VOLUME NO. 35 **Opinion No. 54**

INDIANS — Reservations, strip mining of, jurisdiction over; JURISDICTION — Indian reservations, strip mining of; MINES AND MINING — Indian reservations, strip mining of, jurisdiction over; NORTHERN CHEYENNE INDIAN RESERVATION — Strip mining of, jurisdiction over. 25 U.S.C. §§ 1322 and 1326; Enabling Act of the State of Montana; Article I, Constitution of Montana, 1972; Montana Strip Mining and Reclamation Act, Chapter 325, Session Laws of 1973 (sections 50-1034 through 50-1057, R.C.M. 1947).

HELD: The Montana Strip Mining and Reclamation Act is not applicable to the prospecting for, mining by strip mining methods, or removal of coal on lands within the Northern Cheyenne Indian Reservation covered by a coal lease from the Northern Cheyenne Tribe.

December 28, 1973

Mr. Ted Schwinden, Commissioner
Department of State Lands
State Capitol
Helena, Montana 59601

Dear Mr. Schwinden:

You have requested my opinion as to whether Chapter 325, Laws of 1973, is applicable to the prospecting for, mining by strip methods, and removal of coal on lands within the Northern Cheyenne Indian Reservation covered bya coal lease from the Northern Cheyenne Tribe.

Your question concerns the rather complex legal issue of whether the state of Montana has jurisdiction through Chapter 325, Laws of 1973, the Montana Strip Mining and Reclamation Act (hereinafter called the "Act") over the Northern Cheyenne Indian Reservation lands in Montana.

The Enabling Act for the state of Montana of 1889 states in pertinent part at paragraph 4 as follows:

> Second. **That the people inhabiting said proposed states** [of North Dakota, South Dakota, Montana, and Washington] **do agree and declare that they forever disclaim all right and title** to the unappropriated public lands lying within the boundaries thereof, and **to all lands lying within said limits owned or held by any Indian or Indian tribes;** and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and **said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States;** ... (Emphasis supplied)

Article I of the Constitution of Montana, 1972, makes it clear that the new constitution does not affect any agreements involving Indian lands made with the United States government when Montana first became a state. Article I states:

> All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

There has been much recent litigation concerning the application of state law to Indians on reservations. While those cases do not specifically answer the present issue, a trend appears to be developing concerning the question of a state's jurisdiction over Indian lands.

The case of **Williams v. Lee,** 358 U.S. 217 (1959), limited the application of state law to Indian lands. In that instance a debt action brought in state court was dismissed because all the transactions occurred on the reservation. The United States Supreme Court held that the Indians had a right to govern themselves and the state court had no jurisdiction.

In **Kennerly v. District Court,** 400 U.S. 423 (1971), the Supreme Court held that the civil laws of the state of Montana could not apply to the Blackfeet Indian Reservation without the state's first complying with Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326. The court held that a state may assume jurisdiction over Indian lands only where enrolled Indians within an affected area accept state jurisdiction by majority vote as Congress has provided in 25 U.S.C. §§ 1322 and 1326. 25 U.S.C. § 1322 provides in pertinent part as follows:

> (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, **with the consent of the tribe occupying the particular Indian country** or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and affect within such Indian country or part thereof as they have elsewhere within that State. ... (Emphasis supplied)

25 U.S.C. § 1326 provides:

> State jurisdiction acquired pursuant to this sub-chapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country **only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.** The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults. (Emphasis supplied)

The absence of state jurisdiction over the Crow Reservation was clearly recognized when a state district court was found to lack jurisdiction to enforce a mortgage foreclosure action on the reservation in **Crow Tribe v. Deernose,** 158 Mont. 25. That 1971 case relied heavily upon the **Kennerly** case, supra, and found that Montana had not passed the necessary legislation accepting civil jurisdiction over Indian affairs pursuant to Congressional authorization, and the Crow Tribe had not consented to state jurisdiction as required by federal statute. The Montana Supreme Court held that Montana's state courts therefore lacked jurisdiction over a real estate mortgage foreclosure action on Indian land held in trust by the United States for the mortgagors and situated on the Crow Indian Reservation. The court stated that the federal courts had exclusive jurisdiction over such a matter.

In the case of **Akers v. Morton,** 333 F.Supp. 184 (1971), the Montana federal district court held that the law of Montana, except as it is adopted by Congress as law of the United States, does not apply to trust patent lands, and that the United States is not required in dealing with Indians and Indian lands to conform its laws to the laws of the states wherein reservations lie.

It appears from the foregoing authorities that a state has no jurisdiction over Indian lands unless Congress has authorized that jurisdiction, the state has acted to accept that jurisdiction, and the Indian tribal members have voted to accept the state's jurisdiction.

According to 25 U.S.C. § 1322 (a), supra, Congress apparently has consented to the state of Montana having jurisdiction over Indian lands under the Strip Mining and Reclamation Act **if** the state of Montana accepts that jurisdiction, and **if** the tribal members vote to accept that jurisdiction.

In reviewing the Act, I find no evidence whatsoever that the Montana legislature intended the Act to apply to Indian lands. My research further reveals that Montana has not acted under 25 U.S.C. § 1322 to attempt to obtain jurisdiction for enforcement of the Act upon Indian lands. Likewise, the Northern Cheyenne Tribe has seemingly done nothing to grant the state of Montana jurisdiction to enforce the Act.

THEREFORE, IT IS MY OPINION:

Chapter 325, Laws of 1973, the Montana Strip Mining and Reclamation Act, contained in sections 50-1034 through 50-1057, R.C.M. 1947, is not applicable to the prospecting for, mining by strip mining methods, and removal of coal on lands within the Northern Cheyenne Indian Reservation covered by a coal lease from the Northern Cheyenne Tribe.

Very truly yours,

ROBERT L. WOODAHL
Attorney General