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## What Should Tribes Expect from Federal Regulations? The Bureau of Land Management's Fracking Rule and the Problems with Treating Indian and Federal Lands Identically

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**Monte Mills\***

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## I. INTRODUCTION

The federal government's various Indian policies create a number of boundaries across which Indian tribes must negotiate to ensure successful management of their natural resources. For example, the removal, reservation, and treaty-making period of the late 18th and early 19th Centuries created territorial boundaries that, for many tribes, did not align with their traditional homelands.<sup>1</sup> Thereafter, allotment of many of the resulting tribal reservations decimated the tribal land base and left a checkerboard ownership pattern of land within many reservations.<sup>2</sup> More recent decisions of the United States Supreme Court have limited tribal authority over the non-Indian owned squares on the checkerboard and correspondingly reduced tribal control over reservation land use and natural resources.<sup>3</sup>

In addition to these geographic boundaries, Indian tribes must work across governmental boundaries, particularly those imposed by the trust relationship between tribes and the federal government.<sup>4</sup> This relationship, rooted in the Supreme Court's earliest Indian jurisprudence, impedes the free alienability of tribal land and resulted in the ownership of such land by the federal government in trust for Indian tribes.<sup>5</sup> As federally-owned and managed lands, Indian lands are subject to federal oversight, which often requires federal approval of leases and other

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1. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[6][a], 60-64 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

2. *Id.* § 1.04, 71-79.

3. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981) (limiting tribal authority over non-Indians on non-Indian fee lands subject to two exceptions); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (limiting tribal authority over land use to lands largely closed to non-Indians).

4. COHEN'S HANDBOOK, *supra* note 1, at § 15.01-15.03, 994-99 (on trust status of land); *Id.* § 5.02-03, 391-405 (on federal authority over tribal trust land); *Id.* § 6.02[2][b], 507-11 (on limits of tribal authority over non-Indian owned land).

5. See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (restricting alienability of Indian lands without consent of Federal Government); COHEN'S HANDBOOK, *supra* note 1, at §15.03, 997-99.

transactions affecting those lands.<sup>6</sup> This federal role imports to Indian lands the requirements of other federal laws, such as the National Environmental Policy Act of 1964 (“NEPA”),<sup>7</sup> and the additional burdens of federal administrative and regulatory procedures. Therefore, tribes must often transcend the federal-tribal boundary when seeking to successfully manage and develop natural resources on their own tribal lands.

One of the most recent examples of the challenges presented by the federal-tribal relationship is an attempt by the Bureau of Land Management (“BLM” or “Agency”) to develop a uniform standard for the regulation of hydraulic fracturing, or “fracking,” across both federal and Indian lands.<sup>8</sup> As part of the broader federal regulation of tribal lands, the BLM has long been responsible for authorizing drilling operations on Indian lands through the approval of an Application for Permit to Drill (“APD”).<sup>9</sup> But, in late 2011, then-Secretary of the Interior Ken Salazar indicated that new rules were needed to update the Agency’s outdated regulatory scheme and account for new fracking technology, growing public concern over the practice, and potential safety concerns related to fracking.<sup>10</sup> After nearly four and a half years of work, the BLM published its Final Rule regarding Hydraulic Fracturing on Federal and Indian Lands (“Final Rule”) on March 26, 2015.<sup>11</sup>

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6. See, e.g., 25 U.S.C. § 415(a) (2012).

7. 42 U.S.C. §§ 4321-4370h (2012).

8. The BLM’s rules apply to “Indian lands” subject to the provisions of the Act of 1909, 25 U.S.C. § 396 (2012), the Indian Mineral Leasing Act of 1938 (“IMLA”), 25 U.S.C. §§ 396a-396g (2012), and the Indian Mineral Development Act of 1982 (“IMDA”), 25 U.S.C. §§ 2101-2107 (2012), which, subject to certain limited exceptions, includes lands held in trust by the Federal Government for Indian tribes or individual Indian allottees.

9. Secretary of the Interior Jim Watt transferred authority over the “approval of drilling permits” to the BLM via an Amendment No. 1 to Secretarial Order 3087 on February 7, 1983. 48 Fed. Reg. 8,983 (Mar. 2, 1983). The BLM’s current regulations covering onshore oil and gas operations, including the issuance of APDs, are found at 43 C.F.R. pt. 3160 (2015). Those regulations apply to mineral leasing activities on Indian lands by virtue of the regulations of the Bureau of Indian Affairs (“BIA”), which incorporate them. 25 C.F.R. §§ 211.4, 225.4 (2015).

10. Dave Cook, *Interior Secretary: ‘Fracking’ can be Safe and Responsible*, CHRISTIAN SCIENCE MONITOR (Oct. 5, 2011), available at [http://www.csmonitor.com/USA/Politics/monitor\\_breakfast/2011/1005/Interior-secretary-Fracking-can-be-safe-and-responsible-VIDEO](http://www.csmonitor.com/USA/Politics/monitor_breakfast/2011/1005/Interior-secretary-Fracking-can-be-safe-and-responsible-VIDEO).

11. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule, 80 Fed. Reg. 16,128 (Mar. 26, 2015).

The Final Rule added a number of procedural and substantive requirements for fracking operations to the BLM's existing regulations and proposed to apply these standards uniformly to both federal public and Indian lands.<sup>12</sup> According to the Final Rule, such uniformity was necessary to ensure Indian lands and communities "all receive the same level of protection as provided on public lands."<sup>13</sup> In response to concerns raised during the rulemaking process that such a uniform rule ignored tribal sovereignty, tribal self-determination, and the federal government's trust responsibility to Indian tribes, the BLM expressed its view that providing Indian lands with the same substantive protections as federal public lands was consistent with the trust responsibility and that the rule promoted tribal sovereignty by "facilitating coordination."<sup>14</sup> Furthermore, the Agency noted that the rule included a provision allowing a tribe to request a variance, but made clear that any such variance, if approved in the BLM's discretion, would not "necessarily adopt tribal regulations as the Federal rule."<sup>15</sup> According to the BLM, "[b]y recognizing tribal regulations, [the Final Rule] accords with tribal self-determination to the extent that could be expected from a rule governing hydraulic fracturing operations."<sup>16</sup>

Given the ongoing debate over fracking and its potential environmental, health, and safety risks,<sup>17</sup> the BLM's attempt to regulate fracking on a national basis was sure to draw criticism and face challenges. In fact, within months of the Final Rule's initial proposed effective date, United States District Judge Scott W. Skavdahl of the United States District Court for the District of Wyoming preliminarily enjoined the Rule from taking effect.<sup>18</sup> Although interests both

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 16,185.

17. See, e.g., Jennifer A. Dlouhy, *Clinton Doubles Down Against Fracking in Debate, Raising Alarms*, BLOOMBERG BUSINESS (Mar. 7, 2016), available at <http://www.bloomberg.com/news/articles/2016-03-07/clinton-doubles-down-against-fracking-in-debate-raising-alarms>.

18. Wyoming v. U.S. Dep't. of the Interior, No. 2:15-cv-043-SWS, \_\_\_F. Supp. 3d \_\_\_\_, 2015 WL 5845145 (D. Wyo. Sept. 30, 2015). The BLM intended for its Final Rule to take effect on June 24, 2015; however, in response to a lawsuit filed by a number of western states and an oil and gas industry association, and joined by one Indian tribe and a multitude of national environmental groups, the rule was temporarily enjoined by the United States District Court for the District of Wyoming pending the lodging of the administrative record and, on September 30th, 2015, that court issued a fifty-four-page order preliminarily enjoining the Final Rule.

supporting and opposing fracking will continue to litigate the merits of the Final Rule, this article largely avoids the policy divide over fracking itself and instead critiques the Final Rule as it relates to tribal interests.<sup>19</sup> Viewed in this light, the BLM's efforts marked a step back from the ongoing evolution of federal Indian policy, which since the mid-1970s has aimed to support greater tribal authority and self-governance, including in other areas of natural resource management.<sup>20</sup> Rather than address tribal issues in accord with this more modern approach, the BLM instead chose to apply its statutory responsibilities for protecting public lands uniformly to both federal and Indian lands.<sup>21</sup> In doing so, the BLM avoided meaningful tribal input on the rule, overlooked the specific congressional intent supporting its statutory authority to apply the Final Rule to Indian lands, and failed to fulfill the federal trust responsibility to Indian tribes in a manner that promotes tribal sovereignty. Because of these failures, this article suggests that the BLM modify the Final Rule to exempt Indian lands and work with tribes to develop a new approach that would be more consistent with the BLM's statutory and trust responsibilities.

This article begins by providing an orientation on the regulatory issues related to fracking with a particular focus on the unique regulatory structure of energy development on Indian lands. The second section provides a detailed overview of the development of the Final Rule and how the BLM treated tribal input during the Final Rule's promulgation. Based on the issues raised by tribes throughout the rulemaking process, the article then analyzes the Final Rule in light of the BLM's responsibility to consult with Indian tribes, the statutory authority on which the BLM relied to develop the Final Rule, and the federal trust responsibility. This analysis demonstrates the shortcomings of the Final Rule, particularly in light of how the federal government's support for tribal sovereignty and self-determination has evolved in recent years.

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19. See Michael Burger, *The (Re)federalization of Fracking Regulation*, 2013 MICH. ST. L. REV. 1483 (2013) (“[t]he debate over who should regulate fracking—the federal government or the states—has followed a parallel track to the broader cultural debates, and the corresponding rhetorical alliances are well established. Those who envision private profit and the expansion of American power tend to favor state regulation. Those who fear environmental and public health risks, along with the perpetuation of the fossil fuel economy, tend to favor federal regulation.” *Id.* at 1486).

20. See, e.g., National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (2012).

21. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule, 80 Fed. Reg. 16,128.

Based on these shortcomings, the article concludes that the BLM needs to reconsider the Final Rule as it applies to Indian lands and illustrates the need for federal agencies to recognize the boundary between federal and Indian lands in order to better promote tribal sovereignty and self-determination.

## II. FRACKING: RISKS AND REGULATIONS

The recent proliferation of fracking as a technique for energy development has generated media, public, and scholarly attention.<sup>22</sup> Although Indian Country has already been the focus of some of this attention,<sup>23</sup> the BLM's Final Rule provides a new opportunity to analyze the balance of fracking's risks, rewards, and regulation, particularly within the unique context of the federal-tribal relationship. This section provides some background on fracking, the federalism issues inherent in its regulation, and the current state of energy development oversight in Indian Country.

### A. What is fracking?

Hydraulic fracturing is the subterranean injection of fluids, including water, chemicals, and other materials, such as sand or silica, at high pressure to break up or increase the size and frequency of fractures in shale or other formations in an effort to release natural gas or oil from

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22. See, e.g., recent motion pictures GASLAND (Trish Adlesic, Molly Gandour, Josh Fox, & David Roma, 2010); GASLAND PART II (Trish Adlesic, Josh Fox, & Deborah Wallace 2013); Clifford Krauss, *Split Decision by Voters on Local Fracking Bans*, N.Y. TIMES (Nov. 5, 2014), available at [http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?\\_r=0](http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?_r=0); Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145 (2013).

23. See, e.g., Raymond Cross, *Development's Victim or its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535 (2011); Mitchell Davis, Note, *Fractured Focus: Tribal Energy Development and the Regulatory Contest Over Hydraulic Fracturing In Indian Country*, 4 WASH. & LEE J. ENERGY, CLIMATE & ENV'T. 305 (2013); Szonja Ludvig, Comment, *The Tribes Must Regulate: Jurisdictional, Environmental, and Religious Considerations of Hydraulic Fracturing on Tribal Lands*, 2013 B.Y.U. L. REV. 727 (2013); Kerstie B. Moran, *The Bureau of Land Management's Finalized Hydraulic Fracturing Rule on Tribal Lands: a Responsibility or Intrusion?*, 39 AM. IND. L. REV. 585 (2016).

those formations.<sup>24</sup> Although fracking has been used since the 1940s, more recent advances in technology and economic conditions, particularly over the last fifteen years, have significantly expanded its use and techniques.<sup>25</sup> In fact, according to a 2013 report from the United States Department of Energy, the development of so-called unconventional natural gas, released from shale, “very low permeability sandstones,” or coal seams by fracturing those formations, is more prevalent than conventional gas development.<sup>26</sup> While federal lands have seen similar development, the number of permits issued for proposed wells on those lands declined since a high of over 7,000 in fiscal year 2007.<sup>27</sup> Nonetheless, the BLM estimates that ninety percent of the approximately 2,800 new oil and gas wells started on federal and Indian lands in 2013 were fracked.<sup>28</sup>

### *B. Risks of Fracking*

The rapid expansion of fracking across many basins nationwide has prompted significant discussion and concern over the potential environmental impacts of the practice.<sup>29</sup> Although the precise extent of

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24. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: OIL AND GAS: INFORMATION ON SHALE RESOURCES, DEVELOPMENT, AND ENVIRONMENTAL AND PUBLIC HEALTH RISKS, GAO-12-732 9-13 (Sept. 2012), available at <http://www.gao.gov/assets/650/647791.pdf> [hereinafter GAO-12-732].

25. *Id.* at 7, fig. 1; John M. Golden & Hannah J. Wiseman, *The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy*, 64 EMORY L. J. 955, 968 (2015); Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 117-27 (2009).

26. NAT'L ENERGY TECH. LAB., MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: AN UPDATE 11 (Sept. 2013), available at <https://www.netl.doe.gov/File%20Library/Research/Oil-Gas/shale-gas-primer-update-2013.pdf> (unconventional gas accounted for sixty-five percent of U.S. natural gas production in 2013 and is expected to account for seventy-nine percent of production in 2040).

27. BUREAU OF LAND MGMT., NUMBER OF DRILLING PERMITS APPROVED BY FISCAL YEAR ON FEDERAL LANDS (Oct. 29, 2014), available at [http://www.blm.gov/style/medialib/blm/wo/MINERALS\\_REALTY\\_AND\\_RESOURCE\\_PROTECTION/\\_energy/oil\\_gas\\_statistics/data\\_sets.Par.65795.File.dat/numberofapdsapproved.pdf](http://www.blm.gov/style/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION/_energy/oil_gas_statistics/data_sets.Par.65795.File.dat/numberofapdsapproved.pdf).

28. 80 Fed. Reg. at 16,131.

29. *See generally*, Wiseman, *supra* note 25, at 127-42; David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 440-47 (2013); Michael Burger, Response,



these impacts is not clear,<sup>30</sup> spills of both fracking fluids and produced water, as well as emissions from poorly constructed wells, have caused environmental damage.<sup>31</sup> Thus, the BLM's development of the Final Rule primarily focused on the potential for contamination of groundwater supplies, the storage and management of water both used by and flowing back as a result of fracking operations, and the use and disclosure of chemicals in the fracking process.<sup>32</sup>

The potential for contamination through the underground migration of fracking fluids depends in large part upon the integrity of the well and the geology of the area, including the proximity of underground aquifers to formations targeted for development.<sup>33</sup> The extent of risk posed by each of these conditions is uncertain for a number of reasons, although significant attention is being focused on resolving that uncertainty.<sup>34</sup> For example, in 2011, the Environmental Protection Agency ("EPA") developed a plan for studying the risks posed by fracking to groundwater, and in June 2015, released a draft of its

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*Fracking and Federalism Choice*, 161 U. PA. L. REV. Online 150 (2013) (responding to David Spence's article).

30. Spence, *supra* note 29, at 447 ("significant uncertainty remains regarding the magnitude and frequency of the negative effects of fracking. This uncertainty is reflected in the contrasting and evolving approaches taken by states in fracking regulations."); GAO-12-732, *supra* note 24, at 4 ("[t]he risks identified in the studies and publications we reviewed cannot, at present, be quantified, and the magnitude of potential adverse effects or likelihood of occurrence cannot be determined for several reasons.")

31. See, e.g., *Fracking on Federal Lands: Hearing on the Future of Hydraulic Fracturing on Federally Managed Lands: Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 114th Cong. \_\_\_\_ (July 15, 2015) (statement of Hannah J. Wiseman at 5-6), available at <http://naturalresources.house.gov/uploadedfiles/wisemantestimony.pdf> (describing incidents and collecting sources).

32. See, e.g., Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (May 11, 2012) ("[t]he extension of the practice has caused public concern about whether fracturing can allow or cause the contamination of underground water sources, whether the chemicals used in fracturing should be disclosed to the public, and whether there is adequate management of well integrity and the 'flowback' fluids that return to the surface during and after fracturing operations.").

33. GAO-12-732, *supra* note 24, at 46-49 (collecting studies and including a table showing the relative depth of fracking operations and groundwater supplies in the nation's primary areas of development).

34. See, e.g., *Id.* at 4, 49-50 (noting the lack of baseline data for comparison purposes, variations among business practices and regulatory schemes, and unique characteristics of each geologic region as factors contributing to uncertainty regarding these risks).

Assessment of the Potential Impacts of Hydraulic Fracturing of Oil and Gas on Drinking Water Resources for review by the EPA Science Advisory Board (“SAB”).<sup>35</sup> The release of the draft Assessment for review by the SAB is the penultimate step before a final report of results, although it remains unclear when such a final report will be issued.<sup>36</sup>

While the EPA report will be helpful in determining the level of risk, water supplies may still be contaminated through spills or leaks of water produced by or flowing back from fracking operations.<sup>37</sup> Mitigation of these risks depends upon the standards for management, storage, and reuse of produced and flowback water, which can be stored on-site in lined pits or tanks, reused in future operations, injected back into the sub-surface environment, or trucked away for treatment and disposal.<sup>38</sup>

Concerns over water contamination are related to uncertainty surrounding the nature, extent, and toxicity of the chemicals used in the fracking process.<sup>39</sup> Operators use a variety of components, along with copious amounts of water and proppants like sand and silica, in their fracking fluid and, depending upon the rules applicable to those operators, may not be required to disclose the contents of those components even if they are toxic or dangerous.<sup>40</sup> In response to calls for

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35. Notification of Teleconferences and a Public Meeting of the Science Advisory Board Hydraulic Fracturing Research Advisory Panel, 80 Fed. Reg. 32,111 (June 5, 2015) (announcing release of the draft assessment to the EPA Science Advisory Board for review and input).

36. U.S. ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES: PROGRESS REPORT: EXECUTIVE SUMMARY 4, (Dec. 2012), *available at* <http://www.epa.gov/sites/production/files/documents/hf-progress-report-exec-summary20121214.pdf>.

37. GAO-12-732, *supra* note 24, at 40-44.

38. *Id.* at 13; U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE RANKING MEMBER, COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY, HOUSE OF REPRESENTATIVES: ENERGY-WATER NEXUS: INFORMATION ON THE QUANTITY, QUALITY, AND MANAGEMENT OF WATER PRODUCED DURING OIL AND GAS PRODUCTION, GAO-12-156 14-15 (Jan. 2012), *available at* <http://www.gao.gov/assets/590/587522.pdf> [hereinafter GAO-12-156].

39. *See, e.g.*, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule, 80 Fed. Reg. 16,128 (“Rapid expansion of [fracking] and its complexity have caused public concern about whether fracturing can lead to or cause the contamination of underground water sources [and] whether the chemicals used in fracturing pose risks to human health.”)

40. U.S. ENVTL. PROT. AGENCY, ANALYSIS OF HYDRAULIC FRACTURING FLUID DATA FROM THE FRACFOCUS CHEMICAL DISCLOSURE REGISTRY 1.0,

full disclosure of the chemicals used in fracking, some companies involved in fracking operations alleged that such disclosure would require them to release proprietary information and trade secrets.<sup>41</sup> In addition to the chemicals used in fracking fluid, the water flowing back to the surface from fracking operations, called produced or flowback water, often contains naturally occurring contaminants that may also pose a threat to workers, public health, and the environment.<sup>42</sup>

Although the BLM focused its rulemaking effort on these concerns over water contamination, either through spills and leaks or underground migration resulting from poorly constructed wellbores, and disclosure of the chemicals used in fracking, the practice may also pose risks to air quality, wildlife habitat, and the quantity of water supplies.<sup>43</sup> These potential risks and the ongoing expansion of fracking has prompted debate over how fracking should be regulated, particularly whether states or the federal government should be the primary regulator and how the appropriate government should develop its regulatory scheme.<sup>44</sup>

### C. State versus Federal Regulation

Although fracking presents a multitude of environmental risks, no single federal environmental law comprehensively addresses fracking or provides specific regulatory authority for fracking operations. Thus, Congress has not yet developed or expressly balanced federal fracking standards with state and tribal authority as in other environmental laws, such as the Clean Water Act (“CWA”), Clean Air Act (“CAA”), and the Safe Drinking Water Act (“SDWA”). These laws establish national

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EPA/601/R-14/003 17, 32 (Mar. 2015), available at [http://www.epa.gov/sites/production/files/2015-03/documents/fracfocus\\_analysis\\_report\\_and\\_appendices\\_final\\_032015\\_508\\_0.pdf](http://www.epa.gov/sites/production/files/2015-03/documents/fracfocus_analysis_report_and_appendices_final_032015_508_0.pdf) (identifying 692 unique ingredients of fracking fluids based on disclosures from fracking operators to FracFocus database but noting that, for at least seventy percent of those disclosures, operators claimed the identity of at least one ingredient was confidential business information); GAO-12-732, *supra* note 24, at 12, fig. 3.

41. John Craven, Note, *Fracking Secrets: The Limitations of Trade Secret Protection in Hydraulic Fracturing*, 16 VAND. J. ENT. & TECH. L. 395, 401-02 (2014).

42. GAO-12-156, *supra* note 38, at 12.

43. GAO-12-732, *supra* note 24, at 39-52.

44. See, e.g., *Should the Federal Government Regulate Fracking?*, WALL STREET JOURNAL (Apr. 14, 2013), available at <http://www.wsj.com/articles/SB10001424127887323495104578314302738867078> (including perspectives on each side of the debate).

policy and set minimum standards for air or water quality and allow states and tribes to apply to assume primary regulatory authority for establishing their own environmental standards, licensing, and enforcement arrangements.<sup>45</sup>

While some fracking operations may be subject to air and water quality regulation under these federal laws, there is no oil and gas production or fracking-specific federal law or regulation.<sup>46</sup> Until 2005, the SDWA arguably applied to fracking operations as it sought to ensure protection of drinking water from underground injections.<sup>47</sup> In interpreting the SDWA, however, the EPA did not require that state programs authorized under the SDWA include regulation of fracking because the EPA did not believe that fracking wells were covered by the statute.<sup>48</sup> This regulatory exemption was subsequently codified in the 2005 Energy Policy Act, which specifically excluded “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities” from the definition of “underground injection” for purposes of the SDWA’s application.<sup>49</sup> As a result of the exemption, federal law does not require that the EPA, or a state or tribe exercising authority delegated from the EPA, issue a permit to authorize a fracking operation.<sup>50</sup>

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45. See, e.g., Clean Air Act, 42 U.S.C. § 7601(d) (2012); Clean Water Act, 33 U.S.C. § 1377 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2012).

46. Spence, *supra* note 29, at 447; GAO-12-732, *supra* note 24, at 13-14.

47. 42 U.S.C. § 300h(b)(1) (2012).

48. Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency, 118 F.3d 1467, 1471 (11th Cir. 1997).

49. 42 U.S.C. § 300h(d)(1)(B)(ii).

50. The application of other federal statutes of general applicability more specifically focused on environmental protection largely depend upon the specifics of a particular fracking operation. For example, depending upon how an operator wishes to dispose of wastewater, the disposal may be subject to the Clean Water Act (33 U.S.C. §§ 1251-1274 (2012) (requiring a permit for discharge)) or the Safe Drinking Water Act (42 U.S.C. §300f (2012) (for reinjection)); see also U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: UNCONVENTIONAL OIL AND GAS DEVELOPMENT: KEY ENVIRONMENTAL AND PUBLIC HEALTH REQUIREMENTS, GAO-12-874 (Sept. 2012) [hereinafter GAO-12-874] (outlining requirements from eight federal environmental and public health laws applicable to fracking). Oil and gas operations enjoy exemptions from other federal environmental statutes, however. The disposal of oil and gas wastewater is not subject to the hazardous waste disposal requirements of the Resource Conservation and Recovery Act. 42 U.S.C. § 6921(b)(2)(A) (2012).

Currently, BLM must approve an APD before an operator can drill a well on federal or Indian lands.<sup>51</sup> Although the information to be submitted with an APD primarily addresses potential surface impacts,<sup>52</sup> operators must also submit a drilling plan with technical information about the integrity of the proposed well.<sup>53</sup> Aside from the well information submitted through the APD process, however, no overarching federal law specifically governs fracking operations, leaving comprehensive permitting and regulation of fracking largely a matter of state control.<sup>54</sup> A great deal of debate has ensued as to whether state primacy or comprehensive federal permitting and regulation of fracking is the better regulatory approach.<sup>55</sup>

A number of states have adopted comprehensive fracking regulatory regimes that vary both in types of regulation and activities regulated.<sup>56</sup> In light of the exemption of fracking from the SDWA, and because no federal law specifically preempts application of state fracking regulations on federal lands,<sup>57</sup> these states generally regulate oil and gas production on federal lands in conjunction with federal leasing statutes, such as the Mineral Leasing Act,<sup>58</sup> and accompanying regulations, such as the BLM's APD standards.<sup>59</sup> The BLM's Final Rule proposed to

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51. 43 C.F.R. § 3162.3-1(c) (2012).

52. *Id.* § 3162.3-1(d)(2), (f).

53. *Id.* § 3162.3-1(d)(1), (e).

54. Spence, *supra* note 29, at 447 (“[t]here is no comprehensive federal licensing regime for onshore oil and gas development. To the contrary, the regulation of oil and natural gas exploration and production in the United States has always been primarily a state matter.”)

55. *See, e.g., Id.* (arguing against broad federal regulation and that ongoing “regulatory adjustment by states” and federal regulation under existing authority is an “appropriate response”); Wiseman, *supra* note 25 (suggesting that Congress consider reversing the 2005 exemption); Amanda C. Leiter, *Fracking, Federalism, and Private Governance*, 39 HARVARD ENVTL. L. REV. 107 (2015) (analyzing “governance gap” in fracking regulation and discussing whether gap can be filled by private interest group governance).

56. GAO-12-874, *supra* note 50, at 48-50, table 4 (comparing requirements of six states); Wiseman, *supra* note 25, at 157-68; NATHAN RICHARDSON, MADELINE GOTTLIEB, ALAN KRUPNICK & HANNAH WISEMAN, THE STATE OF STATE SHALE GAS REGULATION (June 2013), *available at* [http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-Rpt-StateofStateRegs\\_Report.pdf](http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-Rpt-StateofStateRegs_Report.pdf).

57. *Cf. Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987) (relying on *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)).

58. 30 U.S.C. §§ 181-187b, 189-193, 195, 201-203, 205 to 208-1, 208, 211-214, 223-226, 226-2, 226-3, 228-229a, 241, 251, 261-263 (2012).

59. 43 C.F.R. pt. 3160 (2015).

incorporate additional federal standards for fracking into these regulations, some of which would conflict with and thereby preempt existing state standards.<sup>60</sup>

The conflict between the Final Rule and state authority is similar to the conflicts between states and local governments over localized bans on fracking. In 2014, the New York State Court of Appeals, New York's highest court, upheld a municipal ban on fracking in light of the municipality's authority to control land use planning and zoning.<sup>61</sup> In doing so, the court noted that the matter was not dependent upon the policy issues related to fracking, but instead depended upon the "relationship between the State and its local government subdivisions."<sup>62</sup> Similarly, the City of Longmont, Colorado, amended its charter to enact a similar ban in light of the risks fracking posed to "public health and safety, property[,], . . . air quality, . . . landscape[, and] drinking and surface water."<sup>63</sup> Colorado's Oil and Gas Association and Oil and Gas Conservation Commission challenged Longmont's ban, arguing that the City's authority was preempted by state law, which authorized the Conservation Commission to "regulate oil and gas activity in the state."<sup>64</sup> Because Longmont's ban could not be "harmonized" with the state's more production-oriented goals, the trial court granted summary judgment to the state plaintiffs but stayed an injunction against the ban to allow for appeal.<sup>65</sup> Similar conflicts between state and local governments and their respective authorities and interests have proceeded elsewhere.<sup>66</sup>

Although the potential for federal-state regulatory conflicts and these intrastate disputes over fracking depend upon the approach of each state and municipality, they highlight the distinction between the

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60. 80 Fed. Reg. at 16,128 (noting age of existing regulations); *Id.* at 16,130 (listing states with existing hydraulic fracturing regulations in place).

61. *Wallach v. Town of Dryden*, 16 N.E. 3d 1188 (N.Y. 2014).

62. *Id.* at 1202.

63. CITY OF LONGMONT, COLO., CODE OF ORDINANCES, pt. 1, art. XVI, § 16.2 (through Jan. 12, 2016), [https://www.municode.com/library/co/longmont/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTXVILOPUHESAWAEC](https://www.municode.com/library/co/longmont/codes/code_of_ordinances?nodeId=PTICH_ARTXVILOPUHESAWAEC).

64. *Colo. Oil and Gas Ass'n v. City of Longmont*, No. 13CV63, 2014 WL 3690665, at \*7-8 (Colo. Dist. Ct. July 24, 2014) (order granting mots. for summ. j.).

65. *Id.* at \*14. Just as this article was going to publication, the Colorado Supreme Court affirmed the lower court's ruling, holding that the local government's fracking ban "materially impedes the application of state law" and is therefore preempted. *City of Longmont v. Colo. Oil and Gas Ass'n*, No. 15SC667, \_\_\_ P.3d \_\_\_, 2016 WL 1757509, at \*10 (Colo. May 2, 2016).

66. See Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 954-76 (2015).

interests of local residents and the broader policies of a larger government. This distinction is particularly relevant in the tribal context, where tribal governments face “quantitatively and qualitatively different risks and impacts from oil and gas development,” including risks to tribal homelands and culturally significant sites, as well as an entirely different demand for sustained economic development, as compared to their municipal, state, and federal counterparts.<sup>67</sup> The oversight of fracking thus poses different challenges for Indian tribes. Unlike lands regulated by states, municipalities, and the public lands managed by the federal government, tribal land offers connections to innumerable prior generations and cultural values that have existed since time immemorial. Many tribes must balance these connections with the potential for developing their natural resources into significant and much-needed economic benefits. Beyond distinctions between the nature of tribal lands and those maintained for state, local, federal, or public purposes, the trust relationship between the federal government and Indian tribes, particularly as it relates to the federal government’s regulation of tribal resources, also sets Indian lands apart.

### III. ENERGY DEVELOPMENT IN INDIAN COUNTRY

The regulatory environment for energy leasing and development in Indian Country is the product of the unique relationship between the federal government and tribal nations and, therefore, poses different issues than intrastate conflicts or the divide between support for either state or federal regulation of fracking. Instead, the federal-tribal relationship is based on the federal government’s trust responsibility toward tribes and their lands and the Indian-specific statutory and regulatory schemes developed as a result of that relationship.

#### A. *Trust Relationship*

The federal government’s trust responsibility to Indian tribes is rooted in federal treaties, laws and policies, and decisions of the Supreme Court that date to the earliest days of the republic. The widely accepted genesis of the notion of a trust relationship is Supreme Court Chief Justice John Marshall’s description of the relationship between tribes and the young federal government as that of a “ward to his guardian.”<sup>68</sup> Chief Justice Marshall based his conception of the trust relationship on the

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67. Cross, *supra* note 23, at 538.

68. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

history of the relationship between native peoples and the colonizing forces of Europe and, later, the United States federal government, and relied in large part upon the interpretation of the treaties entered into on a government-to-government basis between those nations.<sup>69</sup> In its earliest conceptions, the federal government's trust responsibilities manifested in restraints on the alienation of tribal property without oversight and approval by the federal government, and the federal protection of inherent tribal authority within tribal lands through the exclusion of state authority by the federal-tribal relationship.<sup>70</sup> The trust responsibility is foundational in federal Indian law and policy, particularly regarding federal management of Indian lands.<sup>71</sup> As a product of that responsibility, the statutes governing the leasing and development of mineral resources on tribal lands mandate significant federal oversight of those processes and generally require federal approval of any mineral lease or agreement.<sup>72</sup> In order to implement this statutory oversight, the Secretary of the Interior ("Secretary") was granted broad authority for promulgating regulations, which have come to largely define the nature of energy development on Indian lands.<sup>73</sup>

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69. *Id.* (reviewing Treaty of Hopewell, 7 Stat. 18, Nov. 28, 1785, available at <http://www.cherokee.org/AboutTheNation/History/Facts/TreatyofHopewell,1785.asp>); *Worcester v. Georgia*, 31 U.S. 515 (1832) (examining history of British claims to America and treaties with the Cherokee Nation entered into by both Great Britain and the United States to exclude application of Georgia's laws within the Cherokee's territory).

70. *M'Intosh*, 21 U.S. 543; *Worcester*, 31 U.S. at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.")

71. COHEN'S HANDBOOK, *supra* note 1, at § 5.04[3], 412-16.

72. *See, e.g.*, the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (2012) (requiring Secretarial approval of mineral leases on Indian lands).

73. While the following provides a brief summary, Professor Judith Royster provides much more detail in her comprehensive overview of the evolution of the federal-tribal relationship with regard to mineral development. Judith Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L. J. 541 (1994).



*B. Federal Oversight of Energy Development*

The first comprehensive federal statute governing mineral development in Indian Country was the 1938 Indian Mineral Leasing Act (“IMLA”).<sup>74</sup> The IMLA authorized the leasing of unallotted lands within a reservation or lands owned by a tribe under federal jurisdiction, subject to the approval of the Secretary.<sup>75</sup> The IMLA also set forth general procedures for the public auction of such leases,<sup>76</sup> required lessees to furnish performance bonds,<sup>77</sup> and authorized the Secretary to promulgate rules and regulations to cover “all operations” under any lease approved pursuant to the IMLA.<sup>78</sup> The IMLA was intended to provide a measure of uniformity to what had previously been a mix of leasing laws applicable to Indian Country while also promoting tribal governmental authority by requiring tribal consent for each lease authorized under the IMLA,<sup>79</sup> and ensuring that the Secretary maximize returns to tribes from development of their resources.<sup>80</sup>

Nearly fifty years later, largely in response to concerns from tribes over the inflexibility of the IMLA’s leasing regime, Congress enacted the Indian Mineral Development Act (“IMDA”).<sup>81</sup> Unlike the IMLA, which offered no option beyond the lease of tribal minerals, the IMDA allowed tribes to negotiate and enter a variety of arrangements for mineral development, including a “joint venture, operating, production sharing, service, managerial, lease[,] or other agreement.”<sup>82</sup> The IMDA still mandated approval by the Secretary and required the Secretary to promulgate rules and regulations to implement the IMDA within 180 days of the law’s enactment.<sup>83</sup> To ensure tribes had a role in the development of the regulations, Congress required the Secretary to

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74. 25 U.S.C. §§ 396a-396g.

75. 25 U.S.C. § 396a. Originally, the IMLA’s leasing provisions did not apply to “the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, [or] to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.” 25 U.S.C. § 396f. Congress subsequently removed the exception for the Crow Reservation. *Crow Tribe of Indians v. Montana*, 650 F. 2d 1104, 1111, n.6 (9th Cir. 1981).

76. 25 U.S.C. § 396b.

77. 25 U.S.C. § 396c.

78. 25 U.S.C. § 396d.

79. 25 U.S.C. § 396a.

80. See *Crow Tribe*, 650 F. 2d at 1112-13 (describing Congressional intent of the IMLA).

81. 25 U.S.C. §§ 2101-2108 (2012).

82. 25 U.S.C. § 2102(a).

83. 25 U.S.C. § 2107.

“consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of [the regulations] and [in] any future revision or amendment.”<sup>84</sup>

In an effort to fulfill Congress’ directive to ensure tribal input, the Secretary circulated a draft set of regulations to tribes, national tribal organizations, and tribal attorneys for comment, and incorporated “many of the[ir] suggestions” before even opening the public comment period on the proposed regulations.<sup>85</sup> Comments from tribes and tribal organizations were also submitted and considered during the public comment period.<sup>86</sup> Then, although the regulations had been published as a final version, the Secretary, citing “uncertainty expressed by Indian interests and industry on numerous issues,” determined that the regulations needed to be entirely “reformatted and revised” to separate the regulations relevant to IMLA from those implementing IMDA.<sup>87</sup> In doing so, the drafters sought “to ensure that Indian mineral owners and Indian mineral lessees ha[d] a full opportunity to review and comment.” So, the regulations were published as draft, not final, and meetings were scheduled to discuss the draft.<sup>88</sup> Additional comment was also sought on the separate IMLA regulations “in order to address comments expressed by tribal representatives” and others.<sup>89</sup> Ultimately, the final IMDA regulations were adopted in 1994.<sup>90</sup> In 1996, the Department of the Interior (“DOI” or the “Department”) adopted new IMLA regulations.<sup>91</sup> Thus, in accordance with the IMDA’s requirement that the Secretary seek and obtain tribal input in promulgating regulations, the Secretary relied upon consultation with and input from tribes throughout the development of regulations for both IMLA and IMDA. In fact, it was

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84. *Id.*

85. Mining Regulations, Proposed Rule, 48 Fed. Reg. 31,978 (July 12, 1983).

86. Contracts for Prospecting and Mining on Indian Lands; Oil and Gas and Geothermal Contracts, Final Rule, 52 Fed. Reg. 31,916 (Aug. 24, 1987).

87. Leasing of Tribal Lands for Mineral Development, Leasing of Allotted Lands for Mineral Development, and Oil and Gas, Geothermal and Solid Mineral Agreements, Proposed Rule, 56 Fed. Reg. 58,734 (Nov. 21, 1991).

88. *Id.* at 58,735.

89. Leasing of Tribal Lands for Mineral Development; Leasing of Allotted Lands for Mineral Development, 57 Fed. Reg. 40,298 (Sept. 2, 1992).

90. Oil and Gas, Solid Mineral, and Geothermal Minerals Agreements, 59 Fed. Reg. 14,960 (Mar. 30, 1994).

91. Leasing of Tribal Lands for Mineral Development and Leasing of Allotted Lands for Mineral Development, Final Rule, 61 Fed. Reg. 35,634 (July 8, 1996).

largely tribal input that resulted in the separation of the IMLA from the IMDA regulations, which clarified each as a distinct regulatory scheme.<sup>92</sup>

Both the IMLA and the IMDA regulations incorporated the BLM's regulations governing onshore oil and gas development and applied them to IMLA and IMDA leases.<sup>93</sup> One justification for doing so, as set forth in the publication of the final IMLA regulations, was that "[a]ppropriate consistency [between the mineral leasing and development of Indian and federal lands] is desirable because many of the operating and reclamation regulations of other offices and bureaus of the Department [ ] are also applicable in the day-to-day management of" Indian lands.<sup>94</sup> That justification failed to note, however, that the regulations of other DOI agencies and bureaus, like the BLM, were applied to Indian lands solely through adoption of the Department's own regulations. Even then, the publication of the final IMLA regulations went on to recognize that "in a number of important respects mineral leasing and development on Indian lands differ from such activities on Federal lands."<sup>95</sup>

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92. *Id.* at 35,635 (restating that the expression of uncertainty by Indian interests and industry supported the reformatting and revision); *see* 25 C.F.R. pt. 211 (2016) (for IMLA); 25 C.F.R. pt. 225 (2016) (for IMDA). In 1982, the BLM assumed responsibility for certain oversight and approval functions on federal lands from the United States Geological Survey and the Mineral Management Service ("MMS"). 48 Fed. Reg. 8,983 (Mar. 2, 1983). At the time, Secretary Jim Watt also transferred the MMS's responsibilities over such functions on Indian lands to the BIA. *Id.* ("Those functions now performed by the MMS which are being transferred to the BLM will, in the case of their application to Indian lands, be similarly transferred from the MMS to the Bureau of Indian Affairs." *Id.*). Just over a month later, Secretary Watt amended that Order to consolidate the BLM's authority over both federal and Indian lands. *Id.*; *see also* DEP'T OF THE INTERIOR, DEPARTMENT MANUAL 235 DM 1, 1.1.K (Oct. 5, 2009), *available at* <http://elips.doi.gov/elips/0/fo1/884/Row1.aspx> ("[t]he [BLM] Director . . . may exercise the authority of the Assistant Secretary – Land and Minerals Management for administering operations on oil and gas, geothermal, and other mineral leases on Federal and Indian lands under . . . the [IMLA] (25 U.S.C. 396a) . . . and other authorities under which the [BLM] issues mineral leases.")

93. 25 C.F.R. §§ 211.4, 225.4.

94. 61 Fed. Reg. at 35,638.

95. *Id.* at 35,638-39. In fact, Interior's efforts to revise the IMLA regulations arose from a recognition by then-Secretary Rogers C.B. Morton that a revision was needed in order to "better fulfill [his] future trust responsibility to assure the protection of Indian culture and environmental interests as well as to allow maximum development of Indian natural resources." TEXT OF DECISION ON NORTHERN CHEYENNE PETITION 3, *in* OFFICE OF THE SEC'Y, DEP'T OF THE INTERIOR, NEWS RELEASE: MORTON ANNOUNCES DECISION OF NORTHERN CHEYENNE COAL LANDS (June 4, 1974), *available at* <http://www.bia.gov/cs/groups/public/documents/>

Federal oversight and approval of IMLA and IMDA agreements implicates other federal standards beyond the regulations of other Interior offices and bureaus as well. For example, before taking action to approve a lease or agreement on Indian lands, NEPA requires the Secretary to analyze the potential environmental impacts of such actions.<sup>96</sup> The Secretary must also ensure compliance with various federal cultural protection laws.<sup>97</sup>

The equal application of federal law and regulations to both federal and Indian lands and the involvement of various federal bureaus and agencies in the management of Indian lands has resulted in what a recent Government Accountability Office (“GAO”) report described as a “framework [that] can involve significantly more steps than the development of private and state resources, increase development costs, and add to the timeline for development.”<sup>98</sup> That report also noted the sentiment among many stakeholders that development in Indian Country “is generally not managed according to tribal priorities and does not reflect that Indian lands are intended for the use and benefit of Indian tribes and their members,” but are instead “being managed according to priorities generally associated with public lands.”<sup>99</sup>

Therefore, although it was considered “appropriate” to apply the BLM’s operating regulations equally to both federal and Indian lands when the final IMLA and IMDA regulations were developed in the mid-1990s, the result is a regulatory environment that manages Indian lands according to public, not tribal, priorities. In addition, the federal bureaucracy administering those laws and regulations imposes

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text/idc-022233.pdf. In publishing the first draft of those revised regulations, the Department noted that it had delayed a concurrent effort to develop regulations regarding coal mining to exclude Indian-owned coal from rules applicable to federal lands. *Mining on Indian Lands: Mineral Development Contracts, Proposed Rules*, 42 Fed. Reg. 18,083 (Mar. 30, 1977). Then-Secretary Kleppe’s reasoning for doing so was “based upon the conclusion that considerations governing the administration of Indian-owned resources are different from those involved in administering the public estate” and that the regulations as they applied to federal lands “could not be married to the Department’s legal relationship with Indian tribes.” *Id.*

96. 25 C.F.R. §§ 211.7, 225.24.

97. See 25 C.F.R. pt. 211 (for IMLA); 25 C.F.R. pt. 225 (for IMDA).

98. U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE: INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT, GAO-15-502, 24-25 (June 2015), available at <http://www.gao.gov/assets/680/670701.pdf> [hereinafter GAO-15-502].

99. *Id.* at 25.

significant delays and costs on the development of Indian lands.<sup>100</sup> Although tribes expressed concern during the development of the Final Rule that its requirements would add even more costs and delays to these existing regulatory challenges, the BLM instead maintained a consistent focus on the need for uniformity between the regulation of federal and Indian lands.

### C. Tribal Regulation

In recognition of their unique interests in Indian lands, a number of tribes have sought to assume greater control over the regulation of environmental concerns on their reservations.<sup>101</sup> Although Indian tribes retain inherent sovereign authority to do so, their ability to regulate the conduct of non-Indians on their reservations is limited and, therefore, tribes have also sought the delegation of federal authority through so-called Treatment as State provisions of various federal environmental statutes, such as the Clean Air and Clean Water Acts.<sup>102</sup> As a result of the 2005 amendment to the SDWA described above, the EPA does not have any federal authority to delegate to tribes to regulate fracking but, just like their state and local government counterparts, some tribes have adopted laws and regulations related to fracking operations in lieu of a broader federal regulatory scheme.<sup>103</sup>

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100. *Id.* (citing one estimate that the development of Indian lands costs approximately sixty-five percent more than development of other lands not subject to the same regulatory framework).

101. *See, e.g.*, Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. LAW 42, 63-94 (2014) (surveying environmental laws from seventy-four tribes in Arizona, Montana, New York and Oklahoma).

102. *Id.* at 53-59 (describing inherent tribal authority and delegation of Federal authority for the development of tribal environmental laws); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental 'Laboratories'*, 86 U. COLO. L. REV. 789, 809-11 (surveying tribes with TAS status under various statutes).

103. *See, e.g.*, *MHA Energy Division Resolutions*, MHA ENERGY, [http://www.mhanation.com/main2/departments/mha\\_energy\\_division/mhaenergydivision\\_resolutions.html](http://www.mhanation.com/main2/departments/mha_energy_division/mhaenergydivision_resolutions.html) (last visited Dec. 28, 2015) (compiling various tribal resolutions related to energy development on MHA Nation lands); ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, title 22, ch. 2, *available at* [http://www.ftpc.org/ccoj/title\\_22/chapters/chapter2.pdf](http://www.ftpc.org/ccoj/title_22/chapters/chapter2.pdf) (last visited Feb. 23, 2016) (requiring a tribal permit for underground injection activities, in conjunction with tribe's TAS authority under SDWA); S. UTE INDIAN TRIBE, RESOLUTION NO. 2015-98 (June 16, 2015), *available at* <http://www.suitdoe.com/Documents/>

The BLM waded into this regulatory environment when promulgating its Final Rule. This article next provides a detailed review of the Agency's rulemaking process, with particular focus on the issues raised by tribes in light of the initial and revised proposed versions and BLM's Final Rule.

#### IV. THE BLM'S FRACKING RULE

Although it was issued in March 2015, work on the BLM's Final Rule began as early as November 2010 when then-Secretary Ken Salazar hosted a public forum on hydraulic fracturing.<sup>104</sup> In kicking off that forum, Secretary Salazar focused on the need for greater disclosure of the components used in fracking fluids and described the Department's objective as seeking to "reassure the American public that what we are doing is in fact safe and is in fact protective of the environment."<sup>105</sup> At that time, Secretary Salazar and officials within the DOI were focused on the development of natural gas reserves in the context of national energy policy and, aside from considering requirements for disclosure of fracking chemicals, were not clearly committed to a broad approach to regulating fracking.<sup>106</sup> Importantly, although the forum that began discussion and consideration of what became the Final Rule included input from various industry and State regulatory participants, no tribal representatives participated as panelists.<sup>107</sup> In addition, while the forum discussed the interaction of then-current BLM rules with the state

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HydraulicFracturingRegulations.pdf, *adopting* S. UTE INDIAN TRIBE, HYDRAULIC FRACTURING AND CHEMICAL DISCLOSURE REGULATIONS (June 16, 2015), *available at* <http://www.suitdoe.com/Documents/HydraulicFracturingRegulations.pdf> (adopting tribal regulations governing fracking operations on the reservation in response to the BLM's Final Rule).

104. *Bureau of Land Management's Final Hydraulic Fracturing Rule*, 114th Cong. \_\_\_ (statement of Neil Kornze, Dir., Bureau of Land Mgmt., at 2-3), *available at* <http://naturalresources.house.gov/uploadedfiles/kornzetestimony.pdf>; U.S. DEPT. OF THE INTERIOR, Press Release: Salazar Holds Forum to Examine Best Practices for Hydraulic Fracturing in Oil and Gas Production (Nov. 30, 2010), *available at* <https://www.doi.gov/news/pressreleases/Salazar-Holds-Forum-to-Examine-Best-Practices-for-Hydraulic-Fracturing-in-Oil-and-Natural-Gas-Production>.

105. DEPT. OF THE INTERIOR, NWX-DEPT OF INTERIOR-NBC 4 (Nov. 30, 2010) (transcript from November 30, 2010 Fracking Forum), *available at* [https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Fracking\\_Forum\\_2011-11-30\\_Transcript.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Fracking_Forum_2011-11-30_Transcript.pdf).

106. *Id.* at 3-4 (comments of Secretary Salazar).

107. *Id.* at 12-14, 52-54 (introducing panelists).

regulatory schemes of Wyoming and New Mexico, there was no mention of how the BLM rules might interact with Indian Country.<sup>108</sup>

### A. Initial Proposed Rule

Following the initial public forum, the BLM held forums in North Dakota, Arkansas, and Colorado throughout April 2011 to gather additional public input regarding its intent to address concerns over fracking.<sup>109</sup> Unlike the engagement of tribes in drafting the initial IMLA and IMDA regulations,<sup>110</sup> it was not until after these forums and just over a year after Secretary Salazar convened the initial public forum that the BLM sought to engage in any tribal consultation about fracking or potential rulemaking.<sup>111</sup> These initial tribal consultation meetings began in January 2012; however, according to the BLM, the initial proposed rule had already been drafted by that time.<sup>112</sup> Rather than engage and involve tribes in discussion of whether any rule was necessary and, if so, how it could address issues of importance to the tribes or incorporate tribal comments into an initial draft, the BLM instead sought consultation with tribes about how a BLM rule may “affect Indian activities, practices, or beliefs if it were to be applied to particular locations on Indian . . . lands.”<sup>113</sup> This approach prompted significant

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108. *Id.* at 63-82.

109. 80 Fed. Reg. at 16,131. The Final Rule also mentions 2011 recommendations from the Natural Gas Subcommittee of the Secretary of Energy’s Advisory Board “that the BLM undertake a rulemaking to ensure well integrity, water protection, and adequate public disclosure”; however, review of the initial 90-day and final reports of that Subcommittee do not demonstrate such specific recommendations. *Improving the Safety & Environmental Performance of Hydraulic Fracturing*, NATURAL GAS SUBCOMM. OF THE SEC’Y OF ENERGY ADVISORY BD., SAFETY OF SHALE GAS DEV. (Dec. 9, 2011), <http://www.shalegas.energy.gov>.

110. *See supra* Section III.B.

111. 80 Fed. Reg. at 16,132 (describing four regional tribal consultation meetings but also noting that “[t]he BLM distributed copies of a draft rule to affected federally recognized tribes in January 2012.”)

112. *Id.* The Opening Brief for the Federal Appellants filed in the appeal of the injunction issued by Judge Skavdahl pending before the United States Circuit Court of Appeals for the Tenth Circuit also suggests that the rule was already drafted, but not published, before any tribal consultation took place. Opening Br. for the Fed. Appellants at 49, *Wyoming v. Jewell*, (10th Cir. filed Mar. 21, 2016) (No. 15-8126).

113. *Impacts of the Bureau of Land Management’s Hydraulic Fracturing Rule on Indian Tribal Energy Development: Oversight Hearing before the Subcomm. on Indian and Alaska Native Aff. of the H. Comm. on Natural Res.*, Serial

concern from tribal leaders, some of whom expressed extreme frustration that it appeared the BLM had drafted its proposed rule and prepared it for publication before even notifying tribes.<sup>114</sup> Such concerns were particularly pointed in light of a Tribal Consultation Policy adopted by the DOI only a month beforehand.<sup>115</sup>

Undeterred by tribal concerns with the substance of its consultation process (or lack thereof), the BLM forged ahead and published its initial proposed rule in the Federal Register in May 2012.<sup>116</sup> The purported need for the rule in its initial form largely tracked the concerns raised by Secretary Salazar nearly a year and a half earlier, with the rule's summary stating, it "is necessary to provide useful information to the public and to assure that hydraulic fracturing is conducted in a way that adequately protects the environment."<sup>117</sup> As further justification, the commentary on the initial proposed rule emphasized the outdated nature of the BLM's existing regulations, reviewed the quickening pace of development on federal and tribal lands, and developed a cost-benefit analysis projected over a ten-year period (2013 to 2022).<sup>118</sup> According to that analysis, the benefits to be realized from the rule's requirements regarding increased oversight of wellbore integrity and requirements for storage of wastewater ranged from twelve million to fifty million dollars per year while cost estimates ranged from thirty-seven million to forty-four million dollars per year.<sup>119</sup> The BLM also estimated a proposed cost burden "per well stimulation event" of about twelve thousand dollars, meaning that the rule would add that cost to each frack job.<sup>120</sup> With regard to tribal lands, the support for the initial rule simply noted that the BLM proposed to apply the same "rules and standards to Indian lands so

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No. 112-106, 12 (Apr. 19, 2012) (statement of Tim Spisak, Deputy Assistant Dir., Minerals and Realty Mgmt., BLM).

114. See, e.g., *id.* at 41, 43-44 (testimony and statement of James M. "Mike" Olguin, Vice-Chairman, S. Ute Indian Tribal Council, S. Ute Indian Tribe).

115. U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 1, 2011), available at <https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf>.

116. 77 Fed. Reg. 27,691.

117. *Id.*

118. *Id.* at 27,694 ("[a]s stewards of the public lands, and as the Secretary's regulator for oil and gas leases on Indian lands, the BLM has evaluated the increased use of well stimulation practices over the last decade and determined that the existing rules for well stimulation require updating." *Id.* at 27,699-700).

119. *Id.* at 27,692, 27,702 (the analysis did not consider potential benefits from public disclosure of fracking chemicals)

120. *Id.* at 27,702.



that these lands and communities receive the same level of protection provided for public lands.”<sup>121</sup> Aside from that mention of the BLM’s interest in consistency across both tribal and public lands, the information published within the initial rule paid little attention to tribal interests.<sup>122</sup>

### *B. Tribal Response to the Initial Proposed Rule*

Upset by the perceived lack of consultation leading up to the publication of the initial rule, many tribes continued to raise complaints with both the rulemaking process and the substance of the initial rule after its publication in May 2012. For example, in commenting on the initial proposed rule, the Ute Indian Tribe of the Uintah and Ouray Reservation (“Ute Indian Tribe”) of Utah expressed concern that the “BLM continue[d] to make the mistakes of the past by proposing to impose a national rule based on public interest standards that will override tribal authority.”<sup>123</sup> According to the Ute Indian Tribe, the additional requirements suggested by the initial proposed rule could further delay development on its reservation, where “[i]t already takes about 5 to 20 [sic] times as long to get an oil and gas permit” as compared to non-tribal lands.<sup>124</sup> The Council of Energy Resource Tribes (“CERT”), a coalition of tribes engaged in energy production, also commented on the potentially negative impacts of the initial proposed rule on tribal energy development.<sup>125</sup> These concerns were echoed by other tribes reliant upon energy development for economic purposes, who also urged the BLM to engage in greater tribal consultation to better address these issues.<sup>126</sup>

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121. *Id.* at 27,692.

122. *Id.* at 27,704-05.

123. UTE INDIAN TRIBE, COMMENTS ON PROPOSED RULE FOR OIL AND GAS; WELL STIMULATION, INCLUDING HYDRAULIC FRACTURING, ON FEDERAL AND INDIAN LAND 2 (Sept. 10, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2012-0001-7637> [hereinafter UTE COMMENTS].

124. *Id.* at 8.

125. COUNCIL OF ENERGY RES. TRIBES, CERT LETTER RE COMMENTS TO HF RULE 09.10.12, 6-7 (Sept. 10, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2012-0001-7204> (positing a guaranteed decline in revenue for tribes and Indian people as a result of the initial proposed rule) [hereinafter CERT COMMENTS].

126. UTE TRIBE COMMENTS, *supra* note 123, at 2; MANDAN, HIDATSA, AND ARIKARA NATION, THREE AFFILIATED TRIBES, FORT BERTHOLD INDIAN RESERVATION, COMMENTS ON PROPOSED RULE FOR OIL AND GAS; WELL STIMULATION, INCLUDING HYDRAULIC FRACTURING, ON FEDERAL AND INDIAN

Beyond concerns over the potential delays caused by the initial proposed rule, a number of tribes engaged in energy development also questioned the legal basis of the BLM's authority to apply the rule to Indian lands.<sup>127</sup> In opening the discussion section of the publication of the initial proposed rule, the BLM cited the Federal Land Policy and Management Act ("FLPMA") as the basis of the Agency's authority to manage public lands and as establishing the standard—preventing undue and unnecessary degradation of those lands, the so-called "UUD standard"—for doing so.<sup>128</sup> In its comments, the CERT noted that the definition of "public lands" to which FLPMA applies specifically excludes "lands held for the benefit of Indians."<sup>129</sup> Therefore, according to the CERT, whose argument was representative of the position taken by other tribes, even though the BLM also cited to both the IMLA and the IMDA, each of which authorize the Secretary to promulgate regulations to implement their statutory provisions on Indian lands,<sup>130</sup> the Secretary could not delegate this authority to the BLM "because under FLPMA, Indian lands are specifically excluded" from the BLM's jurisdiction.<sup>131</sup>

Similarly, the Mandan, Hidatsa, and Arikara Nation, the Three Affiliated Tribes of the Fort Berthold Reservation ("MHA Nation") of North Dakota argued that the BLM did not assume any authority over leasing on Indian lands until the IMLA regulations were finalized in 1996, which, because it came two decades after FLPMA, was also prohibited.<sup>132</sup> The MHA Nation went on to argue that any attempt by the BLM to apply the standards applicable to public lands under FLPMA, which derive from the general UUD standard, would be inconsistent with the federal government's fiduciary responsibilities to tribes.<sup>133</sup> Consistent with tribal concerns over the potential economic impacts, those alleging

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LANDS 8 (Sept. 10, 2012), available at <http://www.regulations.gov/#!documentDetail;D=BLM-2012-0001-7405> [hereinafter MHA COMMENTS]; *Impacts of the Bureau of Land Management's Hydraulic Fracturing Rule*, *supra* note 113, at 61 (statement of Scott Russell, Sec'y of the Crow Tribe, Area Vice-President Rocky Mountain Region, Nat'l Cong. of Am. Indians).

127. See, e.g., CERT COMMENTS, *supra* note 125, at 4-5.

128. 77 Fed. Reg. at 27,694; see also, 43 U.S.C. § 1732b.

129. CERT COMMENTS, *supra* note 125, at 4.

130. 25 U.S.C. §§ 396d, 2107.

131. CERT COMMENTS, *supra* note 125, at 4-5.

132. MHA COMMENTS, *supra* note 126, at 3.

133. *Id.* at 4-5 (citing *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983)).

a lack of statutory basis for the initial proposed rule urged a return to tribal consultation to address the unique statutory scheme applicable to Indian lands and allow greater consideration of the federal trust relationship toward Indian tribes.<sup>134</sup>

In addition to tribes concerned about the potential for the initial proposed rule to further delay development, some tribes also expressed concern that the BLM's rules would interfere with their ability to sufficiently protect their citizens from the risks of fracking. At a Congressional oversight hearing just before publication of the initial proposed rule, for example, the Co-Chairman of the Business Council of the Eastern Shoshone Tribe of Wyoming made clear that, although his tribe supported energy development, the "main goal should not be how quickly we can get permits approved but how do we support safe and responsible development."<sup>135</sup> As such, the primary worry of the tribes on his reservation was "that the BLM ha[d] shown that they cannot bring about compliance with existing policies and statutes."<sup>136</sup> Similarly, a Tribal Council Representative from the Turtle Mountain Band of Chippewa Indians of North Dakota pointed out that, at the time of the hearing, his was "the only tribe in this nation [sic] who will not allow fracking on [their] land" due to water quality concerns.<sup>137</sup> Nonetheless, although based on divergent interests, these tribal leaders, like those of the tribes critical of the rule for its potentially negative impacts on development, urged a greater role for tribal regulation in place of federal oversight.<sup>138</sup>

After extending the initial comment deadline from one month to three and receiving comments until September 2010, the BLM went back to the drawing board on the initial proposed rule.<sup>139</sup> Prior to doing so, the

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134. See *Id.* at 5; CERT COMMENTS, *supra* note 125, at 21; UTE COMMENTS, *supra* note 123, at 6-7.

135. *Impacts of the Bureau of Land Management's Hydraulic Fracturing Rule*, *supra* note 113, at 53 (statement of Wes Martel, Co-Chairman, E. Shoshone Tribe).

136. *Id.*

137. *Id.* at 55.

138. *Id.* at 54 ("[w]e believe a more enhanced regulatory role for the Tribes is part of the answer."); *id.* at 57 ("Turtle Mountain people know our land best, we know our resources, we know what methods of mining and drilling we are comfortable with, and we are best suited to make the decisions that impact our land and our people.") (statement of Larry DeCoteau, Tribal Council Rep., Dist. 4, Turtle Mountain Band of Chippewa Indians).

139. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, Proposed Rule, Extension of Comment Period, 77 Fed. Reg. 38024 (June 26, 2012).

Agency engaged in additional tribal consultation sessions in the summer of 2012, during which tribes continued to express concerns over both the BLM's consultation during the rulemaking process and the substance of the initial proposed rule.<sup>140</sup> The results of the additional consultation sessions and agency analysis became clear with the publication of a supplemental rule nearly a year later.

### C. Supplemental Rule

The BLM published its revised fracking rule in the Federal Register on May 24, 2013, and, in the information published with the revised rule, sought to address many of the comments raised by tribes and tribal interests in response to the initial proposed rule.<sup>141</sup> For example, in response to the concerns of energy tribes that the rule would result in additional delays, the Agency pointed to revisions in the substance of the rule aimed at reducing administrative burdens.<sup>142</sup> In addition, the BLM attempted to better explain its view of the rule's statutory support and relationship between the rule and Indian Country to respond to tribal concerns over the Agency's respect for tribal sovereignty and the distinction between federal and Indian lands.<sup>143</sup>

Like the initial proposed rule, the revised rule primarily focused on standards related to ensuring wellbore integrity, disclosure of fracking chemicals, and treatment of wastewater produced through the fracking process.<sup>144</sup> Unlike the stricter technical standards of the initial proposed rule, however, the revised rule allowed for some additional flexibility in meeting those standards.<sup>145</sup> For example, the revised rule removed the initial proposed rule's requirement that an operator submit the results of wellbore integrity testing before fracking and, instead, so long as there

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140. See, e.g., Glenda Embry, Pub. Info. Officer, *Consultation Meeting with BIA and BLM Held at Four Bears on Proposed New Rule on Hydraulic Fracturing*, MHA NATION (July 17, 2012), [http://www.mhanation.com/main2/Home\\_News/Home\\_News\\_2012/News\\_2012\\_07\\_July/news\\_2012\\_july17.html](http://www.mhanation.com/main2/Home_News/Home_News_2012/News_2012_07_July/news_2012_july17.html).

141. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636 (May 24, 2013).

142. *Id.*

143. *Id.* at 31,639-40.

144. *Id.* at 31,636.

145. See, e.g., *id.* at 31,641 (describing a change in the revised rule that would remove the requirement of a cement bond log prior to a fracking operation and replace it with a requirement that cement evaluation log be submitted after the operation, "unless there [we]re problems with the cement job.")

were no indications of other integrity issues, proposed allowing the submission of a wider variety of cement evaluation information within thirty days after fracking operations.<sup>146</sup> In addition, the revised rule touted additional reliance on existing state standards, such as Colorado's protection of trade secrets in the context of chemical disclosures.<sup>147</sup> Rather than impose it as an additional requirement, the revised rule also sought additional input as to the costs and benefits of requiring that fluids flowing back from fracking operations be stored only in closed tanks.<sup>148</sup>

Notwithstanding the BLM's attention to the procedural and administrative burdens of the revised rule, however, the Agency noted that the rule would still result in costs of twelve to twenty million dollars annually, a substantial portion of which would result from the cement testing requirements.<sup>149</sup> In specifically responding to tribal concerns over the additional costs imposed by federal regulations applicable to tribal lands, especially when compared to private lands, the BLM noted in publishing the revised rule that it was "aware that [despite some reduced requirements,] the revised proposed rule would nonetheless result in some higher costs for operators on . . . Indian lands, compared with compliance costs for hydraulic fracturing on . . . non-Indian lands," but that those costs were "only one set in a long list of costs that operators compare to anticipated revenues when deciding whether and how much to bid on a[n] Indian lease."<sup>150</sup>

In addition to showing greater sensitivity to tribal concerns over administrative burdens than it had in the initial proposed rule, the BLM used the publication of the revised proposed rule to respond to tribal concerns over the Agency's statutory authority to promulgate a rule applicable to Indian lands and the Agency's responsibility to tribes. With regard to the tribal arguments that Congress, by enacting FLPMA and excluding Indian lands from the definition of public lands, stripped the BLM of any authority over Indian lands, the BLM responded that FLPMA also charges the BLM with the responsibility to carry out other duties assigned to it by the Secretary or assigned to the Secretary by law

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146. *Id.* at 31,641 (comparing the initial proposed rules, 43 C.F.R. § 3162.3-3(c)(2) (2015) (requiring a Cement Bond Log before fracking), with their amended version, 43 C.F.R. § 3162.3-3(e)(2), *published at*, 78 Fed. Reg. at 31,675 (requiring submission within 30 days of completion of fracking operations of a Cement Evaluation Log, which may be a Cement Bond Log or other "class of tools that verify the integrity of annular cement bonding")).

147. 78 Fed. Reg. at 31,637.

148. *Id.*

149. *Id.* at 31,665.

150. *Id.* at 31,670.

subsequent to FLPMA.<sup>151</sup> Thus, according to the BLM, the Secretary's authority to regulate leasing on Indian lands under the IMLA and the IMDA is reaffirmed by FLPMA, and "the Secretary, through the [IMLA and IMDA] regulations promulgated by the Bureau of Indian Affairs ("BIA"), has assigned to the BLM part of the Secretary's trust responsibilities to regulate oil and gas operations on those Indian lands."<sup>152</sup> To the extent such regulations are viewed by tribes as in conflict with tribal sovereignty, the Agency noted that other regulations already apply to oil and gas development on Indian lands, citing the IMLA and IMDA regulations.<sup>153</sup>

Lastly, although the BLM "embrace[d]" the federal policies supportive of tribal self-determination, the Agency noted in publishing the revised rule that it had "consistently interpreted" the Secretary's authority to promulgate rules and regulations under the IMLA to "allow[] uniform regulations governing mineral resource development on Indian and Federal lands" and thereby prohibit treating tribes differently by allowing a tribal opt-out or delegation provision.<sup>154</sup> However, the revised rule suggested that tribes could assert greater control through the authority of other federal statutes, such as contracting to assume some of the BLM's programs pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA").<sup>155</sup> In addition, the revised rule allowed the BLM to consider a variance "that would allow compliance with . . . tribal requirements to be accepted as compliance with the rule, if the variance meets or exceeds th[e] rule's standards."<sup>156</sup> In support of the BLM's unwillingness to recognize tribal authority and exempt tribal lands from the rule, the BLM maintained that such an exemption "would require the Secretary . . . to conclude . . . that usable waters in Indian lands, and the persons who use such waters, are less deserving of protection than waters and water users on Federal lands."<sup>157</sup> In other

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151. *Id.* at 31,669 (citing 43 U.S.C. § 1731(a), (b) (2012)).

152. *Id.*

153. *Id.* (The BLM did not mention the role that tribal input played in the development of those earlier IMLA and IMDA regulations).

154. *Id.* at 31,640.

155. *Id.* Although the ISDEAA allows for the assumption of federal administrative functions, it does not provide a delegation of federal authority or recognition of broader tribal regulatory authority. Instead, in the performance of ISDEAA contracts, "[u]ltimate control remains within the federal government." Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 786 (2006).

156. *Id.*

157. 78 Fed. Reg. at 31,669.

words, the BLM could not fulfill its perceived duty to protect Indian resources by allowing tribes to assume responsibility for such protection.

In crafting the revised rule, the BLM thus refused to consider whether the revised rule should treat Indian lands differently than federal lands. Instead, the BLM doubled down on the need for uniform protection across both federal and Indian lands and its perceived need for ongoing consistency of statutory interpretation supportive of such uniformity. Under the revised rule, therefore, tribes remained subject to the BLM's regulatory authority but could seek a variance from certain provisions, provided tribal regulations were more stringent than the BLM's revised rules, or utilize other means to assume responsibility for carrying out the BLM's functions. But the proposed rule neither recognized nor allowed tribes to assume any additional regulatory authority over fracking. As the BLM might have anticipated, the revised rule did not satisfy many tribes.

#### *D. Tribal Response to the Supplemental Rule*

Predictably, and notwithstanding the BLM's efforts to streamline the administrative burdens from the initial proposed rule, tribes remained concerned about the revised rule. Energy development-focused tribes like the MHA Nation and the Ute Indian Tribe reiterated their arguments about the lack of statutory basis for the BLM's rule and maintained their positions that the rule would greatly affect, if not eliminate, development on their reservations.<sup>158</sup> In addition, the National Congress of American Indians ("NCAI"), a national association of Indian tribes established in 1944, weighed in on behalf of its member tribes and urged the BLM to engage in meaningful consultation.<sup>159</sup> The NCAI noted the passage of

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158. MANDAN, HIDATSA, AND ARIKARA NATION, THREE AFFILIATED TRIBES, FORT BERTHOLD INDIAN RESERVATION, COMMENTS ON REVISED PROPOSED RULE FOR OIL AND GAS; HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LANDS (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5681>; UTE INDIAN TRIBE, COMMENTS ON SUPPLEMENTAL NOTICE OF PROPOSED RULE FOR OIL AND GAS; HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LANDS (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5658>.

159. Letter from Jackie Pata, Exec. Dir., Nat'l Cong. of Am. Indians to Neil Kornze, Principal Deputy Dir., Bureau of Land Mgmt. (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-4214> [hereinafter NCAI Comments].

two separate resolutions at two of its national tribal conferences, each of which demanded that the BLM engage in further dialogue with tribes.<sup>160</sup>

While the NCAI's comments also mentioned the impacts of the revised rule on energy development in Indian Country, other tribes expressed greater concern over the impacts of the revised rule on their authority to regulate and restrict fracking on their lands. The Standing Rock Sioux Tribe ("Standing Rock") of North Dakota, for example, blasted the revised rule for its failure to comply with the federal government's trust obligation to tribes because the rule did not adequately protect Standing Rock's water resources, public health, or environment.<sup>161</sup> In addition, Standing Rock expressed grave concern that the BLM lacked adequate authority to effectively enforce the less-than-adequate protections provided by the revised rule.<sup>162</sup> In doing so, Standing Rock noted that "[t]ribal sovereignty is jeopardized when federal agencies impose rules governing Indian Country."<sup>163</sup> Instead, the "BLM should defer to Tribal law [sic] for compliance purposes, consistent with the federal trust responsibility."<sup>164</sup>

Like Standing Rock, the Assiniboine and Sioux Tribes of the Fort Peck Reservation ("Fort Peck Tribes") of Montana, whose lands lie on the western edge of the Bakken field and, at the time, faced significant potential development,<sup>165</sup> supported the need for additional

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160. *Id.*

161. STANDING ROCK SIOUX TRIBE, STANDING ROCK SIOUX TRIBE - COMMENTS ON PROPOSED RULE FOR HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LAND 1 (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5573>.

162. *Id.* at 4-5.

163. *Id.* at 4.

164. *Id.* at 5; *see also* Letter from Sally J. Kniffin, Env'tl. Specialist, Saginaw-Chippewa Indian Tribe to Dir., Bureau of Land Mgmt. (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-0139>; E. SHOSHONE TRIBE, EASTERN SHOSHONE TRIBE'S COMMENTS ON PROPOSED RULE: OIL AND GAS; HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LANDS (Aug. 23, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5575>.

165. Since 2013, the falling price of oil has virtually eliminated the prospect of economic gains from oil and gas development on the reservation of the Fort Peck Tribes. *See* Matthew Frank, *Over a Barrel: The Boom and Bust, the Promise and Peril, of the Bakken*, MISSOULA INDEPENDENT (Mar. 24, 2016) *available at* <http://missoulanews.bigskypress.com/missoula/over-a-barrel/Content?oid=2744707>.



protection from the risks posed by fracking.<sup>166</sup> In commenting on the revised rule, the Fort Peck Tribes provided detailed critiques of many of the substantive provisions and offered their own perspective based on their experience with regulating fracking on their lands.<sup>167</sup> The Fort Peck Tribes' comments also highlighted the inadequacy of the new variance process proposed by the revised rule.<sup>168</sup> In May 2012, the Fort Peck Tribes adopted their own requirements for oil and gas leases on the reservation, which would mandate the use of best management practices for noise and light pollution, protection of ground and surface water, and other development operations.<sup>169</sup> The Fort Peck Tribes noted that the revised rule appeared to allow for the adoption of these tribal rules as "variances" by the BLM; however, it was "immediately apparent that a procedure of some sort [was] necessary."<sup>170</sup> With oil development "loom[ing] across [the Fort Peck] Reservation's border," the revised rule left the Fort Peck Tribes looking for a "place to initiate [a] dialogue" with BLM on the adoption of a variance that could incorporate their own tribal standards for ensuring protection of their lands.<sup>171</sup>

Therefore, although the BLM revised its initial proposed rule to reduce administrative burdens, the revised rule still fell short of tribal expectations both for tribes seeking to expedite energy development and those desiring greater regulatory authority to restrict such development and ensure protection of their lands from the risks of fracking. In addition, although the BLM touted the inclusion of a rule allowing the Agency to approve a variance for tribes, there was no process for discussing or incorporating such variances into the BLM rule, nor did the revised rule suggest that a variance would support tribal authority. Thus, although tribes had, in the time between the initial proposed and the revised rule, sought additional consultation with the BLM and consistently urged the Agency to demonstrate greater deference to tribal sovereign authority, the revised rule did little to accommodate tribal

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166. FORT PECK TRIBE OFFICE OF ENVTL. PROT., COMMENTS ON THE PLB'S PROPOSED RULE: "OIL AND GAS; HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LANDS" (Aug. 28, 2013), *available at* <http://www.regulations.gov#!documentDetail;D=BLM-2013-0002-5719>.

167. *Id.* at 5 (discussing use of open pits).

168. *Id.* at 15.

169. *Id.* at 16-18 (Resolution #26-790-2012-05 and the accompanying best management practices are attached to the Fort Peck Tribes' comment letter to BLM).

170. *Id.* at 15.

171. *Id.*

concerns.<sup>172</sup> After another extended comment period on the revised rule closed on August 23, 2013, tribes awaited the next efforts of the BLM.<sup>173</sup>

### *E. The Final Rule*

The BLM published its final rule on March 26, 2015, nearly two years after it had published the revised rule and almost five years since Secretary Salazar held the initial public forum on fracking.<sup>174</sup> The information published with the Final Rule largely tracked that of the revised rule and the substance of the Final Rule itself included only slight variations on the requirements proposed by the revised rule.<sup>175</sup> The Final Rule's significant substantive changes allowed some additional

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172. These concerns were neatly summed up by the NCAI's comments on the revised rule, which demanded that any rule issued by BLM:

- Respect that the United States has a unique legal and political relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and federal statutes. These relationships extend to the federal government's historic preservation activities, mandating that federal consultation with tribes be meaningful, in good faith, and entered into on a government-to-government basis;
- Acknowledge the sovereign authority of Indian tribes to make decisions about activities occurring on their own lands by ordinance, resolution, or other action authorized under such constitution or bylaw;
- Provide assistance, either directly or through contract, to interested Indian tribes in the development of tribal regulatory capacity and the development of tribal hydraulic fracturing regulations; and that the proposed regulation's provision on variances should be amended to provide that tribal regulation and procedures may replace the federal regulations, provided that the tribal regulations are consistent with the objectives of the federal regulations;
- Affirm that Indian lands are not public lands as defined in the Federal Land Policy and Management Act of 1976; and
- Allow tribes to opt out of federal regulation and use their own regulations so that tribal regulatory authority is maximized and regulatory duplication is avoided.

NCAI Comments, *supra* note 159, at 2.

173. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, Supplemental Notice of Proposed Rulemaking, Extension of Comment Period, 78 Fed. Reg. 34,611 (June 10, 2013).

174. 80 Fed. Reg. 16,128.

175. Compare, e.g., 78 Fed. Reg. 31,637, with 80 Fed. Reg. at 16,128.

flexibility for testing wellbore integrity, revised the disclosure requirements for fracking chemicals, and, subject to very limited exceptions, required the storage of fracking wastewater in tanks instead of lined pits.<sup>176</sup> The Final Rule also offered some additional clarity on the revised rule's variance provisions and added language specifically prohibiting appeal of the BLM's decision on a proposed variance, which decision remained solely within the Agency's discretion.<sup>177</sup>

As had the minimal substantive changes made to the revised rule by the Final Rule, the BLM's justification for the Final Rule and treatment of the issues raised by tribes throughout the rulemaking process largely tracked the Agency's earlier statements.<sup>178</sup> Like the revised rule, the Final Rule largely relied upon the BLM's stated need to update its own regulations in light of the expanding use of fracking and set forth the cost-benefit analysis of the Rule. A separate Regulatory Impact Analysis published contemporaneously with the Final Rule cited to "Public Concern" expressed at its 2010 public forum and follow-up public meetings in 2011.<sup>179</sup> The Regulatory Impact Analysis also detailed the estimated cost impacts of the Final Rule and concluded that, across all tribal lands, the additional annual incremental cost of the Rule would be approximately ten million dollars, with the greatest impacts on the Ute Indian Reservation (1.2 million dollars) and the Fort Berthold Reservation of the MHA Nation (6.6 million dollars).<sup>180</sup> Nowhere did the BLM's Regulatory Impact Analysis consider or even mention tribal concerns regarding the effect that the Final Rule may have on tribal sovereignty.

Similarly, the Final Rule summarily dismissed tribal input regarding the need to treat Indian lands separately and differently from federal lands. Repeating its refrain from the revised rule, the BLM stated in the Final Rule that it viewed treating federal and Indian lands differently as inconsistent with its "responsibilities under [the] IMLA," specifically the provision authorizing the Secretary to promulgate

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176. 80 Fed. Reg. at 16,129-30.

177. *Id.* at 16140, 16,221.

178. *Compare, e.g.*, sections describing the Agency's compliance, with Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), and Consultation and Coordination with Indian Tribal Governments from the Revised Rule, 78 Fed. Reg. 31,669, 31,669-70, and Final Rule, 80 Fed. Reg. at 16,211-12.

179. U.S. BUREAU OF LAND MGMT., REGULATORY IMPACT ANALYSIS FOR HYDRAULIC FRACTURING RULE 8 (Mar. 26, 2015), available at <http://www.regulations.gov/#!documentDetail;D=BLM-2015-0001-0002>.

180. *Id.* at 83-84, 87.

regulations applicable to mineral development on Indian lands.<sup>181</sup> The BLM also reiterated that its authority for regulating Indian lands stemmed from laws other than FLPMA.<sup>182</sup> In an enlightening departure from the justification for the revised rule, however, the BLM included with the publication of the Final Rule a new section addressing “Tribal Issues” in which the Agency admitted that, while adoption and implementation of the Final Rule would not be “the only possible way to carry out the Secretary’s trust responsibilities under the Indian mineral statutes,” the BLM viewed establishing a parallel regulatory scheme within the BIA as the only other option.<sup>183</sup> The BLM also made clear its view of the federal trust responsibility toward tribes, stating that “[t]he BLM believes it is fulfilling its part of the Secretary’s trust responsibilities by requiring operations on Indian lands to meet the same standards as those on federal lands.”<sup>184</sup> This conception of the trust responsibility further prevented the BLM from considering any means to allow greater exercise of tribal authority under the Final Rule because “the BLM has no way of terminating the Secretary’s trust responsibilities for hydraulic fracturing operations if a tribe were to opt-out [of the Final Rule] or if the BLM [deferred to] a tribe . . . implementing its own program.”<sup>185</sup> Thus, in the BLM’s view, the Agency’s application of a uniform standard to both federal and Indian lands constituted the fulfillment of its trust responsibility and anything less than ensuring such uniform protection, even in recognition of tribal authority, would be an abdication of that responsibility.

The “Tribal Issues” section continued with the BLM’s response to tribal criticism of the proposed variance provisions, noting that some tribes had suggested that those provisions did not comply with “policies promoting tribal sovereignty, self-determination, and the . . . trust responsibility.”<sup>186</sup> The BLM again stated that it viewed the Final Rule as fulfilling the federal government’s trust responsibility by ensuring identical protections for Indian and federal lands.<sup>187</sup> In addition, because the variance provisions allowed the Agency to consider applying tribal regulations if stricter than the Final Rule’s requirements, those provisions

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181. 80 Fed. Reg. at 16,132 (citing 25 U.S.C. §396(d)).

182. *Id.* at 16,137, 16,184.

183. *Id.* at 16,185.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

“accord[ ] with tribal self-determination to the extent that could be expected from a rule governing hydraulic fracturing operations.”<sup>188</sup>

The Final Rule confirmed the BLM’s commitment to updating its fracking regulations and doing so in a manner that prioritized uniformity across federal and Indian lands without any significant distinction. As with the initial proposed and then revised rule, the BLM highlighted public input received in 2010 and 2011 as justification for the Final Rule and largely dismissed or minimized tribal input received through the Agency’s reactive consultations, begun in January 2012. Critically, the Final Rule also cemented the BLM’s view of its trust responsibility to Indian tribes as ensuring protection of their resources to the same extent the resources of public lands are protected and, because of that responsibility, there could be no room for the Final Rule to defer to tribal authority over Indian lands.

Importantly, as this detailed review of the process leading to the Final Rule demonstrates, tribes were largely uniform in their criticism of the BLM’s inflexible approach to regulating on Indian lands even though their individual tribal interests varied. Comments from the tribes facing the greatest potential economic impacts, like the Ute Indian Tribe and the MHA Nation, and those primarily concerned with potential environmental impacts, like Standing Rock, both emphasized the need for increased tribal authority to ensure appropriate regulation of fracking on Indian lands. Short of broad recognition of tribal authority, tribes also expected to be afforded a greater role in consulting and coordinating with the BLM in the development of appropriate standards for their lands. Unlike the broader policy debate over the risks and benefits of fracking, the BLM’s Final Rule and the process through which the Agency developed that rule raised significant issues for tribes, regardless of each tribe’s position on fracking. These issues centered on the BLM’s misconception of the unique federal-tribal relationship and the Agency’s respect for tribal sovereignty and self-determination. As described in the next section, the BLM’s approach was more consistent with a bygone era of federal-tribal relations and failed to align with the federal government’s growing recognition that its trust responsibility requires support for and promotion of tribal sovereignty. This incongruence is particularly acute when analyzing the Final Rule according to the BLM’s standards for tribal consultation, the Final Rule’s statutory authority, and how other agencies view the federal trust responsibility with respect to the promulgation of their rules and regulations.

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188. *Id.*

## V. AN UNFORTUNATE THROWBACK

By failing to adequately account for tribal concerns in developing the Final Rule, the BLM's efforts mark an unfortunate return to the bad old days of federal dominance and paternalism in Indian affairs. The roots of such paternalism were sewn in Chief Justice Marshall's characterization of tribes as "domestic dependent nations" and, although federal policy swung wildly back and forth between the extremes of removal, assimilation and allotment, reorganization and termination of tribes over nearly the next 150 years, the underlying tenet of each of those policies was that tribes were generally incapable of handling their own affairs.<sup>189</sup> Even in the 1930s era of the Indian Reorganization Act, when the federal government sought to enhance tribal sovereign authority through the restoration of tribal lands and support of tribal governments, the terms of many tribal constitutions required federal review and approval and the BIA maintained a significant and dominant presence on many reservations.<sup>190</sup>

Following the failure of the federal termination policies of the 1950s, the historical notions of federal dominance and paternalism were largely repudiated with the dawn of the self-determination era in the mid-1970s. As President Richard M. Nixon made clear in his landmark 1970 address to Congress on Indian affairs, neither termination nor overbearing federal paternalism is the right approach to Indian affairs:

Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-

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189. The schizophrenic history of federal Indian policy has been well documented. See COHEN'S HANDBOOK, *supra* note 1, at §§ 1.03-1.06, 23-93. With regard to paternalism in particular, see Tadd M. Johnson & James Hamilton, *Self-Governance of Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1252-622 (1995).

190. CHARLES WILKINSON, BLOOD STRUGGLE 62, 190-91 (2006). The historic relationship between the BIA and tribes explains the BIA's alternate but oft-heard name around Indian Country: "Bossing Indians Around." See, e.g., Deborah Ziff, *A 'Historic Day' at Pueblo*, ALBUQUERQUE JOURNAL (Mar. 15, 2013), available at <http://www.abqjournal.com/178475/news/a-historic-day-at-pueblo.html> (quoting then-Assistant Secretary for Indian Affairs Kevin Washburn as recognizing that "not that long ago . . . tribal leaders complained that BIA stood for 'Bossing Indians Around'"); Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 4-15 (2004).

determination among the Indian people can and must be encouraged without the threat of eventual termination.<sup>191</sup>

In calling for a new federal commitment to tribal self-determination, President Nixon noted that the policy was “what the Indians themselves have long been telling us” and that it was time to “create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”<sup>192</sup>

The federal commitment to self-determination called for by President Nixon in 1970 resulted in significant changes in the federal-tribal relationship, although those changes came gradually. For example, the 1975 passage of the ISDEAA authorized tribes to contract with the federal government to assume responsibility over various federal programs provided for Indians.<sup>193</sup> Tribes have used these agreements to take on administrative functions related to management of natural resources, such as forest and rangelands, which had previously been performed by the BIA.<sup>194</sup> This assumption of greater responsibility, if not greater authority,<sup>195</sup> enhanced tribal management capability and although the federal agencies tasked with carrying out this commitment have often frustrated the practice of engaging in self-determination, particularly on funding issues,<sup>196</sup> the ISDEAA thereby began a gradual shift of the federal-tribal relationship away from its traditional federal paternalism.

This shift in the federal-tribal relationship also played out in the context of energy development. The IMDA was passed in 1982—just seven years after ISDEAA—and was largely the result of tribal efforts to assume greater control over mineral leasing than allowed by the

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191. Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564, 567-76 (July 8, 1970) (President Richard M. Nixon).

192. *Id.* at 565; *see also*, WILKINSON, *supra* note 190, at 189-90 (quoting tribal leader questioning federal oversight in 1919).

193. 25 U.S.C. §§ 450a, 450b(j) (2012) (these contracts are often referred to as “638 contracts” in light of the ISDEAA’s public law number, 93-638).

194. *See* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1 (2015).

195. *See, e.g.*, Washburn, *supra* note 155, at 786 (existing self-determination efforts are important to shift “day-to-day control” over federal funds to tribes even if they do not “disrupt the allocation of power between the federal government and tribes.”)

196. *See, e.g.*, *Cherokee Nation v. Leavitt*, 543 U.S. 631, 638 (2005); Johnson & Hamilton, *supra* note 189, at 1263-78; Strommer & Osborne, *supra* note 194, at 48-61.

Reorganization-era IMLA.<sup>197</sup> As a result, although the IMDA still requires secretarial approval of mineral development agreements and consideration of whether those agreements are in the tribe's best interests,<sup>198</sup> tribes were able to engage in much broader and more independent negotiation of agreements related to the development of their mineral resources. Thus, tribes could move from passive lessors of their minerals to active participants in their development.<sup>199</sup>

More recent efforts further emphasized tribal self-determination and sovereignty over energy development on tribal lands. The 2005 Indian Tribal Energy Development and Self-Determination Act ("ITEDSDA") authorized Tribal Energy Resource Agreements ("TERA"), which once negotiated and entered into between an Indian tribe and the Secretary, would authorize a tribe to enter into a variety of energy-related agreements, such as leases and rights-of-way, without subsequent secretarial approval of each individual agreement.<sup>200</sup> Although a complex capacity determination and application process, among other issues, have so far deterred any tribe from entering a TERA, the ITEDSDA's expansion of tribal authority over energy development is representative of the continuing evolution of the self-determination era.<sup>201</sup> The Helping Expedite and Advance Responsible Tribal Homeownership Act ("HEARTH Act"),<sup>202</sup> enacted in 2012, represents a similar landmark of federal commitment to tribal self-determination. Pursuant to the HEARTH Act, a tribe can approve leases of its surface lands, so long as the Secretary has approved the tribe's rules for doing so and those rules are "consistent with" federal leasing regulations.<sup>203</sup>

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197. See Carla Fredericks, *Plenary Energy*, 118 W. VA. L. REV. 789, 798-802 (2015).

198. 25 U.S.C. §§ 2102(a), 2103(b) (2012).

199. See Royster, *supra* note 73, at 585-89.

200. 25 U.S.C. §§ 3501-3506 (2012).

201. GAO-15-502, *supra* note 98. Although supportive of tribal self-determination, the ITEDSDA's implementing regulations prevent tribes from assuming responsibility for "inherently Federal functions." 25 C.F.R. § 224.52(c) (2008). The precise definition of this term remains unclear as does the scope of federal regulations that would remain applicable to a tribe that has entered a TERA. GAO-15-502, *supra* note 98, at 32-33. Thus, despite the Agency's suggestion in the Final Rule that tribes could "assert more control over oil and gas operations on tribal land by entering" a TERA, tribes may be unable to assume any of BLM's regulatory authority over fracking under a TERA, particularly in light of BLM's view of its duty to provide federal oversight for fracking. 80 Fed. Reg. at 16,132.

202. 25 U.S.C. § 415(h) (2012).

203. *Id.* § 415(h)(3)(B)(i). The HEARTH Act is limited to the lease of tribal surface lands and does not currently address mineral leasing. Even if mineral



Unlike TERAs, over twenty tribes have taken advantage of the HEARTH Act and exercise largely independent authority to lease their surface lands.<sup>204</sup>

Thus, the shift away from federal paternalism and toward federal support of tribal governance and sovereignty has now pervaded federal policy for a generation. As tribes have exercised expanding authority, their capacity for doing so successfully has correspondingly expanded as well. This expansion in the exercise of actual sovereignty, real nation building, has proven to have significantly positive economic and social effects.<sup>205</sup>

Ultimately, when viewed in light of the continuing efforts of the federal government to promote tribal authority and self-determination, the BLM's response to concerns over the Final Rule raised by tribes through the rulemaking process is, at best, a throwback to earlier policy eras of federal dominance. The inappropriateness of this approach is particularly clear when analyzed in the context of the Agency's obligations to tribal consultation, adherence to statutory authority, and the trust responsibility.

#### A. Tribal Consultation

The federal government's commitment to consultation with tribal governments is not a new phenomenon, as evidenced by Congress' 1982 mandate to the Secretary in the IMDA.<sup>206</sup> After reviewing a comprehensive history of the federal government's approach to tribal consultation, from treaty-making to self-determination era statutory requirements and recent court decisions, Professor Robert Miller concluded that "the duty of federal consultation and consent with Indian nations is a very well established legal principle in the history, statutes,

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leasing were to be included in the HEARTH Act, tribal leasing regulations would likely need to include reference to the BLM's regulations in order to maintain "consistency" with the current IMDA and IMLA leasing regulations.

204. GAO-15-502, *supra* note 98, at 1 n.33; Bureau of Indian Aff. *HEARTH Act of 2012*, U.S. DEP'T OF THE INTERIOR, <http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm> (last visited December 18, 2015).

205. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 6-7 (Miriam Jorgensen, ed. 2007) (comparing the "Nation Building Approach" with the "Standard Approach" that dominated two centuries of federal Indian policy and concluding that the former "works" while the latter "has proven a failure").

206. 25 U.S.C. § 2107; *see infra* Section III.B.

administrative regulations, and case law of the United States.”<sup>207</sup> Other commentators have suggested that the duty of the federal government to consult with Indian tribes should be considered a necessary procedural component of the federal government’s trust responsibility.<sup>208</sup>

In conjunction with the self-determination era, the Executive Branch has in recent years committed to ensuring consultation with Indian tribes regarding matters that may affect their interests. This commitment is expressed through a series of Executive Orders and Memoranda issued by President William J. Clinton,<sup>209</sup> and reaffirmed by Presidents George W. Bush<sup>210</sup> and Barack H. Obama.<sup>211</sup> President Obama’s 2009 Presidential Memorandum demanded of his Administration “regular and meaningful consultation and collaboration with tribal officials in policy decision that have tribal implications.”<sup>212</sup> In order to carry through on that mandate, the Memorandum reaffirmed President Clinton’s earlier Executive Order and required that each Executive agency develop “a detailed plan of actions” to implement that Executive Order within 90 days of November 9, 2009.<sup>213</sup> Largely in response to that directive, the DOI published notice and sought comments on a proposed Department of the Interior Policy on Consultation with Indian Tribes.<sup>214</sup> Secretary Salazar issued the DOI’s

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207. Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N.D. L. REV. \_\_\_\_, at \*17 (2015) (forthcoming publication), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2666687](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666687).

208. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 435-36 (2013).

209. Enhancing the Intergovernmental Partnership, Exec. Order No. 12,875, 58 Fed. Reg. 58,903 (Oct. 26, 1993); Government to Government Relationships with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994); Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 2006); Consultation and Cooperation with Indian Tribal Government, Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

210. Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004).

211. Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 Fed. Reg. 57,879 (Nov. 9, 2009); see also Miller, *supra* note 207, at \*17-20.

212. 74 Fed. Reg. at 57,881.

213. *Id.*

214. Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446 (May 17, 2011).

policy through Secretarial Order 3317 on December 1, 2011.<sup>215</sup> The requirements of the departmental policy were incorporated into the Department's Manual of Operations ("Departmental Manual") on November 9, 2015.<sup>216</sup>

Like the broader requirements of the Executive Order and Presidential Memorandum, the Departmental Manual requires that agencies within the DOI are "open and candid with tribal government(s) during consultations and incorporate tribal views in their decision making processes."<sup>217</sup> The Manual further requires that consultation begin "as early as possible when [an agency is] considering a Departmental action with tribal implications and provide Indian tribes a meaningful opportunity to participate in the consultation process."<sup>218</sup> Furthermore, the Manual encourages the use of various methods of engagement, including negotiated rulemaking.<sup>219</sup> Each of these requirements track the directives of Executive Order 13,175, issued in 2000.<sup>220</sup>

Importantly, Executive Order 13,175 and the subsequent Obama Presidential Memorandum disclaim the creation of any legally enforceable right or benefit by virtue of the establishment of the consultation requirements.<sup>221</sup> In light of these disclaimers, tribes have often relied upon separate statutory authorities requiring consultation, such as the National Historic Preservation Act ("NHPA"), to support challenges to federal agency action based on a lack of adequate

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215. U.S. SEC'Y OF THE INTERIOR, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES, ORDER NO. 3317 (Dec. 1, 2011), *available at* <https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf>.

216. DEP'T OF THE INTERIOR, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS pt. 512, ch. 4 (Nov. 9, 2015), *available at* <http://elips.doi.gov/ELIPS/DocView.aspx?id=4220> [hereinafter POLICY ON CONSULTATION]; DEP'T OF THE INTERIOR, PROCEDURES FOR CONSULTATION WITH INDIAN TRIBES pt. 512, ch. 5 (Nov. 9, 2015), *available at* <http://elips.doi.gov/ELIPS/DocView.aspx?id=4218> [hereinafter PROCEDURES FOR CONSULTATION].

217. PROCEDURES FOR CONSULTATION, *supra* note 216, at pt. 512, ch. 5.4(A).

218. *Id.* at pt. 512, ch. 5.5(A)(1).

219. *Id.* at pt. 512, ch. 5.5(A)(2); *see also* 5 U.S.C. §§ 561-570a (2012).

220. *Compare, e.g.*, PROCEDURES FOR CONSULTATION, *supra* note 216, at pt. 512, ch. 5.5(A)(1), *with* Exec. Order No. 13,175, § 5(b)(2)(A), 65 Fed. Reg. at 67,250.

221. Exec. Order No. 13,175, § 10, 65 Fed. Reg. at 67252; Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 Fed. Reg. 57,881, 57,882 (Nov. 5, 2009).

consultation.<sup>222</sup> That act and its implementing regulations focus on the necessity to ensure adequate tribal input before the approval of projects by a federal agency that may impact areas of historical or cultural significance.<sup>223</sup> Tribes have successfully pursued injunction of certain federal actions where the federal agencies authorizing those actions failed to comply with the statutory or regulatory standards.<sup>224</sup> Even in these instances, however, detailed judicial review of the quality of tribal consultation efforts by federal agencies can be rare.<sup>225</sup>

Nonetheless, a United States Federal District Court Judge for the District of Wyoming, in preliminarily enjoining the Final Rule based on a challenge filed by numerous states and joined by the Ute Indian Tribe, found “merit” in the Ute Indian Tribe’s argument that the BLM’s tribal consultation on the Final Rule failed to comply with the terms of the Department of Interior Manual.<sup>226</sup> In doing so, the court relied upon the timing of the BLM’s consultation and specifically noted that the BLM had already engaged in significant public discussion and drafted the rule before seeking to consult with tribes.<sup>227</sup> This offered the tribes opportunity for input that amounted to “little more than that offered to the public in general” and was not the “extra, *meaningful* efforts” required by the Department Manual.<sup>228</sup> In addition, the district court found it critical that tribal consultation resulted in only two minimal changes to the Final Rule from the revised version that had been previously proposed.<sup>229</sup> Based on these findings, the court concluded the BLM’s failure to comply with the Departmental Manual amounted to an “arbitrary and capricious action” on which the Ute Indian Tribe would likely prevail.<sup>230</sup>

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222. 54 U.S.C. § 302706(b) (2012); Miller, *supra* note 207, at \*15-17 nn.80-92 (collecting cases).

223. 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2-800.6.

224. *See, e.g.*, Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006); Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep’t of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

225. *See* Miller, *supra* note 207, at \*16 (suggesting possibility that Quechan Tribe “will be seen as an outlier because of the strict requirements and close scrutiny the court imposed on the BLM”).

226. *Wyoming*, 2015 WL 5845145, \*15 (considering the consultation argument under standard for preliminary injunction requiring consideration of the likelihood of success on the merits and without a full administrative record).

227. *Id.*

228. *Id.* at \*17 (emphasis in original).

229. *Id.*

230. *Id.* (citations omitted).

The district court's findings on tribal consultation were based only upon the standards for a preliminary injunction, which were argued by the parties with the benefit of an entire administrative record.<sup>231</sup> In addition, the federal and intervenor defendants have each appealed the court's preliminary injunction and the federal appellants have argued that their own consultation policies are not legally binding.<sup>232</sup> Although the viability of the district court's initial assessment of the BLM's adequacy of tribal consultation in preparing the Final Rule is, at best, uncertain, it underscores the legitimacy of the tribal concerns over the consultation process expressed throughout the BLM's rulemaking.

At a minimum, the timing of the BLM's consultation outreach to tribes supports reconsideration of the Final Rule as it applies to tribes. In developing its approach to regulations regarding fracking, the Agency first held one public forum and four public meetings in late 2010 and 2011, then drafted the initial rule and only then used the subsequent tribal consultations to inform tribes of its efforts.<sup>233</sup> This was a far cry from the drafting of the initial IMDA regulations, which were circulated to tribes and tribal interest groups and revised based on their comments prior to being available for any public comment.<sup>234</sup> More recently, the BIA, when revising its regulations related to surface leases of Indian lands for residential, business, and renewable energy projects, distributed a preliminary copy of draft regulations for tribal comment and consultation, which the BIA considered and incorporated before subsequently publishing the initial proposed rule.<sup>235</sup> Furthermore, unlike the BLM's lack of willingness to significantly amend the Final Rule in response to tribal comments, the final structure and format of both the IMLA and the IMDA regulations, along with numerous substantive

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231. *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS, slip op at \*3 (D. Wyo. Dec. 17, 2015) (order den. mot. for final j. or stay of d. ct. proceedings pending appeal). The issues are now fully briefed on the merits and, as this article goes to publication, the matter is before Judge Skavdahl for consideration.

232. Opening Br. for the Fed. Appellants, *supra* note 112, at 48-49; *Wyoming v. Dep't. of the Interior*, No. 15-8126 (10th Cir. filed Nov. 27, 2015); *Wyoming v. Secretary Sally Jewell*, No. 15-8134 (10th Cir. filed Dec. 15, 2015).

233. 80 Fed. Reg. at 16,132.

234. Mining Regulations, Proposed Rule, 48 Fed. Reg. 31,978 (June 15, 1983); *see supra* Section III.B.

235. Residential, Business, and Wind and Solar Resource Leases on Indian Land, Proposed Rule, 76 Fed. Reg. 73,784, 73,786 (Nov. 29, 2011); *see infra* Section V.C.ii.

changes, were largely the result of changes made in response to tribal input.<sup>236</sup>

Beyond its shortcomings in comparison to prior regulatory drafting efforts, the BLM's tribal consultation also failed to align with the Agency's mandates. Although Secretarial Order 3317 was issued between the time of the public meetings and the initiation of tribal consultations, the BLM was still bound by Executive Order 13,175 and President Obama's 2009 Presidential Memorandum, both of which encourage early and meaningful tribal consultation. By failing to engage tribes in conjunction with its public outreach efforts in 2010 and 2011, the BLM eliminated any opportunity for tribes to help shape the direction of the Final Rule and, whether fairly or unfairly, created the perception that the rule was responsive to general public concerns and that tribal concerns were secondary. The subsequent failure of the BLM to separate tribal issues from the broader public lands application of the Final Rule further compounded this perception, rendering the Agency's follow-up attempts to consult with tribes essentially meaningless. As a result, the tribal consultation process that led to the Final Rule fell short of existing consultation standards and is even less sufficient when viewed in comparison to the efforts of the DOI to promulgate its current IMLA and IMDA regulations over thirty years ago and the more recent efforts of the BIA.<sup>237</sup>

Because the BLM's tribal consultation was flawed from the start of the Final Rule's promulgation, the Agency would be well-served to

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236. See *supra* Section III.B.

237. See *id.*; *infra* Section V.C.ii. The BLM's tribal consultation also pales in comparison to the emerging international law concept of free, prior and informed consent. See Miller, *supra* note 207, at \*29-45. As it relates to tribal consultation, the concept is most clearly embodied in Article 19 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which requires that "[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/259 art. XIX (Oct. 2, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). In announcing that the United States supports the UNDRIP, President Obama noted that "Washington can't – and shouldn't – dictate a policy agenda for Indian Country. Tribal nations do better when they make their own decisions." U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2, available at <http://www.state.gov/documents/organization/184099.pdf> (last visited Feb. 23, 2016).

return to the table with tribes, engage in detailed consultation regarding tribal concerns, which will vary from tribe to tribe, and reconsider the substance of the Final Rule as applied to Indian lands in light of those concerns.

### *B. Statutory Authority*

In crafting the Final Rule as applied to Indian lands, the BLM relied upon the general authority granted by the IMLA and the IMDA for the Secretary to promulgate regulations implementing those laws.<sup>238</sup> Supreme Court precedent allows federal agencies to exercise broad discretion in the drafting of regulations, provided the Agency acts within the bounds of its statutory authority.<sup>239</sup> Even if the IMLA and the IMDA grant the BLM broad discretion in crafting fracking regulations, however, Congress specifically intended those acts to promote tribal sovereignty and economic development, which are considerations distinct from those relevant to the management of federal public lands. By failing to recognize this distinction, the BLM's Final Rule fails to serve the interests intended by Congress to be promoted by the IMLA and the IMDA and is inconsistent with the purposes of the BLM's statutory authority, if not the authority itself.

#### *1. Purposes of the IMLA and the IMDA*

Just as the trust responsibility is rooted in historic decisions of the Supreme Court related to the federal relationship with Indian tribes, the Court is largely responsible for creating and recognizing Congress' plenary authority over Indian affairs.<sup>240</sup> The Court has upheld a variety of congressional actions related exclusively to Indian affairs, based on a broad reading of the Constitution's Commerce Clause and a promotion of the inherent authority of the federal government to address sovereign matters, such as treaty making.<sup>241</sup> Therefore, whether in exercise of the

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238. *E.g.*, 80 Fed. Reg. at 16,132.

239. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (“[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.”).

240. *See* COHEN'S HANDBOOK, *supra* note 1, at §§ 501[4], 5.02[1], 389-91.

241. *Id.* § 5.01[4], 390-91 n.53.

federal trust responsibility or to terminate it,<sup>242</sup> Congress has nearly universal authority to create federal law in order to address concerns specifically related to Indian Country.<sup>243</sup> The IMLA and the IMDA are each examples of exercises of Congress's plenary authority over Indian affairs in fulfillment of broader federal Indian policies.

The IMLA was enacted in 1938, just four years after the adoption of the Indian Reorganization Act of 1934 ("IRA").<sup>244</sup> The IRA ended the disastrous allotment of tribal lands and, instead, sought to change the course of federal Indian policy through the reinvigoration of tribal self-government. In furtherance of that policy, the IRA authorized tribes to adopt tribal constitutions and charter corporations.<sup>245</sup> The IRA also restored unallotted and unsettled tribal lands to federal protection on behalf of tribes.<sup>246</sup> Although not every tribe viewed the IRA as supportive of traditional tribal government authority, the IRA reversed the course of the federal government's prior assimilationist policies in favor of broader support for tribal governments.<sup>247</sup>

As an extension of the IRA's policies, the IMLA promoted tribal governmental authority by requiring tribal consent to mineral leases.<sup>248</sup> Congress also intended the IMLA to promote tribal economic development and, as a result, required the Secretary to utilize advertising and bidding procedures that would help ensure a positive economic return on IMLA leases.<sup>249</sup> Although the Supreme Court has determined that the Secretary has no fiduciary responsibility to maximize tribal revenues as a result of these directives, in doing so the Court noted that imposing such a duty would be inconsistent (in the Court's view) with the IMLA's intent to promote tribal self-determination.<sup>250</sup>

Congress' passage of the IMDA expanded the authority and ability of tribes to negotiate various types of agreements to pursue energy

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242. See, e.g., Pub. L. No. 83-280, 67 Stat. 588 (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321-1326 (2012)).

243. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903); *United States v. Sioux Nation*, 448 U.S. 371, 412-16 (1980).

244. 25 U.S.C. §§ 461-479 (2012).

245. *Id.* §§ 476, 477.

246. *Id.* § 463(a).

247. COHEN'S HANDBOOK, *supra* note 1, at § 1.05, 82-83.

248. 25 U.S.C. § 396a.

249. 25 U.S.C. § 396b (requiring advertisement of leases and consideration of the "highest qualified bidder", subject to consideration by the Secretary of whether awarding a lease to such bidder would be in Indian's best interests or consent by the Indians to a privately negotiated lease).

250. *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003).



development.<sup>251</sup> These agreements, including joint ventures, operating, production sharing, service or other agreements, sought to enhance tribal participation and involvement in mineral development beyond simply acting as a passive lessor under the IMLA.<sup>252</sup> This flexibility was intended ““first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources.””<sup>253</sup>

Similarly, the IMDA required that the Secretary consider the best interests of a tribe when reviewing a proposed IMDA agreement, including economic, environmental, and other factors.<sup>254</sup> Consideration of these tribal interests may also help the Secretary fulfill her statutory duty to advise a tribe about the viability of a potential IMDA agreement during negotiation of that agreement by the tribe.<sup>255</sup> While the IMDA’s statutory mandates and corresponding regulatory requirements may appear to create legally enforceable responsibilities for the Secretary, the IMDA also specifically waives the liability of the United States for “losses sustained by a tribe or individual Indian” under an IMDA agreement approved by the Secretary.<sup>256</sup> By excusing the United States from liability for an IMDA deal that results in losses to a tribe, the waiver recognizes the greater potential for risk posed by the variety of agreements authorized by the IMDA and the tribal role in negotiating those agreements.<sup>257</sup> In both the IMLA and the IMDA, therefore, Congress considered the challenges facing Indian Country, specifically the need to promote and support tribal authority and economic development, and passed legislation expressly aimed at those purposes.

## 2. Purposes of FLPMA

While the BLM cited the IMLA and the IMDA as authority supporting the promulgation of the Final Rule and its application to Indian lands, the Agency also proposed amending its existing regulations to incorporate FLPMA as separate authority supporting the Agency’s

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251. 25 U.S.C. § 2102.

252. *Id.*

253. *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1458 (9th Cir. 1986) (quoting S. REP. NO. 97-472, at 2 (1982)).

254. 25 U.S.C. § 2103(b).

255. *Id.* § 2106; *see also Quantum Exploration*, 780 F.2d at 1460-61.

256. 25 U.S.C. § 2103(e).

257. *See Royster, supra* note 73, at 591 (“[t]he intent of the hold-harmless provision is that if tribes wish to become partners in development, then tribes must take the risk of loss.”)

application of the rule to federal lands.<sup>258</sup> Like the IMLA and the IMDA, FLPMA demonstrates congressional intent to establish specific standards for management of natural resources by the Secretary. Unlike the Secretary's duties to fulfill Congress' intent to promote tribal self-determination and economic development, however, FLPMA provides that the Secretary must manage the "public lands under principles of multiple use and sustained yield."<sup>259</sup> Congress further required that the Secretary shall, "[i]n managing the public lands . . . by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."<sup>260</sup> Congress' policy in doing so was to ensure that the public lands would be managed to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values" but also to recognize the "[n]ation's need for domestic sources of minerals."<sup>261</sup> The Supreme Court has recognized that FLPMA's use of the "deceptively simple term," "multiple use management" therefore results in "the enormously complicated task of striking a balance among the many competing uses to which land can be put."<sup>262</sup> Although the nature of this balance can swing from development-oriented to more conservation-minded depending upon the political winds that blow, the interests that Congress demanded the Secretary to serve under FLPMA are those of the public, not Indian tribes. The balance to be weighed in managing the public lands, therefore, largely excludes tribal interests of the type specifically promoted by the IMLA and the IMDA in the management of Indian lands.<sup>263</sup>

The treatment of tribal interests in the management of federal lands demonstrates the distinction between public and tribal interests. Often, conflict arises over the "multiple use" of such lands by the public

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258. 80 Fed. Reg. at 16,141, 16,217.

259. 43 U.S.C. § 1732(a).

260. *Id.* § 1732(b).

261. *Id.* § 1701(8), (12).

262. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

263. In summarizing the statutory authority supporting the Final Rule, BLM Director Neil Kornze told a House Subcommittee that "[o]n net, this statutory regime requires the BLM to balance responsible development with protection of the environment and public safety." *Bureau of Land Management's Final Hydraulic Fracturing Rule*, *supra* note 104 (statement of Neil Kornze, Dir., Bureau of Land Mgmt., at 2-3), available at <http://naturalresources.house.gov/uploadedfiles/kornzetestimony.pdf>. Although he mentioned the IMLA, Kornze did not suggest that the Agency also needed to consider tribal self-determination or economic development.

and the desire of many tribes to maintain cultural and spiritual connections to their ancestral homelands and the sacred sites thereon, of which many tribes have been dispossessed.<sup>264</sup> Professor Rebecca Tsosie has forcefully argued for a broader interpretation of the Indian trust doctrine in this context, noting that although “Native peoples’ rights are often not differentiated in any meaningful way from the interests of other ‘stakeholders’” in the process of federal agency decision-making, those rights “must be differentiated from their rights as separate nations that have a trust relationship with the United States government.”<sup>265</sup> On this basis, Professor Tsosie maintains that where conflicts arise over the use of federal lands outside of Indian Country, “future solutions must respond to the cultural distinctiveness of Native nations, as well as their unique political status within the domestic federal system.”<sup>266</sup> While these considerations are largely ignored in the management of public lands, the congressional purposes behind the IMLA and the IMDA promote a different and more Indian trust oriented regulatory approach to Indian lands than FLPMA did for federal lands. Nonetheless, in promulgating the Final Rule, the BLM conflated its public land management responsibilities under FLPMA with its regulatory authority under the IMLA and IMDA.

The BLM did not distinguish between Indian and federal public lands under the Final Rule or in its proposed application. In justifying this decision, the BLM noted that its existing regulations applied to both types of land and that it viewed its obligations to tribes as requiring that their lands be protected to the same degree as public lands.<sup>267</sup> While

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264. *Lyng v. Nw. Indian Cemetery Prot. Ass’n*, 485 U.S. 439, 451 (1988) (citation omitted) (denying First Amendment claims of tribal members and associations asserted against the building of a road through an area of historical occupation and spiritual significance, the effect of which would “‘virtually destroy the . . . Indians’ ability to practice their religion’”); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (10th Cir. 2008) (denying that the spraying of treated sewage water on the San Francisco Peaks of Arizona, considered sacred by many local tribes and their members, would amount to a substantial burden on the exercise of their religion because such use of water would only affect their “subjective spiritual experience.”)

265. Rebecca Tsosie, *The Conflict between the ‘Public Trust’ and the ‘Indian Trust’ Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 300 (2003).

266. *Id.* at 310.

267. *See, e.g.*, 80 Fed. Reg. at 16,129 (“[I]like other BLM regulations, this final rule applies to oil and gas operations on public lands . . . , as well as operations on Indian lands, to ensure that these lands and communities all receive the same level of protection as provided on public lands.”).

acknowledging that the BLM could allow for separate regulations and regulatory oversight of tribal lands, the BLM felt its uniform approach was “more economic” than creating a parallel regulatory scheme within the BIA.<sup>268</sup> In addition, the BLM acknowledged that both state and tribal regulations may apply in conjunction with the Final Rule and allowed a process for considering specific variances to the Final Rule for both so long as those regulations were as stringent as the Final Rule’s requirements.<sup>269</sup> While claiming to respect the federal policy of tribal self-determination, the BLM viewed tribal governmental authority on the same basis as state governments and largely ignored the uniquely tribal interests promoted by the IMLA and the IMDA.

Similarly, although the Agency evaluated the economic impacts of the Final Rule on tribes and concluded that the rule “poses an incremental cost of about \$10 million per year” across Indian Country, the BLM did not analyze whether or how that additional incremental cost may impact tribal economic development as intended under the IMLA and the IMDA.<sup>270</sup> Instead, the BLM suggested that increased regulatory costs were just part of doing business on federal and Indian lands.<sup>271</sup> In addition, the BLM focused only on the potential effects of the Final Rule itself, stating that “[t]he rule would not render Indian lands more or less attractive than Federal lands.”<sup>272</sup> This narrow focus ignored the significant difference between the need for tribes to develop their homelands and economies and the much less critical economic pressures applicable to management of the public lands.<sup>273</sup> The myopic treatment of Indian and federal lands further overlooked applicability of the Final Rule in the context of express congressional intent to promote tribal economic development and failed to acknowledge the existing regulatory

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268. *Id.* at 16,185.

269. *Id.* at 16,221 (proposed 43 C.F.R. § 3162.3-3(k)).

270. *Id.* at 16,206-07. Industry groups have claimed the agency vastly underestimated the actual costs of the Final Rule; however, because the Rule is yet to be implemented, the exact costs of compliance are yet to be determined. *See* Michelle Ye Hee Lee, *You Can't Trust the Numbers on the New Fracking Regs*, WASH. POST (Mar. 30, 2015), available at <https://www.washingtonpost.com/news/fact-checker/wp/2015/03/30/you-cant-trust-the-numbers-on-the-new-fracking-regs/>.

271. 80 Fed. Reg. at 16,212.

272. *Id.* at 16,185.

273. *See, e.g.*, Bruce R. Huber, *The Fair Market Value of Public Resources*, 103 CAL. L. REV. 1515 (2015) (outlining the challenges and failures of the federal government to obtain fair market value for public resources in various contexts).

environment applicable to Indian lands, which, as the GAO recently reported, already creates significant barriers to development.<sup>274</sup>

Therefore, although the BLM enjoyed broad discretion in promulgating the Final Rule, in exercise of that discretion, it overlooked or discounted specific Congressional interests supporting tribal sovereignty and economic development in favor of a uniform regulatory scheme applicable to both Indian and federal lands. In doing so, the Agency ignored “considerations governing the administration of Indian-owned resources [that] are different from those involved in administering the public estate”—the very same considerations that Secretary of the Interior Thomas S. Kleppe relied on nearly forty years ago to call for revisions to the DOI’s coal mining regulations.<sup>275</sup> New rulemaking that, while incorporating a meaningful tribal consultation process, is also more sensitive to these specific and substantive tribal considerations would be more faithful to congressional intent.

### *C. Trust Responsibility*

Just as the Final Rule is inconsistent with the statutory purposes supporting the IMLA and the IMDA, it is also out of step with recent congressional actions related to energy development and rulemakings of other agencies regarding the management of tribal natural resources. In each of these areas, Congress and the BIA have sought to carry out their trust responsibility through the promotion of tribal authority rather than the expansion of federal oversight.

#### *1. Congressional Action Regarding Indian Energy Development*

Although the self-determination era is now nearly fifty years on from President Nixon’s message, the federal government continues to refine its approach to supporting and encouraging tribal self-determination. Through this evolution, the federal trust responsibility can be seen less as a duty to oversee and protect tribes and instead as an obligation to foster and encourage tribal sovereignty. This approach has been especially apparent with regard to recent enactments authorizing greater tribal management of energy and surface resources.

The ITEDSDA, passed in 2005, authorizes a tribe to negotiate and enter into a TERA with the Secretary that would allow the tribe to

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274. GAO-15-502, *supra* note 98.

275. Mining on Indian Lands: Mineral Development Contracts, Proposed Rules, 42 Fed. Reg. 18,083 (Mar. 30, 1977).

approve energy related leases, rights-of-way and other agreements for projects on Indian lands without secretarial approval. To do so, a tribe must demonstrate sufficient capacity for the oversight of such agreements and develop an approval process that includes an opportunity for and responds to public input.<sup>276</sup> In addition, the ITEDSDA waives any liability of the federal government resulting from any negotiated term of any agreement approved by a tribe pursuant to a TERA.<sup>277</sup> This waiver of liability, which is similar to but narrower than the waiver of federal liability under the IMDA, recognizes that the federal government is not responsible for the consummation of any agreement entered into by a tribe under its own authority pursuant to a TERA. While some have argued that the waiver of liability and elimination of federal oversight of energy-related agreements amounts to a reduction of the federal trust responsibility,<sup>278</sup> the ITEDSDA's broader policy of enhancing tribal governance and regulatory structures, albeit subject to certain conditions, demonstrates a shift away from the conception of the trust responsibility as mandating only federal oversight and protection of tribal resources.

This shift was further emphasized in the passage of the HEARTH Act in 2012. Like the ITEDSDA, the HEARTH Act empowers tribes to review and approve surface leases on their own lands without federal review and approval of each individual lease, provided the tribal process for doing so meets certain standards.<sup>279</sup> In general, the tribe's leasing regulations must be consistent with federal leasing regulations and, just like under a TERA, the tribe must provide an environmental review process similar to the NEPA process. The federal government is also excused from any liability associated with a tribally-approved lease.<sup>280</sup> In addition, the HEARTH Act provides an opportunity to petition the Secretary for review of a tribe's compliance with its regulations, provided tribal remedies have been exhausted.<sup>281</sup>

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276. 25 U.S.C. § 3504(e)(2)(c). For an analysis of ITEDSDA's place along the evolution of tribal control over mineral development and discussion of its downsides, see Judith Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008).

277. 25 U.S.C. § 3504(e)(6)(D)(ii).

278. Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended 'Great Mischief for Indian Energy Development' and the Resulting Need for Reform*, 29 PACE ENV'T L. REV. 811, 845-48 (2012).

279. 25 U.S.C. § 415(h).

280. *Id.*

281. *Id.*

As with the ITEDSDA, these requirements have generated criticism of the diminished federal role in protecting tribal resources;<sup>282</sup> however, the DOI offered tribes significant assistance in taking advantage of the HEARTH Act. For example, the BIA prepared a checklist,<sup>283</sup> provided a national policy memorandum setting forth detailed guidance,<sup>284</sup> and created a largely transparent review and approval process for proposed tribal regulations.<sup>285</sup> As a result, unlike the ITEDSDA, pursuant to which no tribe has yet entered a TERA, over twenty tribes are now reviewing and approving surface leases for their own lands without federal involvement under the HEARTH Act.<sup>286</sup>

Although neither would displace the BLM's Final Rule,<sup>287</sup> both the ITEDSDA and the HEARTH Act demonstrate the ongoing evolution of federal efforts to refocus the trust responsibility away from federal oversight and toward the promotion of tribal authority. These two examples are particularly relevant in comparison to the BLM's Final Rule because they demonstrate specific support for increased tribal regulatory authority over development on Indian lands. Unlike the ITEDSDA and the HEARTH Act, the Final Rule increases the federal role in review and approval of development activities on Indian lands without any opportunity to promote the tribal regulatory role. Although the BLM sought to emphasize that the Final Rule would not interfere or preempt tribal regulations and that the Rule's variance process allowed the Agency to consider whether tribal regulations could apply in limited instances, the Final Rule itself does not allow for the assumption of any

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282. Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development under the HEARTH Act: an Independently Rational but Collectively Deficient Option*, 55 ARIZ. L. REV. 1031 (2013) (criticizing the HEARTH Act's waiver of federal liability and mandated environmental review process as erosive of both tribal sovereignty and the federal trust responsibility).

283. U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., SAMPLE CHECKLIST FOR REGULATIONS SUBMITTED UNDER THE HEARTH ACT, *available at* <http://www.indianaffairs.gov/cs/groups/xots/documents/document/idc1-032154.pdf> (last visited Feb. 15, 2015).

284. U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., NATIONAL POLICY MEMORANDUM: GUIDANCE FOR THE APPROVAL OF TRIBAL LEASING REGULATIONS UNDER THE HEARTH ACT, NPM-TRUS-29 (Jan. 16, 2013) *available at* <http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-026788.pdf>.

285. Bureau of Indian Aff., *HEARTH Act of 2012*, U.S. DEP'T OF THE INTERIOR, <http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm> (last visited Feb. 15, 2015).

286. *Id.*

287. *See supra* notes 190, 191.

additional regulatory authority by tribes.<sup>288</sup> In fact, by adopting a rule that provides comprehensive federal standards and requirements that apply in addition to any existing or yet to be adopted tribal standards, the Final Rule dis-incentivizes tribal regulation of fracking, particularly in light of the delays caused by the existing federal role in tribal energy development.<sup>289</sup> Therefore, rather than promote tribal authority over tribal lands as Congress has done in the ITEDSDA and the HEARTH Act, the Final Rule discourages tribes from regulating fracking on their own.

## 2. Agency Rulemaking

Congress is not alone in its commitment to expanded federal deference to tribal decision-making. Recent updates by the BIA of its leasing and right-of-way regulations, which were proceeding contemporaneously with the BLM's development of the Final Rule, demonstrate increased agency recognition for and respect of tribal authority as well.

In February 2011, the BIA released to tribes for review and comment a preliminary draft revision to the BIA's regulations regarding tribal surface leases, found at 25 C.F.R. part 162.<sup>290</sup> After consulting with tribes on the draft revisions at various tribal meetings and requesting and reviewing written comments on the preliminary draft, the BIA published a proposed rule in November 2011.<sup>291</sup> The proposed rule acknowledged that secretarial approval of surface leases remained a statutory requirement (the rule was proposed prior to passage of the HEARTH Act) but sought to streamline and make the approval process more efficient.<sup>292</sup> To do so, the BIA proposed eliminating the need to approve permits, certain subleases, and assignments; requiring a timeline for its approval; and limiting the bases on which it could refuse to approve amendments, assignments, and other lease-related agreements.<sup>293</sup> Importantly, the proposed rule also eliminated the requirement that the BIA ensure that the tribal lessee secure fair market value for the lease

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288. 80 Fed Reg. at 16,185 (“[a] variance [if granted in BLM’s sole and un-appealable discretion] would not necessarily adopt tribal regulations as the Federal rule.”)

289. GAO-15-502, *supra* note 98.

290. 76 Fed. Reg. at 73,786.

291. *Id.*

292. *Id.* at 73,784-85 (describing various changes to make regulations more efficient and transparent).

293. *Id.* at 73,785.



and replaced it with a provision deferring to the tribal lessee's negotiation of the value of the lease unless the tribe requests a fair market valuation.<sup>294</sup> The proposed rule also required the BIA to comply with tribal law<sup>295</sup> and allowed the Secretary to waive any provisions of the draft regulations that conflicted with tribal law, subject to certain limitations.<sup>296</sup>

In general, tribal reaction to the proposed rule was positive, as the BIA noted in publishing a revised rule as the final leasing rule in December 2012.<sup>297</sup> Even so, in response to a tribal comment urging greater deference to tribes in financial matters, the BIA "reviewed the regulation to ensure that the final rule requires BIA to defer to tribes in *all possible cases, consistent with our trust responsibility.*"<sup>298</sup> Therefore, the final leasing rule maintained the BIA's deference to tribal law and the preamble to the rule explained that the "BIA will defer to tribal law in decisions regarding leases beyond just the approval decision."<sup>299</sup>

Similarly, the final leasing rule incorporated a new section specifically addressing the taxability of improvements, activities, and leasehold interests on leased Indian land.<sup>300</sup> This new section built upon language of the proposed rule and emphasized the federal and tribal interests in leasing Indian lands which, according to established Supreme Court precedent, should tip the balance away from state taxation of non-Indian interests in leased Indian lands.<sup>301</sup> In doing so, the preamble to the

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294. *Id.* at 73,798 (proposed section 162.320).

295. *Id.* at 73,794 (proposed section 162.014).

296. *Id.* (proposed section 162.013) (the Secretary would be prohibited from waiving a regulatory provision in favor of tribal law if such waiver would violate a federal statute or judicial decision or "conflict with the United States' trust responsibility under Federal law.")

297. Residential, Business, and Wind and Solar Resource Leases on Indian Land, Final Rule, 77 Fed. Reg. 72,439, 72,442 (Dec. 5, 2012) ("[t]ribes stated that they supported the steps BIA took in the proposed rule to recognize tribal sovereignty and tribes' achievements in terms of their ability to manage their own affairs on critical leasing issues. Tribes were particularly supportive of provisions for tribal waiver of appraisals, deadlines for BIA action, and BIA's deference to the Indian landowners' determination that the lease is in their best interest.")

298. *Id.* (emphasis added).

299. *Id.* at 72,446. Like the proposed version of the leasing rule, the final leasing rule allowed for tribal law to supersede or modify the regulations where the tribe notified the BIA of the superseding or modifying effect, it would not violate otherwise applicable federal law, and the superseding or modification of the regulation would apply only on tribal land. *Id.* § 162.014, 72,472.

300. *Id.* § 162.017, 72,447.

301. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448, U.S. 136, 143 (1980) (courts must conduct a particularized inquiry of state, federal and tribal

final leasing rule expressly stated the purposes for the rule as “promot[ing] Indian housing and . . . allow[ing] Indian landowners to use their land profitably for economic development, *ultimately contributing to tribal well-being and self-government*.”<sup>302</sup> Increases in project costs, such as the imposition of state and local taxes, would frustrate this latter purpose and the BIA specifically noted the unique impact of such increased costs on tribes, who face significant challenges in attracting capital investment in the first place.<sup>303</sup> The BIA viewed the rule as further promoting tribal sovereignty and self-government through the regulations by ensuring that the final leasing rule required “significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in [the tribe’s] best interest.”<sup>304</sup>

The BIA’s approach to its trust responsibility in the final leasing regulations stands in marked contrast to how the BLM considered its responsibilities to tribes in its revised proposed rule, even though both agencies were developing their rules during the same timeframe.<sup>305</sup> Where the BIA’s final leasing rule viewed deference to tribes “in all possible cases” as consistent with its trust responsibility, the BLM’s revised proposed rule contemplated the trust responsibility as interchangeable with the Secretary’s responsibility to prevent undue or unnecessary degradation of public lands.<sup>306</sup> Where the BIA’s final leasing rule allowed a tribe to notify the Secretary that its own tribal rules will supersede or modify the federal regulations, provided such tribal rules would not violate otherwise applicable federal law, the BLM’s revised proposed rule only allowed tribes to request limited

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interests to determine the authority of a state to tax non-Indian activity on a reservation)).

302. *Id.* (emphasis added).

303. *Id.* at 72,448 (“[i]ncreased project costs can impede a tribe’s ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital.”)

304. *Id.*

305. The BIA’s final leasing rule became effective on January 4, 2013, less than five months before the BLM issued the revised version of its initial proposed fracking rule. *Compare* 77 Fed. Reg. at 72,440, *with* 78 Fed. Reg. at 31,636. Thus, presumably the BLM was drafting the revised proposed rule as the BIA finalized its leasing regulations.

306. *Compare* 77 Fed. Reg. at 72,442 (BIA final leasing rule), *with* 78 Fed. Reg. at 31,644 (BLM’s proposed revised rule, stating that the “revised regulation prevents undue or unnecessary degradation of public lands and furthers the Secretary’s trust responsibilities on Indian lands.”)

variances from its provisions and required that any such variance be approved by the BLM, subject only to the Agency's own discretion.<sup>307</sup> Similarly, while the BIA's final leasing rule sought to enhance the ability of tribes to use their lands "profitably for economic development" in light of the "especially damaging" impact of increased project costs on tribes,<sup>308</sup> the BLM acknowledged that its revised proposed rule would increase the administrative delays and costs for those seeking to develop tribal lands, making those lands potentially less attractive than state or private lands not subject to such additional administrative burdens.<sup>309</sup> Ignoring the BIA's sensitivity to the challenges of tribal economic development, the BLM instead viewed the increased costs created by the revised proposed rule as an ordinary cost of doing business.<sup>310</sup>

Less than two years after finalizing its revised leasing rules and nearly a year prior to publication of the BLM's Final Rule, the BIA also embarked on an effort to revise its outdated regulations governing the process for its review and approval of rights-of-way across Indian lands.<sup>311</sup> In doing so, the BIA noted that the revision of the right-of-way regulations was prompted by the supportive responses it received to the final leasing rule and that it sought to revise the right-of-way regulations in a similar manner.<sup>312</sup> As a result, the proposed right-of-way rule included similar provisions deferring to tribal decision-making regarding compensation,<sup>313</sup> promoting the applicability of tribal laws and authority,<sup>314</sup> and recognizing the exclusion of state tax authority over permanent improvements,<sup>315</sup> activities,<sup>316</sup> or interests in a right-of-way.<sup>317</sup> Each of these provisions were carried over into the final right-of-way

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307. Compare 77 Fed. Reg. at § 162.014, 72,472, with 78 Fed. Reg. at 31,677 (proposed section 3162.3-3(k)).

308. 77 Fed. Reg. at 72,447-48.

309. 78 Fed. Reg. at 31,670 ("[t]he BLM is aware that the revised proposed rule would nonetheless result in some higher costs for operators on Federal and Indian lands, compared with compliance costs for hydraulic fracturing on non-Federal, non-Indian lands in several States.").

310. *Id.* ("[r]egulatory compliance costs, however, are only one set in a long list of costs that operators compare to anticipated revenues when deciding whether and how much to bid on a Federal or Indian lease.")

311. Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455 (June 11, 2014).

312. *Id.*

313. *Id.* § 169.109(a), 34,467.

314. *Id.* § 169.008, 34,464.

315. *Id.* § 169.009(a), 34,464.

316. *Id.* § 169.009(b), 34,464.

317. *Id.* § 169.009(c), 34,464.

rule.<sup>318</sup> The first section of the revised regulations will now make explicit the BIA's intent "to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land."<sup>319</sup> Such support for tribal sovereignty is quite different from the BLM's determination that the trust responsibility prevented any deference to tribal decisions regarding their own fracking regulations.<sup>320</sup> According to the BLM, the Final Rule's limited recognition of tribal regulations through the possibility of a variance, which "would not necessarily adopt tribal regulations as the federal rule," ensures that the Final Rule "accords with tribal self-determination to the extent that could be expected from a rule governing hydraulic fracturing operations."<sup>321</sup>

The BLM's view of its trust responsibility and the interplay of that responsibility with tribal sovereignty and self-determination is inconsistent with how Congress encouraged tribal authority through the ITEDSDA and the HEARTH Act and particularly incongruent with the BIA's approach to regulatory oversight of leasing and rights-of-ways on Indian land. In each of the statutory and regulatory examples discussed herein, either Congress or the BIA developed an approach to the federal government's role in administering its responsibilities to tribes and Indian lands that specifically accounted for and promoted tribal sovereign interests, including both governmental and economic development concerns. Each of these efforts either pre-dated or was contemporaneous with the BLM's promulgation of its Final Rule; however, rather than fashion its Final Rule in a similar manner, the BLM elevated uniformity of regulation across both federal and Indian lands to its highest priority. This approach does not correspond with the current

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318. Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492 (Nov. 19, 2015). After initially scheduling the new regulations to take effect in December 2015, the BIA twice postponed their effective date. *See, e.g.*, Rights-of-Way on Indian Land, 80 Fed. Reg. 79,258 (Dec. 21, 2015) (extending effective date of the final right-of-way rule from December 21, 2015, to March 21, 2016); Rights-of-Way on Indian Land, 81 Fed. Reg. 14,976 (Mar. 21, 2016) (extending effective date until April 21, 2016 and the compliance date "for submission of documentation of past assignments" until August 16, 2016).

319. 80 Fed. Reg. at 72,535.

320. 80 Fed. Reg. at 16,185 (the Secretary would fail to fulfill her trust responsibility "if the BLM failed to implement the final rule because a tribe was implementing its own program.")

321. *Id.*

migration of federal policy and rulemaking away from federal paternalism and toward greater tribal self-determination.<sup>322</sup>

## VI. CONCLUSION

The BLM's efforts to regulate fracking on both federal and Indian lands resulted in a nearly five year process that produced the Final Rule, only to have the Rule preliminarily enjoined by the Wyoming District Court, which was concerned about the Agency's statutory authority to regulate fracking, the need for the rule, and the BLM's tribal consultation process.<sup>323</sup> While that litigation portends a judicial resolution of the debate over regulatory authority between the federal government and states as a matter of federalism, the BLM's view of its trust responsibility to Indian tribes and its lack of meaningful deference to tribal sovereignty and self-determination are not likely to garner significant judicial scrutiny.<sup>324</sup> Provided the BLM prevails in its argument that the IMLA and the IMDA are a statutory basis for the Final Rule,<sup>325</sup> courts are likely to defer to the agency's discretion in crafting

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322. While not as directly comparable as the BIA's leasing and right-of-way regulations, recent efforts by other federal agencies have also demonstrated increasing sensitivity to and respect for tribal sovereignty and related issues. *See, e.g.*, Revised Interpretation of Clean Water Act Tribal Provisions, 80 Fed. Reg. 47,430 (Aug. 7, 2015) (EPA proposes reinterpretation of Clean Water Act Tribal Provision that would enhance EPA's ability to authorize tribes to administer federal regulatory programs on their reservations); Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 80 Fed. Reg. 21,674 (Apr. 20, 2015) (National Park Service proposes regulations authorizing intergovernmental agreements between the federal and tribal governments to authorize tribal members to gather and remove plants used for traditional purposes from National Parks).

323. *Wyoming*, 2015 WL 5845145.

324. Although the Ute Indian Tribe argued that the Final Rule amounted to a breach of the BLM's trust obligations to tribes, the District Court did not consider that argument in granting the preliminary injunction. *Id.*; *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS, slip op. at 4-9 (D. Wyo. June 22, 2015) (mem. in support of TRO and prelim. inj.).

325. Judge Skavdahl took a dim view of the BLM's statutory authority for the Final Rule in preliminarily enjoining application of the Rule, although his order offered scant analysis of the IMLA and IMDA and, instead, focused primarily on whether any of the statutes on which the BLM relied granted the agency authority to regulate beyond surface impacts. *Wyoming*, 2015 WL 5845145, at \*6 (noting that BLM failed to "cite any specific provision of the mineral leasing statutes authorizing regulation of this *underground* activity or regulation for the purpose of guarding against any incidental, *underground* environmental effects") (emphasis added); *Id.* at \*9-10 (also basing preliminary injunction on congressional decision to remove

the Final Rule within the bounds of that authority.<sup>326</sup> Furthermore, the grounds on which a tribe could successfully claim that the federal trust responsibility creates a legally enforceable duty to craft regulations in a particular manner are quite narrow, particularly in light of the Supreme Court's dim view of the Secretary's responsibilities to tribes under the IMLA.<sup>327</sup>

While neither the district court nor any appellate court may have the authority to force the BLM to reconsider the trust responsibility and re-craft the Final Rule to better accommodate tribal sovereign interests, this article demonstrates the need for the Agency to amend the Final Rule to exclude Indian lands from its application, return to the drafting table, re-initiate tribal consultation, and more carefully consider the appropriate exercise of its delegated regulatory authority over Indian lands. Such an approach would be more consistent with the BLM's responsibilities to

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fracking from purview of SDWA, “[i]n determining whether Congress has spoken directly to the BLM's authority to regulate hydraulic fracturing under the [Mineral Leasing Act] or FLPMA, this Court cannot ignore the implication of Congress' fracking-specific legislation in the SDWA and [the 2005 Energy Policy Act].”)

326. *City of Arlington*, 133 S. Ct. at 1868 (relying on *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (the leading case on judicial deference to agency action, in which the Supreme Court stated “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”)).

327. *See Navajo Nation*, 537 U.S. at 508 (denying money damages based on Navajo Nation's claim that the Secretary breached a fiduciary duty created by the IMLA). Although the Navajo Nation claims were money damages claims, courts have failed to properly distinguish such claims from those seeking injunctive relief and have required that tribes demonstrate that Congress intended to create fiduciary duties through express statutory language, regardless of whether the tribe is seeking damages. *See, e.g., El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) (a tribe's challenge to agency action “failed to state a claim for relieve because the Tribe [did] not identif[y] a substantive source of law establishing *specific fiduciary duties*, a failure which is fatal to its trust claim regardless of whether we read the claim as brought under the [Administrative Procedures Act] or under a cause of action implied by the nature of the fiduciary relationship itself.”) (emphasis in original); COHEN'S HANDBOOK, *supra* note 1, at § 5.05[3][c], 430-432. Professor Mary Christina Wood artfully critiqued the improper conflation of these claims and called for the clarification of “the confused direction of the trust doctrine.” Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 29 TULSA L. REV. 355, 367, 365-68 (2003). Notwithstanding the strength and accuracy of this argument; however, a tribe would likely face significant difficulty in convincing a federal judge that the trust responsibility limits the broad authority to promulgate regulations granted to the Secretary by the IMLA and the IMDA.

ensure timely and meaningful tribal consultation, could allow for a Final Rule that is more respectful of tribal sovereignty and economic development, and would allow the Agency to bring its conception of the trust responsibility more in line with the current direction of promoting tribal authority and decision-making. Withdrawing Indian lands from the Final Rule's coverage would also provide the added benefit of limiting the bases on which the Final Rule could be challenged and would allow the BLM to focus on the statutory authority arguments raised by states challenging the Final Rule, without also having to defend its lackluster tribal consultation efforts. Lastly, there is precedent supporting reconsideration of the Final Rule in light of legitimate concerns raised even after its publication as a final rule.<sup>328</sup>

The issues faced by the BLM both during and after the rulemaking process offer helpful lessons for federal agencies attempting to create rules that transcend the boundary between federal and Indian lands. First, any agency considering an issue that may impact tribes or tribal citizens would be well-served by engaging in substantive and meaningful tribal consultation early and often. The BLM's failure to engage tribes in the same way that it reached out to the broader public set the wrong tone for the entire development of the Final Rule and ultimately provided one ground for preliminarily enjoining the Final Rule.<sup>329</sup> Second, agencies would be wise to carefully consider the statutory foundations for their proposed actions and work to ensure that their regulations align with the intent behind those laws. By focusing on the need to protect Indian lands in the same manner as federal lands, the BLM crafted a Final Rule that minimized the promotion of tribal sovereignty and economic development, which were the express purposes of the IMLA and the IMDA on which the agency based its authority to apply the Final Rule to Indian lands. Finally, considering a proposed rulemaking within the broader context of the self-determination era and the evolving trust relationship would result in a regulatory approach that more closely aligns with tribal interests and the efforts of other agencies. BIA's recent rulemakings demonstrate how an agency can exercise its discretion to craft appropriate regulations that fulfill the federal government's trust responsibility by deferring to tribal decision-making and promoting tribal sovereignty. Rather than follow the BIA's

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328. The regulations implementing the IMLA and IMDA were initially published as final rules only to be withdrawn in response to concerns over their lack of clarity and the confusion caused by their treatment of tribal mineral development. 61 Fed. Reg. 35,634 at 35,635.

329. *Wyoming*, 2015 WL 5845145.

lead, however, the BLM developed the Final Rule with a commitment to an outdated and paternalistic view of the federal trust responsibility.

Tribes expect more from their federal partners and the BLM should honor those expectations and work with Indian tribes within Indian Country to develop a new approach to regulating fracking that respects the boundary between federal and Indian lands.