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The Historical Policy of Federal Restraints on Resource Development in Indian Country

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Citation Information

Williams,, Robert A. Jr., "The Historical Policy of Federal Restraints on Resource Development in Indian Country" (1988). *Natural Resource Development in Indian Country (Summer Conference, June 8-10)*. <https://scholar.law.colorado.edu/natural-resource-development-in-indian-country/3>

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Robert A. Williams, Jr., *The Historical Policy of Federal Restraints on Resource Development in Indian Country*, in *NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

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THE HISTORICAL POLICY OF FEDERAL RESTRAINTS
ON RESOURCE DEVELOPMENT IN INDIAN COUNTRY

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

Natural Resources Law Center
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June 8-10, 1988

THE HISTORICAL POLICY OF FEDERAL
RESTRAINTS ON RESOURCE DEVELOPMENT
IN INDIAN COUNTRY

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Summary

Natural resource development in Indian country takes place, if at all, against the backdrop of the three great doctrines of federal Indian law and policy. (These are the doctrines of federal plenary power in Indian affairs, the trust doctrine imposing fiduciary responsibilities on the federal government in managing Indian country resources, and the doctrine of diminished tribal sovereignty which secures limited autonomy for tribal governments in our federal system of government.)

This talk addresses the historical development of the plenary power, trust and tribal sovereignty doctrines, beginning with a discussion of origins in American Revolutionary era history, the English feudal common law, and the European Law of Nations. The history of Federal statutory restraints on resource development in Indian Country, beginning with the 1790 Non-Intercourse Act, reveals the flexible adaptation of these three principal doctrines to the requirements of the Nation's shifting federal Indian policies

over time. While the plenary power, trust, and tribal sovereignty doctrines have demonstrated a remarkable manipulability, the doctrinal framework of federal Indian law and policy is widely perceived today as one of the principal barriers confronting tribal nations as they seek to manage and develop their natural resources in the context of a federal policy encouraging Indian autonomy and self-determination.

B. General References

1. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.)
2. F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1970).
3. Clinton & Hotopp, JUDICIAL ENFORCEMENT OF THE FEDERAL RESTRAINTS ON ALIENATION OF INDIAN LAND: THE ORIGINS OF THE EASTERN LAND CLAIMS, 31 ME. L. REV. 17 (1979).
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5. Chambers & Price, REGULATING SOVEREIGNTY: SECRETARIAL DISCRETION AND THE LEASING OF INDIAN LANDS, 26 STAN. L. REV. 1061 (1974).
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NATURAL RESOURCE DEVELOPMENT
IN INDIAN COUNTRY

The Historical Policy of Federal
Restraints on Resource Development
in Indian Country

Outline

- I. The Feudal Background of Federal Indian Law: Plenary Power, The Trust Doctrine and Tribal Sovereignty
 - a. Federal plenary power in Indian affairs and the American Revolution Federal-State conflicts over control of American Indian lands and resources trace back to the Revolutionary era
 - b. The trust doctrine and the King's Two Bodies. The English feudal common law provides the background of the White Man's Burden of managing the Indian's estate
 - c. Tribal sovereignty and the Natural Law tradition. The legal status of infidel peoples in the European Law of Nations is the source of the diminished self-determination rights of Indian nations in United States law

- II. The Early Federal Period - The Non-Intercourse Acts and the Policy of Benign Apartheid.
 - a. The 1789 Constitution and the Indian Commerce Clause assert the paramountcy of federal control in Indian affairs
 - b. The Non-Intercourse Acts (25 U.S.C. § 177) implemented federal restraints on Indian lands.
 - c. The Reservation System and the 19th century idea of Indian Country embodied a policy of segregating Indian Nations and lands from the dominant and dominating white society

- III. The Engines of Civilization Allotment, the Indian Reorganization Act, and the Leasing of Tribal Lands
 - A. Early Leasing Schemes During the Allotment Era: 1891-1934.
 - B. The Indian Reorganization Act of 1934 and the Indian Mineral Leasing Act of 1938 (25 U.S.C. § 396a

[1982]) provide the modern statutory framework for resource development in Indian Country.

IV. Shifting Paradigm: , The Lessons of History, and the Unbearable Lightness of Doctrine in Contemporary Indian Law and Policy

- a. The modern critique of the plenary power doctrine rejects unbridled federal power in Indian affairs. Will/can international law provide constraints on the superior sovereign's will?
- b. "Spoliation is not management." Modern courts have enforced limited fiduciary restraints on the federal government. As tribal governments assume greater control of resource development, what is the place of the trust doctrine in modern federal Indian law and policy?
- c. An Enemy of the People? Can tribal sovereignty be harmonized with traditions of tribal consensus as tribal governments grapple with the problems and controversies raised by natural resource development on Indian Nations?