THE FEDERAL TRUST RESPONSIBILITY AND TRIBAL-PRIVATE NATURAL RESOURCE DEVELOPMENT

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I. INTRODUCTION

The Federal government's trust responsibility towards Indian lands and r esources is multi-faceted.[2] One element of th e trust doctrine defines tribes' claims against the United States for taking or poorly managing tribal lands. [3] The trust doctrine also figures in defi ning the United States' day-to-day duties with respect to tribal lands, including minerals d evelopment on tribal or individual Indian lands. Consequently, it may define the rights of resource developers under Indian lands leases, minerals agre e-ments, or rights-of-way.[4] Considerations of the United States' trust duties towards Indians or their lands and mine rals may arise at the point of leasing or contracting, [5] in the Bureau of Indian Affairs ("BIA") administration of activities under approved agreements, and in courts' resolutions of di sputes regarding the lands or minerals of tribes or individual Indians. [6] However, while potentially a sword to a dvance tribal rights, the trust doctrine also may serve as a shield to pr otect resources developers' interests under tribal agreements.[7]

Consequently, the scope and rigor of trust duties may affect resource deve lopment and enviro n-mental protection in Indian Country. However, d espite that the doctrine broadly overlays the United States' relationship with Indians, there is no comprehensive statutory or regul atory definition of the scope or standard of case it imposes or the rem edies for the government's breach. Rather, administrators and practitioners must glean its content from reported decisions of the Supreme Court and the lower federal courts. Increasingly, however, those dec isions point back to the federal statutes to define trust duties, e s-chewing an inchoate trust duty.

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[1] This paper draws upon the author's earlier paper, "The Federal Trust Respons ibility and Tribal-Private Economic Deve l-opment: "Taming the Tiger," ABA Section of Environment, Energy and R esources, 11th Section Fall Meeting, October 11, 2003.

[2] *See generally*, Richard B. Collins, "Origins and Dimensions of the Trust Relatio nship Between the Indian Natio ns and United States," ABA Section of Environment, Energy and R esources Law, Annual Conference on Native American Resources (Paper No. 7, February 22, 1991); Reid Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians," 27 Stanf. L. Rev. 1213 (1975).

[3] *See* Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror," 41 Am. U.L.Rev. 753 (1992), St even Paul McSloy, "Revisiting the 'Courts of the Conqueror': American Indian Claims Against the United States," 44 American Univ. L. Rev. 537 (1994).

[4] *See generally*, Michael E. Webster, "Mineral Development on Indian Lands: U nderstanding the Process and Avoiding the Pitfalls," 39 Rocky Mt. Min. L. Inst., 2-1 (1993); B. Kevin Gover and Catherine Baker Stetson, "Development of Natural R e-sources on Indian Lands," 34 Rocky Mt. Min. L. Inst., 3-1 (1988); Judith V. Royster, "Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources," 71 N. Dak. L. Rev. 326 (1995).

[5] *See* Paul E. Frye, "A Travesty of a Mockery of a Sham: The Federal Trust Duty and Indian Self-Determination," Rocky Mt. Min. L. Inst., Special Institute on Nat. Res. Devel. and Environmental Reg. in I ndian Country, Paper No. 2-B at 2-B-7-8 (1999); *see also* Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002), *cert. denied*, Sun Prairie v. McCaleb 537 U.S. 1188 (2003).

[6] *See* Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (*en banc*), *adopting dissenting opinion from* 728 F.2d 1555, (10th Cir. 1984), *cert. denied*, 479 U.S. 970 (1986) ("Jicarilla v. Supron").

[7] *See, e.g.*, Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072, 1075 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983) (Secretary's power to cancel business lease forecloses unilateral tribal cancellation).

Trust notions were built upon an early nineteenth century conception of tribes. Chief Justice John Marshall's early opinion in Cherokee Nation v. Georgia reflects views that influenced the doctrine, describing tribes as "domestic dependent nations," weak and unsophisticated, and reliant upon the protection of the United States:

> They occupy a territory to which we assert a title independent of their will, . . . meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[8]

Marshall's premise, that tribes need federal protection of their lands and resources, continues to be reflected in some federal statutes[9], and in some contemporary trust doctrine opinions.

But, while no generalization about tribes will hold, things are changing. While the United States continues to supervise leasing and contracting under federal statutes, tribes increasingly rely on their own scrutiny of a proposed transaction, employing skilled legal counsel and experienced advisors. The BIA's role gradually is being transformed from that of a guardian protecting an incompetent ward to that of a land management agency, managing that compliance with federal environmental and cultural resource-protective statutes that protect both public and tribal interests, and supervising operators and their reporting and payment.[10] The current era of tribal self-determination is marked by enactment of the Indian Self-Determination Act of 1975[11] and, with respect to minerals development, by the Indian Minerals Development Act of 1982[12] and, more generally, with revisions enacted in 2000, loosening the strict earlier limitations on tribal contracting reflected in "Section 81" [13]. This year, amendments to the Energy Policy Act of 2005 continued this trend.

The BIA, arguably never very effective in optimizing benefits from Indian resources, now must be evaluated by whether it furthers or undermines achieving tribes economic development goals.[14] Stepping beyond their more passive roles in prior years, tribes increasingly seek to regulate Indian and non-Indian conduct occurring on tribal lands and for their courts to decide the controversies arising there.[15] In some areas, federal agencies are delegating regulatory primacy [16] or program implementation[17] to tribes or their agencies. In the future, tribes' abilities to enhance economic well-being may depend more upon their abili-

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[8] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

[9] *See, e.g.,* Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. §§ 396a-396g (1994) ("IMLA").

[10] *See* Paul E. Frye, "A Travesty of a Mockery of a Sham," at 2B-27-29.

[11] *See* Pub. L. 638, June 4, 1975, 25 U.S.C. §§ 450-450n (1982). Congress also has enacted self-determination policies in the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1994); the Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 2608 (1994); and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (1994).

[12] Pub. L. 97-382, 25 U.S.C. §§ 2101-2108 (1994).

[13] Pub. L. 106-179, § 2, 114 Stat. 46, *amending* 25 U.S.C. § 81 (Supp. 2003); *see generally,* Reid Peyton Chambers, "Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century," Rocky Mtn. Min. Law Fndn., Institute on Nat. Res. Devel. in Indian Country, November 11, 2005 Paper No. 134A, 1-4, ("Chambers, Reflections on the Federal Trust Responsibility").

[14] *See* S.10, 109th Cong., 1st Sess. (2005) In 1975, Congress found that "the prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian peoples and their communities . . .". 25 U.S.C. § 450(a)(1) (1994).

[15] *See, e.g.,* Navajo Nation Standard Terms and Conditions for Rights-of-Way, 1999, requiring the right-of-way applicant to consent to the jurisdiction of Navajo Nation executive, legislative and judicial power and to covenant not to contest jurisdiction.

[16] *See generally,* William C. Scott, "Environmental Permitting, Tribal TAS Status under Federal Environmental Laws and Impacts on Mineral Development," Rocky Mtn. Min. L. Fndn., Inst. on Nat. Res. Devel. in Indian Country, November 11, 2005, Paper No. 13A.

[17] *See, e.g.,* 25 U.S.C. § 450(f) (1994).

ties to compete effectively in affording opportunities for economic development and their effectiveness as governments, than upon the level of federal support or the rigor of federal supervision.

Increasingly, to the extent the premise of dependency under the trust doctrine, that premise may not comport with contemporary realities.[18] This Paper seeks to analyze the implications of the trust doctrine in the contemporary era for Indian resource owners, federal regulators, and private developers. It will trace the historical origins of the doctrine,[19] describe the settings in which the doctrine comes into play in contemporary resource transactions and disputes,[20] and analyze the duties and standards of care the trust doctrine imposes upon actions of the federal trustee.[21] Finally, it will discuss ideas for removing impediments the trust doctrine now poses for some tribal resource development. It will review recent initiatives to shift trust functions to capable tribes and suggest ideas for accommodating tribal self-determination in application of the trust doctrine, taking as examples NEPA and the Endangered Species Act,[22] and the implications for an evolving trust doctrine of developing tribal expertise and tribal efforts toward primacy in contracting, regulation, and dispute resolution.[23] Throughout it will address the trust doctrine's effect on the balance between tribal and developer interests: whether the doctrine's preference to resolve disputed matters to favor tribes creates its own disincentive to tribal economic development.

II. A RELATIONSHIP "UNLIKE THAT OF ANY OTHER TWO PEOPLE IN EXISTENCE":[24] A BRIEF HISTORY OF THE TRUST DOCTRINE

In three seminal decisions termed the "Marshall Trilogy," Chief Justice John Marshall described a framework for defining tribes and their legal relations in the federal system.[25] The origins of the United States' trust powers over tribal lands are discussed in this portion of the Paper.

A. Federal Power Over Alienation of Tribal Lands

The Marshall Trilogy addresses three fundamental principles. Johnson vs. McIntosh addressed federal powers over tribal lands. Cherokee Nation vs. Georgia aligned tribal governments with federal and state powers. It determined that the Cherokee Nation was not a "foreign State" that could invoke the Supreme Court's original jurisdiction over actions between a state and a foreign state. Rather, Justice Marshall denominated tribes as "domestic dependant nations. . . . ."[26] A year later, the Supreme Court decided Worcester vs. Georgia, 31 U.S. (6 Pet.) 515 (1832).[27] Worcester addressed yet a third question: the power of Georgia to control relations within the territory of the Cherokee Nation. The Court concluded that Georgia had no power to require "white persons" residing within the limits of the Cherokee Nation to obtain a license or permit from the State. After reviewing history and treaty provisions, Justice Marshall concluded:

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[18] Reid Chambers posits an alternative premise underpinning the doctrine: protecting tribes and tribal governments, as distinct political societies. Chambers, "Reflections on the Federal Trust Responsibility," at 32-33.

[19] *See infra*, Part I.

[20] *See infra*, Part II A.

[21] *See infra*, Part II B.

[22] *See infra*, Part III.

[23] *See infra*, Part IV; on tribes' assertions of jurisdictional primacy, *see generally*, Lynn H. Slade, "Puzzling Powers: Overlapping Jurisdictions of Indian Tribes and the Federal, State, and Local Governments in Development of Natural Resources in Indian Country," 42 Rocky Mtn. Min. L. Inst. 11-1 (1996).

[24] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[25] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1 (1831); Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[26] Cherokee Nation v. Georgia, 30 U.S. (6 Pet.) at 17.

[27] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

> "The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, in which the citizens of Georgia have no right to enter, but with the ascent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." [28]

Worcester, then, allocates governmental powers between tribes, the states, and the federal government. It recognizes federal primacy in allocating those powers.

Johnson v. McIntosh,[29] the first of the Marshall trilogy to be decided, is the case that directly addresses federal power over tribal land transactions. It considered the case of two claimants to the same piece of land, one of whom had received title directly from the Indians, the other by patent from the government. In holding the grants from the tribes ineffective, Marshall established federal control and supervision over tribal lands. In Johnson v. McIntosh, the Court reviewed international law cases involving the powers of colonizing European states over "conquered" Indian-inhabited lands. Chief Justice Marshall's descriptions of both the Indians and the power of the United States reflect much upon the origins of the trust doctrine:

> The ceded territory was occupied by numerous and war-like tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.[30]

As Marshall conceived it, the doctrine allowed the United States to divest tribes of their lands, to enter into treaties with them regarding their remaining lands, and to control tribes' alienation of lands to others. Put simply, "conquest gives a title which the courts of the conqueror cannot deny . . . ." [31]

Marshall's rationale for subjecting all tribal lands to federal control was premised in large measure on generalizations about the "character and habits" of the Indians. Under international law, the "general rule," applicable in the conquest of one nation by another, was that "the new and old members of the society mingle with each other . . ., and the rights of the conquered to property should remain unimpaired . . . ." [32] Marshall found that rule, however, unworkable with respect to the American Indians:

> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[33]

Consequently, control of the soil by the conquering European power was necessary to settlement, and, as a result, "[t]he absolute ultimate title has been considered acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring." [34] Mar-

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[28] 31 U.S. at 561.

[29] 21 U.S. (8 Wheat.) 543, 573 (1823).

[30] *Id.* at 586.

[31] *Id.* at 588.

[32] *Id.* at 589.

[33] *Id.* at 590.

[34] *Id.* at 592; *see* G. Edward White, The Marshall Court and Cultural Change, 1815-1835 at 710 (1991) ("The message of Johnson v. McIntosh, then, was that the natural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America."); *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Indian title not necessarily inconsistent with fee ownership of state).

shall's notion that discovery and conquest qualified tribes' rights in their lands came to be known as the "discovery doctrine."

It is significant to a contemporary analysis of the trust doctrine that Chief Justice Marshall grounded his defense of subjecting American Indian tribes to a harsher rule than that applicable to other conquered peoples, who were allowed to retain their property rights under the conqueror, on notions that Indians simply were different: "those principles which Europeans have applied to Indian title, . . . find some excuse, if not justification, in the character and habits of the people whose rights have been rested from them." [35] It was not merely the act of discovery or conquest, but also the purported nature of the American Indian that justified subjecting tribal lands to colonial and, subsequently, federal powers.

Reid Chambers has proposed that Worcester, rather than Johnson v. McIntosh or Cherokee Nation v. Georgia, is the key case defining the trust responsibility. [36] Worchester held that the Cherokee Nation, not the State of Georgia, could determine who resided within their territory and established federal law controlled determined those powers. Chambers proposes that Worchester, not Johnson or Cherokee Nation, defines the trust responsibility, and that the doctrine is grounded not independency but in tribal self-government.

While an analysis premised on Worcester may comport better with contemporary sensibilities and self-determination policies, Worcester simply addresses a different subject from federal trust duties over tribal lands and minerals. Worcester establishes the "political independence" of the Cherokees, and that "all intercourse with the Indian nations was not in the states, but in the federal government" [37] However it was Johnson v. McIntosh that established federal control of tribal land transactions, the function at the core of the trust doctrine. Johnson grounded that power in the purportedly unique inability of tribes to manage transactions with non-members regarding their lands, and Worcester does not suggest the Court discarded that rationale. To the contrary, only a year before Worcester, Justice Marshall's opinions in Cherokee Nation v. Georgia returned to the aspersions of tribal competence that mark Johnson.[38] Moreover, the trust responsibility has been defined historically, and continues to be defined, in terms of the federal duty towards tribal lands and properties. While a more contemporary notion of the trust responsibility might focus upon federal protection of the prerogatives of tribal self government, the contours of such a duty are reflected primarily in contemporary statutes, rather than in Chief Justice Marshall 's early opinions. However, as the Supreme Court increasing looks to statutory prescriptions to define trust duties, self-determination statutes may come to be seen as imposing new trust duties.

Whatever the source, Marshall's concept of Indian title subject to federal control stands as a central precept of federal Indian law. When Marshall wrote, this limitation on tribal prerogatives already had been reflected in the Indian Trade and Intercourse Acts ("the Non-Intercourse Acts") beginning in 1793, [39] later made permanent in 1802 and 1834.[40] The Non-Intercourse Acts provided that no transfer of interests in lands

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[35] *Id.* at 589. Marshall, of course, ignored that not all American Indians had been conquered by European powers or the United States. *See* David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," 84 Calif. L. Rev. 1573, 1578 n. 19 (1996).

[36] Reid Chambers, "Reflections on the Federal Trust Responsibility" at 8-10. That formulation posits the trust responsibility as premised less on notions of tribal incompetence than in federal protection of tribal of self government.

[37] *See* Francis Paul Prucha, The Great Father, Vol. I at 211-212 (1984).

[38] 31 U.S. (6 Pet.) at 561 (". . .the habits and usages of the Indians and their intercourse ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or regress of wrong, had perhaps never entered the mind of an Indian or others tribe. The appeal was to the tomahawk, or to the government.")

[39] Indian Trade and Intercourse Act of March 1, 1793, Ch. 19, 1 Stat. 329; *see generally*, Rennard Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law, 109-118 (1982) ("Cohen 1982"); Francis Paul Prucha, The Great Father, Vol. I at 91-98 (1984).

[40] *See* Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1994).

from any Indian nation or tribe "shall be of any validity in law or equity" unless properly approved by a p-propriate federal action. The appropriate federal action initially was a "treaty or convention e ntered into pursuant to the Constitution."[41] However, after 1871, when Congress terminated the power to make treaties with tribes,[42] tribal land transactions were authorized by specific statutes authorizing specific transactions or classes of transactions.[43] Consequently, the validity of a lease, right-of-way, or other development agreement historically has required that it be authorized by statute and approved by an authorized Interior Department official.[44]

To secure a valid Secretarial approval, the agreement must be autho rized by statute, and the pr o-cedures leading to its issuance must have complied with statutory requir ements.[45] And, the required stat u-tory compliance may extend beyond those crafted specif ically for Indian lands to NEPA [46] and other envi-ronmental, cultural resource, and sp ecies-protective statutes generally applicable to approve of federal leaves and rights-of-way.[47] Consequently, one clear consequence of the trust doctrine is to subject tribes' intentions regarding their lands, and hence their powers of self -determination, to review by fe deral agen-cies, which may entail for some transactions public comment and participation, i ncluding citizens' suits[48], and ultimately the potential of a federal admini strative or judicial veto. These factors are concerns for d e-veloper as well, particularly g iven recent case law que stioning whether a non-Indian developer has stan d-ing to secure judicial review when its lease is cancelled.[49]

B. The Trust Doctrine in the Allotment Era

The assimilation policies of the late nineteenth century found fertile ground in Chief Justice Mar-shall's, notion that tribal incompetence requires the United States to stand as guardian with respect to I n-dian lands. Characterization of the trust relationship as one "between a sup erior and an inferior, whereby the latter is placed unde r the care and co ntrol of the former . . . " [50] resounds through allotment era S u-preme Court opinions. Whether the doctrine was grounded in an appropriate degree of protection for u n-sophisticated peoples or an "undisguised contempt for native culture . . . " ,[51] it reflected a pe rceived pre-rogative to protect tribes and Indians for their own benefit.

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[41] 25 U.S.C. § 177 (1994).

[42] Act of March 3, 1871, 16 Stat. 544, 566, 25 U.S.C. §71 (1994); *see* Prucha, The Great Father, Vol. I at 527-33.

[43] *See infra*, Part II; after 1871, tribal land holdings could be affected either by state or executive order, and executive order re-servations are subject to leasing or contracting under the statutes and regulations for treaty lands or statutory trust lands. *See* Op. of Atty. Gen., May 27, 1924 (Executive Order Reservations Leasing Act).

[44] *See, e.g.*, Oneida Indian Nation v. County of Oneida , 414 U.S. 661, 667 (1974); *see generally*, Cohen 1982 at 7-9; Sangre de Cristo Dev. Co. v United States , 932 F. 2d 891, 894 (10th Cir. 1991) (because Secretary never complied with NEPA in lease issuance, developer's lease interest never vested); *see also* Youngbull v. United States , 1990 U.S. Cl. Ct. Lexis 3 at *19 -*23, 17 I.L.R. 4001, 4004 (Ct. Cl. 1990) (Secretary's responsibility "to protect title by avoiding the tran sfer of title to those without valid legal claims.").

[45] *See* Sangre de Cristo Dev. Co. v United States , 932 F.2d at 895; *see also* Jicarilla Apache Tribe v. Andrus , 687 F.2d 1324, 1332 (10th Cir. 1982) (statutory requirements regarding publication of notice).

[46] *See* National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

[47] *See infra*, Part III.

[48] *See* Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) (NEPA action to cancel Navajo Nation uranium lease).

[49] *See, e.g.*, Rosebud Sioux Tribe v. McDivitt , 286 F3d 1031, 1037 -40 (8th Cir. 2002), *cert. denied*, Sun Prairie v. McCaleb , 537 U.S. 1188 (2003). For further discussion of Rosebud Sioux Tribe, *see infra* Part IIC.1.

[50] Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).

[51] Nell Jessup Newton, "Federal Power Over Indians: Its Sources, Scope and Lim itations," 132 U. Pa. L Rev. 185, 218 (1984).

The need for federal protection of tribes was heightened, not reduced, by federal Indian policies.[52] In the late 1800's, during the "allotment era," federal Indian policy shifted toward breaking up the reservations and "allotting" lands to individual Indians, accompanied by federal assistance to the allotted Indians, all aimed toward integrating them into white society.[53] The General Allotment Act of 1887[54] had the most significant effect in this regard. Because some individual Indians were unable to make effective use of the parcels "allotted" to them, the Act led to the widespread leasing of allotted lands to non-Indians, with the "allottees" receiving rental payments.[55] This history is reflected in the Supreme Court's observation in Kagama that "[f]rom their very weakness and helplessness, so largely due to the course of dealings of the Federal Government with them and treaties in which it has been promised, there arises the duty of protection . . . ."[56] Used to justify federal divestiture of tribal lands and intrusions upon tribal governments, guardianship became a source of federal power over tribes and their lands.[57]

Supreme Court cases during the allotment era explored the dark side of the trust relationship. In Lone Wolf v. Hitchcock,[58] the Court relied upon the trust relationship in holding that Congress could unilaterally take lands in abrogation of a treaty, without complying with a treaty requirement that required the signatures of three-fourths of the adult males for sessions of the treaty-secured land. Viewing the trust doctrine in light of Kagama and the 1871 statute empowering Congress to govern Indians by statute, the Court held that: "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of government."[59]

C. The Trust Doctrine in the Modern Era

The twentieth century has seen the Court back away from the harsher elements of its allotment era cases and begin to define the contours of a legally enforceable, though arguably narrow, federal trust obligation with respect to Indian land.[60] Subsequent cases have qualified, but not eliminated, the plenary power doctrine. The Court no longer writes in the overtly ethnocentric terms of Kagama and Lone Wolf, and it has stepped away from the plenary power concept that congressional action towards tribes is a political question, immune from judicial review.[61]

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[52] *See* Prucha, The Great Father, Vol. I at 293-318; for a broad review of allotment era policies, see Prucha, The Great Father, Vol. I, 179-318

[53] *See* Prucha, The Great Father, Vol. II at 659-686.

[54] Act of Feb. 8, 1887, Ch. 119, 24 Stat. 388.

[55] *See* Prucha, The Great Father, Vol. II at 671-73.

[56] Kagama v. United States, 118 U.S. 375, 383-84 (1886) (Indians' dependency upon the United States supported federal power to punish the murder of one Indian by another); *see also* Nell Jessup Newton, "Federal Power Over Indians: Its Source, Scope and Limitations," 132 U. Pa. L. Rev. at 212-215.

[57] *See* Richard B. Collins, "Origins and Dimensions of the Trust Relationship," at 7-3.

[58] 187 U.S. 553, 564 (1903).

[59] *Id.* at 565.

[60] *See* Seminole Nation v. United States, 316 U.S. 286, 296, 297 (1942) (awarding relief for breach of trust based on the government's "distinctive obligation of trust," imposing "the most exacting fiduciary standards."); *see also* United States v. Sioux Nation, 448 U.S. 371 (1980) (holding United States liable to compensate Sioux Tribe for taking of the Black Hills because the government did not make a good faith effort to give the Sioux Tribe full value for its lands).

[61] *See* United States v. Sioux Nation, 448 U.S. at 414-15 (noting that "Lone Wolf's presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here."); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977) (Congressional legislation must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians.");Reid Chanbers places considerable weight on Weeks' articulating a trust doctrine that broadly limits federal powers regarding tribes. *See* Reid Chambers, Reflections on the Federal Trust Responsibility at 13A. *see also* Judith V. Royster, "Equivocal Obligations" at 331.

In two pairs of cases analyzing whether the government is liable for money damages for its alleged breach of duties to manage Indian lands, the Court gave the trust obligation its most detailed delineation. In the Mitchell cases, allottees sought damages for breach of trust arising from the United States' mismanagement of their trust timber resources. In Mitchell I, the Court held that the General Allotment Act did not support an action for breach of trust, because it created only a "limited trust relationship" that fell short of "establishing that the United States has a fiduciary responsibility for management of allotted forest lands." [62] Under the GAA, the allottee was "responsible for using the land", "would occupy the land", and, hence, was to "manage the land." [63] Three years later, in Mitchell II, the Supreme Court reviewed the statutes and regulations governing BIA sales and management of Indian timber and concluded that their more detailed provisions "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." [64] Hence, the timber leasing statutes and regulations defined the contours of the United States' fiduciary responsibilities and established a fiduciary relationship. Consequently, Mitchell II held the United States liable in money damages for breach of trust.

Under the Mitchell cases, specifically enforceable fiduciary obligations arise from a statute that expressly imposes comprehensive management responsibility on the United States with respect to defined trust assets. Such duties do not ordinarily arise either from the general trust relationship of the federal government over Indian lands or from statutes, like the General Allotment Act, that generally subject tribal lands to federal supervision and management, but do not prescribe sufficiently specific management duties.

The Court returned to the trust doctrine in 2003, issuing decisions in two other cases and finding a tribal claim for damages for breach of trust against the United States in one case – and rejecting it in the other. In United States v. White Mountain Apache Tribe, [65] a 5-4 majority of the Court found the statutes requiring the former Fort Apache Military Reservation to be "held by the United States in trust" for the Tribe to impose sufficiently specific duties on the United States to subject the United States to a damage claim for breach of trust under the Indian Tucker Act [66]. By contrast, in United States v. Navajo Nation, [67] the Court reached the opposite conclusion, holding that the provisions of the Indian Mineral Leasing Act of 1938 that pertain to coal leasing [68] did not impose specific duties on the government beyond lease approval. Consequently, six Justices declined to infer a claim for money damages, no twithstanding troublesome conduct of officers of the United States. [69] Tribal and federal actions reflect this shift in conception. Eschewing notions that there is some generally applicable trust duty, White Mountain and Navajo Nation follow the Mitchell cases: the Supreme Court scrutinizes statutory provisions closely to determine precisely what duties Congress has imposed on the agency. [70]

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[62] United States v. Mitchell, 445 U.S. 535, 546 (1980) ("Mitchell I").

[63] 445 U.S. at 542-43.

[64] United States v. Mitchell, 463 U.S. 206, 224 (1983) ("Mitchell II"). In Mitchell II, the timber leasing statutes required that sales of timber from Indian trust lands be based on "the needs and best interests of the Indian owner and his heirs," 25 U.S.C. § 406(a), and the government's regulations recognized a duty to "obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." 463 U.S. at 224. Additionally, Mitchell II found present "[a]ll of the necessary elements of a common-law trust," including a trustee, a beneficiary, and a corpus. The Court held that the general trust relationship recognized in Mitchell I "reinforced" its construction of the Indian timber statutes and regulations as creating fiduciary duties.

[65] 537 U.S. 465 (2003).

[66] 28 U.S.C. § 1505.

[67] 537 U.S. 488 (2003).

[68] *See* 25 U.S.C. § 396a (1994).

[69] *See* 537 U.S. at 496-98.

[70] *See* United States v. Navajo Nation, 537 U.S. 488 (2003).

Both cases relied upon the "pathmarking" precedents in Mitchell I and Mitchell II. Justices Ginsburg and Breyer were the swing votes, joining Justices Souter, Stevens, and O'Connor to form the majority in White Mountain Apache. Their concurrence in White Mountain Apache draws into focus the distinctions that ultimately were dispositive: they found White Mountain Apache to be controlled by Mitchell II because a 1960 statute required the Fort Apache properties to be held "in trust" for the Tribe, the statute authorized the government to use and occupy the property, and the United States "availed itself of its option" to exercise daily supervision and enjoy daily occupation of the trust property -- "but has done so in a manner irreconcilable with its caretaker obligations."[71] The Ginsburg/Breyer concurrence in White Mountain Apache distinguished Navajo Nation, and explains why the majority rejected the Navajo Nation's damage claim: the provisions of the Indian Mineral Leasing Act governing coal leasing "assigned the Secretary of the Interior no managerial role over coal leasing . . . ."[72] Of interest, Justice Ginsburg's opinion for the majority in Navajo Nation is careful to point out that the IMLA provisions addressing oil and gas leasing impose more detailed duties on the government than did the coal leasing provisions, and that the decision does not determine whether a damage action would exist for improper management of oil and gas properties under the IMLA.[73]

The Mitchell cases and Navajo/White Mountain define a doctrine under which detailed Congressional directives are prerequisites to imposing trust duties the breach of which is compensable in money damages. Navajo Nation suggests the analysis can be premised both on a statute "and it's implementing regulations . . . ."[74] However, its analysis comparing the regulation's minimum royalty with what the Nation obtained suggests the statute and regulations must embody specific directions in fact violated by Interior.[75] The Mitchell cases and Navajo/White Mountain portend a trust analysis tied tightly to the text of statutes and regulations and deriving little meaning from historical precedent or common law trust concepts.

III. THE TRUST DOCTRINE IN CONTEMPORARY TRIBAL RESOURCE DEVELOPMENT

The significance of the trust concept for Indian lands and resources lies in the federal duties that arise from the trust relationship, in tribes' rights to enforce those duties, and in the impact of the two on resource development and environmental protection. This portion of the Paper explores the standards of care trust duties impose upon the federal government, both where a specific statutory scheme imposes fiduciary-like duties under Mitchell II, and where only general or "limited" trust duties apply. It analyzes canons of statutory interpretation that are closely linked to the trust doctrine, the application of which may affect trust duties and private rights.

A. Trust Duties Under Leasing and Contracting Statutes

Mitchell II held the United States subject to an action for money damages for breach of trust duties with respect to tribal timber leasing, based on the comprehensive statutory leasing scheme implemented by BIA regulations.[76] Tribal energy and mineral resources are leased[77] and subjected to minerals

[71] White Mountain Apache, 537 U.S. at 480.

[72] *Id.*

[73] 537 U. S.. at 507 & n. 11.

[74] *Id.* at 1091 n.11.

[75] *Id.* at 511 ("In sum, neither the IMLA nor any of its regulations establishes anything more than a bare minimum royalty. Hence, there is no *textual basis* for concluding that the Secretary's approval function includes a duty, enforceable in an action for money damages, to ensure a higher rate of return. . . .").

[76] *See* United States v. Mitchell, 463 U.S. at 225-26.

[77] *See, e.g.*, Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1982) ("IMLA").

agreements[78] under a variety of statutes. Allotted lands are subject to mineral leasing,[79] but may only be included in minerals agreements under the IMDA when part of a larger agreement covering tribal lands.[80] Prior to the decision in Navajo Nation, it was observed that the nature and scope of the trust obligation with regard to mineral development is fairly well established for mineral leases under the IMLA, but it is less well defined under the IMDA.[81] Navajo Nation suggests a more detailed statutory analysis now is required and implies a distinction between the IMLA's provisions governing oil and gas leasing and coal.

1. The Trust Responsibility under the Indian Mineral Leasing Act

The IMLA may be described as a "second generation" tribal leasing statute. Earlier statutes had authorized the United States to lease tribal lands, sometimes without the consent of the tribes.[82] The IMLA, however, provided that tribal lands may be leased "by authority of the tribal council or other authorized spokesman for such Indians . . . ."[83] The Supreme Court has described the IMLA as:

> comprehensive legislation [enacted] in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal land for mining purposes. . ." The Act also details uniform leasing procedures designed to protect the Indians.[84]

Prior to Navajo Nation, several federal cases held the IMLA to constitute the comprehensive, Indian-protective kind of statute described by Mitchell II.[85] The Tenth Circuit relied on the IMLA and the royalty regulations then in place[86] as imposing fiduciary duties on the Secretary and requiring the Secretary to act "in the best interest of the tribes."[87] Relying on a Senate report on the IMLA, the *en banc* opinion in Jicarilla v. Supron concluded the IMLA intends tribes to "receive the maximum benefit from mineral deposits on their land . . . ."[88] Although the IMLA contains no statutory reference to "maximization" or its equivalent, Jicarilla v. Supron has remained influential. The Supreme Court's recent decision in Navajo Nation, however, significantly undermines its holding on this point.[89]

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[78] [58]*See, e.g.,* Indian Minerals Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994) ("IMDA").

[79] *See* 25 U.S.C. § 396 (1982).

[80] *See* 25 U.S.C. § 2102(b) (1982).

[81] Judith V. Royster, "Equivocal Obligations," 71 N. Dak. L. Rev. at 334-38.

[82] *See, e.g.*, Act of June 30, 1919, Ch. 4, §26, 41 Stat. 31, as amended, 25 U.S.C. §399 (1994). *See also* Navajo Nation, 523 U.S. at 495 ("Prior to enactment of the IMLA, decisions whether to grant leases in Indian lands generally rested with the Government.")

[83] *See* 25 U.S.C. § 396a (1994).

[84] Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 763 (1985) (citations omitted). Navajo Nation expands these purposes, to include "to advance tribal independence, [it] empowers tribes to negotiate mining leases themselves."

[85] [63]*See* Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (*en banc*), *adopting dissenting opinion from* 728 F.2d 1555, 1563-69 (10th Cir. 1984), *cert. denied*, 479 U.S. 970 (1986) (federal oil and gas leasing and royalty management); Youngbull v. United States, 1990 U.S. Cl. Ct. Lexis 3 at *19-*23, 17 I.L.R. 4001, 4004 (Cl. Ct. 1990) (oil and gas leasing and title transfers); Burlington Resources Oil & Gas v. Dep't of Interior, 21 F. Supp. 2d 1, 4-5 (D.D.C. 1998).

[86] *See* 30 C.F.R. § 206 (1978).

[87] Jicarilla v. Supron, 728 F.2d at 1565.

[88] *Id.* at 1568 (emphasis in original); *see* at 1569 (in choosing between two available royalty calculation methods, both concededly reasonable, "Interior's trust responsibilities require it to apply whichever accounting method . . . yields the Tribe the greatest royalties.").

[89] Navajo Nation, 537 U.S. at 511 n. 16, recognized that the Supreme Court had previously cast doubt on revenue maximization as a purpose of the IMLA:

> We have cautioned against according "talismanic effect" to the [IMLA] Senate Report's "reference to 'the greatest return from [Indian] property,'" and have observed that it "overstates" Congress' aim to attri b-

Judge Seymour's opinion in Jicarilla v. Supron grounds its conclusion that the IMLA and trust concepts require interior to secure "maximum benefit" from tribal oil and gas leasing on statutory provisions requiring the Secretary to:

> Set the "terms" and "conditions" for leasing, approve leases, establish lease sale procedures, reject unsatisfactory bids, require satisfactory performance bonds of lessees, promulgate rules and regulations governing "all operations" under leases, and approve leases for subsurface storage. . .[90]

The relied upon provisions neither contain nor overtly suggest "maximization" rather than, for example, "satisfactory" as a standard. The continued vitality of this standard is, consequently, questionable in light of Navajo Nation.

Jicarilla v. Supron has caused developers considerable concern because the Interior Department had, for over 30 years, accepted royalties in the concededly reasonable manner the decision invalidated. Consequently, the decision has undermined lessees' confidence that their actions or payments will be deemed to comply with leases or regulations if some other interpretation, also reasonable and subsequently conceived, would be more favorable to tribes. Even after the Supreme Court's admonition in Cotton Petroleum, Jicarilla v. Supron's uncompromising standard was incorporated in the 25 C.F.R. Part 211 regulations governing IMLA leases.[91] And, subsequent cases have applied the "maximization" concept to decisions whether to approve a communitization agreement that would extend the term of an Indian oil and gas lease,[92] and to determine whether to approve a proposed lease.[93] Consequently, despite the Supreme Court's criticism of the "maximization" standard, Jicarilla v. Supron's articulation of IMLA trust responsibilities has been, and is positioned to be, material to Indian resource development.

Decisions under the IMLA since Jicarilla v. Supron suggest the contours of more workable standards. A series of Tenth Circuit decisions address whether the Secretary is required to seek only maximization of tribal revenue, without regard to the interests of other parties to IMLA leases. Near the end of the primary terms of IMLA leases, lessees completed wells in lands "communitized" with Indian lands. If the Secretary approved the communitization agreements, the Indian lands lease would be held by the production from the adjacent non-Indian lands; if the Secretary disapproved the communitization, the Indian leases would expire for lack of production and the Indian lessors could seek new leases for new consideration. In early cases, relying on Jicarilla v. Supron, the Tenth Circuit held the maximization of revenue objective could require the BIA to disapprove communitization.[94] Cheyenne Arapaho, however, is more even handed, requiring a broad analysis considering "all relevant factors," not just whether conser-

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ute to the Legislature a purpose "to guarantee Indian tribes the maximum profit available." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 179 (1989). (citations omitted).

[90] 728 F. 2d at 1564-65, *see also* 728 F. 2d at 1568 (citations omitted).

[91] *See* 25 C.F.R. § 211.1(a) (2003), *promulgated*, 61 Fed. Reg. 35653, *et. seq* (July 8, 1996) (regulation to insure that Indian mineral owners' resources developed "in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development.").

[92] *See* Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 589 (10th Cir. 1992).

[93] *See, e.g.*, Youngbull, 1990 U.S. Cl. Ct. Lexis at *27, 17 I.L.R. at 4004.

[94] Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 591 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1642 (1993); Kenai Oil & Gas v. Dep't of Interior, 671 F.2d 383, 384 (10th Cir. 1982) *; but see* Cotton Petroleum Corp. v. Dep't of Interior, 870 F.2d 1515 (10th Cir. 1989) (Secretary must consider factors other than Indian lessor's ability to obtain additional compensation).

vation favored communitization, but also whether market conditions would allow the tribe to benefit from disapproval of the communitization agreement.[95]

The Woods Petroleum decisions reinforced the need for a balanced review. In Woods Petroleum I, the Tenth Circuit held that the Secretary abused his discretion by disapproving a communitization agreement that included lands under a tribal lease when the sole purpose of disapproval was to allow the underlying Indian lease to terminate to allow the Indian mineral owners to re-lease the lands for additional consideration.[96] In Woods Petroleum II, the *en banc* majority of the Tenth Circuit reaffirmed the panel decision in Woods Petroleum I, again narrowing the focus of Jicarilla v. Supron's revenue maximization goal: "The issue before the Secretary is whether the communitization agreement should be approved, and it is not whether the underlying leases, which previously had been approved by the Secretary were a good deal or bad deal with the benefit of hindsight . . . ."[97] The Secretary was required to evaluate all applicable criteria under the statute and could not "use that evaluation as a mere vehicle to achieve an ulterior objective otherwise unattainable."[98] The Tenth Circuit found dispositive that the lessee had drilled and completed the well and submitted the communitization agreement within the ten year primary term of the leases, rejecting the notion that Woods Petroleum should be penalized for waiting "until the eleventh hour" to submit its communitization agreement.[99]

The Woods Petroleum case and its requirement of considering "all relevant factors", not just short term economic benefit to the tribe, is significant IMLA precedent ameliorating the potential for the revenue maximization goal of Jicarilla v. Supron to yield decisions favoring tribes in all cases. The Tenth Circuit also has characterized the Woods Petroleum line of cases as establishing that "judicial review of the Secretary's decision is available under the APA."[100] The challenge for the Secretary is to give meaning to that standard in a way that is fair to developers and does not inhibit Indian lands development.[101]

2. The Trust Responsibility Under the Indian Minerals Development Act

Tribal self-determination in mineral development animates the Indian Mineral Development Act of 1982.[102] The standard form mineral lease used under the IMLA depends upon competition within energy markets to secure appropriate compensation for tribes, specifying competitive bidding in public sales following appropriate notice to bidders.[103] Beginning in the 1970's, several tribes sought a more active role in

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[95] *See* Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 591 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1642 (1993).

[96] Woods Petroleum Co. v. U.S. Dep't of Interior, 18 F.3d 854, 858 (10th Cir. 1994), *reaffirmed*, 47 F.3d 1032, 1038 (10th Cir.) (en banc) *cert. denied sub nom.*, Spotted Wolf v. Woods Petroleum Co., 116 S. Ct. 54 (1995) (requiring the BIA to look beyond "the short-term financial interest of the Indian lessors," recognizing that such an approach "could in the long run be harmful to the interests of Indian lessors.").

[97] 47 F.3d at 1038-39.

[98] *Id.* at 1040. *See also* United Nuclear Corp. v. United States, 912 F.2d 1432, 1438 (Fed. Cir. 1990) (Secretary's refusal to approve a mining plan on Indian leases constituted a Fifth Amendment taking of the lessee's interest, rather than a proper exercise of fiduciary duty, because the Secretary's action was "an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract.").

[99] *Id.* at 1040 n.9.

[100] McAlpine v. United States, 112 F.3d 1429, 1435 (10th Cir. 1997) (emphasizing that Woods Petroleum requires Secretary to "analyze all relevant factors" under applicable statutes and regulations).

[101] Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983), suggests one pertinent consideration: in determining the best interests of a tribe under the business leasing statute, 25 U.S.C. § 415, the Secretary must consider the tribe's (and tribes') long-term interest in a reputation for business reasonableness and the interests of lessees in enforcing rights under BIA-approved leases.

[102] 25 U.S.C. §§ 2101-2108 (1994).

[103] *See* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).

minerals development, including participation in non-lease, joint venture minerals agreements.[104] Between 1978 and 1980, The Interior Department approved several non-lease minerals agreements; however, the Solicitor's office then developed concerns over the enforceability of such agreements under existing statutes.[105] The IMDA was enacted to "clarify that statutory authority existed for such agreements and to authorize tribes to join with industry as mineral developers and choose which development schemes to pursue."[106] Since enactment of the IMDA, and especially since BIA's long-delayed promulgation of regulations implementing the Act,[107] tribes have taken a larger and more active role in the development of tribal minerals.[108] The IMDA's allowance of an enhanced tribal role and greater flexibility has led to an "infinite variation in terms."[109] Agreements under the IMDA have become the rule, rather than the exception.

Although the IMDA injected self-determination into the minerals contracting process, it retained significant vestiges of IMLA leasing. IMDA agreements remain unenforceable without valid Secretarial approval.[110] The Indian mineral owner is "encouraged" to seek advice or assistance from the Secretary before signing an IMDA agreement, although no consultation is required.[111] The Secretary is required to approve the minerals agreement if it is "in the best interests of the Indian mineral owner," complies with the IMDA regulations and applicable law, and "does not have adverse cultural, social, or environmental impacts sufficient to outweigh its expected benefits to the mineral Indian owners . . . ."[112] The Secretary is required to prepare an economic assessment and environmental studies to guide these determinations.[113] As under an IMLA lease, the Secretary continues to monitor and supervise operations and the payment of compensation under the minerals agreement.[114]

The IMDA speaks directly to the trust responsibility. First, it addresses liability of the Secretary. Where the Secretary approves an agreement in compliance with the IMDA and other laws, "the United States shall not be liable for losses sustained by a tribe . . . ."[115] The legislative history does not provide clear guidance on the meaning of this provision. The Administration sought to impose on tribes the risk of improvident transactions.[116] The House Report then states, on the one hand, that "the United States shall not be liable for any losses . . . as a result of market changes or business decisions of the parties on carrying out the agreement."[117] However, it also states that the Administration's proposal was adopted by the

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[104] *See* M. Julia Hook and Britt D. Banks, "The Indian Mineral Development Act of 1982," ABA Section of Natural Resources, Energy, and Environment, Comm. on Native American Res., 5th Ann. Conf. at 3-6 (1993).

[105] *See* S. Rep. No. 97-472 (June 8, 1982) at 5 (accompanying S. 1894) 97th Cong. 2d Sess.; *see also* Marjane Ambler, "Breaking the Iron Bonds, Indian Control of Energy Development at 87 (1990).

[106] Marjane Ambler, Breaking the Iron Bonds, Indian Control of Energy Development at 237.

[107] *See* 25 C.F.R. Pt. 225, adopted, 59 Fed. Reg. at 14971 (March 30, 1994).

[108] *See* Thomas H. Shipps, "Energy Resource Development on the Southern Ute Reservation: A Case Study in Tribal Self-Determination," ABA Section of Natural Resources, Energy, and Environment, Committee on Native American Res., 6th Ann. Conf. at 7-10 (1994).

[109] *Id*. The Southern Ute Tribe had entered into approximately 40 IMDA agreements as of 1994, including joint venture agreements, and flexibility under the IMDA allowed it to refine the sometimes problematic provisions of the standard BIA lease. *Id.* at 7.

[110] *See* 25 U.S.C. § 2102(a); Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1460 (9th Cir. 1986) (tribe may unilaterally rescind IMDA agreement prior to Secretarial approval).

[111] *See* 25 C.F.R. § 225.21(c) (2004).

[112] *See* 25 C.F.R. § 225.22(c) (2004).

[113] *See* 25 C.F.R. §§ 225.23, 225.24 (2004).

[114] *See* 25 C.F.R. §§ 225.26, 225.31 (2004).

[115] 25 U.S.C. § 2103(e) (1994).

[116] *See* S. Rep. No. 97-472 at 12 ("the federal taxpayer should not be a guarantor of the wisdom of the tribes' and the Secretary's business judgment.").

[117] H. Rep. No. 97-746 at 7 (Aug. 13, 1982).

Committee and "simply restates" law that the United States is liable only when the Secretary acts "recklessly *and* in abuse of his discretion as trustee." [118] However, the statutory language is broad: "Where the Secretary has approved a Minerals Agreement in compliance with the provisions of this chapter, and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement . . . ." [119] This language suggests the Secretary is shielded only if her actions were in "compliance" with applicable law.

Two other provisions of the IMDA refer ambiguously to the Secretary's trust responsibilities. The statute expressly refers to a trust duty only regarding supervision of operations, but does so in a manner suggesting trust duties may apply at earlier stages: "the Secretary *shall continue* to have a trust obligation to insure that the rights of a tribe or individual are protected in the event of a violation of the terms of any Minerals Agreement. . . ." [120] One interpretation of these provisions would hold, because the statute singles out post-lease administration, the United States is potentially subject to trust duties only regarding post-contract supervision of operations. Congress' express reference to trust duties in this context is strongly supportive of the existence of a post-contract trust duty under White Mountain Apache.[121] Whether the duty applies to pre-approval responsibilities, such as preparing economic and environmental analyses or providing "advice, assistance, and information during the negotiation . . . ," [122] in light of the language that the duty "shall continue," is a closer question and may depend on the specific responsibility in issue.

Sovereignty and the trust responsibility come into conflict in the IMDA's provisions addressing compliance with the National Environmental Policy Act.[123] During the IMDA hearings, a representative of the Council of Energy Resource Tribes argued that prolonged delays arising from NEPA reviews "could jeopardize a tribe's opportunity to enter into a favorable development agreement." [124] CERT's proposal to limit the time allowed for BIA reviews responded to the economic reality that some minerals development projects require a prompt commitment of reserves, and that the delays attendant to NEPA study could give private off-reservation lands a competitive advantage over tribal lands. The IMDA, as enacted, did not incorporate CERT's proposal that the Act require Interior to complete its economic review, and give approval of the transaction subject to completion of NEPA review, within 60-90 days. Instead, it (1) requires an agreement to be approved within 180 days after submission *or* within 60 days after completion of NEPA studies, whichever is later, [125] *and* (2) provides that the Secretary shall not be required to prepare any study regarding environmental, socioeconomic, or cultural effects "apart from that which may be required under [NEPA]". [126]

The IMDA provisions regarding NEPA studies reflect Congressional intent to minimize the adverse effects on the competitiveness of Indian lands arising from studies attendant to Secretarial approval,

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[118] *Id.* at 8 *(emphasis supplied)*.

[119] 25 U.S.C. § 2103(e) (1994).

[120] *See* 25 U.S.C. § 2103(e) (1994)(emphasis supplied); similar language is incorporated in the IMDA regulations. *See* 25 C.F.R. § 225.1(a) (" . . . the Secretary continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation . . . and to uphold the duties of the United States as derived from the trust relationship and from any treaties, executive orders . . . ").

[121] *See* White Mountain Apache, 537 U.S. at 480 ("the Act expressly and without qualification employs s term of art ('trust') commonly understood to entail certain fiduciary obligations . . . "); *see also* Judith Royster, "Equivocal Obligations" at 338 (concluding that IMDA creates a trust).

[122] *See* 25 U.S.C. § 2106 (1994).

[123] 42 U.S.C. § 4321, *et seq.* (1994) ("NEPA").

[124] Hearing on S-1894, 97th Cong. 2d Sess. at 79 (Remarks of Mr. Ed Gabriel) (Advocating 60-90-day mandatory period for completion of economic review.)

[125] *See* 25 U.S.C. § 2103(a) (1994).

[126] *See* 25 U.S.C. § 2103(b) (1994).

but not to exempt IMDA approvals from NEPA. The IMDA does not refer expressly to studies under the Endangered Species Act or cultural resource protective statutes like the National Historic Preservation Act ("NHPA") or the Native American Grave Protection and Repatriation Act ("NAGPRA"); however, in addition to generally referencing the CEQ NEPA regulations, the IMDA regulations incorporate references to the NHPA and its regulations. [127] Indeed, in adopting the IMDA regulations, the BIA completely ignored the apparent intent to limit barriers from non-NEPA statutory studies, commenting the "Secretary is required to comply with [NEPA] *and any other requirement of Federal law"* before approving a minerals agreement.[128] Since ESA and NHPA review often occur as part of NEPA review, the statute may accommodate preparation of studies similar to those prepared under those statutes as a means to develop data to satisfy NEPA. However, the quoted language of the IMDA limiting reviews to "studies required under" NEPA suggests that BIA cannot require additional studies under non-NEPA statutes, and the IMDA may foreclose additional procedural requirements.

BIA's regulations do not address the tension between the IMDA's attempt to limit non-NEPA studies and the sweeping language of the regulations. The IMDA regulations reference the CEQ NEPA regulations, but those regulations do not sweep in all possible environmental or cultural resource studies or procedures. Neither NEPA nor the CEQ regulations expressly require studies under any other statute, though the CEQ regulations do require that "to the fullest extent possible" federal agencies prepare environmental impact statements "concurrently with and integrated with" environmental studies under NHPA, the ESA, and other statutes. [129] Consequently, NEPA does not require consultation as to the effects of a proposed action on a threatened or endangered species under Section 7 of the Endangered Species Act,[130] or the preparation of a biological assessment of the effects of an action on a species.[131] Arguments to minimize ESA burdens on IMDA approvals may be reinforced by Secretarial Order No. 3026, issued by the Secretaries of the Interior and Commerce on June 5, 1997, which counsels, among other things, that species-protective actions under ESA should be structured to minimally burden tribal lands.[132]

A similar question is presented with respect to the "adverse effect" consultation process under Section 106 of the National Historic Preservation Act.[133] Although NEPA, itself, requires a "systematic interdisciplinary approach" to "identify environmental effects and values", [134] the NEPA does not necessarily entail the specific procedures the agencies have developed under statutes like ESA, NHPA, and NAGPRA. Nonetheless, the BIA's IMDA regulations require full compliance with the NHPA regulations, including specific requirements that apply if a mineral development will have an adverse effect on a property listed on the National Registry of Historic Places. [135] The distinction between studies and procedures NEPA requires and those BIA may seek to impose under other statutes may be material to some projects or timelines. The IMDA is unclear whether its prohibition on studies exceeding those required under NEPA extends to proce-

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[127] *See* 25 C.F.R. § 225.24 (2004), referring to the Council of Environmental Quality ("CEQ") regulations and requiring that the Secretary "ensure that all necessary surveys are performed *and clearances obtained* in accordance with [NHPA regulations]." (emphasis supplied) ; *see infra*, Part III.A.

[128] *See* 59 Fed. Reg. 14960, 14968 (March 30, 1994).

[129] *See* 40 C.F.R. § 1502.25(a) (2005).

[130] *See* 16 U.S.C. § 1536 (1994).

[131] *See* 16 U.S.C. § 153 (C) (1) (1994). ESA § 7 provides expressly that the assessment may be "part of the Federal agency's compliance with [NEPA]." *Id.* However, the scope of study under NEPA and the ESA may be different or Congress may have exempted a program from NEPA: for example, the Ninth Circuit has held NEPA inapplicable to listing of a species under ESA § 4. *See* Douglas County v. Babbitt, 48 F.3d 1495, 1503 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996); *see generally*, Karin P. Sheldon & Mark Squillace, The NEPA Litigation Guide at 218-221 (1999).

[132] For a fuller discussion of the Secretarial Order, s*ee* Part III(A), *infra.*

[133] *See* 16 U.S.C. § 470f (1994); 36 C.F.R. § 800.5 (2004).

[134] *See* 40 C.F.R. § 1501.2 (2005).

[135] *See* 25 C.F.R. § 225.24(b) (2004).

dures such as the consultation processes under ESA and NHPA, which can delay and present opportunities for opposition and litigation. Tribes and developers, however, should be aware that the IMDA provides legislative intent to foreclose BIA from requiring studies beyond those required by NEPA.

The IMDA steps only partially in the direction of self-determination. While tribes may initiate and conclude negotiations, Secretarial approval remains required, and tribes' more significant minerals development efforts can remain subject to the public participation processes and potential challenges arising from the environmental compliance required under the IMDA. Developers face the additional expense and delay of the NEPA process, and possibly procedures under statutes going beyond what NEPA may require, and the risk that their tribal partner will change its mind and back out of the deal before BIA approves.[136] Finally developers face the perhaps remote risk of disapproval by BIA or even of BIA's rescission or cancellation of an earlier approval, possibly leaving the developer without opportunity for judicial review of the decision.[137] These factors remain potential hurdles to tribal resource development under the IMDA.

3. Alternative Models for an Evolving Trust: Delegating, Revising, or Clarifying Trust Responsibilities

Recent statutory amendments suggest avenues for adapting leasing and contracting statutes to balance trust function costs and benefits. This portion of the Paper will address three such developments: recent revisions to "Section 81," revised procedures for business leasing on the Navajo Nation, and the provisions of the Energy Policy Act of 2005 allowing tribes to step into the BIA's shoes in the approval of energy agreements. These statutes provide models for an evolving trust doctrine.

- **"New" Section 81**

The statute that has, for many years, generally voided contracts "relative to" tribal lands that were not approved by the Secretary, "Section 81,"[138] has long been recognized as an impediment to commerce in Indian country. Under Section 81, it was difficult to predict whether a contract was "relative to" tribal lands and, therefore, the approval requirement applied. To enhance tribal economic development by affording greater legal certainty Section 81 was amended in 2000. Among other changes, "new Section 81" limits the statute's applicability to a contract that "encumbers Indian lands for a period of 7 or more years."[139] New Section 81 also includes provisions requiring the contract to address enforceability of the contract up front by either providing an enforceable remedy, including a waiver of immunity from suit--or warning the non-tribal party of tribal immunity from suit.[140] Revised Section 81 also eliminated several technical and outdated requirements of the prior statute and a *qui tam* provision that enabled what amounted to private attorneys general to file suits to recover money unlawfully received by a party to an unapproved contract and pocket half the winnings. Most significantly, limiting the Secretarial approval requirement to contracts that "encumber" lands for seven years or more, as compared to any contract "relative to" tribal lands the 2000 amendments intended to lessen the uncertainty over when the statute applied by removing the Secretarial approval requirement for contracts that do not "encumber" tribal lands and for any contracts for terms shorter than seven years.

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[136] *See* Quantum Exploration, Inc. v. Clark, 780 F.2d at 1460 (agreement not binding on tribe until approved by the BIA).

[137] *See* Rosebud Sioux Tribe v. McDivitt., 286 F.3d 1031, 1036 (8th Cir. 2002), *cert. denied,* 537 U.S. 1188 (2003) (developer lacks standing to challenge cancellation of tribal lease under NEPA and leasing statute); *see* discussion at Part II.C.1, *infra.*

[138] R.S. § 2103, 25 U.S.C. § 81 (1994).

[139] *See* Act of March 14, 2000 Pub. L. 106-179, § 2, 114 Stat. 46, *compiled as* 25 U.S.C. § 81(b) (1994).

[140] *See* 25 U.S.C. § 81(d) (2) (1994).

Under the agency's application, "Section 81," has hardly cured the uncertainty that ailed Indian country contracting under its predecessor. There continue to be questions regarding the applicability of "new" Section 81 to contracts not expressly encumbering specific lands. In GasPlus v. U.S. Dept. of the Interior,[141] the BIA's Southwest Regional Director held a management agreement entered into in 2001, and therefore subject to "new" Section 81, to be invalid because it was not approved by the Secretary or her designee. The management agreement provided for GasPlus to manage a gasoline distribution business owned by Nambe Pueblo in New Mexico, but did not specify a location for the business and did not describe specific tribal lands. The agreement provided for GasPlus to report regularly to the Pueblo and for the Pueblo to have approval authority with respect to capital improvements over $10,000. Nonetheless, the Acting Assistant Secretary-Indian Affairs affirmed the decision that New Section 81 applied because the agreement "encumbered" tribal lands.[142] The agreement was held to encumber tribal lands, because it was found to give "nearly exclusive" control over *the business* to GasPlus, which the Acting Assistant Secretary found to satisfy a standard in the BIA's regulations under "new" Section 81, despite that the regulations refer to "proprietary," not operational, control.[143] The regulatory definition and the Acting Assistant Secretary's interpretation of it together drain the 2000 revision of much of its clarifying potential.[144]

GasPlus, therefore, reflects that, contrary to the intent of the 2000 revisions, there remains substantial uncertainty under revised Section 81 over when a contract providing for substantial control of an operation on tribal lands will be held to require BIA approval. This continuing uncertainty suggests a developer is wise to seek from BIA officials an "accommodation approval," the practice under former Section 81 of providing a written statement that the contract is approved in the event Section 81 requires approval (sometimes accompanied by a statement that the official does not believe approval is required), or an express written statement that Section 81 does not apply. BIA regulations under the revised Section 81 suggest that "accommodation approvals" may be harder to come by, because an official cannot approve unless the statute applies. However, the regulations are helpful in requiring the agency to provide a written statement of any conclusion that the agreement does not qualify for approval under Section 81 within 30 days after receipt of a final, executed agreement.[145]

- **Navajo Business Leasing**

Recent revisions to the business leasing statute regarding the Navajo Nation provide a model for tribal assumption of leasing administration and approval.[146] Based on findings that, among other things, "in the Global economy of the twenty-first Century, it is crucial that individual leases of Navajo trust lands not be subject to Secretarial approval, and that the Navajo Nation be able to make immediate decisions over the use of Navajo trust lands," Congress has authorized business and agricultural leases of Navajo Nation lands without Secretarial approval, if the Secretary has approved tribal regulations for a tribal leasing program. Despite Navajo opposition, revised Section 415 provides that the United States shall not be liable for losses sustained by any party to a lease executed pursuant to the tribal regulations, including the Navajo Nation, but that the Secretary is still obligated to administer the lease "in furtherance of the

[141] U.S. Dist. Ct, D.D.C., No. Civ. 03-1902 (RMC) (stayed pending further proceedings in agency).

[142] *See* Decision on Appeal from February 7, 2002, Decision of the Southwest Regional Director (July 18, 2003).

[143] *See* 25 C.F.R. § 84.002 (2004); the regulation, however, refers to "nearly exclusive *proprietary"* control . . . ", thus suggesting control of ownership, not merely operations.

[144] The GasPlus decision is remarkably similar to--though potentially providing for a broader application than--the leading decision under "old" Section 81: Altheimer & Gray v. Sioux Mfg. Corp, 983 F.2d 803, 811-12 (7th Cir. 1993) (finding prior Section 81 inapplicable where "it would be an overstatement to say [the manager] had exclusive control over the . . . facility.").

[145] *See* 25 C.F.R. § 84.005 (2004).

[146] Pub. L. 106-568, 114 Stat. 2933, *compiled as* 25 U.S.C. § 415(e).

trust obligation . . ." [147] To be approved, the Navajo Nation regulations must "provide for an environmental review process." [148] The 2000 amendments to Section 415 do not authorize a Navajo Nation leasing program with respect to minerals leases or contracts through business site leases may support facilities related to a minerals development operation. The Navajo Nation has not yet applied for a delegation of leasing functions under the amendment.

- **TERA Delegations Under the Energy Policy Act of 2005**

Delegations similar in structure to the Navajo Nation's leasing capabilities under Section 415 are reflected in Title V of the Energy Policy Act of 2005, which allows tribes, with Secretarial approval of a tribal regulatory program, to enter into certain energy-related agreements without Secretarial approval of the specific agreement.[149] Under Title V, a tribe may submit to the Secretary a Tribal Energy Resource Agreement ("TERA"), which must identify a tribal process for entering into energy-related agreements that ensures the tribe addresses all of the major considerations that BIA would be required to address under a conventional lease or joint venture. [150] If the Secretary approves the TERA, the tribe may enter into leases, agreements, and rights of way for the development and transportation of energy without further Secretarial approval, subject to the fairly detailed limitations provided in the Act.[151]

Title V affords tribes an alternative to traditional BIA review and approval of tribal minerals and energy resource agreements, [152] seeking to place tribal lands on more competitive footing with off-reservation lands. The legislation contains detailed requirements regarding the nature of the tribal regulatory program that may be approved, as shaped by the provisions agreed to in the Tribal Energy Resource Agreement.[153] Those provisions require the tribe to demonstrate its capacity to administer the program and to ensure its program will reflect some level of functional equivalency to the BIA's leasing and contracting programs under the leasing acts, the IMDA, and the Indian rights-of-way statutes. Title V also requires agreements approved under a TERA to address remedies available for breach of the underlying agreement.[154] However, the statute does not appear to require a TERA to include a procedure for review of a tribe's actions in oversight of operations or as regulator under a TERA agreement. Presumably a TERA can include such a provision, and developers should consider seeking such provisions in their agreements.

As to environmental review, the Act provides that tribal approval of an energy agreement pursuant to its authority under a TERA does not require BIA to comply with NEPA. However, the Act requires the tribe "to establish a process" to identify "all significant environmental effects (as compared to a 'no action' alternative, including effects on cultural resources." [155] Title V also requires the TERA tribe to provide opportunity for public comment on its determinations, and a process for tribal responses to those comments.[156] The statute requires that the tribe's process requires a developer to comply with "all appli-

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[147] 25 U.S.C. § 415(e)(5). for a fuller discussion of these provisions, *see* Chambers Reflections on the Federal Trust Responsibility at 29-39.

[148] 25 U.S.C. § 415(e)(3).

[149] *See* S. 10, 109th Cong., 1st Sess. (2005); *See* discussion in Chambers Reflections on the Federal Trust Responsibility at 30-31.

[150] *See id.* § 2604(e) (2) (b) (ii).

[151] *See id.* § 503 (a), § 2604 (e) (2) (c).

[152] *See id.*. § 2604 (e) (6) (A).

[153] *See id.* § 2604 (e) (2) (D).

[154] *See id.,* § 2604 (e) (2) (B) (ii) (XI), which requires the TERA to "describe the remedies for breach of the lease, business agreement, or right-of-way." However, Title V does not appear to require a TERA to specify the remedies available to the lessee or right-of-way holder if the tribe acts improperly in a manner that does not violate the lease.

[155] *See id.,* § 2604 (e) (2) (C) (i).

[156] *See id.,* § 2604 (e) (2) (C) (iii).

cable environmental laws . . . "[157] and that the tribe has a process for "oversight . . . of energy development activities . . ." to ensure activities of third parties under the agreement are "in compliance with the [TERA] and applicable Federal environmental laws."[158] The term "environmental laws" is not defined in the statute, and it is not clear whether it would include ESA and NHPA. Depending upon the content of the TERA, there may be a strong argument that the tribe acting under a TERA is not subject to the specific procedures under ESA and NHPA, but is the procedures specified in the TERA to address environmental and cultural resource issues are exclusive.

Title V recognizes a continuing federal trust responsibility. The Act requires the Secretary to "act in accordance with the trust responsibility of the United States relating to mineral and other trust resources" and "in good faith and in the best interests of the Indian tribes." The Secretary also is charged "to continue to fulfill the trust obligation of the United States to ensure that the rights and interests of an Indian tribe are protected . . ." in the event a party to a lease, agreement, or right-of-way violates the applicable agreement or if a lease, agreement, or right-of-way violates the applicable TERA.[159] The Act requires a TERA tribe to notify the Secretary of any breach of a TERA-approved agreement or of breaches of the TERA, itself, thus suggesting the Secretary will still stand as a backstop to ensure compliance with both the TERA and with any agreements a tribe may approve under a TERA. Nonetheless, Title V expressly absolves the United States of liability to any person, including a tribe, for losses sustained from a term actually negotiated between the tribe and the development company.[160] Consequently, while the Act acknowledges a trust responsibility, the roles and responsibilities of the tribe and Interior are spelled out in detail, and the judicially defined trust doctrine appears to have little room within which to operate.

Title V still leaves the leasing or contracting decision in the public arena, requiring NEPA-like studies and public participation in the approval process. Under the Energy Policy Act, a third party, presumably a local resident or possibly an environmental organization, may petition the Secretary for a determination that the tribe acting under a TERA is in violation of the TERA; if the Secretary determines that the tribe is in breach of its regulatory duties under the TERA, and the tribe does not timely cure, the Secretary is authorized to take actions against, not only the tribe, but also the holder of rights under the TERA-approved lease, contract, or right-of-way.[161] The remedies against the developer could include suspension of operations or rescission of the agreement

The developer under a TERA-approved lease, contract, or right-of-way stands at some risk over the tribe's discharge of its regulatory authority under the TERA. In addition, the tribe acting under a TERA has dual roles, acting both as proprietor and regulator, and the developer should be cognizant of the tribe's ability to act in both fashions. In that structure, the likelihood that the Interior Department will be available to moderate disputes with a tribal lessor is reduced. However, if there is a strong developer-tribe relationship, Title V presents the possibility for a tribe to move more promptly and efficiently than the Secretary might, particularly when a project entails strong non-tribal opposition.

Energy Policy Act Title V and the Navajo Nation amendments to the business leasing act provide models for a trust relationship better adapted to contemporary conditions. Both allow a competent tribe, willing to bet on its abilities, to assume the BIA's role in the mineral development process, with the intent that informed tribal self interest will yield the benefits the trust role as intended but seldom delivers.

B. The Search for Standards Defining Contemporary Trust Duties

[157] *See id.*, § 2604 (e) (2) (B) (iii) (VII).

[158] *See id.*, § 2604 (e) (2) (C).

[159] *See id.*, § 2604 (e) (6) (C).

[160] *See id.*, § 2604 (e) (6) (D) (ii).

[161] *See id.*, § 2604 (e) (7) (E) (iii).

The broad formulations the courts have used to define the standard of care required of the Secretary under the trust doctrine raise as many questions as they answer. "The best interests of the Indians," "fiduciary duties," and even "maximizing tribal revenues" only frame the broadest contours of the discussion. They do not address the balance between short-term and long-term tribal interests or that between tribal interests and legitimate, investment-backed expectations of developers. The applicable statutes remain the first and, where applicable, dispositive source of guidance. However, the courts' references to private trust law concepts afford guidance that supports balancing interest of the trust beneficiary with those of parties dealing with the trustee.

The cases do suggest, however, additional guideposts. Several cases refer to private guardianship concepts, referencing a relationship between guardian and ward.[162] Seminole Nation v. United States,[163] while holding the United States subject to "the most exacting fiduciary standards . . . ," referred to principles of private trust law to define federal trust duties.[164] White Mountain Apache relied extensively on private trust concepts.[165] Consequently, where the United States has a statutorily imposed fiduciary duty under Mitchell II, that duty may be defined by private trust concepts, if they have not been modified by statute.[166] However, whether private trust duties apply ultimately is a question of legislative intent. Private trust standards may not control, for example, when the government has a statutory duty to represent both tribes and other federal interests in water litigation: "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary . . . ."[167]

General trust law affords some guidance on the issues Interior's unique role presents. The basic trust law exercise requires interpreting the "manifestations of intentions of the settlor with respect to the trust . . . ."[168] The settlor in an Indian lands trust usually is Congress, and its intent is expressed through statute. The cases reflect three levels of trust duties that may apply to resource development: Statutes of general applicability, a base or limited trust, and a full trust relationship.

1. Statutes of general applicability

Where Congress has enacted a statute of general applicability that applies to Indian lands, in addition to non-Indian lands, courts generally do not impose standards of case under the trust doctrine; they deem the trust responsibility to require only compliance with the applicable statute and its regulations.[169]

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[162] *See, e.g.* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 15; Klamath & Moadoc Tribes of Indians v. United States, 296 U.S. 244, 251 (1935).

[163] Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

[164] *Id., citing*, Bogert, Trusts and Trustees (1935); *and* ALI, Restatement of the Law of Trusts (1935), § 321; *see also* United States v. Dann, 470 U.S. 39, 48-49 nn.11-12 (1982), *and* White Mountain Apache Tribe v. United States, 26 Cl. Ct. 446, 448 (1992), *applying* Bogert on Trusts.

[165] 537 U.S. at 475, *citing*, Bogert and G. Bogert, Law of Trusts & Trustees, § 582, p. 346 (Rev. 2d ed. 1980), Restatement of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.").

[166] *See* United States v. Mason, 412 U.S. 391, 393 (1973) (*quoting* 2A, Scott, Trusts 1408 (3d ed. 1967) (Trustee obliged to "exercise such skill as a man of ordinary prudence would exercise in dealing with his own property."); Covelo Indian Community v. FERC, 894 F.2d 581, 586 (9th Cir. 1990) ("the same principles that govern fiduciaries determine the scope of FERC's obligations to the [Indian] Community.").

[167] Nevada v. United States, 463 U.S. 110, 128 (1983).

[168] Restatement (Second) of Trust, § 164, comment c.

[169] *See, e.g.*, Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981) (EPA's compliance with Clean Air Act regarding off-reservation source satisfied trust responsibilities); North Slope Borough v. Andrus, 642 F.2d 589, 593 (9th Cir. 1980) (compliance with Endangered Species Act satisfies trust duties).

Federal agencies have reached similar conclusions.[170] In these cases, because the statute neither calls tribal lands out for special protection, nor imposes special duties relative to tribal lands, compliance with generally applicable statutes and regulations satisfies the terms of any trust.

2. The "bare or "limited" trust

The second level of trust responsibility arises with respect to federal actions under federal statutes regarding lands or resources held in trust, but where no comprehensive statutory scheme delineates detailed management responsibilities of the United States. Mitchell I found the General Allotment Act to be such a statute.[171] Navajo Nation reached a similar result with respect to IMLA coal leasing.[172] The Supreme Court has described this trust as a "bare" or "limited trust" or "trust-in-name."[173] The Claims Court has referred to such statutes as establishing a "guardian-ward" relationship, as distinguished from the "more intensive" duties arising in a trustee-beneficiary relationship: the government's duties are more limited.[174] The "limited trust" gives rises to remedies restricted to enforcement of the specific purposes of the trust relationship, generally focused in the Indian trust relationship upon the requirement of Secretarial approval of leases or permits enforceable by an administrative action for cancellation or the performance of actions required by statute or regulation. The bare or limited trust has been invoked to support actions for cancellation of land conveyances made without compliance with the Non-Intercourse Acts.[175] However, while courts have referenced the trust concept as a rationale for decision, it is difficult to assess whether the trust label elevated the government's standard of care in a way that has affected the outcome of decisions.

3. Full trust relationship

A third category of trust relationship has been categorized as a "full fiduciary relationship", found in Mitchell II and White Mountain. Due to the focus of many cases, this standard label attaches when a statute is found to "fairly be interpreted as mandating compensation by the Federal Government for damages sustained."[176] As we have seen, the full trust relationship arises from comprehensive federal management of tribal assets pursuant to a comprehensive statutory and regulatory scheme.[177] The full trust relationship has been found to allow remedies both against the United States, and for damages against private lessees.[178]

While the remedies available to tribes and individual Indians arising from the three categories of trust may differ, a central principle appears to underlie them. The courts determine federal duties by inter-

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[170] *See* Covelo Indian Community v. FERC, 859 F.2d 581, 587 (9th Cir. 1990) (FERC's compliance with regulations regarding notice to tribes satisfied trust responsibility in Federal Power Act relicensing proceeding); *see also* Skokomish Indian Tribe, 72 FERC ¶ 61 (1995) (same).

[171] *See, e.g.*, United States v. Mitchell, 445 U.S. 535, 546 (1980).

[172] *See* 537 U.S. at 507 ("Nor do the [IMLA coal provisions] even establish the 'limited trust relationship' existing under the [General Allotment Act] . . ."); *see also* United States v. White Mountain Apache Tribe, 537 U.S. at 479 (Navajo is properly aligned within Mitchell I . . . ") (Ginsburg, J., concurring).

[173] Judith V. Royster, "Equivocal Obligations," 71 N. Dak. L. Rev. at 332.

[174] Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 573 (1990); *see* Restatement (Second) of Trusts § 7 (1959) ("A guardianship is not a trust.").

[175] *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

[176] *See* Mitchell II, 463 U.S. at 226.

[177] *See* Part II.A.1, *supra.*

[178] *Id.*

preting and enforcing expressed congressional and, arguably, administrative intent.[179] The Claims Court has applied a similar, three-pronged analysis of trust duties, also based on statutory terms.[180]

The Supreme Court's recent decision in United States v. Lara[181] reinforces that the federal government's trust duties are defined, not by broad judicial pronouncements, but rather by congressional enactments. In Lara, the Court addressed the effect of Congress' amending the Indian Civil Rights Act to provide that the term "the powers of self-government" in the statute includes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[182] Lara addressed the highly abstract question whether, by so amending the ICRA, Congress over-ruled the Supreme Court's decision in Duro v.Reina,[183] which held that tribes lack inherent power to impose their criminal jurisdiction over Indians not members of the prosecuting tribe. In holding that Congress, not the Court, had the ultimate authority to define tribal power, the Court recognized a Congressional primacy in determining the non-constitutional dimensions of tribal sovereignty.[184] Lara reinforces the guidance of the Mitchell cases, Navajo Nation, and White Mountain Apache that Congress' statutory directives, rather than cases proclaiming broad principles, will be definitive of federal duties.

4. Interpreting Congressional Intent

Courts' reliance upon the terms of applicable statutes to define trust duties highlights the significance of canons of construction applicable to interpretation of treaties and statutes.[185] A long line of Supreme Court decisions counsels, in terms that reference trust concepts, that ambiguities in treaties or statutes generally be resolved in favor of Indians.[186] The canons of construction arose from early treaty negotiations, "where tribal bargaining power was limited and language barriers abounded."[187] Overzealous application of the canons of construction can skew the outcome of litigated cases.

While often invoked in support of decisions favoring tribes, like any rule of construction, the canons are intended to divine the true intentions underlying a treaty, statute, or regulation.[188] Consequently, the rules do not invariably call for a decision favorable to Indians; for example, a longstanding administrative interpretation may require an ambiguity to be resolved consistently with that interpreta-

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[179] A trust relationship also has been held to be established by the government's voluntarily assuming management of tribal resources. *See* White Mountain Apache Tribe of Arizona v. United States, 11 Cl. Ct. 614, 650 (1987) (government's establishment of a grazing lease program obligated it to act in a fiduciary capacity towards the lands so administered) (*aff'd without opinion*) 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 513 U.S. 929 (1994); Moose v. United States, 674 F.2d 1277, 1283 (9th Cir. 1982) (by holding trust funds for minor Indians, government waives immunity from suit for breach of trust).

[180] *See, e.g.*, Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 573-74 (1990).

[181] 541 U.S. 193 (2004).

[182] 25 U.S.C. § 1301(2) (2000).

[183] 495 U.S. 676, 693-94 (1990) (tribes lack inherent power to criminally prosecute Indians not members of the prosecuting tribe).

[184] See 541 U.S. at 201-06.

[185] *See e.g.*, Worcester v. Georgia, 31 U.S. 515, 582 (1832); Winters v. United States, 207 U.S. 564, 576 (1908); United States v. Santa Fe Pacific Rwy. Co., 314 U.S. 339, 353 (1941) (doubts "to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protections and good faith.") (quotations omitted); *see also* Mille Lacs Band of Chippewa v. State of Minnesota, 526 U.S. 172, 200 (1999), ("Indian treaties are to be interpreted liberally in favor of the Indians".)

[186] Cohen 1982 at 221-22 (The same canons of construction may apply to the interpretation of regulations.); *see* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).

[187] David H. Getches, "Conquering the Cultural Frontier," 84 Calif. L. Rev. at 1620-21 n. 210.

[188] The rule is "a base a canon for construing" statutes and "is not a license to disregard clear expression of tribal and congressional intent." DeCoteau v. District County Court, 420 U. S. 425, 447 (1975); *see also* Rice v. Rehner, 436 U.S. 713, 732 (1983) (canon of construction not applied when "tantamount to a formalistic disregard for congressional intent.").

tion.[189] The canons of interpretation will have greatest impact in cases interpreting early treaties and statutes; their usefulness as a guide to determining the intentions underlying a self-determination era statute or regulation asserted to impose trust duty may be less weighty.

C. The Balance of Fairness Under the Trust Doctrine: Remedies and the Search for the Two-Way Street

Resources developers face risks under the trust doctrine. Decisions regarding cancellation of leases or minerals agreements likely will be made by the Secretary.[190] Alternatively, tribes or individual Indian minerals owners may seek cancellation in federal or tribal courts.[191] In such controversies, the Interior Department's conclusions regarding the scope of trust duties and applicable standards of care may be dispositive. Resource developers, already troubled by tribal immunity from suit, potential tribal court jurisdiction, and tribal regulation, may perceive the potential for one-sided trust duty interpretations and resulting remedies as further risks for Indian country resources development.

Reported cases reflect courts' interpretations of trust duties and applicable remedies that truly would be exceptional in private land circumstances. Jicarilla Apache Tribe v Supron Energy Corp. is a prominent and influential example: a concededly reasonable determination of BIA lease terms and royalty accounting regulations, applied uniformly for over thirty years, was set aside in favor of a recently conceived interpretation that the court found would "maximize" tribal revenues.[192] The Tenth Circuit's decision that the Secretary's accounting methods breached trust duties led not to a remedy of damages against the United States for breach of trust[193], although such a claim was pending at the time, but required lessees to account for royalties retroactively over a ten-plus year period and to pay additional royalties owed under that accounting. Consequently, the trust doctrine can give rise to remedies against private developers. The discussion below addresses these and other remedial issues.

1. Visiting the Sins of the Trustee on the Lessee: Cancellation and Other Remedies

"Cancellation is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case . . . ."[194] Although cancellation often has been sought in controversies over Indian mineral leases, lease cancellation does not appear to have been affirmed by any appellate court as a remedy for breach of trust-like duties under a mineral lease.[195] As the early, influential decision in Gray v. Johnson implies, mineral lease cancellation may be an appropriate remedy where a minerals lease is void ab initio.[196] However, the federal courts have been reluctant to order lease cancellation. First, cancellation is an equitable remedy, to be granted "in the discretion of the chancellor."[197] A

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[189] *See* Pueblo of Santa Ana v. Mountain States Tel. & Tel., 472 U.S. 237, 249 (1985) (applying generally applicable canons of construction in interpretation adverse to tribe).

[190] *See* 25 C.F.R. § 211.54 (2004) (Cancellation of tribal leases by the Secretary); 25 C.F.R. § 225.36 (2004) (Cancellation of minerals agreement by the Secretary).

[191] *See e.g.*, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Coosewoon v. Meridian Oil Company, 25 F.3d 920, 924 (10th Cir. 1994).

[192] *See* Jicarilla Apache Tribe v. Supron Energy Corporation, 728 F.2d at 1567-68.

[193] *See* Jicarilla v. Supron, 793 F2 1171 (10th Cir. 1986) (order granting government's motion to require oil and gas lessees, rather than government, to pay damages for improper royalty accounting).

[194] Jicarilla Apache Tribe v. Andrus, 687 F.2d at 1333 (citations omitted).

[195] *But see* Gray v. Johnson, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) (affirming administrative cancellation of grazing lease for exceeding mandatory term limitation).

[196] McClanahan v. Hodel, 14 I.L.R. 3113, 3116 (D.N.M. 1987) (court orders cancellation of uranium leases where failure to join significant minority of allotted lessors rendered leases void *ab initio*).

[197] Jicarilla Apache Tribe v. Andrus, 687 F.2d at 1333.

person coming into a court of equity cannot demand cancellation as a matter of right, and cancellation generally will not be ordered unless the parties can be "put back in *status quo* . . . ." [198] Additionally, because cancellation is an equitable remedy, equitable defenses, including laches and unclean hands, may be available to lessees or mineral developers, even when the party demanding cancellation is a tribe. [199] Consequently, cancellation has been treated as an extraordinary remedy, potentially available when a lease is void *ab initio* and the equities do not counsel in favor of a less drastic remedy.

The question that follows, then, is who is empowered to order lease cancellation and under what circumstances. The IMLA and IMDA regulations specifically empower the Secretary to cancel under defined circumstances and in what circumstances cancellation is appropriate.[200] The Tenth Circuit has dismissed an action for cancellation of an allotted lands Indian oil and gas lease, because the allottee-lessor had not exhausted administrative remedies before the Secretary. [201] The Ninth Circuit addressed a similar issue in the context of a business lease of tribal lands. [202] Although the Interior Department regulation provided that either the Secretary or the tribe could cancel, the Ninth Circuit affirmed the Interior Board of Land Appeals' conclusion that only the Secretary could cancel. The Ninth Circuit's rationale in Yavapai-Prescott, that limiting cancellation power to the Secretary would enhance the value of the lessee's interest in the lease and, hence the value of tribal business leases generally, [203] seems fully applicable to the mineral leasing context. These cases suggest that, for IMLA leases and IMDA agreements, cancellation is an administrative remedy potentially available to a tribe, in timely BIA administrative proceedings or in a judicial action for cancellation preferably after exhaustion of administrative remedies. Lessees may assert equitable defenses in judicial actions for cancellation.

2. Standing to Challenge Cancellation: an Injury Without a Remedy?

Rosebud Sioux Tribe v. McDivitt[204] presents the troubling scenario where a developer's lease was cancelled administratively, yet the court held the developer lacked standing to challenge the cancellation. This case involves a large hog farm on a business lease of tribal trust land of the Rosebud Sioux Tribe under 25 U.S.C. § 415. Field officials of the BIA approved a lease for the first phase of the project (three of thirteen planned sites) after completion of an environmental assessment (EA) and signing of a finding of no significant impact (FONSI). Environmental and animal rights groups filed suit in the District of Columbia, alleging inadequate compliance with NEPA. However, no administrative appeal was filed from the lease approval. Nonetheless, the Assistant Secretary – Indian Affairs, essentially agreeing with the substance of the groups' complaint, issued a letter voiding the lease. The Tribe and Sun Prairie then filed Administrative Procedure Act claims challenging the cancellation in federal court in South Dakota. The district court set aside the Assistant Secretary's action in declaring the lease void and enjoined BIA and the environmental and public interest intervenors from interfering with construction and operation of phase one of the project. On appeal, after tribal elections changed the composition of the Tribal Council,

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[198] *Id*.

[199] *Id.* at 1338-41 (because the tribe delayed unreasonably in filing suit and lessees were prejudiced by delay, laches defense bars cancellation for NEPA non-compliance); *see also* City of Sherifll v. Oneida Indian Nation , 125 S.Ct. 1478, 1492-94 (2005) (long delay by tribe in asserting defense to state taxes supports applying doctrines of laches, acquiescence and impossibility to reject tribe's request for equitable relief from state taxes on tribal fee lands.)

[200] *See* 25 C.F.R. § 211.54 (Cancellation of tribal leases by the Secretary); 25 C.F.R. § 225.36 (Cancellation of minerals agreement by the Secretary) (1998).

[201] Coosewoon v. Meridian Oil Co. , 25 F.3d 920 (10th Cir. 1994) (application to Secretary to cancel under 25 C.F.R. § 212.23(a) is mandatory).

[202] Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d at 1075.

[203] *Id.* at 1075-76.

[204] 286 F. 3d 1031 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 1255 (2003).

the Tribe switched sides in the litigation and supported the Assistant Secretary's action declaring the lease void. In its decision the Eighth Circuit vacated the district court's order and remanded with directions to dismiss for lack of standing, holding that Sun Prairie is not within the zone of interest protected by the environmental and Indian leasing statutes relied upon in its complaint. Consequently, Sun Prairie lacked standing to challenge the BIA's cancellation of its lease.

Sun Prairie asserted standing under, among other statutes, the 1955 business and agricultural leasing statute,[205] "old" Section 81,[206] and NEPA. While conceding that Sun Prairie's loss of its lease was an injury-in-fact that was "considerable," the Eighth Circuit held the company's loss did not fall within the zones of interests of the Indian leasing and contracting statutes: "Sections 81 and 415 impose limitations on contracts and leases involving Indian lands, *and are intended to protect only Native American interests*."[207] While the propriety of the Eighth Circuit's holding as a matter of federal court standing law lies beyond the scope of this paper, the decision raises a spectre for developers that they may lack avenues for judicial review of agency decisions adversely affecting their rights under tribal leases.[208] These cases ignore that one purpose of all Indian leasing and contracting statutes is to provide a mechanism by which the contracting party may obtain enforceable rights. Rosebud Sioux Tribe presents important policy issues that developers should address through litigation or legislatively by inserting language affirming the statutes also protect interests of non-Indian contracting parties. Rosebud Sioux Tribe reflects a profound imbalance between tribal and developer interests based on a narrow view of statutory intent. Holdings such as Rosebud Sioux Tribe may adversely affect opportunities for, and the value of, tribal lands for economic development.

3. The Trust Doctrine Affecting Performance Under Minerals Development Agreements

We have seen that interpretations given the trust responsibility can affect the standard of care required of the United States. Jicarilla v. Supron relied on fiduciary concepts to conclude that the IMLA requires the Secretary, perhaps myopically "maximize" tribal revenues.[209] The Woods Petroleum cases, by contrast, obligate the Secretary to consider "all pertinent factors" under the applicable statute, not merely tribal short term revenue maximization differing formulations raise for developers the question, how will[210] trust concepts affect standards applicable to issues arising in mineral development.

The Supreme Court's recent cases counsel an analysis grounded in Navajo Nation and White Mountain Apache reinforce that careful and objective interpretation of statutes and regulations towards the goal of divining true congressional or administrative intent should be the lodestar. Under Mitchell II, statutes and regulations "define the contours of the United States' fiduciary responsibilities."[211] Interpret-

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[205] 69 Stat. 539, 25 U.S.C. § 415(a) (1994).

[206] 25 U.S.C. § 81 (1994).

[207] 286 F. 3d at 1036 -1037 (emphasis supplied); Sun Prairie relied upon earlier cases reaching similar conclusions. *See, e.g.*, Schmit v. Int'l Finance Mgmt. Co., 980 F.2d 498, 498 (8th Cir. 1992) (25 U.S.C. § 81 enacted solely for benefit of Indians); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1056 (10th Cir. 1993) (holding former § 81 was enacted solely for the benefit of Indians and non-Indian contracting party lacks standing).

[208] A decision in a related, subsequently filed action addresses similar concerns. In a June 5, 2003 decision, the district court denied the government's motion to dismiss Sun Prairie's action seeking declaratory and injunctive relief from the Secretary's alleged unconstitutional taking of its leasehold interest without due process of law -- essentially for failing to afford Sun Prairie notice and hearing regarding the cancellation and failure to follow lease provisions specifying procedures for cancellation. Sun Prairie v. Martin, No. CIV. 02-3030 RHB (Mem. Op. Regarding Motions to Dismiss, June 56, 2003). That action remains pending.

[209] *See supra*, Part II.A.1,

[210] *Id.*

[211] Mitchell II, 463 U.S. at 224.

ing trust duties requires recogn ition that statutes balance competing interests and an analysis that ident i-fies both Indian interests and other statutorily interests of offense intended. [212] Private, trust concepts co m-patible with interpretations given Indian leasing statutes afford additional guidance. The requirement that the trustee determine the best interests of all ben eficiaries would require officials to consider both short - term and long -term interests, not merely the wishes of current tribal off icials. [213] Trust principles require the trustee to deal impartially with all classes of ben eficiaries: in a profit -sharing plan, f or example, both those who would share in current distributions and those whose interests will accrue in future per iods.[214]

Cases interpreting the Federal -Indian trust relationship reflect similar concepts. Woods Petroleum requires the Secretary to consider "all relevant factors", in a manner that is "not a sham process but is exercised in good faith. . .". [215] Yavapai-Prescott reflects the concept that the long -term interests of a tribe, and of tribes in general, counsel for rules that accord lessees stable an d predictable rights. [216] These cases counsel focus on the inte rests of all parties identified under applicable statutes, including the long -term interests of tribes and Indian mineral owners.

IV. RESOURCE DEVELOPMENT ISSUES UNDER THE TRUST DOCTRINE

Self-determination raises new issues for application of the trust doctrine to proc edures developed under the IMLA. NEPA and NHPA impose procedural requirements on Indian leasing and contracting, and ESA imposes both procedural and substantive requirements. The statutorily-required information gathering can inform tribes and develo pers about the potential impacts of a proposed development. However, it also can delay approval of a lease or minerals agreement, potentially for years. Finally, the substantive provisions of ESA or the delay attendant to comple ting NEPA studies or other NEPA -related impediments, such as citizens' suits to enforce the statute, may kill a project that a well-informed tribe wants. The issue presented is just how "public" a dec ision tribal resource development should be. This portion of the Paper will a d-dress how such federal statutes might be harmonized with tribal desires for optimal returns from tribal r e-source development.

A. Flexibility in Leasing and Contracting to Minimize Handicapping of Tribal Minerals

The Indian Mineral Development Act has eliminated many of the roadblocks to e ffective tribal leasing and contracting imposed under the IMLA and the Energy Policy Act provisions promise to pr o-vide other options. Tribes are not limited to a standard form lease or to co mpetitive bidding for oil and gas leases. They are free to adopt terms that reflect their own interests, and those of contracting parties. However, the IMDA process still i mposes requirements that may subject tribal lands to competitive dis-advantages as compared with off -reservation lands. Most signif icantly, the IMDA requires compliance with NEPA before the Secretary may validly approve a minerals agreement, but specifies that no other environmental studies may be required. [217] As noted above, during the d ebates on the IMDA, The Council of Energy Resources Tribes argued in favor of creative measures to allow the e ssential economic terms of

[212] *See* North Slope Borough v. Andrus, 642 F.2d 589, 613 (D.C. Cir. 1980) ("Di scretion is given to the Secretary to make re-sponsible decisions which balance the public and social interest involved . . . . [A] veto for any one particular set of interests . . . would halt the Secretary's delegated decision-making.").

[213] *See, e.g.*, Deneher Corp. v. Chicago Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986) (The duty cannot be di s-charged simply by consulting and carrying out the express wishes of those whose present position makes them the presumptive beneficiaries.).

[214] *See* Central Trust Co., N.A. v. American Avents Corp., 771 F. Supp. 871, 875 (S.D. Ohio 1989).

[215] *See* Wood Oil Co. v. Dept. of the Interior, 47 F.3d at 1039.

[216] *See* Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d at 1075.

[217] *See* 25 U.S.C. § 2103(b) (1994).

minerals agreements to receive Secretarial approval within sixty to ninety days, to allow t ribes to realize opportunities that may not be available if Se cretarial approval cannot be secured until NEPA compliance is completed.[218] Congress did not adopt CERT's proposal; however, BIA may have existing authority to make tribal lands competitive when m inerals development requires prompt assurance that an agreement will be approved subject to NEPA compliance.

The IMDA expressly authorized approval to be conditioned only upon NEPA compl iance. The statute does not mention the Endangered Species Act,[219] the National Historic Preservation Act,[220] the Native American Graves Protection and Repatriation Act,[221] or the Archae ological Resources Protection Act[222] and the Archae ological and Historic Preservation Act.[223] However, the IMDA regulations specif ically require that all "necessary surveys" are performed in accordance with AHPA, NHPA, the American Indian Religious Freedom Act,[224] and applicable regulations.[225] Although the IMDA regulations make no mention of ESA review, they do require that studies be prepared in compl iance with the Council on Environmental Quality ("CEQ") regulations governing NEPA compliance,[226] and the CEQ regulations require consideration of ESA factors in an agency's determination whether an a ction "significantly" affects the human environment.[227] In any event, study of a project area under these statutes usually is part and parcel of the NEPA compliance process. Generally, neither a finding of no si gnificant impact ("FONSI"), nor a final environmental impact statement ("EIS") could be complete until ESA a nd cultural resource reviews are finished.[228] The courts have not addressed whether the IMDA limitation of environmental studies to those "required under [NEPA]" limits age ncies' discretion to require studies or impose conditions under other statutes.

Given that NEPA's requirements are procedural, the primary direct cons equence of NEPA co mpliance is delay. With respect to oil and gas deve lopment, the completion of NEPA review might extend from ninety days to a year or more; with respect to a coal lease, one to three years. During the entire p eriod from execution of a minerals agreement until Secretarial approval following the completion of NEPA compliance, either the tribe or the developer can walk away without penalty.[229] Indirect consequences, including citizens' suits arising from public participation in the NEPA process, can extend the delay. This prolonged uncertainty could kill favorable transactions.

The implications for self -determination underlying the imposition of NEPA, ESA, and cultural resource sta tutes upon Indian tribes are seldom addressed. When NEPA was enacted, Interior initially took the position that, because the statute did not specifically a dvert to tribes or Indian lands, it was ina pplicable to them. It advanced this position in lit igation, and it did not change the position until it had been rejected repeatedly by the courts.[230] The courts' rationale underlying imposition of NEPA duties on BIA lease a pproval hinged on the express language of the statute: BIA decisions regarding lease approva ls

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[218] *See supra* Part II.A; Hearings on S -1894, 97th Cong. 2d Sess. at 79 (Remarks of Mr. Ed Gabriel, Exec utive Director of CERT).

[219] 16 U.S.C. § 1531-1544 (1988).

[220] 16 U.S.C. §§ 470-470w. (1988) and Supp. 1998) ("NHPA).

[221] 25 U.S.C. §§ 3001-3013 (Supp. 1999).

[222] 16 U.S.C. §§ 470aa-470ll. (1988 and Supp. 1988).

[223] 16 U.S.C. §§ 469-469h.(1988 and Supp. 1998) ("AHPA").

[224] 42 U.S.C. § 1996 (1994).

[225] The IMDA regulations reference 36 C.F.R., parts 60, 63, and 800.

[226] *See* 25 C.F.R. § 225.24(a) (2004).

[227] *See* 40 C.F.R. § 1508.27(b)(8) (2004).

[228] *See* 53 Fed. Reg. 10, 439 (March 31, 1988) (BIA appendix of actions usually requiring an EIS or FONSI).

[229] *See* Quantum Exploration, Inc. v. Watt, 780 F.2d at 1460.

[230] *See* Davis v. Morton, 469 F.2d 593, 595 (10th Cir. 1972); Manygoats v. Kleppe, 558 F.2d 556, 557 (10th Cir. 1977).

were "federal actions" that had the potential to "significantly affect the quality of the human environment."[231] Consequently, so long as BIA officials must approve Indian leases or minerals agreements, NEPA compliance likely will be required. Alternatives such as tribal approvals under the Navajo Nation business leasing amendments or under TERAs under the Energy Policy Act of 2005 may circumvent this problem because the approval is by a tribal official.

There may, however, be opportunities for flexible action to minimize the impact of NEPA procedures on tribes' ability to compete for mineral development. A decision by a federal official must be premised on adequate compliance with NEPA before surface-disturbing activities can take place on the ground.[232] Consequently, NEPA may not be an impediment to Secretarial approval of elements of an IMDA agreement that does not authorize surface disturbance that could significantly affect the quality of the human environment and would not irretrievably commit resources.[233]

The Secretary should consider flexible approaches to managing NEPA compliance in a manner that minimizes its intrusion upon tribal self-determination under the IMDA. Expediting NEPA compliance may be an additional device to minimize prejudice caused by delay.

B. Flexibility Under the Endangered Species Act in Indian Country

While the IMDA calls for "required" NEPA studies, neither the IMDA nor its implementing regulations mention the Endangered Species Act.[234] And, the IMDA specifies that "the Secretary shall not be required to prepare any study regarding environmental . . . effects [of an IMDA agreement] apart from that which may be required under [NEPA]."[235] This language arguably limits the Secretary's authority to apply the ESA in a manner that undermines an IMDA agreement.

The ESA has been interpreted as applying on its face to Indians and tribes.[236] However, the Secretary already has recognized agencies' flexibility under the Endangered Species Act to take tribal self-determination into account. On June 5, 1997, the Secretaries of the Interior and Commerce issued a Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act."[237] The Secretarial Order defines the "government-to-government relationship" between tribes and the United States with respect to Endangered Species Act compliance. Although the Fish and Wildlife Service has reaffirmed the position that the ESA applies to Indian lands,[238] Secretarial Order No. 3206 suggests an approach that minimizes the ESA's impact on tribal self-determination.

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[231] *See* Davis v. Morton, 469 F.2d at 597-98.

[232] *See* Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976); Stand Together Against Neighborhood Decay v. Board of Estimate, 690 F. Supp. 1192, 1199-1200 (E.D.N.Y. 1988) (NEPA studies must be completed before authority to construct granted, not before acquisition of land); *accord*, City of Oak Creek v. Milwaukee Metropolitan Sewerage Dist., 576 F. Supp. 482, (E.D. Wis. 1983).

[233] *See* City of Oak Creek v. Milwaukee Metropolitan Sewerage Dist., 576 F. Supp. at 489.

[234] 16 U.S.C. § 1531-43 (1988); *see* Part III.A., *supra*.

[235] *See* 25 U.S.C. § 2103(b) (1994); as noted above, the IMDA regulations, *see* 25 C.F.R. § 225.24(a), reference the CEQ regulations, which in turn reference the ESA. *See* 40 C.F.R. § 1508.27(b)(8) (2004).

[236] *See e.g.*, United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987); *c.f.*, United States v. Dion, 476 U.S. 734, 745-46 (1986) (Bald Eagle Protection Act impliedly abrogates treaty rights); Ruth S. Musgrave and Mark C. Dow, "Indian Wildlife Resources and Endangered Species Management," ABA Section of Nat. Res., Energy and Envir., Comm. On Native American Res., 4th Ann. Conf., at 9-27-29 (1992); Note: "The Effect of the Endangered Species Act on Tribal Economic Development in Indian Country," 50 Wash. U. J. Urb. & Contemp. L. 303 (1996).

[237] Secretarial Order No. 3206, June 5, 1997.

[238] Memorandum From Regional Director, USFWS Region 2 (Albuquerque, N.M.) to Area Directors, BIA (Dec. 16, 1993); *see generally*, Michael O'Connell, "Permitting Issues Affecting Development of Natural Resources On and Near Indian Reservations," ABA Section of Nat. Res., Energy and Envir., Comm. on Native American Res., 7th Ann. Conf. at 20 (1995).

Secretarial Order No. 3206 recognizes tribal governments "as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are government sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources.[239] The Order requires both Departments to consult with, and seek the participation of, affected tribes to the maximum extent practicable in any action under ESA and the Departments to provide technical assistance to tribes.[240]

In provisions significant for trust doctrine analysis, the order requires federal agencies to seek to shift the burden of ESA compliance from tribal to non-Indian lands. Secretarial Order No. 3206 sets forth considerations to guide federal agencies in cases involving agency action affecting tribal lands or proposals that could result in an incidental take under the ESA. Section 7 of the ESA prohibits federal agencies from authorizing funding or carrying out any agency action unless the agency determines that the action will not jeopardize the continued existence of any listed species and is not likely to damage designated critical habitat for listed species.[241] The agency must consider whether conservation restrictions are necessary for conservation of the species, whether the measure is the least restrictive alternative available to achieve the conservation purpose, and whether voluntary tribal measures would be adequate. Additionally, the Order both requires that any such "restriction does not discriminate against Indian activities, either as stated or applied" and that the agency determine that "the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities." The suggestion that non-Indian activities should be curtailed before tribal activity appears to recognize the tension between tribal self-determination and ESA enforcement.

Addressing an oft-litigated issue,[242] the Secretarial Order requires the Departments to "take into consideration the impacts of their actions and policies . . . on Indian use of listed species for cultural and religious purposes. The Department shall avoid or minimize, to the extent practicable, adverse affects upon the non-commercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes."[243]

A tribal preference under ESA is also reflected in provisions of the Order recognizing that the ESA habitat conservation planning process ("HCP")[244] can apply to Indian lands, however the Order again requires agencies to "plan around" trust lands in developing HCP's to the degree feasible: "The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources." Second, recovery plans are expressly required to be structured in a manner that "minimizes the social, cultural and economic impacts on tribal community, consistent with the timely recovery of listed species."[245] The agencies must be "cognizant of tribal desires to obtain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources."[246]

Secretarial Order No. 3206 clearly elevates the interest of tribes over others' in the ESA process. Its provisions suggesting the Departments should minimize impacts on tribal resources arising from ESA conservation measures could allow tribes and developers to work cooperatively with the federal agencies to allow development that might otherwise be unavailable.

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[239] Secretarial Order at 4.

[240] Secretarial Order, Principle 3(A).

[241] 16 U.S.C. § 1536(a)(2) (1984).

[242] *See* United States v. Dion, 476 U.S. 734 (1986) (Bald Eagle Protection Act applies to tribal Indians).

[243] Secretarial Order, Principle 4.

[244] *See* ESA § 10, 16 U.S.C. § 1536 (1984).

[245] *See* Guidelines, Section 3(E)(2).

[246] *Id.*

V. RE-EXAMINING THE PREMISE OF DEPENDENCY

The doctrine of discovery, the Non-Intercourse Act, and, to a lesser degree, the IMLA all are premised to some degree upon the notion that tribes and individual Indians lack the competence, or at least the administrative skills and resources, to enter into such transactions on their own. By contrast, a central premise underlying self determination policies, the IMDA, and the Energy Policy Act is that tribes can, in fact, secure better agreements if they determine the terms of the transaction, rather than relying upon BIA. In practice, tribes have negotiated and set the terms of mineral transactions in the past fifteen years. The cases where BIA insists upon, or even recommends, more favorable terms are rare. Instead, the function of BIA Realty Offices across the country has been transformed from minerals manager to support staff, often assisting tribal minerals departments in ensuring that leases, minerals agreements, or right-of-way packages contain the required components and are supported by the studies required by federal law. Although these functions remain beneficial to the degree the services BIA performs add value to tribal transactions, rather than erecting hurdles or imposing delay to validate transactions, the BIA's role is far narrower than it was.

Assuming tribes are calling the tune on the economic terms of minerals agreements, one can analyze the remaining functions performed by BIA. In the leasing and minerals agreement context, those duties include the ascertainment of compliance with leasing and permitting regulations requiring the qualifications of the lessee to hold leases or contracts, the posting of bond, and the proper description of properties.[247] The Secretary also performs these functions under allotted lands leases;[248] with respect to IMDA agreements, BIA also prepares an economic assessment of the proposed minerals agreement that may provide valuable information to a tribe contemplating a minerals agreement.[249] During operations, BIA reviews and approves unitization agreements and certain assignments.[250] The Secretary, through the Minerals Management Service ("MMS"), receives and audits royalty remittances,[251] except to the degree such functions have been delegated to the specific tribe. Through the Bureau of Land Management ("BLM"), the Secretary supervises operations on the leased lands.[252]

Clearly, these can be valuable services, and tribes and individual mineral owners benefit from not having to supply the services themselves, assuming these services are performed in a timely, efficient, and effective manner. However, there is ample evidence supporting that BIA's handling of these duties does not always fit that description. The current controversy regarding accounting for trust funds raises the question whether allottees are better served by the United States' performing these services without charge than they would have been had the allottees handled the accountings at their own expense. The fact that there is no easy answer to that question does not mean it is not a pertinent inquiry.

This question is now timely. Congress has determined that tribes may be competent to administer services for which BIA has administrative responsibility.[253] Perhaps more significantly, Congress also has determined under several of the federal environmental laws, that tribes may have the competence and administrative capabilities to determine the appropriate quality of reservation waters and air and how to achieve it.[254] The environmental regulatory responsibility delegated to tribes under the Clean Air Act and

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[247] *See* 25 C.F.R. §§ 211.23, 211.24, and 211.25 (2004).

[248] *See* 25 C.F.R. Part 212 (2004).

[249] *See* 25 C.F.R. Part 225, 25 C.F.R. 225.23 (2004).

[250] *See* 25 C.F.R. §§ 211.28, 211.53 (2004).

[251] *See* 25 C.F.R. §§ 211.40, 211.43 (2004).

[252] *See* 25 C.F.R. §§ 211.47, 211.50, 211.54 (2004).

[253] *See* Indian Self-Determination and Assistance Act of 1975, 25 U.S.C. § 450 (1994).

[254] *See* William C. Scott, "Tribal TAS Programs", Rocky Mtn. Min. L. Fnd., Inst. on Res. Devel. in Indian Country, November 10, 2005, Paper No.18(EPA delegations of authority to tribes under the Clean Air Act); *see also* Montana v. United States

Clean Water Act requires competence, administrative expertise, and judgment of the highest order. The decisions tribes make under these delegations will affect the quality of reservation environments, the health and welfare of reservation populations, and affect the investments and livelihoods of businesses and workers on reservations. EPA has delegated, or proposes to delegate, regulatory power not only over tribal members, but also over non-members living and doing business within, or in certain circumstances close to, reservations.

Under established trust and guardianship law principles, enhanced tribal capabilities could lead to a diminished trust role. To the degree the "trust" relationship is properly characterized as that of guardian and ward, common law principles contemplate that the guardianship applies "only when and for so long as the ward is lacking in legal capacity."[255] As noted above, the Claims Court has relied on the Restatement (Second) of Trusts and early Supreme Court cases to observe that the general relationship between the United States and tribes regarding trust property is that of guardian-ward, rather than of trustee-beneficiary.[256] From this premise and principles of guardianship law, Judge Tidwell has argued that: "a guardian-ward relationship implies that, at some point, the ward will begin to take responsibility for its own affairs."[257] Chief Justice Marshall's opinions, and the trust doctrine that arose from them, do not appear to be premised on the notion that Indians and tribes are forever incapable of attaining the acumen necessary to manage their lands and resources. Consequently, to the degree tribal self-determination reflects tribal futures, the vision of the trust relationship as a gradually disappearing one seems appropriate.

If the trust relationship is that of trustee and beneficiary, rather than guardian and ward, tribal self-determination still could effect a change. Where a trust is created for a beneficiary and the purpose of the trust is to deprive him of management of the property on account of a legal, physical, or mental disability, and that disability is subsequently removed, the beneficiary can compel termination of the trust.[258] The same may be true of a trust created during the minority of the beneficiary or during insolvency: when the minor comes of age or the beneficiary becomes solvent, "the trust will be terminated upon the expiration of the period or the happening of the event."[259] These rules would apply if the incapacity of disability were the "only" reason for establishing the trust. It is debatable whether the federal trust imposed on Indian lands solely due to tribes' supposed inability to manage their lands. The United States arguably had other reasons for imposing the trust, including the desire of the United States to control relations with tribes or the related goals of keeping the peace and providing orderly and efficient settlement of lands. Of course, any transformation of the federal trust relationship would require statutory change addressing those elements that have been enacted into statutes that control the disposition of tribal lands.

These trust concepts and changing visions of the tribe require reexamination of trust doctrine. It is, at the very least, incongruous for a tribe to seek or obtain regulatory primacy over its members and non-members, yet still claim the need for a guardian's protection from improvident transactions. It seems indisputable that the skill and knowledge sets and administrative machinery required to manage leasing and mineral contracting are of no higher an order than those required to administer the provisions of the Clean Air Act and Clean Water Act. While only a minority of tribes have thus far sought treatment as state status under the federal environmental laws, Congress' provision for such delegations and EPA's approval of tribal programs impliedly reject the central premise underlying the trust doctrine, that tribes presumptively cannot

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Environmental Protection Agency, 137 F.2d 1135 (9th Cir.), *cert. denied*, 119 Sup. Ct. 275 (1998) (affirming EPA's decision to grant treatment as status to the Confederated Salish and Kooteni Tribes to promulgate water quality standards).

[255] *See* Restatement (Second) Trusts § 7, Comment (a) (1959).

[256] *See* Part II. B., *supra*.

[257] *See* Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. at 573.

[258] Scott on Trusts, 2d ed. § 337.5 at 2464 (1956).

[259] Restatement of Trusts (2d § 334) (1959).

be trusted to manage their affairs.[260] Moreover, some tribes are insisting that resource developers recognize the tribal government and tribal courts as having general jurisdiction over them and the same powers as state governments.[261] If these trends continue, the premise of a need for federal guardianship inherent in Chief Justice Marshall's description of tribes as "domestic dependent nations" increasingly will be false. Even if a premise of safeguarding tribal sovereignty were the applicable paradigm, re-examination of the trust doctrine in these respects would be appropriate.

Recognition of this incongruity is the starting point of an inquiry, not the answer. If policy-makers sought to reconcile trust doctrines with self-determination, a long and pain staking process would be required. Under the Indian Self-Determination Act, Congress did not mandate a blanket transfer of function from BIA to tribes; rather, it authorized BIA, on a case-by-case basis, to contract with tribes to perform specific BIA functions under BIA's overall supervision. Similarly, just as it does for states when states implement environmental regulatory programs pursuant to EPA delegations, EPA delegates to tribe under existing programs only when the specific tribe has demonstrated its ability to handle statutory duties, and EPA stands as a backstop to ensure that the state's program and actions continue to satisfy statutory standards. Amendments to Section 81 and Section 415 already stand as models for reducing trust doctrine impediments to tribal contracting. Although perhaps few tribes and individual mineral owners now stand ready to assume full responsibility for their lands and minerals, that number may be increasing rapidly. Any redefinition of federal trust responsibilities would have to be phased in, perhaps on a tribe-by-tribe basis, with BIA supervision during a transitional period. Clearly, it would be folly to do away with the trust responsibility in a stroke.

Any modification of so central a precept as the trust doctrine must be carefully thought through and finely tuned. Obviously, any suggestion that the trust responsibility should be removed will raise the well-founded spectre of termination.. Careful analysis would be required of the linkage between federal trust responsibilities and restrictions on alienation and immunity from state laws and taxes for trust or restricted lands. The experience of Alaskan native corporations underscores the dramatic impacts that may flow from lifting of restraints on alienation and the modern diminishment of tribal lands.[262] These considerations may affect both *how* leasing and contracting should be modified to comport better with self-determination and *whether* it should be changed. However, the vision of tribes as requiring federal protection is changing; that change ultimately should be reflected in a changed trust relationship between the United States and tribes.

VI. CONCLUSION

Trust concepts affect resource development on Indian lands. Self-determination principles can inject flexibility and predictability into the minerals contracting process. However, a fundamental trust concept, that tribes cannot manage their lands and resources, is being eclipsed in the self-determination era by tribes' efforts to control resource development and exert governmental primacy. Tensions between the two paradigms will cause re-examination of the trust doctrine. In the meantime, resource developers, tribes, and the Department of the Interior should work cooperatively towards sound natural resource management in Indian country.

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[260] *See* Point I, *supra*.

[261] *See, e.g.*, Navajo Nation Standard Terms and Conditions for Rights-of-Way (1998).

[262] *See* Alaska v. Native Village of Venetie, 522 U.S. 520, 531 (1998).