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Note

Breaking Ground: Understanding Indigenous Mining Disputes Through Negotiation Theory

Shaadie Ali*

I. INTRODUCTION

In early 2023, tribes and conservationists in Nevada urged the 9th Circuit Court of Appeals to overturn the District Court's decision to allow the operation plan for the Thacker Pass lithium mine to proceed.¹ While tribes and conservationists are no strangers to mining disputes, Thacker Pass marks a significant development in mining conflict because the Western Shoshone and Paiute tribes found themselves against unlikely adversaries: green energy advocates.² As the United States steps up its efforts to decarbonize its transportation sector, many in the United States are pushing to increase U.S. lithium independence.³ Although the U.S. Inflation Reduction Act, President Biden's flagship climate legislation, provides tax credits for electric vehicles that source battery materials from the United States and free trade partner countries, roughly 95% of global lithium production currently comes from Australia, Chile, China, and Argentina.⁴ As a result of the Act, U.S. investors and green technology manufacturers have made

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1. Scott Sonner, *Conservationists and Tribes Urge US Appeals Court to Block Biden-Backed Nevada Lithium Mine*, AP (June 26, 2023), <https://apnews.com/article/nevada-lithium-mine-court-appeal-15bd07e0ec03230d81349ff172c790dd>.

2. *Id.*

3. Darren Dodd, *Battle for Lithium Heats Up*, FIN. TIMES (Nov. 27, 2023), <https://www.ft.com/content/b4ac6483-b94b-4c60-ad61-b7ed2422678c>.

4. *Id.*

historic investments in U.S. lithium mines like Thacker Pass.⁵ Given the increasing demands on U.S. lithium production independence, such tensions between green energy advocates and tribes will likely worsen in the coming years.

In light of these trends, the relationship between indigenous communities and mining remains highly relevant. Although “Indigenous peoples make up 5 to 10 percent of the global population,” they are “involved in 40 percent of ecological distribution conflicts.”⁶ Over one in four Native Americans live in poverty, “the highest rate of any racial group in the United States.”⁷ Moreover, due to the lack of a formal private sector on most reservations, reservation unemployment rates are around fifty percent.⁸ The confluence of these factors makes Native Americans particularly vulnerable to the negative externalities associated with mining projects.⁹ Troubling as these data are, narratives that frame Native Americans as passive victims in relation to mining developments are also problematic. In practice, tribes vary in their approaches to mining projects ranging from collaboration to fierce opposition.¹⁰ A confluence of political, legal, and sociological factors have led to tribes taking increasingly sophisticated approaches to dealing with mining projects.¹¹ The purpose of this Note is to evaluate recent developments in these conflicts to identify opportunities for collaboration, areas of improvement, and to anticipate future developments in this field of conflict.

This Note uses a comparative analysis of three indigenous mining disputes from different times and places across the United States to assess the efficacy of various negotiation

5. Harry Dempsey & Claire Bushey, *General Motors Invests \$650mn in US Lithium Mine to Secure EV Battery Materials*, FIN. TIMES (Jan. 31, 2023), <https://www.ft.com/content/84840136-d46f-42ff-8b47-3852cb6d8634>.

6. Leonardo Figueroa Helland, *Indigenous Pathways Beyond the “Anthropocene”: Biocultural Climate Justice Through Decolonization and Land Rematriation*, 30 N.Y.U. ENV’T L.J. 347, 377 (2022).

7. Adam Crepelle, *Federal Policies Trap Tribes in Poverty*, AM. BAR ASS’N (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/federal-policies-trap-tribes-in-poverty.

8. *Id.*

9. *See generally id.*

10. SALEEM H. ALI, MINING, THE ENVIRONMENT, AND INDIGENOUS DEVELOPMENT CONFLICTS 11–12 (2003).

11. *Id.* at 11–13.

strategies. By reviewing case studies holistically through careful considerations of the economic, social, and legal contexts of each case, this Note aims to develop criteria for successful outcomes for tribes in mining disputes. This Note takes a novel approach to indigenous mining legal scholarship by firmly situating mining disputes within the context of negotiation rather than framing such conflicts in the terms of discrete legal questions and legal theories that might arise out of a given dispute.¹² Within this context, lawsuits, protests, legislation, lobbying, shareholder activism, and exercise of tribal authority become legible as sophisticated negotiation tools that drive what litigation theories and processes are viable going forward.¹³

II. BACKGROUND

Over the past fifty years, tribes have had varying levels of success in disputes involving mining projects in the United States. This Note considers three case studies across the United States, each with different backgrounds, strategies, and outcomes.

As background, Part II first provides a brief overview in Section A of the literature detailing the general relationship between tribes, the federal government, and private mining corporations. Special attention will be given to literature describing conflicts and ruptures. Next, Section B outlines the literature regarding the case studies, which involve (1) the

12. While litigation is a distinct category of dispute resolution worthy of understanding on its own terms, litigation considerations largely fall outside the scope of this Note. Instead, this Note makes several key assumptions about the nature of such litigation to draw important lessons from mining disputes as *disputes* to be settled through negotiation first and foremost. This Note first assumes that all parties involved in litigation are sophisticated and well-resourced and, accordingly, will pursue the strongest legal arguments available to them. Second, this note assumes that all parties have articulable, rationally self-interested motives which are uniformly held unless otherwise stated. Put in basic terms, this Note presumes that every substantial constituent member of a tribe or tribal coalition and every stakeholder within a mining company has the same verifiable and rationally self-interested motives.

13. Crucially, it should be noted that while this Note proposes the application of the negotiation theory framework to the cases discussed, it is not the only valid lens through which to analyze these case studies, nor is negotiation theory inherently “correct” as a methodological approach. Rather, this Note operates from the premise that negotiation theory is a robust and flexible framework that, when applied to tribal mining, can open new avenues of future research, discussion, and problem-solving for both the field of dispute resolution studies and tribal legal studies.

Crandon Mine in Wisconsin, (2) the Black Mesa Peabody Mine in the Navajo Nation, and (3) the Oak Flat Mine in Arizona.

A. LEGAL AND HISTORICAL BACKGROUND

Given the controversial nature of mining developments, scholars have identified mining and energy as vehicles for understanding federal-tribal relations and land rights.¹⁴ The United States has long conceptualized its interest in Indian lands as an “absolute ultimate title.”¹⁵ This framing ultimately developed into the federal trust scheme, wherein “the federal government holds Indian lands in trust for the benefit of tribes and, in the case of allotted lands, for individual Indians.”¹⁶

The federal government first facilitated the leasing of indigenous lands for mining in earnest through the Dawes Act of 1887, which authorized the allotment of Indigenous lands.¹⁷ Amendments to the Dawes Act four years later required that any lease of indigenous lands have consent from both the tribe negotiating the lease (by virtue of the fact that the tribes signed the lease) and the federal government in their role as trustees.¹⁸ Throughout the late 19th and early 20th centuries, subsequent developments in federal policy were often driven by considerations of federal access to resources, resulting in often-contradictory Congressional approaches depending on the type of subsurface resource and the tribe that held the resource.¹⁹ The tribal consent requirement and the ability of tribes to negotiate leases were restricted or eliminated in some cases depending on specific Congressional initiatives.²⁰

The first major paradigmatic shift in the federal-tribal land relationship came through the Indian Reorganization Act (IRA) of 1934.²¹ The IRA sought to promote tribal self-determination by allowing tribes to acquire lands, formally ending allotment,

14. See generally Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. INDIAN L.J. 36 (2017).

15. *Johnson v. McIntosh*, 21 U.S. 543, 592 (1823).

16. Mills, *supra* note 14, at 46.

17. Mills, *supra* note 14, at 46.

18. Mills, *supra* note 14, at 47.

19. Mills, *supra* note 14, at 48–50.

20. Mills, *supra* note 14, at 49.

21. Indian Reorganization Act of 1934, Pub. L. No. 73-383, Ch. 576, 48 Stat. 984 (1934) (codified as 25 U.S.C. § 461 et seq. (editorially reclassified as 25 U.S.C. §§ 5101–5144)).

and restoring unallotted lands back to tribes.²² The Indian Mineral Leasing Act (IMLA) of 1938 further sought to reimpose uniform standards on tribal mineral leasing regulations by mandating tribal consent for all leases, competitive bidding, and acceptance of the highest oil and gas lease bids.²³ However, in practice, the IMLA reified the federal government's status as the gatekeeper in tribal mining leases because the Bureau of Indian Affairs (BIA) managed the IMLA leasing process through "standard leasing forms" and "unilateral authority to cancel" leases.²⁴ As a result, many tribes were unable to negotiate advantageous leases throughout the middle of the 20th century.²⁵

Recent developments in tribal mineral leasing law sought to remedy a perceived paternalism in federal policy. In 2005, Congress passed the Indian Tribal Energy Development and Self-Determination Act to facilitate the granting of Tribal Energy Resource Agreements (TERAs), which allow tribes to enter and approve their own energy leases without government approval.²⁶ The BIA Secretary is empowered to grant TERAs based on holistic assessments of a tribe's resources and capacities to negotiate advantageous and fair agreements.²⁷ The Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 creates expedited approval processes through BIA for wind and solar energy leasing.²⁸

Scholarship around the federal trust relationship emphasizes the federal government's role in facilitating or hindering tribal self-determination.²⁹ The prevailing paradigm in tribal resource extraction law conceives of tribal sovereignty as a spectrum, wherein federal control exists on one end of the spectrum and tribal self-determination sits on the other end.³⁰

22. Mills, *supra* note 14, at 51–52.

23. Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, Ch. 198, 52 Stat. 347 (codified as 25 U.S.C. §§ 396a–g (2012)); Mills, *supra* note 14, at 53.

24. Mills, *supra* note 14, at 55.

25. Mills, *supra* note 14, at 55.

26. Energy Policy Act of 2005, Pub. L. No. 109-58, Title V, §§ 501–06, 119 Stat. 763 (codified as 25 U.S.C. §§ 3501–06 (2012)); Mills, *supra* note 14, at 64.

27. 25 U.S.C. § 3504(e)(2)(B).

28. Helping Expedite & Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (2012).

29. Mills, *supra* note 14, at 36–37.

30. Mills, *supra* note 14, at 40 ("While the federal-tribal relationship with regard to energy development has evolved over time, it has always moved along

However, a growing body of scholarship has sought to reframe this zero-sum adversarial relationship as an opportunity for future collaboration between tribes and the federal government.³¹ Such scholarship often takes a more nuanced approach to developments in tribal lands, recognizing that in some cases, the promotion of energy and mining developments may, in fact, strengthen tribal sovereignty by spurring economic development and giving tribes decision-making authority.³²

A parallel body of work approaches these trends in tribal sovereignty and mining developments through the lens of social movements.³³ Scholarship in this field is somewhat more varied in focus; some works focus heavily on the role of coalitions in assessing mining conflicts.³⁴ Other works focus heavily on the role of movement lawyering and legal advocacy as a vehicle for discussing these conflicts.³⁵ A related but distinct body of work discusses the general legal landscape surrounding such conflicts and identifies key stakeholders in land use projects in and around tribal lands.³⁶ Such literature frequently assesses and appraises multiple projects to find new opportunities and challenges for all stakeholders.³⁷

a single axis, with broad, paternalistic oversight and control by the federal government at one end and tribal self-determination and sovereignty at the other.”). See also Ezra Rosser, *The Trade-Off Between Self-Determination & the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 350–51 (2005).

31. See generally Mills, *supra* note 14, at 97.

32. Mills, *supra* note 14, at 37.

33. See e.g., Gussie Lord, *Successful Tribal Opposition to Mining Projects in the Upper Midwest*, 34 NAT'L RES. & ENV'T 7 (2019); Patty Loew & James Thannum, *After the Storm: Ojibwe Treaty Rights Twenty-Five Years after the Voigt Decision*, 35 AM. INDIAN Q. 161 (2011); Zoltán Grossman, *Unlikely Alliances: Treaty Conflicts and Environmental Cooperation between Native American and Rural White Communities* (2002) (Ph.D. dissertation, University of Wisconsin-Madison); AL GEDICKS, *THE NEW RESOURCE WARS: NATIVE AND ENVIRONMENTAL STRUGGLES AGAINST MULTINATIONAL CORPORATIONS* (1993).

34. See e.g., Grossman, *supra* note 33; GEDICKS, *supra* note 33; Loew & Thannum, *supra* note 33.

35. Lord, *supra* note 33.

36. See JOSEPH P. KALT, FOUND. FOR NAT. RES. & ENERGY L. ANN. & SPEC. INSTS., *ENERGY AND MINERAL DEVELOPMENT IN INDIAN COUNTRY* (2014-5 RMMLF PROC 4) (2014).

37. Lord, *supra* note 33; Jeanette Wolfley, *Embracing Engagement: The Challenges and Opportunities for the Energy Industry and Tribal Nations on Projects Affecting Tribal Rights and Off-Reservation Lands*, 19 VT. J. ENV'T L. 115 (2018).

B. CASE STUDIES

This Note seeks to analyze a set of mining disputes that are diverse temporally, geographically, historically, and with respect to outcome. By prioritizing diversity in examples, this Note aims to assess the efficacy of various negotiation strategies and identify decisive factors in such disputes. In looking past any particular location, federal circuit, historical moment, or sociopolitical context, the analysis both provides general, practical guidance for the reader as well as serves as a foundation for future scholarship on the intersection between dispute resolution and tribal mining disputes.

The first dispute considered is the Crandon mine. The Crandon mining project and the associated legal and political battles have been the subject of much analysis. The project has been and continues to be an excellent candidate for case studies for several reasons: the well-documented historical records, varied stakeholders, complex social and legal dynamics, and remarkable ingenuity on the part of tribal communities.

By contrast, the Black Mesa Peabody mine is a rich source for analysis because the site of the dispute straddles two tribal authorities: the Navajo and the Hopi. Furthermore, at this stage, the relief sought by the tribes is not the wholesale removal of the mining project, but recompense for a perceived unfair deal. Further complicating (or enriching) this study is the federal trust system. Because the federal government holds land in trust for the tribes, the federal government nominally maintains roles within the negotiation framework as stakeholders, advocates for tribes, brokers with the mining company, and adversaries to the tribes in litigation. The example remains ripe for analysis as a negotiation for its multi-layered, multiparty approach in which the relief sought is far narrower.

Finally, the Oak Flat mine dispute is unique in large part due to its contemporary nature. The dispute, triggered by a land-swap tucked away as a rider in an omnibus bill, is likely the most one-sided with respect to negotiating power, resulting in the tribe relying heavily on more modern negotiation strategies such as activism, formation of non-profits, and legal challenges rooted in religious liberty arguments. While the dispute is ongoing and future legal proceedings could substantively impact outcomes, the legal challenges on appeal are sufficiently developed such that meaningful observations about the proceedings to date can be drawn.

1. Crandon Mine

In 1975, Exxon discovered the Crandon ore body (composed of zinc, copper, and lead) in Northwestern Wisconsin.³⁸ Local Chippewa opposition to the mine was almost immediate, pointing to their contention that the ore body was located within lands promised to the Chippewa by the federal government in an 1854 treaty.³⁹ Exxon sent the Chippewan tribal chairperson a paltry \$20,000 check for the right to explore the reservation directly, exacerbating Chippewan opposition.⁴⁰ The check was torn up at a tribal council meeting.⁴¹

Local opposition to a potential mine intensified throughout the late 1970s and mid-1980s, primarily driven by native groups.⁴² In the early 1980s, Exxon submitted permit applications for a mining project but later retracted purportedly due to low mineral prices.⁴³ Throughout the 1980s and early 1990s, various mining companies and subsidiaries bought and sold the rights to the mining project.⁴⁴ In the 1990s, Exxon returned to the potential mine with Canadian partner Rio Algom.⁴⁵ The Sokaogon Chippewa Community suffered a temporary but significant setback in 1992 in *Sokaogon Chippewa Community v. Exxon*, where the U.S. District Court for the Eastern District of Wisconsin ruled in favor of Exxon on the grounds that the Sokaogon lacked possessory rights to the lands of the proposed mine.⁴⁶ Despite this, throughout the 1990s, the Mole Lake Chippewa, Menominee, Potawatomi, and Mohican tribes remained undeterred, developing a complex negotiation strategy that leveraged multinational coalitions, lawsuits, and clever administrative law maneuvering.⁴⁷

38. ALI, *supra* note 10, at 87.

39. ALI, *supra* note 10, at 87.

40. ALI, *supra* note 10, at 87.

41. ALI, *supra* note 10, at 87.

42. ALI, *supra* note 10, at 87.

43. ALI, *supra* note 10, at 87.

44. Lord, *supra* note 33, at 9.

45. ALI, *supra* note 10, at 89; Lord, *supra* note 33, at 9.

46. *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 805 F. Supp. 680 (E.D. Wis. 1992).

47. *Id.*; ALI, *supra* note 10, at 90–91. While the strategies employed by the tribe are legible more broadly as dispute resolution strategies, this Note limits its scope to negotiation theory. The author notes that future analysis focused on applying broader dispute resolution principles to such disputes remains

The Crandon conflict brought into alignment disparate, formerly antagonistic groups in Wisconsin politics: tribes that enjoyed special access to fishing and water rights and white conservationists that saw tribal fishing rights as damaging to the local ecology.⁴⁸ Interestingly, white anti-treaty environmentalists initially rallied against the Crandon mine but were quickly rendered politically irrelevant when strong coalitions between white pro-treaty environmentalists and native groups formed.⁴⁹ In the early 1990s, indigenous and conservation advocacy groups sponsored large rallies throughout Wisconsin to build popular opposition to mining projects.⁵⁰ Tours throughout Wisconsin created popular support for the Mining Moratorium Law, also called the “Prove it First” law, signed by Governor Tommy Thompson on Earth Day 1998.⁵¹ The law imposed significant requirements on applicants for mining permits: an applicant must show data for a similar mine that has been closed for ten years without causing significant environmental pollution and one that has been operated for ten years without causing pollution.⁵²

The Sokaogon Chippewa Community eventually prevailed by taking advantage of section 518(e) of the Clean Water Act, which permits the EPA to grant tribes treatment-as-state (TAS) status.⁵³ In granting treatment-as-state status to the Mole Lake Reservation in 1995, the EPA gave the tribe authority to promulgate its own water quality standards.⁵⁴ Throughout Mole Lake Band’s application process, the State of Wisconsin voiced its opposition to granting the Mole Lake Band TAS status on the grounds that the state’s sovereignty over all navigable waters precluded granting the Band authority over waters on the Mole Lake Reservation.⁵⁵ One week after the EPA granted the Band TAS status, the State of Wisconsin sued the EPA for their determination that a tribe with a TAS grant may regulate all

underdeveloped in the literature and could be the subject of substantive developments both in the field of dispute resolution and tribal sovereignty.

48. Loew & Thannum, *supra* note 33, at 161; Grossman, *supra* note 33, at 2–3; GEDICKS, *supra* note 33, at 7.

49. Grossman, *supra* note 33, at 35; ALI, *supra* note 10, at 88.

50. ALI, *supra* note 10, at 88.

51. ALI, *supra* note 10, at 88.

52. Wis. Stat. § 293.50 (1998).

53. Lord, *supra* note 33, at 9.

54. Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001).

55. *Id.*

water within a reservation regardless of who owns the body of water.⁵⁶ In 2001, the 7th Circuit Court of Appeals found in favor of the tribe and the EPA, dealing a fatal blow to Rio Algom's project.⁵⁷

2. Black Mesa Peabody Mine

If the case of the Crandon Mine is one of inter-tribal collaboration and coordination for mutual benefit, then the Black Mesa Peabody Mine is a story of internal conflict and inter-tribal disputes. The Hopi and Navajo both occupy the Four Corners region of the United States and have a contentious history of territorial disputes.⁵⁸ Land partitioning between the two tribes has continued well through the 20th century.⁵⁹ Following a purportedly well-intentioned lawsuit initiated by Congressman Stewart Udall,⁶⁰ subsurface and surface land rights were partitioned between the two tribes in some areas and shared in others in a complex scheme.⁶¹ In 1974, Congress intervened to further partition lands and facilitate resettlement.⁶²

In 1966, the Hopi and Navajo signed mining leases containing a plethora of utilities.⁶³ The lease agreement was unusually unfavorable for the tribes and included the tribes signing away nearly a billion gallons of water a year to Peabody for coal slurry.⁶⁴ It has been the subject of much consternation that the attorney representing the Hopi had a problematic relationship to Peabody, working for both the Hopi and Peabody contemporaneously.⁶⁵

Responses to the disastrous lease agreement on the part of the Hopi and Navajo were delayed and uncoordinated. Perhaps the strongest legal challenges to the unfavorable lease conditions were brought by the Navajo Nation in 1993, resulting

56. *Id.*

57. *Id.* at 749.

58. ALI, *supra* note 10, at 77.

59. ALI, *supra* note 10, at 78.

60. ALI, *supra* note 10, at 78.

61. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962).

62. Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712.

63. ALI, *supra* note 10, at 82.

64. ALI, *supra* note 10, at 82.

65. ALI, *supra* note 10, at 82.

in a Supreme Court decision a decade later in 2003.⁶⁶ Amidst a renegotiation process in which the Bureau of Indian Affairs acted favorably to Peabody, the Navajo Nation sued the federal government under a theory of breach of trust.⁶⁷ The Supreme Court found in favor of the federal government, holding that an Indian Tribe must “identify a substantive source of law that establishes specific fiduciary or other duties.”⁶⁸

The Navajo Nation brought another suit several years later on similar grounds, this time alleging that the federal government violated specific duties created by the Navajo-Hopi Rehabilitation Act of 1950 and the Surface Mining Control and Reclamation Act of 1977.⁶⁹ The Supreme Court found that none of the sources of law cited by the Nation provided a basis for imposition of duty on the federal government.⁷⁰

3. Oak Flat Mine

Whereas lawsuits resulting from the Crandon and Peabody mines centered on administrative law and the role of the federal government to intervene in mining disputes, the Apache Stronghold has taken a different approach, focusing primarily on arguments centered around religious freedom. The dispute regarding the Oak Flat Mine is ongoing, but it is a very high-profile case with significant evidence and research available.⁷¹

Oak Flat is a plateau in Arizona of religious significance to many Native American tribes, especially the San Carlos Apache.⁷² The mountain at Oak Flat is used for many religious and cultural ceremonies, including coming-of-age ceremonies for young Apache women.⁷³ In 2013, a mining company named

66. United States v. Navajo Nation, 537 U.S. 488 (2003).

67. *Id.* at 500.

68. *Id.* at 506.

69. United States v. Navajo Nation, 556 U.S. 287, 295 (2009).

70. *Id.* at 302.

71. Anita Snow, *Oak Flat Timeline: Native American vs. Pro-Mining Interests*, AP (June 28, 2023), <https://apnews.com/article/oak-flat-sacred-apache-copper-mine-26fa76965cf75a4addb4108c4818af09>. See also Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV'T L.J. 1, 51–52 (2022).

72. Ryan Devereaux, *Biden Moves Forward With Mining Project That Will Obliterate a Sacred Apache Religious Site*, INTERCEPT (Mar. 22, 2023), <https://theintercept.com/2023/03/22/oak-flat-mine-arizona-biden>.

73. *Id.*

Resolution Copper put forward plans for the proposed Oak Flat mine.⁷⁴ Shortly after, in 2014, the Senate approved a land swap that would give Resolution Copper control over Oak Flat.⁷⁵ The land swap, which was a “rider” placed in a military spending bill, was introduced by Arizona representative Paul Gosar.⁷⁶

In 2021, Apache Stronghold, a nonprofit representing the interests of Western Apache, sued the federal government alleging that the land exchange violated the Religious Freedom Restoration Act (RFRA), the Free Exercise Clause of the First Amendment, and a trust obligation imposed on the United States by the 1852 Treaty of Santa Fe between the Apache and the United States.⁷⁷ The United States District Court for the District of Arizona denied Apache Stronghold’s request for a preliminary injunction of the land swap, claiming that the land swap did not violate RFRA because plaintiffs could not show that the land swap constituted a “substantial burden” on plaintiffs’ religious beliefs.⁷⁸ A subsequent ruling by the 9th Circuit Court of Appeals affirmed that holding in June of 2022.⁷⁹ On March 1, 2024, an eleven-judge panel of the 9th Circuit Court of Appeals ruled 6-5 that the land transfer did not violate RFRA.⁸⁰ Apache Stronghold is currently requesting that the entire twenty-nine-judge panel of the 9th Circuit Court of Appeals review their appeal.⁸¹ While the case will be an uphill battle, there are reasons for cautious optimism for Apache Stronghold: five of the eleven judges found that the plaintiffs had provided sufficient evidence to prove a “substantial burden” to their religion under

74. Snow, *supra* note 71; RESOLUTION COPPER MINING, GENERAL PLAN OF OPERATIONS (2016).

75. Snow, *supra* note 71.

76. Snow, *supra* note 71.

77. Apache Stronghold v. United States, 38 F.4th 742, 751–52 (9th Cir. 2022); Felicia Fonseca & Anita Snow, *Apache Group Sues Over Land Swap for Arizona Copper Mine*, AP (Jan. 12, 2021), <https://apnews.com/general-news-074991609b7cf449bb75c29c7e4905fb>.

78. Apache Stronghold v. United States, 38 F.4th 742, 751–52 (9th Cir. 2022).

79. Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022); *Apache Stronghold*, 38 F.4th at 773.

80. Apache Stronghold v. United States, 95 F.4th 608, 614 (9th Cir. 2024).

81. Debra Utacia Krol, *Apache Stronghold appeals Oak Flat copper mine case to full 9th Circuit appeals court*, AZCENTRAL (Apr. 15, 2024), <https://www.azcentral.com/story/news/local/arizona-environment/2024/04/15/apache-stronghold-appeals-oak-flat-case-9th-us-circuit-court-appeals/73335342007/>.

RFRA.⁸² Further, the per curiam decision overruled Navajo Nation’s narrow interpretation of “substantial burden” under RFRA—a major barrier to Apache Stronghold’s claim.⁸³

III. ANALYSIS

Negotiation theory is a useful framework for evaluating the efficacy of tribal advocacy strategies because it provides the opportunity to recontextualize tribal actors as sophisticated parties capable of autonomy. By focusing on tribal negotiation rather than the U.S. judiciary and federal government as the primary driver of advancements in tribal sovereignty and environmental justice, this Note’s analytical approach seeks to correct for a tendency in legal scholarship to frame tribes as subjects rather than active participants. Part III proceeds by introducing in Section A foundational concepts in negotiation theory and applying them to the three case studies to assess the merits of various strategies. Section B concludes by identifying some of the key factors driving outcomes in mining disputes.

A. FOUNDATIONAL CONCEPTS IN NEGOTIATION THEORY

1. Approaches to Negotiation

Competitive bargaining, also frequently known as zero-sum negotiation, is probably the method of negotiation with which people are most familiar.⁸⁴ As the name implies, competitive bargaining operates on an adversarial model between parties wherein each party tries to win the negotiation.⁸⁵ Accordingly, the approach starts from the basic premise (real or imagined) that each party’s goals are in irreconcilable conflict.⁸⁶ While the immediate benefits of such a model—namely, maximization of immediate gain—are obvious, the approach may be problematic in some applications. Because the approach is singularly focused on immediate gain, it often breaks down in situations where

82. Apache Stronghold, 95 F.4th at 729.

83. *Id.* at 614.

84. CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 84–86 (3d ed. 2018). *See also* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (1996).

85. Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (1996).

86. *Id.* at 342.

maintaining productive long-term relationships between parties is strategically valuable.⁸⁷ Some typical operating assumptions of this model include the view that negotiation relies on maintaining an informational advantage over one's opponent and that concessions should only be given when strictly necessary.⁸⁸

Compromise or accommodative bargaining, by contrast, prioritizes fairness and cooperation.⁸⁹ While the approach can include many strategies, the term is typically understood to encompass approaches that seek to build trust and goodwill between the negotiating parties.⁹⁰ An operating assumption of the model is that each opponent has a basic desire to reach a fair agreement to preserve a working relationship.⁹¹ Whereas the competitive strategy breaks down in situations where maintaining a productive working relationship between opponents is required, the compromise model falters when opponents do not match a party's concessions ungrudgingly.⁹² When a negotiator takes an accommodative approach opposite a competitive negotiator, the accommodative party is vulnerable to exploitation.⁹³ This mismatch in values and lopsided outcomes can result in resentment and perceived unfairness, which can have damaging effects on the long-term productivity of relationships between parties.⁹⁴

Integrative negotiation, by contrast, rejects an underlying assumption of both competitive and compromise negotiation: that negotiation is about the distribution of a finite set of resources associated with the negotiation or transaction.⁹⁵ Integrative negotiation instead views negotiation as a problem-solving exercise in which both parties use the negotiation as an

87. *Id.* at 326.

88. *Id.* at 349.

89. *Id.* at 327.

90. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 52 (1985).

91. *Id.*

92. *Id.* at 53.

93. *Id.*

94. *Id.* at 54.

95. MENKEL-MEADOW ET AL., *supra* note 80, at 89 ("Both strategies focus only on one part of the negotiation – dividing the 'pie' of services or goods that are subject of negotiation – rather than on other activities that can expand the resources available to the parties before they may have to be allocated or divided.").

opportunity to resolve “both parties’ respective interests.”⁹⁶ By separating the parties from the subject of the dispute, integrative negotiators seek to sidestep the zero-sum framing of the competitive model without the risk of being taken advantage of, as in the cooperative model.⁹⁷ However, as with the other negotiation approaches, the model is not universally applicable. The model is most effective when parties’ interests are not in direct opposition and there is not a direct correlation between the benefit of one party and a commensurate loss on the part of the other party.⁹⁸

2. Choosing a Negotiation Strategy

As the above section suggests, there is no one-size-fits-all negotiation approach. In practice, optimal negotiation strategy varies widely depending on context and needs. However, a few considerations should consistently drive a party’s selection process.⁹⁹ First and most critically, the opponent’s negotiation strategy should drive a negotiator’s selection process.¹⁰⁰ As stressed above, the cooperative approach to negotiation breaks down when an opponent chooses a more competitive or adversarial approach.¹⁰¹ In addition to the conciliatory approach resulting in a materially worse position throughout the negotiation process with a competitive opponent, such concessions can often be seen as a sign of weakness rather than an attempt at brokering a fair deal.¹⁰²

The next factor in determining negotiation strategy is relative bargaining power.¹⁰³ While bargaining power can be understood as a party’s actual and perceived ability to influence an opponent, the opponent’s perception of power can sometimes be more decisive.¹⁰⁴ In general, negotiating power is tied to a party’s Best Alternative to a Negotiated Agreement (BATNA).¹⁰⁵

96. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 52 (1985).

97. *Id.*

98. *Id.* at 56–57.

99. *Id.* at 60.

100. *Id.*

101. *Id.*

102. *Id.* at 60–61.

103. *Id.* at 62.

104. *Id.*

105. MENKEL-MEADOW ET AL., *supra* note 80, at 112–15. *See also* Gifford, *supra* note 89, at 63.

If a party has attractive alternatives in the event that negotiations fail to produce an agreement, the opposing party's negotiating power is comparatively weaker.¹⁰⁶ On the other hand, if a party has few viable alternatives to the current negotiations, the opposing party's bargaining position is enhanced considerably.¹⁰⁷ Critically for this analysis, some research suggests that the perception of a party's BATNA is tied to race and gender.¹⁰⁸ One study found that in car sales, white men received significantly better prices than Black people and women.¹⁰⁹ In a follow-up study replicating the results, the author suggested that salespeople may have assumed that Black people and white women had worse BATNAs and accordingly offered them worse deals.¹¹⁰ A less powerful negotiator has two main options when confronted by substantial imbalances in negotiating power: they can either remain within the competitive negotiation paradigm and increase their power relative to their opponent, or pursue a noncompetitive strategy (either compromise or integrative).¹¹¹ Because a less powerful negotiator has little leverage under a competitive scheme, they

106. Gifford, *supra* note 89, at 63.

107. Gifford, *supra* note 89, at 63.

108. MENKEL-MEADOW ET AL., *supra* note 80.

109. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-19 (1991) ("The tests reveal that white males receive significantly better prices than blacks and women. As detailed below, white women had to pay forty percent higher markups than white men; black men had to pay more than twice the markup, and black women had to pay more than three times the markup of white male testers. Moreover, the study reveals that testers of different race and gender are subjected to several forms of nonprice discrimination. Specifically, testers were systematically steered to salespeople of their own race and gender (who then gave them worse deals) and were asked different questions and told about different qualities of the car.").

110. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 112 (1995) ("With these important caveats, this parameterization of the bargaining game suggests three primary conclusions: [1] Sellers discriminate against different buyer types for different reasons. Cost-based inferences may explain part of sellers' discrimination against black females while consequential animus may explain part of sellers' discrimination against black males; [2] The sellers' bargaining behavior is inconsistent with associational animus but supports - especially regarding black males - consequential animus as a partial cause of the sellers' discrimination; and [3] The sellers' bargaining behavior is broadly consistent with revenue-based statistical inferences as a partial cause of the sellers' discrimination.").

111. Gifford, *supra* note 89, at 64.

must either gain leverage or pick another strategy to be effective.¹¹²

As noted earlier, another key consideration in developing a negotiation strategy is the future relationship with the opposing party.¹¹³ More hardline, competitive approaches to negotiation are likely to breed resentment and animus that could result in long-term challenges, should parties be interested in a long-term relationship.¹¹⁴ By contrast, one-shot transactions could be attractive candidates for a more aggressive negotiation strategy.¹¹⁵

Additional considerations for selecting a negotiation strategy might include the pressure to reach an agreement (which might result in a more conciliatory approach), the attitude of a negotiator's client (which might influence the extent to which a client might find a noncompetitive approach acceptable), or social and cultural negotiation norms.¹¹⁶

B. EVALUATING NEGOTIATION STRATEGIES AND OUTCOMES IN CASE STUDIES

This section applies the basic principles of negotiation theory to the three case studies previously introduced to determine the efficacy of various negotiation strategies in the context of mining-related disputes. This Note does not intend or aim to criticize the decision-making of any of the parties involved, but instead to develop a set of lessons learned and put forth a set of indices for negotiation outcomes.

1. Crandon Mine

While the Sokaogon Chippewa's purported preferred outcome in the Crandon mining dispute was the minimization of environmental harm to local waterways (in particular, the Chippewa's wild rice lakes), in practice their preferred outcome was the prevention of the opening of any mine near Crandon.¹¹⁷ The Sokaogon believed, with good reason, that it was impossible for Exxon or Rio Algom to open a mine that would not critically

112. Gifford, *supra* note 89, at 64.

113. Goodpaster, *supra* note 83, at 326.

114. Goodpaster, *supra* note 83, at 326.

115. Gifford, *supra* note 89, at 65.

116. Gifford, *supra* note 89, at 66–68.

117. GEDICKS, *supra* note 33, at 59–82.

jeopardize their water quality and, consequently, cultural practices and local economy.¹¹⁸ This hardline stance on the part of the Sokaogon all but foreclosed any opportunity for integrative negotiation, as it put Exxon's economic interest in a mine in direct conflict with the Sokaogon's goals.¹¹⁹

Although the Crandon mine conflict took on many phases over the course of several decades, the Sokaogon Chippewa's early responses to Exxon's exploratory project in 1976 were notable for their forward-thinking and aggressiveness.¹²⁰ Given the framing of the Sokaogon as the weaker negotiating party in a competitive negotiation regime, their aggressive moves are legible as rational attempts to improve their own relative position.¹²¹ Within five years of Exxon's discovery of zinc-copper deposits near Crandon, the Sokaogon established a tribal mining committee, hired lawyers, sought help from various organizations, and established ties with grassroots groups that had successfully mobilized against copper mining in Wisconsin.¹²²

While these early moves did not directly improve the Sokaogon's negotiation position vis-à-vis Exxon, each of these maneuvers gave them resources to improve their relative negotiation position when the conflict inevitably escalated. For instance, the tribe's establishment of a dedicated tribal mining committee allowed them to make more informed negotiation and planning choices—speaking directly to the competitive negotiation's assumption that informational advantages translate directly to negotiation advantages.¹²³ The Sokaogon's early solicitations for financial assistance can be understood to confer at least two major positional advantages: first, this fundraising made the financial offers from Exxon for exploratory

118. GEDICKS, *supra* note 33, at 62 ("An Exxon engineer once pointed to the terrain map of the mine and said that, from the standpoint of the wetlands, the groundwater, and the overall topography, 'You couldn't find a more difficult place [in the world] to mine.'").

119. See, e.g., Gifford, *supra* note 89, at 54 ("Integrative bargaining is usually associated with a situation in which the parties' interests are not directly opposed and the benefit of one widget for one party does not necessarily result in the loss of one widget for the opponent.").

120. GEDICKS, *supra* note 33, at 67.

121. Gifford, *supra* note 89, at 64.

122. GEDICKS, *supra* note 33, at 67–68.

123. Gifford, *supra* note 89, at 49.

rights far less attractive.¹²⁴ By improving the Sokaogon's baseline financial state, they effectively improved their BATNA in the negotiations with Exxon (and later, Rio Algom). Second, the financial assistance from nongovernmental organizations and private foundations gave the tribe the resources to sustain protracted legal battles. The threat of lengthy and costly litigation functionally worsened Exxon's BATNA should the parties reach an impasse.

While these measures are largely traditionally recognized forms of improving a party's negotiating strength, the Sokaogon's coalition-building should be contextualized as a sophisticated, long-term attempt to gain leverage and improve negotiating strength. In fact, the flexibility of the robust social movement the tribe established made it arguably their greatest asset in the initial conflict with Exxon in the 1970s and 1980s. As contemporaneous reports on mining in Northern Wisconsin point out, time delays in mining projects can enable such opposition to foment, which can be fatal to mining projects.¹²⁵ The Sokaogon coalition's flexible approach allowed them to apply pressure at several key inflection points in the 1980s, from challenging Exxon's prospecting permit in 1980 to sustaining a multi-year Exxon shareholder campaign.¹²⁶ In 1984, the Sokaogon were able to use the threat of a shareholder resolution to force Exxon's management to negotiate about investing in pyrite removal in tailings ponds.¹²⁷ In tandem with falling mineral prices, such efforts were likely the fatal blow for the initial Exxon project in 1986.¹²⁸

The Sokaogon's coalition again proved its strategic value when the battle over the Crandon mine reignited in the 1990s. The coalition was instrumental in the passage of the 1998 Mining Moratorium Law, though the coalition was unable to slow or halt the State of Wisconsin's challenge to the Mole Lake Band's TAS status.¹²⁹

124. GEDICKS, *supra* note 33, at 63 (noting the \$20,000 check sent by Exxon to the Sokaogon Tribal Chairperson in 1975 which was dramatically torn to pieces by the tribal council).

125. GEDICKS, *supra* note 33, at 69.

126. GEDICKS, *supra* note 33, at 69–77.

127. GEDICKS, *supra* note 33, at 74.

128. GEDICKS, *supra* note 33, at 76.

129. ALI, *supra* note 10, at 88–89.

However, as important as the other positional advantages conferred by the Sokaogon's long-term planning and forward thinking were, it is difficult to argue that the Sokaogon's ultimate granting of TAS status was not the single most positional advantage in the entire history of the Crandon mine conflict.¹³⁰ By directly claiming sovereignty over all the water within the reservation regardless of ownership, the tribes decisively won the "stronger" negotiating position of the parties and, as such, were free to unilaterally shut down all negotiations.

2. Black Mesa Peabody Mine

The fractious nature of the Hopi and Navajo tribes makes identifying a single unified goal or desired outcome in the Black Mesa Peabody Mine dispute difficult. However, the Hopi and Navajo's current demands that the lease be renegotiated rather than expelling Peabody altogether suggest that the parties were and are more open to mining projects than the Sokaogon.¹³¹ This means that, whereas the Sokaogon's decisions could only be understood through a competitive negotiation lens, the Navajo's strategy may also be analyzed through noncompetitive strategies (either compromise or integrative).¹³² By contrast, most evidence for Peabody's decision-making process is consistent with a competitive negotiation strategy.¹³³ The agreement is so lopsided in favor of Peabody that it is difficult to conceive of it being an attempt to achieve a fair solution for both parties on the part of Peabody.¹³⁴

Although little documentation exists on the early days of the negotiation between Peabody, the Navajo, and the Hopi, a few general observations about the initial positions of the parties can be made. Most crucially, the fact that the proposed mine straddled Hopi and Navajo lands, compounded by the fact that relations between the Hopi and Navajo were strained, had significant consequences for the parties' negotiation power.¹³⁵

130. ALI, *supra* note 10, at 88–89.

131. *United States v. Navajo Nation*, 537 U.S. 488 (2003).

132. Gifford, *supra* note 89, at 62–65.

133. ALI, *supra* note 10, at 82.

134. ALI, *supra* note 10, at 82. (noting that the original agreement provided the Hopi with so little compensation as to be "laughable" according to one law professor).

135. ALI, *supra* note 10, at 82.

Whereas the Sokaogon established a mining committee responsible for the gathering and centralization of information about the Exxon mining project and similar projects, the strained relations between the Hopi and Navajo likely resulted in informational asymmetry between the tribes and Peabody. As demonstrated in theory and practice in this Note, this can have disastrous consequences against an opponent engaged in competitive negotiation.¹³⁶ Beyond informational disadvantages, the Hopi and Navajo likely suffered from their fractured position; their inability to effectively pool resources in the initial 1966 negotiation process likely contributed to the disastrous leasing agreements. As noted earlier, the efficacy (and even loyalty) of John Boyden, the lawyer representing the Hopi in the transaction, has come under question by recent scholarship.¹³⁷ While the bargaining positions of the Hopi and Navajo were always likely to be weak in the 1960s regardless of choice of counsel, the tribe's inability to retain effective legal representation throughout the negotiation process almost certainly harmed the parties.¹³⁸

Given the Navajo's inability to make satisfactory progress at the negotiating table with Peabody throughout the second half of the 20th century, their pivot towards applying pressure on the federal government is unsurprising. However, this move can be understood as an attempt to improve their negotiating position vis-à-vis Peabody.¹³⁹ As noted earlier, the Navajo's legal contention was that the Bureau of Indian Affairs failed to uphold their fiduciary duties to the Navajo in the negotiation process with Peabody.¹⁴⁰ Were either suit successful, the consequences could have been significant for the Navajo's negotiating position: the United States federal government would have a heightened legal obligation to support the Navajo in lease negotiations.

136. Gifford, *supra* note 89, at 49.

137. ALI, *supra* note 10, at 82. See also Marley Shebala, *Lawsuits Shed Light on Peabody's Clout*, NAVAJO TIMES (Aug. 29, 2011), <https://navajotimes.com/news/2011/0811/082911peabody2.php>.

138. ALI, *supra* note 10, at 82.

139. It is important to remember that negotiation theory is not the only lens through which to understand the Peabody mine dispute. The Navajo's decision to pivot to directly suing the federal government could just as easily be understood as another form of dispute resolution altogether – a form of dispute resolution that was far more likely to result in clear win-lose outcomes and came with a higher risk of setting dangerous precedent.

140. *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Instead, the Supreme Court's affirmation that the Bureau of Indian Affairs has no such fiduciary duty in any available source of law makes them a weaker negotiation partner—both in perception and in fact. As noted earlier, perceived strength is crucial in competitive negotiation.¹⁴¹ Moreover, perceptions around strength are often racialized and hinge on racialized assumptions about BATNAs.¹⁴² The Supreme Court's rulings regarding the Bureau of Indian Affairs' fiduciary duties (or, more precisely, lack thereof) almost certainly further weakened the Navajo Nation's already weak negotiation position.

3. Oak Flat Mine

The Apache Stronghold's conflict with Resolution Copper is notable in this analysis in that the two parties have never engaged in traditional, formal negotiations like the Sokaogon and Exxon or the Navajo and Peabody. The initial land swap, which would give Resolution Copper possessory rights over the mining site at Oak Flat, faced no formal legal challenge until January 2021, almost seven years after Congress authorized the swap.¹⁴³

Like Sokaogon, Apache Stronghold appears to be committed to negotiation positions that will lock them into a zero-sum negotiation with Resolution Copper. Because Apache Stronghold contends that the Resolution Copper mining project will completely destroy the religious sites at Oak Flat, they oppose the construction of the project outright.¹⁴⁴ Accordingly, their approach can and should be understood within the competitive negotiation framework. As the weaker party in the competitive negotiation regime, their lawsuit against the federal government to stop the land transfer and revoke Resolution Copper's possessory rights would improve their relative strength by forcing the government to intervene on their behalf and by weakening Resolution Copper's claim to the land.

Apache Stronghold's demonstrations, communication strategies, and coalition-building efforts can also be understood as attempts to gain leverage. The group touts a broad-based coalition of supporting members including the Sierra Club, the

141. Goodpaster, *supra* note 83, at 341.

142. Ayres, *supra* note 108; Ayres, *supra* note 109.

143. Fonseca & Snow, *supra* note 77.

144. Devereaux, *supra* note 72.

American Civil Liberties Union, and dozens of tribes.¹⁴⁵ However, in a marked difference from the Sokaogon approach, Apache Stronghold, a registered 501(c)(3), did not form until 2015, a year after the land swap took effect.¹⁴⁶ As noted in the Crandon case, time is one of the greatest assets a tribal organization can have in mining disputes. The ability to build and leverage robust social coalitions as early as possible is critical for them to have the maximal effect. The Apache Stronghold's relatively weak negotiating position appears at least somewhat attributable to their lack of time to effectively organize to build leverage.

Despite these challenges, there are some reasons in the most recent eleven-panel en-banc 9th Circuit decision for cautious optimism. Although the majority's per curiam opinion ultimately denied Apache Stronghold's request for injunctive relief, it also overturned *Navajo Nation v. U.S. Forest Service*.¹⁴⁷ In so doing, the 9th Circuit effectively expanded the definition for what constitutes a "substantial burden" under RFRA, which may make it easier for future plaintiffs to show that government action restricting access to religious sites constitutes a violation of RFRA.¹⁴⁸ A plausible explanation for Apache Stronghold's improved outcome is that they have found new allies since their initial filing in district court: religious liberty advocates.¹⁴⁹ Several religious liberty groups filed amicus briefs on behalf of Apache Stronghold, including one brief filed by a coalition of the Church of Jesus Christ of Latter-Day Saints, the General Conference of Seventh-Day Adventists, the Islam and Religious Freedom Action Team of the Religious Freedom Institute, and the Christian Legal Society.¹⁵⁰ These new coalition members, which have increased leverage under a Supreme Court that approaches questions of religious liberty far differently than the

145. *Alliances & Allies*, APACHE-STRONGHOLD, <http://www.apache-stronghold.com/alliances.html> (last visited Apr. 14, 2024).

146. *Form 1023-EZ for Apache Stronghold*, 501C3 LOOKUP, <https://501c3lookup.org/form1023.cfm?lookup=fa06c49f745d7c3cd5709fa52ae77e85> (last visited Apr. 14, 2024).

147. *Apache Stronghold*, 95 F.4th at 614.

148. *Id.*

149. Alejandra Molina, *Jews, Muslims, Sikhs and Christians unite in support for Apache fight to save Oak Flat*, EARTHBEAT (Jan. 21, 2023), <https://www.ncronline.org/earthbeat/justice/jews-muslims-sikhs-and-christians-unite-support-apache-fight-save-oak-flat>.

150. *Id.*

Supreme Court of a decade ago, could meaningfully change the trajectory of Apache Stronghold's challenge.¹⁵¹

4. Indicators of Success and Opportunities for Collaboration

From the Sokaogon, Navajo, and Apache Stronghold's cases, there are a few general conclusions about mining disputes and the efficacy of various negotiation strategies. First and foremost, time and information are the best resources a tribe can have. Even in cases where a noncompetitive negotiation strategy is adopted (which is typically ill-advised given the tendency of mining companies to take competitive negotiation strategies), the nature of such disputes means that tribes start off any negotiation from a place of reactivity because mining plans are only made public once a mining company has decided to move forward. As such, the mining company almost always starts off a negotiation already informed and prepared, and tribes are left reacting. Therefore, a tribe aiming for an effective negotiation process should work as quickly as possible, as early as possible, and prepare for a contentious and drawn-out negotiation process.

Tribes should also work to improve their BATNA to the extent possible. Because this aspect of negotiation is about an opponent's perception of a party's position, efforts to conceal these advancements may actually be counterproductive. As soon as feasible, tribes pursuing a successful negotiation should seek out all forms of support possible—from financial support to coalition-building. Relatedly, inroads with coalitions, politicians, and lobbyists should be made quickly. Such efforts should not be seen as an alternative to negotiation or legal advocacy, but as an integral part of those processes. Creative thinking in leveraging coalitions, particularly in public forums such as shareholder meetings and in the permitting process, should be encouraged. On a similar note, in cases where two tribes are responsible for negotiations, the two tribes should seek to act as a unified party for the sake of negotiation. Although tribes often have conflicting and opposing positions, it is also often the case that tribes have

151. John Kruzel, *LGBT rights yield to religious interests at US Supreme Court*, Reuters (Jul. 3, 2023), <https://www.reuters.com/legal/lgbt-rights-yield-religious-interests-us-supreme-court-2023-07-01/>, (noting the “dramatic” ideological shifts in the Supreme Court “recalibrated how it weighed conservative Christian causes against the dignity interests of people protected by civil rights laws”).

more to gain from negotiating together than separately. Finally, where possible, tribes should seek to take advantage of mechanisms of the federal government that expand their sovereignty and rulemaking authority, like TAS designation.

IV. CONCLUSION

Turning back to the Thacker Pass mining dispute, the principles of negotiation theory analyzed and identified in this Note may give some cause for concern for those interested in tribal sovereignty. Since the 1990s, non-tribal environmental activist coalitions have been a core part of tribal negotiation strategy with mining companies.¹⁵² A broad-based cross-racial and cross-class coalition of community members opened up a host of strategies to the Sokaogon in the Crandon mine dispute: from triggering shareholder disputes within Exxon to achieving legislative victories through protest and lobbying, activist firepower gave the Sokaogon the ability to create pinch points in negotiations with Exxon at several key junctures. However, the growing rift between environmentalists and green energy advocates puts the tool of activist leverage in jeopardy.¹⁵³ Unlike the rift between white anti-treaty conservationists and pro-treaty conservationists in Wisconsin in the 1990s, the pro-mining green energy contingent seems unlikely to be sidelined.

The ascendancy of a pro-mining green energy faction within U.S. politics creates a second major problem for the negotiating power of tribes: the role of the federal government. While the role of the federal government has been complex and varied throughout the history of the United States, the Biden administration's decision to take an active role in the Thacker Pass mine marks a shift from the cases of the Crandon mine and the Peabody mine, where the federal government was actively helpful or passively unhelpful respectively.¹⁵⁴ Rather, the case is more in line with the Oak Flat mine dispute, where the federal government's involvement in support of the mine has made a favorable negotiated outcome for the tribes all but impossible by

152. See e.g., Loew & Thannum, *supra* note 33, at 161; Grossman, *supra* note 33, at 2–3; GEDICKS, *supra* note 33, at 7.

153. Jonathan Chait, *Why are Environmental Activists Trying to Block Green Energy?*, INTELLIGENCER (Sept. 9, 2022), <https://nymag.com/intelligencer/2022/09/why-are-environmental-activists-trying-to-stop-green-energy.html>.

154. Sonner, *supra* note 1.

severely weakening the tribe's negotiation power. Also as in that dispute, the Western Shoshone and Paiute tribes have employed similar legal arguments about the sacredness of the land as a method to oppose the mine.¹⁵⁵

Despite the apparent imbalance of the parties, there are still important reasons for the Bureau of Land Management and the Lithium Nevada Corp. to employ a more integrative negotiation strategy with the Shoshone and Paiute: they are long-term neighbors. While the competitive bargaining model has obvious appeal as a way to secure immediate gains, the life-cycle of a mine can be many decades, and in some cases, over a century.¹⁵⁶ Because the integrative approach often yields better outcomes in cases where the preservation or maintenance of a long-term relationship is prioritized,¹⁵⁷ the fact that Lithium Nevada Corp. will have to contend with the Shoshone and Paiute for decades means that an all-or-nothing approach may cause decades of costly and tumultuous conflict, as in the Peabody mine example.

Regardless of how the Thacker Pass mining dispute resolves, the intersection of tribal mining disputes and dispute resolution theory remains fertile ground for analysis and creative problem-solving. Although this note focused primarily on negotiation theory, tribes and their mining company counterparts engage in a variety of complex dispute resolution tactics that can and should be understood within broader dispute resolution frameworks. Future scholarship and research in this field should seek to apply other dispute-resolution theory to tribal mining disputes. While some scholarship already exists on the question of how sovereign immunity for tribes impacts whether arbitration agreements with tribes are binding,¹⁵⁸ expanding those inquiries to a broader investigation of the relationship between dispute resolution and tribes is new and important work.

155. *Id.*

156. *Copper Mining and Processing: Life Cycle of a Mine*, U. ARIZ.: SUPERFUND RSCH. CTR., <https://superfund.arizona.edu/resources/modules/copper-mining-and-processing/life-cycle-mine> (last visited Apr. 14, 2024) ("The extraction stage can take from 5-30 years to complete, although many mines have been open for more than 100 years[.]").

157. Goodpaster, *supra* note 83, at 326.

158. See e.g., Devin Ryan, *Off the Reservation: Native American Tribes Reasserting Sovereign Immunity to Trump Arbitration Agreements*, 4 ARB. L. REV. 286 (2012).

Tribes are sophisticated and intelligent parties that are subject to substantial conflict with mining companies and the federal government. The fact that they are remarkably open about their strategies, constraints, and goals makes them excellent leaders and teachers in negotiation theory and dispute resolution more broadly. While recent trends in federal government policy on mining have been troubling, the author hopes that this contribution summarizing achievements and challenges in mining negotiations can assist in some way to help community leaders and decision-makers at mining companies come to informed, productive, and safe agreements.
