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**Teacher's Memorandum to accompany
Getches, Wilkinson, Williams, Fletcher & Carpenter
FEDERAL INDIAN LAW, 7th ed.**

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INTRODUCTION

The Seventh Edition of this casebook was released in 2017. This teacher's memorandum includes additional Nation Building and Lawyering Notes, some of which are much lengthier than Notes included in the book (*Carcieri* and labor relations), others involving issues not resolved until the conclusion of the book (*Patchak* and Dakota Access Pipeline), and a pending issue (Bears Ears). The memorandum also includes materials on *Lewis v. Clarke* and *Upper Skagit Indian Tribe v. Lundgren*, recent Supreme Court decisions touching upon tribal immunity and the Supreme Court's non-decision in the so-called culverts case, the latest matter in the long-running *United States v. Washington* fishing rights litigation.

At the request of an intrepid law teacher, we have included material cut from the Seventh edition on federal-tribal relations involving leasing, timber management, and the Interior Department's trust duties to Indian tribes.

Comments on the memorandum and on the 7th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan at matthew.fletcher@law.msu.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon **GETCHES, WILKINSON, WILLIAMS, FLETCHER, AND CARPENTER CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. 2017)**.

Matthew Fletcher
East Lansing, Mich.
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CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 321:

INDIAN LAWYERING NOTE:

THE *CARCIERI* PROBLEM*

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5308 (formerly 25 U.S.C. § 465), authorizes the Secretary of the Interior to acquire land in trust for the benefit of Indians and Indian tribes:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Section 7 authorized the Interior Secretary to declare new reservations on acquired trust lands. 25 U.S.C. § 5101 (formerly § 467) (“The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.”).

Section 5 authorizes the Interior Secretary to acquire land in trust for “Indians,” a term of art defined a later section of the IRA as “all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*. . . .” 25 U.S.C. § 5129 (formerly § 479).

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the Interior Secretary may not acquire land in trust for the benefit of the Narragansett Indian Tribe. *Id.* at 382-83, 395-96. The State of Rhode Island challenged the Secretary’s decision to take land into trust on the ground that the tribe, which the federal government recognized as an Indian tribe in 1983, was not under federal jurisdiction in 1934, the date of the enactment of the IRA. The federal government and the tribe argued that “now” meant at the time of the Interior Secretary’s decision to acquire land in trust. The Court agreed with the state.

* Materials in this Note are derived from Matthew L.M. Fletcher, Federal Indian Law § 7.3 (2016).

The Court undertook statutory construction under which it concluded that the definition of “Indian” was unambiguous. The Court looked to the “ordinary meaning of the word ‘now,’ ” and located contemporaneous dictionary definitions of the word that suggested the word “ordinarily” refers to a “present” time or moment. *Carcieri, supra*, at 388. The Court pointed to a statement made by John Collier, architect of the IRA and the Commissioner of Indian Affairs, in 1936, two years after the IRA’s enactment: “Section 19 of the Indian Reorganization Act . . . provides, in effect, that the term ‘Indian’ as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act. . . .*” *Id.* at 390 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)) (emphasis in original). The Court concluded by noting that no party ever claimed the Narragansett Indian Tribe was under federal jurisdiction in 1934, and shut the door to further proceedings by declaring that it would hear no evidence to the contrary.

Justice Breyer’s concurrence argued that “now” in § 479 [currently codified at 25 U.S.C. § 5129] might be more inclusive of tribes than it appears from the *Carcieri* facts. *Id.* at 397. While the Interior Department compiled a list of 258 tribes it recognized in 1934, Breyer suggested that in fact there might have been many, many more that “the Department did not know [about] at the time.” *Id.* at 398.

Professor Bill Rice argued that the decision throws a monkey wrench in modern Indian affairs:

This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or [Oklahoma Indian Welfare Act] and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net.

G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”*: Updating the Trust Land Acquisition Process, 45 *Idaho L. Rev.* 575, 594 (2009).

On March 12, 2014, the Interior Solicitor issued an opinion on the definition of “under federal jurisdiction” for IRA purposes. Dept. of Interior, Office of the Solicitor, *The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act*, M–37029 (March 12, 2014). The Solicitor opined that there is no plain meaning of “under federal jurisdiction.” The Solicitor then concluded that whether an Indian tribe was “under federal jurisdiction” in 1934 is a two-part inquiry:

Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department’s early practices, as well as the Indian canons of

construction, I construe the phrase “under federal jurisdiction” as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe’s history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe’s history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

* * *

Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe’s jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Id. at 19.

Litigation challenging the Secretary of the Interior’s authority to acquire land in trust for tribes more recently federally recognized since 1934 has exploded. E.g., *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), cert. petition filed sub nom., *Citizens Against Reservation Shopping v. Zinke* (July 29, 2016) (No. 16-572); *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016); *Poarch Band of Creek Indians v. Hildreth*, 656 Fed.Appx. 934 (11th Cir. 2016); *Big Lagoon Rancheria v. State of California*, 789 F.3d 947 (9th Cir. 2015); *KG Urban Enterprises, Inc. v. Patrick*, 693 F.3d 1 (1st Cir. 2012); *No Casino in Plymouth v. Jewell*, 136 F.Supp.3d 1166 (E.D. Cal. 2015).

The litigation involving the trust land acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians is instructive. The Grand Traverse Band is a signatory to treaties with the United States in 1836 and 1855, but suffered through “administrative termination,” whereby the Department of the Interior refused to acknowledge the tribe from the 1870s until 1980 based on a misreading of the treaty language. The Interior Board of Indian Appeals held that the tribe remained “under federal jurisdiction” in 1934 even though the tribe did not enjoy federal recognition, largely because of its retained treaty rights:

We agree with the Regional Director that the historical record supports his finding that the Tribe was under Federal jurisdiction in 1934. The Tribe is the successor to the Grand Traverse Ottawas and Chippewas, who signed treaties with

the United States reserving commercial and subsistence fishing rights. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan DNR*, 971 F. Supp. 282, 285, 288 (W.D. Mich. 1995) (Tribe's rights under 1836 and 1855 treaties), *aff'd*, 141 F.3d 635 (6th Cir. 1998). The treaty-reserved fishing rights included a servitude, or easement of access over land surrounding the Indians' traditional fishing grounds, that remained in effect even after the land became privately owned. 141 F.3d at 639. When the United States took action in the 1970s to protect the tribal treaty-reserved rights, it did so on its own behalf and on behalf of, i.e., as trustee for, the tribes whose rights were subject to Federal protection. See *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979). The Board has previously recognized that when the United States continues to hold land in trust for a tribe or its members, it cannot reasonably be disputed that the tribe is under Federal jurisdiction. See *Village of Hobart*, 57 IBIA at 20 n.23. In the present case, in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary's improper *de facto* "termination" of the Federal government's relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty. See *Grand Traverse Band*, 369 F.3d at 968. In our view, the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe.

Grand Traverse County Board of Commissioners v. Midwest Regional Director, Bureau of Indian Affairs, 61 IBIA 273, 281-82 (2015). It seems that extant treaty rights provide considerable evidence that an Indian tribe was "under federal jurisdiction" in 1934, but what about tribes that are not signatories to treaties with the United States?

For detailed commentary on the issues arising from *Carcieri*, see William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. Kan. L. Rev. 415 (2016). For broader discussion of pressures on reservation lands during the Trump administration, see Kristen A. Carpenter and Angela R. Riley, *Privatizing the Reservation?*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166333.

INDIAN LAWYERING NOTE:

THE *PATCHAK* PROBLEM

Prior to 2012, once the Secretary of the Interior exercised discretion to acquire land in trust for Indians or tribes, the Quiet Title Act (QTA) barred any challenges to that discretion. 28 U.S.C. § 2409a(a). The QTA is actually a waiver of federal sovereign immunity allowing persons to sue the United States to quiet title to disputed property, but the Act bars any such challenges to Indian trust lands:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands

Id.

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that individuals challenging the authority of the Secretary of the Interior to acquire land in trust for the benefit of Indian tribes under 25 U.S.C. § 5108 [formerly 25 U.S.C. § 465] are not barred by the Quiet Title Act, 28 U.S.C. § 2409a(a) & (d), from bringing suit. The challenger had wanted to bring a *Carcieri* challenge to the trust acquisition after the land had already been acquired. In 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113–179, Sept. 26, 2014, 128 Stat.1913, confirming the authority of the Secretary to take land into trust for the tribe, ratifying the trust acquisition, and stripping the federal courts of jurisdiction over the *Patchak* remand and other potential challenges to the tribe’s trust lands:

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed.Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113–179, § 2. The statute was the brainchild of the tribe’s general counsel, Zeke Fletcher, who quietly worked behind the scenes on Capitol Hill to secure its passage.

In *Patchak v. Zinke*, 138 S. Ct. 897 (2018), a sharply divided Supreme Court affirmed the validity of the Gun Lake Trust Land Reaffirmation Act from a separation of powers challenge. While normally the Court looks askance at efforts by Congress to strip federal courts of jurisdiction over pending cases, in this instance Congress was merely affirming the Secretary's decision and therefore eliminated all challenges to the Secretary's authority by doing so, as Justice Breyer's concurrence explains:

Congress then enacted the law here at issue. Gun Lake Trust Land Reaffirmation Act, Pub.L. 113–179, 128 Stat. 1913. * * * The first part “reaffirm[s],” “ratifie[s],” and “confirm[s]” the Secretary’s “actions in taking” the Bradley Property “into trust,” as well as the status of the Bradley Property “as trust land.” § 2(a). The second part says that actions “relating to” the Bradley Property “shall not be filed or maintained in a Federal court and shall be promptly dismissed.” § 2(b). Read together, Congress first made certain that federal statutes gave the Secretary the authority to take the Bradley Property into trust, and second tried to dot all the I’s by adding that federal courts shall not hear cases challenging the land’s trust status. The second part, the jurisdictional part, perhaps gilds the lily, perhaps simplifies judicial decisionmaking (the judge need only determine whether a lawsuit relates to the Bradley Property), but, read in context, it does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the first part: The Bradley Property shall remain in trust.

The petitioner does not argue that Congress acted unconstitutionally by ratifying the Secretary’s actions and the land’s trust status, and I am aware of no substantial argument to that effect. See * * * Brief for Federal Courts and Federal Indian Law Scholars as Amici Curiae 6–11 (citing numerous examples of tribe-specific Indian-land bills). The jurisdictional part of the statute therefore need not be read to do more than eliminate the cost of litigating a lawsuit that will inevitably uphold the land's trust status.

This case is consequently unlike *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519 (1872), where this Court held unconstitutional a congressional effort to use its jurisdictional authority to reach a result (involving the pardon power) that it could not constitutionally reach directly. *Id.*, at 146; see *Bank Markazi v. Peterson*, 578 U.S. —, —, and n. 19, 136 S.Ct. 1310, 1324, and n. 19, 194 L.Ed.2d 463 (2016). And the plurality, in today’s opinion, carefully distinguishes from the case before us other circumstances where Congress’ use of its jurisdictional power could prove constitutionally objectionable. *Ante*, at 906, and n. 3, 918, n. 6. Here Congress has used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional. Under

these circumstances, I find its use of that power unobjectionable. And, on this understanding, I join the plurality's opinion.

Patchak, 138 S. Ct. at 910-11.

SECTION B.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2. TREATY ABROGATION

Add to the end of the note on *Indian Treaty Abrogation and Congressional Intent* on page 361:

NATION BUILDING NOTE:

TRIBAL LABOR RELATIONS

Indian tribal gaming operations employ about 450,000 non-Indians. Most gaming operations are relatively modest affairs, with a few on either extreme of the bell curve generating an enormous windfall for tribes or losing money. The bigger, more successful casinos tend to employ few tribal members, in large part, because there are simply not enough tribal members to staff a sizeable casino. Most casinos can be staffed by a significant plurality, or even a majority, of tribal members. Non-Indian gaming operations are often unionized, and it was only a matter of time before labor unions began organizing Indian casino employees.

The key federal labor relations law is the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 151 et seq., administered and enforced by the National Labor Relations Board (NLRB). Labor can file grievances against management through processes established by the NLRB. State and federal government employers are protected from certain labor organizing techniques, most notably strikes. Tribal governments are not mentioned in either the statute or the legislative history. Notably, the NLRA was enacted a year after the Indian Reorganization Act of 1934, 25 U.S.C. § 5301 et seq. (formerly 25 U.S.C. § 461 et seq.).

The Sixth Circuit recently decided two cases involving the NLRB's assertion of jurisdiction over two Michigan Indian tribes. In the first, *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), cert. denied, 136 S.Ct. 2508 (2016), a split panel held that the National Labor Relations Act could be asserted against the tribal casino operation. The court first concluded that federal statutes of general applicability should apply to Indian nations – as in the *Coeur d'Alene* framework, see page 359 – because tribal authority over nonmembers is limited:

Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Wheeler*, 435 U.S. at 323, 98 S.Ct. 1079. Yet,

such residual sovereignty is “unique and limited.” *Id.* As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is “subject to complete defeasance” by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, see generally Cohen’s Handbook § 4.02(3), at 226–42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

Id. at 549. The court therefore applied the *Coeur d’Alene* framework:

We find that the *Coeur d’Alene* framework accommodates principles of federal and tribal sovereignty. . . . [T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d’Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress’s power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. See 751 F.2d at 1115; cf. *Montana*, 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by *Coeur d’Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of *Iowa Mutual* and *Santa Clara Pueblo* that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d’Alene* framework preserves “the unique trust relationship between the United States and the Indians.” *Grand Traverse Band*, 369 F.3d at 971 (quoting *Blackfeet Tribe*, 471 U.S. at 766, 105 S.Ct. 2399). We therefore adopt the *Coeur d’Alene* framework to resolve this case.

Id. at 551. The court’s application of that framework placed the onus on the tribe to get out from under the federal statute:

Under the *Coeur d’Alene* framework, since there is no treaty right at issue in this case, the NLRA applies to the Band’s operation of the casino unless the Band can show either that the Board’s exercise of jurisdiction “touches exclusive rights of self-governance in purely intramural matters” or that “there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations.”

Id. Though the tribe argued that the Act and the Board's assertion of jurisdiction effectively abrogated the tribe's internal self-governance authority:

The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the Board's order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

Id. at 552. The court systematically rejected all those claims. Id. at 552-55.

In dissent, Judge McKeague slammed the majority's reasoning, referring to the *Couer d'Alene* framework based on the Supreme Court's *Tuscarora* decision as a "house of cards":

So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress's silence. *San Manuel*, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960): "[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The statement buttressed the Court's holding, but was not essential to it. While the *Tuscarora* statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the *Tuscarora* "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

Id. 557-58.

A few weeks later, a different panel of the Sixth Circuit – also split 2-1 – applied the *Little River* holding in *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), cert. denied, 136 S.Ct. 2509 (2016), to reach the same result in a matter involving the Saginaw Chippewa Indian Tribe. Unlike *Little River*, the tribe directly tied its authority over nonmembers to its treaty right to exclude persons from its reservation.

The court first rejected the tribe's claim that its general, treaty-reserved power to exclude persons from its reservation precluded application of the National Labor Relations Act:

Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. . . . The 1864 Treaty states that the Isabella reservation land would be "set apart for the exclusive use, ownership, and occupancy [by the Tribe]." 14 Stat. 657. . . . [T]he 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. . . . Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe's right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties, standing alone, bars application of the NLRA to the Casino.

Id. at 661.

The court then rejected the *Little River* panel's reasoning in adopting the *Coeur d'Alene* framework, proposing one of its own that would have mandated a contradictory outcome:

The *Little River* majority concluded that the NLRA applies to on-reservation casinos operated on trust land. *Little River*, 2015 WL 3556005, at *13–17. Given the legal framework adopted in *Little River* and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in *Little River*.

Id. at 662. The *Soaring Eagle* panel focused its analysis on the *Montana-Hicks* line of cases, see pages 602-605 (*Montana*), 631-638 (*Hicks*), in which the Supreme Court held that tribal civil jurisdiction over nonmembers is limited, even on tribally owned lands. Id. at 662-67. The court

then adopted a presumption that statutes of general applicability apply to Indian tribes absent a clear statement from Congress that they do not apply. *Id.* at 666-67. Even so, the court would have concluded that the Act *does not* apply under the *Montana-Hicks* framework:

We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board's desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses. See *Bay Mills*, 134 S.Ct. at 2037 (“[I]t is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity.”) We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. § [5301] et seq., to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. . . . Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” and “to ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702; see also *id.* § 2710(b)(2)(B)(i) (requiring that “net revenues from any tribal gaming” are only be used, *inter alia*, “to fund tribal government operations or programs,” “to provide for the general welfare of the Indian tribe and its members,” and “to promote tribal economic development”); *id.* §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts regarding employment practices of gaming employers); *Bay Mills*, 134 S.Ct. at 2043 (Sotomayor, J., concurring) (“And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues.” (internal quotation marks omitted)).

Id. at 668-69. But since the *Little River* panel decision was first, the *Soaring Eagle* court's analysis could not control. En banc petitions were denied, despite the fact that four of the five active Sixth Circuit judges to have heard these cases disagreed with the controlling framework

adopted by the *Little River* panel and the NLRB acquiesced to the cases being reheard. The Supreme Court, short a justice, denied petitions for certiorari in 2016.

In a third case, the National Labor Relations Board refused jurisdiction over the casino owned by the Chickasaw Nation of Oklahoma based on the treaty rights argument made by the tribe, *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015). The relevant treaty provision guaranteed the tribe's right to be free of federal legislation and control without its consent:

The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

7 Stat. 333. The Chickasaw Nation became a party to this treaty in 1837. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 fn. 15 (1995).

This specific treaty language certainly bars a federal statute that is silent as to its application to Indian tribes and is not otherwise an “Indian Affairs” statute: “These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs.” *Chickasaw Nation d/b/a Winstar World Casino, supra*, at 4.

Other recent tribal challenges to NLRB jurisdiction – and to the jurisdiction of other federal agencies such as the Consumer Financial Protection Board – have not been successful. *E.g., Casino Pauma v. National Labor Relations Board*, 888 F.3d 1066 (9th Cir. 2018); *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), *cert. denied*, 138 S. Ct. 555 (2017).

Many tribes have or will adopt the regressive strategy of adopting “right-to-work” laws, which are laws that are intended to undermine labor union recruiting and organizing strategies. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 725 (2004). Other tribes are more interested in welcoming labor activity, so long as the activity is conducting in accordance with tribal laws that treat casino employees as governmental employees. But, as with the case of the Little River Band, one labor union can undo this regime by persuading the NLRB that the mere existence of a tribal ordinance is a violation of the NLRA. What should tribes do?

For an argument that tribal labor laws create a form of healthy disruption to existing labor relations archetypes by potentially discarding the adversarial relationship assumed to be predominant by federal law, see Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, Tribal Disruption and Tribal Relations, *available at* <https://ssrn.com/abstract=2401711>.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 2. EXECUTIVE AGENCY CONFLICTS IN THE ADMINISTRATION OF FEDERAL TRUST RESPONSIBILITY TO INDIANS

Add to the end of notes on page 402:

INDIAN LAWYERING NOTE:

THE DAKOTA ACCESS PIPELINE*

Starting April 2016, American Indian people led by members of the One Mind Youth Movement began to gather on the shores of Lake Oahe on the Standing Rock Indian Reservation in North Dakota in an effort to stop the completion of the Dakota Access Pipeline (DAPL). See Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. Times, Jan. 31, 2017. By the end of the year, thousands of American Indians and others had gathered there, establishing permanent camps on federal and tribal lands, and for the most part successful in temporarily stopping the construction of the pipeline by putting enormous political pressure on the Obama Administration.

DAPL is a 1,172 mile pipeline running from the Bakken oil shale fields of western North Dakota to oil terminals in Illinois. The pipeline originally was to run near the City of Bismarck, North Dakota, but the pipeline owners chose to route the pipeline under Lake Oahe. Lake Oahe was formed in the 1960s when the United States Army Corps of Engineers and the Bureau of Reclamation established several dams on the Missouri River under the Pick-Sloan dam project. The United States condemned over 200,000 acres of reservation lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe for the project, lands that are now flooded. See generally *South Dakota v. Bourland*, 508 U.S. 679 (1993).

Because the DAPL would run underneath a portion of the Lake Oahe federal public lands (the confiscated reservation lands), and the Missouri River, the Army Corps had an obligation to review and decide whether to authorize the construction of the pipeline through the issuance of an easement. The tribes retain hunting and fishing rights, and perhaps *Winters* rights to

* Portions of this Note derive from commentaries published in Law360.com by Matthew L.M. Fletcher.

groundwater and a homeland at Lake Oahe. Additionally, as many as 18 million Americans depend on the groundwater in the Oglalla Aquifer.

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the Standing Rock Sioux Tribe lost an initial federal court challenge to DAPL in September 2016, only to learn minutes later that the Obama Administration would dramatically reverse its position and delay the issuance of the final easement required to complete the pipeline. In a few short months, three federal agencies (Interior, Army, and Justice) issued a report, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, *available at* <https://bia.gov/cs/groups/public/documents/document/idc2-060030.pdf>, intended to address the lack of adequate consultation between the Army Corps and tribal stakeholders.

However, the Trump Administration effectively ordered the Army Corps to issue the easement in the early weeks of the new administration, which the Corps did. Litigation restarted. Montana law professor Monte Mills helpfully described the key legal arguments:

Religious Freedom and Restoration Act

According to the Cheyenne River Sioux Tribe, oil running through the pipeline would represent the fulfillment of a generations-old prophesy, passed down through the oral traditions of tribal members, that warned of a Black Snake coming to defile the sacred waters necessary to maintain the tribes' ceremonies. Beyond the environmental concerns often at the center of the pipeline protests, the tribe's motion for an injunction squarely defines final authorization of the pipeline by the Corps as an existential threat: destruction of the tribes' religion and way of life.

The Constitution's First Amendment guarantees the exercise of religion free from governmental interference. But the Supreme Court, in *Lyng v. Northwest Indian Cemetery Protection Association*, in 1988 upheld the Forest Service's approval of a road across an area on federal land sacred to local tribes even while recognizing the road could have devastating effects on their religion.

Then in 1993, Congress enacted the Religious Freedom and Restoration Act (RFRA), which requires that the government demonstrate a compelling interest and use the least restrictive means to achieve that interest if its actions will substantially burden religious practice.

In other words, even if approving the Dakota Access Pipeline served a compelling governmental interest, RFRA may require the U.S. Army Corps of Engineers to show that the pipeline easement under Lake Oahe would have the least impact on tribal religion. That approach would be consistent with the Supreme Court's broad application of RFRA in a 2014 case not involving tribal

interests or federal lands and may pose a significant challenge to the corps, which considered but rejected a different route that did not pose the same threat to the tribes.

Both the Corps and company behind the Dakota Access Pipeline argue that the risk of spill from the pipeline is minimal and that the tribes failed to raise these religious concerns in a timely manner. In addition, the Corps contends that, consistent with the *Lyng* case, governmental action on federal land should not be restricted because of religious concerns raised by local tribes.

Thus, resolution of the case will turn upon whether the court recognizes the legitimacy of the tribal religious concerns and broadly applies RFRA or, instead, chooses to prioritize federal authority over federal land to the detriment of those concerns. ***

Arbitrary or capricious decisions?

In addition to their religious concerns, the Sioux Tribes challenge the Corps' decisions based on the rights they reserved in treaties made with the federal government in 1851 and 1868.

The Constitution recognizes treaties as the "supreme law of the land" and, according to a 2016 analysis done by the Solicitor of the U.S. Department of the Interior, both the Standing Rock and Cheyenne River Sioux retain treaty-reserved water, hunting, and fishing rights in Lake Oahe.

Before reversing course in February, the Corps refused to issue the easement last year in order to further understand and analyze those treaty rights.

Importantly, federal law generally allows courts to set aside arbitrary or capricious agency decisions. In a February 14th filing, the Standing Rock Sioux Tribe asks the court to review the Corps' about-face under that standard and argues that the federal trust responsibility, recognized by the Supreme Court since the early 1800's, demands more than just a cursory review of tribal treaty rights.

Monte Mills, How will Native tribes fight the Dakota Access Pipeline in court?, The Conversation, Feb. 15, 2017, available at <https://theconversation.com/how-will-native-tribes-fight-the-dakota-access-pipeline-in-court-72839>.

Recent decisions from the Ninth Circuit may bolster the tribal claims. In the *United States v. Washington* culverts subproceeding (see page 923), 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S.Ct. 1832 (2018), the court held that off-reservation hunting and fishing rights impliedly included the right to a healthy fisheries habitat. And in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir.

2017), the court held that *Winters* rights (see page 819) include the right to groundwater. These precedents may be helpful to the Lakota tribes fighting against DAPL.

On March 7, 2017, Judge Boasberg denied the tribes' motion for a preliminary injunction. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017), *appeal dismissed*, 2017 WL 4071136 (D.C. Cir., May 15, 2017). However, on June 14, 2017, Judge Boasberg held that the Army Corps did not comply with the National Environmental Policy Act, and ordered review. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017). However, the court ultimately rejected the challenges on the merits. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 301 F. Supp. 3d 50 (D.D.C. 2018).

Oil began to flow in June 2017.

CHAPTER 6

TRIBAL SOVEREIGNTY AND THE CHALLENGE OF NATION-BUILDING

SECTION A.

FEDERAL INDIAN LAW AND POLICY IN CONTEMPORARY PERSPECTIVE

Add to the end note 3 on pages 462-63:

4. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that state law claims brought against tribal employees in their individual or personal capacities are not barred by tribal sovereign immunity. The case involved an accident allegedly caused by a limousine driver employed by the Mohegan Tribe. The driver was on the clock for the tribe at the time. The accident occurred on non-Indian lands. The plaintiffs brought suit in state court for state law tort more than one year after the accident. The Mohegan Tribe had waived its immunity for such claims in tribal court, with a one year statute of limitations and a damages cap more limited than that under Connecticut law.

The first critical holding in the decision was that individual capacity suits against tribal employees do not implicate tribal sovereignty:

This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which “will not require action by the sovereign or disturb the sovereign’s property.” *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut’s concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

Id. at 1292.

The tribe fervently argued that tribal sovereignty actually *is* implicated when tribal employees are sued for money damages for actions they take on company time. The Mohegan

Tribe had adopted a law that it would indemnify any tribal employee for damages awarded against the employee for actions taken during that employment. The Court rejected that claim, holding that the tribe's laws did not affect the underlying individual capacity doctrine:

Here, the Connecticut courts exercise no jurisdiction over the Tribe or the Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. The Tribe's indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing. Moreover, indemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in "wanton, reckless, or malicious" activity. Mohegan Tribe Code § 4–52. That determination is not necessary to the disposition of the Lewises' suit against Clarke in the Connecticut state courts, which is a separate legal matter.

Id. at 1294. The Court did state that tribal employees may still be cloaked in sovereign immunity when they act in an official capacity, the same as federal and state employees. *Id.* at 1295 ("In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities.").

Whether a tribal employee is acting within the scope of official authority rather than in an individual capacity apparently will now be left to federal and state courts.* The precursor to *Lewis* was the Ninth Circuit's decision in *Maxwell v. County of San Diego* (page 471). There, the court held that individual capacity suits against tribally employed emergency responders could proceed, even where the responders arrived on the scene in accordance with an intergovernmental public safety agreement. The affected tribe vigorously argued that their employees' exposure to liability could undermine recently established Indian country governance relationships, but to no avail.

The initial area in which tribal exposure to liability may be expanded under *Lewis* is in state courts. Indian tribes that had been able to limit damages and time frames, and govern the venue, for even off-reservation torts and other possible damages claims through tort claims ordinances may face state courts suits. State tort law is, unlike most other areas of the common law, fairly local. Some states have restrictive liability exposure and others more expansive. Tribes, who have no say in state tort laws whatsoever, may be forced into state tort regimes against their will when they choose to indemnify their employees. *Lewis* could also give plaintiffs two cracks at deep pockets, meaning that a plaintiff might suit both the tribe under a tort claims ordinance and the tribal employee in state court. Tribes may reconsider their tort

* The following is excerpted from Matthew L.M. Fletcher, A Look at the Impact of *Lewis v. Clarke* Thus Far," Law360.com, May 16, 2017, available at <https://www.law360.com/nativeamerican/articles/924746/a-look-at-the-impact-of-lewis-v-clarke-thus-far>.

claims ordinances, a potentially very regressive move under established nation-building theory. Tribes that have purchased liability insurance with the parameters set by their tort claims ordinances may be forced to renegotiate with their insurer.

Lewis involved an off-reservation incident, but the court's reasoning does not limit individual liability suits to off-reservation actions. For reservations in Public Law 280-type states, which constitute about 70 percent of all reservations, that might not be significant expansion, as every tort claim against a tribal employee could be brought in state court. But for the remaining tribes, precedents like *Williams v. Lee* (see page 418) generally bar state court jurisdiction over civil suits brought against Indians or tribes arising in Indian country. Or do they, post-*Lewis*? Indian tribes may soon be defending a rise in individual capacity suits against nonmember tribal employees.

The next area of potential new exposure is in the area of official capacity actions. State and federal officials are governed by official immunity and qualified official immunity doctrines. Whether tribal officials have the same protections remains open after the *Lewis* decision. Imagine a heated tribal council meeting where one elected official makes a statement that potential defames another elected official. An analogous case is currently pending in the California Court of Appeals based on *Maxwell*. Before *Lewis*, the tribal elected official who made the statement could assert the general federal Indian law principle that state and federal courts have no jurisdiction over the internal affairs of the tribal government. A federal or state official making the same statement likely would be governed by official immunity. But, potentially, the federal Indian law bar might dissipate in an individual capacity suit because the tribe's interests are not the same as an individual's interest.

5. In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), the Supreme Court vacated a Washington Supreme Court decision interpreting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), to mean that Indian tribes do not possess immunity from *in rem* suits. In *Upper Skagit*, the tribe had purchased fee land upon which ancestors who had died from smallpox were buried "with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door." *Id.* at 1652. Upon completing a survey of the boundaries, the tribe discovered that a barbed wire fence owned by its neighbors, the Lundgrens, crossed into its territory and informed the Lundgrens of its intent to tear down the fence. The Lundgrens brought a quiet title action.

The Supreme Court, in Justice Gorsuch's first Indian law opinion, remanded the case back to the Washington Supreme Court to address the so-called "immovable property" exception to sovereign immunity:

At common law, [the Lundgrens] say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a

foreign country, ... may be considered as so far laying down the prince, and assuming the character of a private individual.” *Schooner Exchange v. McFaddon*, 7 Cranch 116, 145, 3 L.Ed. 287 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the “the character of a private individual.”

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 * * * (1998) (“[T]he immunity possessed by Indian tribes is not coextensive with that of the States”). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. * * *

We leave it to the Washington Supreme Court to address these arguments in the first instance. * * * Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an amicus brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe’s other amici had their say. * * *

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of “hornbook law.” *Post*, at 1657 – 1661 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a “grave” decision that “casts uncertainty” over the law and leaves lower courts with insufficient “guidance.” *Post*, at 1657, 1662 – 1663. Both cannot be true. If the immovable property exception presents such an easy question, then it’s hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in “hornbook law,” and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

Id. at 1653-54.

CHAPTER 9

THE NATION-BUILDING CHALLENGE: MODERN TRIBAL ECONOMIES

SECTION A.

TRIBAL ECONOMIC DEVELOPMENT

The following material is from the Sixth edition of the Getches casebook and is included here by popular request. It has not been updated since the publication of that volume.

After the end of Section A on page 734, add:

1. LAND LEASING IN INDIAN COUNTRY

Indian tribal and allotted lands are leased for a variety of purposes. Agricultural and business leases can provide tribes and individual Indian allottees with significant revenues. Rights of way and other surface leases also provide a source of income for tribal governments. Oil, gas, coal, and other mineral leases are discussed in the next subsection.

Leasing of Indian lands is authorized by 25 U.S.C. § 415(a), originally enacted in 1955, which allows leases of surface resources on the following terms:

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on [several listed reservations] which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

**REID PEYTON CHAMBERS & MONROE E. PRICE, REGULATING SOVEREIGNTY:
SECRETARIAL DISCRETION AND THE LEASING OF INDIAN LANDS**

26 Stan.L.Rev. 1061, 1061–68 (1974).

Indian trust land can be leased by its tribal or individual owner only after the Secretary of the Interior has approved the transaction. Surface leasing of Indian land is governed principally by 25 U.S.C. § 415; enacted in 1955, section 415 permits leasing for a wide range of purposes—“public, religious, educational, recreational, residential or business.”² The basis for the leasing statute and its requirement of approval by the Secretary is in part the commerce clause, which authorizes Congress “[t]o regulate Commerce . . . with the Indian tribes.” More broadly, statutes such as section 415, which wholly or partially restrain the alienation of Indian lands, have been sustained as exercises of the federal guardianship or trust responsibility to “protect” the Indians. But while the trust responsibility serves as a source for the Secretary’s approval power, it is unclear whether and to what extent it furnishes standards which limit his discretion in administrative exercise of that power.

* * *

Between 1890 and 1955, lease terms were limited, by and large, to periods of 5 or 10 years; although business leases were not formally prohibited, the effect was to discourage commercial development and use of Indian trust lands by non-Indians. Under section 415, the lease period may be up to 25 years, with an option to renew for another 25-year period. Subsequent to 1955, section 415 has been amended, and other statutes have been enacted, to extend 99-year leasing authority to * * * tribes.

* * *

When lease terms were limited, it was rare that a particular lease had great cultural or political effects on the tribe. Surface leases were short-term, normally agricultural; mistakes were reversible because the leases were not of great permanence. There was debate, particularly in the late 19th century, as to whether leasing rather than working the land was in the best interests of the individual Indian, and there could be some question about the quality of the bargain struck by the lessor. But the Secretary’s concerns about the impact of leasing did not often go beyond those areas. This is no longer the case. The issues that come before the Secretary in the context of approval of long-term business leases are of enormous significance in terms of the lawmaking power of the tribe and its cultural and political future. Some leases may bring large numbers of non-Indians onto the reservation or may entice states to attempt to exercise regulatory and taxing powers over reservations. More than the landscape may be changed: an influx of non-Indians or state authority may interfere with tribal control over the reservation and continuation of tribal culture.

* * *

In order to determine the appropriate standards for exercise of the Secretary’s approval power, a judgment must be made as to which policy goals are to be furthered by his leasing supervision. If the goal of leasing is merely the production of income, the Secretary’s function could be limited to ensuring that the tribe or individual beneficiary receives fair financial value for the lease. If other policies are of equal or greater importance, however, more could be required: for example, the Secretary could be viewed as having some trust responsibility to preserve a reservation land base, to protect the tribe’s continued political existence and governmental self-sufficiency, to preserve the environment of the reservation, to encourage development of a viable economic and social structure on the reservation, to ensure equitable participation in the enterprise by the lessor, or to determine what law (state, tribal, or federal)

² 25 U.S.C. § 415(a).

should apply to disputes that arise from the lease enterprise. Perhaps the Secretary's trusteeship could even include an obligation to ensure that the lease is consistent with a broad, coherent rehabilitative strategy of the federal government.

These are not always exclusive or necessary considerations in the exercise of the approval power with regard to any particular lease. But there has been virtually no analysis of how the Secretary should resolve these often competing considerations. * * *

* * *

NOTES

1. Should leasing policy be different when allotted lands are involved? The amendment to the Allotment Act permitting leasing was controversial. See pages ____—____, *supra*. Many felt that it would defeat the purpose of training the Indians themselves to be farmers. Nevertheless, the debate was won by those arguing that the land base must somehow be made productive for Indians who, by reason of age or physical condition, could not work the land.

There have been recent outreach efforts by the U.S. Department of Agriculture (USDA) to offer its services to Indian farmers and ranchers. USDA's 2007 Census of Agriculture, released and updated in 2009, reports that between 2002 and 2007, there was a 124 percent increase in the number of Indians who were the principal operators of a farm or ranch, with close to 80,000 Indian principal operators nationwide. USDA, Census of Agriculture, 2007, Summary and State Data, Volume 50, Geographic Area Series, Part 51, AC-07-A-51.

2. Restrictions on lease terms and oversight of rentals and other provisions by BIA officials are intended to protect Indian interests. Nevertheless, complaints of unfairness and sharp dealing abound. Experience under the Crow Allotment Act of 1920, 41 Stat. 751, is illustrative.

Congress allotted land suitable for agriculture and grazing to individual Crows. An amendment to the Act allowed competent allottees to negotiate leases of their trust lands without BIA supervision but limited the lease term to five years. The following method was used by leasing agents for non-Indian ranchers to circumvent the limitation. An initial five-year lease with an Indian lessee was executed and the rancher prepaid the entire rent. About a year later, documents were executed that cancelled the lease at a specified future date and created a new five-year lease to begin on the future date. Rent for the added term was paid on execution. The Interior Solicitor ruled that the *in futuro* leases violated the Act's restriction. See also *United States v. Lobbitt*, 334 F.Supp. 665 (D.Mont.1971).

After the *Lobbitt* case, a similar practice with the same objective was developed. Five-year leases were executed and the full rents were prepaid. After the first year the leases were simultaneously cancelled and new five-year leases executed effective immediately. Payment for the added term was then made. Crows, many of whom are poor, were induced to go along with the cancellation and re-lease practice in order to get an annual income from the land which they would not have received if the five-year prepaid lease were to run its course. Several allottees sued the leasing agents to set aside such arrangements. They argued that they were locked into the practice by economic necessity and therefore were deprived of being able to have their land free of encumbrances at least once every five years as Congress intended. The disadvantageous leases were perpetuated unless a Crow was fortunate enough to be able to go without income for the five-year term. The practice was upheld because there was inadequate evidence that they were forced by economic pressures to re-lease land to the same ranchers. *Stray Calf v. Scott Land and Livestock Co.*, 549 F.2d 1209 (9th Cir.1976).

3. In the American Indian Agricultural Resources Management Act of 1993, 25 U.S.C. §§ 3701–3745, Congress reaffirmed the Secretary's authority to approve leases on farm and range land for terms up to 25 years. In order to promote tribal self-determination over agricultural lands management on the reservation, tribes may develop 10-year agricultural resource management plans under the Act to govern tribal as well as federal management of agricultural lands. Consistent

with the federal trust obligation and federal law, the Secretary is required under the Act to manage agricultural lands in compliance with tribal environmental, historic, or cultural preservation, land use, and other laws. Significantly, the Act directs the Secretary to establish civil penalties for trespass on agricultural lands such as rangelands, and gives tribes the ability to enforce the Secretary's agricultural trespass regulations in tribal court. The Act specifically entitles those tribal court judgments to full faith and credit in federal and state courts.

4. In *Yavapai–Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.1983), cert. denied 464 U.S. 1017 (1983), the tribe obtained the approval of the Secretary of the Interior for a lease pursuant to 25 U.S.C. § 415, for a tract of land as an automobile dealership for a term of 25 years with an option to renew for an additional 25 years. Interior Department's regulations accompanying 25 U.S.C. § 415 (now codified at 25 CFR 162.1) require the Secretary to participate in the cancellation of the lease in the event of a breach. The lease approved by the Secretary in *Yavapai–Prescott*, however, provided that the tribe “and/or” the Secretary had the power to terminate in the event of the automobile dealership's default on the lease obligations. When the dealership arranged to sublet the land and sell the business to a partnership, the tribe disapproved of the sublease as a breach of the lease agreement and terminated the lease without the Secretary's approval.

In holding that the tribe could not validly cancel the lease without the Secretary's approval, the court took the view that eliminating the Secretary's approval requirement, while clearly enhancing tribal power to eliminate the unfavorable aspects of a lease, “increases the risk of there being lease terms not consistent with the long-run interests of the tribe.” *Id.* at 1075.

It is difficult to be certain about how the balance should be struck between the risk of improvidence and the enhancement of tribal power. However, we choose to reduce the risk—a cautious approach admittedly. To some extent our level of anxiety is less than it otherwise might be because, whatever our choice, it lies within the power of the Secretary to set aside our choice at least with respect to the future. Were we to enhance tribal power by recognizing under the circumstances of this case the power of the Tribe to terminate the lease unilaterally, it is likely that the Secretary could nullify the effect of our decision by henceforth approving only leases that required his approval for termination. On the other hand, following our decision in this case the Secretary could abandon his position by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease. We believe it is more consistent with the judicial process to accept the Secretary's present choice with respect to the proper balance between enhanced tribal power and increased risks of improvidence and to leave to that office the task of altering that choice.

Id.

5. The Secretary may cancel a lease where a previous approval was not in accord with applicable regulations. It has been held that this does not deprive the lessee of any vested property rights. *Gray v. Johnson*, 395 F.2d 533 (10th Cir.1968), cert. denied 392 U.S. 906 (1968). Equities favoring the lessee are not considered.

6. In 1970, the Tesuque Pueblo of New Mexico and the Sangre de Cristo Development Company entered into a lease to develop a substantial portion of the tribal lands for residential purposes. The lease was approved by the Department of the Interior. Seven years later at the request of the pueblo, the Department of the Interior disapproved the lease. James Joseph, Undersecretary of the Department, explained:

The reasons for my disapproval are that the potential development of a subdivision of 16,000 persons in close proximity to the Pueblo of 300 persons poses too great a risk of social, economic and political upheaval for the Pueblo inhabitants to be offset by the benefits they might derive. The presence of 16,000 non-members of the Tribe on the reservation, I believe, poses perhaps insurmountable jurisdictional problems, especially regarding the Tribe and this Department's authority and responsibility over those persons. A subdivision of the magnitude proposed also poses environmental risks that may not be

adequately minimized. There are serious questions concerning the quantity, quality and treatment of water that the residents of the subdivision would be otherwise faced with resolving. The lands themselves do not seem to be well suited to a subdivision on the scale and density proposed, especially in view of the soils, their steepness and the semi-arid climate of the area. If a smaller scale project were proposed, the Tribe would not receive the substantial benefits predicted at first; or, the sale of subleases may now simply not be successful, so that fewer benefits will be derived by the Tribe. All of these concerns, in our view, point out that the project as it is proposed is unworkable. Finally, the Pueblo is now firmly and unalterably opposed to the development and has rescinded its approval of the lease.

Letter dated August 24, 1977, from James Joseph, Undersecretary, to Governor Joe M. Romero, Tesuque Pueblo. The Department's disapproval was upheld against a challenge by the lessee in *Sangre de Cristo Development Co., Inc. v. United States*, 932 F.2d 891 (10th Cir.1991), cert. denied 503 U.S. 1004 (1992).

7. In *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir.2002), a non-Indian lessee had entered into a lease with the tribe to construct a pork production facility on the reservation. A new tribal council was then elected, which opposed the project, and despite the fact that approximately five million dollars had already been expended on construction by the lessee, the BIA voided the lease. The BIA took this action after tribal members and environmental groups filed their own lawsuit to cancel the lease, charging that the BIA had failed to comply with federal environmental law in approving the hog production project. The non-Indian lessee then brought suit against the BIA for voiding the lease. The Eighth Circuit ruled that the non-Indian lessee lacked standing to sue the BIA for voiding the lease. Finding that the leasing statutes relied upon by the lessee to bring suit against the BIA "were enacted to protect Indian interests," the court reasoned that it would be legally inconsistent to interpret these acts "as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests." *Id.* at 1037.

8. In *Seva Resorts, Inc. v. Hodel*, 876 F.2d 1394 (9th Cir.1989), a resort developer sought an injunction to compel the Secretary of the Interior to sign concession and lease agreements for the development of a marina and recreational resort along Lake Powell in the Glen Canyon National Recreation Area on lands belonging to the Navajo Nation and the federal government. The agreements had been negotiated by the tribe with the developer, but subsequent to the negotiations, the tribe began to voice concerns about the developer's ability to complete the \$30 million project. The Secretary refused to approve the agreements based on the concerns raised by the Navajo. The Ninth Circuit concluded that the Secretary did not abuse his discretion under 25 U.S.C. § 415 in refusing to approve the lease agreements on Indian lands. The court distinguished *Yavapai-Prescott* by noting that its decision in that case concerned the cancellation of a lease of Indian land without the Secretary's approval.

How does the Secretary's broad discretion to cancel or refuse approval of a lease agreement favored by a tribe affect the willingness of non-Indians to do business with Indians? What effect is it likely to have on the rents that lessees are willing to pay? What advice would you give to a non-Indian client proposing to lease Indian land?

2. MINERAL DEVELOPMENT

Large quantities of fossil fuel and other mineral resources are located on numerous Indian reservations. Coal and lignite deposits on Indian lands have been estimated at 44.2 billion short tons. Indian Mineral Resources Horizons, BIA Division of Energy and Natural Resources (May 1992). Much of the coal is low-sulfur, which means that it can be burned with less pollution and thus its value increases with stricter air pollution controls. The coal resource is heavily concentrated on a few reservations.

In 2009, tribes received \$389.5 million in mineral revenues from royalties, rents, and other fees, including \$85.4 million in oil royalties, \$166.4 million in gas royalties, and \$85.5 million in

coal royalties. Royalties from minerals other than oil, gas, and coal were \$42.1 million. All Reported Revenues, Fiscal Year 2009, U.S. Department of Interior, Bureau of Ocean Energy Management, Regulation and Enforcement. In 2003, the U.S. Department of Interior reported administering 3,772 mineral leases, licenses, permits, and applications on 2.3 million acres of Indian land, 3,625 of which were oil and gas leases on 1.7 million acres of Indian land. Mineral Revenues 2000, Report on Receipts from Federal and Indian Leases, U.S. Dept. of the Interior, Minerals Management Service, p. 83–84.

The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, superseded prior legislation and authorized leases approved by the Secretary after competitive bidding supported by a tribal resolution. Leases under the Act are for a ten-year term that can be extended if there is production, in which case they continue for “as long thereafter as minerals are produced in paying quantities.” 25 U.S.C. § 396a. The 1938 Act was intended to give tribes control over mineral leasing decisions. In fact, they were often relegated to granting or withholding consent, merely playing a passive role as recipients of royalties under a lease negotiated between the Bureau of Indian Affairs and the mineral developers. The Secretary of the Interior has promulgated extensive regulations to govern mineral leasing. 25 C.F.R. parts 211–14, 216–17 (1985).

The 1938 Act was an inflexible model for developing Indian minerals. The Act and its attendant regulations were designed to protect tribes and individuals against non-Indian exploitation of Indian mineral estates. But this protective approach did not lead to optimal mineral development of Indian lands. A number of tribes found that they could negotiate operating agreements, joint ventures, or other arrangements with mineral developers that were more advantageous than leases. An agreement conveying rights in a portion of the mineral estate in tribal land, however, was within the scope of the Nonintercourse Act and thus arguably not valid unless authorized or ratified by Congress.

During the Self-Determination Era new legal arrangements for pursuing mineral development have been authorized by Congress that allow tribes greater flexibility and autonomy to tailor deals that fit their particular situations. The Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101–2108, specifically authorized individual Indians and tribes to negotiate and enter into non-lease mineral agreements. The IMDA is intended to promote Indian self-determination and to maximize financial returns. See *United States v. Navajo Nation I*, page ___, supra. While standard leasing procedures under the 1938 Indian Mineral Leasing Act allow only a narrow range of conditions and types of compensation, the IMDA imposes no restrictions on the terms or types of agreements. For a tribe with the ability to risk some losses and provide development capital, a joint venture agreement might be appropriate. A tribe without its own resource management program might well choose a negotiated lease agreement with fewer risks. The Secretary must approve or disapprove the transaction within 180 days after its submission, considering the best interests of the individual Indian or tribe, as well as the economic return and the potential environmental, social, and cultural effects. The Secretary is also responsible, to the extent of available resources, for providing Indians with advice, assistance, and information during the negotiation of a minerals agreement.

In 2005, Congress passed the Indian Tribal Energy Development and Self-Determination Act (ITEDSA), 25 U.S.C.A. §§ 3501–3506. This statute, unlike IMDA, does not require tribes to obtain the Secretary’s approval for each individual action it undertakes in entering into agreements for energy resource development. Rather, it allows tribes to enter into tribal energy resource agreements (TERA) with the Department of Interior that permit tribes to enter into agreements for energy resource development, including rights of way for pipelines and similar actions, without the need for individual approval by the Secretary. See Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral*

Resources, 29 Tulsa L.Rev.541 (1994), for a comprehensive treatment of the history of federal regulation of mineral development in Indian country.

NOTES

1. Many leases under the Indian Mineral Leasing Act of 1938 remain in force, and raise continuing problems of construction for the courts. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir.1982), involved a tribe's effort to invalidate four sales of oil and gas leases on the Jicarilla Apache Indian Reservation on a number of grounds, including the Secretary's failure to comply with regulations on notice and bidding procedures under the 1938 Act, and failure to comply with the National Environmental Policy Act (NEPA). While the Tenth Circuit did find a technical violation of the regulation on notice procedures, it affirmed the district court's decision to decline to order outright cancellation. Instead, the court allowed the lessees to avoid cancellation by paying adjusted bonuses to the tribe. The court also found that the tribe had unreasonably delayed asserting its NEPA claim as a ground for attacking the leases.

The Tribe commenced the action in April 1976. The four lease sales were held beginning in April 1970 and concluding in September 1972. During the period of lease sales, the law was unclear as to applicability of NEPA to the approval of lease sales by the BIA. In November 1972, however, this court held that NEPA was applicable to Government approval of a 99-year lease of Indian lands in New Mexico. *Davis v. Morton*, 469 F.2d 593, 597-98 (10th Cir.). It was more than three years after that decision when the Tribe brought this action.

* * *

We feel the trial judge could reasonably find, as he did, that the Tribe was not motivated by good faith concerns for the environmental impact of oil and gas development, that it was motivated by its desire to obtain the maximum possible compensation for the development, and that it was unjust and inequitable to allow the Tribe to use NEPA as a device solely for economic gain.

Id. at 1338, 1340.

2. The Secretary's refusal to approve a mining plan without tribal consent was held a taking in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed.Cir.1990). United Nuclear Corporation was awarded leases by the Navajo Tribe and they were approved by the Secretary. The company spent over \$5 million for exploration. As required by the lease, the company submitted a mining plan that conformed to the Secretary's regulations but the Secretary refused to approve the plan without tribal consent. Part of the majority analysis turned on a belief that the tribe was holding out for more money. The dissent by Chief Judge Nies reframed the dispute as between the Navajo and United Nuclear, and said tribal law should be applied to decide the case in tribal court. Judge Nies refused to base his judgment on assumptions about the tribe's motives.

3. Does the IMLA of 1938 give rise to a fiduciary duty on the part of the Secretary enforceable in monetary damages? The Supreme Court has twice held no. First, in *United States v. Navajo Nation (I)*, 537 U.S. 488 (2003), *supra*, at pp. 334-339 the Navajo Nation alleged that the Secretary breached his fiduciary duty to the tribe by approving a lease that caused the tribe to receive less than market value royalty rates on a coal lease. The Court held that the IMLA did not contain an express and unequivocal statement of a trust duty, thus, no fiduciary duty existed. On remand, the Federal Circuit found that while the IMLA did not contain an express statement of a trust duty on the part of the Secretary, the "network of statutes and regulations" applicable to coal mining on Navajo land and federal control of the mining did in fact create a trust relationship upon which the Navajo were entitled to damages for breach of that trust. *Navajo Nation v. United States*, 501 F.3d 1327, 1340-45 (Fed. Cir. 2007). In 2009, the Supreme Court reversed this decision, finding that the IMLA controlled and its lack of express trust language barred the Navajo from obtaining money

damages for the alleged breach. See *United States v. Navajo Nation II*, supra, at pp. 339–340, supra —.

4. Some of the nation's major energy companies held extensive permits and leases for the exploration and strip mining of the rich coal deposits under the Northern Cheyenne and Crow Indian Reservations in Montana. At first, the tribes encouraged these leases, but as the associated environmental and cultural disruptions became apparent, tribal opinion changed and the tribes sought cancellation of the leases. The Secretary of the Interior responded to a petition of the Northern Cheyenne Tribe by ordering the energy companies and the tribe to conform their leases to a 2,560 acre limitation contained in mineral leasing regulations. This limitation (which the Secretary has authority to waive) effectively canceled the leases, since it was not economically feasible to mine tracts of that size. The Secretary further ruled that the National Environmental Policy Act (NEPA), which had been enacted after the leases, was applicable and ordered the preparation of an environmental impact statement. The Secretary's decision, dated June 4, 1974, contained the following explanation: "As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation." In 1976, the Secretary determined that Crow Reservation leases also must conform to the acreage limitations and NEPA. The Crows also brought a suit urging the invalidity of the lease and permits by reason of the Secretary's failure to follow his own regulations in approving them. The court ruled that violations of the acreage limitation were unlawful. *Crow Tribe v. Andrus*, No. CV-76-10-BLG (D.Mont.1978) (order granting partial summary judgment).

5. The Tenth Circuit Court of Appeals has confronted the difficult task of reconciling the federal government's trust responsibility in managing Indian lands with the contractual obligations arising from mineral leases on those lands in a series of cases involving communitization agreements. Under this type of agreement, lands overlying an established oil field are treated as part of a unit. Drilling operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit.

A frequent practice of mineral lessees is to avoid termination of the lease for failure to produce minerals in paying quantities by applying to the Secretary to include the leased lands in a communitization agreement. Under standard lease terms, such approval keeps the lease in force. Failure by the Secretary to approve the agreement, however, means the Indian mineral holder is free to negotiate a new lease, perhaps with better economic terms. See *Kenai Oil & Gas, Inc. v. Department of the Interior*, 522 F.Supp. 521 (D.Utah 1981), affirmed and remanded, 671 F.2d 383 (10th Cir.1982).

In *Kenai*, a lessee attempted to obtain the BIA Superintendent's approval of a communitization agreement on the eve of the expiration of the ten-year lease term. No production had occurred on Indian lands, but non-Indian lands that would have been included in the communitized area were producing. Had the agreement been approved, all the tracts would have been deemed to be "producing." The court upheld the Superintendent's refusal to sign the agreement based on his judgment as to the best interests of the Indians.

In *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir.1992), cert. denied, 507 U.S. 1003 (1993), the Secretary of Interior was found to have breached his trust responsibilities to the tribe by failure to examine all relevant factors, including recent market conditions, before approving the communitization agreement. Then, an en banc panel of the Tenth Circuit Court of Appeals held in *Woods Petroleum Corporation v. Department of Interior*, 47 F.3d 1032 (10th Cir.1995), cert. denied *sub nom.* *Spottedwolf v. Woods Petroleum*, 516 U.S. 808 (1995), that the Secretary acted arbitrarily and abused his discretion when he rejected a proposed oil and gas communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into new, more lucrative, but identical leases,

which Interior then approved. The court offered the Secretary the following guidance in approving or disapproving communitization agreements for Indian mineral interests:

The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners. Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians * * * is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.

* * *

* * * This is not to say that the Secretary may not reject a communization agreement either because an analysis of all relevant factors fairly leads to the conclusion that the particular agreement is not advantageous to the Indians, or because the Secretary determines that it is in the Indian lessor's best interests to forego communization altogether. However, it is to say that the process of evaluating a communization agreement is not a sham process but rather must be exercised in good faith, and the Secretary may not act arbitrarily and inconsistently in exercising his approval powers.

47 F.3d at 1038–1040.

The two judge dissent in *Woods Petroleum* noted the Secretary's "precarious position" when confronted with a decision on approving a communization agreement for Indian mineral interests:

If he is presented with a communization agreement that operates to extend underlying leases, he must still consider whether it would be more beneficial to the Indian owners to allow the leases to expire and to negotiate new leases. If he does not consider the market value and marketability of new leases, he breaches his fiduciary duty under *Cheyenne–Arapaho*, supra and the federal law that establishes his obligations to Indian mineral owners. However, if he determines that disapproval of the agreement and the negotiation of new leases is in the best interests of the Indian owners, then he may have acted unreasonably and arbitrarily under the majority's holding here. Moreover, under the majority's reasoning, whether the Secretary's disapproval of a communization agreement is unreasonable and arbitrary depends on a course of events that follows his initial decision and that the Secretary may not be able to predict. Thus, according to the majority, if a communization agreement is disapproved, new leases are negotiated, and a new communization agreement establishing the same unit area as the rejected agreement is submitted to the Secretary, his approval of the second agreement makes his disapproval of the first one unreasonable. However, if the Secretary disapproves an agreement and new leases are negotiated but, for reasons that the Secretary may not been aware of at the time of the disapproval, a new communization agreement is not submitted (or a substantially different communization agreement is submitted), then the disapproval of the first agreement apparently would pass the majority's reasonableness test.

Id. at 1053. The cases are analyzed in Randolph L. Marsh, *Secretarial Discretion in Communitization of Indian Oil and Gas Leases: The Tenth Circuit Speaks With a Forked Tongue*, 32 Tulsa L.J. 779 (1997).

6. Should tribes be allowed to intervene in lawsuits between their mineral lessees and the federal government? What factors should be considered in deciding the issue? In *Sanguine, Ltd. v. Department of the Interior*, 736 F.2d 1416 (10th Cir.1984), nine Indian owners of oil and gas-producing Indian lands sought to intervene in a lawsuit brought by their lessee. The lessee alleged that the BIA had unlawfully changed its standard form for communization agreements. The new form did not include a key provision under which production of oil and gas in paying quantities from any zone within the drilling and spacing unit is deemed produced from every zone on each lease within the unit. As a result, production in paying quantities on one lease would no longer serve as a "blanket" extension of the ten-year lease term for other leases in the same drilling unit. After the

district court enjoined the government from requiring the lessee to use the new communitization form, the parties entered a consent decree and the government accepted the lessee's standard form agreement. At that point, the Indian mineral owners (the lessors) moved to intervene. The district court denied the motion because it found that the government had adequately represented the Indians' interests. The Tenth Circuit Court of Appeals overruled the trial court, finding that the government failed to file a responsive pleading, did not make many significant arguments, and called no witnesses at the hearing. In short, the government "conceded the case at the outset." 736 F.2d at 1419. See generally Winifred T. Gross, Note, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes*, 9 Am. Indian L.Rev. 309 (1981).

7. Because tribes are sovereigns as well as landowners, they may seek to control lessees both by contract and by an exercise of the police or taxing power. See pages ____—____, *supra*. *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir.1996), cert. denied, 520 U.S. 1139 (1997), held that the Cheyenne–Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands held in trust for tribal members because such lands constitute Indian country over which the tribes have civil jurisdiction and the inherent power to enact and enforce their taxes.

In *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir.1984), the tribe enacted several ordinances imposing certain licensing, organizational, and tax requirements on its oil and gas lessee some fifty years after the lease was negotiated. The tribe notified Tenneco that a petition for cancellation of the lease had been prepared for non-compliance with the new ordinances. Tenneco then filed suit in federal court seeking declaratory and injunctive relief. The tribal defendants claimed sovereign immunity and argued that the court had no jurisdiction. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), page ____, *supra*. See generally, William V. Vetter, *Doing Business with Indians and the Three "S's: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz.L.Rev. 169 (1994). The Court of Appeals held that the tribe could itself claim sovereign immunity but that individually named tribal officials could not: if the tribe lacked the power to pass its mineral leasing ordinance, then any official enforcing it would be acting outside the scope of his or her authority and thus would be subject to suit. The court also held that the district court had federal question jurisdiction. See *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), page ____, *supra*.

Should tribes have the power to legislate inequitable mineral leases out of existence? Does such power promote or hinder desirable Indian mineral development?

8. Royalties are typically a percentage of the "value" of production. The actual selling price of minerals is treated merely as evidence of value. In *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir.1986) (en banc), cert. denied 479 U.S. 970 (1986), the tribe filed suit claiming breach of various oil and gas leases executed twenty-five or thirty years earlier. The court of appeals upheld a district court decision that the Secretary had improperly calculated royalties because he failed to use the higher figure as between the amount actually realized by the seller of the final product and the price received at the wellhead. The lease allowed either method to be used. Adopting the dissenting opinion of Judge Seymour upon rehearing of an earlier court of appeals decision (728 F.2d 1555 (10th Cir.1984)), the court held that the Secretary had breached his fiduciary duty by failing to interpret the royalty terms favorably to the tribe, failing to ensure that lessees developed diligently according to lease terms, and failing to ensure protection of leased lands from drainage. See also *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639 (2003) (holding that government had no fiduciary duty to "maximize" oil and gas revenue from such production; however, government did have a fiduciary duty to value the oil and gas properly upon which royalties were paid, citing 25 U.S.C.A. §§ 396a–396g, and Federal Oil and Gas Royalty Management Act of 1982, §§ 2–309, 30 U.S.C.A. §§ 1701–1757, and 30 CFR 206.103); *Enos v. United States*, 672 F.Supp. 1391 (D.Wyo.1987) (Secretary must act as fiduciary to Indians when managing oil and gas leasing of allotted lands); *Pawnee v. United States*, 830 F.2d 187 (Fed.Cir.1987), cert. denied 486 U.S. 1032 (1988) (royalties collected by Interior for the Pawnee Tribe for oil and gas

leases did not have to be based on the highest market value); *Youngbull v. United States*, 17 Indian L.Rep. 4001 (Cl.Ct.1990) (damages awarded for BIA abrogation of trust responsibilities by invalid patent of tribal land depriving tribe of oil and gas lease value of 320 acres).

9. Land patents issued to western settlers pursuant to the Coal Lands Act of 1909 and 1910 conveyed the land and everything in it, except the “coal,” which was reserved to the United States. In 1938, the United States restored to the Southern Ute Indian Tribe, in trust, title to previously ceded reservation land interests still owned by the federal government, including the reserved coal in lands patented under the 1909 and 1910 Acts to non-Indian homesteaders.

At the time of the 1909 and 1910 Acts, coalbed methane gas (CBM gas) was considered a dangerous waste product of coal mining. Today, it is considered a valuable energy source. The Southern Ute reserved coal lands contain large quantities of CBM gas. Relying on a 1981 opinion by the Solicitor of the Department of the Interior that CBM gas was not included in the Acts’ coal reservation, oil and gas companies entered into CBM gas leases with the individual landowners of some 200,000 acres of patented land in which the tribe owns the coal. The tribe filed suit seeking a declaration that CBM gas is coal reserved by the 1909 and 1910 Acts.

In *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), the Supreme Court held that surface patentees owned the CBM gas contained in coal which the Southern Ute tribe owns equitable title to under the Coal Lands Acts of 1909 and 1910. The Court found that inasmuch as the common conception of coal in 1909 and 1910 did not include CBM gas, the tribe’s right to the coal does not imply ownership of gas even if the right to mine coal in 1909 and 1910 implied the right to release gas incident to coal mining.

Before the Court rendered its decision adverse to the tribe’s claim, counsel for the oil companies and the tribe had already negotiated a settlement with a practical solution that hedged the serious losses that either would have faced. The settlement essentially created a partnership with the tribe holding a 32% stake in over 250 CBM spacing units. The companies could keep a decade’s worth of royalties that they might have lost if the decision went against them. See Electa Draper, “Amoco, Southern Utes Unite,” *The Denver Post*, May 14, 1999. This compromise resulted in the tribe’s mineral production company, Red Willow, reaping millions of dollars a year in revenues enabling further investment in mineral development on and off the reservation. Is this an example of a nation-building approach, good business sense, or both?

NOTE: PROBLEMS IN FEDERAL MANAGEMENT OF INDIAN MINERAL RESOURCES AND REVENUES

As early as the 1950s, reports of mismanagement of Indian mineral resources began to surface, but national attention did not focus on the issue until the early 1980s. In early 1982, responding to allegations that tribes and the federal government were losing millions of dollars in stolen oil and underpaid royalties for resources developed on both Indian and federal lands, the Secretary of the Interior appointed the Commission on Fiscal Accountability of the Nation’s Energy Resources (better known as the Linowes Commission, after its chairman). The Linowes Commission identified severe problems in royalty management collection processes resulting in underpayment of royalties by as much as ten percent, as well as problems with theft and fraud. “The federal government had operated royalty collection and management on an industry ‘honor system,’ and that system had failed.” Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 *Tulsa L.J.* 541, 567 (1994). Following the Commission’s report in 1982, the Interior Department abolished the old Conservation Division of the U.S. Geological Survey, which had been in charge of royalty collection for both federal and Indian lands, and replaced it with a new Minerals Management Service (MMS).

Congress responded as well by enacting the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701–1757. The Act provided new procedures for royalty management and added provisions for investigations, hearings, inspections, interest on late or deficient payments, penalties, and criminal and civil enforcement. It also authorized the Secretary to enter into

cooperative agreements with states and tribes to work together on inspection, auditing, investigation, and enforcement. Full authority to perform these functions could be delegated to the states but not the tribes. However, delegations to states could not extend over Indian lands without the consent of the tribe or allottee involved.

Despite the initial promise of these measures, Professor Royster notes that the initial effect on royalty collection management and resource theft was minimal because:

* * * [T]he [FOGRMA] provision for tribal cooperative agreements was not drafted with tribes and their needs and limitations in mind. Interior assumed that tribes could provide staffing, technical expertise, and funding at the same levels as the states, an assumption unwarranted for many tribes. Moreover, the Minerals Management Service did not implement the cooperative program. By 1989, only four tribes had entered into cooperative agreements; even then, the federal government retained control of enforcement and ultimate authority to determine which leases would be audited.

Id. at 595–596.

Other royalty management improvements were similarly slow and insufficient. Some aspects of royalty management did improve during the 1980s: reporting errors were reduced, audits and inspections were conducted more regularly, and millions of dollars in royalties and penalties were collected. Nonetheless, by 1989 severe problems with theft and accounting errors remained.

These problems were investigated in 1989 by the specially-created Special Committee on Investigations of the Senate Select Committee on Indian Affairs, which issued a report on fraud, corruption, and mismanagement in American Indian affairs. The Committee found that the federal management of Indian natural resources was still costing the tribes millions of dollars in lost revenues from their non-renewable natural resource base. Special Committee on Investigations of the Senate Select Committee on Indian Affairs, Final Report and Legislative Recommendations: A New Federalism for American Indians, S.Rep. No. 216, 101st Cong., 1st Sess. (1989), pp. 3–23. According to the report:

The Committee found that simple “smash-and-grab” theft—stealing entire tankfuls of crude oil by force—rarely occurs; but sophisticated and premeditated theft by mismeasuring and fraudulently reporting the amount of oil purchased has been the practice for many years of the largest purchaser of Indian oil in the United States and others. The Department of the Interior and its relevant agencies, charged with stewardship of federal and Indian land, have knowingly allowed this widespread oil theft to go undetected for decades, at the direct expense of Indian owners.

* * *

The Bureau of Land Management (BLM) of the Department of the Interior is the agency charged with being the “watchdog” to detect and prevent the theft of crude oil and natural gas from Indian land. * * *

* * *

* * * Inspectors have relied totally on industry reports and have instituted no competent back-gauging or surveillance program, which would be capable of detecting * * * fraudulent reporting. At the same time, BLM officials actually agreed with other expert witnesses before the Committee that the opportunity to steal crude oil from Indians by fraudulent mismeasurement and reporting is “wide open,” a self-fulfilling prophecy given their complete lack of oversight.

BLM officials even failed to report to appropriate law enforcement authorities the pitifully low incidence of theft they logged. Only in one or two instances did BLM simply telephone law enforcement officials, and still no report or file was forwarded, or any follow-up ever made.

* * *

Robert Goodman, Director of BLM Oil and Gas Inspection for Eastern Oklahoma, testified that he failed to contact the FBI regarding oil theft because he “didn’t have the proper telephone number.” * * * [T]he result is that at least nine full-time BLM inspectors annually recorded only \$20,490 in oil theft from Indian lands in nine years. By contrast, the Special Committee uncovered millions in oil theft after only two months of investigation.

Id. at 105, 113–15.

MMS collected approximately \$500 million in Indian oil and gas royalties from 1983 through 1987, but during that same period the Senate Select Special Committee on Investigations estimated potential underpayments at up to \$25 million. The Committee said this of MMS’s efforts in collecting Indian royalties:

The problem at MMS is not institutional incompetence as at BIA, or direct antagonism towards Indian interests as demonstrated by the callousness of BLM, but lack of a clear direction and mandate concerning Indians. For years, companies paying Indian royalties have been neither adequately audited by MMS nor sufficiently penalized when they fail to specially account for, and properly pay, Indian royalties. The problem is that Indian royalties comprise such a small part of MMS jurisdiction that they simply fail to be a priority, in part because Congress has not instructed the agency how much resources it should devote to Indian royalties.

Id. at 122.

The Committee did note one positive development. Tribes were becoming more active in the monitoring and oversight of their own oil and gas leases. For example, the Committee pointed to the Southern Ute Tribe’s formation of a tribal Energy Resource Division in 1980, and its “formidable array” of professionals, including in-house geologists and a mineral accountant. The Division identified several instances of underpayments of royalties owed to the tribe. The Wind River tribes have installed a sophisticated computer system to evaluate production, sales, and valuation data from the tribes’ numerous leases. In 1986 alone, the tribes were able to identify approximately \$300,000 in underpayment of royalties through this system. Id. at 122–25.

Congress reacted to the findings of the Special Committee on Investigations by enacting the Indian Energy Resources Act of 1992 (IERA), 25 U.S.C.A. §§ 3501–3506. The Act’s purpose is to promote tribal economic self-sufficiency through energy development and to further tribal control of such development. In addition to authorizing grants and technical assistance to the tribes for the purpose of developing tribal regulation of mineral resources, the Act called for the creation of an eighteen-member Indian Energy Resource Commission, charged with developing recommendations for royalty management reforms.

3. TIMBER MANAGEMENT

The evolution of ownership of tribal timber is traced in *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873), discussed at page ___, supra and *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), page ___, supra; and the accompanying notes. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145–46 (1980), page ___, supra, the Court described current BIA management practices:

* * * Under 25 U.S.C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation. * * * Sales of timber must “be based upon a consideration of the needs and best interests of the Indian owner and his heirs.” 25 U.S.C. § 406. The statute specifies the factors which the Secretary must consider in making that determination.¹³ In order to assure the continued productivity of timber-producing land on

¹³ Those factors include “(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and

tribal reservations, timber on unallotted lands “may be sold in accordance with the principles of sustained yield.” 25 U.S.C. § 407. * * * He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U.S.C. § 466.

Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the “development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.” 25 CFR § 141.3(a)(3).^{*} The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8–141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12–141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

448 U.S. at 145–48.

As the Court’s opinion in *White Mountain* attests, “the Federal Government’s regulation of the harvesting of Indian timber is comprehensive.” *Id.* at 145. See also *In re Blue Lake Forest Products, Inc. v. Hong Kong and Shanghai Banking Corporation, Ltd.*, 30 F.3d 1138, 1142 (9th Cir.1994) (noting that “federal interests are very extensive” and therefore normally prevail over state interests “in the regulation of timbering on Indian reservations.”) Under an extensive federal regime of laws and regulations, for example, sustained yield timber management is required on Indian lands, see 25 U.S.C.A. § 406. Any harvesting of timber on the reservation should insure the future productivity of the land and cut-over areas should be reforested. *Cf.* 16 U.S.C.A. § 531(b) (Multiple–Use Sustained–Yield Act of 1960 applicable on national forest lands). These types of federally mandated management requirements, as well as significant investments of capital to construct roads and support facilities, means that the costs of Indian timber harvesting can be substantial in relation to revenues.

BIA management of Indian forest lands historically has been described as ranging from “mediocre to abysmal.” Angelo A. Iadarola, *Indian Timber: Federal or Self–Management?* (1979). In *United States v. Mitchell*, 463 U.S. 206 (1983), the United States was held liable for decades of mismanagement of timber on Indian allotments on the Quinault Reservation in Washington. See also *Menominee Tribe of Indians v. United States*, 91 F.Supp. 917 (Ct.Cl.1950) (finding federal mismanagement of timber on tribal lands on the Menominee Reservation in Wisconsin).

The same congressional committee that identified massive fraud, corruption, and mismanagement by the federal government in Indian mineral resource development programs, the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, see *supra*, page ___, found similar problems in the BIA’s management of Indian forests. The Committee’s hearings in 1989 identified losses to tribes of \$330 million in the 1980s alone from the BIA’s “poor management of their forests and woodlands.” Senate Report 101–216, November 20, 1989, pages 138–140.

practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.” 25 U.S.C. § 406(a).

^{*} [Ed.] The regulations have been renumbered as 25 C.F.R. § 163, 3(b)(4).

The Committee's hearings led to passage by Congress of legislation in 1990 that significantly reformed management of Indian timber. The National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C.A. § 3101 et seq., reaffirmed the federal government's trust responsibility for Indian forest resources, reshaped the statutory framework for the exercise of this trust responsibility, and provided a broadened role for tribes in the management of their own forest resources. Darla J. Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 Am. Indian L. Rev. 259 (1997). It is still too early to determine the NIFRMA's impact on Indian forest management. Senator John McCain of Arizona, who co-sponsored NIFRMA, expressed "dismay" at the BIA's "unconscionable" five-year delay in issuing final regulations implementing the Act. Following McCain's harsh criticism, the BIA issued regulations in October, 1995. 60 Fed. Reg. 52250 (1995).

The federal role in Indian timber, no matter how burdensome and poorly administered historically, still has an important part to play in modern tribal economic development efforts. After all, in *White Mountain* it was the extensive regulatory role of the BIA that pre-empted state taxation of the non-Indian businesses involved in on-reservation timber harvesting. The principles of federal Indian law provide reservation economic development with a variety of special rules that cut across the entire spectrum of Indian business dealings. For example, in the previously cited *In re Blue Lake Forest Products* case, supra, the court held that Indian law's principles of federal preemption overrode state commercial law which recognized a security interest in logs harvested on the reservation held by an off-reservation bank under the Uniform Commercial Code. Because of the federal regulations governing the harvesting of Indian timber, title to those logs remained with the United States as the tribe's trustee. The tribe, and not the off-reservation bank, was entitled to the proceeds from the sale of those logs.

Can you think of any other areas of Indian economic development, besides timber harvesting, where federal law, not state law, exclusively governs non-Indians involved in the transaction? Can you see any disadvantages for a tribe's economic development efforts once someone in the bank's position understands that its secured loans to a non-Indian company involved in harvesting tribal timber or other on-reservation business activities might be covered by the special rules of federal Indian law?

NOTE: FEDERAL INCOME TAXATION OF RESERVATION ENTERPRISES

For most businesses, federal income tax planning is a major consideration. Reduction or avoidance of tax liabilities can enhance profits or even make the difference between a profitable and losing enterprise. We have seen that the government role in resource management under federal law can be a mixed blessing. Federal income tax law offers particular advantages to tribal businesses and, under certain circumstances, to individual Indians. Because Indian tribes themselves are simply not among the entities made taxable under the Internal Revenue Code, their exemption from federal income taxation is normally not an issue for reservation economic and community development.

The non-taxability of tribes does not apply to individual Indians. Reservation Indians are treated like other "individuals" under the Internal Revenue Code. Although an Indian has no general exemption from federal income taxation simply by being an Indian, see, e.g., *Lafontaine v. Commissioner*, 533 F.2d 382 (8th Cir.1976), some tax exemptions in favor of individual Indians may be found in treaties and statutes.

The leading case is *Squire v. Capoeman*, 351 U.S. 1 (1956). Under Section 6 of the General Allotment Act, the Secretary of the Interior was empowered to issue a patent in fee simple to any Indian allottee, deemed "competent and capable of managing his or her affairs * * * and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Squire* involved the question of whether proceeds of the sale of standing timber on an Indian trust allotment should

be exempt from federal taxation. The government argued that the language in Section 6 was directed solely at permitting state and local taxation after a transfer in fee. Applying the general rule that exemptions from federal taxation should be clearly expressed in the statute, the government argued that since the statute was silent on the question of federal taxation of restricted allotments, the Indian allottee was responsible for the federal tax.

Interestingly, Section 6 antedated the federal income tax by ten years, a fact that could explain Congress' silence on the issue of federal taxation. Nonetheless, applying the rule that federal statutes should be liberally construed in favor of Indians, the Court held income derived directly from tribal trust and restricted Indian allotted lands is not subject to federal taxes: "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." *Id.* at 7–8.

Subsequent courts have been less than generous to allottees and other Indians asserting extensions of *Squire's* "derived directly" test. The cases have not allowed tax exemptions much beyond the basic income—from, for example, timber, grazing, and farming—derived directly from an allottee's own allotment. See, e.g., *Holt v. Commissioner*, 364 F.2d 38 (8th Cir.1966), cert. denied 386 U.S. 931 (1967) (Income of tribal member from cattle grazing on tribal trust land held taxable).

The Chickasaw Indian Nation sued the United States, seeking a refund of federal wagering and occupational excise taxes paid by the tribe in connection with its gambling operations. In *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), instead of applying the Indian law canons of construction, the Supreme Court applied a competing canon that requires tax exemptions to be expressly stated and narrowly construed: "Nor can we say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than Indian treaty is at issue." *Id.* at 535–536. The Supreme Court refused to interpret the Indian Gaming Regulatory Act as granting tribes the same exemption from federal excise taxes that had been granted to states. See generally George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 *Am. Indian L.Rev.* 399 (2002–2003).

4. THE ROLE OF TRIBAL SOVEREIGNTY IN THE MANAGEMENT AND CONTROL OF RESERVATION RESOURCES: A CASE STUDY ON INDIAN TRIBES AND THE ENDANGERED SPECIES ACT

Many Indian tribes have asserted that one of the most significant challenges to their sovereignty and to economic development on the reservation is undue interference by the federal government. This chapter has already discussed the pervasive control exercised historically by federal officials over reservation resources and economic development, with little to show for such efforts. As tribes entered the modern era determined to exercise their sovereignty to achieve self-sufficiency, decades of mismanagement and sometimes even outright corruption within federal agencies left many reservations worse than before, impeding their development efforts.

Many Indians have maintained that they could do a better job of developing and protecting the reservation environment and its resources than federal bureaucrats in Washington and BIA field offices. Popular stereotypes romanticize Indians as the "first environmentalists," but for many tribes, administration by federal agencies of the Endangered Species Act (ESA), one of the most important legislative achievements of the modern environmental movement, posed a threat to their sovereignty and economic self-sufficiency.

Some tribes have used the ESA to protect resources essential to their economic well-being and cultural survival. E.g., *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir.1984), cert. denied 470 U.S. 1083 (1985) (water releases from federal dam for Indian reservation fishery upheld under ESA). But at times the ESA has been enforced on Indian reservations by federal agencies in order to protect a threatened species of animal or plant life so as to frustrate or defeat a proposed tribal development project. Ironically, the peril of the species is often the result of major non-Indian development activities, causing tribal leaders to object to putting the burden of belated species protection on chronically underdeveloped reservations. As is so often the case when tribes contemplate strategies for economic development, the principles of federal Indian law provided no clear and unambiguous guidance on what their rights and responsibilities were under the legislation.

The U.S. Supreme Court has held that federal statutes do not abrogate Indian treaty rights unless there is “clear evidence” that Congress actually considered the issue and chose to abrogate the treaty. See pages ____–____, *supra*; *United States v. Dion*, page ____, *supra*. The ESA is silent as to its applicability to Indian tribes and Indian reservations, but the few decisions that did raise the question gave tribes serious concern. E.g., *United States v. Billie*, 667 F.Supp. 1485 (S.D.Fla.1987) (applying the Act to a Seminole Indian’s non-commercial hunting of panther on the tribe’s reservation in Florida). Although the lower court in *Dion* found that the ESA did not abrogate tribal treaty rights to take eagle feathers, the U.S. Supreme Court based its ruling in *Dion* on the Bald Eagle Protection Act and did not reach the general issue of the ESA’s applicability in the face of treaty rights. See generally Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 Or.L.Rev. 543, 563–74 (1991); Tim Vollmann, *The Endangered Species Act and Indian Water Rights*, 11 Nat. Resources & Env’t 39 (1996); Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 Env’tl. L. 733, 778–79 (1995).

Professor Charles Wilkinson describes the chain of events leading up to the tribal confrontation with federal officials over administration of the ESA in Indian country in his article, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: the Tribal Rights-Endangered Species Secretarial Order*, 72 Wash.L.Rev. 1063, 1065 (1997).

During the 1970s, as Congress vastly expanded federal environmental laws, tribes had intermittent brushes with the enforcement of laws protecting animal species, notably eagles. By the mid-1990s, the ESA had become a major concern for tribes. Stresses on the environment had increased, especially in the West. The tribes had become much more active in resource management and development. The Act, fortified by the U.S. Supreme Court’s ruling in *Tennessee Valley Authority v. Hill*, was administered strictly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Although the environmental impacts had been created by non-Indian development, the tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting; tribal leaders strenuously objected to the federal officials’ lack of respect for tribal sovereignty and resource management practices. In Congress, legislative proposals regarding ESA reauthorization were pending.

One of the leaders of this movement by Indian tribes challenging federal administration of the ESA in Indian country was Ronnie Lupe, the then Chairman of the White Mountain Apache Tribe of Arizona. In a 1992 speech, Lupe called the Ecological Services Branch of the United States Fish and Wildlife Service (one of the agencies with primary responsibility for enforcing the ESA), “a group of environmental extremists.” He also declared, “I see the Endangered Species Act being used as the dominant society’s most modern method of performing genocide on the Apache People.” Ronnie Lupe, *The Challenges of Leadership and Self-Government: A*

Perspective from the White Mountain Apaches, delivered at Phillips Exeter Academy, October 7, 1992.

Chairman Lupe spoke more temperately in his testimony before the Senate panel considering reauthorization of the ESA in 1995 (referred to in Professor Wilkinson's article). Nonetheless, the chairman insisted that the ESA does not and should not apply to tribes and that Congress should amend the Act by specifically excluding tribes from its requirements.

**TESTIMONY OF RONNIE LUPE, CHAIRMAN OF THE
WHITE MOUNTAIN APACHE TRIBE PREPARED FOR
THE U.S. SENATE COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS SUBCOMMITTEE ON
DRINKING WATER, FISHERIES AND WILDLIFE**

104th Cong., July 13, 1995.

* * *

FORT APACHE INDIAN RESERVATION

For those of you who are not familiar with our White Mountain Apache people and our land, our reservation homeland, known as the Fort Apache Indian Reservation, is comprised of some 1.6 million acres of lands ranging in elevation from 2,500 feet to over 11,400 feet. We have vast canyons and range land and over 700,000 acres of primarily ponderosa pine forest through which traverse 400 miles of rivers and streams. Our reservation is home to abundant game and fish, including the once endangered Apache trout, elk, bear, mountain lion, pronghorn antelope, deer, wild turkey, osprey and our nation's symbol, the bald eagle.

In pre-reservation days, we were entirely self-sufficient and healthy in mind, body and spirit. The sacred waters which arise on our reservation sustained us. We depended upon wildlife, native plants and our own agriculture for food, shelter and clothing. All life was held sacred and that tradition continues today. The first deer was never struck down during a hunt. We would let it pass so that there would always be one remaining in the forest. Prayers were always offered after the taking of any wildlife, giving honor to the sacrifice of that life for the survival of our families. Prayers are still offered today when animals are hunted and killed.

Apache people never saw ourselves as separate from the earth. We are one with the land. Hunting was not for sport and trophies but to provide food and clothing. Although we have been masters of our lands since time immemorial, the land and its fruits have never been simply for the taking but are elements of our responsibility for stewardship of the lands that the Creator has provided us. Our people have always been taught to respect the land and living things. Individual ownership of land was unknown to us but our responsibility to care for the land was taught to us from an early age.

Our tradition of stewardship continues to guide the natural resource management philosophy of the White Mountain Apache Tribe. Our lands were severely damaged due to mismanagement by the Department of Interior from the time the reservation was first established in 1871. We have since regained managerial control of our lands and are now in the process of repairing the extensive damages that were done to our grazing lands, forests and riparian areas. In the past ten years, the Tribal Council has voluntarily reduced our annual allowable timber harvest from 92 million board feet to 57 million board feet because of our concerns about overcutting our forest and damaging our environment. Included in this reduction has been the removal of several "old growth" timber sales because of our cultural and environmental concerns.

INITIAL EXPERIENCE WITH THE ENDANGERED SPECIES ACT

Despite the damages we have sustained, our reservation remains a refuge for many endangered and sensitive species, both listed and unlisted. Although the Endangered Species Act was passed in 1973, our Tribe had very little involvement with the Act or its implementation until recent years. Initially, we viewed the challenges by environmental groups and the regulatory actions of the U.S. Fish & Wildlife Service regarding endangered species as total hypocrisy. Those who sought to impose the ESA upon our Tribe and our aboriginal lands, made their challenges from cities where they had long ago exterminated native animals and plants and had erected cities of concrete and steel where prairies, wetlands and other wildlife habitat once existed. The species found on our reservation that are listed as “endangered” are rare because there are few healthy habitats elsewhere. Our reservation is home to many of these plants and animals because we have managed our lands well.

In our Apache tradition, we do not manage our lands for the benefit of a particular species. We strive to protect the land and all the life forms that it supports. Our homeland is too vast to manage for just one species. Our reservation traverses five life zones from Upper Sonoran to Sub-Alpine Forests. The diversity of our land provides habitat for a wide variety of plants and animals and each is important to us. The pressures of environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to manage our lands for a single species was a contradiction to our view of life.

THE ENDANGERED SPECIES ACT DOES NOT APPLY TO INDIAN TRIBES

It has always been our view that the Endangered Species Act does not apply to the White Mountain Apache Tribe and Indian Tribes generally. Nowhere in the Act does it specify that the Act applies to Indian Tribes. Congress has the power to make the Act apply to Tribes but until it has spoken, it cannot be assumed that it applies or that the Tribe is bound by its dictates. In the past four years, we saw increasingly aggressive action by the U.S. Fish & Wildlife Service, perhaps because of lawsuits against that agency, to establish critical habitat and to list endangered species on our tribal lands. Nevertheless, having managed our land so well for hundreds of years, we were confident that the Act would not affect our lands or our people.

Then, one after another, critical habitats were proposed that would include our reservation lands for the loach minnow, Arizona willow, razorback sucker, and Mexican spotted owl. Because our reservation is a refuge for many endangered plants and animals it was probable that new proposals would be made in the future. It soon became apparent that the Congressional goals of tribal self-governance, tribal self-determination and economic self-sufficiency could be paralyzed by third parties filing lawsuits against the U.S. Fish & Wildlife Service to force the Service to declare critical habitat on our reservation. Such a designation would affect our sawmill, ski area, cattle industry, development of recreational facilities and our entire wildlife and land management philosophy. The prospect of our aboriginal lands being controlled by environmental activists living hundreds of miles from our homeland was too much to bear and so we adopted resolution 2-94-060, on February 24, 1994, which prohibits any federal or state agency from entering our Fort Apache reservation for the purpose of conducting any studies or sample collection of any kind whatsoever. We were particularly affronted by the implications that we were not capable of managing our lands.

NOTE

The tension between the tribe and the USFWS described by Chairman Lupe gave rise to an extraordinary series of negotiations between the Chairman and Director of the U.S. Fish & Wildlife Service, the late Mollie Beattie. Beattie was a forester by training, and the first woman to head the Fish & Wildlife Service. She had developed a reputation as an advocate for species conservation through her efforts at reintroducing gray wolves into Yellowstone National Park. Yet, in her negotiations with Lupe, Beattie proved a patient listener who respected the Apaches’ strong

connection with the Earth. See Jeff Barker, *Indians Agree to Species Pact*, The Arizona Republic, A1, 12, June 5, 1997.

The negotiations between the Apache tribal chairman and the USFWS Director took place in Washington, D.C., but not at the Fish and Wildlife Services office. Chairman Lupe wanted to meet at a neutral site, outdoors, amidst, as he described it “the sound of trees and flowers, with the sounds of birds mingled with laughing children.” One type of noise the parties agreed to do without, however: no attorneys were to be present during their meeting.

As a result of their negotiations, Chairman Lupe and Director Beattie agreed to set aside their legal concerns and work toward an improved relationship between the tribe and the Service. They each told their staffs not to be constrained by perceived legal constraints in designing this new type of relationship for federal-tribal cooperation on species and ecosystem management. The process led to the following “Statement of Relationship,” signed by Chairman Lupe and Director Beattie in the Tribal Council Chambers in Whiteriver, Arizona on December 6, 1994.

STATEMENT OF THE RELATIONSHIP BETWEEN THE WHITE MOUNTAIN APACHE TRIBE AND THE U.S. FISH AND WILDLIFE SERVICE

(Dec. 6, 1994).

PURPOSE

Tribal sovereignty and Service legal mandates, as applied by the Service, have appeared to conflict in the past, but both the Tribe and the Service believe that a working relationship that reconciles the two within a bilateral government-to-government framework will reduce the potential for future conflicts.

I. GUIDING PRECEPTS

- The Tribe and the Service have a common interest in promoting healthy ecosystems.
- The Service recognizes the Tribe’s aboriginal rights, sovereign authority, and institutional capacity to self-manage the lands and resources within the Fort Apache Indian Reservation as the self-sustaining homeland of the White Mountain Apache people.
- The Service’s technical expertise in fish, wildlife, and plants establishes it as a significant resource for the Tribe’s management of the ecosystems and associated sensitive species of the Reservation.
- The Service has a trust responsibility and is required to consult with the Tribe, as articulated in Order No. 3175 by the Secretary of the Interior, regarding any of its activities that may affect the Tribe’s trust resources and the sustained yield of those resources. Such activities will support the Tribe’s self-determination and economic self-sufficiency.

* * *

II. TRIBAL MANAGEMENT

- The Tribe is continuing to institutionalize internal processes for planning, review, regulation, and enforcement to ensure that economic activity on its reservation is consistent with traditional Apache values for living in balance with the natural world.
- The Tribe will complete integrated resource management plans on a watershed basis that promote tribal goals, including sustained yield. These plans will direct the assessment, management, and restoration of ecosystems in accordance with tribal values. * * *

III. COMMUNICATION

- The government-to-government relationship requires working with the White Mountain Apache Tribal Government and its resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common

concern. Both the Tribe and the Service recognize, however, that release of tribal proprietary, commercial, and confidential information may be restricted by either the Tribe or the Service.

* * *

- Whenever the Service considers a change in the status of a species that may exist on the Reservation now or in the future, it will promptly notify the Tribe's Endangered Species Coordinator. Concurrently, the Service will indicate what scientific information it presently has, the nature of the Service's concern, and what additional information and management would render unwarranted the elevation of the species to a more protected status or would encourage the delisting of the species.

* * *

IV. COORDINATION

* * *

- The Service and the Tribe will cooperatively develop and propose management practices based upon identified threats to sensitive species and their habitats for incorporation into the Tribal Management Plan (TMP), which consists of the portions of the Ecosystem Management Plan and integrated resource management plans which address sensitive species. This activity will initially take the form of lists of sensitive species, threats, and an assessment of commonality and severity of the threats.

***NOTE: THE SECRETARIAL ORDER ON "AMERICAN INDIAN TRIBAL RIGHTS,
FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES
ACT"***

In his Senate testimony in 1995, Chairman Lupe spelled out the benefits his tribe had received by negotiating over the ESA, rather than litigating:

Before the Statement of Relationship, our staff spent many hours trying to negotiate the bureaucratic maze of the Fish & Wildlife Service, understand the nuances of the Endangered Species Act, and posturing for potential litigation. There was little time for active field work. But today we have programs in which we are protecting sensitive habitats using funds from the Service and the labors of our Tribal young. This approach seems to be more directly related to protection of endangered species than bureaucratic fighting and potential litigation.

Both Beattie and Lupe recognized that the approach they had negotiated for federal-tribal cooperation on the ESA could be used as a model for a broader agreement, applying to all federally recognized tribes. Lupe and other tribal leaders, along with tribal resource managers and tribal lawyers from across the country, convened a national meeting on the ESA in 1996 in Seattle, Washington. Out of this meeting, a working group, comprised of twenty-five representatives from all regions of the country, was organized to examine legislative and administrative alternatives and to make its recommendations. After considering various options involving litigation and legislation, the group increasingly focused on the approach taken in the Statement of Relationship that the White Mountain Apache Tribe and the USFWS signed in 1994, and decided to recommend to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the White Mountain Apache-U.S. Fish and Wildlife Service Statement of Relationship.

Following a series of extensive negotiations between the tribal representatives and federal officials, the Secretaries of the Interior and Commerce (the cabinet-level departments with primary legislative authority for enforcing the ESA) issued Secretarial Order No. 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." Under the 1997 Secretarial Order, the departments will carry out their responsibilities under the Act "in a

manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.” Section 1. The order also recognizes that “Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.” Section 4.

Section five sets out five principles that form the substantive basis for the order:

Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.

Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.

Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.

Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.

Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.

The explanatory text accompanying the principles contains a number of important provisions. Principle 3(B) of the order, for example, states that “the Departments shall give deference to tribal conservation and management plans.” Another important provision, growing out of the White Mountain Apache experience, states that departmental employees should generally seek tribal permission before entering Indian reservations. The order also encourages the use of dispute resolution processes, evidencing a shared determination on the part of tribes and federal officials to resolve disputes outside of court if possible. Finally, the order includes an appendix that sets out specific, detailed instructions to aid field personnel in on-the-ground administration. See Wilkinson, *supra*, at 1066, 1074–1085.

Professor Wilkinson, who participated in the negotiations as a tribal representative, makes the following assessment of what tribes achieved through the negotiations leading up to the Secretarial Order:

These government-to-government negotiations, then, resulted in several advances for the tribes. The Order recognizes the unique characteristics of tribes and tribal lands. It establishes a special place for tribes, tailored to the characteristics of tribal sovereignty and the trust duty, in all the key areas of administration of the ESA. It is also a practical document that focuses on relationships in the field between tribal and federal resource managers. The Order does not accomplish what the tribes would cherish most—a definitive statement that the ESA does not restrict tribes. However, it is neutral on the issue of ESA coverage, gives explicit deference to tribal decisions, and establishes a number of significant procedural steps and substantive requirements before federal officials can seek to apply the ESA to tribes.

Id. at 1083–1084.

The Fish and Wildlife Service has continued to implement the policy outlined in the Secretarial Order. In 2000, the USFWS issued its Final Designation of Critical Habitat for the spikedace and loach minnow, two endangered species found on the White Mountain Apache Tribe’s reservation. Under its ruling, the Service announced that it would defer to tribal management plans for the two species.

The White Mountain Apache Tribe, which has currently occupied loach minnow habitat and potential loach minnow and potential spokedace habitat within its reservation boundaries, produced a Native Fishes Management Plan. After reviewing this plan, we determined that the tribe's management of the species will provide substantial protection for the relevant habitat areas, and that designation of critical habitat will provide little or no additional benefit to the species, particularly since the areas are occupied by the loach minnow. Conversely, designation of critical habitat would be expected to adversely impact our working relationship with the Tribe, the maintenance of which has been extremely beneficial in implementing natural resource programs of mutual interest. In 1994, the Fish and Wildlife Service and White Mountain Apache Tribe signed a Statement of Relationship which formalized our commitment to work cooperatively with the Tribe in promoting healthy ecosystems. Since that agreement, we have worked cooperatively with the Tribe to the significant benefit of threatened and endangered species. In addition to managing the habitats of the spokedace and loach minnow, these programs include management of the threatened Mexican spotted owl, management of healthy populations of threatened Apache trout, and other natural resource programs.

Rules and Regulations Department of the Interior Fish and Wildlife Service, 50 C.F.R. part 17 *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Spikedace and the Loach Minnow*, 65 Fed. Reg. 24328–01, 24338 (April 25, 2000) (to be codified at 50 C.F.R. Pt. 17). After weighing the benefits of critical habitat designation on the tribe's reservation against what the ruling called, "the adverse impact on our cooperative natural resource programs," USFWS found that the benefits of excluding reservation lands, "in terms of the spikedace and loach minnow, as well as ecosystems in general, outweigh the benefits of including those areas as critical habitat." *Id.* See generally Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D.L.Rev. 381 (1998).

Elsewhere, the USFWS has entered into partnership with the Nez Perce Tribe of Idaho, which is the primary manager of the Grey Wolf Recovery Project on 13,000,000 acres in central Idaho. Beyond management, the tribe is also actively involved in outreach and education, research, and monitoring of the wolves' progress. See Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 Nat. Resources J. 543, 553–554 (1999).

NOTE: THE ROLE OF FEDERAL INDIAN LAW IN RESERVATION ECONOMIC DEVELOPMENT

Tribal sovereignty as recognized by the Supreme Court includes all inherent powers of self-government not expressly taken away by Congress. What is the relation between this understanding of tribal sovereignty and the "de facto" sovereignty, defined as genuine decision-making control over reservation affairs, that the Cornell and Kalt research identifies as the "first key to economic development?" Have tribes like the White Mountain Apache and Nez Perce now acquired the type of "de facto" sovereignty necessary for economic development according to Professors Cornell and Kalt by mobilizing the concepts of Native nation-building and securing negotiated agreements and partnerships with the USFWS over the enforcement of the ESA and species recovery on their tribal lands?

Some commentators perceive the present majority of the Supreme Court, led by Chief Justice John Roberts, as being disinclined or at least disinterested in providing any meaningful clarification of tribal sovereignty which is necessary to support expanded tribal control over reservations. Thus, for the foreseeable future at least, they have urged tribes and their advocates at least to consider the potential advantages as well as the liabilities of negotiation and settlement as opposed to adjudication.

In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal

doctrines, but on practical realities. Negotiation gives people—including subordinated people—a piece of the legal action and a chance to own, if only partially, both the resolution of particular disputes and a greater sense of the structure and efficacy of the long-term relationships between the parties.

Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv.L.Rev. 1754, 1783–1784 (1997). See also Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 New Eng.L.Rev. 523, 535–544 (2003); Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal Governments*, 26 Hamline L.Rev. 48, 75–81 (2002); P.S. Deloria & Robert Laurence, *Negotiating Tribal–State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga.L.Rev. 365, 373–74 (1994); David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations’ Self–Government*, 1 Rev. of Constitutional Studies 120 (1993).

Consider the role of federal Indian law in the types of negotiation and consultation processes which led to the White Mountain Apache Statement of Relationship with the Fish and Wildlife Service and the Secretarial Order on “American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act.” See page ___, supra. Both documents contain a number of references to the trust doctrine and tribal sovereignty—both judge-created principles of federal Indian law. How would the federal agencies involved in the negotiations that led to the approval of these agreements have gone about justifying their preferential treatment for tribes under the ESA without the special set of rules and principles of federal Indian law developed over the course of nearly two centuries by the Supreme Court, Congress, and the Executive Branch?

The question of whether tribes should pursue negotiation rather than litigation in order to secure their sovereignty and control over reservation development cannot be answered as simply as it is posed. But it cannot be answered at all without considering the principles of federal Indian law. There is, therefore, at least one very important challenge which Indian tribes and the field of Indian law itself share as tribes move into the next century along with the rest of United States society: Can this body of law be developed in a progressive manner, serving to provide a just set of principles for defining the degree of measured separatism that American Indian tribes need for their continued cultural development and survival?

CHAPTER 10

INDIAN RELIGION AND CULTURE

SECTION A.

PROTECTION OF AMERICAN INDIAN SACRED LANDS AND SITES

After the partial paragraph on page 788, add:

NATION BUILDING NOTE:

BEARS EARS NATIONAL MONUMENT

Congress enacted the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, to protect archeological and Indian sacred sites on federal lands from the depredations of collectors and others. See generally Mark Squillace, *The Monumental Legacy of the Antiquities Act*, 37 Ga. L. Rev. 473 (2003).

In 2015, a coalition of five Indian tribes formally petitioned President Obama to invoke the Antiquities Act to create the Bears Ears National Monument. The highlights of the coalition's proposal identified cultural and environmental justifications for the proposal:

The proposed Bears Ears National Monument is a place rich in history and culture. It is a place to connect, a place to heal, and a place where Native American Traditional Knowledge can be explored and nurtured so that it continues to inform and illuminate modern life. The Bears Ears Inter-Tribal Coalition, a consortium of five sovereign Indian nations—the Hopi, Navajo, Uintah & Ouray Ute, Ute Mountain Ute, and Zuni—has formally petitioned President Barack Obama to proclaim the Bears Ears National Monument in order to protect this extraordinary area for our Tribes, all Native people, and the nation.

The proposed 1.9 million acre monument is a landscape of deep, carved canyons, long mesas, inspiring arches, and arresting red rock formations. The monument's namesake, the Bears Ears, are twin buttes in the heart of the landscape that rise high above the piñon-juniper forests and canyons that adorn the renowned and majestic Cedar Mesa. It lies in Southern Utah, north of the

Navajo Nation and the San Juan River, east of the Colorado River, and west of the Ute Mountain Ute Reservation. Bears Ears is adjacent to Canyonlands National Park and is every bit the equal of Canyonlands and the other great parks and monuments of the Colorado Plateau.

Ever since time immemorial, the Bears Ears area has been important to Native American people as a homeland. In the mid-1800s, Native Americans were forced fully and violently removed from the area and marched to reservations. But the Native bond to Bears Ears is strong and today is a place that embodies that history. Modern Native American people continue to use the Bears Ears area as a place for healing, ceremonies, and the gathering of firewood, plants, and medicinal herbs.

When they return to Bears Ears today, Native American people feel the presence of their ancestors everywhere. This landscape records their ancestors' migration routes, ancient roads, great houses, villages, granaries, hogans, wikiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, shade houses, and burial grounds. Our people are surrounded by the spirits of the ancestors, and embraced by the ongoing evolution of their culture and traditions. For Native American people, Bears Ears is a place for healing. It is also a place for teaching children—Native American children and the world's children—about meaningful and lasting connections with sacred and storied lands.

All of this is threatened—by destructive land uses, such as mining and irresponsible off-road vehicle use and by the rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape. The Bears Ears National Monument proposal is a bold and inspired plan to stem the tide of this erosion—and protect Bears Ears for the benefit of all.

Bears Ears Inter-Tribal Coalition, The Tribal Proposal to President Obama for the Bears Ears National Monument, Executive Summary (2015), *available at* <http://www.bearscoalition.org/wp-content/uploads/2015/01/ExecutiveSummaryBearsEarsProposal.pdf>.

On December 28, 2016, President Obama invoked the Antiquities Act, established the Bears Ears National Monument, and issued the following statement:

Today, I am designating two new national monuments in the desert landscapes of southeastern Utah and southern Nevada to protect some of our country's most important cultural treasures, including abundant rock art, archeological sites, and lands considered sacred by Native American tribes. Today's actions will help protect this cultural legacy and will ensure that future generations are able to enjoy and appreciate these scenic and historic landscapes.

Importantly, today I have also established a Bears Ears Commission to ensure that tribal expertise and traditional knowledge help inform the management of the Bears Ears National Monument and help us to best care for its remarkable national treasures.

Following years of public input and various proposals to protect both of these areas, including legislation and a proposal from tribal governments in and around Utah, these monuments will protect places that a wide range of stakeholders all agree are worthy of protection. We also have worked to ensure that tribes and local communities can continue to access and benefit from these lands for generations to come.

Statement by the President on the Designation of Bears Ears National Monument and Gold Butte National Monument (Dec. 28, 2016).

The Trump Administration proposed shrinking Bears Ears by as much as 90 percent. Julie Turkewitz, Trump Slashes Size of Bears Ears and Grand Staircase Monuments, *NEW YORK TIMES*, Dec. 4, 2017. Indian tribes sued the federal government to stop that action. Complaint, *Hopi Tribe v. Trump*, No. 17-2590 (D.D.C.), available at <https://turtletalk.files.wordpress.com/2017/12/doc-1-complaint-00184691x9d7f5.pdf>.

CHAPTER 12

FISHING AND HUNTING RIGHTS

SECTION B.

OFF-RESERVATION FISHING AND HUNTING

Replace note 1 on page 935 with the following:

The Supreme Court granted cert in *Washington v. United States*, the state of Washington's appeal of the culverts injunction. Justice Kennedy, who as a Ninth Circuit judge, had participated in prior en banc proceedings in earlier incarnations of *United States v. Washington*, recused himself from the case. The court heard oral argument but did not issue an opinion, announcing that it was an equally divided court and affirmed the lower court decision. 138 S. Ct. 1832 (2018).