

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 12

SUMMER 2022

ISSUE 3

AIDING EMPLOYMENT AND THE ENVIRONMENT ON TRIBAL LANDS:

AN ANALYSIS OF HIRING PREFERENCES AND THEIR USE IN THE MINING
INDUSTRY

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This Note analyzes hiring preferences on tribal lands in the mining industry within the United States and particularly in the State of Arizona, which has a relatively high number of both mines and federally recognized tribes. Arizona has its own robust history and case law on hiring preferences in the mining industry for tribal members. This Note asserts the efficacy of hiring preferences in increasing employment and improving economies on tribal lands and explains how hiring preferences can be of use moving forward. To establish context, this Note introduces the history of tribal relations regarding land with the federal government, covers the history and current state of mining on tribal lands, and analyzes how hiring preferences are set in a lease or tribal government document. Then, the constitutionality of hiring preferences (particularly regarding the Civil Rights Act of 1964) is addressed, along with how tribal constitutions and enactments alike interpret and apply such hiring preferences. This Note also looks at hiring preferences thus far from statistical and economic perspectives. Finally, this Note predicts how hiring preferences might benefit tribes moving forward, particularly with expanding sustainable development and renewable energy.

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I. Introduction

The unemployment rate of Native Americans is considerably higher than the rest of the population in the United States.¹ This issue is cyclical because unemployment brings about poverty, which leads to fewer opportunities for education for the next generation, then to lower wages and fewer career opportunities, and finally resulting again in a higher likelihood of unemployment.² One potential solution to lower unemployment rates is the implementation of hiring preferences on tribal lands by governments and private companies, which requires employers to give preference to members of a certain tribe within the workforce in an industry on any given project.³ Contractors also have the right to require such preferences within their hiring processes, as long as the employment opportunity is “on or near an Indian reservation.”⁴

Generally, an employer cannot “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities” based on various identifications set out in the Civil Rights Act of 1964 (the Act).⁵ Because federally recognized tribes⁶

¹ Mary Dorinda Allard & Vernon Brundage Jr., BUREAU OF LABOR STATISTICS, American Indians and Alaska Natives in the U.S. Labor Force (2019), <https://www.bls.gov/opub/mlr/2019/article/american-indians-and-alaska-natives-in-the-u-s-labor-force.htm>. In 2018, for example, the unemployment rate of AIANs (American Indian and Alaska Natives) was 6.6%, compared to 3.9% for the United States as a whole.

² Rafael Tapia Jr., *Labor Day and Native American Employment Disparities*, PARTNERSHIP WITH NATIVE AMERICANS (Nov. 3, 2019), <http://blog.nativepartnership.org/labor-day-and-native-american-employment-disparities/>.

³ *E.g.*, Navajo Preference in Employment Act, 15 N.N.C. § 604(A)(1) (2010).

⁴ 41 C.F.R. § 60-1.5(a)(7) (2021).

⁵ 42 U.S.C. § 2000e-2(a).

⁶ *See* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 *et seq.* (Jan. 28, 2022); 25 C.F.R. § 83.1. Federally recognized tribes are those with which the United States maintains a government-to-government relationship. When referring to “Indians” or “Native Americans” throughout the remainder of this Note, assume that the groups being referred to fall within the list of federally recognized tribes and are tribes that are located within the borders of the United States.

consider hiring preferences in the realm of a political classification due to the applicant or employee's tribal affiliation, the Act does not protect this class and therefore permits such preferences.⁷

Hiring preferences should be encouraged specifically in the mining industry. The United States Department of the Interior (DOI) has subjected nearly two million acres of tribal lands to mineral leases⁸ thereby making the industry ripe for imposing such preferences. The DOI estimates that 15 million more acres of tribal land across the United States could be tapped for resource wealth in addition to the existing two million acres that are already being developed.⁹ This surge in available resources will generate jobs that can be set aside for Native Americans residing on or near those lands.¹⁰

With this opportunity comes a major risk. Expectedly, tribes have internal conflicts on how they want to develop their lands; some choose not to at all.¹¹ In addition, *after* a mine has been depleted of its resources and abandoned, a decline in employment and environmental issues like abandoned mine drainage can occur.¹² It will be pivotal for companies and tribal governments to continue implementing hiring preferences in mining and forms of renewable energy projects (e.g., wind and solar¹³), especially as coal mining decreases.¹⁴ Hiring preferences can be a strong tool in the renewable energy sector for the sake of increasing employment.

This Note demonstrates that hiring preferences can be implemented in the mining industry and that they are an effective tool in alleviating unemployment on tribal lands. First, the history of the relationship between the federal government and tribes regarding land and mining, along with the legislation surrounding it, is laid out. Next, this Note points out the considerable overlap of Native American lands and where mining operations are conducted, showing why the mining

⁷ E.E.O.C. v. Peabody W. Coal Co., 773 F.3d 977, 982 (9th Cir. 2014).

⁸ *Protecting America's Waters from Irresponsible Mining: Close the Clean Water Act's Mining Waste Loopholes*, NAT'L WILDLIFE FED'N, https://www.nwf.org/~media/PDFs/Wildlife/Mining-Loopholes/Tribal_v4/Tribal_v6.ashx (last visited July 31, 2022); See also Johnnye Lewis et. al., *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENVTL. HEALTH REP. 130, 135 (2017) ("Although reservations encompass only 5.6% of land area in the Western USA, approximately one in five uranium mines are located within 10 km of [a] Native American Reservation.").

⁹ MAURA GROGAN ET AL., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 6 (2011), https://www.resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf.

¹⁰ ARIZONA MINING ASS'N, 2020 ARIZONA MINING ASSOCIATION ECONOMIC IMPACT STUDY (2021), <https://www.azmining.com/wp-content/uploads/2021/09/AMA-2020-Economic-QUICKFACTS.pdf>.

¹¹ GROGAN ET AL., *supra* note 9, at 3.

¹² *Abandoned Mine Drainage*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nps/abandoned-mine-drainage> (last visited Sept. 30, 2021).

¹³ U.S. DEP'T OF ENERGY, SOLAR FUTURES STUDY 6 (2021). The Biden Administration released this report, envisioning the United States producing almost half of its electricity by 2050 from solar energy.

¹⁴ U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2020 (2021). In 2020, coal production in the United States fell to its lowest level since 1965.

industry is particularly ripe for hiring preferences. This section also covers other aspects of mining on tribal lands and the potential economic benefits of hiring preferences. Next, this Note explains the legal authorities, both from cases and statutes, that permit the use of hiring preferences on tribal lands. Lastly, this Note addresses the environmental ramifications that mining has presented on tribal lands, and looking into the future, how hiring preferences could be instrumental in the development of renewable resources as well.

II. History

In analyzing aspects of mineral extraction on or near Native American reservations, it is crucial to understand the long and unsettling history of land disputes between Native American tribes and the federal government. Following the adoption of the United States Constitution, Congress dealt with Native American tribes through treaties and statutes.¹⁵ The prevailing goal of the United States during this treaty-making period was to acquire Native American lands, specifically those surrounded by non-Native American settlements.¹⁶ The federal government often failed to fulfill the terms of treaties and was unsuccessful and sometimes unwilling to prevent states and non-Native Americans from violating the treaties.¹⁷ Territorial expansion became a priority for the federal government,¹⁸ exhibited in a letter from Thomas Jefferson to William Henry Harrison¹⁹ stating:

Our system is to live in perpetual peace with the Indians . . . [but s]hould any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation.²⁰

¹⁵ NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 97 (Robert T. Anderson et. al. eds., 2012) (hereinafter COHEN'S HANDBOOK); Although contact by Europeans with indigenous peoples occurred hundreds of years before the adoption of the United States Constitution, involving issues with land and violent exploitation from the beginning, this Note covers those relations with land between Native American tribes and the U.S. government following the adoption of the U.S. Constitution—considering the initial and eventual powers granted to both Congress and Native American tribes throughout American history.

¹⁶ *Id.*; *Trail of Tears*, History (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears>. The federal government primarily sought Native American lands to acquire resources. For example, when Andrew Jackson signed the Indian Removal Act, it gave the “federal government the power to exchange Native-held land in the cotton kingdom east of the Mississippi for land to the west.”

¹⁷ COHEN'S HANDBOOK, *supra* note 15, at 98.

¹⁸ *Id.* at 110.

¹⁹ Harrison was Governor of the Indiana Territory at this time and would become President for a very brief period in 1841. *William Henry Harrison*, The White House, <https://www.whitehouse.gov/about-the-white-house/presidents/william-henry-harrison/>.

²⁰ COHEN'S HANDBOOK, *supra* note 15, at 110.

Harrison went on to negotiate very low-cost treaties that would relinquish millions of acres of land to the United States in the early years of the nineteenth century.²¹

Eventually, as Native American tribes resisted such cessions of land, the federal government began driving Native Americans west.²² This “removal policy” fully materialized following the election of Andrew Jackson in 1828 with the Indian Removal Act.²³ Passed by a narrow margin, the Indian Removal Act authorized the President to provide lands west of the Mississippi in exchange for Native American lands in the east.²⁴ Though the Indian Removal Act did not authorize forcible removal, bargaining power was unequal and the government advised that refusal to emigrate meant that those tribes would no longer receive federal protection.²⁵ But, following the Treaty of New Echota—which lacked true representation of Cherokee leadership—few Cherokee individuals ceded nearly their entire territory²⁶ to the federal government in exchange for 1,250 square miles (800,000 acres) of western land.²⁷ Thousands of federal troops forcibly removed those Cherokees who refused to leave their homeland—amounting to what became known as the “Trail of Tears.”²⁸

The relationship between Native American tribes and the federal government was founded on the federal trust responsibility, which arose from a series of three Supreme Court decisions spanning from 1823 to 1831.²⁹ These cases together became known as the Marshall Trilogy³⁰ and described tribes as “domestic dependent nations” with an independent source of sovereignty, yet under federal protection.³¹ Chief Justice John Marshall, author of all three opinions, wrote in *Cherokee Nation v. Georgia*:

Meanwhile [the Indians] are in a state of pupilage. Their relations to the United States resemble that of a *ward to his guardian*. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.³²

²¹ *Id.*

²² *Id.* at 113.

²³ *Id.* at 114.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Cherokee*, Britannica, <https://www.britannica.com/topic/Cherokee-people> (last visited July 31, 2022). At one point the Cherokee controlled approximately 40,000 square miles (25,600,000 square acres) of the Appalachian Mountains in parts of present-day Georgia, eastern Tennessee, and the western parts of North Carolina and South Carolina.

²⁷ COHEN’S HANDBOOK, *supra* note 15, at 118.

²⁸ *Id.*; See generally Elizabeth Nix, *At Least 3,000 Native Americans Died on the Trail of Tears*, History (Nov. 30, 2018), <https://www.history.com/news/7-things-you-may-not-know-about-the-trail-of-tears>.

²⁹ GROGAN ET AL., *supra* note 9, at 10.

³⁰ *Id.*; See generally *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

³¹ GROGAN ET AL., *supra* note 9, at 10.

³² *Cherokee Nation*, 30 U.S. at 2 (emphasis added).

With this paternalistic and condescending attitude, the federal government became trustee for Native American lands and believed it was obligated to manage those lands for the welfare of the tribes.³³ Therefore, the federal government assumed duties with respect to mineral development on tribal lands arising out of “leasing or contracting, in the Bureau of Indian Affairs (BIA) administration of activities under approved agreements, and in courts’ resolutions of disputes regarding the lands or minerals of tribes or individual Indians.”³⁴

Later in the nineteenth century, the federal government created the reservation system,³⁵ which concentrated Native Americans on fixed reservations and promoted assimilation into “American life.”³⁶ The primary goal of Native American policy at this time was for the federal government to acquire the maximum amount of tribal land for non-Native American settlement.³⁷ Congress eventually enacted the Allotment Act, which permitted dividing tribal lands into individually-owned parcels on many reservations.³⁸ Because many owners sold or lost the allotted parcels, a “checkerboard” effect took place, where trust land and non-Native American land became intermingled.³⁹ This sort of division makes the planning of mineral extraction very difficult and convoluted for parties involved.⁴⁰

The allotment era concluded with the passage of the Indian Reorganization Act (IRA) in 1934,⁴¹ which sought to end allotment and improve “tribal economic self-sufficiency and increased tribal control over tribal affairs.”⁴² Because tribes lacked the necessary resources to achieve such economic self-sufficiency, they were encouraged by the federal government to adopt governing structures and constitutions like those of other U.S. state and federal institutions.⁴³ The IRA required the consent of tribes to lease their lands (although some tribes, including the Navajo, rejected the IRA).⁴⁴ Lastly, the IRA directed the Secretary of the

³³ *Id.*

³⁴ Lynn H. Shade, *The Federal Trust Responsibility and Tribal-Private Natural Resource Development*, 5 ROCKY MT. MIN. L. INST., 1 (2005), https://www.modrall.com/wp-content/uploads/2016/10/1421_the_federal_trust_responsibility.pdf.

³⁵ COHEN’S HANDBOOK, *supra* note 15, at 128.

³⁶ *Id.* at 129.

³⁷ *Id.* at 165.

³⁸ GROGAN ET AL., *supra* note 9, at 10–11.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ GROGAN ET AL., *supra* note 9, at 11; Catherine Denial, *Reservations, Resistance, and the Indian Reorganization Act, 1900-1940*, DIGIT. PUB. LIBR. OF AM., <https://dp.la/primary-source-sets/reservations-resistance-and-the-indian-reorganization-act-1900-1940> (last visited July 31, 2022) (“[The Navajo] distrusted the Bureau of Indian Affairs because it had ordered them to kill many of their sheep and goats in 1934 in a misguided attempt to stop soil erosion on the reservation. The Navajo were left without livestock on which they depended, especially during the harsh winter of 1934.”). Nonetheless, the Leasing Act of 1938 required non-IRA tribal governments to consent to leasing as well. *See* 25 U.S.C. § 396.

Interior to establish numerous standards for the various positions maintained by the BIA.⁴⁵ The IRA also featured an early sign of preferential hiring for the BIA, where it “granted *preference* to appointment to vacancies in any such positions” to Native Americans.⁴⁶

Coinciding with the IRA, Congress passed the Indian Mineral Leasing Act (IMLA) in 1938.⁴⁷ The IMLA “prohibited state taxation of tribal mineral income, established and standardized a system of rents, royalties and bonuses,” and improved various processes involving the federal government and tribes.⁴⁸ Perhaps most importantly, the IMLA allowed tribes to once again decide whether their lands could be leased for mineral development.⁴⁹ The Act reads:

[U]nallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.⁵⁰

The Supreme Court interpreted Congress’ legislative intent with the IMLA as aiming “to foster tribal self-determination by giving Native Americans a great say in the use and disposition of the resources found on Native American lands.”⁵¹ This brought “uniformity with respect to the leasing of tribal lands . . . and enable[d] the Indians to gain the greatest return from their property.”⁵²

The last piece of transformative legislation brought by Congress in the twentieth century came in 1982 with the Indian Mineral Development Act (IMDA).⁵³ The IMDA undisputedly broadened and strengthened tribal control and expanded tribal participation in mineral development. The IMDA reads:

Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement . . . providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources . . . in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.⁵⁴

⁴⁵ 25 U.S.C. § 5116.

⁴⁶ *Id.* (emphasis added).

⁴⁷ GROGAN ET AL., *supra* note 9, at 13.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 25 U.S.C. § 396a.

⁵¹ *United States v. Navajo Nation*, 537 U.S. 488, 494 (2003) (quoting *BHP Minerals Int’l Inc.*, 139 I.B.L.A. 269, 311 (1997)).

⁵² *Blackfeet Tribe of Indians v. State of Mont.*, 729 F.2d 1192, 1199 (9th Cir. 1984).

⁵³ GROGAN ET AL., *supra* note 9, at 15.

⁵⁴ 25 U.S.C. § 2102(a).

Since the passing of the IMDA, Native American tribes have seen a gradual increase in royalty income from oil and gas as a percentage of sales volume while the royalty income on the same basis for the federal government has *decreased*.⁵⁵ This is because the IMDA allows tribes to lease their resources using agreements that best fit the needs of the tribe and the potential industry partner.⁵⁶ Also, under the IMDA, the Secretary of the Interior must “determine that the proposed agreement is ‘in the best interest of the Indian tribe’” and “consider the potential economic return, the potential ‘environmental, social, and cultural effects’ on the tribe, and the provisions in the agreement for resolving disputes between the parties.”⁵⁷ However, what comes with this greater control over the mining process is the risk of negotiating without adequate information, expertise, or advice.⁵⁸ Nonetheless, the IMDA brought quick and productive results. In just under a decade, tribes had negotiated 67 alternative mineral agreements; nearly half were negotiated leases containing provisions not available under the IMLA of 1938.⁵⁹

These “government-to-government” relationships between tribes and the federal government are established through “federal recognition.”⁶⁰ A Native American group’s legal status establishes its existence as a distinct political society.⁶¹ The power of Congress to establish these relations with Native American tribes is rooted in the United States Constitution’s Commerce Clause which states that Congress has the power “to regulate commerce with foreign nations, and among the several states, and with *Indian tribes*.”⁶² In terms of the aforementioned acts by Congress, recognition is “vital in determining eligibility for programs and services by Congress under its constitutional power to legislate for the benefit of Native American tribes.”⁶³

As of January 2022, the BIA has published a list of 574 tribal entities⁶⁴ and must publish such a list every year in accordance with the Federally Recognized Indian Tribe Act of 1994.⁶⁵ The criteria to be acknowledged as a federally recognized tribe include previous governmental (federal and state) interactions with the tribe, identification of the tribe by anthropologists, historians, and other scholars, and identification as an entity by the petitioner itself.⁶⁶ The several

⁵⁵ U.S. DEP’T OF THE INTERIOR, OIL AND GAS OUTLOOK IN INDIAN COUNTRY 4 (2013), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/DEMD_OG_Oil_Gas_Outlook_508.pdf.

⁵⁶ *Id.* at 1.

⁵⁷ COHEN’S HANDBOOK, *supra* note 15, at 1751.

⁵⁸ *Id.* at 1752.

⁵⁹ *Id.* at 1753.

⁶⁰ *Id.* at 260.

⁶¹ *Id.*

⁶² U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

⁶³ COHEN’S HANDBOOK, *supra* note 15, at 261.

⁶⁴ 87 Fed. Reg. 4636-41 (Jan. 28, 2022).

⁶⁵ 25 U.S.C. § 5131.

⁶⁶ 25 C.F.R. § 83.11(a) (2015); *See also* OFFICE OF FED. ACKNOWLEDGEMENT (OFA), U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa>.

hundred tribes in the contiguous United States possess extensive powers of internal self-government and “operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes.”⁶⁷

Lastly, Congress introduced the Energy Policy Act in 2005.⁶⁸ This included the Indian Tribal Energy Development and Self-Determination Act, which authorized tribes to create Tribal Energy Resource Agreements (TERAs) for their lands.⁶⁹ Unlike IMLA or IMDA agreements, TERAs give tribes the “blanket authority to undertake mineral development on [their] lands, without having to get separate approval for each business arrangement the tribe makes.”⁷⁰ These agreements can consist of projects involving:

- (1) exploration for, extraction of, or other development of the energy mineral resources of the Indian tribes located on tribal land including, but not limited to marketing or distribution; (2) construction or operation of an electric generation, transmission, or distribution facility located on tribal land; and (3) a facility to process or refine energy resources developed on tribal land.⁷¹

Although these agreements liberalize the process for tribes and grant them more independence in contracting, no tribes had requested a TERA through 2018 due to “overly burdensome requirements.”⁷² The primary challenge was interpreting what “inherently federal functions” would continue to be carried out in the process, which tribes found to be ambiguous.⁷³ Therefore, in 2019, then Secretary of the Interior David Bernhardt supported and updated TERA regulations by signing Secretary’s Order 3377, providing “policy guidance on the contractibility of federal functions for oil and gas development on Indian lands.”⁷⁴

⁶⁷ G.A. Res. 61/295 U.N. Doc. A/RES/47/1 at 5, 16 (Sept. 13, 2007) (whether the United States government “recognizes” tribes and their choices regarding land and natural resources, the United Nations, in its Declaration on the Rights of Indigenous Peoples, acknowledges “the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development” and says that “[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopted and implementing legislative or administrative measures that may affect them.”).

⁶⁸ 42 U.S.C. § 13201 *et seq.*

⁶⁹ *Id.* § 15801 *et seq.*

⁷⁰ GROGAN ET AL., *supra* note 9, at 15.

⁷¹ *Id.* at 15-16.

⁷² *Assistant Secretary Sweeney Clears the Path for Tribes to Develop Energy Resources on Tribal Land*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS (Dec. 23, 2019), <https://www.bia.gov/as-ia/opa/online-press-release/assistant-secretary-sweeney-clears-path-tribes-develop-energy>; *DOI Identifies Burdens to Energy Development on US Tribal Land*, LATHAM & WATKINS LLP: ENVIRONMENT, LAND, AND RESOURCES (Dec. 20, 2017), <https://www.globalelr.com/2017/12/doi-identifies-burdens-to-energy-development-on-us-tribal-land/>.

⁷³ *Id.*

⁷⁴ U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, *supra* note 72; Secretary’s Order, *Contractability of Federal Functions For Oil and Gas Development On Indian Lands*, SOI Order

III. Mining on Tribal Lands

There is a vast history of mining on tribal lands. It is not a coincidence that a considerable amount of resource development takes place on tribal lands; natural resources are abundant in many parts of Indian country. Although there are several benefits to tribes by extracting resources on these lands, primarily economic, tribes have internal disagreements or overall dispositions about whether certain or any resources should be extracted on these lands.

A. History of Mining on Tribal Lands

A powerful incentive for exploration and settlement of large populations across the American West was the mining of hard-rock minerals.⁷⁵ The economic foundation for many of these communities was based on mineral development.⁷⁶ More than a century of hard rock mining has piled up around 160,000 abandoned mines in the American West alone.⁷⁷

Beginning in 1891, Congress passed numerous federal laws that allowed mining companies to lease minerals on tribal lands without consent.⁷⁸ When mineral resources were identified on such lands, the federal government quickly ignored ethical and legal responsibilities addressed in treaties and further reduced previously allotted reservation lands to create areas for mining operations.⁷⁹ Many congressional debates demonstrate that reservations with vast reserves of minerals would never have been approved if representatives knew those reserves existed beforehand.⁸⁰ Even where legislation existed to provide a portion of the net value of resources extracted to the tribes, those laws were abused by both companies and the federal government for years—eventually resulting in settlements reached between 2009 and 2016 involving the United States Attorney General and Secretary of the Interior.⁸¹ These settlements were made with more than 100 tribes and totaled 3.3 billion dollars for “mismanagement of monetary and natural resource assets held in trust by the [United States] for the benefit of the tribes.”⁸²

No. 3377, https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3377-508-compliant-1_0.pdf.

⁷⁵ KIM BENNETT, ABANDONED MINES — ENVIRONMENTAL, SOCIAL, AND ECONOMIC CHALLENGES 241 (A.B. Fourie & M. Tibbett eds., 2016), https://papers.acg.uwa.edu.au/p/1608_16_Bennett/.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ NAT'L WILDLIFE FED'N, *supra* note 8.

⁷⁹ LEWIS ET AL., *supra* note 8, at 135.

⁸⁰ *Id.* at 131, 134. For example, the 1868 Fort Laramie Treaty between the federal government and the Sioux Nation guaranteed that the Sioux people would have “undisturbed use and occupation” of the Black Hills. When gold was discovered on this sacred land, though, the rights under that treaty were abandoned and signed away by fewer than 10% of the adult male population of the Tribe to allow for mining.

⁸¹ *Id.* at 131.

⁸² *Id.* Settlements of this kind, from a financial standpoint, continue to only remediate slim portions of the destruction done to mines and the areas around them. For example, a recent one billion dollar settlement from a private company, Tronox, was awarded to the Navajo Nation—but

B. Convergence of Native American Lands and Resources

Many mines are on or near Native American reservations that are abandoned or are currently being mined.⁸³ It was estimated in 2017 that more than 600,000 Native Americans lived within 10 kilometers of an abandoned mine.⁸⁴ Nonrenewable resources are embedded in and surround Indian country. Based on several reports, Native American lands contain around 30 percent of the coal found in the western United States and up to 50 percent of the potential uranium reserves.⁸⁵ And, “[a]lthough Indian reservations encompass only 5.6% of land area in the Western [United States], approximately one in five uranium mines are located within 10 km [or 6.2 miles] of a [N]ative American [r]eservation with more than 75% within 80 km [or 49.7 miles].”⁸⁶ For reference, the closest active mine to Phoenix, Arizona, of few, is about 104 kilometers or 65 miles away in Superior.⁸⁷ Figure 1 below displays the large amount of overlap between Native American reservations and abandoned mines:

addresses a mere 10 percent of the 3.6 billion kilograms of uranium mine waste on Navajo lands alone.

⁸³ *Id.*

⁸⁴ *Id.* In 2017, more than 4.1 million Indians lived in the Western United States; 478,000 of them on reservations.

⁸⁵ GROGAN ET AL., *supra* note 9, at 7.

⁸⁶ LEWIS ET AL., *supra* note 8, at 135.

⁸⁷ *Active Mines in Arizona*, Ariz. Geological Survey, <https://uagis.maps.arcgis.com/apps/webappviewer/index.html?id=9eceb192cd86497e8eed04113302db8b>.

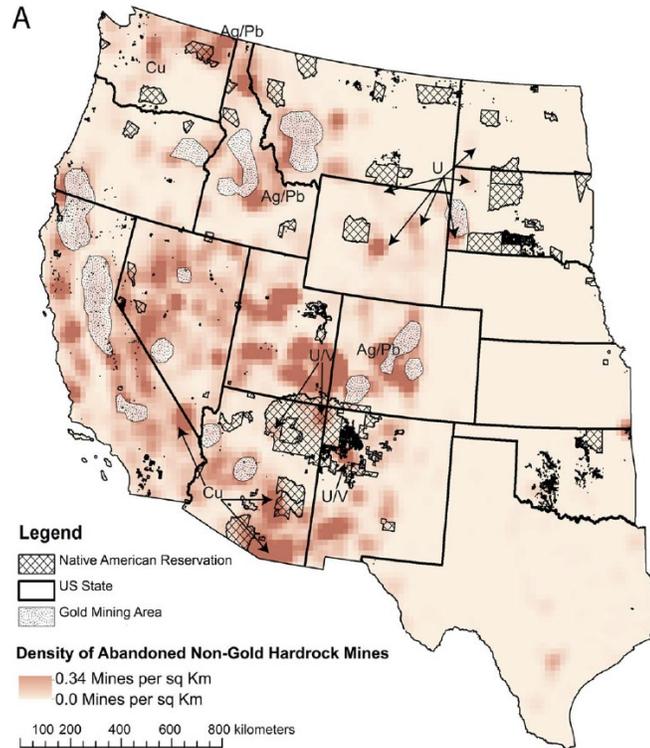


Figure 1. This figure displays the amount of overlap between Native American reservations and abandoned mines.⁸⁸

C. Economic Benefits

These vast amounts of mineral reserves can significantly stimulate tribal economies. Within Arizona, mining continues to be pervasive and undoubtedly required for the lives we live.⁸⁹ In 2020, the Arizona mining industry had a total economic impact of 15.4 billion dollars and provided 13,759 direct jobs.⁹⁰ It also supported 47,657 overall jobs, brought in a total income of two billion dollars to Arizona workers, and amounted to 6.9 billion dollars in total output/sales.⁹¹ Mines across the American West are themselves often near or on Native American reservations; this holds true especially in the state of Arizona (see Figure 2 below).

⁸⁸ LEWIS ET AL., *supra* note 8, at 132. This figure displays the density of hard rock mines in the Western United States.

⁸⁹ *Why We Need Mining*, INT'L COUNCIL ON MINING & METALS, <https://www.icmm.com/en-gb/mining-metals/about-mining/why-we-need-mining>.

⁹⁰ ARIZONA MINING ASS'N, *supra* note 10.

⁹¹ *Id.*

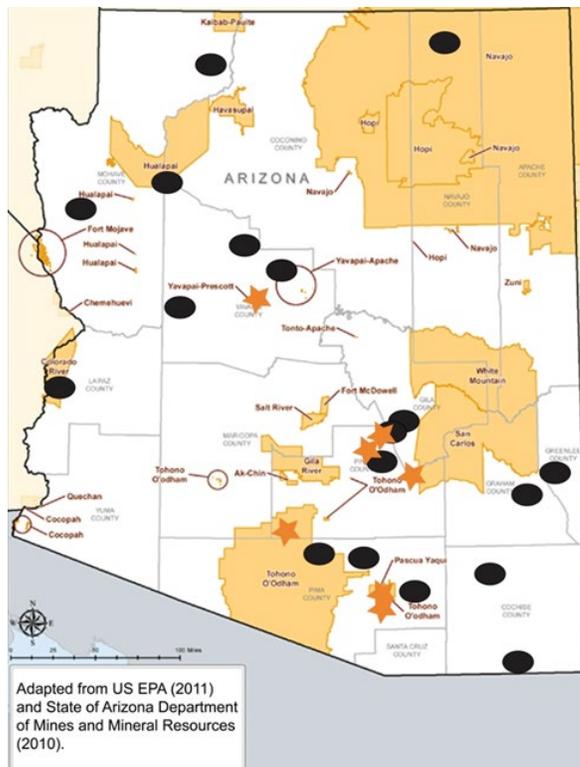


Figure 2. This figure demonstrates the proximity of *copper* mines (black) to Native American reservations (golden yellow).⁹²

Because of how widespread mining is in Arizona, “accessible energy resources can be a lifeline to prosperity and opportunity” for tribes.⁹³ For example, “coal revenues accounted for 88 percent of the Hopi Tribe’s budget for 2009.”⁹⁴ That same year, Arizona and Hopi unemployment rates were at 8.5 percent and more than 50 percent, respectively. Mining companies and tribes could remedy this disparity by implementing hiring preferences.⁹⁵

D. Internal Conflicts and Considerations

Although the abundance of resources and possible extraction in Indian country seems attractive from a financial standpoint, tribes face challenges in deciding how and whether to use these resources. Aside from concerns of environmental damage,

⁹² *Copper Mining in AZ and Tribal Lands*, THE UNIV. OF ARIZ. SUPERFUND RSCH. CTR., <https://superfund.arizona.edu/resources/modules/copper-mining-and-processing/copper-mining-az-and-tribal-lands>.

⁹³ GROGAN ET AL., *supra* note 9, at 6.

⁹⁴ *Id.*; See also Morgan Craft, *Potential Closure of Kayenta Mine a Revenue Crisis for Hopi*, NAVAJO-HOPI OBSERVER (Mar. 27, 2018, 10:39 AM), <https://www.nhnews.com/news/2018/mar/27/potential-closure-kayenta-mine-revenue-crisis-hopi/>. “The [Kayenta] mine and power station provide hundreds of well-paying jobs for members of the Hopi and Navajo nations and mining royalties account for nearly 75 percent of the Hopi Tribe’s budget.”

⁹⁵ GROGAN ET AL., *supra* note 9, at 6.

social, physical, and cultural effects can play a large role in the decision-making process.⁹⁶ For example, in the 1970s, the Northern Cheyenne had concerns about “the difficulties that large-scale development and all its associated effects might pose for the cross-generational transfer of Cheyenne *values and culture*.”⁹⁷

Many mines exist in areas that, although not directly on a Native American reservation, are near and hold sacred value to one or more tribes.⁹⁸ For example, Oak Flat is a site sacred to the Apache and other tribes in Arizona that faces possible decimation from copper mining.⁹⁹ From the surface, such copper mining has obvious financial incentives, but the Apache Stronghold¹⁰⁰ opposes any sort of project, arguing it would obliterate Apache religious heritage by desecrating one of the peoples’ holiest sites.¹⁰¹ Similarly, a proposed lithium mine in Northern Nevada threatens a culturally significant area from religious and historical standpoints¹⁰²—including possible human remains of Paiute ancestors tying back to an 1865 massacre committed by United States Cavalry.¹⁰³

Mining across the American West and in particular, Indian country, has been pervasive and lucrative but concerns of economic reliance, environmental damage, and loss of sacred sites are crucial factors in deciding whether to mine on such lands. When tribes decide to develop lands for minerals, tribes should be encouraged to incorporate hiring preferences to further boost tribal employment and economies.

⁹⁶ *Id.* at 43.

⁹⁷ *Id.* (emphasis added). These leases promised hundreds of jobs and more than \$1 billion in potential profits over 20 years.

⁹⁸ *Id.* at 7. These public areas were carved out of tribal territories, but tribes continue to access their sacred sites and exercise their traditional stewardship duties. E-mail from Rebecca Tsosie, Regents Prof. & Morris K. Udall Prof. of L., Univ. of Ariz. James E. Rogers Coll. of L., to author. (Apr. 2, 2022, 20:29 MST) (on file with author).

⁹⁹ Debra Utacia Krol, *Oak Flat: A Place of Prayer Faces Obliteration by a Copper Mine*, AZCENTRAL (Aug. 20, 2021, 7:30 AM), <https://www.azcentral.com/in-depth/news/local/arizona/2021/08/19/south-mountain-freeway-cultural-sites-ruins/7903863002/>.

¹⁰⁰ *About Us*, APACHE-STRONGHOLD, <http://apache-stronghold.com/about-us.html>. The Apache Stronghold is a community organization (NGO) who defends Holy sites; The San Carlos and White Mountain Apache Tribes oppose the mine. See Dana Hedgpeth, *This Land is Sacred to the Apache, and They Are Fighting to Save It* (Apr. 12, 2021), WASH. POST, <https://www.washingtonpost.com/history/2021/04/12/oak-flat-apache-sacred-land/>.

¹⁰¹ Krol, *supra* note 99.

¹⁰² Kristen Hackbarth, *Tribes File New Federal Lawsuit in Thacker Pass Dispute* (Dec. 3, 2021), THIS IS RENO, <https://thisisreno.com/2021/12/tribes-file-new-federal-lawsuit-in-thacker-pass-dispute/>.

¹⁰³ Jeri Chadwell, *Permit Issues for Archeological Survey at Proposed Lithium Mine Site*, THIS IS RENO (Oct. 1, 2021), <https://thisisreno.com/2021/10/permit-issued-for-archaeological-survey-at-proposed-lithium-mine-site/>. At the time of writing this Note, the site had yet to be investigated by an archeological team to confirm the remains.

IV. Hiring Preferences

In the context of Native American employment, hiring preferences require employers to give preference to members of a certain tribe on any given project.¹⁰⁴ While this tool could be used across numerous industries prevalent in Indian country, mining is particularly appropriate for its use because, as highlighted above, the potential economic gains available on Native American lands are boundless.

A. Native American Unemployment

On some Native American reservations in the United States, unemployment has ranged from 20 to 80 percent.¹⁰⁵ To help improve this number, governments can play a “crucial role in . . . managing the legal systems that help enforce contracts and property rights. Governments can also regulate [by] creating and enforcing rules that ensure a fair, stable economic system, which in turn, can attract investors.”¹⁰⁶ The Civil Rights Act of 1964, along with other statutes and regulatory acts, provide the government flexibility in using hiring preferences to ensure this fair and stable economic system. This “keeps ‘Indian money’ in the Indian community and helps to grow tribal economies.”¹⁰⁷

According to a study in the early 2000s, American Indian and Alaska Native (AIAN) households have eight cents for every dollar of wealth that the average white American household has.¹⁰⁸ Some say that the income gap could be partly tied to the fact that many Native Americans live outside of metropolitan areas and have fewer jobs available to them.¹⁰⁹ Because hiring preferences take place “on or near” a reservation, the jobs remain local and partially alleviate the difficulty with proximity and access to jobs.

Each time hiring preferences are implemented on behalf of the federal government, contractors, or tribes, unemployment inevitably decreases if those occupations are not already filled by members of that tribe. Hiring preferences are not so much as a quick strategy or mere wave of a boosted economy—they are a long-term and readily available tool that can be used at an institution’s disposal.

¹⁰⁴ See 15 N.N.C. § 604(A)(1).

¹⁰⁵ Robert J. Miller, *Establishing Economies on Indian Reservations*, REGULATORY REV. (Apr. 8, 2021), <https://www.theregreview.org/2021/04/08/miller-establishing-economies-indian-reservations/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Native American Households Make 8 Cents for Every Dollar a White Household Has* (Apr. 5, 2021), NATIONAL INDIAN COUNCIL ON AGING, INC., <https://www.nicoa.org/native-households-make-8-cents-for-every-dollar-a-white-household-has/>.

¹⁰⁹ Charisse Jones, *Why Political Clout, Financial Stability Could be on the Horizon for Native American Community* (Nov. 2, 2021), USA TODAY, <https://www.usatoday.com/story/money/2021/11/02/native-americans-could-see-political-clout-financial-boom-horizon/6237552001/>.

B. Constitutional Interpretations and Congressional Acts

Congress made it unlawful through the Civil Rights Act of 1964 to refuse to hire any individual because of one's race, color, religion, sex, or national origin.¹¹⁰ Further, an employer cannot "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities" based on these identifications.¹¹¹ Federal preferences for tribal members in employment are considered "political" classifications and are not "racial," and therefore do not violate the Constitution or civil rights law.¹¹² Also, the Act has sections that are deliberately exempt from its coverage, like preferential employment of Native Americans.¹¹³ When this exemption was challenged in *Morton v. Mancari* for employment within the BIA, the Court stated that:

Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.¹¹⁴

Following the Civil Rights Act of 1964, Congress reiterated and encouraged the practice of hiring preferences again in the Indian Self-Determination and Education Assistance Act (ISDEA).¹¹⁵ While the ISDEA primarily focused on the educational needs and requirements for Native American tribes to prosper and have an increased role in decision-making processes, it touched on employment as well. The ISDEA reads:

Preference requirements for wages and grants: Any contract, subcontract, grant, or subgrant pursuant to this chapter, the [Johnson-O'Malley Act], as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible: (1) *preference* and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and (2) *preference* in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.¹¹⁶

¹¹⁰ 42 U.S.C. § 2000e-2(a).

¹¹¹ *Id.*

¹¹² *Peabody*, 773 F.3d at 982.

¹¹³ 42 U.S.C. § 2000e-2(i); *Peabody*, 773 F.3d at 989 ("Congress was plainly aware that Title VII could have ramifications for Indian communities, and it saw clearly the need to mitigate those possible effects. For that reason, Congress excluded tribal employers from Title VII's scope and exempted general Indian hiring preferences.").

¹¹⁴ *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

¹¹⁵ 25 U.S.C. § 5301 *et seq.*

¹¹⁶ *Id.* §5307(b) (emphasis added).

Importantly, the ISDEA took further steps in encouraging economic growth and employment on reservations. While the Civil Rights Act of 1964 laid the foundation for the legal authority of hiring preferences to be implemented, ISDEA elaborates on specific ways that the preferences could be useful, like in the “training” in preparation for such contracts.¹¹⁷ While not all contracts will be granted to “Indian organizations [and] Indian-owned economic enterprises” every time a project is conducted, like in mining, at least contractors could implement such preferences.¹¹⁸

In the 2014 case of *E.E.O.C. v. Peabody Western Coal Company*, the Ninth Circuit interpreted the issue similar to the Court in *Morton*. Peabody extracted coal at numerous mines leased from the Hopi and Navajo reservations in northeastern Arizona.¹¹⁹ These leases required Peabody to give preference in employment to “Navajo Indians,” whereas the individuals that filed discrimination charges with the Equal Employment Opportunity Commission (EEOC) were members of the Hopi Tribes and the Otoe Tribe.¹²⁰ According to the court, both leases received approval from the DOI under the IMLA¹²¹ and “[s]ince at least as early as the 1940s, Interior-approved mineral leases, including the two at issue here, have routinely included tribal hiring preferences.”¹²² The EEOC claimed that Title VII prohibited the tribal hiring preference contained in the Peabody leases.¹²³

The leases included language giving preference to tribal members. For example, one lease stated that Peabody “agree[d] to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.”¹²⁴ Also, a lease provided that Peabody “shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with its operations under this lease.”¹²⁵

The court cited *Morton*, saying that “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”¹²⁶ Here, the private company

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 979 (9th Cir. 2014).

¹²⁰ *Id.*

¹²¹ *United States v. Navajo Nation*, 537 U.S. 488, 509 (2003). Through IMLA, Congress delegated broad discretion to the Secretary of the Interior to approve mineral leases. *See* page 304.

¹²² *Peabody*, 773 F.3d at 979.

¹²³ *Id.* at 980.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 987; *Morton v. Mancari*, 417 U.S. 535, 555, 587 (1974). (internal quotations omitted). *Morton* also provides that the political classification applies for a general Native American hiring preference rather than a tribe-specific preference, but *Peabody*, among other cases, conclude that tribe-specific preferences are permissible. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (“Congress certainly has the authority to single out ‘a constituency of tribal Indians’ in legislation ‘dealing with Indian tribes and reservations.’”).

found the hiring preferences useful in providing economic benefits that flow from the “most important resource” on the reservation to be accrued by the tribe and its members.¹²⁷ The court noted that hiring preferences were simply a “measure” to preserve the “fruits of the resources found on the tribe’s own land” and help fulfill the government’s trust obligations to the tribe(s).¹²⁸

Finally, the court held that “Title VII is a general antidiscrimination statute.”¹²⁹ Both the text and the legislative history show that Congress anticipated possible effects of Title VII on federal Indian policy and crafted provisions specifically designed to preserve the status quo.¹³⁰ According to the court, tribal hiring preferences are intended to further the goals embodied in the IRA and the IMLA—assuring “American Indians [the] continued right to protect and promote their own interest and to benefit from Indian preference programs now in operation or later to be instituted.”¹³¹

C. Implementation of Hiring Preferences

Hiring preferences could be implemented on behalf of the federal government, state governments, and private companies and contractors. On the federal side, the BIA has an Indian Preference policy, which is referenced in *Morton*.¹³² The BIA is authorized to “offer preferential treatment to qualified candidates of [AIAN] heritage seeking employment with them.”¹³³

Contractors and subcontractors have their own obligations and are regulated on how they hire too, although an exception for “[w]ork on or near Indian reservations” exists:

It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word “near” would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.¹³⁴

¹²⁷ *Peabody*, 773 F.3d at 988.

¹²⁸ *Id.*

¹²⁹ *Id.* at 989.

¹³⁰ *Id.*

¹³¹ *Id.* at 989–90.

¹³² *Indian Preference*, U.S. Dep’t of the Interior, https://www.bia.gov/jobs/Indian_Preference (last visited Nov. 13, 2021).

¹³³ *Id.*

¹³⁴ 41 C.F.R. § 60-1.5(a)(7).

Although voluntary, this regulation extends the opportunity for companies to give hiring preference to Native Americans living on or near a Native American reservation. For companies who seek to bring equity to various industries, this is a viable and legal option to do so.

Most importantly, Native American governments themselves have enacted legislation for such hiring preferences. The Navajo Nation, which has over 173,000 members¹³⁵ living on the reservation located in the American Southwest,¹³⁶ has its own employment preference called “The Navajo Preference in Employment Act.”¹³⁷ This lengthy provision in the Navajo Code details how such preferences shall be implemented:

(A) All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall: (1) Give preference in employment to Navajos . . . for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions; (B) Specific requirements for Navajo preference: (1) All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act. . . . (9) All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.¹³⁸

Although the Navajo Nation is especially sophisticated when it comes to such bodies of legislation and governmental actions,¹³⁹ this Note encourages other federally recognized tribes to look at this legislation as a model to help solidify the importance and presence of hiring preferences today.¹⁴⁰

¹³⁵ Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/navajo-chokeo-population.html>. These 173,000 members are part of the larger population of Navajos across the country who are enrolled as tribal members, which consists of nearly 400,000 people.

¹³⁶ *The Navajo Nation Quick Facts*, THE UNIV. OF ARIZ. COLL. OF AGRICULTURE & LIFE SCI., <https://extension.arizona.edu/sites/extension.arizona.edu/files/pubs/az1471.pdf>.

¹³⁷ 15 N.N.C. § 604. <https://www.onlr.navajo-nsn.gov/Portals/0/Files/NPEA%20Booklet%2002.03.2022.pdf?ver=IcJsPolq3UpE7c67R6ik0w%3d%3d>.

¹³⁸ *Id.*; Howard L. Brown & Raymond D. Austin, *The Twenty-Fifth Anniversary of the Navajo Preference in Employment Act: A Quarter-Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws*, 40 N.M. L. REV. 17, 53-54 (2010). This legislation is enforced by the Office of Navajo Labor Relations (ONLR), which is an “administrative agency established by the Navajo Nation Council to implement Navajo Nation labor policies, and monitor and enforce the [Navajo Preference in Employment Act (NPEA)]. Any person may file a charge alleging a violation of his or her rights under the NPEA. Additionally, the ONLR may, on its own initiative, file a charge claiming a violation of rights held by an individual or a class of persons.

¹³⁹ Romero, *supra* note 135. “The Navajo Nation already ha[s] its own police academy, universities, bar association and court system, plus a new Washington office near the embassies of other sovereign nations.”

¹⁴⁰ Brown & Austin, *supra* note 138, at 74. “The Navajo preference system should be heralded to the extent that it has met the NPEA’s purposes of providing employment opportunities for

The federal government, contractors, and tribes all have the right to implement hiring preferences in accordance with a Title VII exemption from the Civil Rights Act of 1964. Because unemployment has stricken tribes for decades, hiring preferences may resolve that systemic issue.¹⁴¹

V. Environmental Impacts and Moving Forward

Many mining operations and natural resource extraction projects have brought ruin to Native American communities. This has been introduced in the forms of environmental contamination and overall health—which happen to be intrinsic to one another. Because of this pattern, many tribal nations have brought suit against the companies that have conducted past, ongoing, and potential mining operations. Although new science and technology is bringing about safer and more reasonable procedures to mine, it is vital to look at how renewable energy projects, too, will play a role in the future economies of tribes, especially when hiring preferences are implemented.

A. Environmental Contamination

Mining across the American West has resulted in chronic exposures to toxic metal mixtures in Native American communities.¹⁴² In addition to the mines themselves, exposure could come from sources such as waste piles, mill tailings piles, and areas affected by spills, accumulating to more than 500,000 contamination sources.¹⁴³ Unfortunately, these aforementioned sites are often “unmarked, unfenced, and located only through historical memory of mining records.”¹⁴⁴ For example, the United States Department of Energy found soil, surface water, and shallow groundwater on the Wind River reservation in Wyoming contaminated with uranium, radium, and thorium.¹⁴⁵ “Concentrations are strongly associated with distance from abandoned mines. Moreover, when regulated public water is available, drinking water systems in Indian [c]ountry experience

Navajos, promoting economic development on the Navajo Nation, and fostering economic self-sufficiency of Navajo families.”

¹⁴¹ *Id.* Brown & Austin point out that although high unemployment persists, even long after NPEA’s enactment, “[o]ne way to attract businesses to a locale is to fashion a business environment in which employers have a sense of certainty about the forum’s employment laws and the assurance that they will not be overwhelmed by employment-related litigation.”

¹⁴² LEWIS ET AL., *supra* note 8, at 130. “[M]any of the Native communities in proximity to these waste sites have numerous risk factors associated with disparities in health outcomes such as poverty, educational status, infrastructure, and frequently, compromised underlying health status. Further complications to predicting toxicological responses arise from the traditional and subsistence lifestyles of many Native communities that create distinct exposure patterns not captured in the assumptions of standard suburban, recreational, or occupational exposure scenarios used for risk assessments.”

¹⁴³ *Id.* at 131.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 133.

'significant violation' of health-based violations of Safe Drinking Water Act regulations twice as frequently as other systems."¹⁴⁶

The most catastrophic incident on Native American lands regarding contamination was the Church Rock uranium spill in 1979 in New Mexico.¹⁴⁷ Waste from the site was disposed into lagoons fortified by a man-made dam;¹⁴⁸ the dam eventually breached and over 1,000 tons of uranium waste and 94 million gallons of radioactive water went into the Puerco River, which Navajos relied on as a watering source for livestock.¹⁴⁹ This is just one example of how harmful and deadly uranium mines have been—which are often in close proximity to Native American reservations.¹⁵⁰ Recent findings suggest that Native Americans living near abandoned uranium mines also have an “increased likelihood for kidney disease and hypertension.”¹⁵¹

B. Current Legal Matters and Economic Trends

Tribal communities have taken legal action for a multitude of reasons.¹⁵² For example, pressure to open new uranium mines in the Navajo Nation led to the passing of the Natural Resources Protection Act of 2005, banning uranium mining and processing on the land.¹⁵³ In 2005, the Navajo Nation Council stated:

The purpose of the [Act] is to ensure that no further damage to the culture, society, and economy of the Navajo Nation occurs because of uranium mining within the Navajo Indian Country and that no further damage to the culture, society and economy of the Navajo Nation occurs because of uranium processing until all adverse economic, environmental and human health effects from past uranium mining and processing have been eliminated or substantially reduced [to the] satisfaction of the Navajo Nation Council.¹⁵⁴

Among protests, litigation has sparked in Nevada as well. Tribal communities filed an amended federal lawsuit in December 2021 against the Bureau of Land

¹⁴⁶ *Id.*

¹⁴⁷ *The Church Rock Uranium Mill Spill*, ENV. & SOC'Y, <https://www.environmentandsociety.org/tools/keywords/church-rock-uranium-mill-spill>; *See also* Ranjani Chakraborty & Melissa Hirsch, *The Biggest Radioactive Spill in US History Never Ended*, VOX (Oct. 13, 2020, 1:40 PM), <https://www.vox.com/21514587/navajo-nation-new-mexico-radioactive-uranium-spill>.

¹⁴⁸ *The Church Rock Uranium Mill Spill*, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ LEWIS ET AL., *supra* note 8, at 134.

¹⁵¹ *Id.* at 135 (“As late as 1991-2005, 25 percent of deaths in the 4137 former uranium miners followed by [U.S. Public Health Service] were attributed to lung cancer, with Native miners at triple the expected rate.”).

¹⁵² *See* South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009) (tribes sought an emergency injunction regarding the approval of a gold mining project located in a sacred site).

¹⁵³ 18 N.N.C. § 1303.

¹⁵⁴ Resolution of the Navajo Nation Council (2005), CAP-18-05., <https://www.nrc.gov/docs/ML0723/ML072340482.pdf>.

Management (BLM) in a dispute related to a potential lithium mine.¹⁵⁵ The proposed mine is located at Thacker Pass and supposedly possesses the United States' largest deposit of lithium.¹⁵⁶ Tribal members argue that BLM failed to consult with them regarding their connection to the area, which is to be culturally significant from religious and historical perspectives.¹⁵⁷

The Chair of the Nevada Indian Commission (NIC)¹⁵⁸ directed attention to portions of the opening brief in the matter before the Ninth Circuit, mentioning:

BLM . . . accelerated the public comment period during the height of the COVID-19 pandemic and restrictions. The COVID-19 outbreak limited community meetings and other opportunities for public input on the Project. The Tribes never received information from BLM about the Project or were afforded an opportunity to engage in government-to-government consultation about the Project, including any impacts to cultural resource sites or proposed mitigation measures to address impacts to cultural resources, including the development of the Historic Properties Treatment Plan.¹⁵⁹

In addition to such legal challenges hindering future mining projects, there are also downward economic trends for extracting various minerals. For example, across the United States the production and use of coal is drastically falling.¹⁶⁰ In 2020, coal production fell to its lowest level since 1965.¹⁶¹ Along with a decrease in the need for and production of various minerals, economic trends demonstrate that without renewable energy projects, among other industries to rely on, tribes face dire economic impacts once nonrenewable resources deplete.¹⁶² Not only are jobs lost but those revenues may be a huge source of income for tribal

¹⁵⁵ Hackbarth, *supra* note 102.

¹⁵⁶ *Thacker Pass*, Lithium Americas, <https://www.lithiumamericas.com/thacker-pass/>.

¹⁵⁷ Hackbarth, *supra* note 102.

¹⁵⁸ Pursuant to NRS § 233A.090, the purpose of the Nevada Indian Commission is to “study matters affecting the social and economic welfare and well-being of American Indians residing in Nevada, including, but not limited to, matters and problems relating to Indian affairs and to federal and state control, responsibility, policy and operations affecting such Indians. The Commission shall recommend necessary or appropriate action, policy and legislation or revision of legislation and administrative agency regulations pertaining to such Indians. The Commission shall make and report from time to time its findings and recommendations to the Legislature, to the Governor and to the public and shall so report at least biennially.”; “The [Thacker Pass] Project falls under the purview of the Commission because it affects several federally recognized tribes and their members in the State of Nevada.” E-mail from Stacey Montooth, Exec. Dir., Nev. Indian Comm’n, to author (Feb. 17, 2022, 19:34 MST) (on file with author).

¹⁵⁹ E-mail from Stacey Montooth, Exec. Dir., Nev. Indian Comm’n, to author (Feb. 17, 2022, 19:34 MST) (on file with author); *But see Lithium Americas Expects Court Ruling on Nevada Lithium Mine by Autumn*, REUTERS (Feb. 25, 2022, 11:29 AM), <https://www.reuters.com/legal/transactional/lithium-americas-expects-court-ruling-nevada-lithium-mine-by-autumn-2022-02-25/>; *See also* Julia Kane, *A Controversial Lithium Mine in Nevada is One Step Closer to Operation*, GRIST (Mar. 2, 2022), <https://grist.org/equity/nevada-issues-permits-for-lithium-mine/>.

¹⁶⁰ U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2020 (2021).

¹⁶¹ *Id.*

¹⁶² GROGAN ET AL., *supra* note 9, at 44.

governments.¹⁶³ The Southern Ute Tribe, for example, is actively avoiding such results by regularly investing in a diverse portfolio of gaming enterprises, real estate, and alternative energy development.¹⁶⁴

These circumstances do not only affect places throughout Indian country. So-called “boomtowns” emerged all across the American West, accompanied by massive population influxes and economic development.¹⁶⁵ Following these economic shocks, there is potential for economic “busts,”¹⁶⁶ which result in “ghost towns”—mining outposts defined by economic blight following a surge of intense and rapid growth.¹⁶⁷ For these reasons alone, it is important to look to the future of renewable energy, including solar and wind power, among others, for Native American populations to thrive and get the best use of hiring preferences—for the long run.¹⁶⁸

C. Renewable Energy and Implementing Hiring Preferences

Many Native American lands are positioned in ideal locations to develop renewable resources.¹⁶⁹ A “substantial number of tribes throughout the country are exploring projects in wind, solar, biomass geothermal and hydropower, often with grant funding from the Department of Energy’s Tribal Energy Program.”¹⁷⁰ When matched with the future of renewable energy, driven currently by the Biden Administration¹⁷¹ and the determination on behalf of tribes to become involved and invested in renewable energy,¹⁷² hiring preferences can play a major role in

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Characteristics of a Boomtown*, THE OHIO STATE UNIV., <https://ohioline.osu.edu/factsheet/cdfs-sed-2>.

¹⁶⁶ *Contributing Factors to a Boomtown Bust*, THE OHIO STATE UNIV., <https://ohioline.osu.edu/factsheet/cdfs-sed-3>.

¹⁶⁷ See Matt Hickman, *11 Abandoned Old West Boom Towns*, TREEHUGGER (Feb. 5, 2021), <https://www.treehugger.com/abandoned-old-west-boom-towns-4864122>; Examples in Arizona include Bisbee, Jerome, and Globe; an example in Nevada is Virginia City; and an example in California is Bodie.

¹⁶⁸ See Noam Scheiber, *Building Solar Farms May Not Build the Middle Class* (July 16, 2021), N.Y. TIMES, <https://www.nytimes.com/2021/07/16/business/economy/green-energy-jobs-economy.html> (some criticisms exist in the potential for quality jobs in the renewable energy sector) (“[President] Biden’s plan, which would go further in displacing well-paid workers in fossil-fuel-related industries,” could consist of “grueling work schedules, few unions, middling wages and limited benefits.”).

¹⁶⁹ GROGAN ET AL., *supra* note 9, at 7.

¹⁷⁰ *Id.*

¹⁷¹ Oliver Milman, *Biden’s Clean Energy Plan Would Cut Emissions and Save 317,000 Lives*, THE GUARDIAN (July 12, 2021), <https://www.theguardian.com/us-news/2021/jul/11/biden-administration-clean-energy-climate-crisis>. “Joe Biden has said he wants all electricity to be renewable by 2035” and “[a] clean energy standard would require utilities to ratchet up the amount of clean energy, such as solar and wind, they use, through a system of incentives and penalties.”

¹⁷² Valerie Panne, *Hopi Tribes Looks to a Solar-Powered Future*, NATIVE NEWS ONLINE (Feb. 7, 2022), <https://nativenewsonline.net/environment/hopi-tribe-looks-to-a-solar-powered-future>. When looking to the Hopi Tribe’s future in solar, Carroll Onsaie, president and general manager for

boosting Native American economies across the country. It so happens that mineral reserves are not the only valuable resources surrounding Native American lands. For example, tribes across Arizona have access to the sunniest region of the entire country¹⁷³—optimal for generating solar energy from panels. Also, regarding wind power:

Sufficient wind resources are available on a majority of reservations for many local residential and commercial uses, and many have Class 4 (good) to Class 6 (outstanding) wind power levels that could easily support large utility-scale development. In the northern Great Plains, perhaps the richest wind regime in the world, the tribal wind power potential exceeds 300 gigawatts across six states. This is equivalent to about half of the total installed electrical generating capacity in the United States.¹⁷⁴

Lastly, electricity generated from hydropower on tribal lands has the capability of reaching 2.9 percent of the total United States technical potential.¹⁷⁵ Although Native American lands comprise approximately two percent of United States land, they contain five percent of all renewable energy sources.¹⁷⁶ With that being said, the future is bright for Native American economies in building a sustainable future.¹⁷⁷ With developing this sort of infrastructure and technology comes a major need for employment.¹⁷⁸ Using the technique of implementing hiring preferences

the Hopi Utilities Corporation, stated “We’re . . . looking at workforce development. That’s to train Hopi’s either to manage or operate the solar-power and the data-center systems. If there’s some spillover from this project to other, small economic development projects, that would provide jobs for people on the reservation. It expands to the education of our young Hopi individuals, because this system would be highly technical. It would require science, technology, engineering, and math curricula. This would be one way of keeping talent and intelligence on the reservation.”

¹⁷³ Trevor Wheelwright, *Here are the Best (and Worst) Cities for Endless Sunshine*, MOVE.ORG (Jan. 27, 2020), <https://www.move.org/sunniest-cities-america/>.

¹⁷⁴ *Wind Projects on Native American Lands*, OPENEI, https://openei.org/wiki/Wind_Projects_on_Native_American_Lands.

¹⁷⁵ U.S. DEP’T OF ENERGY, DEVELOPING CLEAN ENERGY PROJECTS ON TRIBAL LANDS 3 (2013); See also Jennifer Hiller, *Tribes, Industry Groups Reach Deal to Boost U.S. Hydroelectric Power*, FOX BUSINESS (Apr. 4, 2022), <https://www.foxbusiness.com/economy/tribes-industry-groups-deal-boost-us-hydroelectric-power>. “After years of fighting, Native American tribes, environmentalists and the hydroelectric power industry say they have reached a deal on a proposed legislative package that could boost clean energy as well as river conservation.” The deal, according to general counsel for a tribe, could further tribal self-determination.

¹⁷⁶ U.S. DEP’T OF ENERGY, DEVELOPING CLEAN ENERGY PROJECTS ON TRIBAL LANDS 3 (2013).

¹⁷⁷ Lucas Toh, *Let’s Come Clean: The Renewable Energy Transition Will Be Expensive* (Oct. 26, 2021), STATE OF THE PLANET – COLUMBIA CLIMATE SCHOOL, <https://news.climate.columbia.edu/2021/10/26/lets-come-clean-the-renewable-energy-transition-will-be-expensive/>. The value of renewable energy may vary depending on the distance from where it is being sourced. The United States is “quickly using up the best locations for wind and solar. These are places near to existing transmission lines that receive strong and steady wind or sun. To build out more renewables, we will need to lay out thousands of more transmission lines to reach more remote windy and sunny areas.”

¹⁷⁸ *Fact Sheet | Jobs in Renewable Energy, Energy Efficiency, and Resilience*, ENV’T & ENERGY STUDY INST. (2019), <https://www.eesi.org/papers/view/fact-sheet-jobs-in-renewable-energy->

that have been used in the mining industry and others, tribes can get a head start on generating reliable jobs and income for populations across the country for the future ahead.

D. The Obstacles of a Newly Restored Need for Mining

One current predicament in this move “forward” lies in President Joe Biden’s vow to safeguard Native American resources, which conflicts with his Administration’s goal of starting a revolution in renewable energy.¹⁷⁹ For example, in the Salmon River Mountains of Idaho, there is a proposal for a vast open-pit gold mine that could potentially produce up to 115 million pounds of antimony.¹⁸⁰ This semi-metal will be critical in manufacturing high-capacity liquid-metal batteries in the future.¹⁸¹ Failing to expand on rare-earth minerals like antimony could present a “risk to the nation’s energy and military preparedness.”¹⁸²

At times, such proposed projects threaten Native American tribes. For example, the Nez Perce tribe, located in the Salmon River Mountain area, has already been driven out of their homelands due to mining interests, which contaminated their rivers and ancestral hunting grounds.¹⁸³ The choice to mine in such areas is challenging as commodities like “lithium, copper, cobalt and antimony become more valuable, and critical to the nation’s future.”¹⁸⁴

In the Santa Rita Mountains of Arizona, a Canadian mining company is seeking federal approval to mine copper despite the objections of numerous tribes, who argue that the mines would damage their hunting and fishing lands, siphon scarce water, and desecrate burial grounds and ceremonial sites.¹⁸⁵ In Nevada, the Fort McDermitt Paiute and Shoshone Tribes are protesting the potential Thacker Pass lithium mine.¹⁸⁶ A Vancouver-based company seeks to mine a dormant volcano that contains the United States’ largest deposit of lithium, a key component in batteries for electric cars.¹⁸⁷ In addition to electric cars, these minerals are vital for production of smartphones, computer hard disks, digital cameras, and more.¹⁸⁸

energy-efficiency-and-resilience-2019. Jobs in the energy efficiency sector now employ more than three million people in the United States.

¹⁷⁹ Jack Healy & Mike Baker, *As Miners Chase Clean-Energy Minerals, Tribes Fear a Repeat of the Past* (Dec. 27, 2021), N.Y. TIMES, <https://www.nytimes.com/2021/12/27/us/mining-clean-energy-antimony-tribes.html>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* Section V.B.

¹⁸⁷ *Id.*

¹⁸⁸ *How Do We Use Rare Earth Minerals?* AM. GEOSCIENCES INST., [https://www.americangeosciences.org/critical-issues/faq/how-do-we-use-rare-earth-elements#:~:text=%22Rare%2Dearth%20elements%20\(REEs,computer%20monitors%2C%20and%20electronic%20displays.](https://www.americangeosciences.org/critical-issues/faq/how-do-we-use-rare-earth-elements#:~:text=%22Rare%2Dearth%20elements%20(REEs,computer%20monitors%2C%20and%20electronic%20displays.)

Willie Sullivan of Yellow Pine, who manages the water system in the town near the Salmon River Mountains of Idaho commented, “Nobody wants [the mining] in their backyard, . . . [b]ut have the environmentalists stopped using phones or computers? The things that are required to develop these modern technologies all come from the ground.”¹⁸⁹

The challenge of responsibly mining for resources while respecting tribal rights and the natural environment is an ongoing concern. An even more monumental challenge is determining how the federal government and companies can further involve Native American tribes in decision-making processes and identifying ways to positively impact tribes from such development—an anomaly in American history. With the expansion and need of such minerals, the potential for wind, solar, and hydropower in Indian country, and more, hiring preferences are a terrific tool to bring employment, funding, and independence to tribes across the United States.

VI. Conclusion

Tribal hiring preferences should be implemented more often in the mining industry to alleviate the problem of unemployment and to improve participation on behalf of tribes in the contracting process and development of natural resources. In a long, partly inefficient, and uncompleted path toward establishing tribal “self-determination” for federally recognized tribes, Congress has passed the Indian Mineral Leasing Act, Indian Mineral Development Act, and Indian Tribal Energy Development and Self-Determination Act, among others. Slowly, such enactments have fostered more independence and self-governance and strengthened tribal control in mineral development.

Because of the staggering overlap of where mines and Native American reservations are located, the mining industry is particularly ripe for hiring preferences. However, it is important to foresee how such hiring preferences could be implemented in other natural resource industries as well because mining could lead to severe conflicts within tribes about sacred and cultural lands and environmental contamination in various circumstances. There is also tremendous potential in renewable energy sources like wind, solar, and hydropower in Indian country across the United States. Hiring preferences can change the landscape of the mining industry and should be used more often because of the vast number of benefits they bring to Native American tribes who seek to develop their land and increase overall employment.

¹⁸⁹ Healy & Baker, *supra* note 179.