

**“THOSE WHO CANNOT REMEMBER THE
PAST ARE CONDEMNED TO REPEAT IT”:
THE TRIBAL ROLE IN RECURRING
FEDERAL REGULATORY CLIMATES**

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GUIDING QUOTES

- As above: Learn from history.
- Eternal vigilance is the price of tribal sovereignty.
- “We need protection from our protectors.”
 - Peterson Zah (2012)



**"Those who don't study history are doomed to repeat it.
Yet those who *do* study history are doomed to stand by
helplessly while everyone else repeats it."**



Current Congressional/Regulatory Climate

- DAPL, mineral royalties, flaring, etc.
- Tax Reform, Native American Energy (H.R. 210)
- Indian Trade and Commerce Regulations
- Fee-to-Trust Regulations

American Indian Empowerment Act, H.R. 215 (2017)

- § 2(e) - “TRUST RESPONSIBILITY NOT DIMINISHED. — Nothing in this section shall be construed to diminish the Federal trust responsibility to any Indian tribe.”
- Oct. 25, 2017 Hearing memo – “the federal ‘trust responsibility’ has ill-served Native people”
- DOI testimony - “If a tribe is going to take on complete decision-making control of land and resources, we believe liability on behalf of the federal government should be nonexistent.”
- Navajo testimony – “While we support one of the aims to minimize federal micromanagement of Navajo land, minimizing micro-management should not replace the trust responsibility. ”

The Nature of the Trust Responsibility

- Contracts – land/resources = consideration
- Property Law – places matter; *Armory v. Delamirie*
- Trust Law – general v. fiduciary; guardian-ward
- Foreign Relations – suzerainty, Vattel to UNDRIP
- (Pre)Constitutional Law – Northwest Ordinance

The Issues

- **Executive Liability Evasion**
 - “Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic.” *California Federal Bank v. United States*, Fed. Cl. (1997)
 - “Although defendant continues to argue otherwise, . . . ‘the duty of care owed by the United States “is not mere reasonableness, but the highest fiduciary standards.” *Jicarilla Apache Nation v. United States*, Fed. Cl. (2013)

- **Neocolonial Judicial Activism**

DOI v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001) - oral argument trans. at 28:

[Scalia]: I guess . . . the moral is you should never pick a trustee who enacts a Freedom of Information Act.

(Laughter)

[Breyer]: But I'm not sure the Indians had a choice.

Neocolonial Judicial Activism (contd.)

United States v. Navajo Nation, 537 U.S. 488
(2003) - oral argument transcript at 5:

Breyer: "Ex parte communications take place all the time in those [informal adjudication] situations. So what's unfortunate about it? Maybe it was unfortunate politically, but I mean, legally -"

Episodic Federal Action and the Future of the Trust Responsibility

- Prior efforts
 - Congressional - 1994 Trust Reform Act, *Cobell*-related, ITARA
 - Executive - Secretarial Orders 3215, 3335, 303 DM 2.7
- Pending efforts
 - Native American Energy Act (H.R. 210)
 - American Indian Empowerment Act (H.R. 215)
 - Indian Trader Regulations (maybe)
 - Fee-to-Trust Regulations (not)
- Issues/Ideas
 - Reaffirmation (not likely)
 - Self-determination (above?)
 - Integration and Elevation (ITARA)
 - Oversight (White House Council; NCIO)
 - Funding (TBD)

Conclusion

“[T]he Government has often structured the trust relationship to pursue its own policy goals.”
United States v. Jicarilla Apache Nation (2011).