

# ENERGY DEVELOPMENT ON TRIBAL LANDS

- The Fundamentals
  - Know Tribal History and Government
    - Be familiar with Tribal Constitution and Government
    - Treaties
    - Allotment Agreements
  - The Federal Trust Responsibility
    - What is it and how does it affect energy development on Indian land?
  - Applicability of tribal, federal and state laws
    - Three different jurisdictions can affect energy development in Indian Country
  - Land Status and Title Issues
    - Trust land and fee land

# TREATIES

- “The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.” *Worcester v. Georgia*, 31 U.S. 515, 559-560 (1832)
- “The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.” *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)

# Atkinson and O'Fallon treaties *aka* ‘Friendship Treaties’ of 1825 (Ratified in 1826)

- A group under Indian Agent Benjamin O'Fallon and Army Brigadier General Henry Atkinson traveled up the Missouri River to Yellowstone with 9 keelboats and large military escort, making treaties with a number of tribes, including the Mandan, Hidatsa, and Arikara.
- Arikara (7 Stat. 259), Mandan (7 Stat. 264), Hidatsa (7 Stat. 261). Three separate treaties, all with nearly identical provisions.
  - Purpose; forgive offences committed, remove all future cause of misunderstanding, as respects trade and friendly intercourse between the parties, “firm and lasting peace”
  - Treaties acknowledged the MHA’s “country” but did not attempt to define or limit their boundaries. Aboriginal Territory encompassed both sides of the Missouri River.
  - United States agreed to receive MHA into their friendship, and under their protection (the promise of protection is a foundation of the trust responsibility)

# 1825 Treaties, Commerce and Trade Provisions

- MHA acknowledged the right of the United States to regulate all trade and intercourse with them.
- MHA agreed not to trade with anyone but authorized American citizens, (prior thereto MHA was actively trading with Great Britain and France).
- United States agreed to admit and license traders “under mild and equitable regulations”.

# 1851 Treaty at Fort Laramie

- Largest treaty council ever held: more than 10k Plains Indians from Lakota, Cheyenne, Arapaho, Crow, Mandan, Arikara, Assiniboine, and Hidatsa
- Exchange of \$50k a year for 50 years, the Indian nations agreed to allow the US to construct roads and military posts through their country
- The tribes agreed to maintain peaceful relations with one another and with the US
- Recognized the Mandan, Hidatsa, and Arikara territory south and west of the Missouri River
- Art 5 also stated that MHA does “not hereby abandon or prejudice any rights or claims they may have to other lands”
- Art. 5 savings clause is important because it acknowledged MHA’s land north and east of the Missouri river, later added by Executive orders.

# GENERAL ALLOTMENT ACT OF 1887

## 25 USC 331 *et seq.*

- General Allotment Act of 1887, 25 USC 331 *et seq.* reflected Congress' policy to break up tribal land holdings into individual allotments, usually from 80 to 160 acres per individual.
- Many tribes, including MHA, were affected by allotment. Allotment resulted in the loss of about 90 million acres of Indian land nationwide. Fractionated lands resulted from allotment.
- MHA Allotment Agreement of 1886 (ratified March 3, 1891) further diminished the Reservation and provided for allotment.
- a 1910 Act of Congress opened unallotted lands in northeastern part of Reservation to sale and homesteading, but did not diminish the boundaries of the Reservation.

# RESERVATION LAND STATUS

- As a result of the allotment policy, there are three types of land holdings on the Reservation, tribal trust, allotted trust, and fee patented.
- Legal title to all trust land (tribal and allotted) is held by the United States in trust for the benefit of the tribe or allottees and their heirs.
  - BIA's Land Title and Records Office, Aberdeen S.D. houses recorded trust deeds and title documents.
- Fee patented lands can be owned by the tribes (usually reacquired by tribes by purchase), or individuals including non tribal members.
- Different laws apply to reservation land depending on whether it is trust or fee.

# INDIAN REORGANIZATION ACT OF 1934

- Many Tribes, including the MHA Nation, reorganized their governments under this Act.
  - The IRA ended the policy of allotment and re-emphasized tribal sovereignty and self-determination.
  - Congress recognized Tribe's right to adopt Constitutions subject to the approval of the Secretary.
  - IRA Constitutions generally define how the tribal government works, tribal jurisdiction, and how the tribal government manages its resources, including tribal energy resources.
  - Section 17 of The IRA also authorized separate federal charters of incorporation for tribes to separately conduct business. These "Section 17 corporations" have the power to lease land for up to 25 years without federal approval.



# ENERGY DEVELOPMENT ON TRIBAL LANDS

- No interest in tribal trust land may be conveyed, leased or encumbered without the consent of Congress.
  - Indian Mineral Leasing Act, 25 USC 396a; Indian Mineral Development Act 25 USC 2101 *et. seq.*; 25 CFR Parts 212, 225.
  - Federal Oil and Gas Royalty Management Act, 30 USC 1701 *et. seq.*; 30 CFR Chapters VII, XII.
  - Federal approval of tribal energy agreements and leases triggers NEPA.
- Tribes who have section 17 Corporations can lease tribal trust land for up to 25 years without federal approval.
  - Section 17 has not been used much for energy development, although the potential is there.
  - NEPA not applicable to Section 17 leases but tribal laws apply.
- Energy Development on tribal fee land on Indian reservations does not require federal approval, tribal laws apply.

# ENERGY DEVELOPMENT ON TRIBAL LANDS

- Section 503 of the Energy Policy Act of 2005 (Public Law 109-58)
  - Authorizes Tribal Energy Resource Agreements (TERA). Provides tribes the option of entering into energy-related agreements and rights of way without the review and approval of the Secretary of the Interior. TERAs have been under-utilized.
- Indian Tribal Energy Development and Self Determination Act of 2018 (Pub. L. 115-325), amends the Energy Policy Act of 2005
  - Purpose is to provide Indian tribes with greater autonomy over the management and development of their energy resources.
  - Streamline and bring greater certainty to the Bureau of Indian Affairs' approval process for TERAs.

# ENERGY DEVELOPMENT ON ALLOTTED LANDS

- Allotted trust lands may not be conveyed, leased or encumbered without the approval of Congress.
  - Congress has provided that allotted Lands can be leased for mining purposes with the approval of the Secretary of Interior.
    - Indian Mineral Leasing Act, 25 USC 396; 25 CFR Part 211
    - Fort Berthold Mineral Leasing Act, 112 Stat. 620, 113 Stat 979.
  - Secretary must determine that the leases in in the best interest of the owner(s)
  - NEPA applies to energy leases and Rights of Way on allotted trust lands.
  - Individual owner (or a majority of the owners if there is more than one) must approve the lease.
  - Secretary may execute leases on behalf of undetermined heirs or heirs who cannot be located.

# FEDERAL AGENCIES

- Department of Interior
  - BIA approves leases, rights of way, and other energy related agreements on trust land.
  - BLM has been delegated certain authority by the Secretary of the Interior to regulate energy development on Indian trust land.
    - 25 CFR 211.4, 212.4, 225.4
  - ONRR (Office of Natural Resource Revenue)
    - Royalty and auditing of Indian leases and agreements.
  - IESC (Indian Energy Service Center)
    - multi-agency collaboration between BIA, BLM, ONRR, and OST whose mission is to support and expedite Indian energy development.
- Environmental Protection Agency
  - Enforces the Clean Water Act, Clean Air Act, Safe Drinking Water Act in Indian Country, for both fee and trust lands.
- Corps of Engineers
  - Lake Sakakawea
- US Fish and Wildlife Service
  - Endangered species Act

# CHALLENGES

- Gas Capture, venting and flaring of natural gas
  - BLMs tribal deference rule.
  - EPA enforcement of Clean Air Act.
- Infrastructure
  - Pipelines, processing and refining.
  - Deficient federal funding to support energy development.
- Dual taxation, regulation.
- Need for regulatory certainty.
- Oil and Gas development leaves a big footprint, ensuring responsible development requires regulatory oversight.