on Indian lands. The BLM was not to exercise its jurisdiction, including its multiple use and sustained yield and other management guidelines for *public* land, on *Indian* lands.

#### IV. AGENCY REGULATIONS AND ORDERS

The BIA and the BLM have both adopted regulations that govern their respective oversight of energy development on Indian lands. Many of these regulations purport to assert BLM jurisdiction over oil and gas development on Indian lands. This section will assess BIA regulations, BLM regulations, Secretarial Order 3087, and whether they purport to vest the BLM with regulatory authority on Indian lands.

##### A. BIA Regulations

BIA regulations for mineral leasing of Indian lands contain the following two provisions regarding the BLM:

The regulations of the [BLM], the Office of Surface Mining Reclamation and Enforcement, and the Minerals Management Service that are referenced in §§ 211.4, 211.5, and 211.6 are supplemental to the regulations in this part, and apply to parties holding leases or permits for development of Indian mineral

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107. *Hallmark Const. Co.*, 1998 WL 433774.

resources unless specifically stated otherwise in this part or in such other Federal regulations.<sup>108</sup>

The functions of the [BLM] are found in 43 CFR part 3160—Onshore Oil and Gas Operations, 43 CFR part 3180—Onshore Oil and Gas Unit Agreements: Unproven Area, 43 CFR part 3260—Geothermal Resources Operations, 43 CFR part 3280—Geothermal Resources Unit Agreements: Unproven Areas, 43 CFR part 3480—Coal Exploration and Mining Operations, and 43 CFR part 3590—Solid Minerals (other than coal) Exploration and Mining Operations; and currently include, but are not limited to, resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification.<sup>109</sup> These regulations, [sic] apply to leases and permits approved under this part.<sup>109</sup>

Foremost, § 211.1 incorporates by reference the BLM regulations. Second, § 211.4 incorporates by reference specific BLM regulatory parts as well as, again, broadly incorporating BLM regulations to “leases and permits approved under this part.”<sup>110</sup> This section lists the BLM’s functions, too.

On their face, these regulations appear to incorporate by reference BLM oil and gas regulations to Indian mineral development, but they do not appear to attempt to confer jurisdiction on the BLM. After all, there is no provision that the BLM will administer and enforce those incorporated regulations. Thus, based on these regulations, it appears that, to the extent the BIA incorporates BLM oil and gas regulations, the BIA would still be bound to administer and enforce that regulatory regime, as Congress explicitly excluded Indian lands from the BLM’s jurisdiction. But, FLPMA contained specific land management guidelines and mandates, such as multiple use and sustained yield, and Congress explicitly intended for those mandates to *not* guide Indian land development and management. Thus, the BIA itself may not impose a more stringent management guideline on Indian development than congressional intent allows.

Finally, regarding BIA regulations, the only provision in the BIA regulations for tribal mineral development that concerns permits follows:

**Permission to start operations.**

- (a) No exploration, drilling, or mining operations are permitted on any Indian lands before the Secretary has granted written approval of a mineral *lease or permit* pursuant to the regulations in this part.
- (b) After a *lease or permit* is approved, written permission must be secured from the Secretary before any operations are started on the leased premises, in accordance with applicable rules and regulations in 25 CFR part 216; 30 CFR chapter II, subchapters A and C; 30 CFR part 750 (Requirements for Surface Coal Mining and Reclamation Operations on

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108. 25 C.F.R. § 211.1(c) (2011).

109. *Id.* § 211.4.

110. *Id.*

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Indian Lands), 43 CFR parts 3160, 3260, 3480, 3590, and Orders or Notices to Lessees (NTLs) issued thereunder.<sup>111</sup>

Notwithstanding the absence of any statute explicitly authorizing the Secretary to require oil and gas permits on Indian lands, this section concerns approval of a lease or permit. But, the regulations again purport to incorporate BLM regulations. In the end, this provision also cannot be read as conferring jurisdiction on Indian lands, as Congress excluded Indian lands from the BLM's jurisdiction. This limitation on an agency's ability to promulgate regulations only within its congressional mandate is discussed at length below as a tenet of administrative law. Lastly, Indian leasing regulations at 25 C.F.R. part 162 do not concern mineral leases;<sup>112</sup> there is no mention of such leases therein.

### B. BLM Regulations and Orders

BLM onshore oil and gas regulations purport to apply to federal and Indian oil and gas leases.<sup>113</sup> BLM regulations cite three provisions in FLPMA for its authority over Indian oil and gas leases.<sup>114</sup> The BLM further seeks to establish its authority to regulate in the jurisdiction section of its regulations which provides "[a]ll operations conducted on a Federal or Indian oil and gas lease by the operator are subject to the regulations in this part."<sup>115</sup> The BLM has also issued onshore oil and gas orders that purport to apply to Indian oil and gas leases and references 43 C.F.R. part 3160 for their authority.<sup>116</sup>

BLM regulations at 43 C.F.R. part 3160 govern onshore oil and gas operations. These regulations purport to govern:

[O]perations associated with exploration, development and production of oil and gas deposits from—

(a) Leases issued or approved by the United States;

(b) Restricted Indian land leases; and

(c) Those leases under the jurisdiction of the Secretary of the Interior by law or administrative arrangement including the National Petroleum Reserve-Alaska (NPR-A).<sup>117</sup>

As mentioned above, these regulations, administered by the BLM, cite for their authority: the Mineral Leasing Act, the Mineral Leasing Act for Acquired Lands, 25 U.S.C. § 396, 25 U.S.C. §§ 396a-396q, 25 U.S.C. § 397, 25

111. *Id.* § 211.48 (Emphasis added).

112. 25 C.F.R. §§ 162.100-.623 (2011).

113. 43 C.F.R. § 3160.0-1 (2011).

114. 43 U.S.C. §§ 1732(b), 1733, 1740 (2006).

115. 43 C.F.R. § 3161.1(a).

116. Links to the text of all seven orders are available on the BLM website. *Onshore Orders*, BLM (May 16, 2007), [http://www.blm.gov/nv/st/en/prog/minerals/leasable\\_minerals/oil\\_gas/oil\\_and\\_gas\\_operations/onshore\\_orders.html](http://www.blm.gov/nv/st/en/prog/minerals/leasable_minerals/oil_gas/oil_and_gas_operations/onshore_orders.html) [hereinafter *Onshore Orders*].

117. 43 C.F.R. § 3160.0-1.

U.S.C. § 398, 25 U.S.C. §§ 398a-398e, 25 U.S.C. § 399, 43 U.S.C. § 1457, Attorney General's Opinion of April 2, 1941, the Federal Property and Administrative Services Act, the National Environmental Policy Act, the Combined Hydrocarbon Leasing Act, the Federal Oil and Gas Royalty Management Act, the Indian Mineral Development Act, and Secretarial Order 3087 "under which the Secretary consolidated and transferred the onshore minerals management functions of the Department, except mineral revenue functions and the responsibility for leasing of restricted Indian lands, to the [BLM]."<sup>118</sup> The Secretarial Order is discussed in turn. However, as discussed above, none of these statutes cited confers jurisdiction over Indian oil and gas leases to the BLM.<sup>119</sup>

In addition, there are seven BLM orders pertaining to oil and gas operations, which are meant to supplement the primary set of regulations at 43 C.F.R. part 3160.<sup>120</sup> They aim to implement and supplement the oil and gas regulations found at 43 C.F.R. part 3160 for conducting oil and gas operations on federal and Indian lands, providing more detailed information on matters such as the following: Order One covers approval of operations;<sup>121</sup> Order Two covers requirements and standards for drilling and abandonment;<sup>122</sup> Order Three covers requirements and standards for site security;<sup>123</sup> Order Four provides requirements and standards for measurement of oil;<sup>124</sup> Order Five provides the requirements and standards for the measurement of gas;<sup>125</sup> Order Six provides the requirements and standards for conducting oil and gas operations in an environment known to or expected to contain hydrogen sulfide (H<sub>2</sub>S) gas;<sup>126</sup> and Order Seven provides the methods and approvals necessary to dispose of produced water associated with oil and gas operations.<sup>127</sup>

But, these orders, like regulations, are bound to operate within their congressional authorization. These orders cite the BLM oil and gas regulations at 43 C.F.R. part 3160 as their authority.<sup>128</sup> And, in the end, invalidly promulgated regulations outside the scope of congressionally

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118. *Id.* § 3160.0-3; *see also id.* § 3160.0-2.

119. *See supra* Section II.

120. *Onshore Orders, supra* note 116.

121. Joint Final Rule, Onshore Oil and Gas Order Number 1: Approval of Operations, 72 Fed. Reg. 10,308 (2007) (codified at 43 C.F.R. pt. 3160).

122. Final Rule, Onshore Oil and Gas Order No. 2: Drilling Operations, 53 Fed. Reg. 46,798 (1988) (codified at 43 C.F.R. pt. 3160).

123. Final Rule, Onshore Oil and Gas Order No. 3: Site Security, 54 Fed. Reg. 8,056 (1989) (codified at 43 C.F.R. pt. 3160).

124. Final Rule, Onshore Oil and Gas Order No. 4: Measurement of Oil, 54 Fed. Reg. 8,086 (1989) (codified at 43 C.F.R. pt. 3160).

125. Final Rule, Onshore Oil and Gas Order No. 5: Measurement of Gas, 54 Fed. Reg. 8,100 (1989) (codified at 43 C.F.R. pt. 3160).

126. Final Rule, Onshore Oil and Gas Order No. 6: Hydrogen Sulfide Operations, 55 Fed. Reg. 48,958 (1990) (codified at 43 C.F.R. pt. 3160).

127. Final Rule, Onshore Oil and Gas Order No. 7: Disposal of Produced Water, 58 Fed. Reg. 47,354 (1993) (codified at 43 C.F.R. pt. 3160).

128. *See, e.g.*, 72 Fed. Reg. 10,308, at 10,329.

vested authority cannot be the basis for an order supplementing those regulations. Based on an invalid primary regulation, the supplementary order, too, must fail. These orders also cite BIA regulations discussed above for the delegation of authority over Indian leases to the BLM, but, as discussed above, the Secretary cannot promulgate regulations to delegate authority to an entity that Congress did not intend to be vested with that authority.<sup>129</sup> Through these orders, such as Order Number One on Approval of Operations, the BLM imposes conditions consistent with its FLPMA public land regulatory authority on Indian lands, including the requirements of application for permits to drill (APDs), conditions of approval, and best management practices.<sup>130</sup>

### C. Secretary of Interior Order No. 3087

Secretarial Order No. 3087 is cited as a source of the BLM's authority to promulgate oil and gas regulations and enforce them on Indian lands. However, Order 3087 does not confer jurisdiction on the BLM. The only relevant provision of Order 3087 follows:

All MMS onshore minerals management functions on non-Indian lands, including resource evaluation, approval of drilling permits and mining or production plans, inspection and enforcement, are transferred to the BLM. Those functions now performed by the MMS which are being transferred to the BLM will, in the case of their application to Indian lands, be similarly transferred from the MMS to the Bureau of Indian Affairs.<sup>131</sup>

Yet, Amendment No. 1 to section 5 of the Order purported to delegate "onshore minerals management functions on Federal and Indian lands" to the BLM.<sup>132</sup> Nonetheless, Order 3087 only delegates the Minerals Management Service (MMS), now known as the Office of Natural Resources Revenue (ONRR), authority on non-Indian lands to the BLM. Further, the Order delegates MMS functions on Indian lands to the BIA. To the extent Amendment No. 1 purported to delegate authority to BLM, such attempt is contrary to congressional intent and statutory authorization and is, therefore, invalid.

## V. TRIPARTITE MEMORANDUM OF UNDERSTANDING

The BIA, the BLM, and the MMS, now known as the ONRR, purported to enter into a tripartite memorandum of understanding (MOU) in 1991. In this MOU, the sister agencies attempted to divvy up responsibilities for oil and gas development on Indian land. According to the MOU, the BLM would be responsible for ensuring that oil and gas operations comply with the BLM's onshore oil and gas regulations.<sup>133</sup> The stated purpose of the MOU was to "achieve common standards and methods for creating an efficient

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129. *Id.*

130. *Id.* at 10309, 10330.

131. Order No. 3087, Organizational Restructuring of the Department of Minerals Management Functions, 48 Fed. Reg. 8,983 (1983).

132. 48 Fed. Reg. 8,983 (1983).

133. MOU, *supra* note 106, at 2 and Attachment E.

and effective working relationship between the Bureaus and for achieving the common goal of improved minerals accountability on Federal and Indian leases.<sup>134</sup> These agencies are the three primary Interior Department agencies, along with the Office of the Special Trustee as created by the 1994 American Indian Trust Fund Management Reform Act, which is responsible for executing the Secretary's Trust Responsibility as it relates to the leasing of Indian Minerals.<sup>135</sup> Thus, while not explicitly stated in the MOU's purpose, the MOU likely took place in the context of increasing cognizance at that time of the historical deficiencies in these agencies' fulfillment of their trust responsibilities, a general awareness that led to the *Cobell* litigation - the *Cobell v. Salazar* case filed in 1996 that became the largest government class-action settlement in our nation's history, having successfully challenged the federal government's failure to account for billions of dollars owed to Indians.<sup>136</sup> To some extent, the agencies' attempt to improve efficiency in management of Indian oil and gas leases could be seen as an attempt to generally improve the fulfillment of its trust responsibility in this arena.

However, interagency MOUs are permissible to eliminate redundancy and promote efficiency but typically only where development may cross jurisdictional boundaries or where surface and subsurface ownership varies, as explained by the U.S. Office of Management and Budget in an annual assessment of the BLM regulation.<sup>137</sup> Neither is the situation at hand.

For one, only if the energy development is occurring on not only Indian lands but also another type of land, with a different mineral rights owner, would there be a development of crossing jurisdictional boundaries. Second, most mineral rights on Indian reservations are beneficially owned by tribes, not by the federal government. Unless memorialized otherwise in a treaty, statute, or agreement, reservations are not split estates where the federal government owns the subsurface minerals.<sup>138</sup> There are situations where the federal government has reserved the mineral estate for itself and the tribe owns only the surface estate, but, in those cases where the tribe owns the minerals and the surface, there is no need to regulate this land as a split estate. Plus, the guidelines expressed by the Office of Management and Budget for when the BLM should enter interagency agreements—that is, where development may cross jurisdictional boundaries or where surface and subsurface ownership varies—are not met here.

In addition, it is a fundamental tenet of administrative law that Congress creates administrative agencies and sets forth their mandate.

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134. *Id.* at 1.

135. American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001-4061).

136. *See generally* *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009).

137. *Bureau of Land Management Energy and Minerals Management Assessment*, U.S. OFFICE OF MGMT. AND BUDGET 2003, <http://www.whitehouse.gov/omb/expectmore/detail/10001077> (archived at <http://georgewbush-whitehouse.archives.gov/omb/expectmore/detail/10001077.2003.html>).

138. *See, e.g.,* *Boyd & McWilliams Energy Grp., Inc. v. Tso*, No. 93-C-1083A (D. Utah, filed Dec. 17, 1993)(discussing a split estate where BLM managed the mineral estate on the Navajo Reservation on behalf of the United States pursuant to a statute reserving those minerals to the United States).

Agencies are constricted by their congressional mandate. In other words, agencies cannot agree beyond the bounds of their congressional mandates. By entering the MOU, the agencies have attempted to exceed the bounds of their congressional mandates to vest the BLM with regulatory authority over oil and gas on Indian lands.

#### VI. RECOMMENDATIONS FOR FURTHER ACTION

Apparently, no one has challenged the BLM and the BIA exceeding the bounds of their congressional mandates through the Tripartite MOU and the BLM's resulting attempt to assert jurisdiction in this case. Without statutory authority on Indian lands, indeed with a mandate *not* to exercise regulatory jurisdiction on Indian lands, the BLM may not require APDs and administer other requirements rooted in FLPMA for oil and gas development on Indian lands. Congress clearly carved out Indian lands from the BLM's authority to manage public lands for multiple use and sustained yield in accordance with land use plans, thereby abiding by its policy of self-determination for Indian tribes. In order to clarify the BLM's lack of statutory authority, tribes could either seek a declaratory judgment that the BLM lacks statutory authority on Indian lands or seek that declaration in legislation.

As a practical matter, if the BIA does in fact have jurisdiction to require oil and gas permits—that is, separate from and in addition to its congressional mandates over mineral leases and agreements—and if the BLM lacks statutory authority, then APD processing would fall back onto the BIA, which likely could not process them in a timely manner, considering its current resource and staffing shortage. But, if the BIA does not have jurisdiction to require APDs on Indian lands, since FLPMA regulations add an entire regulatory layer to tribal energy development that Congress did not intend, perhaps there should be no APDs for energy development on Indian lands, as the law stands today.

In the end, the long-standing policy of Indian self-determination and the congressional intent in FLPMA certainly support not imposing public land management guidelines onto Indian lands via an additional layer of regulatory requirements. Tribal sovereignty and self-determination are furthered by tribes assuming more control and responsibility over their own energy development and other opportunities as governments and landowners.

This congressional support of Indian energy and regulatory independence is evident in some of the U.S. Environmental Protection Agency-administered environmental statutes, including the Clean Air Act and Clean Water Act, which provide for Treatment as a State by a tribe under certain conditions.<sup>139</sup> Upon receiving Treatment as a State, a tribe may then assume regulatory control over the statutory scheme. Similarly, pursuant to the Indian Self-Determination and Education Assistance Act, tribes may enter into what are known as 638 contracts to assume regulatory control over a Department of Interior-administered program.

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139. See, respectively, 42 U.S.C. § 7410(o) and 33 U.S.C. § 1377(e).

Accordingly, this overarching self-determination and energy independence congressional policy would be upheld by no longer imposing the FLPMA regulatory regime on Indian lands.

There is currently a budding national dialogue regarding the appropriateness and inefficacy of the many layers of regulatory requirements for energy development on Indian lands. On January 18, 2011, President Obama issued Executive Order 13563, entitled "Improving Regulation and Regulatory Review."<sup>140</sup> Section 3 of the Order provides that "[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules."<sup>141</sup>

In line with the Order, on February 25, 2011, the Department of Interior published a Request for Information in the Federal Register "asking for ideas and information from the public in preparing [its preliminary] plan and identifying opportunities to improve any of its significant regulations by modifying, streamlining, expanding, or repealing them."<sup>142</sup> The Department continues to accept comments after the announced March 2011 deadline. On the legislative side, there are a few bills being drafted and circulated currently that aim to streamline energy development regulation on Indian lands, such as Senator John Barrasso's draft Indian energy bill, Indian Tribal Energy Development and Self-Determination Act Amendments of 2011, Senate Bill 1684, which is cosponsored by Senator Akaka, Chairman of the Senate Committee on Indian Affairs.<sup>143</sup> In addition, Congressman Don Yong has introduced the American Indian Empowerment Act of 2011, House Bill 3532, which aims "[t]o empower federally recognized Indian tribes to accept restricted fee tribal lands," to allow preemption of federal laws relating to leasing of Indian lands in certain circumstances, and to remove the Secretarial approval requirement for leasing of Indian lands.<sup>144</sup>

Certainly, all of these developments recognize the problem of redundant and unduly burdensome regulatory requirements and provide opportunities to ameliorate the significant inefficiencies. However, a fix to eliminate the now somewhat institutionalized and accepted regulatory presence of the BLM may be more difficult to achieve. There is much inertia with the current agency arrangement. Yet, attempts to legislatively fix this unconstitutional exercise of jurisdiction in Indian Country are likely to come from Indian advocates in the near future.

As one important legislative fix in this area, Congress should adopt a definition of Indian lands that applies to all federal statutes concerning Indian development and resources. For the sake of clarity, standard

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140. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (2011).

141. *Id.* at 3,822.

142. Request for Information, Reducing Regulatory Burden, 76 Fed. Reg. 10,526, 10,526 (2011).

143. Indian Tribal Energy Development and Self-Determination Act Amendments of 2011, S. 1684, 112th Cong. (2011).

144. American Indian Empowerment Act of 2011, H.R. 3532, 112th Cong. (2011).

utilization of a term of art is needed in the complex area of Indian energy and resource development. Land status in Indian Country is already multifaceted; lack of clarity in legal terminology only further complicates the complex factual analyses. Congressional establishment of a standard definition of Indian lands would streamline and clarify the Indian energy and resource regime. As a result, Indian lands would be better situated for harmonious management with all congressional policies, necessarily removing Indian land from any semblance of public lands.

In addition, or in the alternative, in order to streamline the complex regulatory approval process for Indian oil and gas, Congress should require establishment and implementation of a "One Stop Shop," as has been employed at the Fort Berthold Reservation agency in North Dakota.<sup>145</sup> A "One Stop Shop" would coordinate the multiple agency efforts and databases, streamlining communication and regulatory approvals via a shared physical office as well as a shared database and other remote communication tools.<sup>146</sup> This One Stop Shop would maximize efficiency and process regulatory approvals in a more timely manner—a benefit that appeals to operators, who can commence exploration and development more expeditiously, as well as tribe-landowners, who may attract more operators and stand to reap more financial benefit.

Finally, the APD fees currently imposed by the BLM are costly and somewhat deterring to oil and gas operators, to the detriment of tribes. These fees should be eliminated or reduced so long as they are deposited into the General Treasury Fund. Better yet, these fees should be deposited into a BIA account for the benefit of the mineral-owning tribe or into a tribal account.

Ultimately, the legislative dialogue is underway, at least. Congress has multiple tools that it may employ to improve the regulatory regime for oil and gas development on Indian lands. The issue of the BLM's ostensibly unsupported exercise of jurisdiction, the BLM's significant APD fees, and the need for a conclusive definition of Indian lands are all appropriate starting points.

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145. Press Release, BLM, Oil and Gas Development on the Fort Berthold Indian Reservation (Sept. 6, 2011), *available* at [http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm\\_information/bps.Par.97138.File.dat/Ft%20Berthold.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_information/bps.Par.97138.File.dat/Ft%20Berthold.pdf).

146. *Id.*