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BEYOND A ZERO-SUM FEDERAL TRUST  
RESPONSIBILITY:  
LESSONS FROM FEDERAL INDIAN  
ENERGY POLICY

*Monte Mills*

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# BEYOND A ZERO-SUM FEDERAL TRUST RESPONSIBILITY: LESSONS FROM FEDERAL INDIAN ENERGY POLICY

*Monte Mills\**

## ABSTRACT

*The federal government's trust relationship with federally-recognized Indian tribes is a product of the last two centuries of Federal Indian Law and federal-tribal relations. For approximately the last 50 years, the federal government has sought to promote tribal self-determination as a means to carry out its trust responsibilities to Indian tribes; but the shadows of prior federal policies, based largely on notions of tribal incompetence and federal paternalism, remain. Perhaps no other policy arena better demonstrates the history, evolution, and promise for reform of the federal trust relationship than Federal Indian energy policy, or the range of federal statutes and regulations devoted to the management of the development of tribal energy resources. This article provides a detailed review of Federal Indian energy policy and proposes a new path for reform that would allow for broader tribal authority and, potentially, a new conception of the federal trust responsibility.*

## I. INTRODUCTION

The relationship between Indian tribes, the federal government, and the development, transportation, and use of energy resources is fraught with conflict, opportunity, and challenge. While the world has recently learned of these conflicts through tribal

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opposition to massive oil pipeline projects permitted to cross historical tribal treaty lands, such as the Dakota Access and Keystone XL,<sup>1</sup> the economic potential of energy development within Indian Country has long been the subject of significant tribal and federal attention. A century and a quarter after the first federal law authorizing the leasing and development of tribal energy resources,<sup>2</sup> there is now a comprehensive body of federal laws, regulations, and policies that apply to the development of both “traditional” and renewable energy resources within Indian Country.<sup>3</sup> Taken together, these laws, regulations, and policies form a broad Federal Indian energy policy that is bound up in the history of federal oversight of tribal resources and, more recently, attempts to promote tribal self-determination and economic development.<sup>4</sup>

Federal Indian energy policy reflects the balance of tribal sovereignty and the federal role in overseeing tribal resources at the heart of Federal Indian law.<sup>5</sup> For example, since the enactment of the 1938 Indian Mineral Leasing Act (IMLA),<sup>6</sup> the federal government has promoted natural resource development as a way to serve the twin aims of enhancing tribal sovereignty and economic prosperity—two objectives that were hallmarks of the Indian Reorganization Act (IRA) passed just a few years earlier.<sup>7</sup> Nearly 50 years later, in the early years of the current era of tribal self-

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<sup>1</sup> See, e.g., Jack Healy, *Tension on the Plains as Tribes Move to Block a Pipeline*, N.Y. TIMES, Aug. 24, 2016, at A9 <https://www.nytimes.com/2016/08/24/us/occupying-the-prairie-tensions-rise-as-tribes-move-to-block-a-pipeline.html> [<https://perma.cc/UYD3-K8LP>] (last visited Dec. 5, 2017) (includes a photo depicting “Lakota riders” demonstrating against the Dakota Access Pipeline).

<sup>2</sup> Act of February 28, 1891, Ch. 383, 26 Stat. 794, 51st Cong. (1891).

<sup>3</sup> See, e.g., Indian Mineral Leasing Act, 25 U.S.C. §§ 396a–396g (2012); Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108 (2012); Indian Tribal Energy Development & Self-Determination Act of 2005, 25 U.S.C. §§ 3501–3506 (2012); Helping Expedite & Advance Responsible Tribal Homeownership Act, 25 U.S.C. § 415(h) (2012).

<sup>4</sup> See Judith V. Royster, *Mineral Development in Indian Cnty.: The Evolution of Tribal Control over Mineral Res.*, 29 TULSA L.J. 541 (1994). Article provides a comprehensive review of the evolution of tribal authority over mineral development under Federal Indian energy policy.

<sup>5</sup> Professor Royster has aptly described the evolution of the federal-tribal relationship under various mineral development statutes as a “microcosm of the history of federal-tribal relations during the last century.” *Id.* at 543.

<sup>6</sup> Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, Ch. 198, 52 Stat. 347 (codified as 25 U.S.C. §§ 396a–396g (2012)).

<sup>7</sup> Indian Reorganization Act of 1934, Pub. L. No. 73-383, Ch. 576, 48 Stat. 984 (codified as 25 U.S.C. §§ 416 et seq. (2012) (editorially reclassified as 25 U.S.C. §§ 5101–5144)).

determination, a coalition of energy-focused tribes pushed for the Indian Mineral Development Act (IMDA),<sup>8</sup> which authorized more tribal independence in the negotiation and development of energy deals. More recent enactments and corresponding regulations have authorized even greater tribal authority over the leasing of surface lands for the development of solar and wind energy projects.<sup>9</sup> And yet, notwithstanding these efforts to encourage greater tribal authority, tribes seeking to capitalize from energy development still face delays and obstacles resulting from the federal government's involvement.<sup>10</sup> As a result, "energy tribes" continue to advocate for even further loosening, if not eliminating, the federal role in tribal energy development.<sup>11</sup> These efforts align with and may find support from recent policies of President Donald J. Trump and Secretary of the Interior, Ryan Zinke, to promote domestic energy production and remove the federal government from development decisions.<sup>12</sup>

Meanwhile, other tribes and tribal citizens remain concerned about the inability or unwillingness of federal or tribal governments to prevent energy development-related environmental harm to their tribal homelands and resources.<sup>13</sup> The gathering of thousands of

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<sup>8</sup> Indian Mineral Development Act, Pub. L. No. 97-382, 96 Stat. 1938 (1982) (codified as 25 U.S.C. §§ 2101–2108 (2012)).

<sup>9</sup> Helping Expedite & Advance Responsible Tribal Homeownership Act, 25 U.S.C. § 415(h) (2012); Leases & Permits, 25 C.F.R. Pt. 162 (2012).

<sup>10</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-502, Report to the Chairman, Committee on Indian Affairs, U.S. Senate: Indian Energy Dev.: Poor Mgmt. by BIA has Hindered Energy Dev. on Indian Lands (June 2015), <http://www.gao.gov/assets/680/670701.pdf> [<https://perma.cc/7K2C-9KNS>] [hereinafter GAO-15-502]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-43, Indian Energy Dev.: Additional Actions by Fed. Agencies are Needed to Overcome Factors Hindering Dev. (Nov. 2016), <https://www.gao.gov/assets/690/680935.pdf> [<https://perma.cc/K78A-H4L7>] [hereinafter GAO-17-43].

<sup>11</sup> See, e.g., GAO-15-502, *supra* note 10, at 25–26; *Indian Tribal Energy Development & Self-Determination Act Amendments of 2014: Hearing on S. 2132 Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014).

<sup>12</sup> See Promoting Energy Independence & Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (March 28, 2017); Mark Wolf, *Interior Sec'y Pledges Advocacy for Tribes*, THE NCSL BLOG, May 2, 2017, <http://www.ncsl.org/blog/2017/05/02/interior-secretary-pledges-advocacy-for-tribes.aspx> [<https://perma.cc/JKB9-C2W8>]; *Oversight hearing on 'Identifying Indian Affairs Priorities for the Trump Admin.'*, SENATE COMM. ON INDIAN AFFAIRS, March 8, 2017, <https://www.indian.senate.gov/hearing/oversight-hearing-identifying-indian-affairs-priorities-trump-administration1> [<https://perma.cc/2878-NNA2>].

<sup>13</sup> See, e.g., Matthew L.M. Fletcher, *Pawnee Nation & Walter Echo-Hawk Sue over Fracking*, TURTLETALK, Nov. 21, 2016, <https://turtletalk.wordpress.com/2016/11/21/pawnee-nation-walter-echo-hawk->

tribal and non-tribal citizens in opposition to the Dakota Access Pipeline in North Dakota powerfully demonstrated the coalescence of broader concerns over climate change, environmental damage, and these tribal issues.<sup>14</sup> Though the core of those challenges was rooted in the connection of the Sioux nation to the land and water, the water protectors also stood in opposition to development of fossil fuels and energy projects more broadly.<sup>15</sup> Those concerns reflected a deeper division within Indian Country, aptly summed up by Professor Matthew Fletcher’s recent comments that, because “most Indian tribes are not energy tribes, and most Indian people are not supportive of natural resources extraction,” the continued push to allow greater tribal authority over energy development may result in “a terrible battle over competing claims to tribal sovereignty—tribal energy against tribal environments.”<sup>16</sup> Thus, while historically focused on promoting the development of tribal energy resources, Federal Indian energy policy now affects a diverse array of tribal interests, and even when an energy tribe may benefit from a shift in that policy toward that tribe’s priorities, such reform may impact other tribes.<sup>17</sup>

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sue-over-fracking/ [https://perma.cc/MW9S-THS7]; Sulome Anderson, *What Oil Pipelines can do to Native Am. Land & Life*, VICE MEDIA, Nov. 28, 2016, 7:30am, [https://www.vice.com/en\\_us/article/standing-rock-fort-berthold-how-oil-can-transform-and-damage-native-reservations](https://www.vice.com/en_us/article/standing-rock-fort-berthold-how-oil-can-transform-and-damage-native-reservations) [https://perma.cc/WBV9-ANWB].

<sup>14</sup> See, e.g., Jason Patinkin, *Standing Rock Tribe Protests over N. Dakota Pipeline*, AL JAZEERA MEDIA NETWORK, Oct. 29, 2016, 12:18 GMT, <http://www.aljazeera.com/indepth/inpictures/2016/10/north-dakota-native-americans-protest-pipeline-161028150518748.html> [https://perma.cc/V6SD-J4YY]; Eugene Tapahe, *Injustice at Standing Rock*, HUFFINGTON POST, Nov. 22, 2016, [http://www.huffingtonpost.com/entry/injustice-at-standing-rock\\_us\\_58337cf6e4b0d28e5521542c](http://www.huffingtonpost.com/entry/injustice-at-standing-rock_us_58337cf6e4b0d28e5521542c) [https://perma.cc/2FDX-SQBM]; *Stand with Standing Rock: News*, STAND WITH STANDING ROCK, <http://standwithstandingrock.net/category/news/> [https://perma.cc/Y6YM-EKR3] (last visited Dec. 5, 2017).

<sup>15</sup> See, e.g., Kyle Powys White, *Why the Native Am. pipeline resistance in N. Dakota is about Climate Justice*, THE CONVERSATION, Sept. 16, 2016, 12:28 PM EDT, <https://theconversation.com/why-the-native-american-pipeline-resistance-in-north-dakota-is-about-climate-justice-64714> [https://perma.cc/4N48-KZ8H].

<sup>16</sup> Matthew Fletcher, *New Divisions in Indian Cnty. over Energy Justice*, TURTLETALK, May 2, 2017, 11:35 EDT, <https://turtletalk.wordpress.com/2017/05/02/fletcher-new-divisions-in-indian-country-over-energy-justice/> [https://perma.cc/D537-5RQF].

<sup>17</sup> One example is the conflicting interests of the Crow Nation, who seeks to produce coal to ship to Asian markets through territory in which other tribes of the Northwest have reserved treaty rights. See, e.g., William Yardley, *U.S. Rejects Proposed Coal Export Facility, Siding with One Indian Tribe Over*

If the prospect of an impending conflict between tribal energy development and tribal environmental concerns is realistic, then the federal government's role in Federal Indian energy policy cannot continue to ignore the environmental, social, natural, and cultural well-being of tribes and their members. Integrating multiple and sometimes conflicting values into the development of energy policy is already a significant challenge,<sup>18</sup> which, when it comes to Federal Indian energy policy, is compounded by the historical narrowness of that policy.

Just as the various eras of Federal Indian energy policy reflect the eras of broader Federal Indian policy, the federal-tribal relationship dictated by Federal Indian energy policy reflects the broader federal trust relationship with Indian tribes. While the federal-tribal relationship with regard to energy development has evolved over time, it has always moved along a single axis, with broad, paternalistic oversight and control by the federal government at one end and tribal self-determination and sovereignty at the other.<sup>19</sup> Though the federal policy has shifted along this axis toward allowing greater tribal authority, the limits of the discussion have always been clear: tribes can assume greater authority but only to the extent that such assumption correspondingly reduces federal obligations. In addition, tribes are limited to exercising expanded authority in a manner consistent with the federal government's existing standards and practices.<sup>20</sup> In other words, for tribes, Federal Indian energy policy is a zero-sum proposition where the only

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*Another*, L.A. TIMES (May 9, 2016, 8:01 PM) <http://www.latimes.com/nation/lanasej-cherry-point-20160509-snap-story.html> [<https://perma.cc/8MZ5-KFKM>].

<sup>18</sup> See, e.g., Victor Flatt & Heather Payne, *Not One Without the Other: The Challenge of Integrating U.S. Env't, Energy, Climate, & Econ. Policy*, 44 ENV'T L. L. 1079, 1081 (2014) ("Our energy laws and policies focus on national security, cheap energy, or energy that causes less environmental harm, but these interests may work at cross purposes.").

<sup>19</sup> Professor Ezra Rosser describes a similar "trade-off," between the trust responsibility and tribal self-determination. Ezra Rosser, *The Trade-Off Between Self-Determination & the Trust Doctrine: Tribal Gov't & the Possibility of Failure*, 58 ARK. L. REV. 291, 350–51 (2005). See also Carla F. Fredericks, *Plenary Energy*, 118 W. VA. L. REV. 789, 790–91 (2015).

<sup>20</sup> See, e.g., Helping Expedite & Advance Responsible Tribal Homeownership Act (HEARTH Act), 25 U.S.C. §§ 415(h)(3)(B)(i)–(ii) (2012); Indian Tribal Energy Development & Self-Determination Act of 2005, 25 U.S.C. §§ 3501–3506, 3504(e)(2)(C) (2012); 25 C.F.R. 224.63(c) (2014).

variables considered are whether and to what extent the tribe decides to assume the pre-existing federal role.<sup>21</sup>

The evolution of the federal trust responsibility, particularly in the current era of tribal self-determination, has exposed these limits in clear relief. Professor Kevin Washburn, who served as Assistant Secretary of Indian Affairs at the United States Department of Interior (the Department)—the federal official most responsible for carrying out the trust responsibility—from 2012-2015, recently explained that increased tribal self-determination means that “tribal decisions have begun to have more significant consequences, and have produced confusion about federal and tribal roles and responsibilities.”<sup>22</sup> In addition, Professor Washburn notes that “the residue of federal paternalism continues to pose significant obstacles for tribes,”<sup>23</sup> while, in the name of promoting tribal self-government, both the judicial<sup>24</sup> and legislative<sup>25</sup> branches have significantly narrowed the federal government’s potential liability for breaches of its trust oversight and approval duties.<sup>26</sup> In light of this conflict, Professor Washburn poses the “significant question [of] whether the trust responsibility has any value to tribes if tribes are subject to federal control for which the federal government is not legally accountable.”<sup>27</sup> Professor Washburn ultimately concludes that the political branches have become largely responsible for fulfilling the trust responsibility,<sup>28</sup> which now, “in effect, constitutes the obligation to foster and protect tribal self-governance.”<sup>29</sup>

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<sup>21</sup> Cf. Raymond Cross, *The Fed. Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369, 394 (describing the United States Supreme Court’s zero sum approach toward the federal trust responsibility and tribal sovereignty in *United States v. Navajo Nation*, 537 U.S. 488 (2003)); Rosser, *supra* note 19, at 311–20. See also GOKTUG MORCOL, A COMPLEXITY THEORY FOR PUBLIC POLICY 50–55 (2012).

<sup>22</sup> Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Fed. Indian Policy*, 130 HARV. L. REV. F. 200, 202 (2017).

<sup>23</sup> *Id.* at 223.

<sup>24</sup> See, e.g., *United States v. Navajo Nation*, 556 U.S. 287, 301–02 (2009); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–79 (2011).

<sup>25</sup> See, e.g., 25 U.S.C. § 2103(e) (excusing the United States from any liability or losses suffered by an Indian tribe pursuant to an IMDA approved by the Secretary of the Interior in accordance with the terms of that Act and applicable law).

<sup>26</sup> See Washburn, *supra* note 22, at 208–12 (reviewing the Supreme Court’s Indian trust jurisprudence and concluding that it “seems that the trust responsibility exists, but only in situations in which tribal self-determination does not . . . Power, it is sometimes said, is a zero-sum game.”).

<sup>27</sup> Washburn, *supra* note 22, at 212.

<sup>28</sup> Washburn, *supra* note 22, at 200.

<sup>29</sup> Washburn, *supra* note 22, at 214.



Like Professor Washburn, Kevin Gover, another former Assistant Secretary of Indian Affairs, analyzed the federal-tribal relationship after his 2001 departure from the Department of Interior.<sup>30</sup> In an article published five years later, Gover called for bringing the trust relationship into the 21<sup>st</sup> century by criticizing federal policy at the time as “stirringly dumb”<sup>31</sup> and arguing that, because “[t]he assumptions [of tribal incompetence and impermanence] underlying the trust are invalid... the specifics of the trust hold little value in the making of modern Indian policy.”<sup>32</sup> Instead, Gover proposed that “Tribes should be able to retain those aspects of the trust that they find useful and desirable and eliminate those that they do not want.”<sup>33</sup> Citing to a pre-cursor of 2012’s Helping Expedite Affordable and Responsible Tribal Homeownership (HEARTH) Act,<sup>34</sup> as a key step toward his proposal, Gover’s modern trust would allow for negotiation, on a tribe-by-tribe basis, of the trust duties to be carried out by the federal government.<sup>35</sup>

As two of the top-three longest serving Assistant Secretaries for Indian Affairs, Washburn and Gover offer deeply informed and critical views that, taken together, can help chart a course for the next era of federal Indian policy, albeit with some significant potential challenges.<sup>36</sup> Perhaps more than any other policy area, Federal Indian energy policy provides a concrete context that demonstrates the shortcomings of continuing the zero-sum approach to balancing the federal trust responsibility with tribal self-governance. Importantly, however, recent developments within this policy arena also show the potential for moving beyond that single axis of federal-tribal relations toward a new relationship that would

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<sup>30</sup> See generally Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317 (2006).

<sup>31</sup> *Id.* at 373.

<sup>32</sup> *Id.* at 318.

<sup>33</sup> *Id.* at 359.

<sup>34</sup> Navajo Nation Trust Land Leasing Act of 2000, S. Con. Res. 161, 114 Stat. 3211 (2000). In 2012, the HEARTH Act further amended the Indian Long-Term Leasing Act to allow other tribes to assume control of surface leasing, subject to relevant limitations. See *infra* Part II, Section G (Helping Expedite Affordable and Responsible Tribal Homeownership Act (HEARTH) of 2012).

<sup>35</sup> Gover *supra* note 30, at 359–62.

<sup>36</sup> For example, both Washburn recognizes the increased scrutiny of tribal decision-making and calls for additional federal oversight to prevent human rights or other perceived abuses. See Washburn *supra* note 22 at 224–31. Both Washburn and Gover note the need to protect allottees and their interests. See *id.* at 230–31; Gover *supra* note 30, at 367–68.

allow for broader and more independent tribal authority without a corresponding reduction of federal support or involvement. Therefore, while there remains a real potential for the battle of “tribal energy against tribal environments,”<sup>37</sup> all tribes, whether energy- or environmentally-focused, stand to benefit from a potentially redefined federal-tribal relationship.

This article highlights the lessons of Federal Indian energy policy to demonstrate how the evolution and future of that policy may result in a new federal-tribal relationship; one that moves beyond the limits of the zero-sum approach. To do so, the article begins by setting the historical context of Federal Indian energy policy, including its basis in the federal trust relationship and its development through various eras of broader Federal Indian Law and policy. The second part details the current century’s contributions to Federal Indian energy policy: the 2005 Indian Tribal Energy Development and Self-Determination Act (ITEDSDA),<sup>38</sup> which authorized tribal authority over a variety of energy-related transactions, and the HEARTH Act,<sup>39</sup> which, in combination with revised leasing regulations specifically providing for wind and solar projects,<sup>40</sup> authorized greater tribal authority over certain energy-related surface leases. The article then proceeds to critique each of these approaches, as well as the most recent legislative and administrative reform proposals, in light of their continuing promotion of a zero-sum strategy. After acknowledging the current threats to an expanded approach to Federal Indian energy policy, the article proposes a new, more holistic approach to reform to meet the challenges left unaddressed by current law and recent proposals for change. The article then concludes with a few examples of the beginning of such an approach as well as its potential applicability beyond the realm of Federal Indian energy policy.

Ultimately, although recognizing that the current political climate poses significant threats to tribes and tribal authority, this article concludes on a hopeful note. The potential for meaningful

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<sup>37</sup> Fletcher, *supra* note 16.

<sup>38</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 764 (codified at 25 U.S.C. §§ 3501–06 (2012)).

<sup>39</sup> Helping Expedite & Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (codified at 25 U.S.C. § 415(h)(2012)).

<sup>40</sup> *See generally* 25 C.F.R. §§ 162.501–599 (2014).

reform of the federal-tribal relationship, led by tribal initiative and implemented in accordance with tribal priorities, is real; and, just as the long arc of history bends toward justice,<sup>41</sup> the arc of the federal-tribal trust relationship bends toward such tribally-driven reform.

## II. HOW WE GOT HERE: THE TRUST RELATIONSHIP AND FEDERAL INDIAN ENERGY POLICY

The federal trust relationship with Indian tribes is a complex, broad, and multi-faceted beast; however, energy and mineral development in Indian Country presents perhaps the clearest window into the evolution of that relationship. Indeed, the federal approach to such development has consistently reflected the prevailing federal policy toward Indian tribes, for better or worse, and, more recently, provided a vehicle for the Supreme Court to significantly limit the potential for tribes to enforce the trust responsibility by pursuing damages claims against the federal government.<sup>42</sup> As such, this section provides a detailed overview of the history of the nature of the trust responsibility and its role in Federal Indian energy policy.

### A. *The Trust Relationship*

The roots of the federal government's trust responsibility to Indian tribes are entwined with those of the United States itself. Although it was not until 1831 that Chief Justice John Marshall described the relationship of the federal government to an Indian nation as "that of a ward to his guardian," he rested that assertion upon earlier treaties and other relations with the tribes that, in Marshall's view, informed the drafters of the Constitution to include

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<sup>41</sup> THEODORE PARKER, TEN SERMONS OF RELIGION 84–85 (Frances Power Cobbe ed., 1853); Dr. Martin Luther King, Jr., *Address at the Conclusion of the Selma to Montgomery March*, STANFORD UNIVERSITY (March 25, 1965), [http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc\\_address\\_at\\_the\\_conclusion\\_of\\_selma\\_march.1.html](http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march.1.html) [https://perma.cc/82GA-FQ6X].

<sup>42</sup> *United States v. Navajo Nation*, 537 U.S. 488, 513 (2003) (Navajo I) ("[T]he Tribe's assertions are not grounded in a specific statutory or regulatory provision that can fairly be interpreted as mandating money damages."); *United States v. Navajo Nation*, 556 U.S. 287, 301-02 (2009) (Navajo II) ("Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating."); *See infra* notes 89–93 (providing the original features of the Indian Mineral Leasing Act of 1938).

“Indian tribes” as entities distinct from states and foreign nations with which Congress was authorized to regulate commerce.<sup>43</sup> In the following term of the Supreme Court, Marshall further defined the federal-tribal relationship to the exclusion of the state authority and again relied upon treaties between the tribes and the United States for support of his finding that “[t]he whole intercourse between the United States and the [Indian] nation[s], is, by our constitution and laws, vested in the government of the United States.”<sup>44</sup> In addition, Marshall drew upon the colonial history of the United States and recognized that, by entering treaties with the original inhabitants of the nation, the United States, as had colonial powers before it, acknowledged the tribes’ right of self-governance and assumed the burdens of “furnish[ing] supplies of which they were in absolute need, and restrain[ing] dangerous intruders from entering their country.”<sup>45</sup> Beyond the treaties, Marshall noted this recognition was also reflected in the earliest laws of both the Continental and United States Congresses.<sup>46</sup> Thus, as conceived by Marshall, the trust relationship flowed from the United States’ colonial ancestry and its subsequent assumption of the role of protector of the tribes in the nation’s earliest treaties and laws.<sup>47</sup>

The manner in which Congress first sought to regulate trade and intercourse between Indians and non-Indian settlers remains relevant for present-day Federal Indian energy policy. The first so-called Trade and Intercourse Act, enacted in 1790, required that any sale of Indian property be done only pursuant to the authority of the United States.<sup>48</sup> Congress also created a substantial role for the federal government in the regulation and licensing of those trading with Indians.<sup>49</sup> These oversight and approval activities were consistent with duties that the United States had assumed under

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<sup>43</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17–18 (1831); U.S. CONST. ART. I, § 8, cl. 3.

<sup>44</sup> *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

<sup>45</sup> *Id.* at 547; *see id.* at 561.

<sup>46</sup> *Id.* at 549, 556–57; 2 J. CONTINENTAL CONG. 175, 183 (1775); Act of Aug. 7, 1789, ch. 8, 1 Stat. 49. *See also* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999, 1007–08 (2014). Four of the nation’s first thirteen statutes dealt with Indian affairs. FELIX COHEN, HANDBOOK OF FED. INDIAN LAW § 1.03 (Nell Jessup Newton, ed. 2012) [hereinafter COHEN’S HANDBOOK].

<sup>47</sup> *Worcester*, 31 U.S. at 557–58.

<sup>48</sup> Act of July 22, 1790, § 4, 1 Stat. 137, 138. (confirmed by *Johnson v. M’Intosh*, 21 U.S. 534, 568–69 (1823)). This provision remains in effect, with some revisions. 25 U.S.C. § 177 (2012).

<sup>49</sup> Act of July 22, 1790, §§ 1–3.

earlier treaties with various tribes and were the practical exercise of Congress' constitutional authority to regulate commerce with Indian tribes.<sup>50</sup> Chief Justice Marshall later conceptualized (and sought to justify) the United States' interest in Indian lands as "absolute ultimate title ... acquired by discovery, subject only to the Indian title of occupancy."<sup>51</sup> This conception, in combination with Chief Justice Marshall's subsequent "ward to guardian" notion, ultimately led to the Congressional recognition that the federal government holds Indian lands in trust for the benefit of tribes and, in the case of allotted lands, for individual Indians.<sup>52</sup>

The federal trust responsibility and the concomitant federal trusteeship of a tribal property is thus a fundamental tenet of both federal Indian law and our nation's constitutional structure. It is no surprise, then, that the United States' approach to the development of tribal energy and mineral resources has depended upon how both the legislative and executive branches sought to carry out these responsibilities.

#### B. *The Early Years: What Policy?*

The first efforts to authorize the leasing of Indian lands for mining purposes arose in the early years of the allotment era. Congress opened that era and the subsequent rush on Indian lands by authorizing the allotment of Indian reservations pursuant to the Dawes Act of 1887.<sup>53</sup> Contemporaneously with the push to open Indian reservations for allotment, other private interests sought to lease Indian lands for grazing and mining; however, questions soon arose as to whether Indians could lease their lands without federal approval.<sup>54</sup> The Attorney General and the Department of the Interior

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<sup>50</sup> U.S. CONST. ART. I, § 8, cl. 3. *See e.g.*, Treaty with the Delawares, U.S.-Delaware Nation, art. 5, 7 Stat. 13 (1788) <http://digital.library.okstate.edu/kappler/Vol2/treaties/del0003.htm> [<https://perma.cc/NW3X-WQ9E>]; Treaty with the Choctaw, U.S.-Choctaw Nation, art. 8, 7 Stat. 21 (1786) <http://digital.library.okstate.edu/kappler/Vol2/treaties/cho0011.htm#mn8> [<https://perma.cc/4CL6-AYN4>].

<sup>51</sup> *Johnson*, 21 U.S. at 592.

<sup>52</sup> *See, e.g.*, Indian General Allotment Act, Ch. 119, § 5, 24 Stat. 388, 389 (codified as 25 U.S.C. § 348 (2012)); 25 U.S.C. §§ 5102, 5108 (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Leasing of Indian Lands: Hearings Before the S. Comm. On Indian Affairs*, 57th Cong. 115 (1st sess. 1902) (statement of George Sutherland, member of the House of Representatives from Utah, claiming that, "as early as 1884, people were agitating the question of securing leases of land in the Indian territory").

repeatedly concluded that federal approval was required for such transactions; and because no federal law authorized such approvals, any such leases were void.<sup>55</sup> Frustration over the limitations on the alienability of Indian land largely motivated the first legislative effort to allow leasing of such land, which came about via an amendment to the Dawes Act passed in 1891.<sup>56</sup>

The 1891 Act authorized the leasing of individual allotments where the allottee “by reason of age or other disability ... can not personally and with benefit to himself occupy or improve his allotment.”<sup>57</sup> The act also authorized the leasing of lands “occupied by Indians who have bought and paid for the same ... by authority of the Council speaking for such Indians.”<sup>58</sup> The phrase “bought and paid for” initially caused some confusion because neither tribes nor allottees had paid for their lands. Nonetheless, the Department of the Interior concluded that the 1891 Act applied to lands reserved by a tribe where the tribe had ceded other lands to the federal government.<sup>59</sup>

Additionally, the 1891 Act cured the prior lack of federal involvement by expressly requiring the approval of the Secretary of the Interior for each lease and by authorizing the Secretary to prescribe the terms and conditions for allotment leases and the “agent in charge” of a reservation to recommend the terms and conditions for all other leases.<sup>60</sup> According to the Commissioner of Indian Affairs, however, the leases themselves were negotiated between the Indians and the companies seeking the lease, thereby affording tribal consent, and the federal role was limited to

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<sup>55</sup> *See id.* at 115–116; Indian Leases, 18 Op. Att’y Gen. 486 (1890) (finding that coal mining lease entered into between Choctaw Indians and a private corporation was invalid for lack of any federal law authorizing federal approval of such lease); Lease of Indian Lands for Grazing Purposes, 18 Op. Att’y Gen. 235 (1885); Sinking Fund of Union & Cent. Pac., 19 Op. Att’y Gen. 491 (1890).

<sup>56</sup> Act of February 28, 1891, Ch. 383, 26 Stat. 794.

<sup>57</sup> *Id.* at § 3, 26 Stat. at 795.

<sup>58</sup> *Id.* Although authorized by the 1891 act, leasing of allotments generally took place under a later 1909 act. Act of March 3, 1909, Ch. 263, 35 Stat. 783 (codified as 25 U.S.C. § 396 (2012)).

<sup>59</sup> *See, e.g.*, 25 Pub. Lands Dec. 408, 413 (Nov. 17, 1897) (“It is clear that the Indians on this reservation gave up what were to them valuable rights for the purpose of securing a place for permanent homes . . . that they may very justly be considered as . . . occupying lands which they have ‘bought and paid for.’”) (citing Act of Feb. 28, 1891, Ch. 383, § 3, 26 Stat. 794)).

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

permitting the negotiations and approving the final product.<sup>61</sup> This limited federal role, the tribal consent requirement, and the broad interpretation of the applicability of the 1891 Act caused consternation in Congress over the potential for tribes to lease their mineral resources without benefit to the federal government.<sup>62</sup>

As the “mighty pulverizing engine” of allotment rolled on, tribes lost extensive ownership and control over their lands and resources.<sup>63</sup> The Supreme Court’s 1903 decision in *Lone Wolf v. Hitchcock* encouraged these efforts by throwing open reservations upon a Congressional whim, regardless of whether any treaty required tribal consent for such action and with a presumption that Congress’ action would be in “perfect good faith.”<sup>64</sup> The allotment and subsequent opening of “surplus lands” within Indian reservations to settlement by non-Indians generally resulted in the alienation of subsurface minerals and resources as well, unless Congress specifically reserved the subsurface estate to the tribe or otherwise.<sup>65</sup> In the early 1900s, growing concern over the loss of significant mineral resources to private ownership motivated the

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<sup>61</sup> *Leasing of Indian Lands*, *supra* note 54, at 9 (statement of William A. Jones, Commissioner of Indian Affairs, (describing Interior’s role related a mining lease on the Uintah Reservation as “[a]ll the Department could do was to permit them to negotiate with the Indians for this lease; and they entered on the reservation and did negotiate with the Indians and came back with the lease complete.”)

<sup>62</sup> *Leasing of Indian Lands*, *supra* note 54, at 119–120. In closing a 1902 hearing of the Senate Committee on Indian Affairs regarding “Leasing on Indian Lands,” during which hearing the scope of the 1891 act had been discussed, Chairman William M. Stewart commented that the question of the tribes’ authority to enter mineral leases under that act was “a grave question” involving “the prosperity of almost the entire West. [T]hese reservations . . . include vast mineral regions [and t]o delegate to the Indians the right to sell or lease those lands would lead to a great many investigations . . . It was never intended that the Indians should lease the lands, practically sell them.” *Leasing of Indian Lands*, *supra* note 54, at 119.

<sup>63</sup> Theodore Roosevelt, *State of the Union Address, Part II*, TEACHING AM. HISTORY, Dec. 3, 1901, <http://teachingamericanhistory.org/library/document/state-of-the-union-address-part-ii-8/> [<https://perma.cc/N9FH-X7G5>] (“The General Allotment Act is a mighty pulverizing engine to break up the tribal mass.”) According to a 1934 report to Congress by John Collier, then-Commissioner of Indian Affairs, allotment resulted in the diminishment of Indian landholdings from 138,000,000 acres in 1887 to 48,000,000 acres in 1934 and, beyond loss of acreage, Collier estimated that allotment reduced the value of Indian lands by 80 percent and the value of allotted Indian lands by a staggering 85 percent. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 17 (2d Sess. 1934) (statement of John Collier, Commissioner).

<sup>64</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566, 568 (1903).

<sup>65</sup> *United States v. Bruisedhead*, 248 F.Supp. 999, 1001 (D. Mont. 1966).

United States to reserve coal from the patenting of homesteads on public lands.<sup>66</sup> Similar sentiments eventually resulted in the splitting of the surface and subsurface estates for allotments and other lands within Indian Country that had been opened to entry.<sup>67</sup>

In 1919, Congress authorized the Secretary of the Interior to lease unallotted Indian lands in nine western states for the mining of metalliferous minerals.<sup>68</sup> These provisions allowed the Secretary to open such lands for the location of mining claims and then, upon such location, lease the lands for a twenty-year period and include a preferential right to renew for subsequent ten year periods.<sup>69</sup> Perhaps reflecting earlier concerns over the tribal consent requirement of the 1891 Act, the 1919 leasing authorization did not require any tribal consent for such leases, although it did require that the royalties paid (not less than five percent of net value) be held by the United States for the credit of the tribe whose lands were leased.<sup>70</sup> Congress also expressly disclaimed any federal interference with the rights of states to tax the “rights, property, or assets of any lessee.”<sup>71</sup> Seven years later, Congress expanded this leasing authority to include “nonmetalliferous minerals, not including oil and gas.”<sup>72</sup>

In 1924, Congress expanded the reach of the 1891 leasing provisions to include oil and gas leasing for most reservations authorized by treaty or agreement.<sup>73</sup> The 1924 Act maintained the earlier act’s requirement of tribal consent and established lease terms of ten years “and as much longer thereafter as oil or gas shall be found in paying quantities.”<sup>74</sup> In addition, however, Congress

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<sup>66</sup> Coal Lands Act of 1909, Ch. 270, 35 Stat. 844 (codified as 30 U.S.C. § 81 (2012)); Coal Lands Act of 1910, Ch. 318, 36 Stat. 583 (codified as 30 U.S.C. §§ 83–85 (2012)); *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868–69 (1999).

<sup>67</sup> See MARJANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEV.* 44 (Univ. of Kan. Press 1990) (listing instances where Congress reserved mineral estates to tribes when allotting their reservations) [hereinafter, AMBLER, *BREAKING BONDS*]; Act of Feb. 27, 1917, Pub. L. No. 64-358, Ch. 133, 39 Stat. 944 (authorizing entry on “surplus coal lands in Indian reservations”).

<sup>68</sup> Act of June 30, 1919, Pub. L. No. 66-3, Ch. 4, § 26, 41 Stat. 31, 31–34 (codified as 25 U.S.C. § 399 (2012)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (although those funds remained “subject to appropriation by Congress for the [tribe’s] benefit”.)

<sup>71</sup> *Id.*

<sup>72</sup> Act of Dec. 16, 1926, Pub. L. No. 69-531, Ch.12, 44 Stat. 922, 922–23.

<sup>73</sup> Act of May 29, 1924, Pub. L. No. 68-158, Ch. 210, 43 Stat. 244 (the act excluded the lands of the Five Civilized Tribes and the Osage Reservation).

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



specifically authorized state taxation of revenues produced from such leases and directed the Secretary of the Interior to pay such taxes from the royalties generated by the leases.<sup>75</sup> These provisions were subsequently extended to reservations created by executive order.<sup>76</sup>

The allotment period, therefore, generated varied and conflicting statutory approaches to the development of the mineral and energy resources of Indian lands. The applicable statutory structure depended upon the type of mineral resource sought and the reservation where it was located. Depending on those factors, the process for securing a lease to develop such resources may or may not require tribal consent, state taxes may or may not be applicable, and the terms of each such lease may vary. Across the board, however, the various enactments generally tracked broader federal interests (i.e., protection of minerals for national benefit, opening lands to non-Indian settlement) without significant consideration of tribal objectives, including environmental or cultural concerns. Although some tribes were more actively engaged in negotiation and granting of their consent for leasing, at least where such consent was required, few had the information, expertise, or experience to effectively leverage such consent and assert greater influence on their federal trustee.<sup>77</sup> Instead, consistent with the Supreme Court's view of plenary federal power in *Lone Wolf*, leasing and development of Indian lands for energy and mineral purposes during the allotment era—at least on those Indian lands that were not lost during the era—was subject to Congressional whim and dominated by federal, not tribal, priorities.<sup>78</sup> In the late 1920s and early 1930s, however, these priorities began to shift, and the result would define the development of Indian mineral resources for much of the rest of the 20th century.

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<sup>75</sup> *Id.* See also *Montana v. Blackfeet Tribe of Indians*, 751 U.S. 759, 763–64 (1985) (discussing tax provisions of 1924 act); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 180–83 (1989).

<sup>76</sup> Act of March 3, 1927, Pub. L. No. 69-702, Ch. 299, §1, 44 Stat. 1347.

<sup>77</sup> See AMBLER, *BREAKING BONDS* *supra* note 67, at 47–51.

<sup>78</sup> *Lone Wolf*, 187 U.S. at 568; See generally *U.S. v. Kagama*, 118 U.S. 375 (1886) (“This power of Congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.”).

### C. Reorganizing Federal Indian Energy Policy

The allotment and assimilation policies of the late 19th and early 20th centuries had drastic effects across Indian Country and, by the 1920s, those effects prompted many to reconsider the federal government's approach to Indian policy. In 1928, the Meriam Report documented the current state of much of Indian Country and emphasized the negative impacts of prior federal policies on the health, education, wealth, and economies of the nation's tribes.<sup>79</sup> President Franklin Delano Roosevelt's appointment of John Collier as Commissioner of Indian Affairs further hastened the shift away from allotment as Collier sought to promote tribal interests and reduce the role of the federal Indian Service.<sup>80</sup> Collier recognized the failures of allotment from both the federal and tribal perspectives, noting in 1934 that allotment "stripped [the Indians] of their property ... disorganized [them] as groups and pushed [them] to a lower social level as individuals" all while increasing federal costs and compelling his federal agency "to be a real-estate agent in behalf of the ... allottees."<sup>81</sup> Collier's push for reforming federal Indian policy and the broader social and political support for FDR's New Deal ultimately led to the Indian Reorganization Act (IRA), which put an end to allotment and refocused federal Indian policy on tribal self-government and control.<sup>82</sup>

The purpose of the IRA was to redefine the federal-tribal relationship by formally ending allotment, restoring unallotted and open "surplus" lands to tribes, allowing and encouraging the reacquisition of other lands by tribes, and promoting tribal self-government and commerce through the adoption of constitutions and incorporation of so-called section 17 corporations.<sup>83</sup> In furtherance of tribal control, Congress expressly vested those tribes

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<sup>79</sup> See generally INSTITUTE FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMIN. (Lewis Meriam ed., 1928).

<sup>80</sup> *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 15-16 (2d Sess. 1934) (statement of John Collier, Commissioner).

<sup>81</sup> *Id.*

<sup>82</sup> Indian Reorganization Act of 1934, Pub. L. No. 73-383, Ch. 576, 48 Stat. 984 (1934) (codified as 25 U.S.C. §§ 461 et seq. (editorially reclassified as 25 U.S.C. §§ 5101-5144)).

<sup>83</sup> H.R. REP. NO. 73-2049, 6 (1934) (Conf. Rep.) ("[i]t is felt that the [final version of the IRA] is a definite step toward the goal of 'a new standard of dealing between the Federal Government and its Indian wards.'") (Citation omitted).

that elected to adopt a constitution pursuant to the IRA with the right “to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.”<sup>84</sup> Although the IRA did not address the specifics of leasing or expressly amend the earlier mineral and oil and gas leasing laws described above, it did establish a new federal-tribal dynamic for addressing these issues.

This new dynamic was the result of a shift in how the federal government viewed both tribal sovereignty and its trust responsibility. In urging Congress to enact the IRA in the months leading up to its final adoption, President Roosevelt echoed the century-old words of Chief Justice Marshall, suggesting that the trust responsibility required federal support for tribal sovereignty.

We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection.<sup>85</sup>

Thus, rather than the top-down federal dominance of the allotment era that largely unilaterally dictated destructive and conflicting policies toward the ownership and development of tribal resources, the IRA—at least in purpose—sought a more balanced federal-tribal relationship and justified that re-balancing, at least in part, on the federal government’s trust responsibility to tribes.

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<sup>84</sup> 25 U.S.C. § 476(e) (2012) (editorially reclassified as 25 U.S.C. § 5123(e)). The act made clear that these vested rights were in addition to all other powers vested in tribes by existing law and was later amended to make clear that tribes “shall retain inherent sovereign power to adopt governing documents under procedures other than those” set forth in the IRA. 25 U.S.C. § 476(h) (editorially reclassified as 25 U.S.C. § 5123(h)), adopted pursuant to Pub. L. 108-204, §103 (2004).

<sup>85</sup> LETTER FROM PRESIDENT FRANKLIN D. ROOSEVELT TO BURTON K. WHEELER, April 28, 1934, *reprinted in* S. REP. NO. 73-1080, at 3 (1934). Roosevelt went on to note that “the continuance of autocratic rule, by a Federal department, over ... more than 200,000 [Indian] citizens ... is incompatible with American ideals of liberty” and that the IRA “allows the Indian people to take an active and responsible part of the solution of their own problems.” *Id.* at 4.

Though not immediate, the reforms of the IRA led to a reexamination of the leasing scheme for Indian minerals and, in June 1937, Charles West, the Acting Secretary of the Interior, sent a proposed bill to Congress that, if enacted, would “govern the leasing of Indian lands for mining purposes.”<sup>86</sup> In transmitting the proposed bill, Acting Secretary West noted the various statutory bases of leasing of minerals and oil and gas, including the 1891 act, as amended in 1924, and the 1919 act, and made clear that one purpose of his proposed legislation was to “obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.”<sup>87</sup> West also explained the inefficiencies of the process under the 1919 act and the limitations on developing coal on Indian lands, suggesting that the current statutory structure was not “adequate to give the Indians the greatest return from their property.”<sup>88</sup> Thus, West’s proposal sought to “bring all mineral leasing matters in harmony with the [IRA].”<sup>89</sup>

As ultimately passed by Congress, the Indian Mineral Leasing Act (IMLA) furthered West’s intentions by providing a uniform process for leasing minerals from unallotted Indian lands,<sup>90</sup> requiring tribal consent for all such leases,<sup>91</sup> and mandating competitive bidding (unless the tribe consents to private negotiations) and acceptance of the highest bid for oil and gas leases unless the Secretary of the Interior determined such acceptance was unwise or contrary to the tribe’s best interests.<sup>92</sup> Congress also

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<sup>86</sup> LETTER FROM CHARLES WEST TO THE PRESIDENT OF THE SENATE, *reprinted in* S. REP. NO. 75-985, at 1 (1937), and H. REP. NO. 75-1872, at 1 (1938).

<sup>87</sup> S. Rep. No. 75-985, at 1–2 (1937).

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, Ch. 198, 52 Stat. 347 (codified as 25 U.S.C. §§ 396a–396g (2012)). Certain tribes were excluded from application of the original IMLA, although subsequent enactments extended the statute to some of their lands as well. *Id.* at 348, § 6 (excluding the Papago, Crow, and Osage Reservations as well as the ceded lands of the Shoshone Reservation and the coal and asphalt lands of the Choctaw and Chickasaw Tribes); Act of May 27, 1955, Pub. L. No. 84-47, Ch. 106, § 2, 69 Stat. 67 (rescinding the exclusion of the Papago Reservation); Act of Aug. 27, 1958, Pub. L. No. 85-780, § 1, 72 Stat. 935 (extending the IMLA to apply to mineral leasing on the Wind River (Shoshone) Reservation); Act of Sept. 16, 1959, Pub. L. No. 86-283, 73 Stat. 565 (extending the IMLA to apply to leasing on the Crow Reservation). Allotted lands were still leased pursuant to the 1909 act, although the leasing regulations eventually incorporated many of the same procedures as authorized by the IMLA. *See, e.g.*, 25 C.F.R. pt. 212 (2017).

<sup>91</sup> 25 U.S.C. § 396(a) (2012).

<sup>92</sup> *Id.* § 396(b).

authorized the Secretary to adopt rules and regulations to guide implementation of the IMLA,<sup>93</sup> and the first version of those regulations included the minimum rent and royalty that must be paid to a tribe pursuant to an IMLA lease.<sup>94</sup> These primary features of the IMLA served the main purposes of West's proposal to provide uniformity, encourage tribal self-government and control, and promote economic development and return for tribes.

In addition, in an effort to harmonize the IMLA with the IRA, the IMLA did "in no manner restrict the right of tribes" that had chosen to organize under the IRA to lease their lands "in accordance with the provisions of any constitution and charter adopted" pursuant to the IRA.<sup>95</sup> Building on this statutory language, the initial IMLA regulations recognized the right of IRA tribes to supersede those rules through constitution, bylaw, charter, ordinance, resolution or other authorized action.<sup>96</sup> This language remains in the IMLA regulations, although now with the proviso that "tribal law may not supersede the requirements of Federal statutes applicable to Indian mineral leases."<sup>97</sup> The proviso was added in 1996 after the first major overhaul of the IMLA leasing regulations since 1938 and, in publishing those revised regulations, the Department noted that the proviso clarified that tribes could not avoid Secretarial approval of each IMLA lease.<sup>98</sup> The 1996 Final Rule also purported to limit tribal authority to supersede federal IMLA regulations and require secretarial approval for any such proposed supersession.<sup>99</sup> In recent litigation, the Department has argued that the recognition of the authority of IRA tribes in the IMLA applies only to that Act's leasing provisions, i.e., public auction, advertisement, and bidding, and not to "laws or regulations

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<sup>93</sup> *Id.* § 396(d).

<sup>94</sup> 25 C.F.R. § 186.13 (1938) (rental of \$1.25 per acre and royalty of 12 ½ percent).

<sup>95</sup> 25 U.S.C. § 396(b) (2012).

<sup>96</sup> 25 C.F.R. § 186.29 (1938) ("The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the [IRA] . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.")

<sup>97</sup> 25 C.F.R. § 211.29 (2014).

<sup>98</sup> Leasing of Tribal Lands for Mineral Dev. & Leasing of Allotted Lands for Mineral Dev., 61 Fed. Reg. 35,634, 35,637 (July 8, 1996) (amending 25 C.F.R. pts. 211, 212).

<sup>99</sup> *Id.* at 35,652.

governing oil and gas extraction operations on tribal land.”<sup>100</sup> Thus, the apparent recognition of independent tribal authority for leasing in 25 U.S.C. § 396b has gone largely unexercised and has been significantly narrowed by subsequent regulatory and interpretive stances.<sup>101</sup>

Indeed, overriding federal involvement in the leasing and development of minerals under the IMLA largely eclipsed the law’s intended promotion of tribal self-government. Aside from the tribal consent required for leasing and to engage in the private negotiation of leases, the BIA mostly controlled the IMLA leasing process through standard leasing forms<sup>102</sup> and unilateral authority to cancel a lease.<sup>103</sup> The IMLA’s mandate that, once entered for an initial ten-year term, leases would remain in effect so long as minerals were “produced in paying quantities” further compounded the effect of that authority.<sup>104</sup> Although the IMLA regulations set a floor for rents and royalties in each lease,<sup>105</sup> once approved, those leases remained in effect, often with royalty amounts that were far outstripped by the changing market and other conditions.<sup>106</sup>

Although some tribes were able to negotiate decent concessions, many lacked sufficient information regarding their resources to do so.<sup>107</sup> As a result of the sparse information available and the state of many tribal governments at the time, “[d]uring the 1950s and 1960s when many of the early mineral contracts were negotiated, tribes had few alternatives to relying upon BIA.”<sup>108</sup> Even then, in at least one instance, the BIA’s efforts to honor tribal decision-making were also frustrated by the rigidity of the IMLA’s

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<sup>100</sup> Fed. Defendants’ Merits Brief (“Declaratory Judgment Issues”), *S. Ute Indian Tribe v. U.S. Dep’t. of the Interior*, case no. 1:15-cv1303-MSK, (D. Colo. filed Oct. 15, 2015). This case was stayed shortly after the filing of this merits brief and the parties ultimately settled the matter without the court ruling on the merits of the United States’ argument. *See infra* notes 280–284 and accompanying text.

<sup>101</sup> *See* Peter C. Maxfield, *Tribal Control of Indian Mineral Dev.*, 62 ORE. L. REV. 49, 63–64 (1983) (describing other challenges of the supersession provision in the regulations).

<sup>102</sup> *See* 25 C.F.R. § 186.30 (1938).

<sup>103</sup> *Id.* at § 186.27.

<sup>104</sup> 25 U.S.C. § 396(a) (2012).

<sup>105</sup> 25 C.F.R. § 186.13 (1938).

<sup>106</sup> JAMES ROBERT ALLISON III, *SOVEREIGNTY FOR SURVIVAL: AM. ENERGY DEV. & INDIAN SELF-DETERMINATION* 41 (2015) (average royalty for Indian coal was \$0.158/ton while, by 1972, it was \$7.66/ton on the open market).

<sup>107</sup> AMBLER, *BREAKING BONDS supra* note 67, at 56.

<sup>108</sup> AMBLER, *BREAKING BONDS supra* note 67, at 58.

structure.<sup>109</sup> The federal government also failed to adequately calculate, collect, and pay royalties (such as they were) on many leases, leading to an extensive investigation and review of the entire federal royalty system.<sup>110</sup> Worst of all, even when tribal efforts to negotiate better IMLA deals were derailed by ex parte collusion between the Secretary of the Interior and the other parties to the negotiations, the Supreme Court excused the federal government from any liability for damages relying, in part, upon the IMLA's purported aim of promoting tribal self-determination.<sup>111</sup> Thus, although the IMLA was intended to serve the IRA's purposes of promoting tribal self-determination and economic development, nearly half a century of leasing under the act led tribes to chafe at its lack of flexibility and their inability to assert greater governmental control over the management of their own resources.<sup>112</sup> These concerns became particularly acute in the late 1970s as tribal governments became more sophisticated and came to better understand both their own political and technical capacities.<sup>113</sup>

#### D. *Alternatives to Leasing under the IMLA*

Just as the IMLA effectuated the federal trust responsibility—and restraint on alienation—of Indian mineral resources,<sup>114</sup> federal law also required federal involvement in and approval of various other types of tribal dealings. For example, in 1955, Congress enacted what has become known as the Indian Long-Term Leasing Act, 25 U.S.C. § 415, which authorized the leasing of Indian-owned surface lands for “public, religious,

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<sup>109</sup> See, e.g., *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436–37 (Fed. Cir. 1990) (Secretary's refusal to approve a mining plan without tribal approval constituted a taking of the lessee's leasehold rights where no such tribal approval was required by IMLA or its regulations).

<sup>110</sup> See DAVID F. LINOWES, REPORT OF THE COMM. ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RES. (January 1982); *Fed. Coal Leasing: Comm. on Fair Market Value Policy: Hearing Before the S. Energy & Nat. Res. Comm.* 98th Cong. 12 (1984) (testimony of David F. Linowes, Chairman) [hereinafter LINOWES COMM. HEARING].

<sup>111</sup> *Navajo Nation v. United States*, 537 U.S. 488, 508 (2003).

<sup>112</sup> AMBLER, BREAKING BONDS, *supra* note 67, at 52–53; COHEN'S HANDBOOK, *supra* note 46, at 1128–29.

<sup>113</sup> See generally AMBLER, BREAKING BONDS, *supra* note 67, at 62–90; ALLISON III, *supra* note 106, at 98–172.

<sup>114</sup> 25 U.S.C. § 396(a) (2012); See *infra* Part II, Section D (Alternatives to Leasing under the IMLA).

education, recreation, residential, or business purposes.”<sup>115</sup> Similarly, the federal law dating to 1872 and amended in 1958, provided requirements for contracting with tribes and individual Indians “for the payment or delivery of any money or other thing of value ... or for the granting or procuring of any privilege ... in consideration of services for said Indians relative to their lands.”<sup>116</sup> As amended in the late 1950s, 81 of the statute required that any such “services” contracts be in writing, with duplicates or copies delivered to each party, have a fixed term of duration, and be approved in writing by the Secretary of the Interior and the commissioner of Indian affairs, among other required details.<sup>117</sup>

Notwithstanding the above limitations dictated by federal law, in the late 1970s, some tribes creatively interpreted the contracting process outlined in federal law to expand their ability to enter mineral development deals beyond the restrictive leasing-only regime of the IMLA.<sup>118</sup> In 1982, the Department of the Interior identified six federally-approved non-lease agreements for the development of mineral resources, “[t]he approval authority [for which] was based on section 81.”<sup>119</sup> In addition, some tribes urged that a broad reading of the term “lease” in the IMLA could allow for the approval of joint venture and other more flexible development arrangements.<sup>120</sup> In fact, leasing regulations proposed by the Department of the Interior in 1977 and 1980 supported such interpretations.<sup>121</sup> The potential for such flexibility was, however,

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<sup>115</sup> Ch. 615, 69 Stat. 539 (1955). This act also amended the 1909 mineral leasing act for allottees to incorporate the competitive bidding requirements of the IMLA. *Id.* §3, 69 Stat. at 540. In 2012, the HEARTH Act amended the Indian Long-Term Leasing Act to provide for tribal control, subject to relevant limitations, over the surface leasing process. *See infra* § 2, part G (the Helping Expedite Affordable and Responsible Tribal Homeownership Act (HEARTH) of 2012).

<sup>116</sup> Act of May 21, 1872, Ch. 177, 17 Stat. 136 (codified as amended at Act of Aug. 27, 1958, Pub. L. No. 85-770, 72 Stat. 927, and Act of March 14, 2000, Pub. L. 106-179, § 2, 114 Stat. 46 (codified in 25 U.S.C. § 81 (2012)).

<sup>117</sup> Act of May 21, 1872, Ch. 177, § 2, 17 Stat. 136 (codified as amended in Act of Aug. 27, 1958, Pub. Law. No. 85-770, 72 Stat. 927).

<sup>118</sup> *See, e.g.,* ALLISON III *supra* note 106, at 151–154 (discussing the use of “alternative contracts”).

<sup>119</sup> *Indian Mineral Dev.: Hearings Before the U.S. Senate Select Comm. on Indian Affairs on S. 1894, 97th Cong. 72 (1982)* (statement of Tim Vollman, Solicitor’s Office) [hereinafter *IMDA Hearings*].

<sup>120</sup> *Id.*

<sup>121</sup> Mining on Indian Lands: Mineral Dev. Contracts, 42 Fed. Reg. 18,083, 18,085 (proposed March 30, 1977) (relying on the statutory authority of the IMLA, Section 81, the IRA, the 1909 Act, the Indian Long-Term Leasing Act and others to propose regulations that would have defined “contract” for mining



called into serious question later in 1980, however, when one such alternative arrangement, proposed by and between the Northern Cheyenne Tribe and ARCO, led Clyde O. Martz, then Solicitor of the Department of the Interior, to conclude that the Department had no statutory authority to approve such agreements.<sup>122</sup> This reversal, called the “final betrayal” by one prominent tribal leader, led tribes to refocus their push for broader flexibility from the negotiating table to the halls of Congress.<sup>123</sup>

E. *The Indian Mineral Development Act:  
Reform on a deal-by-deal basis*

Tribal frustration with the limitations of the IMLA and the federal government’s management of leasing thereunder led many tribes to seek other avenues for pursuing energy development. The energy market of the mid- and late 1970s and the desire of the energy industry to find and develop domestic energy sources offered significant potential gains for tribes, particularly in comparison to their losses under the IMLA.<sup>124</sup> This potential, in combination with

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and development purposes as expressly “not limited in its meaning to leases, permits, or licenses”); *Id.* at 18,093 (same for oil and gas “contracts”); Indian Mineral Dev. Regulations, 45 Fed. Reg. 53,164, 53,165 (proposed Aug. 11, 1980) (pursuant to the authority to promulgate regulations under IMLA, the 1909 Act, the Indian Long-Term Leasing Act, and a 1940 act regarding leasing inherited allotments, proposing a regulation for prospecting and mining that would allow “contracts” for such activities that were “not limited . . . to leases, permits, or licenses”); Indian Mineral Dev. Regulations, 45 Fed. Reg. at 53,174 (same for oil and gas “contracts”).

<sup>122</sup> *IMDA Hearings*, *supra* note 119, at 72; AMBLER, *BREAKING BONDS*, *supra* note 67, at 87.

<sup>123</sup> Marjane Ambler, *CERT Stresses Production, not Rebellion*, HIGH CNTY. NEWS 6 (Sept. 19, 1980), [http://s3.amazonaws.com/hcn-media/archive-pdf/1980\\_09\\_19.pdf](http://s3.amazonaws.com/hcn-media/archive-pdf/1980_09_19.pdf) [<https://perma.cc/76CZ-EFGC>] As evidenced by their approval of various agreements and proposed regulations, DOI officials at the time clearly agreed that tribes should have such flexibility but were ultimately bound by the Solicitor’s view that the Department lacked statutory authority for enabling such flexibility. At least one official noted that the Department might have recognized the statutory issue earlier, i.e., prior to the publication of the seemingly illegal regulations, but the Department was not “getting any pressure from tribes to enter such contracts at that time.” *Id.* Thus, unlike the IMLA and most other pre-self-determination era Indian statutes, tribal efforts, not those of their federal trustee, were primarily responsible for the Indian Mineral Development Act. *See also* AMBLER, *BREAKING BONDS*, *supra* note 67, at 62–90; ALLISON III, *supra* note 106, at 167–72.

<sup>124</sup> *See, e.g.*, AMBLER, *BREAKING BONDS*, *supra* note 66, at 82–83 (describing the increased industry attention toward Indian Country in these years and the effect of changing federal rules for oil and gas prices, changing both “[t]he

the recent ushering in of a new era of federal policy devoted to promoting tribal self-determination and the growing technical and governance capabilities of tribes,<sup>125</sup> changed the face of Federal Indian energy policy once again.

Congress passed the Indian Mineral Development Act (IMDA) on December 22, 1982.<sup>126</sup> Based on the concerns raised by various tribes, allottees, developers, and federal officials, Congress' intent in doing so was specifically focused on "provid[ing] Indian tribes flexibility for the development and sale of their mineral resources."<sup>127</sup> This flexibility sought to serve the same objectives that the IMLA had nearly 50 years earlier, "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources."<sup>128</sup>

Beyond seeking to promote goals similar to those of the IMLA, the IMDA also employed a structure similar to that of the IMLA, as both focused on the development, review, and approval of an individual development transaction. Where the IMLA had authorized only leases, however, the IMDA expanded the types of agreements to be employed in such transactions to include "any joint venture, operating, production sharing, service, managerial, lease or other agreement," which were collectively referred to as a "Minerals Agreements."<sup>129</sup> The IMDA also eliminated the federal role in the auction and award of leases and instead required that, upon the request of a tribe and subject to the "extent of his available resources," the Secretary "shall have available advice assistance, and information during the negotiation of a Minerals Agreement."<sup>130</sup> The IMDA provided clear guidance for the federal review and

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Indians' game rules . . . [and] with the rise in oil prices, . . . the stakes" of the game too.)

<sup>125</sup> Richard Nixon, Special Message to the Cong. on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970); *E.g.*, Indian Self-Determination & Education Assistance Act, Pub. L. No. 93-683, 88 Stat. 2203 (1975) (codified as amended in Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (codified as 25 U.S.C. §§ 450 et seq. (2012)) (editorially reclassified as 25 U.S.C. §§ 5301 et seq.)). The Council of Energy Resource Tribes, or CERT, a coalition of energy-focused tribes engaged in lobbying and policy work, was also a significant factor in the development of new legislation and policy. *See, e.g.*, Ambler *supra* note 123.

<sup>126</sup> Pub. L. No. 97-382, 96 Stat. 1938 (codified as 25 U.S.C. §§ 2101–2107 (2012)).

<sup>127</sup> S. REP. NO. 97-472, at 2 (1982).

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

<sup>129</sup> 25 U.S.C. § 2102 (2012).

<sup>130</sup> *Id.* § 2106.

approval of each such agreement by requiring that the Secretary consider whether the agreement would be in the “best interest of the Indian tribe or ...individual Indian ... party,” including the “potential economic return ... , the potential environmental social and cultural effects ... , and provisions for resolving disputes.”<sup>131</sup> Thus, the IMDA removed the stringent lease-only shackles of the IMLA and opened the door for tribes to negotiate their own deals while retaining federal review and approval requirements generally consistent with the overriding federal trust responsibility. In view of the expansion of tribal negotiating authority, however, the IMDA limited the potential liability of the federal government “for losses sustained by a tribe or individual Indian” resulting from any Minerals Agreement approved by the Secretary in compliance with the statute.<sup>132</sup>

The IMDA offered a much needed remedy to the tribal complaints about the IMLA’s narrow authority and the expanding use of alternative agreements to sidestep those limitations. But, much as the IMLA’s shortcomings ultimately demanded further legislative action, the IMDA has not entirely fulfilled its objectives of promoting tribal self-determination and maximum economic return. Initially, national and international energy and economic policies during the first Reagan administration severely undermined tribal economic positions and bargaining power.<sup>133</sup> The push to boost domestic energy production motivated an increase in global production and, in the words of one commentator, “the ‘energy crises’ of the 1970s turned into the ‘oil glut’ of the mid-1980s.”<sup>134</sup> The resulting weakened position of many energy companies left tribes seeking deals more like the one-sided IMLA leases than the broader and more balanced arrangements made possible by the IMDA.<sup>135</sup> By 1988, about half of the sixty-seven IMDA agreements entered into by tribes since the passage of the act were leased like those authorized by the IMLA with only slight modifications that could allow for escalating royalties or other benefits not available

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<sup>131</sup> *Id.* § 2103(a). That section also makes clear that no separate study of these factors is required beyond the review of the potential effects of the proposed agreement under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). *Id.* § 2103(b).

<sup>132</sup> *Id.* § 2103(e).

<sup>133</sup> See ALLISON III, *supra* note 106, at 174–175.

<sup>134</sup> See ALLISON III, *supra* note 106, at 175.

<sup>135</sup> See ALLISON III, *supra* note 106, at 175.

under the strict IMLA structure.<sup>136</sup> Although the IMDA intended to allay some of these difficulties by providing that the Secretary would assist tribes in the negotiation of Mineral Agreements, the Department of the Interior noted that such assistance could prove “unwieldy and potentially very costly.”<sup>137</sup> Congress never appropriated funds to support any additional assistance from Interior, leaving the full benefits of IMDA’s flexibility further unrealized.<sup>138</sup>

In recognition of the continuing challenges faced by tribes seeking to develop their own energy resources, Congress, as part of the Comprehensive National Energy Policy Act of 1992, included a title specifically dedicated to Indian energy resources.<sup>139</sup> In doing so, Congress sought to “support ... Indian tribes to develop the institutional capacity to participate fully in the development of [reservation] energy resources.”<sup>140</sup> Just as the IMLA and IMDA both sought to promote economic development and tribal sovereignty, the purposes of the Indian energy title in the 1992 Act were to “allow Indian tribes to become more self-sufficient [and] provide[ ] Indian tribes with the technical and financial assistance to control the development of ... natural resources.”<sup>141</sup>

To fulfill these purposes, Congress created a demonstration program to help support the building of tribal “managerial and technical expertise” to promote tribal assumption of control over the development of mineral resources.<sup>142</sup> The 1992 Act also authorized grants by the Secretary of the Interior to assist tribes “in the development, administration, implementation, and enforcement of tribal laws and regulations governing the development of energy resources on Indian reservations.”<sup>143</sup> Lastly, the 1992 Act established the Indian Energy Resource Commission (the Commission) to study, among other related topics, the “barriers or obstacles to the development of energy resources on Indian reservations, and make recommendations designed to foster the development of energy resources on Indian reservations and

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<sup>136</sup> AMBLER, *BREAKING BONDS*, *supra* note 67, at 243.

<sup>137</sup> H.R. REP. NO. 97-746, at 13 (1982).

<sup>138</sup> AMBLER, *BREAKING BONDS*, *supra* note 67, at 239–40.

<sup>139</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, Title XXVI, 106 Stat. 3113.

<sup>140</sup> H.R. REP. NO. 102-474, pt. 8, at 92 (1992).

<sup>141</sup> *Id.* at 93.

<sup>142</sup> Energy Policy Act of 1992 § 2603(a)(1), 106 Stat. 3114.

<sup>143</sup> *Id.* § 2604(a), 106 Stat. at 3114–15; H.R. REP. NO. 102-474, pt. 8, at 92.

promote economic development.”<sup>144</sup> Despite its early intentions, Congress never funded the study and the Commission never fulfilled its mandate. The Commission’s statutory authorization was repealed by the Energy Policy Act of 2005 (EPACT),<sup>145</sup> and nothing in the 1992 Act changed the federal statutory structures by which tribes could authorize the development of their mineral resources.

At the end of the twentieth century, then, notwithstanding the successful efforts of many tribes to push for the IMDA and expand their ability to negotiate and enter broader and more flexible energy development deals, Congress was still seeking a better solution to promote tribal economic development and self-determination in its tribal energy policy—congressional (and tribal) objectives that had been at the forefront since the IMLA’s passage in 1938. The next statutory efforts to meet these goals opened the door for the modern era of Federal Indian energy policy with the promise of a refined federal trust relationship between the United States and Indian tribes.

#### F. *The Indian Tribal Energy Development and Self-Determination Act of 2005*

Though the Indian energy title of the 1992 Energy Policy Act planted the seeds for the reform of Federal Indian energy policy, that reform did not begin to take shape for nearly a decade. In 2003, two Indian energy bills sought to build on the technical and financial assistance promised in the 1992 Act, but also initiated a discussion of the federal trust responsibility as it related to the review and approval of certain energy-related transactions.<sup>146</sup> For example, each of the proposals included provisions that would remove the requirement of federal approval for certain leases, agreements, or rights-of-way, provided that each such lease, agreement or right-of-way was authorized by the tribe in accordance with tribal regulations

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<sup>144</sup> *Id.* at § 2605(k)(5), 106 Stat. at 3117.

<sup>145</sup> *Tribal Energy Self-Sufficiency Act & the Native Am. Energy Dev. & Self-Determination Act: Hearing on S. 424 & S. 522 Before the S. Comm. on Indian Affairs*, 108th Cong. 126 (2003) [hereinafter *ITEDSDA Hearing*] (statement of A. David Lester, Executive Director, Council of Energy Resource Tribes); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as 42 U.S.C. §§ 15801 et seq.).

<sup>146</sup> *Tribal Energy Self-Sufficiency Act*, S. 424, 108th Cong. (2003); *Native Am. Energy Dev. & Self-Determination Act*, S. 522, 108<sup>th</sup> Cong. (2003).

approved by the Secretary.<sup>147</sup> Although the proposals varied slightly in their scope and application,<sup>148</sup> each established minimum standards for the tribal regulations that would govern such approvals, including a requirement that the tribal regulations provide an environmental review process similar to that required by the National Environmental Policy Act.<sup>149</sup> As part of such a review, the tribal regulations would mandate an opportunity for “public” review and comment on the lease, agreement, or right-of-way and one of the legislative proposals would have required consultation with the local state.<sup>150</sup> In addition, each proposal included provisions that would allow for challenges of tribal actions based on alleged non-compliance with Secretari ally-approved tribal regulations.<sup>151</sup> Finally, just as with the IMDA, the proposals included waivers of any federal liability that might result from tribal decisions made in accordance with their own, secretari ally-approved regulations.<sup>152</sup>

These proposals for reform provided tribes yet another option for pursuing the development of their energy resources and corresponding economic benefits. Unlike the IMLA and the IMDA, however, these proposals did not focus on individual agreements, whether they be leases under the IMLA or Minerals Agreements under the IMDA. Instead, the new proposals offered each tribe the option to assume broader regulatory review and approval responsibilities for all future energy-related leases, agreements, and rights-of-way, provided that tribal regulations meet certain standards, receive federal approval, and guide tribal decisions. This shift in focus marked a further change in the federal trust responsibility as it authorized, if not promoted, federal review and approval of expanded tribal governmental authority, subject to certain limitations, rather than requiring federal review and approval of each individual transaction. Thus, instead of determining whether the terms and conditions of an IMLA lease or a proposed IMDA Minerals Agreement would be in the best interests of a tribe, these proposals instead authorized tribes to take on the responsibilities (and corresponding administrative costs and burdens) for reviewing

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<sup>147</sup> S. 424, § 103; S. 522, § 2605.

<sup>148</sup> *E.g.*, S. 424, for example, focused on the siting of energy transmission and refining facilities while S. 522 applied more broadly to leases, business agreements and rights-of-way involving energy development or transmission.

<sup>149</sup> S. 424 § 103(f)(3); S. 522, § 2605(e)(2)(C).

<sup>150</sup> S. 424 § 103(f)(2)(C); S. 522 § 2605(e)(2)(B)(x).

<sup>151</sup> S. 424 § 103(f)(7); S. 522 § 2605(e)(7).

<sup>152</sup> S. 424 § 103(f)(6); S. 522 § 2605(e)(6).

and approving their own agreements according to their own regulations. Thereafter, the federal government would be excused from any liability for those decisions. Although this new conception of the federal trust responsibility was met with a mixed reception from tribes and commentators,<sup>153</sup> the provisions, with some refinement, found their way into Title V of the Energy Policy Act of 2005, which was enacted as the Indian Tribal Energy Development and Self-Determination Act (ITEDSDA).<sup>154</sup>

The ITEDSDA created a new forum for the negotiation of energy-related agreements. Rather than focusing on federal oversight of deals negotiated and reached between Indian tribes and lessees, developers, or partners in their energy resource plans, the ITEDSDA established Tribal Energy Resource Agreements (TERAs) to be entered into by and between a tribe and the Secretary.<sup>155</sup> Far more than just transaction-specific or resource-specific terms, a TERA would instead delineate a tribe's authority to enter and approve their own "lease or business agreement for the purpose of energy resource development on tribal land," subject to certain conditions, and thereby obviate the need for federal approval of each such lease or agreement.<sup>156</sup> The necessary conditions for approval of a TERA evolved from those first proposed in the early 2000s and included that the tribe have an environmental review process requiring public notice and input,<sup>157</sup> that the tribe's process for approving a lease, business agreement, or right-of-way meet certain standards applicable to each such transaction,<sup>158</sup> and that a

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<sup>153</sup> See *ITEDSDA Hearing*, *supra* note 145, at 83 (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council, on behalf of the Eastern Shoshone Tribe and the Northern Arapahoe Tribe); *id.* at 101 (testimony of the Navajo Nation); *id.* at 107 (supplemental statement of Joe Shirley, Jr., President, Navajo Nation); *id.* at 118 (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Reservation); *id.* at 155 (statement of Howard D. Richards, Sr., Chairman, Southern Ute Indian Tribal Council); Elizabeth Ann Kronk, *Tribal Energy Res. Agreements: The Unintended "Great Mischief for Indian Energy Dev." & the Resulting Need for Reform*, 29 PACE ENV'T'L. L. REV. 811, 834–38 (2012); Judith V. Royster, *Practical Sovereignty, Political Sovereignty, & the Indian Tribal Energy Dev. & Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1097–1101 (2008).

<sup>154</sup> Pub. L. No. 109-58, Title V, §§ 501-06, 119 Stat. 763 (codified as 25 U.S.C. §§ 3501-06 (2012)).

<sup>155</sup> 25 U.S.C. §§ 3504(a)(2)(C), (e) (2012).

<sup>156</sup> *Id.* § 3504(a)(1).

<sup>157</sup> *Id.* § 3504(e)(2)(C).

<sup>158</sup> *Id.* § 3504(e)(2)(B)(iii).

tribe have “sufficient capacity to regulate the development of energy resources of the tribe.”<sup>159</sup>

Thus, the ITEDSDA, building on the concepts of its earliest proposals, created yet another new avenue for tribes to pursue energy development. Unlike the IMLA and the IMDA, which remain options for tribes to consider, the ITEDSA authorized a shift of the federal government’s role in the development of tribal energy resources away from overseeing, reviewing, perhaps second-guessing, and approving a tribe’s business judgment and negotiating skill represented in an individual transaction. Instead, the ITEDSDA envisioned a broader federal responsibility focused on tribal regulatory capacity and standards, but still retained a responsibility for reviewing such capacity and standards in light of the values and standards of the federal regulatory scheme.<sup>160</sup> As described in greater detail below, the retention of these and other aspects of Federal Indian energy policy’s zero-sum history has overshadowed the promise of such a shift (at least thus far). In addition, the approach detailed in the next section, which is more consistent with this modern view of the trust responsibility, has also overtaken the TERA model as an avenue for reform.

#### G. *The Helping Expedite Affordable and Responsible Tribal Home-ownership (HEARTH) Act of 2012*

As described above, the Indian Long-Term Leasing Act of 1955, which provides statutory authority for the leasing of the surface of tribal and individual trust lands for certain purposes, has at times been seen as a mechanism for facilitating tribal energy development.<sup>161</sup> Recently, the broader push for opportunities to develop solar and wind energy resources has highlighted how surface leasing can contribute to these industries and enhance tribal economic development.<sup>162</sup> Like the evolution of the trust responsibility as it related to mineral development, the role of the

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<sup>159</sup> *Id.* §3504(e)(2)(B)(i).

<sup>160</sup> Gover, *supra* note 30, at 346–50. ITEDSDA’s concept was consistent with the notion of allowing each tribe to negotiate how the federal government should be obligated to carry out its trust responsibilities.

<sup>161</sup> See Judith V. Royster, *Tribal Energy Dev.: Renewables & the Problem of the Current Statutory Structures*, 31 STAN. ENV’T L. L.J. 91, 96–97 (2012).

<sup>162</sup> Residential, Business, & Wind & Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784 (Nov. 29, 2011) (revising 25 C.F.R. pt. 162); Royster, *supra* note 159, at 103–04.



federal government in reviewing and approving surface leases for tribal lands has shifted away from its paternalistic origins and toward a greater recognition of and support for tribal regulatory authority.

The most recent example of this shift in the surface leasing context is the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012.<sup>163</sup> Although the 1955 Indian Long-Term Leasing Act had previously been amended to allow certain tribes to review and approve their own surface leases without Secretarial approval,<sup>164</sup> the HEARTH Act amended the statute to authorize surface lease approval authority over tribal lands for *any tribe* choosing to pursue such authority by seeking Secretarial approval of the tribe's proposed leasing regulations.<sup>165</sup> Just like the TERA structure authorized by the ITEDSDA, the HEARTH Act required that the tribal regulations meet certain standards, including that they are "consistent with" federal leasing regulations and provide for an environmental review process including public notice, an opportunity for comment, and responses to those comments.<sup>166</sup> Also like the ITESDA, the HEARTH Act allows for interested parties to challenge tribal decisions and allows the Secretary to review whether a tribe has complied with its own regulations in the approval of a lease.<sup>167</sup> Unlike the ITEDSDA, the HEARTH Act did not require any determination of tribal capacity or formal agreement—such as a TERA—between a tribe and the Secretary.<sup>168</sup> Rather, tribes seeking additional authority under the HEARTH Act simply had to ensure "consistency" between their regulations and federal leasing regulations.<sup>169</sup>

The adoption of new federal leasing regulations expanded the reach of the HEARTH Act into energy development. On December 4, 2012, the Department of the Interior published final, revised leasing regulations applicable to Residential, Business, and Wind and Solar Resource Leases on Indian Land.<sup>170</sup> Though the

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<sup>163</sup> Helping Expedite & Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (2012).

<sup>164</sup> *See, e.g.*, Navajo Nation Trust Land Leasing Act of 2000, Pub. L. No. 106-568, Title XII, § 1203(2), 114 Stat. 2868.

<sup>165</sup> 25 U.S.C. § 415(h) (2012).

<sup>166</sup> *Id.* § 415(h)(3)(B).

<sup>167</sup> *Id.* § 415(h)(8).

<sup>168</sup> *Compare* 25 U.S.C. § 3504(e)(2)(B)(i) (2012) *with* 25 U.S.C. § 415 (h).

<sup>169</sup> 25 U.S.C. § 415(h)(3)(B).

<sup>170</sup> 77 Fed. Reg. 72,439 (Dec. 5, 2012) (revising 25 C.F.R. pt. 162 (2014)).

prior regulations provided procedures for the review and approval of business leases under the authority of the Indian Long-Term Leasing Act—which could have included leases for certain energy-related facilities—the 2012 regulations made explicit a process for tribes seeking to lease tribal land for the purposes of solar or wind energy projects.<sup>171</sup> When combined with the HEARTH Act’s option for additional tribal regulatory and approval authority, these leasing regulations, by specifying the procedures for the leasing of tribal land for renewable energy purposes,<sup>172</sup> offered another new avenue for tribes to pursue greater authority over energy development on their lands. Just as the ITEDSDA had formalized the shift of the federal government’s focus from individual mineral development deals to broader tribal authority, the HEARTH Act and the new federal leasing regulations offered a way for tribes to remove federal approval from the equation for wind and solar energy-related surface leases.

Both the ITEDSDA and the HEARTH Act offered new opportunities for tribal authority in hopes of promoting the same purposes forwarded by the IMLA and the IMDA— the seemingly straightforward but apparently challenging twin aims of tribal self-determination and economic development. Despite the promise of these new approaches, however, in June 2015, the United States Government Accountability Office (GAO) released a report detailing the challenges that tribes face when seeking to develop their energy resources.<sup>173</sup> Among other factors, the GAO determined that a complex regulatory framework, largely the product of the federal statutory scheme detailed *supra*, contributes to hindrances on tribal development.<sup>174</sup> The federal role in the development of tribal energy resources implicates broader federal policies and responsibilities, such as those promoted by the National

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<sup>171</sup> *Id.* at 72,441 (“The current regulations provide for the approval of these instruments, but do not specify the approval procedures . . .”); *id.* at 72,453 (“While many of the business leasing and WSR [Wind and Solar Resource] provisions are the same, our intent in making WSR leasing a separate subpart is to encourage future WSR development of Indian land through making the procedures as transparent as possible.”)

<sup>172</sup> The regulations also specifically included “biomass [and] waste-to energy” projects as “business purposes” covered by their business leasing provisions. *Id.* at 72,441.

<sup>173</sup> GAO-15-502, *supra* note 11.

<sup>174</sup> GAO-15-502, *supra* note 11, at 24–27.

Environmental Policy Act of 1969 (NEPA),<sup>175</sup> the Endangered Species Act (ESA),<sup>176</sup> and the National Historic Preservation Act (NHPA).<sup>177</sup> As a result, some interviewed by the GAO indicated that they believed that “the applicability of some of these laws results in Indian lands being managed according to priorities generally associated with public lands and that review processes and requirements associated with the acts can hinder development.”<sup>178</sup> Therefore, although the HEARTH Act and the TERA’s of the ITEDSDA seem to offer new solutions to the challenges of promoting tribal authority and the corresponding reduction of the federal role in energy development, neither has yet lived up to its potential.

### III. STILL ZERO-SUM: ISSUES WITH TERAS AND THE HEARTH ACT AND CURRENT PROPOSALS FOR REFORM

Despite the shift of federal oversight and responsibility promised by the ITEDSDA, as of early 2017, nearly a dozen years after they were authorized by the ITEDSDA, no TERA exists between a tribe and the federal government. A number of factors have been identified by tribes, scholars, and the GAO to explain why tribes have yet to enter a TERA.<sup>179</sup> Most of these factors illustrate the ITEDSDA’s adoption of the single-axis approach of federal-tribal energy oversight. For example, the environmental review process that a tribe must put in place in order to enter a TERA requires public (including non-tribal) review and comment on proposed leases, agreements, and rights-of-way to be approved by a tribe.<sup>180</sup> While consistent with the general federal policy expressed by the NEPA, non-tribal member review and comment on tribal decision-making may not be consistent with tribal interests and

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<sup>175</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as 42 U.S.C. §§ 4321–4370h (2012)).

<sup>176</sup> Endangered Species Act of 1982, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as 16 U.S.C. §§ 1531–1544 (2012)).

<sup>177</sup> An Act to Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation, & for Other Purposes, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as 54 U.S.C. §§ 300101 *et seq.*, formerly cited as 16 U.S.C. §§ 470 *et seq.*).

<sup>178</sup> GAO-15-502, *supra* note 11, at 25.

<sup>179</sup> *See, e.g.,* Kronk, *supra* note 153.

<sup>180</sup> 25 U.S.C. § 3504(e)(2)(C) (2012).

values. In addition, the ITEDSDA’s waiver of federal liability for “any negotiated term” of a tribally-approved agreement, while perhaps fair in light of the lack of federal approval of any such agreement, has been viewed as a diminishment of the federal trust responsibility.<sup>181</sup> This perception is consistent with the zero-sum conception of federal and tribal authority as it demands that the assumption of authority by tribes be accompanied by a corresponding elimination of federal responsibility. Similarly, the regulations implementing ITEDSDA allow tribes to assume “activities normally carried out by the Department [of the Interior] except for inherently Federal functions.”<sup>182</sup> In doing so, the regulations sought to preserve some portion of the federal end of the federal-tribal axis; however, the regulations failed to define what those functions might be. Lastly, the ability of a tribe to enter a TERA hinges upon the tribe’s capacity, as determined by the Secretary, to carry out the TERA’s functions.<sup>183</sup> By establishing an overly complex application and assessment process for that determination without a correspondingly strong commitment to work with tribes to build such capacity, the ITEDSDA further confirms the zero-sum approach.<sup>184</sup>

Since the HEARTH Act’s 2012 enactment, over twenty tribes have assumed responsibility for review and approval of surface leases on their lands.<sup>185</sup> Of these tribes, however, as of early 2017, only a few had regulations approved for wind and solar or solar resource leases.<sup>186</sup> Like ITEDSDA’s adoption of the zero-sum

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<sup>181</sup> See, e.g. Kronk, *supra* note 153, at 828–34.

<sup>182</sup> 25 C.F.R. § 224.52(c) (2014).

<sup>183</sup> 25 U.S.C. §3504(e)(2)(B)(i) (2012).

<sup>184</sup> See, e.g., S. 2132, *Indian Tribal Energy Dev. & Self-Determination Act Amendments of 2014: Hearing before the S. Comm. on Indian Affairs*, 113th Cong. 4 (2014) (Statement of Hon. Kevin Washburn, Assistant Secretary—Indian Affairs, U.S. Dep’t of the Interior).

<sup>185</sup> See HEARTH Act of 2012, U.S. DEPT. OF THE INTERIOR: BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm> [<http://perma.cc/MW3A-C8ZN>].

<sup>186</sup> *Id.*; HEARTH Act Approval of Ohkay Owingeh Regulations, 81 Fed. Reg. 1638-01 (Jan. 13, 2016); HEARTH Act Approval of Makah Indian Tribe of the Makah Indian Reservation Regulations, 80 Fed. Reg. 51,836-01 (Aug. 26, 2015); HEARTH Act Approval of Gila River Indian Community Regulations, 80 Fed. Reg. 77,655-01 (Dec. 15, 2015). According to the GAO, as of March 2015, only one utility-scale wind facility was in operation on tribal land, with one more such facility and one utility-scale solar facility then-under

approach to authorizing tribal authority, the HEARTH Act includes similar tribal environmental review process requirements and waiver of federal liability.<sup>187</sup> Beyond these limitations, the HEARTH Act does not provide a tribe with comprehensive authority to pursue energy development, as it addresses only surface leasing authority and does not allow tribes to approve rights-of-way that might be necessary and incidental to such surface development.

Although the ITEDSDA and HEARTH Acts represent the most advanced evolution of the federal-tribal relationship as it relates to energy development, their shortcomings have led to a number of recent proposals to further reform or build upon their approaches. Most prominent among the legislative efforts were two such proposals included in comprehensive national energy policy bills passed in 2016.<sup>188</sup> The Senate’s version of that bill focused on enhancing and streamlining the TERA process by simplifying the capacity determination and application process while also making funding available to tribes that assume greater authority pursuant to a TERA.<sup>189</sup> That version would have also broadened the applicability of TERAs by including tribal authority for approving a wider range of energy-related agreements and removing the requirement of secretarial approval for certain such agreements entered into between a tribe and a “tribal energy development organization” that has been certified as such by the Secretary.<sup>190</sup> In reporting the bill, which later became part of the broader Energy

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construction. By comparison, since 2005, 686 utility-scale wind projects and 778 utility-scale solar projects have been constructed on non-tribal lands. GAO-15-502, *supra* note 9, at 2-3.

<sup>187</sup> See, e.g., Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Dev. Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1053–70 (2013).

<sup>188</sup> N. Am. Energy Security & Infrastructure Act of 2016, S. 2012, 114th Cong. (as passed by House with changes, May 25, 2016).

<sup>189</sup> *Id.* § 6013(a)(4)(B)(ii)(II)(ee) (for capacity determination purposes, adding the reduced requirement that the tribe certify that it has carried out a 638 contract or compact for three years prior to applying for a TERA or that the tribe has “substantial experience [or participation] in the administration, review or evaluation of energy resource leases or agreements”); *id.* § 6013(a)(6) (authorizing the Secretary of the Interior to make funding available to a tribe that has assumed authority and functions pursuant to a TERA).

<sup>190</sup> *Id.* § 6013(a)(1)(A)(iii) (including pooling, unitization, or communitization agreements within the types of agreements that a tribe could approve pursuant to a TERA); *id.* § 6013(a)(1)(b) (adding an exception from Secretarial approval for leases or business agreements executed “by [a] tribe and a tribal energy development organization” certified by the Secretary); *id.* § 6013(a)(6) (establishing certification criteria for the Secretary’s review of Tribal Energy Development Organizations).

Policy Modernization Act of 2016 out of his Senate Indian Affairs Committee, Chairman John Barrasso specifically noted the findings of the 2015 GAO Report and described how the proposed amendments aimed “to provide direction and clarity” for the TERA process.<sup>191</sup>

In addition to its TERA-focused provisions, the Senate Indian energy proposal included a number of miscellaneous provisions, including proposals to reform and streamline the federal appraisal process for tribal energy or mineral resources held in trust<sup>192</sup> and to authorize federally-supported tribal weatherization and biomass demonstration projects.<sup>193</sup> In addition, just as the expansion of the Navajo Nation’s (the Nation) ability to enter surface leases without secretarial approval served as a precursor to the HEARTH Act,<sup>194</sup> the bill proposed a further expansion of the Nation’s surface leasing authority to include the ability to enter into a mineral lease without secretarial approval, provided the Secretary had approved the Nation’s leasing regulations.<sup>195</sup> The proposed provision would effectively apply the HEARTH Act approach to Navajo trust mineral development instead of the more complicated TERA application and capacity determination process. But, by simply adding mineral leases to the Nation’s existing surface leasing authority, the proposal would not require that the Nation adopt regulations consistent with the federal mineral development regulations under the IMLA and IMDA.<sup>196</sup>

While the Senate took a TERA-focused approach with the addition of a HEARTH Act-type proposal for the Navajo Nation in its miscellaneous provisions, the House took a much more scattershot approach in passing a number of provisions dedicated to Indian energy that did not reference the ITEDSDA or TERAs at all.<sup>197</sup> Though the House version included a few of the same miscellaneous provisions as the Senate version, such as the appraisal

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<sup>191</sup> S. REP. NO. 114-149, at 2 (2015).

<sup>192</sup> S. 2012, 112<sup>th</sup> Cong. § 6204.

<sup>193</sup> *Id.* §§6202–6203.

<sup>194</sup> *See supra* note 34 and accompanying text.

<sup>195</sup> S. 2012, § 6205.

<sup>196</sup> *See* 25 U.S.C. § 415(e)(3) (2012) (requiring the Secretary’s approval of tribal regulations that are consistent with the Secretary’s *surface leasing* regulations, i.e., 25 C.F.R. Part 162, without reference to the IMLA or IMDA regulations, 25 C.F.R. parts 211 and 225, respectively).

<sup>197</sup> *See* Division C, Title IV, Native Am. Energy Act, S. 2012, 112<sup>th</sup> Cong. §§ 4001–4009 (May 25, 2016) (engrossed amendment House).

reform, biomass demonstration project, and the Navajo Nation mineral leasing provisions, the heart of the House proposal was aimed at narrowing the applicability and scope of the NEPA and judicial review of projects on tribal lands.<sup>198</sup> These provisions would limit the environmental review of federal actions related to activities on Indian lands to allow only tribal members, local residents or governments within the area affected by the activity to comment on the proposed action.<sup>199</sup> Similarly, the bill sought to significantly limit the availability of judicial review for “energy related actions” and challenges to the federal approval of energy-related activity on tribal lands.<sup>200</sup> Thus, although the report accompanying the House version pointed to many of the same challenges at which the Senate’s proposal had aimed,<sup>201</sup> the House sought to reform specific aspects of the federal role in Indian energy development while the Senate proposed enhancing the TERA avenue for tribes to seek greater control. Though the omnibus energy policy legislation and legislative efforts in the 114<sup>th</sup> Congress died,<sup>202</sup> they are the basis of additional legislative efforts to reform the TERA process and address other tribal energy issues in the 115<sup>th</sup> Congress.<sup>203</sup> As such, these proposals remain narrowly focused like their zero-sum predecessors.

In addition to legislative proposals for reform, officials within the Department of the Interior also have sought to reform the manner in which their department, and the agencies therein, carry out the trust responsibility within the existing statutory framework for Federal Indian energy policy. As with the efforts at legislative reform, the GAO’s 2015 report on Indian energy development provided an outline of administrative issues and gave the Department of Interior a number of recommendations on which to

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<sup>198</sup> *Id.* §§ 4004–05.

<sup>199</sup> *Id.* § 4004.

<sup>200</sup> *Id.* § 4005 (proposing a 60-day statute of limitations, narrowed appellate review, and limited the availability of fee recovery for such actions). Then-Representative Zinke voted in favor of moving the bill from committee and the bill as a whole. 161 Cong. Rec. H6911 (daily ed. Oct. 8, 2015)).

<sup>201</sup> *Compare*, S. REP. NO. 114-149, at 1-3 (2015), *with* H. REP. NO. 114-276, at 1-5 (2015).

<sup>202</sup> *See* Devin Henry, *Speaker’s Office: No Energy Bill this Year*, THE HILL (December 7, 2016, 5:04 PM EST), <http://thehill.com/policy/energy-environment/309312-speakers-office-no-energy-bill-this-year> [<https://perma.cc/S3QT-JCN7>].

<sup>203</sup> Indian Tribal Energy Dev. & Self-Determination Act Amendments of 2017, S. 245, 115th Cong. (2017) (Senate Indian Affairs Committee voted on Feb. 8, 2017 to move the bill out of Committee).

base its reforms, but it largely avoided any consideration of the broader structure of the trust relationship.<sup>204</sup> Instead, the GAO detailed the challenges facing the Bureau of Indian Affairs regarding that agency's lack of comprehensive data concerning the ownership and use of Indian minerals, its lack of any defined or accountable process for the agency's review and approval of energy-related transactions, and the dearth of well-qualified agency staff to handle those procedures.<sup>205</sup> Based on these concerns, the GAO report recommended that the BIA Director further develop the agency's data and information system and also "develop a documented process to track its review and response times."<sup>206</sup> In response, the Department noted its efforts to implement a new software package that would, in the Department's view, address the information shortage, but concurred with the need to develop an effective process for tracking and accounting for the review and approval of energy-related transactional documents.<sup>207</sup> In addition to responding to the issues raised in the GAO Report, the Department also touted its efforts to establish an Indian Energy Service Center (IESC), which would include representatives from various federal agencies involved in Indian energy development to "provide expertise, policy guidance, standardized procedures, and technical assistance across a broad spectrum of services."<sup>208</sup> As noted by Interior's Principal Deputy Assistant Secretary at the time, the collaborative approach envisioned for the IESC would "reflect the spirit of the White House Council on Native American Affairs,"<sup>209</sup> which was created by Executive Order in June 2013 in an effort "to improve the coordination of Federal programs and the use of resources available to tribal communities."<sup>210</sup>

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<sup>204</sup> See GAO-15-502, *supra* note 11, at 18–24.

<sup>205</sup> See GAO-15-502, *supra* note 11, at 18–24.

<sup>206</sup> See GAO-15-502, *supra* note 11, at 36.

<sup>207</sup> See GAO-15-502, *supra* note 11, at 46–47.

<sup>208</sup> *The GAO Report on Indian Energy Dev.: Poor Mgmt. by BIA has Hindered Dev. on Indian Lands: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 13 (2015) (statement of Frank Rusco, Director, Natural Resources and Environment, U.S. Government Accountability Office).

<sup>209</sup> *Id.* at 11.

<sup>210</sup> Establishing the White House Council on Native Am. Affairs, Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013). The Council also includes an energy subgroup, chaired by the Secretaries of Interior and Energy, focused on further coordination of these issues. See *White House Council on Native Am. Affairs*, U.S. DEPT. OF THE INTERIOR: BUREAU OF INDIAN AFFAIRS, [https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/idc1-022327.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc1-022327.pdf) [<https://perma.cc/X3MQ-MJHR>].



Notwithstanding these administrative reform efforts, a more recent GAO review determined that more is needed in order to effectively address the barriers to the efficient administration of the federal trust responsibility for Indian energy development.<sup>211</sup> Despite the spirit of collaboration envisioned by the White House Council on Native American Affairs, the GAO in 2016 identified a number of issues that may be preventing effective collaboration among the members of the Council’s Energy Subgroup, including a dearth of sustained leadership, failures on the part of participating agencies to dedicate adequate and consistent resources, and the lack of a documented process or framework for collaboration.<sup>212</sup> Similarly, the GAO pointed out that the BIA’s development of the IESC failed to “follow some leading practices or adhere to agency guidance during [its] early stages ... which may impact its effectiveness.”<sup>213</sup> These failures included the lack of an identified lead agency, failure to effectively involve employees and their input, and not documenting the basis for key decisions about the formation and development of the IESC.<sup>214</sup> Following on its 2015 findings, the GAO’s 2016 report also noted continuing high vacancy rates at key BIA offices and confirmed that some offices “may not have staff with the level of competence that allows them to review some energy development documents.”<sup>215</sup> Compounding these challenges, according to the GAO, is the BIA’s lack of detailed workforce information, which prevents a comprehensive analysis of workforce skills, needs, and competencies.<sup>216</sup> In summing up this challenge, the GAO aptly described the struggles faced by Federal Indian energy policy more broadly: “[w]ithout current workforce information on key skills needed for energy development, tribal goals and priorities, and potential workforce resource gaps, BIA may not have the right people with the right skills doing the right jobs in the right place at the right time and cannot provide decision

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<sup>211</sup> GAO-17-43, *supra* note 10.

<sup>212</sup> GAO-17-43, *supra* note 10, at 15–18.

<sup>213</sup> GAO-17-43, *supra* note 10, at 19.

<sup>214</sup> GAO-17-43, *supra* note 10, at 19–23.

<sup>215</sup> GAO-17-43, *supra* note 10, at 23.

<sup>216</sup> GAO-17-43, *supra* note 10, at 25. The GAO Report includes various examples of the challenges posed by a lack of qualified staff, including a statement from the BIA Director “that BIA agency offices generally do not have the expertise to help tribes with solar and wind development because it is rare that such skills are needed.” GAO-17-43, *supra* note 10, at 24.

makers with information on its staffing needs going forward.”<sup>217</sup> None of the GAO’s findings or recommendations looked at the balance of the federal government’s trust responsibility; nor did the GAO Report make any proposals for significant reform in that regard.

Thus, a century and a quarter after the 1891 leasing act, the structure, and implementation of the federal government’s trust responsibilities for the leasing and development of tribal land and energy resources remain in flux. Though federal priorities have shifted from the destruction and exploitation of tribal resources toward promoting the twin aims of tribal self-determination and economic development,<sup>218</sup> tribes continue to express frustration about both the statutory framework and its administrative implementation.<sup>219</sup> Much of the frustration results from the limited way in which that framework has treated the federal-tribal relationship and the narrow means available for tribes to assume greater authority over energy development.

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<sup>217</sup> GAO-17-43, *supra* note 10, at 25.

<sup>218</sup> The most recent statement of federal policy on these issues came from Congress in enacting the Indian Trust Asset Reform Act, which included the following findings and reaffirmation of federal policy:

SEC. 101. FINDINGS.

Congress finds that—

- (1) there exists a unique relationship between the Government of the United States and the governments of Indian tribes;
- (2) there exists a unique Federal responsibility to Indians;
- (3) through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians;
- (4) the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and
- (5) the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed.

SEC. 102. REAFFIRMATION OF POLICY.

Pursuant to the constitutionally vested authority of Congress over Indian affairs, Congress reaffirms that the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development.

Indian Trust Asset Reform Act, Pub. L. No. 114-178, Title I, §§ 101–102, 130 Stat. 432 (2016) (codified as 25 U.S.C. §§ 5601–02).

<sup>219</sup> See, e.g., GAO-15-502, *supra* note 11, at 25-26; *Indian Tribal Energy Dev. & Self-Determination Act Amendments of 2014: Hearing on S. 2132 Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014).

At one end of this debate are those who characterize the shortcomings of current policy in terms of federal overreach and the need to minimize the federal presence.<sup>220</sup> This characterization is consistent with recent proposals for regulatory reform,<sup>221</sup> but is also cloaked in the language of promoting tribal sovereignty and self-determination.<sup>222</sup> Nonetheless, for many in Indian Country, these arguments sound like the diminishment of the federal trust responsibility and therefore echo the specters of allotment and termination.<sup>223</sup>

At the other end of the spectrum are tribes, tribal citizens, environmental groups, and others concerned about the failure of the federal government to adequately protect their trust resources from the degradation and threat posed by energy development.<sup>224</sup> The zero-sum nature of Federal Indian energy policy also fails to serve these interests. Where federal trust responsibility remains for the review and approval of energy-related transactions, such as under the IMLA or IMDA, the procedural requirements of NEPA,

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<sup>220</sup> See, e.g., Terry L. Anderson & Shawn Regan, *It's Time for the Feds to Get Out of Indian Cnty.*, WALL STREET JOURNAL, Oct. 7, 2016, <https://www.wsj.com/articles/its-time-for-the-feds-to-get-out-of-indian-country-1475880064> [<https://perma.cc/8MTT-8KNB>] (last visited Dec. 5, 2017); Lance Morgan, *Ending the Curse of Trust*, INDIAN CNTY. TODAY MEDIA NETWORK Mar. 23, 2015, <https://indiancountrymedianetwork.com/news/ending-the-curse-of-trust/> [<https://perma.cc/YDU4-XVXN>].

<sup>221</sup> See, e.g., Enforcing the Regulatory Reform Agenda, Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (reviewing President Trump's earlier actions on regulatory reform and directing review and reform of federal regulations by each agency).

<sup>222</sup> See, e.g., Congressman Markwayne Mullin Press Release, *Mullin Statement on Tribal Sovereignty*, CONGRESSMAN MARKWAYNE MULLIN (Dec. 5, 2016), <https://mullin.house.gov/news/documentsingle.aspx?DocumentID=415> [<https://perma.cc/6GM3-KBDM>] [hereinafter Mullin Statement].

<sup>223</sup> See Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016, 4:23 AM), <http://www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1> [<https://perma.cc/7AU4-6FZ9>].

<sup>224</sup> See e.g., Complaint, *Pawnee Nation v. Jewell*, No. 4:16-cv-00697-JHP-TLW (N.D. Okla. Nov. 18, 2016) (alleging that the approval of various oil and gas leases and permits by both BIA and BLM “have run roughshod over Pawnee natural resource protection laws, disregarded a tribal moratorium on new oil and gas approvals, and violated the agencies’ trust responsibilities to the Pawnee.”) Though not specifically related to energy development in Indian Country, the Standing Rock and Cheyenne River Sioux Tribes raised similar concerns over the federal government’s role (through the U.S. Army Corps of Engineers) in reviewing and approving the proposed Dakota Access Pipeline. *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 205 F. Supp. 3d, 4 (D.D.C. 2016).

including the ESA and other federal standards, may provide some assurance to those concerned about the environmental impacts.<sup>225</sup> Given the federal-tribal relationship, however, the conduct and result of those reviews may be deferential to tribal government decision-making, which may or may not adequately account for the concerns of environmental organizations.<sup>226</sup> Conversely, the reliance upon federal statutes as a basis for challenging tribal development decisions effectively denigrates tribal status while reifying federal supremacy. Professor Ezra Rosser examined this conflict in detail with regard to environmental permitting of a coal mine and power plant supported by the Navajo Nation, explaining that “[t]he current federal permitting process . . . seems to put environmental organizations in the position of either having to give up on their larger environmental goals or participate in the colonialism of federal environmental policy.”<sup>227</sup>

Despite the efforts of more recent initiatives—like ITEDSDA and the HEARTH Act—to remove the federal government from the review and approval process for energy-related or surface leasing transactions, each of those statutes requires that tribes essentially adopt the federal review process, a NEPA-lite,<sup>228</sup> and ultimately allow for federal review of alleged non-compliance on the part of tribes exercising such authority.<sup>229</sup> These limitations restrict the ability of tribal regulatory schemes to respond to the “quantitatively and qualitatively different risks and impacts” of energy development on tribal lands, including risks to tribal homelands, culturally significant sites, and environments.<sup>230</sup> Without a broader conception of the federal-tribal relationship and a trust responsibility that allows for more tribal flexibility, these

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<sup>225</sup> See *supra* notes 172–75 and accompanying text.

<sup>226</sup> See Mary Christina Wood, *Indian Land and the Promise of native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1480 (“As a practical matter . . . the BIA simply approves transactions that tribal governments support.”)

<sup>227</sup> Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. LAW 437, 521 (2010).

<sup>228</sup> See, e.g., HEARTH Act of 2012, Pub. L. No. 112-151, § 2(h)(3)(B), 126 Stat. 1150, 1151 (2012) (HEARTH Act provision requiring “consistency” between tribal leasing regulations and federal standards), 25 U.S.C. § 3504(e)(2)(C) (2012).

<sup>229</sup> HEARTH Act § 2(h)(8); 25 U.S.C. § 3504(e)(7) (2012).

<sup>230</sup> Raymond Cross, *Development's Victim or its Beneficiary?: The Impact of Oil & Gas Dev. on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535, 538 (2011).

risks are left to federal agencies, federal courts, and federal regulations to resolve.

In addition, many tribal citizens have expressed concern about the willingness and ability of their own tribal governments to provide similar protection for tribal resources in the event that the federal government authorizes broader tribal oversight.<sup>231</sup> These concerns relate less to the balance of federal or tribal authority over the development and instead focus on the effectiveness of such authority in responding to the concerns of local tribal citizens. While the challenges facing tribal governments are many and varied, the history of federal involvement and oversight, particularly through the establishment of IRA constitutions and governmental structures, often results in a significant disconnect between the structures of tribal governments and the concerns of tribal citizens.<sup>232</sup> While tribes across the country have begun to reconsider and reshape their governments to better respond to this potential divide, the zero-sum nature of Federal Indian energy policy remains narrowly focused upon the tribal capacity to assume the federal regulatory role<sup>233</sup> rather than the sustainability and effectiveness of tribal governance within tribal communities.

Therefore, for many in Indian Country, it may matter less whether the federal or local tribal government has authority for authorizing, approving, and regulating energy development so long as whichever entity with authority is adequately listening to and addressing their concerns. Thus, though the axis around which Federal Indian energy policy has turned has always been the foundational (and illusory) notion that the federal government's role, and corresponding trust responsibility, must be balanced against the role or interests of the tribes involved, the history of Federal Indian energy policy has demonstrated the shortcomings of this conception. With some notable but mostly singular

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<sup>231</sup> See, e.g., Curt Brown, *While N. Dakota Embraces the Oil Boom, Tribal Members ask Envtl. Questions*, MINNEAPOLIS STAR-TRIBUNE, Feb. 25, 2014, 8:24 AM, <http://www.startribune.com/n-d-tribal-members-question-oil-boom-s-effects-on-sacred-land/233854981/> [<https://perma.cc/3XT6-3ZB6>].

<sup>232</sup> The scholars of the Harvard Project on American Indian Economic Development have emphasized the importance of “cultural match” between tribal governance structures and tribal cultural norms. See, e.g., Manley A. Begay, Jr., Stephen Cornell, Miriam Jorgensen, & Joseph P. Kalt, *Dev., Governance, Culture: What are They & What do they have to do with Rebuilding Native Nations?*, in REBUILDING NATIVE NATIONS 47–52 (Miriam Jorgensen, Ed., 2007).

<sup>233</sup> 25 U.S.C. § 3504(e)(2)(B)(i) (2012).

exceptions,<sup>234</sup> Federal Indian energy policy has largely failed to successfully promote sustained economic development and tribal self-determination. While legislative and administrative reform efforts continue,<sup>235</sup> they primarily focus on shifting the existing federal regulatory review and approval process over to tribes without a broader consideration of the shortcomings of that process, the challenges it presents, or whether the process will even serve tribal interests. To overcome this myopia and the likely failure of such reforms, the remainder of this article proposes a new approach, one based on a broader view of the trust responsibility and unchained from the narrow proposals of the past.

#### IV. THE THREAT OF OUR TIMES AND THE PROMISE OF REFORM THROUGH RECOMMITMENT TO A BROADER TRUST RESPONSIBILITY

To support a broader view of reform for Federal Indian energy policy, this section begins by addressing a few fundamental hurdles. First, reforming Federal Indian energy policy, like Indian policy more broadly, demands consideration in a non-partisan manner. The federal government's trust responsibility to Indian Country is not the product of a liberal or conservative agenda; rather, it is rooted in the foundation of the constitution and federal law. Therefore, political ideology can take a backseat to the question of upholding the trust relationship; however, political issues and partisan ideologies unconnected to Indian affairs can and have interfered with the federal government's willingness and ability to carry out its trust responsibility. Second, new proposals must also overcome the zero-sum history of federal-tribal relations and separate the assumption and exercise of greater tribal authority from a diminished federal role. Instead, the federal role must evolve to

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<sup>234</sup> Jonathan Thompson, *The Ute Paradox*, HIGH CNTY. NEWS (July 12, 2010), [http://www.hcn.org/issues/42.12/the-ute-paradox?b\\_start:int=2#body](http://www.hcn.org/issues/42.12/the-ute-paradox?b_start:int=2#body) [<https://perma.cc/DB74-3VK8>]; DEP'T OF JUSTICE, Press Release No. 11-1388, *United States and Osage Tribe Announce \$380 Million Settlement of Tribal Trust Lawsuit*, (October 21, 2011), <https://www.justice.gov/opa/pr/united-states-and-osage-tribe-announce-380-million-settlement-tribal-trust-lawsuit> [<https://perma.cc/UN2E-DPSJ>].

<sup>235</sup> See, e.g., Indian Tribal Energy Dev. & Self-Determination Act Amendments of 2017, S. 245, 115th Cong. (2017); U.S. GOV'T ACCOUNTABILITY OFFICE, HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS, GAO-17-317, 34–35 (Feb. 2017), <http://www.gao.gov/assets/690/682765.pdf> [<http://perma.cc/6D47-24WP>].

better accommodate and respond to the unique needs and concerns of tribes beyond the narrow axis of federal versus tribal oversight.

### A. *The Threat of Political Ideology*

The history of federal Indian policy demonstrates a commitment by both conservatives and liberals alike to support and promote tribal interests and the federal-tribal relationship.<sup>236</sup> The lack of a partisan divide remains a hallmark of the Senate Committee on Indian Affairs, which routinely reviews and approves legislation introduced and co-sponsored by members of both political parties.<sup>237</sup> In fact, that Committee's most recent action on Federal Indian energy policy, approving a bill amending the ITEDSDA, was bi-partisan in nature.<sup>238</sup>

Notwithstanding the non-partisan nature of the federal-tribal relationship, however, federal Indian law and policy often get tangled up in—and suffer from—partisan political interests. For example, consistent with the non-partisan nature of tribal self-

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<sup>236</sup> Though built on statements from both Presidents Kennedy and Johnson, President Richard M. Nixon was the first to formally commit the federal government to the current era of tribal self-determination. *See* Richard Nixon, Special Message to the Cong. on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970). Since that time, nearly every President, regardless of political affiliation, has recommitted the federal government to this principle. Gerald Ford, Statement on Signing the Indian Self-Determination and Education Assistance Act, 1 PUB. PAPERS 10 (Jan. 4, 1975); Jimmy Carter, The State of the Union Annual Message to the Cong., THE AM. PRESIDENCY PROJECT (Jan. 25, 1979), <http://www.presidency.ucsb.edu/ws/?pid=32735> [https://perma.cc/RZ2T-MFZX]; Ronald Reagan, Statement on Indian Policy, THE AM. PRESIDENCY PROJECT (Jan. 24, 1983), <http://www.presidency.ucsb.edu/ws/?pid=41665> [https://perma.cc/PP8T-5KGC]; George Bush, *Statement Reaffirming the Gov't-to-Gov't Relationship Between the Fed. Gov't & Indian Tribal Governments*, THE AM. PRESIDENCY PROJECT (June 14, 1991), <http://www.presidency.ucsb.edu/ws/index.php?pid=19695&st=&st1=> [https://perma.cc/54ZM-5S9Q]; William J. Clinton, *Remarks to Native Am. & Native Alaskan Tribal Leaders*, THE AM. PRESIDENCY PROJECT (April 29, 1994), <http://www.presidency.ucsb.edu/ws/?pid=50070> [https://perma.cc/8BMW-CQFN]; George W. Bush, *Memorandum on Gov't-to-Gov't Relationship with Tribal Governments*, THE AM. PRESIDENCY PROJECT (Sept. 23, 2004), <http://www.presidency.ucsb.edu/ws/index.php?pid=64553&st=&st1=> [https://perma.cc/4EZR-RK57]; Barack Obama, *Statement of Admin. Policy*, THE AM. PRESIDENCY PROJECT (Nov. 17, 2015), <http://www.presidency.ucsb.edu/ws/?pid=111336> [https://perma.cc/AMC4-85RR].

<sup>237</sup> *Business Meeting*, 161 CONG. REC. D76 (daily ed. Jan. 28, 2015); *Business Meeting*, 163 CONG. REC. D89 (daily ed. Jan. 31, 2017).

<sup>238</sup> S. REP. NO. 115-84 (2017).

determination, President Reagan's 1983 Statement on Indian Affairs committed his administration to "remove the obstacles to self-government by creating a more favorable environment for the development of healthy reservation economies."<sup>239</sup> Echoing the preceding decades of Federal Indian energy policy, President Reagan's policy touted the need to develop both tribal governments and economies through energy resource development and suggested that the role of the federal government was to encourage such development in a manner consistent with "Indian values and priorities."<sup>240</sup> But, contemporaneously with such worthy statements on the federal-tribal relationship, the federal budget for Indian affairs was being drastically cut,<sup>241</sup> leading some to dub the Reagan administration's approach to Indian policy "termination by accountants."<sup>242</sup> These cuts were consistent with broader economic policies of the Reagan era,<sup>243</sup> but as a result, tribal self-determination and economic development suffered,<sup>244</sup> and the BIA and IHS budgets were set on a path of decades of diminished funding.<sup>245</sup>

Reform of Federal Indian energy policy must avoid being viewed as or falling prey to a partisan political divides and broader politically-driven agendas. As demonstrated above, the federal trust responsibility in the area of Federal Indian energy policy has long been conceived of as support for both tribal self-determination and economic development. Though challenges remain in meeting those goals, reform of such policy toward those ends cannot be cabined by conservative or liberal principles.

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<sup>239</sup> Reagan, *supra* note 236.

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

<sup>241</sup> See, e.g., Select S. Comm. on Indian Affairs, Analysis of the Budget Pertaining to Indian Affairs Fiscal Year 1982, S. REP. NO. 79-735, at 5 (1981) (showing a proposed budget cut of over \$70M from BIA's budget), <https://babel.hathitrust.org/cgi/pt?id=purl.32754070363753;view=1up;seq=17> (last visited December 05, 2017).

<sup>242</sup> C. Patrick Morris, *Termination by Accountants: The Reagan Indian Policy*, 16 POL'Y STUD. J. 731 (1988).

<sup>243</sup> Ronald Reagan, Inaugural Address, THE AM. PRESIDENCY PROJECT (Jan. 20, 1981), <http://www.presidency.ucsb.edu/ws/index.php?pid=43130> [<https://perma.cc/F8U5-8TEM>].

<sup>244</sup> ALLISON III, *supra* note 106, at 174-75.

<sup>245</sup> See National Cong. of Am. Indians, *An Honorable Budget for Indian Cnty.: Fiscal Year 2015 Budget Request* (Washington, D.C.), Jan. 2014, at 20, [http://www.ncai.org/ncai\\_2014\\_budget\\_request.pdf](http://www.ncai.org/ncai_2014_budget_request.pdf) [<http://perma.cc/FCZ8-NXHM>].



## B. *The Threat of a Continued Zero-Sum Approach*

To achieve successful reform, Federal Indian energy policy must also break free from its zero-sum past. Throughout its history, Federal Indian energy policy has relied upon a singular view of federal competence and corresponding tribal incompetence.<sup>246</sup> As demonstrated *supra*, the policy has evolved to allow tribes greater authority only where they can demonstrate that they have overcome the latter and are able to carry out federal functions in a manner similar to or “consistent with” the federal government.<sup>247</sup> This approach is consistent with the broader approach of the self-determination era, in which tribes have contracted to take over formerly federal programs, services, functions, and activities but must meet federal performance standards to do so.<sup>248</sup>

While there are many benefits for tribes in taking on such responsibilities,<sup>249</sup> the approach demands consideration of a reduced federal responsibility consistent with greater tribal authority. In addition, tribes are authorized to fulfill the role of the federal government in the manner of the federal government, which has often failed Indian beneficiaries.<sup>250</sup> Perhaps most perniciously for reform efforts, viewing the balance of authority over energy development in Indian Country as a federal-tribal dichotomy lends credence to a view of reform in which the federal government helps tribes by “getting out of the way,” which then justifies reduced federal spending and involvement in carrying out the trust responsibility.<sup>251</sup> In assessing whether the federal government is

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<sup>246</sup> See, e.g., Gover, *supra* note 30, at 318, 355.

<sup>247</sup> Indian Mineral Dev. Act, 25 U.S.C. § 2107 (2012); HEARTH Act of 2012, § 2(h)(3)(B)(i); Indian Tribal Energy & Self-Determination Act, § 3504(e)(2)(B)(i).

<sup>248</sup> Indian Self Determination & Educational Assistance Act, Pub. L. 93-638, § 102(a)(1)–(2), 88 Stat. 2206 (1975) (For example, the standards by which the Secretary of the Interior can decline a tribe’s proposal to enter a self-determination contract include that the service to be performed by the tribe “will not be satisfactory,” or that “adequate protection of trust resources is not assured.”).

<sup>249</sup> See, e.g., Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, & Future of Tribal Self-Governance under the Indian Self-Determination & Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4–5 (2014).

<sup>250</sup> See, e.g., Class Action Settlement Agreement, *Cobell v. Salazar*, Civil Case No. 1:96CV01285-JR (Dist. D.C. Dec. 7, 2009), [https://naturalresources.house.gov/uploadedfiles/cobellsettlementagreement\\_120709.pdf](https://naturalresources.house.gov/uploadedfiles/cobellsettlementagreement_120709.pdf) [<https://perma.cc/Q6AH-2PST>]; LINOWES COMM. HEARING, *supra* note 110.

<sup>251</sup> This sentiment echoes President Reagan’s Statement on Indian Affairs and has been resurrected in more recent statements by representatives of President

liable for damages resulting from its failure to ensure that tribal interests are protected when approving IMLA leases, the Supreme Court relied upon a similar view of the federal-tribal dichotomy, noting that “[i]mposing on the Government a fiduciary duty to oversee management ... would not have served” that statute’s purpose of promoting tribal self-determination.<sup>252</sup>

While some tribes support the reduction and streamlining of the federal oversight of tribal energy development, that support recognizes the importance of tribal capacity in the management and oversight of development.<sup>253</sup> More nuanced than the zero-sum/federal-tribal dichotomy approach, tribal criticism is largely focused on the manner in which the federal trust responsibility is carried out, which, in the tribal view, can frustrate tribal interests.<sup>254</sup> This criticism is borne out by audit reports demonstrating the shortcomings of federal energy management, including the lack of accurate data and information, dearth of qualified staff in appropriate positions, and lack of accountability or timeframes.<sup>255</sup>

Consistent with these reviews and tribal criticism, the focus of reforming Federal Indian energy policy must be the manner in which the federal government carries out its responsibilities, not

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Trump’s Native American Affairs Coalition and within the House of Representatives. *See, e.g.*, Andrew Restuccia & Anna Palmer, *Trump Team Reaches out to Native Am.*, POLITICO (Dec. 16, 2016, 6:44 AM EST), <http://www.politico.com/story/2016/12/trump-team-native-americans-232719> [<http://perma.cc/HRN4-97RL>]; Mullin Statement, *supra* note 222; *Tribal Prosperity & Self-Determination Through Energy Dev.: Oversight Field Hearing Before the H. Comm. on Nat. Res.*, 114th Cong. 2 (2017) [hereinafter Oversight Field Hearing].

<sup>252</sup> *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003).

<sup>253</sup> *See* Oversight Field Hearing, *supra* note 251, at 6 (statement of Hon. James “Mike” Olguin, Tribal Council Member, Southern Ute Indian Tribe) (“It is perfectly clear that the [Bureau of Indian Affairs] does not have the data, resources, technological capabilities, or staffing to meet the needs of the tribe. Meanwhile, the tribe has the capability and, most importantly, the incentive to improve the situation.”)

<sup>254</sup> *See* Oversight Field Hearing, *supra* note 251, at 6.

<sup>255</sup> *See, e.g.*, GAO-15-502, *supra* note 10, at 18–24. The experience of the Southern Ute Indian Tribe is particularly revealing in this regard. Alleged mismanagement of tribal energy resources on the part of the BIA’s Southern Ute Agency ultimately led to a review by the Dept. of Interior’s Office of Inspector General, whose report discusses the “challenges associated with initiating energy self-determination for a tribe with sophisticated energy practices.” DEP’T. OF INTERIOR, OFFICE OF INSPECTOR GENERAL, BUREAU OF INDIAN AFFAIRS’ S. UTE AGENCY’S MGMT.OF THE S. UTE INDIAN TRIBE’S ENERGY RES., Rep. No. CR-EV-BIA-0011-2014, at 14 (Feb. 2016) <https://www.doi.gov/sites/doi.gov/files/CREVBIA00112014Public.pdf> [<https://perma.cc/8W53-Y8WY>].

simply how to reduce those responsibilities. Instead of reducing the federal role in order to increase tribal self-determination, for example, a realignment of federal priorities with regard to Federal Indian energy policy could result in an expanded federal role *and* increased tribal self-determination. Only by dismissing political ideology and moving beyond the zero-sum approach can reform successfully answer the central question of Federal Indian energy policy for nearly a century—how can the federal government best support tribal sovereignty and economic development through energy development?

### C. *Proposing Reform: Stepping Toward a New Trust Relationship*

Fundamentally, reforming Federal Indian energy policy to serve the twin aims of tribal self-determination and economic development will require that the federal government first take a step *toward* Indian tribes rather than stepping back or out of the way. With rare exception,<sup>256</sup> tribes demand greater legal, regulatory, and technical capacities to ensure effective tribal management and oversight of energy development. Though ITEDSDA recognized these needs and authorized grants to tribes to develop such capacities,<sup>257</sup> tribal needs still outstrip federal support.<sup>258</sup> In addition to being underfunded, ITEDSDA’s authorization for appropriations to fund these grants expired in 2016.<sup>259</sup> A recommitment to

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<sup>256</sup> See DEP’T. OF INTERIOR, *supra* note 255.

<sup>257</sup> 25 U.S.C. § 3502(a) (2012).

<sup>258</sup> According to Interior’s FY2017 budget justification, the Department was able to fund less than half (10/22) of the Tribal Energy Development Capacity (TEDC) grant requests it received for FY2015, providing only \$1.5M of over \$3M requested. Dep’t of the Interior: Indian Affairs, *Budget Justifications and Performance Information, Fiscal Year 2017*, IA-CED-10 (2016) [https://www.doi.gov/sites/doi.gov/files/uploads/FY2017\\_IA\\_Budget\\_Justification.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_IA_Budget_Justification.pdf) [<https://perma.cc/ZKF3-WDCW>]. The FY2015 TEDC grants that were funded supported a variety of legal and technical development projects. *Id.* at 9. The Department’s Division of Energy and Minerals Development (DEMD) also provides direct technical assistance to tribes seeking energy development projects. See *Division of Energy & Mineral Dev.*, DEP’T OF THE INTERIOR: INDIAN AFFAIRS, <https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development> [<https://perma.cc/7FEY-YWYE>].

<sup>259</sup> 25 U.S.C. § 3502(a)(3); see also Indian Country’s Priorities for Fed. Energy Legislation, Resolution No. SD-015-38 (Oct. 2015) (calling for reauthorization and expansion of the TEDC appropriations), [http://www.ncai.org/attachments/Resolution\\_qMHMstHTzqxRxfyszNHIJtQWsJwCTsRfxceShlONcPiSBAVith\\_SD-15-038.pdf](http://www.ncai.org/attachments/Resolution_qMHMstHTzqxRxfyszNHIJtQWsJwCTsRfxceShlONcPiSBAVith_SD-15-038.pdf) [<https://perma.cc/H4R7-S8D5>].

expanding and enhancing the federal government's support for tribal capacity development is a necessary first step toward reform.

Importantly, however, a commitment to financial and other support for building tribal capacity must avoid the pitfalls of the "Planner's Approach," a term coined by the Harvard Project on American Economic Development (HPAIED) to describe the failures of various federal programs seeking to support tribal economic development.<sup>260</sup> According to one HPAIED Research Affiliate, "[t]he Planner's Approach was simplistic in treating economic development as a fundamental question of resources and expertise, as opposed to one of incentives and institutions."<sup>261</sup> Instead of such a narrow approach, HPAIED, after conducting numerous studies of economic development across Indian Country, promotes a "Nation Building" approach emphasizing the importance of stable tribal governmental institutions, the responsiveness of those institutions to tribal citizens and culture, and the importance of tribal sovereignty.<sup>262</sup> Considering these factors in the design and development of effective federal support for tribal capacity building would enhance the long-term stability and effectiveness of such support. Therefore, the recommitment to supporting tribal capacity building must take a long-term "Nation Building" approach, including longer-term grant programs and effective measures for success and accountability.

Beyond capacity building, the statutory framework for federal oversight and approval of energy development in Indian Country also requires reform. To maximize flexibility, the current range of options for such development, including the IMLA, the IMDA, TERAs and the HEARTH Act, should be retained; however, a new paradigm is needed to overcome the deficiencies of these current options.<sup>263</sup> As with federal support for building tribal capacity, statutory reform requires federal engagement with tribes and tribal priorities and the development of options for tribes to tailor their own authorities without rigidly conforming to the interests or objectives of the federal government. This demand for

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<sup>260</sup> Oversight Field Hearing, *supra* note 251, at 26 (statement of Eric Henson, Senior Vice President, Compass Lexecon, Research Affiliate, Harvard Project on American Indian Economic Development).

<sup>261</sup> Oversight Field Hearing, *supra* note 251, at 26.

<sup>262</sup> Oversight Field Hearing, *supra* note 251, at 27–28; See Stephen Cornell and Joseph P. Kalt, *Two Approaches to the Dev. of Native Nations: One Works, The Other Doesn't*, in REBUILDING NATIVE NATIONS (Miriam Jorgensen, Ed., 2007).

<sup>263</sup> See *supra* notes 180-189 and accompanying text.

flexibility aligns with the call from former Assistant Secretary Kevin Gover that Congress should authorize the Department of the Interior to negotiate agreements with tribes—on a tribe-by-tribe basis—pursuant to which each tribe could “retain those aspects of the trust that [it] finds useful and desirable and eliminate those that [it does] not want.”<sup>264</sup>

The shortcomings of the HEARTH Act and ITEDSDA’s TERAs demonstrate the need to consider Gover’s concept in reforming Federal Indian energy policy. While a number of tribes have taken advantage of the additional authority to review and approve surface leases under the HEARTH Act, including leases for solar and wind energy-related projects, the only authority that those tribes are exercising was created by the federal government for itself in the Indian Long-Term Leasing Act.<sup>265</sup> In addition, the HEARTH Act demands that tribes carry out that authority “consistent with” the manner in which the federal government would have done so and provide an environmental review process allowing for public review of and input on proposed tribal decisions.<sup>266</sup> Setting aside whether such procedures and requirements could be effectively adopted by tribal governmental institutions—including considerations such as cultural match—the additional effect of those requirements is the transfer of administrative burden and expense from the federal government to tribal governments. Tribes must, therefore, weigh those additional costs and burdens and the management of a regulatory scheme that may or may not serve tribal interests against the potential benefits resulting from the removal of federal approval requirements for each lease. While some tribes have decided that the benefits of assuming that authority outweighs

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<sup>264</sup> Gover, *supra* note 30, at 359.

<sup>265</sup> See generally HEARTH ACT of 2012; see *supra* notes 162-173.

<sup>266</sup> 25 U.S.C. § 415(h)(3)(b). In this regard, the HEARTH Act is somewhat analogous to the ability of tribes to be delegated federal environmental regulatory authority under the “treatment as a state” (or TAS) provisions of the Clean Air Act and Clean Water Act, pursuant to which some tribes have assumed the responsibility for environmental regulation but have largely done so by the mirroring or maintaining consistency with the pre-existing federal regulatory scheme. See Elizabeth Ann Kronk Warner, *Tribes as Innovative Envtl. Laboratories*, 86 COLO. L. REV. 789, 816–817 (2015) (“tribes that have codified environmental laws as a result of [TAS] status [under the Clean Air Act] do not appear to be departing in any significant respect from federal laws.”); *Id.* at 817 (“there is substantial similarity between the tribal and federal water quality standards [adopted under the TAS provisions of the Clean Water Act], as the tribes are required to meet the federal minimums, but there are occasional differences.”) (Citations omitted).

the disadvantages, the HEARTH Act prevents a more flexible allocation of the burdens and benefits between tribes and their federal trustee.

The potential authority to be assumed by a tribe pursuant to a TERA is broader than that allowed by the HEARTH Act,<sup>267</sup> but the conditions associated with negotiating and assuming such an authority are both more stringent and less defined. For example, the ITEDSDA's tribal capacity requirements pose a significant hurdle to TERA eligibility, but, unlike the HEARTH Act, which offers tribes the opportunity to adopt an existing federal regulatory scheme for approving surface leases,<sup>268</sup> ITEDSDA provides no comparable guides for developing tribal regulatory programs for a TERA. In addition, the ITEDSDA's requirement that the federal government review and confirm a tribe's capacity to enter a TERA echoes the post-IRA and IMLA days of BIA dominance and paternalism. Like tribal authority requirements under the HEARTH Act, however, the public review and input requirements for tribal regulations may or may not align with tribal institutional and cultural structures. And, also like tribes pursuing authority under the HEARTH Act, any tribe entering a TERA to assume broader approval authority is also taking on significant administrative costs and responsibilities to carry out those functions without any guarantee of financial support from the federal trustee. Therefore, while a TERA presents a tribe with the potential to assume a much broader range of authority than the HEARTH Act's surface leasing structure, acquiring such flexibility is subject to much greater federal scrutiny and bureaucracy than the HEARTH Act's relatively straightforward approach.

Even though the HEARTH Act represents the furthest evolution of the trust relationship toward tribal authority, both the HEARTH Act and the TERA options still demand that tribes accept a trade-off between greater authority and the flexibility to define that authority as the tribe may see fit. Rather than requiring a tribal assumption of federal duties, the next evolution of the trust responsibility demands eliminating that trade-off and developing a broader avenue for bilateral federal and tribal coordination of tribal interests and federal trust obligations. Drawing on Gover's notion of a negotiated trust, tribes should be empowered to work with their

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<sup>267</sup> As described *supra* notes 181-188 and accompanying text, TERAs authorize tribal authority over a variety of energy-related agreements while the HEARTH Act is limited to surface leasing only.

<sup>268</sup> See 25 C.F.R. part 169 (2014).

federal trustee to establish a regulatory review and approval process that is consistent with tribal institutional, environmental, and cultural norms instead of pre-existing, historical, and potentially inconsistent federal conceptions of the how to serve tribal interests. The basis of Federal Indian energy policy should be a recognition that each tribe can propose how best to oversee and regulate or restrict development and then, with appropriate federal support, build or enhance the governmental institutions necessary for doing so. In negotiating the details of each such proposal, then, the federal government could work with the tribe to identify how tribal property and interests will be best protected, but importantly, neither the tribal nor the federal government should be bound to a specific regulatory scheme. Instead, with federal support, assistance, and, potentially, co-management, tribal governments will be able to develop their own energy policies, laws, rules and regulations as they see fit.

#### D. *Challenges to Reform*

As this article demonstrates, the evolution of the trust relationship in Federal Indian energy policy has been slow and incremental. Given this inertia, instant reform of the type proposed here is unlikely, but as shown in the next section, incremental progress toward such reform is ongoing and likely to continue. Nevertheless, there are challenges and potential drawbacks to the type of reform described herein.

First, empowering tribes to develop, implement, and enforce their own regulatory approaches to the management of energy resources is likely to prompt concern on the part of neighboring communities and citizens. For example, depending on how the tribe chooses to consider, review, and approve projects related to such management, non-tribal members may not be informed or have an opportunity to comment on such management but may, nonetheless, face environmental, social, or economic burdens as a result of tribal decision-making. As noted above, both the HEARTH Act and the TERA options for enhancing tribal authority addressed this issue by requiring that tribes ensure public review and comment on lease or energy-related proposals prior to tribal approval.<sup>269</sup> While some tribes may still include such opportunities in their regulatory

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<sup>269</sup> See *supra* notes 181-188.

approach, others have objected to these requirements as infringing upon tribal sovereignty.<sup>270</sup> Despite the apparent conflict between tribal sovereignty and these broader interests, reforming the federal-tribal relationship to allow for a broader conception of the tribal role within Federal Indian energy policy would provide a middle road to balance these sometimes competing forces. As noted above,<sup>271</sup> many tribes and tribal members already face internal conflicts over natural resource management within their existing governmental structures. These conflicts have led to turnover within tribal governments and further development of tribal government institutions to address the varied concerns of tribal citizens.<sup>272</sup> Expanding the tribal presence in energy management could allow consideration of these issues and foster the development of stronger tribal institutions to address them. In turn, enhancing tribal institutions could provide additional avenues for dialogue between potentially competing for non-tribal interests and tribal officials, avenues that are largely absent in the existing zero-sum structure. Therefore, while conflicts over tribal decision-making will certainly continue, reform would allow for more robust tribal consideration of those conflicting views.

Reform of the type described herein also presents some practical complications, particularly on the part of the federal government. How, for example, would the federal government negotiate its trust responsibilities on a tribe-by-tribe basis and account for potentially 567 different, unique, and diverse tribal demands? Similarly, the development of a broad range of tribal regulatory and legal structures could deter non-Indian investors or businesses seeking to bring much-needed investments to Indian Country. These concerns may prove illusory, however, as the existing diversity of tribal capabilities, interests, and priorities is unlikely to result in an overwhelming demand for such negotiations in the short term. As former Assistant Secretary Gover noted in

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<sup>270</sup> Kronk Warner, *supra* note 187, at 1055–57.

<sup>271</sup> See *supra* notes 221–231 and accompanying text.

<sup>272</sup> The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota are a prime example of these developments. There, a new chairman was swept into office after concerns arose over the environmental impacts of energy development. See, e.g., Mike Lee, *Fort Berthold Candidates see Chance for Change in Heart of Bakken Shale*, ENERGYWIRE (Nov. 3, 2014), <https://www.eenews.net/stories/1060008264> [<http://perma.cc/C2DA-FVS9>]; Amy Sisk, *While One Tribe Fights Oil, Another Cautiously Embraces It*, INSIDEENERGY, Nov. 22, 2016, <http://insideenergy.org/2016/11/22/while-one-tribe-fights-oil-another-cautiously-embraces-it/> [<https://perma.cc/3X4T-GTMX>].



making his proposal for reform, “tribal consent is a *sine qua non* in the implementation of the policy,” and many tribes may be unwilling to pursue reform of the federal trust responsibility in light of more pressing tribal interests, such as law enforcement or providing other services to tribal members.<sup>273</sup> But, without an opportunity to pursue a broader or negotiated federal-tribal relationship, tribes who do seek such reform are hamstrung in their efforts to do so. Therefore, an incremental and perhaps tribe-by-specific-tribe approach to legislative efforts at reform may prove to be the best solution in the short-term, and a handful of proven success stories may pave the way for increased tribal interest in the future.<sup>274</sup> Even without such tribal specific legislation, however, there are already some examples of reform, which the next section will address.

## V. POTENTIAL FIRST STEPS AND RELEVANCE BEYOND ENERGY POLICY

While a more comprehensive legislative reform effort will be needed to promote and support tribal capacity, encourage development of tribal regulatory programs, and authorize the negotiation of federal-tribal agreements regarding energy resource management in Indian Country, recent tribal efforts demonstrate how such legislation could take shape and the type of negotiated federal-tribal agreement that might be possible.

### A. *Broadening Trust Management and Negotiating Regulatory Authority*

The Indian Trust Asset Reform Act provides a potential starting point for legislative efforts toward such reform.<sup>275</sup> That Act authorizes tribes to submit to the Secretary a plan for managing a trust asset and, so long as the tribe’s management would not violate

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<sup>273</sup> Gover *supra* note 30, at 320.

<sup>274</sup> Such a strategy would parallel the development of the HEARTH Act, which began by Congress authorizing such a surface leasing structure for the Navajo Nation and later expanded to allow any tribe to pursue such authority. *Compare* 25 U.S.C. § 415(e) (2012) (enacted in 2000 and authorizing leasing by the Navajo Nation), 25 U.S.C. § 415(h) (2012) the HEARTH Act, enacted in 2012, expanding such leasing to all federally recognized Indian tribes).

<sup>275</sup> Indian Trust Asset Reform Act, Pub. L. 114-178, 130 Stat. 432 (2016) (codified as 25 U.S.C. §§ 5601–36).

any federal laws applicable to that asset, the tribe could then assume such management authority, potentially even at a standard “less-stringent . . . than the Secretary would otherwise require or adhere to in absence of an Indian trust asset management plan.”<sup>276</sup> Unlike ITEDSDA or the HEARTH Act, the Indian Trust Asset Reform Act does not specifically require that a tribe adopt a particular regulatory framework or ensure a public review and comment process in managing a trust asset, other than forest resources or surface leasing already subject to a tribe’s HEARTH Act regulations.<sup>277</sup> Though this Act focuses more specifically on the management of surface and timber resources by tribes,<sup>278</sup> it presents an alternative model for Congress to consider beyond the current framework of Federal Indian energy policy. By acknowledging and allowing a willing and interested tribe to develop a plan for managing its own trust energy resources, such an alternative model would encourage a flexible federal-tribal relationship and promote the management and oversight of tribal energy resources in accordance with tribal interests and values.

Resolution of one tribe’s recent legal challenge to the Bureau of Land Management’s (BLM) 2015 regulations regarding the use of hydraulic fracturing in energy development on tribal lands provides another example. Relying on the IRA and 25 C.F.R. section 211.29,<sup>279</sup> the Southern Ute Indian Tribe asserted that its own tribal regulations regarding hydraulic fracturing, adopted before the BLM’s new regulations were set to take effect, superseded those newer federal rules.<sup>280</sup> Though a separate legal action resulted in the BLM’s regulations being temporarily set aside,<sup>281</sup> the tribe and Department of the Interior continued to negotiate a settlement of the tribe’s challenge. Ultimately, the parties agreed to disagree over whether the tribe had the power to supersede the BLM rules; however, in recognition of their shared interest in “regulating hydraulic fracturing, based on their interest in both oil and gas

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<sup>276</sup> 25 U.S.C. § 5615(b).

<sup>277</sup> 25 U.S.C. § 5614(b)(2).

<sup>278</sup> *Id.* §5614.

<sup>279</sup> *See supra* notes 101-102 and accompanying text.

<sup>280</sup> Parties Joint Motion to Stay Proceedings, *S. Ute Indian Tribe v. U.S. Dep’t of Interior, et al.*, Civil Action No. 1:15-cv-01303-MSK (D. Colo. June 25, 2015).

<sup>281</sup> *See* Order on Petitions for Review of Final Agency Action, *Wyoming v. United States Dep’t of the Interior*, Civil Action No. 2:15-CV-043-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016) *vacated by* *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir., Sept. 21, 2017).

development and environmental protection,” the tribe and Department of Interior agreed that the federal parties to the case would “recognize the tribe’s [hydraulic fracturing regulations] as the governing rules regulating hydraulic fracturing for all Indian lands within ... the [Southern Ute] Reservation to the exclusion of [both] the BLM’s” previous hydraulic fracturing regulations and practices as well as the newer 2015 regulations.<sup>282</sup> In the agreement, the Department of Interior further recognized that the tribe’s regulations met or exceeded the BLM’s own rules for regulating hydraulic fracturing operations.<sup>283</sup> The parties also negotiated a separate Memorandum of Agreement (MOA) to describe the “respective roles in cooperatively administering and enforcing the tribe’s [regulations] in conjunction with BLM’s regulations.”<sup>284</sup>

Through both the Settlement Agreement and the MOA, the federal government recognized and agreed to help enforce the tribe’s regulations in lieu of the BLM’s otherwise applicable regulatory authority. In addition, through negotiation of those agreements, the federal government and the tribe identified and agreed upon aspects of federal oversight and regulatory authority that were workable, such as the BLM’s ongoing authority to review and approve applications for permits to drill, while elevating tribal decisions and priorities for how hydraulic fracturing would be conducted, even if those decisions were not consistent with federal rules. Thus, notwithstanding the ongoing disagreement over the statutory authority for the tribe’s supersession argument, these agreements provide a model for the negotiation and development of cooperative tribal-federal regulatory authority over tribal energy resources and management.<sup>285</sup> These agreements also demonstrate that the federal government need not get out of the way to allow

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<sup>282</sup> Settlement Agreement, *S. Ute Indian Tribe v. U.S. Dep’t of the Interior, et al.*, Civil Action No. 1:15-cv-01303-MSK, at 3–4 (filed March 13, 2017) (attached as Exhibit 1 Joint Motion to Dismiss and Incorporate Settlement Agreement).

<sup>283</sup> *Id.* at 4.

<sup>284</sup> *Id.* (Memorandum of Agreement Between U.S. Department of the Interior Bureau of Land Management and Southern Ute Indian Tribe Concerning the Administration and Enforcement of the Southern Ute Indian Tribe’s Hydraulic Fracturing and Chemical Disclosure Regulations, at 1, attached to Settlement Agreement).

<sup>285</sup> As described above, *see supra* note 255, the Southern Ute Indian Tribe is unique in its technical and regulatory capacity and, as noted in the Settlement Agreement, the Tribe’s extensive experience in managing energy production played an important part in the negotiations.

tribal oversight and management of energy resources. Instead, as this model shows, both governments can work together to ensure proper regulation, with the tribe taking the lead and implementing its own regulatory system that incorporates and reflects tribal interests and values.

### B. *Reform beyond Federal Indian Energy Policy*

In some ways, proposing to expand the federal-tribal relationship with regard to Federal Indian energy policy tracks the evolution of tribal self-determination and self-governance programs under the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>286</sup> Pursuant to that Act and its numerous amendments since original enactment in 1975, tribes across the country have entered into agreements with the federal government to assume responsibility for delivering federal programs, functions, services, and activities (PSFAs) to their members and local citizens.<sup>287</sup> In fact, tribes that negotiate and enter into self-governance compacts are able to exercise the significant freedom to redesign the way previously federal PSFAs were carried out and reallocate federal funding as they see fit.<sup>288</sup> These programs have been quite successful in shifting federal funding and control to tribes;<sup>289</sup> however, the ongoing expansion of these programs has slowed, and tribes still face limitations and challenges to the self-governance and self-determination scheme under the ISDEAA that echo the limits of Federal Indian energy policy. Therefore, broadening the trust relationship through reform of Federal Indian energy policy could

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<sup>286</sup> Indian Self-Determination & Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012) *transferred to* 25 U.S.C. §§ 5301-32, 5345-56, 5361-68, 5381-99); Indian Self-Determination & Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified as 25 U.S.C. §§ 458aaa–458aaa-18 (2012) *transferred to* 25 U.S.C. §§ 5381-99); Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. § 458aa–hh (2012) *transferred to* 25 U.S.C. §§ 5361-68); Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified as 25 U.S.C. §§ 458aaa–458aaa-18 (2012) *transferred to* 25 U.S.C. §§ 5381–99).

<sup>287</sup> See generally Strommer & Osborne, *supra* note 249, at 18–48.

<sup>288</sup> See Strommer & Osborne, *supra* note 249, at 34–45; 25 U.S.C. §§ 5361-68, 5381-99.

<sup>289</sup> Strommer & Osborne, *supra* note 249, at 48–49.

promote further reform of self-determination and self-governance programs as well.

Thus, while the ISDEAA approach demonstrates the viability of individualized tribal-federal agreements in the energy realm, it is an imperfect model that also suffers from the history of the zero-sum federal-tribal dynamic. As recently described by two leading practitioners, the primary challenges posed by the current state of tribal self-governance programs are the lack of sufficient and sustained congressional funding, ongoing agency recalcitrance toward negotiating and entering such agreements, and the narrow scope of programs available for the assumption by tribes.<sup>290</sup> Each of these is fundamentally similar to the zero-sum approach of Federal Indian energy policy as they all reflect the underlying assumption that tribes may only assume funds, functions, or duties that the federal government has deemed appropriate for tribal control and, even then, such control may only be exercised in accordance with federal standards. Agency and congressional failures to adequately request and fund the development and maintenance of tribal capacity necessary to carry out federal PFSAs has resulted in decades of litigation and ongoing funding challenges.<sup>291</sup> Just as with TERAs and the HEARTH Act, therefore, tribes are often faced with the prospect of assuming PFSAs and their corresponding administrative burdens without a secure and committed funding source to address those additional costs adequately.<sup>292</sup> A federal commitment to funding tribal capacity, whether for the oversight and regulation of energy development or the broader exercise of self-determination, could help alleviate these dire choices.

Similarly, bureaucratic recalcitrance to engage in self-governance compacting and to make a broader range of PFSAs available for such compacting demonstrates the “it’s us or them” mentality of the federal-tribal trade-off inherent in the zero-sum approach to Federal Indian energy policy.<sup>293</sup> Rather than viewing

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<sup>290</sup> Strommer & Osborne, *supra* note 249, at 49.

<sup>291</sup> *See, e.g.*, Cherokee Nation v. Leavitt, 543 U.S. 631 (2005); Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012); Strommer & Osborne, *supra* note 249 at 55–56.

<sup>292</sup> *Cf.* Washburn, *supra* note 22, at 219–220.

<sup>293</sup> An important caveat here, the nature of this recalcitrance is bureaucratic and stems primarily from the history of federal-tribal relations and its resulting statutory scheme rather than from the actions or mentality of individual federal employees who, with some exceptions, are committed to promoting tribal

tribes as partners with which to share and enhance the delivery of trust responsibilities, for example, many federal agencies have resisted the expansion of self-governance programs as inconsistent with the historic federal grantor-tribal grantee relationship, which allows for greater federal control and oversight of tribal activities.<sup>294</sup> This ongoing opposition has delayed much-needed amendments to the self-governance, and related employment training acts,<sup>295</sup> and is consistent with the recent decision by the Department of the Interior to end its support for a unique approach to tribal management of the National Bison Range.<sup>296</sup>

Thus, although the details and scope of Federal Indian energy policy may be quite different than other federal policies focused on tribal self-determination and self-governance, the challenges posed by the zero-sum approach to federal-tribal relations are endemic to both. The potential to detach Federal Indian energy policy from that approach by enhancing federal support for tribal capacity-building and broadening the bases on which the federal government can negotiate and develop its relationship with tribes may, therefore, present an opportunity for enhancing the federal-tribal relationship in these other contexts as well.

## VI. CONCLUSION

The current political climate has drastically raised the stakes and changed the potential for reform suggested herein. For example, President Trump's directives to roll back various environmental and other regulations in the name of domestic fossil fuel production have magnified the political divide between environmental protection and energy development.<sup>297</sup> Therefore, it seems likely that efforts to

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interests but may be unwilling constrained by bureaucratic, regulatory, or statutory limitations.

<sup>294</sup> See Strommer & Osborne, *supra* note 249, at 63–64.

<sup>295</sup> Strommer & Osborne, *supra* note 249, at 64–66; *see also* Indian Employment, Training, and Related Services Consolidation Act of 2017, S. 91, 115th Cong. (as introduced, Jan. 10, 2017).

<sup>296</sup> Notice of Intent to Prepare a Comprehensive Conservation Management Plan for the National Bison Range, Moiese, Montana, 82 Fed. Reg. 22,843-02 (May 18, 2017) (reversing prior direction of the Department of the Interior to pursue a legislative transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana).

<sup>297</sup> Promoting Energy Independence & Econ. Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (March 28, 2017); *see also, e.g.*, Flatt and Payne, *supra* note 18, at 1103–04. *See also* Shannon M. Roesler, *Beyond Zero-Sum Environmentalism*, 47 ENV'T L. REP. NEWS & ANALYSIS 10,328 (2017).

reform Federal Indian energy policy aligning with the broader political interests of increasing development of fossil fuels will find traction while environmental concerns, along with tribal cultural, religious, and conservation issues, are likely to be ignored, if not targeted.<sup>298</sup>

Concurrently, while trumpeting the significance of tribal sovereignty,<sup>299</sup> the new administration has also proposed drastic budget reductions for the federal agencies most directly responsible for carrying out the trust responsibility to Indian Country.<sup>300</sup> These proposals could be viewed as consistent with the perceived need for the federal government to get out of tribes' way to promote energy and economic development.<sup>301</sup> Indeed, Secretary Zinke even went so far as to suggest that tribes are seeking an "off-ramp" from the federal trust responsibility,<sup>302</sup> a thinly-veiled throwback to the termination era of the 1950s.<sup>303</sup> Thus, while reform of Federal Indian energy policy may find support at both ends of Pennsylvania Avenue and in the Department of the Interior, that support comes at a price and is tied to broader political ideologies separate from (and irrelevant to) the federal-tribal relationship, which may serve only to continue the narrow zero-sum approach of present-day Federal Indian energy policy, if not result in a return of de facto, if not de jure, termination.<sup>304</sup>

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<sup>298</sup> Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, 68 DAILY COMP. PRES. DOC. (Jan. 24, 2017), Review of Designations Under the Antiquities Act, Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

<sup>299</sup> See, e.g., Christine Powell, *Zinke Touts Tribal Sovereignty as Key at Committee Hearing*, LAW360 (March 8, 2017, 7:40 PM EST), <https://www.law360.com/articles/899176/zinke-touts-tribal-sovereignty-as-key-at-committee-hearing> (last visited December 05, 2017).

<sup>300</sup> See, e.g., Office of MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AM. FIRST: A BUDGET BLUEPRINT TO MAKE AM. GREAT AGAIN 27 (2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf) [<https://perma.cc/QLU6-U6CQ>] (proposing a 12% cut in funding for the Department of the Interior).

<sup>301</sup> See, e.g., Sen. John Barrasso, *Getting Wash. Out of Indian Cnty.*, INDIAN CNTY. TODAY MEDIA NETWORK, Nov. 20, 2015, <https://indiancountrymedianetwork.com/news/opinions/getting-washington-out-of-indian-country/> [<https://perma.cc/H3DN-YA7Q>].

<sup>302</sup> Wolf, *supra* note 12.

<sup>303</sup> See Indigenous Law & Policy Center, *Donald Trump, & Indian Cnty.'s Termination Fears*, TURTLETALK (May 8, 2017), <https://turtletalk.wordpress.com/2017/05/08/donald-trump-and-indian-countrys-termination-fears/> [<https://perma.cc/R3CG-RBEL>] [hereinafter *Trump Termination Fears*].

<sup>304</sup> See *supra* notes 221-224; Washburn, *supra* note 22, at 220 ("If federal funding diminishes after tribes agree to take over federal functions, the federal

Therefore, if the future of Federal Indian energy policy is to truly serve the interests of all tribes, its reform must take a broader view than simply freeing tribes from federal oversight and correspondingly allowing the federal government to reduce its legal, moral, and fiscal commitments to Indian Country. Divorcing Federal Indian energy policy from its zero-sum past could open the doors to a broader re-conception of the federal-tribal relationship across other realms and allow tribes to truly decide for themselves how to engage with their federal trustee. Perhaps then the federal-tribal relationship could move farther into the twenty-first century,<sup>305</sup> instead of returning to its dismal past.<sup>306</sup>

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government will have off-loaded an important responsibility and left the scene, leaving tribes holding the (empty) bag.”).

<sup>305</sup> Cf. Gover, *supra* note 30.

<sup>306</sup> See *Trump Termination Fears*, *supra* note 303; Valerie Volcovici, *Trump Advisors aim to Privatize Oil-Rich Indian Reservations*, REUTERS, Dec. 5, 2016, 4:23 AM, <http://www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1> [<https://perma.cc/7AU4-6FZ9>] (noting the similarities between the move toward “privatization” and the earlier eras of allotment and termination).