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## PLENARY ENERGY

*Carla F. Fredericks\**

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### I. INTRODUCTION

Indian tribes and individual Indians possess an enormous stake in domestic mineral resources: 55 million surface acres and 57 million acres of subsurface mineral estates, all of which is held in trust for them by the United States.<sup>1</sup> This vast acreage is mineral-rich, and it and the mineral estates themselves remain largely untapped.<sup>2</sup>

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\* Director, American Indian Law Program; Associate Clinical Professor; University of Colorado Law School. I would like to express deep gratitude to my research assistant, Michael Holditch, as well as thank Kristen Carpenter, Sarah Krakoff, Charles Wilkinson, Monte Mills, Deborah Cantrell, Brad Bernthal, Helen Norton, Kristelia Garcia, Blake Reid, and Rich Bienstock for helpful comments; participants in Works-in-Progress at the University of Colorado Law School and the Federal Bar Association Indian Law Section for advice, ideas, and helpful discussion; and Tom Fredericks, the Ute Indian Tribe, the Spokane Tribe of Indians, the Coalition of Large Tribes, United Nations Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz, Rebecca Adamson, and Tex Hall for the opportunity to experience the complexities of this topic firsthand. Any errors are mine alone.

The main complicating factor for tribes and individual Indians considering development of their mineral wealth is the unique status of their lands, whereby the United States, as trustee, holds Indian lands in trust for the benefit of Indians.<sup>3</sup> As a result, these “tribal trust lands” are treated as federal lands and are therefore subject to the complex, onerous, and manifold federal laws and regulations applicable to federal lands.<sup>4</sup>

Federal Indian policy generally is a continuum spanning the United States’ control over and obligation to Indians as trustee on the one end and tribal self-determination on the other. Where tribal autonomy is highest, the trust relationship retreats, and where the trust is the most robust, tribal self-determination becomes constrained.<sup>5</sup> The three federal statutes that govern

<sup>1</sup> *Energy Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 18 (2012) [hereinafter *Energy Development Hearings*] (statement of Jodi Gillette, Deputy Assistant Sec’y of Indian Affairs). This testimony also contains the following statement on the eye-opening abundance of energy resources on tribal lands: “In consultation with tribes, the Office of Indian Energy and Economic Development . . . ha[s] assisted Tribes and allottees in the exploration and development of 2.1 million acres of active and 15 million acres of potential energy and mineral resources.” *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 1 (2015) [hereinafter 2015 GAO REPORT].

<sup>2</sup> See Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LA. ST. U. J. ENERGY L. & RESOURCES 195, 211 (2014) (“In 2008, the DOI estimated that Indian lands contain over 5 billion barrels of oil, 37 trillion cubic feet of natural gas, and 53 billion tons of coal that are technically recoverable with current technologies.”); Shawn Regan, *Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development*, PERC POLICY PERSPECTIVE, Feb. 2014, at 13–16, <http://www.perc.org/sites/default/files/pdfs/IndianPolicySeries%20HIGH.pdf> [hereinafter *Unlocking the Wealth of Indian Nations*]; see also U.S. DEP’T OF ENERGY, GEOSPATIAL ANALYSIS OF RENEWABLE ENERGY TECHNICAL POTENTIAL ON TRIBAL LANDS (2013). According to a recent study, these Indian energy resources amount to 30% of this nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and gas reserves. MAURA GROGAN, REBECCA MORSE & APRIL YOUPEE-ROLL, NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 7 (2011), [http://www.resourcegovernance.org/sites/default/files/RWI\\_Native\\_American\\_Lands\\_2011.pdf](http://www.resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf).

<sup>3</sup> See *Energy Development Hearings*, *supra* note 1, at 20. This testimony contains the following:

Since 2008 IEED has assisted Indian mineral owners in the negotiation of 48 IMDA leases for oil, gas, renewable energy, and aggregate totaling approximately 2,750,000 acres and about \$45 million in bonuses (upfront payments). These leases have the potential to produce over \$20 billion in revenue to the Indian mineral owner over the life of the leases through royalties and working interests.

*Id.* “In the last 25 years, Congress has provided about \$83 million in funding to the Department for projects to assess and help develop energy and mineral resources information on Indian trust lands.” *Id.* at 17; see also 25 U.S.C. § 177 (2013); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS 108–14 (1984).

<sup>4</sup> See 2015 GAO REPORT, *supra* note 1, at 15.

<sup>5</sup> See Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291 (2005).

Indian energy—the Indian Mineral Leasing Act of 1938 (“IMLA”),<sup>6</sup> the Indian Mineral Development Act of 1982 (“IMDA”),<sup>7</sup> and § 3504 of the Energy Policy Act of 2005, or tribal energy resource agreements (“TERAs”)<sup>8</sup>—illustrate the unworkability of this tension.<sup>9</sup>

The challenge to develop Indian energy begs consideration of the role that exercise of congressional plenary power in instituting federal Indian policy can and should play in the development of resources on tribal land moving forward, especially in light of international consensus concerning indigenous rights. This Article suggests an addition to the trust-sovereignty continuum in tribal energy policy, whereby Congress would acknowledge the right of tribes and individual Indians to free, prior and informed consent over impacts to their lands, territories, or resources.

This Article is divided into several sections, meant to examine Indian policy and jurisprudence as currently applied to tribal energy policy. First, the plenary power doctrine is explained and set against the premise of the federal-Indian trust relationship; the current statutory regime is then contextualized in the eras of allotment, termination, and self-determination and set against relevant judicial decisions. Second, alternatives to congressional plenary authority and federal trust oversight are explored, both in the context of tribal sovereign action and within the human rights framework. Finally, recent congressional action on the Keystone XL pipeline is considered as possible insight into the irreconcilable tension between plenary authority of a political body and tribal consent in developing energy policy.

## II. FEDERAL INDIAN ENERGY POLICY ACT 1: THE ALLOTMENT AND REORGANIZATION POLICY AND THE INDIAN MINERAL LEASING ACT

The exercise of congressional plenary power as to Indian mineral resources is directly tied to statutes on land policy generally.<sup>10</sup> In 1887, just six

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<sup>6</sup> Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g (2013).

<sup>7</sup> Indian Mineral Development Act of 1982, 25 U.S.C. §§ 1201–1208.

<sup>8</sup> Energy Policy Act of 2005, 25 U.S.C. § 3504.

<sup>9</sup> See Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1100–01 (2008) (“Unlike the Indian Mineral Leasing Act, which encouraged tribal dependence on government decision-making, the modern statutes set forth a clear bargain. Tribes can take advantage of new options and increased practical sovereignty, but in exchange the government has a deeply discounted trust responsibility.”).

<sup>10</sup> See D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 5–6 (Francis Paul Prucha ed., U. of Okla. Press 1973); see also Peter F. Carroll, Note, *Drumming out the Intent of the Indian Mineral Leasing Act of 1938*, 7 PUB. LAND L. REV. 135, 136 (1986) (“In 1891, [The General Allotment Act of 1887] was amended to allow, for the first time, mineral leasing of Indian lands. The 1891 Act provided that the Secretary of the Interior (Secretary) could issue mineral leases on unallotted Indian lands ‘not needed for farming or agricultural purposes, and

years after the end of treaty-making, Congress unilaterally divided and allocated tribally owned lands among individual tribal members, with the passage of the General Allotment Act, or the Dawes Act.<sup>11</sup> The codification of the allotment policy as law “initiated an era in which national policy sought to assimilate the Indian into a Western European lifestyle.”<sup>12</sup>

Allotment was a wholesale change to federal Indian policy that affected every aspect of how tribal lands were handled, including mineral exploration and development.<sup>13</sup> Under the Act, lands “granted” to individual Indian allottees did not feature fee simple ownership, rather, the United States retained legal title to the land as trustee for the individual allottee. Therefore, an Indian landowner possessed only significantly encumbered “usufruct” or beneficial title whereby sale or lease was subject to the federal government’s approval.<sup>14</sup>

In 1891, Congress passed further legislation to address the issue of lease approvals on allotted Indian lands. The Act of February 28, 1891 provided, in relevant part,

That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes.<sup>15</sup>

Consistent with the trust-beneficiary relationship set forth in the Dawes Act, the 1891 Act specifically limited leases to those approved by the Secretary of the Interior.

Thirty-three years later, Congress passed The Act of May 29, 1924, allowing for extension of leases for mining purposes beyond the ten-year

are not desired for individual allotments. . . .’ Although the 1891 Act applied only to Indian lands that were bought and paid for, it did allow the Secretary to lease unimproved and unused allotments under certain conditions. The 1891 Act established the Indian mineral leasing program which was added to or amended several times in the next thirty years.” (citations omitted)).

<sup>11</sup> Pub. L. No. 49-119, 24 Stat. 388 (1887) (codified in scattered sections of 25 U.S.C.).

<sup>12</sup> See Carroll, *supra* note 10, at 136.

<sup>13</sup> See Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L. REV. 541, 552–53 (1994) (explaining that prior to the allotment era, Indians could not alienate minerals from their own lands without congressional approval). It was during the allotment era that Congress began to enact legislation allowing, under limited circumstances, allottees to lease their land for mineral development. *Id.*

<sup>14</sup> *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited Nov. 5, 2015); see OTIS, *supra* note 10, at 6.

<sup>15</sup> Act of Feb. 28, 1891, § 3, 26 Stat. 794.

restriction in the 1891 Act. The 1924 Act also provided that “production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands.”<sup>16</sup> Coinciding with states imposing taxing power over tribal land was the right of the Secretary of the Interior to “issue mineral leases on unallotted Indian Lands” pursuant to an 1891 amendment to the General Allotment Act of 1887.<sup>17</sup> The same 1924 statute that gave states the right to tax Indian mineral royalties provided that the Secretary could allow leases to “remain in effect as long as these leases were productive,” which loosened the strict ten-year limit imposed by the 1891 Act.<sup>18</sup>

In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461–494a (the “IRA”), or the Wheeler-Howard Act, which effectively ended allotment.<sup>19</sup> The IRA also sought to promote tribal self-government and self-determination toward restoring the rights of tribes to manage land and assets.<sup>20</sup> The IRA contained mechanisms for tribes to adopt written constitutions, authorized funds to aid tribal governments, and allowed the Secretary of the Interior to take land into trust for tribes.<sup>21</sup>

On May 11, 1938, Congress passed the Indian Mineral Leasing Act (“IMLA”). IMLA served to resolve a confused and inconsistent Indian mineral policy in the wake of the IRA and allotment; it lies furthest on the high-federal-trust low-tribal-sovereignty end of the spectrum. The historical context

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<sup>16</sup> OTIS, *supra* note 10, at 136–37; *see also* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Though Literature*, 82 N.D. L. REV. 605 (2006).

<sup>17</sup> OTIS, *supra* note 10, at 136 (citing Act of Feb. 28, 1891, ch. 383, 26 Stat. 794).

<sup>18</sup> *Id.* The decades leading up to the passage of the IRA established a federal-state scheme of control over mineral development on Indian lands and the benefits arising therefrom. There thus existed a dissonance between autonomy granted to Indians over their land in the IRA and the mineral leasing scheme that was currently in place, an incongruity leading to the passage of IMLA in 1938. *See also* Montana v. Blackfoot Tribe of Indians, 471 U.S. 759 (1985) (holding that Congress nullified the power of the states to tax Indian mineral leases in enacting IMLA).

<sup>19</sup> Joseph D. Matal, *A Revisionist History of American Indian Country*, 14 ALASKA L. REV. 283, 307 (1997); *see also* ALEXANDER TALLCHIEF SKIBINE, TOWARDS A TRUST WE CAN TRUST: TAKING THE DUTY TO TRANSFER LAND INTO TRUST FOR INDIAN TRIBES SERIOUSLY 9 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1639567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639567) (“One can argue that in enacting the IRA and re-establishing a government to government relationship with Indian tribes, Congress also rejected the rather racist version of the trust doctrine prevailing during the allotment era an[d] re-instated the original or Marshall version of the trust doctrine. Under this version, trust duties are not obligations that exist because Indians are weak and defenseless, poor, or incompetent, but arise because Indian tribes ceded millions of acres to the United States, either in treaties or through the doctrine of discovery, and in exchange, the United States promised that it would protect the tribes’ exclusive right to their territories and the right to exercise tribal self-government inside these territories.”).

<sup>20</sup> *See generally* ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (Jerome E. Edwards ed., 2000).

<sup>21</sup> Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2013).

surrounding IMLA is significant in framing and understanding the progression of trust and sovereignty regarding tribal energy policy. On a pragmatic level, certain factors were present during the passage of IMLA that may have contributed to the character of the statute. In fact, the Secretary himself initiated adjustments to the Indian mineral leasing program after the enactment of the IRA, which might help explain why the Secretary retained so much deference and oversight over mineral leasing in IMLA while the states lost their power to tax Indian mineral royalties.<sup>22</sup> In addition, IMLA functioned as the Indian energy leasing regulatory scheme necessary in the wake of increased tribal sovereignty recognized by the Indian Reorganization Act.

IMLA specifies that “unallotted 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.”<sup>23</sup> Alongside IMLA’s requirement that tribal mineral leases be approved by the Secretary of the Interior, a number of limitations on the leasing power of tribes and individual Indians are enumerated in the statute.<sup>24</sup> For example, specific parameters are placed on Indian lease terms, such as the provision in § 396a stating that leasing terms cannot “exceed ten years and as long thereafter as minerals are produced in paying quantities.”<sup>25</sup> Additionally, under IMLA, the Secretary of the Interior enjoys wide discretion as to whether the lease is appropriate and in the “best interest” of the Indians, extending into multiple aspects of the leasing process.<sup>26</sup> To wit, § 396b provides the Secretary may reject a leasing bid, even if that is the highest bid submitted, if the Secretary determines that accepting the bid will not be in the tribe’s best interest.<sup>27</sup> Ultimately, IMLA provides the Secretary of the Interior with virtually unbridled discretion over the processes involved in establishing Indian mineral leasing agreements.<sup>28</sup> However, this discretion is subject to the fiduciary obligation of the United States as trustee.<sup>29</sup>

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<sup>22</sup> See Carroll, *supra* note 10, at 137 (citing H.R. REP. NO. 75-1872, at 1 (1938)); see also *id.* at 138–44 (summarizing the holding and implications thereof in *Montana*, 471 U.S. 759 (1985), in which the Court based its ruling that the silence on taxation in IMLA did not imply a continuation of the taxing power the states possessed pursuant to the 1924 Act, and a lack of express provisions allowing state taxation stood as a preclusion of state taxing power).

<sup>23</sup> Indian Mineral Leasing Act, 25 U.S.C. § 396a.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* §§ 396b–396d.

<sup>27</sup> *Id.* § 396b.

<sup>28</sup> See *id.* § 396d (“All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any



If the IRA were the catalyst for IMLA, the implications for the government as trustee are necessarily complicated; IMLA reflects the IRA period's intentions for tribal self-determination but also its paternalistic structure and means. The IRA sought to give tribal governments the ability to organize themselves and manage their own affairs. IMLA settled the question of whether a state could tax mineral proceeds—it could not—but the federal-Indian relationship in Indian mineral leases remained inextricably intertwined and tribes still lacked full decision-making power over their lands and resources.<sup>30</sup>

The Supreme Court was also active during this period in its jurisprudence on the federal trust responsibility and Indian lands. The year of IMLA's passage also garnered the Supreme Court's decision in *United States v. Shoshone Tribe of Indians of the Wind River Reservation in Wyoming*,<sup>31</sup> holding that mineral rights on a reservation belonged not to the federal government, but to the tribe.<sup>32</sup> A few years after the passage of IMLA, the Supreme Court further endorsed a federal "trust" predicated on Indian dependence and land status in *Seminole Nation v. United States*,<sup>33</sup> affirming that the United States "has charged itself with moral obligations of the highest responsibility and trust" in carrying out treaty obligations.<sup>34</sup> By invoking a

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such lease which involves the development or production of oil or gas from land covered by such lease."). This section exemplifies the extensive and multi-leveled reach of Secretarial discretion under IMLA.

<sup>29</sup> *But see* *United States v. Navajo Nation*, 537 U.S. 488, 506–09 (2003). Though acknowledging the existence of a general trust relationship, the Court denies that IMLA or its regulations established a fiduciary relationship that supported a claim for monetary damages: "[T]he IMLA and its regulations do not assign to the Secretary managerial control over coal leasing. Nor do they even establish the 'limited trust relationship,' existing under the GAA; no provision of the IMLA or its regulations contains any trust language with respect to coal leasing." *Id.* (citations omitted).

<sup>30</sup> *See* *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 765–66 (1985) (using the Indian canons of construction, as well as the text and legislative history of IMLA, to determine that the Act did not give Montana consent to tax tribal royalty income); *see also* Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 308 (2006) (explaining that federal protection of tribes from state imposition is necessary for tribes to retain a meaningful degree of sovereignty). This illuminates a complicating federal-tribal dynamic in the context of this Article about the inverse relationship between federal trust and tribal sovereignty.

<sup>31</sup> 304 U.S. 111 (1938).

<sup>32</sup> *Id.* at 118.

<sup>33</sup> 316 U.S. 286 (1942).

<sup>34</sup> *Id.* at 296 (emphases added). Also of note in this part of the opinion is the description of the federal trust responsibility toward the tribes as a "humane and self imposed policy," reflecting a common law fiduciary role similar to that described in *Moose v. United States*, 674 F.2d 1277 (9th Cir. 1982). *Seminole Nation*, 316 U.S. at 296. *Moose* explains that courts have found a trust to be created where a property owner declares that he or she is holding the property for another's benefit. *Moose*, 674 F.2d at 1281 n.7.

moral obligation to Indians and describing the United States as “more than a mere contracting party” in executing its obligations to the tribes, the Supreme Court further elucidated the duties owed to Indian tribes and peoples in the treaty context as characterized by a trust relationship between the United States and Indian tribes transcendent of common law trust doctrine.<sup>35</sup> However, with a lack of precedent or common law boundaries to the trust relationship, a flexibility to the meaning of “trust” could emerge that would expose tribes to the possibility of exploitation by their federal trustee. Therefore, no firm, reliable, or enforceable mechanism has been developed to govern the relationship between the United States and Indian tribes.

This jurisprudential and political gap came to full expression in the following decade, when the United States Congress unilaterally abandoned the trappings of the trust relationship. On August 1, 1953, the House of Representatives announced their support for a new policy in House Concurrent Resolution 108 (“HCR-108”), whereby federal “supervision”—i.e., trust responsibility—over American Indian tribes would be abolished as soon as possible, and all Indians would become subject to the same laws, privileges, and responsibilities as other U.S. citizens.<sup>36</sup> In the ensuing years, well into the mid-1960s, Congress passed what became known as “termination” acts on a tribe-by-tribe basis.<sup>37</sup> The effect of the termination acts was to end federal recognition status for 109 tribes and bands as “domestic dependent nations”; “[a]pproximately 2,500,000 acres of trust land was removed from protected status” during these years, much of which became alienated to non-Indians.<sup>38</sup> For terminated tribes, the trust responsibility ended, as did federal recognition of their sovereignty.<sup>39</sup>

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<sup>35</sup> *Seminole Nation*, 316 U.S. at 296; see also *Moose*, 674 F.2d at 1281. In reference to the rule that there need be no specific “trust” language in the creation of the trust so long as the property owner declares the property is being held for the benefit of another, the *Moose* court states that “this general rule applies with perhaps greater than usual force to a situation where the United States holds funds for an Indian tribe because of the traditional and repeated emphasis on the fiduciary nature of the United States-Indian relationship.” *Id.* This helps explain how the court placed the Indian trust relationship within a common law trust context and from there described the particularly extensive degree to which trust duties apply in federal dealings with tribes.

<sup>36</sup> H.R. Con. Res. 108, 83d Cong. (1953).

<sup>37</sup> See, e.g., 25 U.S.C. §§ 564a–564x (2013) (termination of federal supervision of the Klamath Tribe).

<sup>38</sup> *History and Culture Termination Policy—1953–1968*, AM. INDIAN RELIEF COUNCIL, [http://www.nrcprograms.org/site/PageServer?pagename=airc\\_hist\\_terminationpolicy](http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_terminationpolicy) (last visited Nov. 5, 2015).

<sup>39</sup> See Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 142 (1977); Matthew L.M. Fletcher, *Statement Before the Senate Committee on Indian Affairs: Oversight Hearing on Fulfilling the Federal Trust Responsibility* (Mich. State Univ. Legal Studies Research, Paper No. 10-13, 2012), <http://ssrn.com/abstract=2060395>. See

### III. FEDERAL INDIAN ENERGY POLICY ACT 2: SELF-DETERMINATION BUT CONTINUED TRUST

The tide changed again in 1970, when Richard Nixon ended termination in a “Special Message to the Congress on Indian Affairs.” Nixon’s message articulated the essence of the current self-determination policy and stated that the national policy toward Indian affairs was to promote self-determination of tribes without termination of the federal trust relationship.<sup>40</sup> Critically, Nixon’s restoration of the federal trust relationship also featured a new recognition of a coexisting tribal self-determination:

Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian’s sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy.<sup>41</sup>

In immediate application, the national policy was statutorily manifest outside the mineral context in the 1975 Indian Self-Determination and Education Assistance Act (“ISDEAA”).<sup>42</sup> The ISDEAA embodies this dual

generally Michael C. Walsh, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1983).

<sup>40</sup> Richard Nixon, *Special Message to the Congress on Indian Affairs*, AM. PRESIDENCY PROJECT (July 8, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2573>.

<sup>41</sup> *Id.*

<sup>42</sup> Comfort with the notion that there exists a meaningful federal trust responsibility in an era where tribes seek control of federal programs and services may, at first blush, seem counterintuitive. In Robert McCarthy’s *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, McCarthy acknowledges difficulties in reconciling self-governance with the trust relationship. He cites specifically to the Tribal Government Task Force of the AIPRC stating that giving tribes control over trust resources implicitly terminates the trust

vision of tribal sovereignty and trust, providing for a willing tribe to contract its own services back from the federal government, as well as grant the tribe monies to assist them in building their capacity to achieve the ability to do so.<sup>43</sup> The ISDEAA also obliges the Secretary of the Interior and the Secretary of Health and Human Services to give requesting tribes control over federal Indian programs.<sup>44</sup> Under Title II of this statute, Congress also created the Self-Government program, which strives to empower participating tribes to an even further extent, increasing tribal control over Bureau of Indian Affairs programs.<sup>45</sup>

The tribal energy quandary still remained complicated for the United States, tribal nations, and allottees to resolve. Even after Nixon's 1970 directive, the high-trust, low-sovereignty IMLA continued to prescribe federal control over Indian mineral leasing arrangements. Frustrated, tribes began to seek other solutions. In 1975, for example, the Blackfoot Tribe expressed their sovereign will by entering into a "Petroleum Companies" arrangement with another tribe.<sup>46</sup> Following the attempts of the two tribes to circumvent IMLA requirements, the Solicitor for the Department of the Interior issued an opinion that IMLA authorized only leasing as a form of agreement.<sup>47</sup> Thereafter, attorneys from the Department of the Interior, working with tribal attorneys, drafted IMDA.<sup>48</sup>

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relationship. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 139 (2004). Notwithstanding the logical complications of maintaining that there exists a trust relationship in this era of self-determination, one must be mindful of the fact that the federal government protects the tribes from more than just itself. See *id.* at 133 (citing 25 U.S.C. § 450). In Sam Deloria's article, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, Deloria points out that the only feasible way of retaining any degree of tribal sovereignty beyond that which is "self-referential and abstract" is to uphold federal recognition of the tribes so that tribal governance continues to be protected from state and local government by the Supremacy Clause. Deloria, *supra* note 30, at 308. Seen in this light, retaining the federal relationship with tribes is vital to sovereignty rather than nullifying of it, and imposing upon itself specific trust duties simply may not be the most prudent option for Congress when considering potential judicial hostilities toward the reconcilability of sovereignty and federal oversight. *Id.* Of note in the self-governance context is that Deloria emphasized the need for federal recognition of tribes in order for states to "recognize their governmental character" and abide by the boundaries of a "juridical space" in which tribes can exercise their powers. *Id.*; see also U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

<sup>43</sup> Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458ddd2 (2013).

<sup>44</sup> *Id.*

<sup>45</sup> See *Indian Mineral Development: Hearings Before the Select Comm. on Indian Affairs to Consider S. 1894*, 97th Cong., 2d Sess. (1982) [hereinafter *IMDA Hearings S. 1894*]; S. REP. NO. 97-472 (1982).

<sup>46</sup> *IMDA Hearings S. 1894*, *supra* note 45.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

IMDA's legislative history establishes that tribes and the bill's proponents understood IMDA was to provide tribes with greater autonomy in decisions around the development of their mineral resources. In February of 1982, the Senate's Select Committee on Indian Affairs held hearings on the proposed bill. During these hearings, Senator John Melcher of Montana articulated the purpose of the bill as "to provide Indian tribes greater flexibility than they now have for the development and sale of their mineral resources."<sup>49</sup> Melcher also stated that the tribes should have "the right to negotiate terms of contracts like any other owner of valuable resources."<sup>50</sup> Tribal leaders and Indian advocates testifying at the hearing also lauded the increased flexibility the proposed bill provided. Representatives of the Blackfeet Tribe expressed a general support for the bill on the basis that "realization" of the self-determination policy adopted by the federal government required recognition that Indian tribes are "self-sufficient economic units."<sup>51</sup> This, in turn, required the ability of tribes to "make decisions regarding their resources."<sup>52</sup>

With more tribal autonomy, but full Secretarial engagement and approval, IMDA inched to the middle of the trust-sovereignty continuum. IMDA, like IMLA before it, requires Secretarial approval for Indian mineral agreements and grants deference to the Secretary in determining whether a given agreement is in the best interest of the tribe.<sup>53</sup> However, IMDA provides a wider variety of agreements for tribes to consider entering, including "joint venture, operating, production sharing, service, managerial, lease or other agreement[s]."<sup>54</sup> IMDA also retroactively applied to mineral agreements entered into between January 1, 1975, and December 22, 1982, that were approved by the Secretary but did not fall strictly under the category of lease, allowing for an affirmation of the legitimacy of a tribe's prior mineral agreements.<sup>55</sup>

Interestingly, discussion in the legislative process surrounding IMDA on the need for tribal self-determination and sovereignty coexisted alongside supporters' express belief that the federal trust responsibility and attendant oversight and approval responsibilities of the Secretary of the Interior present in IMLA were to remain intact. Throughout the legislative hearings and committee process, tribal leaders and advocates, as well as industry interests, voiced concern over the possibility of limiting federal trust oversight in favor of

<sup>49</sup> *Id.* at 1 (statement of Sen. John Melcher, Acting Chairman, S. Comm. on Indian Affairs).

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 14 (statement of the Blackfeet Tribe).

<sup>52</sup> *Id.* at 1–4.

<sup>53</sup> Indian Mineral Development Act, 25 U.S.C. §§ 2101–2107 (2013).

<sup>54</sup> *Id.* § 2101(a).

<sup>55</sup> *Id.* § 2104. The coverage of agreements back to 1975 served to legitimize the Blackfeet and Jicarilla Apache agreements that instigated the legislation.

tribal self-determination. John Gidley, Vice President of Fourstar Resources, stated, "If the Indian people were allowed to negotiate their own lease agreements without an agency established to interpret and evaluate the pending contracts, the legal departments of the oil industry would have a field day using contractual language with dual meanings."<sup>56</sup> George Hiwalker, Jr., Vice President of Northern Cheyenne tribal council, testified to express concern over the retroactive aspect of IMDA, worrying that the retroactive ratification did not necessarily entail that type of "particularized analysis" of those agreements that is required under the U.S. trust responsibility.<sup>57</sup> Senator Melcher declared that the proposed bill "leaves the Secretary to determine, by regulations, the terms tha[t] an agreement would include and the financial return to the tribe or individual."<sup>58</sup> The Secretary was thus understood to retain a high degree of oversight over the terms of the mineral agreements, cutting off unfettered tribal freedom at the level of choosing what types of mineral agreements to pursue.

In August of 1982, responding to the concerns about federal oversight, the House Committee on Insular Affairs submitted a revision of the proposed bill that added six specific factors for the Secretary to consider in deciding whether or not approval of a proposed Indian mineral agreement was in the best interest of the tribe.<sup>59</sup> The factors presented covered a wide range of considerations, including potential economic returns for the tribe from the proposed agreement, environmental impacts the agreement would have on tribal lands, and whether the agreement contains any provisions through which Indians are able to resolve disputes that may arise on a future date.<sup>60</sup> Required Secretarial consideration of these factors was incorporated into the final bill, reflecting the far-reaching extent to which Secretarial oversight remained an encompassing aspect of mineral development under IMDA.<sup>61</sup> Finally, in asking the Speaker of the House for unanimous consent of the Senate's amendments to the bill, former Secretary of the Interior Stewart Udall framed the intent of the bill as to provide Indians with greater risk and greater potential reward.<sup>62</sup>

IMDA passed in October 1982 as a conceptual embodiment of tribal self-determination fortified by the trust relationship. Although it sought to

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<sup>56</sup> *IMDA Hearings S. 1894*, *supra* note 45, at 137 (statement of John Gidley, Vice President, Fourstar Resources).

<sup>57</sup> *Id.* at 18 (statement of George Hiwalker, Jr., Vice President, N. Cheyenne Tribal Council).

<sup>58</sup> *Id.* at 3-4.

<sup>59</sup> H.R. REP. NO. 97-746 (1982).

<sup>60</sup> *Id.*

<sup>61</sup> See 25 U.S.C. § 2103 (2013) ("[T]he Secretary shall determine if it is in the best interest of the Indian tribe or of any individual Indian who may be party to such agreement and shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement . . .").

<sup>62</sup> 128 CONG. REC. 30,042 (1982).

provide tribes with greater flexibility to pursue and negotiate various types of mineral development agreements and retain the federal government's trust duties to ensure that the mineral agreements are ultimately in the tribe's best interests, IMDA also expressly limited the actionable remedies for tribes seeking to enforce those duties.

The case for heavy application of the trust responsibility and oversight in the approval process arises from the fact that the Secretary, not the tribe, is ultimately deciding to place legal obligations upon the tribe. However, the statutory language of IMDA removing liability from the United States for losses sustained from an approved mineral agreement while expressly declaring the continuance of the trust responsibility provides little guidance in defining the duties that the United States retains after approving a proposed agreement.

The legislative history of IMDA reflects an understanding that the statute was intended to give Indians the opportunity to engage in riskier mineral development endeavors with minimal protection from uneven bargaining power with mineral development companies. Stringent federal trust requirements during the Secretarial approval process would be useful to provide resources for tribes to mitigate the uneven negotiating power large oil companies may have over tribes. However, giving binding authority to the United States and then excusing the United States from liability for losses sustained during the course of a mineral agreement leaves tribes in danger of having to endure the terms of agreements rendered unprofitable by circumstances that could not have been foreseen by the Secretary at the time of approval. Without a remedy, requiring Secretarial approval for termination of these agreements becomes more of a bureaucratic obstacle that unduly lengthens the amount of time the agreement remains intact, in turn increasing damages sustained by tribes. The role of the trust responsibility in alleviating the consequences of these unprofitable agreements is central to determining whether the trust responsibility is a meaningful remedial mechanism under IMDA, but the contours of this trust obligation seemingly still lack unified definition.

The Secretary may be bound by other federal statutes existing outside of an approved IMDA agreement. The agreements do not necessarily exist in isolation, and the terms therein should thus not be viewed as laying out a fully integrated financial framework for the contracting parties without first considering these extraneous factors. This can work to the advantage or disadvantage of tribes, and it certainly begs consideration of the fact that IMDA expressly states that the Act does not limit federal responsibility over tribes in any way.

Importantly, § 2103(e) of the Act absolves the United States from liability for any losses that tribes sustain from a mineral agreement that has been approved by the Secretary.<sup>63</sup> However, IMDA itself has an enumerated trust provision: "the Secretary shall continue to have a trust obligation to ensure

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<sup>63</sup> 25 U.S.C. § 2103(e).

that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement," and "nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe."<sup>64</sup> The desire embodied in IMDA to preserve the federal trust relationship is significant in that tribal landowners recognized a certain value in the trust relationship that would offset the attendant complications of continued federal oversight and approval. But the question as to what the tribes actually received for ceding full energy sovereignty in return for the federal trust responsibility remains.

#### IV. IRRECONCILABLE PREMISES: THE PLENARY POWER DOCTRINE AND THE FEDERAL INDIAN TRUST RESPONSIBILITY

The Indian energy question shines a light on the interplay between the plenary power doctrine and the federal Indian trust responsibility. Congressional authority for legislating Indian energy resources sounds in the plenary power doctrine, a premise tied to the Commerce Clause of the U.S. Constitution, which authorizes the United States to "regulate commerce with foreign Nations, and among the several States, and *with the Indian Tribes*."<sup>65</sup> The plenary power doctrine also finds substantial roots in the famed trio of early American Indian Law cases now known as the "Marshall Trilogy," in which the Supreme Court laid a broad but enduringly influential foundation for defining the legal relationship between the United States and Indian tribes. Perhaps the most influential case among this trio in terms of establishing a conceptual backdrop for what became the plenary power doctrine was *Cherokee Nation v. Georgia*.<sup>66</sup> In its *Cherokee Nation* opinion, the Court christened Indian tribes "domestic dependent nations" and described the relationship between Indian tribes and the United States as resembling that of a "ward to his guardian."<sup>67</sup> This language has played a significant role in vindicating the United States' expansive and, at times, overbearing authority over tribes under the plenary power doctrine.

The genesis of the federal government's involvement in the mineral resources of tribes can be traced at least to the *Cherokee Nation* decision, and the legal canon describing a "trust relationship" between Indian tribes and the United States.<sup>68</sup> Marshall's reasoning that Indian tribes are "domestic

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<sup>64</sup> *Id.*

<sup>65</sup> U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

<sup>66</sup> 30 U.S. 1 (1831).

<sup>67</sup> *Id.* at 17.

<sup>68</sup> See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust*



dependent nations” and his re-characterization of the inherently sovereign relationship Indian tribes have toward the United States federal government to ward-guardian quantified the parameters of what is still law today: Tribes cannot be trusted to fully own their land and resources, and the responsibility for these riches is vested in the United States as trustee.<sup>69</sup>

The conceptual underpinnings of Justice Marshall’s decision lie in the Doctrine of Discovery, namely, that the United States, having discovered the land, had rights to its title.<sup>70</sup> At the time, the United States regularly had engaged in the process of treaty making and bargained-for, if not equitable, exchanges with tribes for their lands. The treaty-making practice ended in 1871 with the passage of the Indian Appropriations Act, whereby Congress ceased to recognize tribes within the United States as independent nations “with whom the United States may contract by treaty.”<sup>71</sup>

Case law following the Marshall Trilogy has both confirmed the existence of and expounded upon the plenary power and attendant trust doctrines. In the 1886 case *United States v. Kagama*,<sup>72</sup> the U.S. Supreme Court decided that Congress possessed statutory jurisdictional authority to punish an Indian for murdering another Indian within reservation boundaries.<sup>73</sup> In its opinion, the Court used language reflecting the “ward to his guardian” perception from *Cherokee Nation*, stating that the “power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”<sup>74</sup> Though the *Kagama* Court did not explicitly refer to a “plenary power” over tribes, this articulation of the federal government’s wardship powers has been cited by courts as a foundational precedent when invoking the plenary power doctrine.<sup>75</sup> Further, since the

*Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995); see also Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 361 (2006).

<sup>69</sup> *Cherokee Nation*, 30 U.S. at 17.

<sup>70</sup> See generally ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 3–9 (2010).

<sup>71</sup> Indian Appropriations Act of 1871, ch. 120, 16 Stat. 566. See generally Gover, *supra* note 68; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

<sup>72</sup> 118 U.S. 375 (1886).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 384.

<sup>75</sup> See *Stephens v. Cherokee Nation*, 174 U.S. 445, 485–86 (1899); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–67 (1903); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 180–81 (2002) (explaining how the term “plenary power” was first used in reference to congressional power over Indian affairs in *Stephens v. Cherokee Nation*, in which the Court derived its finding of plenary power from the “wardship power announced in *Kagama*”).

Court's 1903 opinion in *Lone Wolf v. Hitchcock*, Congress has enjoyed judicially-created exclusive plenary power over all Indian-related matters, and any legal or moral obligations the federal government has toward Indians constraining the actions of Congress are for Congress to decide.<sup>76</sup>

Indian people and tribes remain heavily regulated by policies formed as a result of congressional delegation. Though Article I of the United States Constitution vests Congress generally with "all legislative powers," Congress may delegate legislative authority to the executive branch as long as there is an "intelligible principle" attached to this legislative authority.<sup>77</sup> This standard has not proven particularly burdensome; as of 2001 only two statutes had been found lacking in adequate guidance for a constitutionally sound delegation of authority.<sup>78</sup>

#### V. EROSION OF THE FEDERAL INDIAN TRUST DOCTRINE AS APPLIED TO THE FEDERAL TRIBAL ENERGY REGIME

Indian law scholars have long wrestled with the notion of a conflicted Indian trustee, whose responsibility to the public at large trumps and whose fiduciary obligation to Indians remains subject to limitation, while simultaneously functioning as a constraint on tribal self-determination.

Sarah Krakoff's *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation* points out that domestic dependent nations are "unique and paradoxical constructions" that have led to baffling judicial fluctuations regarding the meaning and extent of "sovereignty" in the uniquely American Indian context.<sup>79</sup> There are thus significant implications as to how the international view on the relationship between indigenous communities and governing states is conceived. The nature of aspirations surrounding this relationship as it exists on a human rights and global scale may help provide some constructive perspective upon the complex entanglement of conflicting ideas that defines the domestic relationship between Indian tribes and the federal government.

In her article *The Conflict Between the "Public Trust" and "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, Rebecca Tsosie describes the historical framework establishing a trust relationship

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<sup>76</sup> *Lone Wolf*, 187 U.S. at 565–66; see also Gover, *supra* note 68, at 318–19 (stating that the plenary power of Congress has "evolved" into a mechanism by which Congress can deprive Indians of their property without considering their interests).

<sup>77</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); see U.S. CONST. art. I, § 1.

<sup>78</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

<sup>79</sup> Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

between the federal government and the American public in the treatment of lands.<sup>80</sup> She points to the fact that courts used “trust language” not only in maintaining federal ownership of land for the purposes of facilitating expansion in the early history of the United States, but also in justifying federal control over land disposition and natural resource management in order to sustain the viability of public lands in the 19th century.<sup>81</sup>

Tsosie aptly recognizes the public trust doctrine cannot be conflated with an Indian trust doctrine, as the public trust doctrine sits as more of a reflection of public policy than as a distinct legal doctrine with obligations flowing from binding treaties and laws.<sup>82</sup> The political picture is even more complicating for tribes: the public whose interest is being served has “conveniently overlooked the fact that federal ‘public lands’ are the same lands that were appropriated from Native people by military force during . . . the nineteenth century.”<sup>83</sup> As Tsosie points out, the federal government has appropriated Native lands for “homesteading, grazing, mining, railroads, national parks, reclamation projects, and military installations,” demonstrating the development of a national economic infrastructure arising without meaningful consideration of Indian interests.<sup>84</sup> Additionally, with land having a significant cultural and spiritual element to many Indian communities, it is important to consider conceptual appropriations of land and natural resources

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<sup>80</sup> Rebecca Tsosie, *The Conflict Between the “Public Trust” and “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 272, 301–10 (2003).

<sup>81</sup> *Id.* (explaining that this kind of language was used by courts to “justify federal plenary power to protect public lands”).

<sup>82</sup> *Id.* at 281–82 (citing Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269 (1980)).

<sup>83</sup> *Id.* at 284.

<sup>84</sup> *See id.* (explaining that Indians have historically not been considered “stakeholders” in debates over public land policy while “developers, recreationalists, environmentalists, and industrialists” have all participated in this policy development discourse); *see also* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 4–9 (1993) (describing how Congress is able to delegate legislative duties to the executive branch in order to get its way without being held politically accountable for the actions involved in meeting its self-serving desires). Schoenbrod uses Sunkist to exemplify this phenomenon. Sunkist, the “dominant marketer and processor of California and Arizona citrus fruit,” has very much been the beneficiary of a law enacted by the Secretary of Agriculture known as an agricultural marketing order. SCHOENBROD, *supra*, at 6. This law increases the amount consumers pay for oranges by “restricting the amount that growers may supply.” *Id.* at 4. When confronting the question of how a law that “seemed to benefit so few at the expense of so many” could be held up for any significant period of time, Schoenbrod explains that delegating the responsibility for the enactment of agricultural marketing orders to the executive branch allows Sunkist, a large company that hires political lobbyists, to get the law it wants without “provid[ing] effective ammunition to a political opponent.” *Id.* at 7–8. This case study aptly demonstrates how delegation can be a legislative loophole allowing members of Congress to appeal to entities they perceive as the most politically significant, even at the expense of other constituents.

(such as doctrines of property law that help define property as alienable and marketable among individuals) that do not accord with the value that Indians may derive therefrom.<sup>85</sup> Given the complicated set of these facts and issues, it becomes evident that Congress faces potentially irreconcilable conflicts of interest in simultaneous execution of the Indian trust responsibility and the public trust doctrine in its management of energy and natural resources.

According to the 2010 Census, there are only about 5.2 million people in the United States (within a total U.S. population of 308.7 million) who identified themselves as American Indian or Alaska Native.<sup>86</sup> Furthermore, the Census revealed that the vast majority of those who identified themselves as American Indian or Alaska Native reside in one of only ten states.<sup>87</sup> These numbers indicate two important realities: First, American Indians make up only a small piece of the greater population represented by Congress, and second, most states have a proportionately miniscule Indian representation even in light of the relatively small overall numbers. On an electoral basis, Congress's interest in appealing to its numerical constituency would not necessarily require consideration of Indian interests.<sup>88</sup>

This idea of needing to adhere to a non-majoritarian set of values for Federal Indian law is captured within American jurisprudence. For example, Justice Kennedy's concurrence in *United States v. Lara*<sup>89</sup> reflects a judicial trend of "quasi-constitutionalism," or the application of "constitutional values in constructing a federal common law pertaining to tribes."<sup>90</sup>

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<sup>85</sup> See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1039–40 (2009) (using Eric Posner's assertion in *The International Protection of Cultural Property: Some Skeptical Observations* that cultural property should be viewed in the context of its free market value as a means of exhibiting the "theoretical paucity of current law and economics theory to grapple with heavily contested claims to indigenous cultural resources").

<sup>86</sup> U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 1–3 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); see also Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015) (suggesting that further research is needed in reviewing the impact and scope of congressional action towards Indian and tribes).

<sup>89</sup> 541 U.S. 193 (2004).

<sup>90</sup> See Anne E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 699–701, 712 (2009) (discussing Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE J. L. 1, 65 (1999)). In presenting various methodologies for drafting restorative jurisdictional legislation that could

Fundamentally, the *Lara* Court upheld the concept of inherent tribal sovereignty.<sup>91</sup> The idea that there exists an inherent sovereignty that extends beyond tribal boundaries to Indians as a whole could suggest that the Judiciary has embraced an essentialist mindset regarding the sovereignty of Indian peoples within the United States.

The inherent sovereignty aspect of *Lara* can be seen as reflective of a U.S. framework within which tribes are bound in trying to assert sovereign rights, even those that are also seen as fundamental within the international law doctrine. The implications of *Lara* in the context of incorporating international human rights law as a restoration of sovereignty among tribes in the United States may set a jurisprudential path to recognizing international indigenous human rights norms in United States law.<sup>92</sup>

In 1980, the Supreme Court handed down *United States v. Mitchell* (*Mitchell I*),<sup>93</sup> disavowing the creation of a trust relationship in Congress's Indian General Allotment Act of 1877.<sup>94</sup> The *Mitchell* Court, for the first time,

feasibly be held up by the Judiciary, Tweedy suggests that the incorporation of core constitutional values such as equal protection and right to counsel should be accounted for in light of the Court's agenda of quasi-constitutionalism. This aspect of *Lara* could be reflective of the domestic framework within which tribes are bound in trying to assert sovereign rights generally, and those made available through emerging international law doctrine. The implications of *Lara* in the context of incorporating international human rights law as a restoration of sovereignty among tribes in the United States could influence the methodologies of indigenous human rights advocates in the United States for other reasons as well. *Id.*; see also *Duro v. Reina*, 495 U.S. 676, 693–94 (1990) (“Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.” (citing *Reid v. Covert*, 354 U.S. 1 (1957))); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

<sup>91</sup> *Lara*, 541 U.S. at 199 (finding that Indian tribes had the power to prosecute other Indians, even those who were not members of that tribe, as a product of inherent tribal sovereignty and citing to *Yakima* in invoking the “plenary and exclusive” powers of Congress to “legislate in respect to Indian tribes, vesting Congress with the exclusive authority to both restrict and relax tribes’ inherent prosecutorial authority”). Together, these rulings suggest that congressional authority over the affairs of tribes extends even to tribal rights that the Court has, at least nominally, acknowledged as “fundamental” or “inherent” to the tribes, yet still subject to congressional will. See also Tweedy, *supra* note 90.

<sup>92</sup> See Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 942 (2011) (discussing Justice Thomas's dissent in *Lara* and describing the “paradox” of inherent sovereignty and plenary power as “a prominent feature of the dialogue on indigenous self-determination”).

<sup>93</sup> 445 U.S. 535 (1980).

<sup>94</sup> *Id.* at 542. The Supreme Court had just reaffirmed the extensive reach of Congress's plenary power over tribes in the prior term, in 1979, with its ruling in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, holding that a Washington statute that obligated the state to “assume civil and criminal jurisdiction over Indians and Indian territory within the State” subject to certain conditions was constitutional notwithstanding the argument

determined that the trust relationship is dependent on the congressional intent in creating the trust:

It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States “hold the land . . . in trust” not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.<sup>95</sup>

Even though the General Allotment Act expressly stated that certain land was to be held “in trust” for the Indians to better accord with its understanding of congressional intent, the Court found the language to be subject to qualification.<sup>96</sup> According to the Court, Congress statutorily obliged the federal government to hold the land in trust “not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation.”<sup>97</sup> The Court referred to this new federal responsibility as a “limited trust.”<sup>98</sup>

The application of the “limited trust” came a year after IMDA’s passage; in 1983, *Mitchell* plaintiffs brought a second action to the Court under the Indian Tucker Act, in a case commonly known as *Mitchell II*.<sup>99</sup> When the *Mitchell II* plaintiffs sued the United States for monetary damages, they invoked the Tucker Act to effect waiver of sovereign immunity by the United States.<sup>100</sup> But prevailing on an Indian Tucker Act damage claim also requires the Court to interpret the statutes and regulations in question to be “reasonably

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that the statute abridged the tribes’ “fundamental right” to self-government. 439 U.S. 463, 463, 500–01 (1979). This finding was based upon the fact that the Washington statute was authorized by an act of Congress, and that “Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.” *Id.*

<sup>95</sup> *Mitchell I*, 445 U.S. at 544.

<sup>96</sup> *Id.* at 543.

<sup>97</sup> *Id.* at 544.

<sup>98</sup> *Id.* at 542. The Court expounds upon this notion of a limited trust by stating that “[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands.” *Id.*; see also Lynn H. Slade, *The Federal Trust Responsibility and Tribal-Private Natural Resource Development* 8 (Modrall, Sperling, Roehl, Harris, & Sisk, P.A., Paper 13B) (connecting the idea of the limited trust with the Court’s conclusion that the General Allotment Act provided that the allottees were to have use and occupation of allotted land and thus management thereof).

<sup>99</sup> *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983).

<sup>100</sup> *Id.*

amenable to the reading that it mandates a right of recovery in damages.”<sup>101</sup> In this sense, *Mitchell II* represented a mere compartmentalization of a certain type of trust responsibility claim. It utilized the idea that there does exist a general trust relationship, but did so in a manner that was in pragmatic accordance with the doctrine of sovereign immunity.<sup>102</sup>

In its opinion in *Mitchell II*, the Court found that federal timber management statutes did indeed confer a fiduciary duty upon the federal government to manage tribal timber resources.<sup>103</sup> “In contrast to the bare trust created by the General Allotment Act,” the Court stated, “the statutes and regulations now before us clearly give the federal government full responsibility to manage Indian resources and land for the benefit of the Indians.”<sup>104</sup> The Court also asserted that construing the timber management statutes as created fiduciary duties was “reinforced” by an “*undisputed existence of a general trust relationship between the United States and the Indian people.*”<sup>105</sup>

*Mitchell II* itself was not per se damaging to the trust responsibility. At the time, it may have seemed the two Justices Marshall reached across the centuries in their Indian law jurisprudence: the express acknowledgement in *Mitchell II* by Justice Thurgood Marshall’s majority opinion of a general Federal trust obligation hearkened directly back to the trust precedent set by the Justice John Marshall opinion in *Cherokee Nation v. Georgia*.<sup>106</sup> However, the foundation for further erosion nonetheless lay in the *Mitchell II* opinion. The reasoning of *Mitchell II* was different; it was not “general” at all, rather, it was “[t]he language of these statutory and regulatory provisions” that “directly supports the existence of a fiduciary relationship.”<sup>107</sup> *Mitchell II* actually undermined the very relationship it confirmed by relying instead on specific statutory construction rather than a stand-alone doctrine with its own distinct

<sup>101</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

<sup>102</sup> *See Mitchell II*, 463 U.S. at 218 (“In this case, however, there is simply no question that the Tucker Act provides the United States’ consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear.”).

<sup>103</sup> *Id.* at 224.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 225 (emphasis added).

<sup>106</sup> *Id.* at 225–26 (citing *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117–18 (1938); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382–84 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)).

<sup>107</sup> *Id.* at 224.

legal implications.<sup>108</sup> This departure from the nature of the trust relationship conceptualized in *Seminole Nation* and subversion to statute laid the framework for the Court's later reliance on statutory language in determining whether federal trust duties to Indian tribes exist at all.

Importantly, the limitations of the trust responsibility, as well as its attendant rights and remedies, have been further contoured by the courts in cases where a tribe has alleged a breach of federal trust in the context of IMDA. For example, in *Cheyenne-Arapaho Tribes of Oklahoma v. United States*,<sup>109</sup> a panel of judges from the Court of Appeals for the Tenth Circuit found an abuse of discretion and failure to adhere to fiduciary duties where the Secretary of the Interior approved communitization agreements on Indian land but failed to consider the market conditions and marketability of leases prior to the oil and mineral "boom" period immediately preceding these communitization agreements.<sup>110</sup> The court stated general principles regarding review of agency decisions must be applied in light of the Secretary of Interior's fiduciary responsibilities to the Indians.<sup>111</sup> However, the court, applying IMDA, found that the actionable breach of trust took place during the approval process, and issued an injunction to prevent enforcement of the agreements in question.<sup>112</sup> When the tribe filed a subsequent suit for damages for breach of trust against the United States, the tribe could find no remedy, as their action was barred due to issue preclusion.<sup>113</sup>

In 1986, in *Quantum Exploration, Inc. v. Clark*,<sup>114</sup> the Ninth Circuit held that an agreement under IMDA is "entirely dependent" upon Secretarial approval,<sup>115</sup> and that a tribe may rescind a proposed agreement when Secretarial approval is still pending.<sup>116</sup> The appeals court distinguished the case from

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<sup>108</sup> *Id.*; see also Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U. L. REV. 1069, 1070 (2006) (explaining that the affirmation of a general trust relationship has not helped the courts much in defining the contours of federal obligations, one judicial concern being the "end[er]s[ment]" of a "legal theory that might subject the federal treasury to a flood of money damage awards"); Slade, *supra* note 98, at 8 (fiduciary duties "do not ordinarily arise . . . from the general trust relationship").

<sup>109</sup> 966 F.2d 583 (10th Cir. 1992).

<sup>110</sup> *Id.* at 589–91.

<sup>111</sup> *Id.* at 589. The Court also suggested that in approving mineral agreements, it is the Secretary's trust responsibility to understand the particularized circumstances surrounding the land at issue and how these circumstances could ultimately affect the economic gains of the tribe under the proposed agreement. *Id.*

<sup>112</sup> See *Cheyenne-Arapaho Tribes v. United States*, 33 Fed. Cl. 464, 466 (1995).

<sup>113</sup> *Id.* at 466–70.

<sup>114</sup> 780 F.2d 1457 (9th Cir. 1986).

<sup>115</sup> *Id.* at 1459.

<sup>116</sup> *Id.* at 1461.



*Yavapai-Prescott Indian Tribe v. Watt*,<sup>117</sup> in which it earlier ruled that a tribe could not unilaterally terminate an agreement that had already been formally approved by the Secretary.<sup>118</sup> Therefore, an agreement under IMDA is not valid unless the Secretary approves it, but once so approved, it becomes binding.<sup>119</sup>

The Court adjudicated the statutory or general issue in 2011 with *United States v. Jicarilla Apache Nation*,<sup>120</sup> another case arising under the Indian Tucker Act. In *Jicarilla*, the Court spoke broadly about the status of the federal trust responsibility, attenuating the compartmentalizing effect of *Mitchell II* and *Navajo Nation*.<sup>121</sup> In *Jicarilla*, the tribe sued the United States for mismanagement of its assets held in trust by the United States.<sup>122</sup> In the lawsuit, the tribe sought documents that the United States claimed attorney-client privileged and shielded from disclosure to the tribe.<sup>123</sup> The tribe argued that the fiduciary exception to the attorney-client privilege rule should apply because of the federal government's status as trustee to the tribe.<sup>124</sup> Even though the *Jicarilla* question was particular in nature, the Court nonetheless held broadly, declaring that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."<sup>125</sup> The Court acknowledged that "[t]hroughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."<sup>126</sup> Yet, in determining whether or not to apply common-law trust principles to the tribe's claim that the federal government mismanaged their trust funds, the *Jicarilla* Court, while acknowledging the "undisputed existence of a general trust relationship between the United States and the Indian People,"<sup>127</sup> went on to state that the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."<sup>128</sup> This language

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<sup>117</sup> 707 F.2d 1072 (9th Cir. 1983).

<sup>118</sup> *Id.*; see also *Quantum Expl.*, 780 F.2d at 1460.

<sup>119</sup> The line of cases that further created boundaries for the trust responsibility were brought under the Indian Tucker Act. The Indian Tucker Act gave the U.S. Court of Federal Claims jurisdiction over a claim by an Indian tribe against the United States when "such claim is one arising under the Constitution, laws or treaties of the United States." See Indian Tucker Act, 28 U.S.C. § 1505 (2013).

<sup>120</sup> 131 S. Ct. 2313 (2011).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2315.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2325.

<sup>126</sup> *Id.* at 2324.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2325.

suggests not only that the clout of the trust responsibility is circumscribed by the plenary power doctrine, but also that specific federal obligations under the trust responsibility are limited to those which are affirmatively conferred by Congress. The Court went on to explain that “the Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes,” quashing any doubt that any seemingly defining aspects of the trust relationship are fleeting in nature and subject to the sole deference of the government it supposedly obliges.<sup>129</sup>

With the Federal trust responsibility toward Indians now more or less cabined as duties expressly established by statutory language, Congress finds itself in the enviable position of creating its own power checks.<sup>130</sup> With the statutory reliance and plenary power framework in place, several conflicts of interest are omnipresent, many of which can and have proven damaging or fatal to the trust relationship. These conflicts involve friction between the trust relationship and other congressional duties and considerations, including (but not necessarily limited to) political self-interest, federal policy favoring self-determination, and the public trust regarding land and natural resource management.

In 1995, in *Utah v. Babbitt*,<sup>131</sup> Utah sued to compel royalty tax payments from oil and gas production on the Navajo reservation. In that case, which analyzed a 1933 congressional Act that took 552,000 acres from the public domain in Utah and added it to the Navajo reservation, a percentage of

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<sup>129</sup> *Id.* at 2326. The expansive nature of the language used in *Jicarilla Apache* may be attributable to a widespread trend of judicial misuse of case law arising under the Tucker Act. See Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 364–68 (2003) (arguing that recent claims for injunctive relief that have arisen under the Administrative Procedure Act (“APA”) have been wrongfully subjected to the Tucker Act standard of seeking specific federal statutes and regulations as the primary source for trust duties). The APA makes unlawful any agency action that is “arbitrary, capricious, [an abuse of discretion,] or otherwise not in accordance with law.” *Id.* at 362. Wood asserts that the APA establishes a standard that is different from the Indian Tucker Act in that it does not require a trust responsibility claim to be founded in express law, but that this distinction has been blurred by courts using a Tucker-based analysis on APA claims and thereby establishing a flawed stare decisis upon which future courts rely. *Id.* at 364–66. This trend is particularly concerning when viewed in light of the transcendent nature of the “trust” concept as it seemed to be understood in *Seminole Nation*, because adhering to strict statute-based standards does not leave adequate room for courts to consider the foundational moral justifications upon which the idea that there exists a trust relationship originated.

<sup>130</sup> See Gover, *supra* note 68, at 355–56 (describing statutes as “defining” the trust responsibility and explaining that the Judiciary has been “unwilling to read into the trust statutes something as basic as the obligation of good faith and fidelity in the absence of specific statutory language”); see also *Jicarilla Apache Nation*, 131 S. Ct. at 2325 (stating that the Government’s trust duties are limited to the extent by which the Government “expressly accepts those responsibilities by statute”).

<sup>131</sup> 53 F.3d 1145 (10th Cir. 1995).

oil and gas royalties from this land was to be paid to the State of Utah, which was in turn to use the tax on the “health, education, and general welfare of the Navajo Indians residing in San Juan County.”<sup>132</sup> The Navajo Nation entered an operating agreement, approved by the Secretary under IMDA, with Chuska Energy Co., an oil and gas operator on the property in question. The State of Utah still demanded royalty tax from oil and gas production by Chuska, but Chuska argued that the 1933 Act did not apply to operating agreements.<sup>133</sup> The district court held, in part, that it remained the duty of the Secretary to collect these royalties and give them to the state of Utah.<sup>134</sup> One of the questions faced by the circuit court was whether it was a violation of IMDA to require the Secretary to collect and distribute these royalties under the federal statute (the idea being that contracting parties under IMDA can designate a third party other than the Secretary to collect royalties).<sup>135</sup> However, there was no evidence that any such third-party designation was made by the contracting parties.<sup>136</sup> Therefore, requiring the Secretary to continue to collect royalties was not a violation of IMDA.<sup>137</sup>

It remains an open jurisprudential question whether a tribal private right of action seeking to void leases with third parties to seek redress under IMDA is plausible. However, the fundamental tenet that no interest in Indian tribal property held in trust by the United States may be conveyed absent the consent of Congress is instructive.<sup>138</sup> Indian property may not be alienated absent the consent of the United States as supreme sovereign.<sup>139</sup> Moreover, the regulation of trade and intercourse between Indian tribes and non-Indians is exclusively the province of federal law, embodied in the Indian commerce clause of the United States Constitution and the Trade and Intercourse Act of 1790, which gave way to the Non-Intercourse Act.<sup>140</sup> The Non-Intercourse Act comprises the essential predicate to a Tribal right of action against IMDA, when considered within the Supreme Court’s holdings in *Oneida Indian Nation of New York v. County of Oneida (Oneida I)*<sup>141</sup> and *County of Oneida v. Oneida Indian Nation of New York (Oneida II)*.<sup>142</sup>

<sup>132</sup> *Id.* at 1147.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1148.

<sup>135</sup> *Id.* at 1151.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. 543, 573–74 (1823).

<sup>139</sup> *Id.*

<sup>140</sup> 25 U.S.C. § 177 (2013).

<sup>141</sup> 414 U.S. 661 (1974).

<sup>142</sup> 470 U.S. 226 (1985).

In *Oneida I*, the Supreme Court held that the tribe stated a claim for possession under federal law for jurisdictional purposes when it brought suit seeking damages representing the fair rental value of land that had been conveyed in violation of the trade and intercourse act.<sup>143</sup> In *Oneida II*, the Court held that Indian tribes have a private right of action under federal common law to seek damages against trespassers who unlawfully occupied their lands without federal authorization.<sup>144</sup> In the course of its holding, the Court discussed the underpinning of a private right of action as follows:

With the adoption of the Constitution, Indian relations became the exclusive province of federal law. From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands . . . and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." Thus, as we concluded in *Oneida I*, the possessory right claimed [by the Oneidas] is a *federal* right to the lands at issue in this case.<sup>145</sup>

The Court went on to state that the right of Indian tribes to sue to enforce their property rights has been recognized throughout history in numerous cases.<sup>146</sup> Noting that the Indian right of occupancy need not be based upon treaty statute or other formal government action, the Court held that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law."<sup>147</sup> This suggests a private right of action may sound in voiding Indian mineral agreements not approved by the Secretary because, conceptually, the reasoning lies in the laws restrict the alienation of tribal property generally, as well as pendant actions that might be brought under federal common law.

The Second Circuit had held that the Oneida tribe had a private right of action under both federal common law and the Non-Intercourse Act.<sup>148</sup> The circuit court reasoned that the fact that the act was enacted to protect Indian property and that private remedy was part of the contemporary legal context in which Congress legislated, Congress must have intended that they would be enforced by private actions since they were clearly intended to benefit the tribes.<sup>149</sup> The opinion went on to conclude that the tribes still had a private right

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<sup>143</sup> *Oneida I*, 414 U.S. at 665.

<sup>144</sup> *Oneida II*, 470 U.S. at 233–37.

<sup>145</sup> *Id.* at 234–35 (citations omitted).

<sup>146</sup> *Id.* at 235–36.

<sup>147</sup> *Id.* (quoting *Oneida I*, 414 U.S. at 674).

<sup>148</sup> *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 719 F.2d 525, 530–37 (2d Cir. 1983).

<sup>149</sup> *Id.* at 532–33.

of action to enforce the Non-Intercourse Act.<sup>150</sup> However, the Supreme Court did not reach the Second Circuit's holding, because it found the tribe had a remedy to protect its property rights under the federal common law.<sup>151</sup> However, it seems plausible that the same reasoning that gives rise to a tribal private right of action to seek adjudication under the Non-Intercourse Act would also apply to IMDA, as a similar statute that enumerates the circumstances under which Indian property can and cannot be alienated.

The line of Supreme Court cases contemplating the nature of the Indian trust obligation held by United States vis-à-vis Indian tribes and as applied to the tribal energy statutes demonstrate that the plenary power doctrine can employ or dispense with the trust requirement. Given the current status of the trust relationship as embodied only where it is specifically stated within federal statutes and regulations, it is difficult to view the trust relationship as a constant—neither beneficial to tribes or a meaningful check on the plenary power held by Congress over Indian affairs. What is clear is that federal oversight has negative impacts on tribal energy development.<sup>152</sup>

#### VI. TERAS: HORSETRADING TRUST FOR SOVEREIGNTY

As the trust relationship has begun to show its tenuousness in the courts, tribes have persisted in their quest for further autonomy from the United States in their resource development. As a component of the Energy Policy Act of 2005, Congress established a procedure for a separate tranche of Indian mineral agreements that would no longer be subject to the constraints of IMDA. Section 3504 of the 2005 Act declares “an Indian tribe may, at the discretion of the Indian tribe, enter into a lease or business agreement for the purpose of energy resource development on tribal land.”<sup>153</sup> The statute further establishes a procedure for Secretarial approval of tribal energy resource agreements (“TERAs”) that would authorize a tribe's approval of leases, business agreements, etc.<sup>154</sup> This procedure sets forth response-time requirements and a fixed set of conditions under which the Secretary must approve a proposed TERA, thereby placing boundaries on Secretarial discretion

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<sup>150</sup> *Id.* at 533–37.

<sup>151</sup> *Oneida II*, 470 U.S. at 233–36. For a more comprehensive exploration of tribal rights of actions generally, compare Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499 (2014).

<sup>152</sup> See 2015 GAO REPORT, *supra* note 1; Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 188 (1998).

<sup>153</sup> Energy Policy Act of 2005, 25 U.S.C. § 3504(a)(1) (2013); see also *Tribal Energy Self-Sufficiency Act and Native American Energy Development and Self-Determination Act: Hearing Before the Comm. of Indian Affairs*, 108th Cong. 70–72 (2003) (statement of Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs).

<sup>154</sup> 25 U.S.C. § 3504(e).

to dictate the timing and terms by which a tribe could engage in mineral resource development.<sup>155</sup> Notably, these conditions require the Secretary to approve of a TERA if, along with conditions relating to the completeness of the agreement terms being met, the “Indian tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe.”<sup>156</sup> The statutory language calls for the Secretary to be mindful of tribal capabilities on a broad level, and the term “capacity” connotes not just present capabilities but future potential as well.<sup>157</sup> In this sense, the TERA approval procedures promote sovereignty not only by limiting Secretarial discretion, but also by widening the scope through which the Secretary is to perceive tribal capabilities to manage their resources. However, the provisions continue to vest the Secretary with ultimate decision-making authority as to whether tribes pass muster to manage their own assets.

The TERA scheme created in the Energy Policy Act of 2005 has brought with it concerns that the trust aspect of Indian mineral development has been diminished to a degree that will prove debilitating to Indians. In *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities?*, Andrea S. Miles identifies some of the viewpoints of those who oppose the TERA scheme, such as concerns over the negotiating power of Indians in dealing with energy development companies and fears that a lack of federal oversight from an environmental perspective could end up being detrimental to tribal lands and natural resources.<sup>158</sup> Miles points out that the

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<sup>155</sup> *Id.* § 3504(e)(2)(A). The Section states the following:

Not later than 270 days after the date on which the Secretary receives a tribal energy resource agreement from an Indian tribe under paragraph (1), or not later than 60 days after the Secretary receives a revised tribal energy resource agreement from an Indian tribe under paragraph (4)(C) (or a later date, as agreed to by the Secretary and the Indian tribe), the Secretary shall approve or disapprove the tribal energy resource agreement.

*Id.* Section 3504(e)(2)(B) contains the factors requiring Secretarial approval of the proposed TERA.

<sup>156</sup> *Id.* § 3504(e)(2)(B).

<sup>157</sup> See 25 C.F.R. § 224.72 (2015). These regulations require the Secretary to account for both the past—i.e. the tribe’s “past performance administering contracts and grants associated with self-determination programs” and future potential—i.e. the “financial capacity of the tribe to maintain or procure the technical expertise needed to evaluate proposals and to monitor anticipated activities in a prudent manner.” *Id.* Black’s Law Dictionary does not contain an encompassing definition of the term “capacity” as it is used in this context, but it does contain definitions for certain legal types of capacity from which one can infer that “capacity” refers to one’s ability to perform some future action. Testamentary capacity, for example, is defined as having the ability to recognize certain information in order to produce a valid will. Note that it speaks to the ability to recognize, not actual recognition. See *Testamentary Capacity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>158</sup> Andrea S. Miles, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust*

statute contains general language requiring the Secretary to act in accordance with the federal trust responsibility, but the enumerated elements of the TERA process certainly call into question whether there remains any genuine substance to the trust relationship in Indian mineral resource development under this system.<sup>159</sup>

Tribes have expressed support for a recently proposed piece of tribal energy development legislation.<sup>160</sup> If passed into law, this legislation could significantly alter the landscape of tribal energy resource development and instruct how tribes can take steps forward in using their energy resources as a source of economic self-sufficiency. Senate Bill 2132 proposes several substantial amendments to the Indian Tribal Energy Development and Self-Determination Act, as it exists within the Energy Policy Act of 2005. Senate Bill 2132 was first introduced on March 13, 2014, by John Barrasso, a Republican Senator from Wyoming.<sup>161</sup> Following a legislative hearing before the Senate Committee on Indian Affairs on April 30 of the same year, the Committee convened in a meeting on May 21, during which the Committee approved of several amendments to the bill and ordered the bill to be reported favorably to Congress.<sup>162</sup> The bill was then reported to Congress on July 30, 2014,<sup>163</sup> but it has yet to be enacted.

The proposed amendments to the Indian Tribal Energy Development and Self-Determination Act presented in the bill offer several significant changes to the law. By and large, these amendments surround three distinct, but interrelated, categories: new requirements regarding federal participation in the energy resource development process, changes to the TERA procedure, and the new powers available to certified tribal energy development organizations.

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*Responsibilities?*, 30 AM. INDIAN L. REV. 461, 464–70 (2006) (explaining how the shift in the federal-tribe relationship disrupted the regulatory environmental framework pertaining to Indian lands); see also *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (holding in part that “[t]he fact Indian lands are held in trust does not take it out of NEPA’s jurisdiction” under the rationale that all “public lands” in the United States are held “in trust for the people of the United States”); Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended “Great Mischief for Indian Energy Development” and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811 (2012) (suggesting that TERAs either be subject to trust remedies or proceed with less federal control). The trust relationship could herein be interpreted as establishing a common characteristic between Indian land and other lands within the purview of federal environmental regulations.

<sup>159</sup> Miles, *supra* note 158, at 473 (citing Energy Policy Act of 2005, 25 U.S.C. § 3504(e)(6)(A)–(B)).

<sup>160</sup> This Article does not take up H.R. 538, the “Native American Energy Act,” which has been recently introduced in the 114th Congress. See Native American Energy Act, H.R. 538, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/538>.

<sup>161</sup> S. REP. NO. 113-224, at 19 (2014).

<sup>162</sup> *Id.*

<sup>163</sup> See generally *id.*

Many of the amendments proposed in Senate Bill 2132 would make changes to the degree and nature of federal participation in tribal energy resource development. First, and perhaps most significantly for the purpose of setting an impactful precedent, the bill contains a consultation clause requiring the Secretary to “consult with each applicable Indian tribe before adopting or approving a well spacing program or plan applicable to the energy resources of that Indian tribe or the members of that Indian tribe.”<sup>164</sup> Second, the bill provides for increased federal technical assistance to tribes at various stages in the process of executing plans and programs for energy resource development. At the capacity-building stage, the bill allows the Director of the Department of Energy to provide grants to tribes in order to fund “activities to increase the capacity of Indian tribes to manage energy development and energy efficiency programs.”<sup>165</sup> At the planning stage, the bill requires that the Secretary provide technical assistance to tribes in developing an energy plan,<sup>166</sup> and finally, at the implementation stage, the bill requires that the Secretary “collaborate with the Directors of the National Laboratories” in ensuring that tribes have access to the “full array of technical and scientific resources of the Department of Energy.”<sup>167</sup> Through these provisions, Senate Bill 2132 acknowledges the potential efficacy of federal participation to tribal energy resource development and promotes constructive federal contributions at various stages of the resource development process.

Senator Barrasso’s bill makes several amendments to the established TERA procedure as well. Notably, the TERA approval protocol is reframed such that the bill, if enacted, would provide a limited set of circumstances under which a Secretary would be *permitted* to disapprove of a TERA.<sup>168</sup> This is in contrast with the current law, under which there are certain enumerated circumstances where the Secretary is required to approve a TERA, but no other limiting language setting definite contours to the Secretary’s disapproval power.<sup>169</sup>

Aside from establishing new parameters on Secretarial discretion in approving and disapproving a TERA, the bill also proposes several amendments to the TERA approval process itself. Under the proposed legislation, for example, TERAs are self-executing. That is, if the Secretary fails to either approve or disapprove of a TERA within 271 days of receiving the TERA or within 91 days of receiving a TERA revision, then the TERA

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<sup>164</sup> Indian Tribal Energy Development and Self-Determination Act Amendments of 2014, S. 2132, 113th Cong. § 101(a)(1)(E) (2014).

<sup>165</sup> *Id.* § 101(b)(3).

<sup>166</sup> *Id.* § 101(a)(2).

<sup>167</sup> *Id.* § 104(2).

<sup>168</sup> *See id.* § 103(a)(4)(B)(ii)(I).

<sup>169</sup> Indian Tribal Energy Development and Self-Determination Act of 2005 § 2604(e)(2)(B), 25 U.S.C. § 3504(e)(2)(B) (2013).



automatically goes into effect.<sup>170</sup> In terms of the approval process itself, the bill requires the Secretary to make a preliminary capacity determination within 120 days of TERA submission by the tribe, allowing tribes the time to address capacity concerns and resubmit their TERA early in the process.<sup>171</sup> The proposed legislation *requires* a positive finding of capacity if the Secretary determines that the tribe has, for at least three consecutive years prior to the submission of the TERA, carried out a contract under Titles I and IV of the Indian Self-Determination and Education Assistance Act without “material audit exceptions” and which contains “programs or activities relating to the management of tribal land.”<sup>172</sup> As with TERA approval, this capacity determination is self-executing in that the Secretary’s failure to make a determination within the 120 day time limit for a preliminary finding equates to a positive finding of capacity.<sup>173</sup>

The bill’s TERA amendments also provide greater incentives for tribes to endeavor in the TERA process. For one, the amendments provide a funding mechanism for tribes executing a TERA. Senate Bill 2132 provides for an “annual written funding agreement that is negotiated and entered into with the Indian tribe that is separate from the tribal energy resource agreement.”<sup>174</sup> Through the terms of these mandated agreements, the Secretary would be required to make payments available to tribes in order to compensate them for the costs they have incurred while carrying out activities under their TERA that would normally be incurred by the federal government if the tribe had not obtained a TERA in the first place.<sup>175</sup> This alleviates what tribes might otherwise consider a strong economic disincentive to obtaining a TERA. Moreover, the bill requires that the Secretary promulgate regulations within one year of enactment that establish a process for “amending an existing tribal energy resource agreement to assume authority for approving leases, businesses agreements, or rights-of-way for development” that are not part of the original TERA.<sup>176</sup> This prevents tribes from feeling foreclosed by the terms of their original TERA as the energy resource development process evolves over time.

It is also worthy to note that the bill’s amendments to the TERA process expound slightly upon the purported trust duties of the federal government, amending the original Act to state that the “Secretary shall continue to fulfill the trust obligation of the United States to perform the

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<sup>170</sup> S. 2132, § 103(a)(4)(B)(ii).

<sup>171</sup> *Id.* § 103(a)(4)(B)(v).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* § 103(a)(6).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

obligations of the Secretary under this section.”<sup>177</sup> While the current Indian Tribal Energy Development and Self-Determination Act requires the Secretary to fulfill the trust responsibility, it contains no specification that the requirements set forth in the legislation itself fall within the scope of the trust responsibility.<sup>178</sup> Although this language does not necessarily shed new light upon the role of the trust responsibility in modern law, it does demonstrate a congressional acknowledgment that the trust responsibility can still encompass new legislation.

Senate Bill 2132 also contains “add-ons” in the form of amendments to existing pieces of legislation outside of the Indian Tribal Energy Development and Self-Determination Act of 2005. Two notable add-ons as they relate to ensuring that tribes have the opportunity to develop their own strategies for resource development and general economic sustainability are the Indian Energy Efficiency Program and the Weatherization Program. The Weatherization Program is manifest in Senate Bill 2132 as an amendment to the Energy Conservation Production Act, which, in relevant part, permits the Secretary to provide grants to states and Indian tribal organizations to provide “financial assistance with regard to projects designed to provide for the weatherization of dwelling units.”<sup>179</sup> The amendment specifically pertains to section 413(d) of the Act, which requires the Secretary to reserve a percentage of grant funds otherwise allocated to the state for low-income Indians upon determining that “low-income members of an Indian tribe are not receiving benefits . . . that are equivalent to the assistance provided to other low-income persons in such State” and that “the members of such tribe would be better served by means of a grant made directly to provide such assistance.”<sup>180</sup> This section is amended in a manner that gives tribes decision-making authority. Specifically, the amendment states that the Secretary’s obligation to reserve funds for low-income Indians is inapplicable unless “the tribal organization serving the low-income members of the applicable Indian tribe requests that the Secretary make a grant directly.”<sup>181</sup> This gives tribes the ultimate authority to decide what type of funding would benefit them the most.

The Indian Energy Efficiency Program is manifest in Senate Bill 2132 as an amendment to title III, part D of the Energy Policy and Conservation Act.<sup>182</sup> This amendment does not alter the existing substance of the law, but instead adds a new section establishing a minimum percentage for the

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<sup>177</sup> *Id.* § 103(a)(4)(D)(ii).

<sup>178</sup> *See* Indian Tribal Energy Development and Self-Determination Act of 2005 § 2604(a)(6)(C), 25 U.S.C. § 3504(e)(6)(C) (2013).

<sup>179</sup> 42 U.S.C. § 6863(a); S. 2132, § 203.

<sup>180</sup> 42 U.S.C. § 6863(d)(1).

<sup>181</sup> S. 2132, § 203(1).

<sup>182</sup> *Id.* § 106.

allocation of funds used to provide competitive grants to Indian tribes wishing to implement projects and strategies that promote energy efficiency.<sup>183</sup> This program affords tribes the opportunity to receive funding for specific projects that can engage, educate, and empower tribes and their members.

Perhaps the portion of Barrasso's bill with the greatest potential impact is the establishment of a certification scheme for what the bill refers to as Tribal Energy Development Organizations ("TEDO"s). The bill defines a TEDO rather expansively as either "any enterprise, partnership, consortium, corporation, or other type of business organization that is engaged in the development of energy resources and is wholly owned by an Indian tribe" or "any organization of 2 or more entities, at least 1 of which is an Indian tribe, that has the written consent of the governing bodies of all Indian tribes participating" to apply for financial assistance or "enter into a lease or business agreement with, or acquire a right-of-way from, an Indian tribe pursuant to subsection (a)(2)(A)(ii) or (b)(2)(B) of section 2604" of the Energy Policy Act of 1992.<sup>184</sup> The original Indian Tribal Energy Development and Self-Determination Act provided for a similar type of entity, a tribal energy resource development organization,<sup>185</sup> but TEDOs are allowed a higher degree of autonomy in the energy development process under the proposed legislation.

Unlike in the current legislation, Senate Bill 2132 provides a process through which organizations can formally apply to the Secretary for formal TEDO certification.<sup>186</sup> Under this bill, the Secretary must approve or disapprove of an application for certification within 90 days of its submission.<sup>187</sup> Similar to the bill's proposed protocol for determining capacity, the bill *requires* that the Secretary approve of an application upon finding that the tribe has, for at least three consecutive years prior to the submission of the TERA, carried out a contract under titles I or IV of the Indian Self-Determination and Education Assistance Act without "material audit exceptions" and which contains "programs or activities relating to the management of tribal land."<sup>188</sup> A few additional caveats to this approval requirement, however, are that the requirement only applies when (a) the TEDO is "organized under the laws of the Indian tribe and subject to the jurisdiction and authority of the Indian tribe," (b) "the majority of the interest in the [TEDO] is owned and controlled by the Indian Tribe (or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed)," and (c) the "organizing document of the [TEDO] requires that the Indian tribe

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* § 105(a).

<sup>185</sup> 25 U.S.C. § 3501.

<sup>186</sup> S. 2132 § 103(j)(6).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

(or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed) own and control at all times a majority interest in the [TEDO].”<sup>189</sup>

Once certified, a TEDO would be able to engage in certain central aspects of the energy resource development process without the need for formal Secretarial approval. Certified TEDOs would be able to enter into business leases and agreements relating to energy resource development without Secretarial approval so long as (a) the majority of the interest in the TEDO is “owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed)” throughout the entire term of the agreement, and (b) the term of the agreement does not exceed 30 years, or “in the case of a lease for the production of oil resources, gas resources, or both, 10 years and as long thereafter as oil or gas is produced in paying quantities.”<sup>190</sup> Certified TEDOs would also be able to grant rights-of-way over tribal land for energy development facilities or to serve the purpose of any “lease or business agreement entered into for energy resource development on tribal land.”<sup>191</sup> Once again, the majority of the interest in the TEDO must be owned by the Indian tribes throughout the term of the right-of-way, and the term cannot, in any circumstances, exceed 30 years.<sup>192</sup> Notwithstanding these restrictions, however, this bill supplies a great deal of autonomy to certified TEDOs in building a foundation for tribal energy resource development and continuing to grow from that point.

On April 30, 2014, a legislative hearing was held before the Senate Committee on Indian Affairs during which several tribal representatives expressed enthusiastic support for the bill.<sup>193</sup> The bases for this support varied from speaker to speaker, though there was a common focus on the TERA amendments. James M. Olguin, Acting Chairman for the Southern Ute Indian Tribal Council, focused primarily on the amendments the new bill would make to the TERA process.<sup>194</sup> Olguin concisely summarized the failures of TERA to date in stating “we are spending more time fighting with the Bureau of Indian Affairs (‘BIA’) about nonsensical directives and conditions for obtaining

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Note that these testimonies are based off of a reading of the bill as it existed prior to the amendments approved during the May 21st meeting of the Committee of Indian Affairs. The amendments generally did not alter aspects of the bill for which these witnesses expressed support.

<sup>194</sup> *Indian Tribal Energy Development and Self-Determination Act Amendments of 2014: Hearing on S. 2132 Before the S. Comm. on Indian Affairs*, 113th Cong. 39–46 (2014) [hereinafter *Hearing on S. 2132*] (statement of James M. Olguin, Acting Chairman, Southern Ute Indian Tribal Council).

federal approvals.”<sup>195</sup> He also identified several reasons for TERA’s failure, non-exhaustively citing too much federal decision-making authority, inadequate funding made available to TERAs in light of the fact that they “would be assuming duties and responsibilities typically carried out by the United States,” unclear standards for measuring tribal capacity, and a prohibitively cumbersome process for obtaining TERA approval.<sup>196</sup> Olguin expressed support for specific TERA amendments in the new bill, including its self-executing nature and its requirement of a positive finding of capacity based on the successful execution of contracts under the Indian Self-Determination and Education Assistance Act.<sup>197</sup>

Michael O. Finley, Chairman of the Confederated Tribes of the Colville Reservation and First Vice-President of the National Congress of American Indians, also supported the TERA amendments, identifying specific provisions in the proposed bill that improve the TERA process.<sup>198</sup> Like Olguin, Finley pointed to the self-executing nature of TERAs under the bill, stating that “tribes cannot rely on the federal government to take action in a timely way.”<sup>199</sup> Finley also pointed to the proposed funding mechanism for TERA-executing tribes as a favorable amendment to the TERA process, acknowledging that “[s]ome tribes have expressed concerns about the costs of implementing a TERA and would want to have financial support for taking on the additional activities.”<sup>200</sup> Finley goes on to state that such a funding mechanism “would provide funding to the tribe without impacting the Federal budget.”<sup>201</sup>

Tribal representatives also expressed a great deal of support for many of the “add-ons” in the bill that would implement new projects or extend certain rights to Indian tribes. Finley praised the weatherization program mentioned above, stating the amendments that make up this new program are “critical in that they would bring Indian tribes into closer parity with states in being able to access these weatherization funds.”<sup>202</sup> Carole Lankford, who is Vice Chairwoman of the Confederated Salish & Kootenai Tribes of the Flathead Nation, expressed support for section 201 of the bill, which would amend section 7(a) of the Federal Power Act to extend to Indian tribes federal preference in issuing licenses for operation and construction of “dams,

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<sup>195</sup> *Id.* at 45.

<sup>196</sup> *Id.* at 44.

<sup>197</sup> *Id.* at 45.

<sup>198</sup> *Id.* at 33–35 (statement of Michael O. Finley, Chairman, Confederated Tribes of the Colville Reservation; First Vice President, National Congress of American Indians).

<sup>199</sup> *Id.* at 34.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 35.

conduits, reservoirs, etc.”<sup>203</sup> Lankford cited the importance of obtaining these hydro-licenses in allowing her tribe to retain its self-governance by managing its own trust land.<sup>204</sup> She noted also that these licenses would give rise to much needed employment opportunities within her tribe.<sup>205</sup>

Lankford and Finley both also spoke out in favor of section 202 of the bill, which amends the Tribal Forest Protection Act of 2004 to require the Secretary to enter into “stewardship agreements” with a certain number of tribes to “carry out demonstration projects to promote biomass energy projects . . . on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land.”<sup>206</sup> While Finley generally praised this program in both its promotion of biomass usage and the opportunity it provides for tribes to “perform forest health projects and on neighboring federal forest and rangelands,”<sup>207</sup> Lankford focused specifically on how the onset of unharvested biomass has damaged the health of her tribe’s forestlands, providing practical anecdotal evidence to encourage the implementation of such a program.<sup>208</sup> Despite the opportunity presented in this legislation, unless and until this bill attaches to a pressing political impetus, tribes cannot securely rely on this bill as a catalyst for meaningful progress in the tribal energy development framework.

The failure of the existing TERA to take hold and the uncertainty about real trust remedies in the case law raise the possibility of the trust responsibility as ripe for political negotiation. The Federal Indian Trust remains largely unenforceable and vulnerable due to jurisprudential erosion, and the political exchange by tribes of this right for more tribal sovereignty and resource control begs consideration of the impact of the obligation of the federal government to consider the overall public interest and resulting federal at-large policy that is at times discordant and conflicted with interests specific to Indian communities in broader management of land and natural resources.<sup>209</sup>

This problem is rooted in the fact that the United States will always be a conflicted and imperfect trustee. Conversely, indigenous peoples, faced with

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<sup>203</sup> Federal Power Act, 16 U.S.C. §§ 797(e), 800(a) (2013); Indian Tribal Energy Development and Self-Determination Act of 2005, S. 2132, 113th Cong. § 201 (2014); *Hearing on S. 2132, supra* note 194, at 28–29 (statement of Carole Lankford, Vice Chairwoman, Confederated Salish and Kootenai Tribes).

<sup>204</sup> *Hearing on S. 2132, supra* note 194, at 29.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 29–30, 33, 35; S. 2132, § 202.

<sup>207</sup> *Hearing on S. 2132, supra* note 194, at 33.

<sup>208</sup> *Id.* at 29–30.

<sup>209</sup> See Tsosie, *supra* note 80, at 290–96 (discussing this discordance specifically in the context of religious interests, as seen in *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), as well as the debate over members of the Hopi Tribe taking eagles at Wupatki National Monument outside of Flagstaff); see also Kronk, *supra* note 158; Royster, *supra* note 9.

considerations as to the lands to which they are inextricably tied, upon which the very survival of their communities, both cultural and physical rests, are compelled to act as their own best fiduciaries.<sup>210</sup>

## VII. TRIBAL SOLUTIONS

While the courts and Congress continue to wrestle with how to reconcile tribal sovereignty over mineral development with the federal Indian trust doctrine, tribes have employed a form of self-help from the existing regime with models that maximize resource development and effectively balance tribal sovereignty and protective remedies for tribes whose lands are used for mineral development. The Southern Ute Indian Tribe in southwestern Colorado has found success in both areas through the Red Willow Production Company (“Red Willow”).<sup>211</sup> While the working interest model embodied by Red Willow may present the most tribally active and sustainable means of economic development for energy resource development, it remains subject to federal oversight and approval.<sup>212</sup>

While tribes find themselves at a disadvantage in the areas of both energy resource development and participation in the capital market, Red Willow, founded by the Southern Ute Indian Tribe in 1992 as an operator of wells on tribal lands, has developed into an expansive enterprise operating wells throughout Colorado, New Mexico, Texas, and Louisiana and having well interests in undeveloped lands in several other states and the Gulf of Mexico.<sup>213</sup> The genesis of this highly successful company can be traced back to 1974, when the Tribe placed a moratorium on new energy leases based on shortcomings of the federal government to “negotiate appropriate compensation for leases on the reservation.”<sup>214</sup> The Tribe did not rely on the federal government to serve as trustee, rather, it instead sought its own experts to apprise the Tribe of the extent and true value of its undeveloped resources.<sup>215</sup>

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<sup>210</sup> See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

<sup>211</sup> Welcome, RED WILLOW PRODUCTION COMPANY, <http://www.rwpc.us/Default.aspx> (last visited Nov. 5, 2015).

<sup>212</sup> See *id.*

<sup>213</sup> See *Areas of Operations*, RED WILLOW PRODUCTION COMPANY, <http://www.rwpc.us/AreasOfOperations/Default.aspx> (last visited Nov. 5, 2015); see also Regan & Anderson, *supra* note 2, at 217 (giving a quantitative value to the capital success of Red Willow: “Today, the tribe’s 1,400 members are each worth millions on paper and receive dividends every year from the fund.”).

<sup>214</sup> *Unlocking the Wealth of Indian Nations*, *supra* note 2, at 17; see also Jonathan Thompson, *The Ute Paradox*, HIGH COUNTRY NEWS (July 19, 2010), <http://www.hcn.org/issues/42.12/the-ute-paradox>.

<sup>215</sup> See sources cited *supra* note 214.

The capital used to begin gas production on the reservation came in the form of an \$8 million settlement payment from the federal government in the Colorado Ute Water Rights Settlement.<sup>216</sup> The decision to deploy the water settlement money to tribal mineral development was a high-risk move for the Tribe's leaders, both politically and financially.<sup>217</sup> Politically, it was certain to upset the tribal membership, who were already receiving lower per capita income because of the moratorium on energy leases and its impact on oil and gas royalties.<sup>218</sup> At the time, the Tribe was impoverished with a high unemployment rate, and the risk to capital investment as it pertained to tribal members on a per capita basis must have been a weighty matter indeed for the tribal leaders.<sup>219</sup>

Although risky, the plan paid off for the Southern Utes. Red Willow is now an expansive oil and gas operation with interests in wells covering a vast geographical area and 140 full-time staff.<sup>220</sup> Though perhaps an exceptional example in terms of the sheer extent of its capital success, the success of Red Willow can be viewed as a microcosm of the successes tribes have had in managing their own resources; tribes taking affirmative steps to bring in their own mineral experts in order to equip them with knowledge about their own resources on their own lands is, unsurprisingly, maximally efficient.<sup>221</sup>

#### VIII. THE POSSIBILITY OF FPIC TO REALIZE TRIBAL ENERGY SELF-DETERMINATION

As history has shown, especially in the context of mineral development, American Indians and the federal government both must grapple with what has been legislatively and judicially perceived as an inverse

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<sup>216</sup> Thompson, *supra* note 214.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *See id.*

<sup>220</sup> *Who We Are*, RED WILLOW PRODUCTION COMPANY, <http://www.rwpc.us/WhoWeAre/Default.aspx> (last visited Nov. 5, 2015) ("The staff includes engineers, geologists, landmen, accountants, gas control and marketing specialists, field foreman and lease operators, and administrative staff."); *see also About Us*, SOUTHERN UTE INDIAN TRIBE GROWTH FUND, <http://www.sugf.com/AboutUs.aspx> (last visited Nov. 5, 2015) (stating that Red Willow is a subsidiary of the Southern Ute Tribe Growth Fund, which was created as part of a Financial Plan that "insures that a core government and matching finances will exist in perpetuity").

<sup>221</sup> *Unlocking the Wealth of Indian Nations*, *supra* note 2, at 3 ("Policy reforms that enable tribes to control their own resources will give tribes the opportunity to unlock the tremendous wealth of Indian nations."); *see also* 2015 GAO REPORT, *supra* note 1; Thompson, *supra* note 214; *cf.* Raymond Cross, *Development's Victim or Its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535 (2011).



relationship between trust and sovereignty.<sup>222</sup> Looking beyond a domestic scope and into the international sphere, the international human rights framework supports coexistence of trust and sovereignty, but does so in terms that still fail to reconcile the two concepts on a systemic level. However, the international human rights framework allows for a better application of rights themselves as fundamental and internationally accepted standards for how governing states should carry out their responsibilities over indigenous communities.<sup>223</sup>

On December 16, 2010, President Barack Obama announced that the United States is in support of United Nations Declaration on the Rights of Indigenous People (“UNDRIP”).<sup>224</sup> This non-binding 2007 U.N. Declaration focuses largely on expressing rights held by indigenous communities to exercise their “right to development in accordance with their own needs and interests” in light of the fact that a long history of dispossession of indigenous lands and resources has stood as an impediment to exercising these rights.<sup>225</sup>

As to natural resource development on indigenous lands, article 32 of UNDRIP states, “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”<sup>226</sup> There is no mention in this article about ascertaining the best interest of the tribe, distinguishing it from IMLA and IMDA.<sup>227</sup> It does, however, confer upon governing states the responsibility to “provide effective mechanisms for just and fair redress” to the tribe when the governing state

<sup>222</sup> See Gover, *supra* note 68, at 357 (articulating the problem of the trust-plenary paradigm and suggesting that “the time has come for the Tribes to move even further forward in the exercise of their proprietary powers, and to further remove the United States from the day-to-day management of their lands. The Tribes’ assertions of authority and responsibility gain strength and credibility when they take responsibility for the administration of trust resources.”).

<sup>223</sup> Kristen Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 207–13 (2014) (describing several examples of international human rights standards contributing to the development of a jurisprudential paradigm favorable to Indigenous rights, even in the domestic sphere); see also S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L. & COMP. L. 13, 14 (2004) (“Numerous processes within the international system have focused on the common set of ongoing problems that are central to the demands of indigenous groups, such that there are discernible patterns of response and normative understandings associated with the rubric of indigenous peoples. These international processes now reveal a contemporary body of international human rights law on the subject.” (citations omitted)).

<sup>224</sup> US: Obama Announces US Support to the UNDRIP, INT’L WORK GROUP FOR INDIGENOUS AFF. (Dec. 17, 2010), [http://www.iwgia.org/news/search-news?news\\_id=79](http://www.iwgia.org/news/search-news?news_id=79).

<sup>225</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>226</sup> *Id.* at art. 32.

<sup>227</sup> *Id.*; see also 25 U.S.C. §§ 396, 2103(b) (2013).

itself approves of projects that would affect indigenous lands or natural resources.<sup>228</sup>

In establishing a working interest in their energy development resources, tribes should be able to find protection through the principles of free, prior, and informed consent (“FPIC”) as set out in UNDRIP. FPIC is an emerging international standard for indigenous peoples. Closely tied to the concepts of tribal sovereignty and self-determination, FPIC requires any entity engaged with a tribe in a manner that impacts tribal resources to first receive the tribe’s free, prior, and informed consent.<sup>229</sup> FPIC is designed to replace the historical processes that excluded tribes from decision-making regarding activities that took place on or near their land.<sup>230</sup> FPIC has generally been invoked in the context of resource extraction, but is also applicable to other situations.

Free, prior, and informed consent appears at multiple points in the Declaration. Perhaps most notable are articles 19 and 32. Article 19 of UNDRIP requires states to “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 adopting and implementing legislative or administrative measures that may affect them.”<sup>231</sup> Article 32 requires that states obtain “free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resource.”<sup>232</sup>

Using UNDRIP to sway the United States’ domestic disposition surrounding Indian mineral development would require a new statutory regime to guard against domestic self-interest and seek tribal self-determination via consent.<sup>233</sup> UNDRIP is a non-binding document. Even with President Obama’s

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<sup>228</sup> UNDRIP, *supra* note 225, art. 32.

<sup>229</sup> Hum. Rts. Council, Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples, ¶¶ 26–29, U.N. Doc. A/HRC/24/41 (July 1, 2014), <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>.

<sup>230</sup> UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18 (2013), [www.un-redd.org/Launch\\_of\\_FPIC\\_Guidelines/tabid/105976/Default.aspx](http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx) [hereinafter UNREDD] (follow “UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC)”).

<sup>231</sup> UNDRIP, *supra* note 225, art. 19.

<sup>232</sup> *Id.* at art. 32.

<sup>233</sup> Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & C.L. 45 (2012) (exploring consent theory as applied to Federal Indian Law); *cf.* Exec. Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (“Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency’s implementation of this order. Within 60

endorsement, the declaration has no influence from a purely legal standpoint. However, tribes can still utilize UNDRIP as political capital to protect their rights. If tribes make this demand the prevalent norm, then Congress may begin to consider its plenary authority in accordance with UNDRIP, altering the entire legal and administrative landscape in a manner conducive to sufficient protection of tribal property rights.

International Labour Organization (“ILO”) Convention No. 169, or the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, is another key international human rights instrument affecting these issues and weighs heavily in promotion of self-determination and cultural protection of indigenous communities.<sup>234</sup> Former United Nations Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, describes this Convention as “perhaps the most prominent and specific international affirmation of indigenous cultural integrity and group identity.”<sup>235</sup> Article 7 of the Convention encompasses this idea of cultural integrity from a self-determination angle.<sup>236</sup> This article states that indigenous tribal people “shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being . . . and to exercise control, to the extent possible, over their own economic, social and cultural development.”<sup>237</sup> This language suggests an international policy that favors giving indigenous communities control over not just the mechanisms for protecting the economic and spiritual well-being of tribes, but also over the process of prioritizing the tribe’s needs in deciding what development initiatives to take and when to take them.<sup>238</sup>

Using both Convention No. 169 and UNDRIP as exemplars, Anaya summarizes the status of indigenous people in the general international human rights framework.<sup>239</sup> Anaya states “the contemporary human rights regime concerning indigenous peoples advances, on the one hand, cultural integrity and autonomy and, on the other, participatory engagement.”<sup>240</sup> He then notes that this “dual thrust,” reflects an international view that indigenous communities are both a part of and distinct from the governing states under

days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency’s consultation process.”).

<sup>234</sup> International Labour Organisation, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991) [hereinafter Convention No. 169].

<sup>235</sup> See Anaya, *supra* note 223, at 23.

<sup>236</sup> Convention No. 169, *supra* note 234, art. 7.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*; see also Anaya, *supra* note 223, at 22–23 (stating that Convention No. 169 “generally enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them”).

<sup>239</sup> Anaya, *supra* note 223, at 60.

<sup>240</sup> *Id.*

which they fall.<sup>241</sup> From an American perspective, this international view could easily be understood as a manifestation of the “domestic dependent nation” status that has proven complicating to the idea of tribal sovereignty in American jurisprudence.<sup>242</sup>

However, Anaya speaks positively about the UNDRIP as an embodiment of international “principles of self-determination and cultural integrity” that collectively “uphold the right of indigenous peoples to maintain and develop their own customary law systems of self-governance.”<sup>243</sup> He points specifically to article 33 of the draft of UNDRIP, which states that “[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.”<sup>244</sup> According to Anaya, included in these “internationally recognised human rights” are rights that comport with indigenous conceptions of ownership that have proven to be problematic sources of dissonance between western culture and native communities throughout the course of history.<sup>245</sup> Anaya looks specifically to Convention No. 169 providing for recognition of indigenous land tenure systems in asserting that this Convention “affirms the

<sup>241</sup> *Id.*

<sup>242</sup> Krakoff, *supra* note 79, at 1110–13 (“Scholars need to educate the federal courts—as well as ourselves—that tribal self-government can prosper in the twenty-first century in ways that are efficacious and appropriate.’ Otherwise, the impression will continue in the minds of some members of the Court and many members of the public that tribal sovereignty is nothing more than an inconsistent, paradoxical legal shell that American case law has constructed.” (quoting Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 12 n.37 (2002))).

<sup>243</sup> Anaya, *supra* note 223, at 49–52; *see also* International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976). Anaya cites to the latter two documents to exemplify his statement that a “common article 1 of the international human rights covenants” state something along the lines of the following: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.” UNDRIP, *supra* note 225, art. 34.

<sup>244</sup> Anaya, *supra* note 223, at 51 (citing Comm’n on Hum. Rts., Rep. of the Sub-Comm’n on Prevention of Discrimination and Protection of Minorities on Its Forty-Sixth Session, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 113 (Oct. 28, 1994)). Anaya’s article was published in 2004 when the UNDRIP was still a proposed draft. Article 34 of the resulting Declaration states essentially the same as this the draft: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” UNDRIP, *supra* note 225, art. 34.

<sup>245</sup> Anaya, *supra* note 223, at 40–41. *See generally* Carpenter & Riley, *supra* note 223 (proposing a model of ownership that shifts away from individual-based property law rights and into a stewardship model that more aptly protects tribal interests in obtaining and enforcing property rights as a means of protecting cultural heritage).

notion, promoted by various international institutions, that indigenous peoples, as groups, are entitled to a *continuing* relationship with lands and natural resources according to traditional patterns of use or occupancy."<sup>246</sup>

FPIC is an international rights-based standard for interactions with indigenous peoples. Closely tied to the concepts of tribal sovereignty and self-determination, FPIC requires any entity engaged with a tribe in a manner that impacts tribal resources to first receive the tribe's free, prior and informed consent.<sup>247</sup> FPIC is designed to replace the historical processes that excluded tribes from decision-making regarding activities that took place on or near their land.<sup>248</sup> FPIC has generally been applied in the context of resource extraction, but may be appropriate in other settings.<sup>249</sup>

Each element of free, prior, and informed consent has legal significance. It is important to note that these definitions are still being developed and are often context-specific. First, consent can only be made freely if "given voluntarily and absent of 'coercion, intimidation or manipulation,'" and the process "is self-directed by the community from whom consent is sought, unencumbered by coercion, expectations or timelines that are externally imposed."<sup>250</sup> It is clear that a tribe must be given time to "understand, access, and analyze information" before giving consent.<sup>251</sup> However, there is disagreement about the stage in the planning and development process at which consent must be obtained.<sup>252</sup>

Critically, consent can only be properly obtained if a tribe is adequately informed of all of the potential harms and impacts of a proposed activity.<sup>253</sup> This means that the tribe should have access to information that is "clear, consistent, accurate, constant, [] transparent . . . objective . . . and complete."<sup>254</sup> This includes access to information in the local language and in a format that is culturally appropriate.<sup>255</sup> The precise set of actions that constitutes consent

<sup>246</sup> Anaya, *supra* note 223, at 40 (citing Convention No. 169, *supra* note 234, arts. 14(1), (3)). Article 14(1) states that "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." *Id.* Anaya points out the significance of the present tense in the word "occupy" but also notes that the Convention, via article 13, allows for a constructive present "occupancy" to be established by showing a cultural connection to the land. *Id.*

<sup>247</sup> Hum. Rts. Council, *supra* note 229.

<sup>248</sup> UN-REDD, *supra* note 230, at 18.

<sup>249</sup> Hum. Rts. Council, *supra* note 229.

<sup>250</sup> UN-REDD, *supra* note 230, at 16, 18.

<sup>251</sup> *Id.* at 19.

<sup>252</sup> *See, e.g., id.* at 20.

<sup>253</sup> *Id.* at 19.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

varies from indigenous group to group.<sup>256</sup> FPIC is a relatively new concept that has most often been considered in an international, rather than a domestic, context. It is clear, however, that consent is predicated on the ability for a tribe to say “[n]o” to a proposed activity.<sup>257</sup>

One essential question is whose consent must be obtained. Many feel that all impacted rightsholders and community members must be included in the process in order for there to be free, prior, and informed consent.<sup>258</sup> Another critical question is whether consent should be given once or should be required at each phase of an agreement’s implementation.<sup>259</sup>

In the public context, FPIC is seen as a minimum standard for nations working with indigenous groups.<sup>260</sup> FPIC is recognized in multiple articles of UNDRIP.<sup>261</sup> Article 32, for instance, states the following:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>262</sup>

Although the document is not legally binding, this helps demonstrate the nation’s acceptance of the concept of FPIC.

In the private context, FPIC is developing into an international standard for companies operating on indigenous lands.<sup>263</sup> Much of this progress is a result of shareholders concerned about the financial and reputational risks to which their companies are exposed when operating on indigenous land without the consent of the impacted community.<sup>264</sup> For instance, in 2007, 91.6% of shareholders passed a resolution that directed the Newmont Mining Corporation to assess their practices and policies with respect to indigenous peoples.<sup>265</sup> Newmont, as a founding member of the International Council on

<sup>256</sup> *Id.* at 20.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *See, e.g., id.*

<sup>260</sup> FIRST PEOPLES WORLDWIDE, INDIGENOUS PEOPLES GUIDEBOOK ON FREE PRIOR AND INFORMED CONSENT AND CORPORATION STANDARDS 4 (2011), <http://www.firstpeoples.org/images/uploads/IPs%20Guidebook%20to%20FPIC.pdf>.

<sup>261</sup> UNDRIP, *supra* note 225, arts. 10, 11, 19, 28, 29, 32.

<sup>262</sup> *Id.* art. 32.

<sup>263</sup> FIRST PEOPLES WORLDWIDE, *supra* note 260.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 3.

Mining and Metals (“ICMM”), recently approved an Indigenous Peoples and Mining Statement that recognizes FPIC and discusses the importance of engaging and consulting with indigenous communities that may be impacted by their business operations.<sup>266</sup> ICMM states that indigenous people should be “(i) able to freely make decisions without coercion, intimidation or manipulation; (ii) given sufficient time to be involved in project decision making before key decisions are made and impacts occur; and (iii) fully informed about the project and its potential impacts and benefits.”<sup>267</sup>

In *Indigenous Peoples’ Right to Free, Prior, and Informed Consent: Reflections on Concepts and Practice*, Joji Cariño suggests that free, prior and informed consent is a key aspect in adhering to a “rights-and-risks” approach to decision-making regarding energy resource development.<sup>268</sup> The “rights-and-risks” approach “explicitly combines human rights impact assessments with risks assessments” in ascertaining the stakeholders for these decisions.<sup>269</sup> Cariño presents this approach as being part of a greater scheme of proper negotiation with stakeholders, a scheme that is at odds with the “balance-sheet” approach, in which the benefits that a decision can provide for one group are “statistically offset against adverse impacts on other sections of society.”<sup>270</sup> Through free, prior, and informed consent principles within a “rights-and-risks” scheme for decision-making, tribes should be able to establish a working interest in their energy resources without undue interference from outside entities that seek benefits perceived to outweigh those of the tribe.

This developing legal canon of free, prior, and informed consent can play a role in broadening the scope of tribal jurisdiction. Stemming from UNDRIP’s FPIC requirements, Matthew L.M. Fletcher’s take on consent theory is one potential protection mechanism for tribes having a working interest in energy resource development. In *Tribal Consent*, Fletcher defines consent theory as the “notion that tribal authority remains extant absent

<sup>266</sup> *Strengthening Our Commitment to the Rights of Indigenous Peoples*, NEWMONT (May 22, 2013), [www.newmont.com/our-voice-blog/2013/Strengthening-Our-Commitment-to-the-Rights-of-Indigenous-Peoples/default.aspx?view=details&item=Strengthening-Our-Commitment-to-the-Rights-of-Indigenous-Peoples](http://www.newmont.com/our-voice-blog/2013/Strengthening-Our-Commitment-to-the-Rights-of-Indigenous-Peoples/default.aspx?view=details&item=Strengthening-Our-Commitment-to-the-Rights-of-Indigenous-Peoples).

<sup>267</sup> INT’L COUNCIL ON MINING & METALS, INDIGENOUS PEOPLES AND MINING (2013), <http://www.icmm.com/document/5433>.

<sup>268</sup> Joji Cariño, *Indigenous Peoples’ Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT’L & COMP. L. 19, 21–24 (2005); see also WORLD COMM’N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING (2001), [www.internationalrivers.org/files/attached-files/world\\_commission\\_on\\_dams\\_final\\_report.pdf](http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf).

<sup>269</sup> Cariño, *supra* note 268, at 22–23.

<sup>270</sup> *Id.* at 22; see also WORLD COMM’N ON DAMS, *supra* note 268, at 204 (“We are moving from assessing public interest in general terms to a focus on improving equity in the spread of costs and benefits from development . . . . The emerging consensus on the need for greater transparency and participation in development decision-making is likely to speed up this transition considerably.”).

consensual abrogation of that authority.”<sup>271</sup> Fletcher’s article focuses on the role of consent as it pertains to tribal jurisdiction over nonmembers.<sup>272</sup> Fletcher argues that while the judiciary has not made comprehensive determinations on whether there should be a legal presumption that tribes have jurisdiction over nonmembers on tribal lands, tribes can take advantage of the fact that courts cannot and will not hear every case challenging a tribal regulation over a nonmember by exercising tribal jurisdiction through what Joseph Kalt and Stephen Cornell refer to as “de facto sovereignty.”<sup>273</sup> Through this exercise, tribes can move toward establishing their own “consent regime[s]” shaping the requirement under *Montana* that nonmembers must be engaged in a consensual relationship with the tribe in order fall under tribal jurisdiction.<sup>274</sup> This type of tribal juridical indoctrination can help fortify tribal jurisdiction over nonmembers, helping establish a foundational legal landscape supporting the implementation of consent theory.

Although the United States and major extractive companies are moving toward a respect for tribal rights, it will be the tribes themselves that are vested with the unique opportunity to proactively engage stakeholders with respect to FPIC as a condition for companies engaging with the tribe. A consent regime recognizes this right and this reality, and considers both best interests and fulfills self-determination.

#### IX. KEYSTONE XL AS AN EXAMPLE OF PLENARY POWER WITHOUT FPIC

One issue that in many ways embodies the current political juncture of energy resource development and how it relates to Indian tribes is that of the Keystone XL Pipeline. The Keystone XL Pipeline is a proposed project of TransCanada Keystone Pipeline, LP, (“Keystone”) which entails the construction of an 875-mile oil pipeline from Morgan, Montana to Steele City, Nebraska, enabling over 800,000 barrels of crude oil to be directly transported from the Western Canadian Sedimentary Basin to middle America each day.<sup>275</sup>

While this pipeline has undoubtedly been at the forefront of political discourse over environmental policy since it was initially proposed, it has

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<sup>271</sup> Fletcher, *supra* note 233, at 118.

<sup>272</sup> *See id.* at 109–20.

<sup>273</sup> *Id.* at 118–19 (“This shift toward self-determination has allowed those nations that have been willing to do so to engage in genuine self-governance, to turn sovereignty as a legal matter into de facto sovereignty: sovereignty in fact and practice.” (citing Cornell & Kalt, *supra* note 152, at 188)).

<sup>274</sup> Fletcher, *supra* note 233, at 119.

<sup>275</sup> U.S. DEP’T OF STATE, BUREAU OF OCEANS & INT’L ENVTL. & SCI. AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT OF THE KEYSTONE XL PROJECT: EXECUTIVE SUMMARY 1 (2014) [hereinafter EIS EXEC. SUMMARY], <http://keystonepipeline-xl.state.gov/documents/organization/221135.pdf>.



picked up considerable steam with the incoming of the 114th Congress. Within the first two weeks of January 2015, the Senate and the House of Representatives both introduced identical bills to approve the pipeline, both of which have since reached the Senate Calendar.<sup>276</sup> The bills, both entitled “Keystone XL Pipeline Act,” would give express congressional authorization to “construct, connect, operate, and maintain the pipeline and cross-border facilities.”<sup>277</sup>

The pipeline itself is certainly no windfall for Indian tribes. According to the Executive Summary of the State Department Bureau of Oceans and International Environmental and Scientific Affairs’s Final Supplemental Impact Statement for the Keystone XL Project (“Final Supplemental EIS”), approximately 17% of the land near the proposed pipeline “intersects areas with low income or minority populations, including Indian tribes.”<sup>278</sup> The Final Supplemental EIS also concludes that the Cheyenne River Indian Reservation and the Rosebud Indian Reservation are amongst the minority population areas affected by the proposed project.<sup>279</sup> The Final Supplemental EIS then identifies some of the possible adverse effects on this project for these areas as “exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health service.”<sup>280</sup>

These dangers to tribal well-being are compounded by the threat the pipeline poses to Indian sacred sites. In 2011, the Great Plains Tribal Chairman’s Association (“GPTCA”) issued a letter to President Obama urging him to refrain from approving the construction of the pipeline.<sup>281</sup> Amongst a bevy of other objections to the pipeline, the GPTCA stated in its letter that the pipeline could destroy or compromise thousands of sacred cultural resources held by the Great Sioux Nation in violation of the Fort Laramie Treaties of 1851 and 1868.<sup>282</sup> Similarly, in April 2013, the National Congress of American Indians (“NCAI”) produced comments in response to the draft Supplemental Environmental Impact Statement that had been released by the Department of State in March of the same year.<sup>283</sup> In these comments, the

<sup>276</sup> Keystone XL Pipeline Act, S. 1, 114th Cong. (2015); Keystone XL Pipeline Act, H.R. 3, 114th Cong. (2015).

<sup>277</sup> S. 1; H.R. 3.

<sup>278</sup> EIS EXEC. SUMMARY, *supra* note 275, at 20.

<sup>279</sup> *Id.* at 21.

<sup>280</sup> *Id.*

<sup>281</sup> Letter from John Steele, Chairman, Great Plains Tribal Chairman’s Ass’n, to Barack Obama, President (Jan. 11, 2015), [http://indigenouising.org/wp-content/uploads/2014/09/GPTCA\\_letter-to-obama.pdf](http://indigenouising.org/wp-content/uploads/2014/09/GPTCA_letter-to-obama.pdf).

<sup>282</sup> *Id.*

<sup>283</sup> NAT’L CONG. OF AM. INDIANS, COMMENTS IN RESPONSE TO THE UNITED STATES DEPARTMENT OF STATE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (DSEIS) FOR THE KEystone XL PROJECT APPLICANT FOR PRESIDENTIAL PERMIT (2013),

NCAI explained that while the pipeline would not cross through reservation lands themselves, they would still pass through lands that tribes have historically considered sacred.<sup>284</sup> The NCAI pointed specifically to lands that are “the territory of tribal nations as recognized in the Treaty of Fort Laramie of 1851,” lands which “hold religious and cultural significance for the tribal nations involved in that treaty.”<sup>285</sup>

Concern over sacred sites has been addressed to some extent. As Final Supplemental EIS explains, the Programmatic Agreement signed by Keystone, several state and federal agencies, and Indian tribes requires that Keystone “complete cultural resources surveys on all areas that would be potentially impacted by the proposed Project” and “provide adequate mitigation in consultation with the Department, state and federal agencies, and Indian tribes.”<sup>286</sup> While this alleviates some of the concern over the damaging effects the pipeline may have on sacred sites, there does not appear to be any reference to FPIC in this consultation requirement, calling into question what it would truly mean for Keystone to minimally comply with the Agreement. Moreover, the Final Supplemental EIS explains that the Indian tribes would have a role in determining the mitigation measures Keystone must take in cases where “cultural resources will be affected.”<sup>287</sup> This language is vague in describing what such a situation might look like. For instance, can this “inability” to avoid a cultural resource stem from a balancing of interests? If so, then the benefits of consultation become highly compromised.

Unfortunately for Indian tribes that will be affected by the construction of the Keystone XL pipeline, these risks are grounded in a very serious reality. In November of 2014, Rosebud Sioux President, Cyril Scott, stated to RT that congressional approval of the pipeline would constitute an “act of war,” later explaining that the construction of the pipeline would threaten the health of future generations by contaminating the Ogallala Aquifer, which he identified as the “second biggest water aquifer in the world.”<sup>288</sup> Scott lamented the “lack

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<http://www.ncai.org/resources/testimony/ncai-comments-on-the-draft-supplemental-environmental-impact-statement-dseis-for-the-proposed-keystone-xl-pipeline>.

<sup>284</sup> *Id.* at 13.

<sup>285</sup> *Id.*

<sup>286</sup> EIS EXEC. SUMMARY, *supra* note 275, at 26.

<sup>287</sup> *Id.*

<sup>288</sup> *Passing Keystone Pipeline 'An Act of War,' Sioux Tribe President Tells RT*, RT (Nov. 20, 2014), <https://www.rt.com/usa/207107-sioux—keystone-act-war/>; *see also* Amanda Holpuch, *South Dakota Sioux Tribe Calls Keystone XL Pipeline Approval 'Act of War,' THE GUARDIAN* (Nov. 17, 2014, 1:49 PM), <http://www.theguardian.com/environment/2014/nov/17/sioux-tribe-keystone-xl-pipeline-south-dakota-act-of-war>; *As Sioux Tribe Calls Keystone XL an "Act of War", Transcanada Hires PR Firm to Probe Critics*, DEMOCRACY NOW! (Nov. 19, 2014), [http://www.democracynow.org/2014/11/19/as\\_sioux\\_tribe\\_calls\\_keystone\\_xl](http://www.democracynow.org/2014/11/19/as_sioux_tribe_calls_keystone_xl).

of intergovernmental cooperation” on this issue,<sup>289</sup> a statement which is very much vindicated by the 2014 Indigenous Rights Risk Report published by First Peoples Worldwide. According to this report, U.S.-based extractive companies have done a very poor job implementing policies that address relationships with tribes. Among the 330 projects assessed in the report, 89% presented high to medium levels of risk exposure to tribal opposition or violations of tribal rights, yet only 38% of the projects had policies that even “reference[d] Indigenous Peoples” while only a total of five companies had policies that referenced FPIC.<sup>290</sup> This suggests that even the few companies that have implemented Indigenous Peoples policies have not done so in a manner that ensures meaningful consultation with Indigenous tribes prior to engaging in potentially harmful projects. With this rather galvanizing track record among extractive companies, First Peoples Worldwide points out that “TransCanada has two options: either expect profit loss due to community opposition, or adjust their community engagement policies.”<sup>291</sup>

It is not difficult to see that the hazards addressed in the report cover a wide gamut of afflictions, obstacles, and interruptions to a well-functioning tribal government, yet, much like private extractive companies, Congress has done very little to address these tribal concerns in moving forward with the approval process for this pipeline. The bills themselves make no express mention of Indians. The only area where the language may be construed as invocative of Indian rights is in its declaration that the Final Supplemental Impact Statement issued by the Secretary of State shall satisfy “any . . . provision of law that requires Federal agency consultation or review.”<sup>292</sup> If anything, however, this statement dismisses Indian rights as being previously addressed and satisfied instead of providing them with any viable grounds for protection to rely upon.

It may be true that the threats to tribes that are presented by the pipeline have been ignored by Congress at large, but they have not gone unnoticed by all members of Congress. In 2013, Congress introduced the Northern Route Approval Act, a bill which, if enacted, would eliminate the need for a presidential permit for the pipeline.<sup>293</sup> On April 16, 2013, Ben Ray Luján, a

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<sup>289</sup> Zoë Schlanger, *South Dakota Sioux Says Keystone XL Approval Is an ‘Act of War,’ Will Close Its Borders*, NEWSWEEK (Nov. 18, 2014, 12:53 PM), <http://www.newsweek.com/south-dakota-sioux-says-keystone-xl-approval-act-war-will-close-its-borders-285276>.

<sup>290</sup> FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT 32, 36 (2014), <http://firstpeoples.org/images/uploads/Indigenous%20Rights%20Risk%20Report.pdf>.

<sup>291</sup> *At a Loss: The Unmentioned Social Risks of Keystone XL Approval*, FIRST PEOPLES WORLDWIDE, <http://firstpeoples.org/wp/at-a-loss-the-unmentioned-social-risks-of-keystone-xl-approval/> (last visited Nov. 5, 2015).

<sup>292</sup> Keystone XL Pipeline Act, S. 1, 114th Cong. § 2(b)(2) (2015); Keystone XL Pipeline Act, H.R. 3, 114th Cong. § 2(b)(2) (2015).

<sup>293</sup> Northern Route Approval Act, H.R. 3, 113th Cong. (2013).

Representative from New Mexico, proposed an amendment to the bill which would add an entire section at the end of the bill stating the following:

This Act shall not become effective unless the President determines that Native American tribes, in States where the pipeline will be located, will be fully consulted and that cultural and paleological sites significant to such tribes will be protected to the fullest extent possible during construction and operation of the Keystone XL pipeline.<sup>294</sup>

This amendment did not survive long. During an Energy and Commerce Committee Full Committee Mark Up on the bill on April 17, 2013, the Lujan amendment was defeated by a roll-call vote.<sup>295</sup> The Committee went on to favorably report the bill itself.<sup>296</sup>

On January 27, 2015, Senator Ben Cardin of Maryland offered the following amendment, directly addressing the concerns expressed by both the GPTCA and the NCAI:

Nothing in this Act may change, suspend, supersede, or abrogate any trust obligation or treaty requirement of the United States with respect to any Indian nation, Indian tribe, individual Indian, or Indian tribal organization, including the Fort Laramie Treaties of 1851 and 1868, without consultation with, and the informed and express consent of, the applicable Indian nation, Indian tribe, individual Indian, or Indian tribal organization as required under Executive Order 13175 (67 Fed. Reg. 67249) (November 6, 2000).<sup>297</sup>

Yet, on January 29, 2015, the Senate voted to approve the pipeline via the Keystone Pipeline Approval Act, a bill which included neither Senator Cardin's amendments nor any mention whatsoever of Indian treaties or sacred sites.<sup>298</sup> This omission once again proved that tribes will likely remain marginalized as long as energy resource development in the United States is shaped and steered by political forces.<sup>299</sup>

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<sup>294</sup> Amendment to H.R. 3, 113th Cong. § 9 (as proposed by Mr. Ben Ray Luján of New Mexico, Apr. 16, 2013), <http://docs.house.gov/meetings/IF/IF00/20130417/100723/BILLS-113-HR3-L000570-Amdt-09.pdf>.

<sup>295</sup> COMM. ON ENERGY & COMMERCE, 113TH CONGRESS ROLL CALL VOTE OF H.R. 3, THE "NORTHERN ROUTE APPROVAL ACT" (Apr. 17, 2013), <http://docs.house.gov/meetings/IF/IF00/20130417/100723/CRPT-113-IF00-Vote010-20130417.pdf>.

<sup>296</sup> See *id.*

<sup>297</sup> 161 CONG. REC. S529 (daily ed. Jan. 27, 2015) (statement of Sen. Ben Cardin).

<sup>298</sup> Keystone XL Pipeline Approval Act, S. 1, 114th Cong. (2015).

<sup>299</sup> Cf. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.) (holding that "[o]nce Aboriginal title is established, S. 35 of the *Constitution Act, 1982* permits incursions on it

## X. CONCLUSION

The continuum spanning federal trust, congressional expression of plenary authority, and tribal sovereignty has resulted in an outdated set of politically-driven solutions that fails to recognize fundamental tribal sovereignty or human rights as currently understood. The fiduciary obligation of the United States as trustee mandates that the right to consent confirmed in UNDRIP and the federal government's policy of self-determination condition Congress's exercise of plenary authority, freeing the process from political considerations, outmoded paternalistic norms, and the reality of trust failure. A rights-based consent regime is a forward-looking mechanism that has the potential to truly empower the tribes to more fully realize self-rule over their resources and lands.

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only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group" and finding that permits by the Canadian government to permit logging failed to meet this standard).

