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Our Land is What Make Us Who We Are: Timber Harvesting on Tribal Reservations after NIFRMA

Darla J. Mondou

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*Darla J. Mondou**

I. Introduction

A. Scope and Purpose

> *Our land is what makes us who we are. Whatever we do travels in a circle. Somewhere down the road good or bad will come back. We have to look ahead and take care of what we have.*[1]

> *The sacred circle is the circle of life; the delicate thread that unites all living things. Only man knowingly holds the thread. Of all the animals, only he has the intelligence to protect and preserve it. Only he can be the keeper of the sacred circle.*[2]

Since time immemorial, Indians have held the belief that Mother Earth is to be protected and revered. That tenaciously held tenet is being assaulted today as Indians have to strive harder and harder to make the federal government execute the protection afforded to forested tribal lands through the trust relationship. This article will address salient problems occurring in one specific realm of "Mother Earth" — the timber growing on native American tribal lands, and the vision that Indian tribes foresee in the future: tribal forests managed under tribal care. This vision can, tribes hope, be

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*LL.M., 1997, J.D., 1992, University of Arkansas; B.A., 1990, Bridgewater State University. Fellowship Research Assistant, National Center for Agricultural Law, Research and Information, Fayetteville, Ark.

1. Indian Forest Management Assessment Team (IFMAT), quoting unnamed Indian during visit of IFMAT team on a reservation. The report was published in November 1993 by the Intertribal Timber Council. INDIAN FOREST MANAGEMENT ASSESSMENT TEAM, AN ASSESSMENT OF INDIAN FORESTS & FOREST MANAGEMENT IN THE UNITED STATES III-13 (1993) [hereinafter IFMAT REPORT].

Today, the environmental situation on many Indian lands is harmed to the extent that Sen. Thomas A. Daschle (D-S.D.) was quoted as describing the degradation as "Dances With Garbage." Laura Ina, *Sioux Debate Whether to Use Mother Earth for Waste Dump*, WASH. POST, Aug. 24, 1991, at A3.

2. VISIONS: THE ART OF BEV DOOLITTLE (Judith Hohl ed. 1989). A painter of renown, Bev Doolittle uses watercolor as her medium to paint vivid pictures of Indians in natural settings. The sacred circle is a symbol of the connection of man to the earth and all living things. The Indian culture strives for a relationship that is symbiotic: man takes from the earth and gives back to the earth, thus a circle is formed, and should not be broken.

realized under the guidelines of the National Indian Forest Resource Management Act of 1990 (hereinafter NIFRMA), which President Bush signed into law on November 28, 1990.[3]

This article will refer to Native Americans as "Indians." By so doing, there will be consistency with the federal government's use of "Indian" in statutes, interagency departments, statute names, and references in case law.

B. Historical Background of Treaties, Sovereignty, Self-Determination

Article I, Section 8, Clause (3) of the United States Constitution, the Commerce Clause, provides that Congress shall have the power "[t]o regulate Commerce . . . with the Indian Tribes."[4] The Constitution also provides that the treaties and laws of the United States are the supreme law of the land.[5] This provision explicitly includes treaties made with and for Indian tribes.[6] In the late eighteenth and early nineteenth centuries, native Indians exchanged vast amounts of land for the creation of reservations[7] and

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3. PUB. L. NO. 101-630, 104 Stat. 4532 (codified at 25 U.S.C. §§ 3101-3120 (1994)).

4. U.S. CONST. art. I, § 8, cl. 3.

5. U.S. CONST. art. VI, cl. 2; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (stating that when declaring the supreme law of the land, the Constitution is first mentioned). The Constitution of the United States only mentions dealings with Indians in the Commerce Clause. Treaties and federal statutes are the guiding hand in Indian affairs.

6. 19 Stat. 256 (1877) (stating "Congress shall, by appropriate legislation, secure to [the Indians] an orderly government; they shall be subject to the laws of the United States and each individual shall be protected in his rights of property, person and life").

7. For an explanation of what a reservation is, it is necessary, for consistency, to examine a criminal statute in which the Supreme Court defined "Indian country." The Indian Country Crimes Act, 18 U.S.C. § 1151 (1994), defines the term "Indian country":

> Except as otherwise provided in sections 1154 and 156 of this title, the term "Indian country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian tribes to which have not been extinguished, including rights-of-way running through the same.

Id. Under the above definition, a reservation is the name given to the whole area of "Indian country." *See* Donnelly v. United States, 228 U.S. 243, 268 (1913). Land which Congress intended to reserve for tribes, and over which Congress intended primary jurisdiction to rest in the federal and tribal governments, are "reservations" for purposes of defining Indian country under 18 U.S.C. § 1151. Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1988), *cert. denied*, 487 U.S. 1218 (1988).

There has been a diminishment in reservation size by the Supreme Court recently; although beyond the scope of this article there are several articles which explore the impact of the Court's tenor of diminishment. *See generally* Robert A. Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Laws to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act in Limiting Both*, 30 U. RICH. L. REV. 781 (1996); Robert A. Laurence, *The Unseemly Nature Of Reservation Diminishment by Judicial, as*

the right to be free of incursion from the newly emerging states and non-Indian settlers.

Moreover, the treaties symbolize the special legal and moral relationship that exists between the tribes and the United States, as vital to Indians and their reservations today as the relationship was at its inception. The Indians relinquished to the United States government their right to freely roam on aboriginal land, land that they had lived on and off of, long before Europeans ever envisioned the utopia of natural resources for the taking on this continent. Forests and game were in abundance; the Indians lived and hunted well in the woods. They made use of the sap, bark, branches, leaves, needles and roots.

After the Revolutionary War, the relationship between the United States and Indian tribes can best be described as agreements between equals.[8] The balance soon was destroyed as states began to enforce their laws on Indians residing on reservations, as was evidenced on the Cherokee Nation Reservation in Georgia.[9] The United States Supreme Court, when confronted with the claim of "inherent sovereignty of Indian tribes" for the first time in *Cherokee Nation v. Georgia*,[10] built the foundation for the sovereignty doctrine and self-determination goals that survive, albeit in a rather diluted form, today. The Cherokee Nation rationale was further developed in *Worcester v. Georgia*.[11] Implicit in the reasoning of sover-

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Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act, 71 N.D. L. REV. 393 (1995).

While 18 U.S.C. § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. DeCouteau v. District County Court, 420 U.S. 425, 426 (1975), *reh'g denied*, 421 U.S. 939 (1975).

8. STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 2 (1992).

9. Allison M. Dussias, *Geographically and Membership-based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 7-8 (1993). The state of Georgia forcibly extended the parameters of its authority to Cherokee country by arresting an Indian, trying him, and convicting him of murder. The Cherokee Nation sought a speedy determination of a state's right to make an incursion into tribal affairs. *Id.* at 8 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831)).

10. 30 U.S. (5 Pet.) 1, 16-17 (1831). The Court, with Chief Justice John Marshall boldly leading the way, rejected the argument proffered by the Cherokees that they were a "foreign state"; however, the Court determined that the Cherokee Nation was "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts." *Id.* Further, Chief Justice Marshall iterated the concept that Indians tribes were "domestic dependent nations," a phrase that would restrict judicial interpretations of sovereignty to the degree that remains fixed today.

11. 31 U.S. (6 Pet.) 515, 561 (1832). The Court reaffirmed its holding in *Cherokee Nation* by stating that

> the Cherokee Nation is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, or acts of Congress.

eignty was that Congress is the only government which holds power to invade, abrogate, or control Indian lands.[12]

The "allotment and assimilation era" began in the late 1800s when Congress passed the General Allotment Act of 1887.[13] The federal government began to lessen the restrictions of Indian tribal access to the benefits from selling reservation timber. During the life of the General Allotment Act, subsequently abolished in 1934, tribal reserved land decreased from 140 million acres held in communal status to fifty million acres.[14] The result is a "checkerboard of land" with beneficial ownership in Indians communally, trust and fee ownership in Indians individually as allotments, and non-Indians in fee. The government's policy emerged as one of vacillation between compelling Indians to assimilate into white culture, to the Roosevelt program of toleration,[15] to the opposite extreme of

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Id.

12. Dussias, *supra* note 9, at 16. The Court equated the "sovereignty" status of Indian tribes based on a theory of Indians having inherent control over their *territory*. "The scheme established by the federal government," the Court reasoned, "'allow[s] for complete self-government by the tribe and its members and territory'." *Id.* at 16 (citing Earl Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89, 113 (1978)).

13. Ch. 199, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (1994)). For an in-depth discussion of the allotment era, see *Hodel v. Irving*, 481 U.S. 704 (1987). The General Allotment Act had as its purpose the division of communally held tribal lands into individual parcels, of which every Indian would receive a parcel, and surplus parcels would be sold to white settlers. The Congress desired the effect to be that Indians, closely living near whites would assimilate into white culture due to the fragmentation of Indian-held lands.

The allotment era is also the inchoate period of the "trust responsibility" doctrine. In *Seminole Nation v. United States*, 316 U.S. 286, 301-08 (1942), the Court found a cause of action against the United States for breach of a fiduciary duty under the trust relationship for distributing annuity payments to tribe officials when they believed the funds were being misused.

However, the "allotment act" set the stage for continual legal battles over tribes property and territory. Congress restricted alienation of allotted land, with several exceptions: the result was a significant, immeasurable diminishment of Indian lands. Richard A. Monette, *Governing Private Property in Indian Country; The Double Edge Sword of the Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 39 (1995).

14. For an in-depth history of Indian affairs, see FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982).

The Allotment Act was fruitless in effectuating the intended purpose of assimilation of Indians into white culture due to the tenacious strength of culture based traditions. Territory is equated with identity. John S. Harbison, *The Broken Promise Land: An Essay on Native American Tribal Sovereignty over Reservation Resources*, 14 STAN. ENVTL. L.J. 347 (1995). This article explores the severance of identity from land which occurs when Indians lose the rights of communal government. An accounting of how three recent United States Supreme Court decisions have made this a reality is vividly described by Harbison.

15. Toleration was exemplified by the passing of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1994)). The expressly stated purpose of the IRA was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. REP. NO. 73-1804, at 6 (1934); 25 U.S.C. § 450 (1994).

termination of government efforts to improve the Indians economic life by a virtual elimination of all supports and benefits.[16]

C. Federal Trust Doctrine

More so than in any other areas of federal Indian relations, the trust doctrine evinces a love/hate relationship between the tribes and the federal government.[17] Over time, there has risen within the Supreme Court the issue of what, exactly, is the standard of care due to the tribes under the "trust responsibility." The many and varied holdings of the Supreme Court, current and past, leaves the doctrine open to reconstruction every time an Indian case reaches the bench. At best, it is fair to say the Supreme Court has historically defined the contours of the trust responsibility in a procedural posture, and not in a substantive fashion.[18] Indeed, Congress has been instrumental in creating the uncertainties, due to the enactment of statutes which impose the trust duty, but lack a clear guiding definition. What is obviously clear, is that the trust responsibility, up until the late 1960s, had effectively been a blanket covering any independent action by the tribes in their own behalf. It was during this time frame that the Indians began to speak out; their silence was broken by the desire to participate in their own affairs.

Beginning in 1968, the federal government espoused an attitude that allows the Indians a voice with which they can participate in governing their resources: self-determination.[19] There still remains the plenary power of Congress to enact legislation specific to native people, land, and government. But plenary power means more than the ability to control; ultimately Congress can restrict the basic "sovereignty" of tribes within their own sphere.[20] However, Congress is subject to two restrictions in exercising

16. Between 1954 and 1966 Congress terminated over 100 tribes, with the devastating result that all of a tribe's property was to be distributed to either the tribal members individually or the tribe was ordered to form a corporation to hold title to the property. This accomplished a loss of rights of such magnitude that the catastrophe has never again been equaled to this day. The Supreme Court left its stamp of approval on such action by Congress in *Menominee Tribe v. United States*, 391 U.S. 404 (1968). *See also* Antoine v. Washington, 420 U.S. 194 (1975).

17. G. William Rice, & Judith Royster, et al., *Federal Trust Responsibility and Conflicts of Interest: Environmental Protection of Natural Resource Development*, 71 N.D. L. REV. 365 (1995). This article lays out the landscape of the trust doctrine as applied, not just theorized. Blatant abuses of the fiduciary duty are recanted, with outright disregard for the "best interest" of the tribe(s) seeming to be the norm.

18. *Id.* at 371.

19. PEVAR, *supra* note 8, at 8. "We must affirm their rights to freedom of choice and self-determination." *Id.* The Supreme Court noted that "both the tribes and the federal government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Id.* at 8-9 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983)).

20. Rice v. Rehner, 463 U.S. 713, 719 (1983) (finding native sovereignty "exists only at the

plenary power: the Constitution and the special trust relationship imposed on the federal government as trustee of Indian land, discussed above.[21]

Since the tribal land base is the sine qua non of sovereignty, the trust duty in issues relating to natural resources rises to a position of significant importance to tribes.[22] Legal title to reservation land is lodged in the United States, and tribes as a whole, or as an individual allottee, are the beneficial owners. As beneficiaries the tribes have a vested interest in the viability of their land to provide them with economic, spiritual, and aesthetic values.[23]

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sufferance of Congress"). The sovereignty of tribes provides a backdrop from which to weigh the interests of the tribe against the interest of the government.

The limit of tribal powers is guided by three principles:

> (1) An Indian tribe possesses . . . all the powers of a sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (Univ. of N.M. photo reprint 1971) (1942).

21. *See supra* note 13.

22. Mary Christina Wood, *Protecting The Attributes of Native Sovereignty: A New Trust Paradigm For Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109 (1995). In applying the trust doctrine to determine if the federal agency involved has upheld its fiduciary duty, the court must look beyond the priorities in a private, non-Indian trust: to Indians the land is more than a landscape with its attributes, it is an ancestral entity that is revered primarily because of the importance of memories in their culture. *Id.* at 133. Precisely because reservation land is fixed, meaning the tribe cannot relocate to a better or different piece of land, the trust duty must be focused on preservation for future generations. *Id.* at 138.

The land base supplies the reservation economy, marks the tribal jurisdiction, provides a place of habitation for present and future generations of a tribe; without an ecologically viable land the self-determination of a tribe is rendered a hollow concept. Mary Christina Wood, *Fulfilling the Executives Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVLT. L.J. 733, 739 (1995) [hereinafter Wood, *Fulfilling the Executives*].

23. Indian reservations include allotments made to individuals during the allotment period. The trust responsibility extends only to land that of which title resides in the United States. The trust relationship has been found to expressly extend to tribal timber; the United States must account for its management of a tribe's timber resources. Navajo Tribe of Indians v. United States, 9 Cl. Ct. 336, 344 (1986).

Title 25 U.S.C. § 3103(10) defines "Indian land" as land title which is held by:

> (A) the United States in trust for an Indian, an individual of Alaskan Native ancestry who is not a member of a federally recognized tribe, or an Indian tribe, or
>
> (B) an Indian, an individual or Indian of Alaskan Native ancestry who is not a member of a federally recognized tribe, or an Indian tribe subject to restriction by the United States against alienation.

25 U.S.C. § 3103(10) (1994).

The definitions, taken together, mean land that is held by the United States for the listed classes, or land that title is held by an Indian.

The management of Indian lands is performed by the Executive Office, specifically the Bureau of Indian Affairs in the Department of Interior.[24] "Indian land" is defined in statutes and has been established in courts.[25] Pursuant to federal law, there are comprehensive regulations governing the harvesting of timber on Indian land. Except in very limited circumstances, states are without jurisdiction to enforce regulations on Indian land due to the supremacy clause.[26]

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24. Federal officials exercise extensive control over tribal timber through federal statutes and regulations. Because the statutes and regulations impose specific duties which in turn impose specific trust responsibilities, tribes are permitted to recover damages from the federal government for violations of the trust responsibility. United States v. Mitchell, 463 U.S. 206 (1983) (hereinafter *Mitchell II*). The BIA has, in many areas, failed to act as a protector of Indian rights; an investigation revealed that the agency has severely mismanaged timber resources, among other findings of breach of the fiduciary duty. *Fraud in Indian Country*, ARIZ. REPUBLIC, Oct. 4, 1987, at 3.

Within the Department of Interior, in addition to the BIA, other agencies impact on Indian land. The United States Fish and Wildlife Service (USFWS), and the Bureau of Reclamation, and the Bureau of Land Management (BLM) have Native American Policies in effect. Additionally, the Department of Agriculture (USDA) has had a policy on American Indians and Alaska Natives since 1992. More importantly, the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 (1994), and the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), applies with equal force to Indian lands.

The Supreme Court has held that, absent a treaty or federal statute to the contrary, Indian tribes are subject to federal laws of general applicability. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

25. Navajo Tribe of Indians, 9 Cl. Ct. at 344. For a more detailed jurisdictional analysis, see Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71, 73 (1992).

For this article, the relevant statute is the National Indian Forest Resources Management Act of 1990, 25 U.S.C. §§ 3101-3120 (1994). The definition section states:

> (2) "forest" means an ecosystem . . . ;
>
> (3) "Indian forest land" means Indian lands, including commercial and non-commercial timberland and woodland, that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover . . . ;
>
> . . . .
>
> (7) "forest resources" means all the benefits derived from Indian forest lands . . . ;
>
> . . . .
>
> (9) "Indian" means a member of an Indian tribe;
>
> (10) "Indian Land" means land title to which is held by —
>
> (A) the United States in trust for an Indian, an individual Indian of Indian or Native Alaskan ancestry who is not a member of a federally-recognized tribe or an Indian tribe, or
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> (B) an Indian, an individual of Indian or Native Alaskan ancestry who is not a member of a federally recognized tribe, or an Indian tribe subject to a restriction by the United States against alienation.

Id. § 3103.

26. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 (1980). A two-part test is employed to see if the state is barred from enforcing their laws on a reservation: first, federal law

D. Timber Harvesting on Indian Lands Before the NIFRMA

Under federal law, timber on reservation and allotment land is owned by the United States for the benefit of the tribe and cannot be harvested for sale without the consent of Congress.[27] The primary function of the Department of Interior's Bureau of Indian Affairs (BIA) is to regulate and oversee the timber harvest for the protection, development, and production of tribal timber. Tribes may harvest the timber growing on their reservations pursuant to the Indian Timber Sales Act of 1964.[28] That section provides that "under regulations prescribed by the Secretary of the Interior, the timber growing on reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained yield management or converted to a more desirable use."[29]

The General Forest Regulations governing the management of Indian forests express as the objectives of the regulations: "the development of Indian forest land . . . by Indians . . . to promote self-sustaining communities, so that Indians may receive from their Indian forest land not only stumpage value, but also the benefit of all the labor and profit that such Indian forest land is capable of yielding."[30] Thus, prior to the passing of the National Indian Forest Resource Management Act (NIFRMA),[31] sustained yield management was a stated goal on Indian lands; however, in practice this theory was rarely used. As a result, there has been significant deterioration of timber on reservations.[32]

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may preempt state law; second, state law enforcement may be blocked if it unlawfully "infringes" on the right of Indians to make their own laws and be ruled by them. *Id.* at 143-44; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 330, 332 (1983) (stating that "tribes and their reservation lands are insulated in some respects from state and local control because of a historic immunity"). In a timber context, see *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (1989), holding that California plays no role in the Hoopa Valley Tribe's timber activities.

This article will not further explore issues relevant to the lack of state authority, except in the context of a watershed that is on both the state land and "Indian land" for the purposes of implementing the mandates of NIFRMA.

27. *Bracker*, 448 U.S. at 138.

28. PUB. L. NO. 88-301, 78 Stat. 186 (codified at 25 U.S.C. § 407 (1994)). See *Navajo Tribe of Indians*, 9 Cl. Ct. at 389-394, for an in depth, finely detailed description of timber harvesting before the NIFRMA.

29. 25 U.S.C. § 407 (1994).

30. 25 C.F.R. § 163.3(b)(4) (1996). Stumpage value is defined as "the value of a forest product prior to extraction from Indian forest land." *Id.* at § 163.1.

31. 25 U.S.C. §§ 3101-3120 (1994); *see Navajo Tribe of Indians*, 9 Cl. Ct. at 389.

32. See *Navajo Tribe of Indians*, 9 Cl. Ct. at 389-94, for a lengthy judicial discourse on the effects of mismanagement of timber.

II. National Indian Forest Resource Management Act (NIFRMA)

A. The Legislative History of the NIFRMA

Comporting with contemporary federal Indian policy, the NIFRMA is an Act that allows Indian tribes self-determination in managing the forested lands on their reservations. The final regulations implementing the NIFRMA became effective Oct. 5, 1995.[33] As required, the proposed regulations were published for public comment and hearings.[34] The comments are answered and published with the final rule. From the comments, clarification of terms or wording was a major concern, with a total of twenty questions submitted.[35] The scope and objective section of the comments on the NIFRMA produced many inquires that were directed at ascertaining congressional intent for enacting this statute.[36] Some of the proposed rules were revised as a result of the comment period, such as 25 C.F.R. § 163.1 which was revised to provide for the improvement and maintenance of the road system in a given tribe's forested land.[37] A change in forest management planning and sustained yield at 25 C.F.R. § 163.11(a) now includes all Indian forest land, instead of "tribal land."

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33. 25 C.F.R §§ 163.1-.83 (1995).

34. Proposed Rules, 59 Fed. Reg. 3952 (1994).

35. 60 Fed. Reg. 52,250 (1995) (codified at 25 C.F.R. § 163 (proposed Jan. 27, 1994)). As examples, I include the following due to the importance of the subject matter to this article:

> Comment #11 — The definition of forest management plan in § 163.1 of the rule implies that an integrated resource management plan must be completed prior to developing a forest management plan. This seems to contradict § 163.11 (b) of the rule which states that a forest management plan *may* be developed without an integrated management plan.
>
> Response — The preparation of the forest management plans is required by 25 U.S.C. § 3104(b)(1)(1995). The NIFRMA also requires that forest management plans be consistent with integrated resource management plans whenever such plans exist. However, while the Act encourages preparation of integrated management plans, it does not require them. The rule has not been revised because it provides clear direction in regards to the requirements for integrated resource management plans in § 163.11 of the rule.

Id. at 52,250.

36. The tribes wanted the NIFRMA to be clear on the objectives to be accomplished by the Act. However, the Congress did not agree, and as evidenced by the following comment, refused to revise the proposed rule:

> Comment #21 — The objectives enumerated in § 163.3 of the rule are contradictory and lack specificity.
>
> Response — The rule has not been revised because the objectives must be broad based to address the wide range of objectives tribes may have for managing their lands. The objectives are not contradictory in that tribes, and the Secretary, would not manage to achieve all objectives on a given tract of land at one time.

Id. at 52,251.

37. *Id.* at 52,251, cmt. #24.

The NIFRMA stands as *the* organic act for Indian self-determination by allowing tribes to create the forest management plans on their respective reservations.[38] A healthy, thriving ecosystem is the result desired by those who are concerned by the diminishing amount of available timber. When a community or people live on the land where the timber is harvested, the concern becomes intertwined with other concerns: physical beauty, financial profits, spiritual rewards, and other diverse cultural needs.[39]

The summary in the final rule[40] states that

> the National Institute Forest Resource Management Act reaffirmed many aspects of the existing Indian forestry program and established new program direction for cooperative agreements, forest trespass, Secretarial recognition of tribal laws pertaining to Indian forest lands, Indian forestry program assessments, Indian forest assistance accounts, tribal forestry programs, Alaska Native technical assistance, and forestry education assistance.[41]

Affected Indian and Alaskan Native tribes contributed and fully participated in the development of the final rule.[42]

Title 25 U.S.C. § 3102, the "purpose" section, provides in part:

> The purposes of this chapter are to —
> (1) allow the Secretary of the Interior to take part in the management of Indian forest lands, with the participation of the lands beneficial owners, in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners . . . .[43]

The purported purpose clearly indicates that the trust responsibility is mandated to be considered in tribal timber management. And in the case of tribal timber harvesting, the BIA is the agency mandated to conform its actions in accordance with the trust responsibility. However, there are manifest problems in implementing the NIFRMA as written.

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38. James D. Hill & Howard G. Arnett, *Understanding Tribal Timber Sales*, 9 WTR NAT. RESOURCES & ENV'T 38, 38 (1995). This article raises issues which may be of interest to lawyers who are retained by clients to pursue contracts for timber sales from tribal reservations.

39. John Muir, a noted preservationist, has authored many books and articles on the forest and their beauty.

40. 60 Fed. Reg. 52,250 (1995).

41. *Id.*

42. *Id.*

43. 25 U.S.C. § 3102 (1994).

B. The Required Indian Forest Management Assessment Team and Report

Forested lands on Indian reservations cover 16 million acres; of these 7.3 million acres are classified as "timberland." Much of the commercial timberland, 5.6 million acres containing 45 billion board feet, is covered with Ponderosa pine. With such a vast amount of land as the subject matter of the NIFRMA, Congress thought it imperative to include a requirement for a comprehensive study of Indian forest lands.

Title 25 U.S.C. § 3111(a) requires:

> (a) Initial assessment
>
> (1) Within one year after the date of enactment of this title, the Secretary, in consultation with affected Indians tribes, shall enter into a contract with a non-Federal entity knowledgeable in forest management practices on Federal and private lands to conduct an independent assessment of Indian forest lands and Indian forest land management practices.[44]

Wisely, section 3111(b) requires the same independent assessment on every tenth year anniversary of the NIFRMA.[45] Section 3111(c) states that there shall be a status report of Indian forest lands with respect to standards, goals, and objectives set forth in approved forest management plans. In compliance with the Act, the Secretary contracted with the Intertribal Timber Council (hereinafter ITC).[46] The ITC selected seven well recognized experts in the field of forestry to serve as the Indian Forest Management Assessment Team (hereinafter *IFMAT*).[47] The findings of the *IFMAT* will be used as a guiding light for Indian tribes and Congress to see where and why the NIFRMA may not be adequate in its present form to accomplish the stated purposes and goals.

The initial assessment report is extensive and detailed. The report was published in 1993, and provides a basis from which to undertake an analysis of the issues uncovered by the *IFMAT*: the shortsightedness of the NIFRMA in both protection of tribal timber, and protection of the trust relationship.

The NIFRMA stipulated eight tasks to be completed by the *IFMAT*:[48]

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44. *Id.* at § 3111(a).

45. An assessment will be required again in the year 2000, and every ten years thereafter. *Id.* at § 3111(b).

46. The Intertribal Timber Council is comprised of members from 65 Indian timber tribes across the nation. The ITC is located at 4370 N.E. Halsey Street, Portland, Oregon 97213. The *IFMAT* report may be ordered and further information may be obtained by writing, or by phoning (503) 282-4296. IFMAT REPORT, *supra* note 1, at Appendix V-2.

47. *Id.* at ES-1. The first IFMAT meeting was held in Portland, Oregon, on April 17, 1992.

48. *Id.* at ES-2.

(A) An in-depth analysis of management practices on, and the level of funding for, specific Indian forest land compared with similar federal and private land;

(B) A survey of the condition of Indian forest lands, including health and productivity levels;

(C) An evaluation of staffing patterns of forestry organizations of the BIA and of Indian tribes;

(D) An evaluation of procedures employed in timber sale administration, including preparation, field supervision, and accountability for proceeds;

(E) An analysis of the potential for reducing or eliminating relevant administrative procedures, rules, and policies of the BIA consistent with the federal trust responsibility;

(F) A comprehensive review of the adequacy of Indian forest land management plans, including their compatibility with applicable tribal integrated resource management plans[49] and their ability to meet tribal needs and priorities;

(G) An evaluation of the feasibility and desirability of establishing minimum standards against which the adequacy of the forestry programs of the BIA in fulfilling its trust responsibility to Indian tribes can be measured; and

(H) A recommendation of any reforms and increased funding levels necessary to bring Indian forest land management programs to a state-of-the-art condition.[50]

Included in the report are management issues special to allotments, Alaska, other ownership *within* Indian reservations, and *off-reservation* lands.[51] The directives to the *IFMAT* are directly on point of most, if not

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49. The *IFMAT* report's glossary defines "integrated resource management plans" as: "A plan that integrates the goals, objectives and operations of all the natural resource management programs (e.g., forestry, fish, wildlife, range, water and cultural resources)." *Id.* at Glossary-5.

50. Under NIFRMA, Indian forest land management programs are to be designed by the tribes themselves; however, 25 U.S.C. § 3103(14) (1994) uses the term "sustained yield," thereby requiring a management plan to be based on the same principal as prevailed prior to the Act.

51. IFMAT REPORT, *supra* note 1, at ES-3 (emphasis added). The glossary of the report defines reservation by dividing the definition into five categories:

> Category-1: Major Forested Reservation: comprised of more than 10,000 acres of commercial timberland in trust, *or* determined to have more than 1.0 MMBF (million board feet) harvest of timber products annually.
>
> Category-2: Minor Forested Reservation: comprised of less than 10,000 acres of commercial timberland in trust, *and* less than 1.0 MMBF harvest of timber products annually, and whose forest resource is determined by the Area Office to be of significant commercial timber value.
>
> Category-3: Significant Woodland Reservation: comprised of an identifiable forest area of any size which is lacking a timberland component, *and* whose forest resource is determined by the Area Office to be of significant commercial woodland value.

all, the central concerns of the tribes and those of the BIA.[52] And, in fairness, the *IFMAT* report applauds the BIA for the limited success they have reached in spite of "vacillating and vague" federal Indian policies.[53]

C. The Method of Gathering Information for the Report

A total of 33 reservations with timber programs in varying dimensions were visited by the *IFMAT* during 1991 through 1993. Questionnaires and surveys were presented to tribes and BIA staffs; the *IFMAT* undertook a study with which to complete a comparison of Indian tribal forest management plans with plans from federal and private forested land.[54] The *IFMAT* team conducted focus groups during the on site reservation visits to clarify the "vision" of tribal perspectives of their forests;[55] investigated staffing patterns of natural resource professionals from disciplines other that forestry; and visited national, area, and agency offices of the BIA.[56]

From the above methods, it appears as though an extensive, serious effort was undertaken to fully explore, in exacting detail, all aspects of the tasks assigned to the *IFMAT* by the Secretary. For cohesiveness and ease of discussion, this article will separately address each task as reported above.

D. The Results and Recommendations Presented in the IFMAT Report

1. Task A

The first task consisted of a comparison of funding by the federal government for federal and other private forest lands in relation to the funding for Indian forest lands.[57] The *IFMAT* report states that Indian forestry is seriously underfunded and understaffed compared with forestry on similar federal and private lands.[58] As stated earlier, prior to enactment of the NIFRMA, the BIA was under a duty to operate Indian forests in a "sustained yield" manner. The duty of the BIA extends beyond the duty of

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> Category-4: Minimally Forested Reservation: comprised of identifiable forest area of any size determined by the Area Office to be of minor commercial value at this time.
>
> Category-5: Reservation or Indian property with forest land that the Bureau is charged with some degree of legal responsibility, but the land is not (Federal) trust status.

Id. at Glossary-7.

52. *Id.* at I-1. The well-being of Indian tribes is intimately tied to the health of their forest lands. The BIA has expressed concern over not being able to provide necessary forest-management services. *Id.* at ES-1.

53. *Id.* at ES-1.

54. *Id.* at II-2.

55. *Id.* at II-3.

56. *Id.* at II-4.

57. *Id.* at V-1.

58. *Id.* at V-3.

other federal agencies chiefly because it is solely responsible for managing tribal lands and resources, which can be easily depleted or rendered valueless with improper harvesting/reforestation, or inattentive or overworked staff caused by a lack of funding.[59]

Within five years of the enactment of the NIFRMA, it was apparent that the purpose of Act was being frustrated by a lack of funding. In 1995 a number of Indian tribes appealed to Congress for a hearing to address the salient problems needing immediate attention; in response, the Senate scheduled hearings on the NIFRMA.

The Senate Indian Affairs Committee Oversight Hearing on the NIFRMA was held on September 20, 1995.[60] As one among several other tribal representatives, Jaime Pinkham, President of the ITC and a member of the Nez Perce tribe, began by addressing the *IFMAT* report on Task (A), the issue of underfunding.[61] Pinkham stated that the *IFMAT* found that funding for Indian forests is only 63% of that for timber production for the National Forests; only 50% of that for timber productions for private forestry in the Pacific Northwest; and only 35% of that for coordinated resource management for the National Forests.[62] Pinkham pointedly reminded the Senate committee that their budget recommendations for the U.S. Forest Service was down by 11%; the budget recommendation for the BLM forest management was down 8%; but in direct contrast the federal budget for Indian forests is down by the disproportionate amount of 27%.[63]

Pliny McCovey, speaking on behalf of the Hoopa Valley tribe, conveyed to the Senate that the Hoopa believe that the NIFRMA describes the tools for a state of the art ecosystem management.[64] McCovey said that without the tools in place the tribe will continue down the path of less than state of the art management. He stated that tribal timberlands generate 141% more revenue per commercial acre than do U.S. Forest Service lands; his tribe suggests a more reasonable and equitable funding solution would be to reduce U.S. Forest Service funding and increase BIA funding for forest management by using the savings from U.S. Forest Service funds.[65] Noting

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59. Wood, *Fulfilling the Executives*, *supra* note 22, at 800.

60. *Indian Forest Resources Management Act: Oversight Hearing Before the Committee on Indian Affairs*, 104th Congress (U.S. Government Printing Office 1995) [hereinafter *NIFRMA Oversight Hearing*].

61. *Id.* at 23.

62. *Id.* at 25. Jaime Pinkham of the Nez Perce tribe was the first member to address Congress. *See also* IFMAT REPORT, *supra* note 1, at V-3 & tbl. 11, at V-4.

63. *NIFRMA Oversight Hearing*, *supra* note 60, at 25.

64. *Id.* at 39. The Hoopa Valley reservation is in northern California. The reservation timber is mixed evergreen which is composed of old growth Douglas fir, tan oak, and madrone. About 38,000 acres of the 80,000 acres of forest lands are clearcut. There are 1280 miles of streams; the anadramous fish population is almost depleted. *Id.*

65. *Id.* at 41. McCovey notes that the tribe's logging corporation buys all of the tribal timber, conducts the logging and hauling and receives whatever profit is left over. *Id.* at 39-40.

that the tribe is having to do more with less, and the government is still downsizing the BIA and the budget for Indian forests, McCovey informed the Senate that the tribe is willing to work with the Senate, but that the underfunding is inadequate to protect Hoopa forests.[66]

Ronnie Lupe spoke on behalf of the White Mountain Apache tribe.[67] Lupe stated that the NIFRMA recognized that insubstantial funding for Indian forest resources is an impediment to satisfactory management of the forests. He believes that the attempt by Congress to reduce funding levels ignore the government's trust responsibility and Congress's moral responsibility to Indian people; at the reduced level, the BIA will be unable to prepare enough timber sales contracts to meet the needs of the two sawmills on the reservation.[68]

Lupe observed that the Indian forest land is subject to unfunded mandates that do not apply to privately held forest land, mandates that without funding will render the NIFRMA ineffective. He stated that there are 84,000 acres that need to be thinned and that the BIA has funds to thin only 2,000 acres per year; if the timberland is not thinned, sufficient saw log growth will not occur. He informed the Senate that the lack of thinning will spell disaster for his tribe, culminating in financial ruin. He additionally argued that to not properly thin the forests will be a breach of the government's trust responsibility.[69]

Lawrence Waukau, president of the Menominee Tribal Enterprises took the podium after Lupe.[70] Waukau related to the Senate the monetary value of the land that his tribe ceded to the United States in return for a promise that they could live, with the protection and support of the United States, on their reservation.[71] Waukau told the Senate that Chief Oshkosh advocated sustained yield forestry by cutting trees only in an east to west pattern and at such a speed as to allow each generation to start over again.[72] Waukau proclaimed that the funding shortfall is a measure of what is not provided, not a measure of the quality of service of what is provided. The services not provided, he stated, are a breach of the fiduciary trust

66. *Id.* at 41.

67. *Id.* at 35. Ronnie Lupe is a member of the White Mountain Apache reservation which is located in the east central mountains of Arizona. The topography ranges from desert to a 11,500 foot mountain. The reservation contains a portion of the world's largest Ponderosa pine; there are 800,000 acres of commercial timber supporting two sawmills.

68. *Id.* at 36.

69. *Id.* at 36-37.

70. *Id.* at 42. Lawrence Waukau is a tribal member who was raised on the reservation. He has been involved with timber all his life. The Menominee reservation is in east central Wisconsin. *Id.*

71. Waukau estimates that based on timber values today, the Menominee gave the United States over $22 billion in timber. *Id.*

72. *Id.* at 43.

responsibility duty owed to Indian tribes; the forestry services needed are reasonable, necessary, and used on all other federally managed forest lands.[73] Waukau then asked that if Congress cannot provide the funds that they return part of the Menominee ancestral homeland, the Nicolet National Forest, to help the tribe achieve self-sufficiency.[74]

The harsh reality of decades of insufficient funding is starkly evident in the opinion written by Judge Lyndon in *Navajo Tribe of Indians v. United States*.[75] The court held that the Navajo Tribe was entitled to recover damages from the United States on several claims: a failure to cut claim; unpaid stumpage claim; its logging waste claim; and its sawmill mismanagement claim. One can imagine the cost to the federal government if all tribes with similar claims presented them: millions upon millions of dollars, attributable to the lack of funding for proper sustained yield management or understaffed BIA agencies.[76] As such, *Navajo Tribe* is precedent in the United States Claims Court, where jurisdiction is lodged for Indian tribes claims against the United States. It is the United States that has the burden of covering the damages when an Indian agency violates the trust (by not harvesting in accord with silviculture practices: i.e., sustained yield).[77]

The *Mitchell II* decision lays out the onus on the government to "manage Indian resources and land for the Indian's benefit."[78] The Court held that the existence of the trust relationship between the United States and Indians or Indian tribes includes, as a fundamental right, the right of an injured beneficiary to sue the trustee for damages resulting from the breach of trust.[79]

With the "prudent person" as a recognized standard to gauge the Indian/government trust relationship, the disproportionate funding cut becomes even more puzzling. If more money will insure better forest practices, both through practical means (application of the principles written into the forest management plans that tribes author) and through sufficient staff to physically inventory and oversee the forest lands, then that will

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73. *Id.* at 45.

74. *Id.*

75. 9 Cl. Ct. 336 (1986). The length, depth, and breadth of dicta on mismanagement in *Navajo Tribe* is too extensive and exhaustive to set out in this article. The dicta is instructive for assessing past BIA conduct in not fulfilling the trust duties.

76. *Id.* at 369.

77. *Navajo Tribe*, 9 Cl. Ct. at 344. For a detailed, lengthy discussion, see United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).

78. *Mitchell II*, 463 U.S. at 224.

79. *Id.* at 215. The Indian Tucker Act, 28 U.S.C. § 1505 (1994), provides a waiver of the federal government's immunity from suit for Indian claims. The BIA is to engage in practices that a "prudent person" would under a trust relationship.

conversely mean less money in claims for violation of the trust duty down the "logging road."

It is plausible to conclude that the NIFRMA may be the congressional response to *Navajo Tribe*. If Indian tribes are responsible for fashioning the forest management plans, then the federal government (the BIA) is relieved of some level of responsibility on Indian forest land. If the plans drawn up by tribes under the NIFRMA do not result in better forest management practices, then it is the tribe who will bear the responsibility for any resulting harm.[80]

2. Task B

The second task focused on the health and productivity of Indian forest lands; maintaining desirable ecological conditions in mixed-conifer stands, including forest health, is one of the greatest management challenges on Indian forest lands. The *IFMAT* reported that the plentiful Ponderosa pine is generally in good commercial condition. Ecological concerns, however, remain for these forests: fire suppression, snags, and the harvesting of large old trees.[81] Mixed-conifer forests present varying ecological concerns. Although uneven-aged management has been practiced, forest conditions are deteriorating.[82] Ecological concerns in pinyon-juniper woodlands are the result of overgrazing and other agricultural uses. Fire suppression and unregulated harvesting of firewood has made the overall condition deteriorate.[83] The economical viability of the pinyon-juniper woodlands has been drastically reduced.

Coastal conifer forests in the Northwest are very resilient and are usually clearcut; however, brush and logging slash have sometimes delayed regeneration.[84] Watershed, riparian (streamside) areas show signs of deterioration from harvesting, road use, and grazing. Eastern hardwood-conifer forests, such as maples, oaks, basswood, birches, aspen and eastern white pine have been altered by past human activities. The condition of eastern forests reflect fire suppression, clearing and harvesting.[85]

During the Senate hearings the speakers addressed the issues raised in Task B, expressly emphasizing the extensive soil compaction on

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80. IFMAT REPORT, *supra* note 1, at V-38. The report compared the objectives for forest management in 25 C.F.R. § 163.3 (1989) with the proposed objectives in the draft regulations. *Id.* at V-39. (The draft regulations have been enacted since the IFMAT report was published). The IFMAT found that the draft regulations represent the visions and goals of tribal members as stated in the surveys better than existing regulations. *Id.* at V-40.

81. *Id.* at ES-7.

82. *Id.* As in Ponderosa pine forests, fire suppression is a concern, as well as watershed protection.

83. *Id.*

84. *Id.*

85. *Id.* at ES-8.

reservations from roads and skid trails. Pinkham brought up the fact that neither the NIFRMA, nor the BIA agency, has a road building budget, as does the National Forests; the National Forests operating costs are part of the Department of Agriculture funding.[86] McCovey described the conditions of roads found by the *IFMAT* on the Hoopa reservation; prior to the tribe taking over management, the BIA did little more than clear brush, provide dust abatement, and installed some culverts.[87] In looking at the condition of the transportation system on Indian lands, the *IFMAT* found most unsurfaced and inadequately drained. The lack of an all-weather road system is a main obstacle to implementation of a coordinated resource management; the *IFMAT* found the road conditions limited flexibility in scheduling harvest operations.

McCovey, bolstering what Pinkham had to say regarding the roads, informed the Senate that since the NIFRMA put management in their control five years ago, the Hoopa's have spent $13,000 per mile for betterment and $4000 per mile for maintenance of the roads on the reservation. Addressing the forest issues, he stated that a serious forest health issue on the Hoopa reservation is the backlog of forest development caused by sprouting brush which negatively impacts on planted and natural seedlings. McCovey said that the Hoopa tribe prepared a supplemental forest development plan in 1991 to treat forest backlog, and presented the plan to Congress, but it was not funded; had the plan been funded it would have economically reduced Hoopa backlog in twenty years.[88] To insure forest health the Hoopa are willing to commit their funds to future regeneration, but he said they are unwilling to fund the backlog created by past BIA mismanagement.[89]

Lupe commented on the fact that the U.S. Forest Service receives money for a special fund for road costs, whereas the White Mountain Apache and all other timber harvesting tribes must pay 100% of the road costs. He further pointed out that the *IFMAT* found the road conditions deplorable.[90]

The *IFMAT* report recommends that $200 million is needed to adequately drain and improve reservations roads to reach parity with the roads in National Forests.[91] The BIA Branch of Roads office is responsible for coordinating operations on multiuse public roads on reservations, not timber logging roads. This restriction means that the majority of reservation roads

86. *NIFRMA Oversight Hearing*, *supra* note 60, at 25.

87. *Id.* at 40.

88. *Id.* at 40-41.

89. The Hoopa reservation has 550 miles of forest roads. The current forest development backlog is attributable to forest management practices by the BIA prior to 1980.

90. *Id.* at 36. *See also* IFMAT REPORT, *supra* note 1, at ES-8. Many roads show extensive soil compaction from skid trails. The lack of all-weather roads will impede the implementation of a coordinated resource management system.

91. IFMAT REPORT, *supra* note 1, at V-8.

are not eligible for BIA road management. Additionally, many reservation roads are located along stream beds and affect the water quality. The lack of an all-weather road system is one of the main obstacles to implementing coordinated resource management.[92]

The result of many years of low investment by the federal government for the health of Indian forest lands is an infrastructure that is weak with much environmental damage. Whereas the investment in Forest Service infrastructure is $3.00 per acre, Indian investments are less than $1.00 per acre.[93] Twenty-four percent of all Indian commercial timberlands qualify as forest development backlog. At a cost of $100 per acre, it will take almost $150 million dollars to thin and regenerate.[94]

Congress is in a position to place the Indian forests on firm ground so that the income generated from timber sales will be the maximum allowed under the forest plans adopted by the respective tribes. Addressing the monetary responsibility for cleaning up the forests, and securing the funding to accomplish the clean up, will clear the path for the objectives in NIFRMA to be realized. Lack of accountability for past mismanagement only strengthens the Indian position of a breach of fiduciary duty.

The *IFMAT* recommends an "ecosystem management" as a tool for an overall approach to protecting the health and productivity of Indian forests. Ecosystem management is a strategy or plan to manage ecosystems in a manner that will provide for all associated organisms and processes. When forest are managed as an ecosystem, forests may continue to be productive, while providing short term use. As Aldo Leopold said: "save all parts" — meaning retain species and natural resources.[95] This is a tenet that the Indian envisions as the mode of operation in drawing revenue from their forested lands.

Of equal importance on Indian forest land is the adherence to the mandates of the Endangered Species Act (ESA).[96] The Forest Management Plan is the planning document for timber harvests; because the Indian tribes are granted authority to create their own Forest Management Plans by a federal statute, as approved by the BIA, they are subject to the ESA[97] in the same vein as are other government agencies, such as the U.S. Forest Service. Before the NIFRMA, the timber harvest plans were the creation of the BIA, and therefore, the BIA was subject to the ESA. Moreover, the regulations implementing the NIFRMA require compliance with the

92. *Id.* Very few roads on reservations are designed by BIA engineers. If there is a timber sale, the BIA will perform some road maintenance. Soil and water degradation is a major problem stemming from inadequate road systems. *Id.* at V-24.

93. *Id.* at V-10.

94. *Id.* Only two percent of National Forest commercial acres are back logged.

95. ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).

96. 16 U.S.C. §§ 1531-1544 (1994). The ESA applies to Indian lands and must be followed.

97. *Id.*

mandates of the National Environment Policy Act.[98] Timber harvesting plans must be consistent with the intent and purpose of the ESA, which requires consultation with the Fish and Wildlife Service. At this time, there is a lack of funding for the required impact assessments; this has resulted in the inability to draft a forest management plan for several tribes, most notably the Navajo Nation.[99]

3. Task C

For task three, the *IFMAT* analyzed extensive data to determine the forestry staffing patterns in the National Forests, and compared the results to the staffing patterns of the BIA reservations. Tribes themselves employ foresters. The finding was that the BIA and tribes have far fewer forestry staff per thousands of acres than do the National Forests.[100] Neither the BIA nor the tribes have natural-resource staff other than foresters. A survey conducted by *IFMAT* revealed that out of 214 forested reservations, fewer than 46 natural resource professionals were employed on reservations, whereas the National Forests have over 2700 natural resource professionals working on public lands. The Forest Service has five times as many natural resource professionals per unit of forest area than the BIA and tribes.[101]

The BIA Branch of Roads engineering staff for maintaining public roads on the reservations is less than ten nationally.[102] Indian constitute approximately 22% of all forestry professionals in the BIA. Congress recognized that more Indians need to be pursuing professional careers in natural resource management; 25 U.S.C. § 3113 grants education assistance for Indians and Native Alaskans who wish to pursue degrees in forestry.[103]

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98. 25 C.F.R. § 163.34 (1996). Actions taken by the Secretary under the regulations in this part must comply with the National Environmental Policy Act of 1969, applicable Council on Environmental Quality Regulations, and tribal laws and regulations.

99. The Navajo Nation's forest management plan expired in 1992. They now are required to create one under NIFRMA regulations. Without the funds for an Environmental Impact Statement (EIS) the tribe's timber harvesting has been shut down.

DINE CARES is an Indian environmental action group, composed of Navajo Indians and non-Indians; they are funded by outside reservation money. DINE CARES has promised to sue to enjoin any Navajo Nation Forest Management Plan that does not have an EIS as to the effects on any endangered species within the timber harvest area.

The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994), requires that the federal government consult with the Fish and Wildlife Service.

100. IFMAT REPORT, *supra* note 1, at V-28.

101. *Id.*

102. *Id.*

103. 25 U.S.C. § 3113(a) (1994). The section establishes 20 forestry intern positions within the BIA. The Secretary is ordered to pay all costs incurred while an intern is enrolled in an approved post-secondary or graduate forestry school. *Id.* Additionally, section 3113(b) states that the Secretary shall maintain through the BIA a cooperative education program. *Id.* § 3113(b). In section 3113(c) the Secretary is authorized to award scholarships to enrolled Indians and Native Alaskans. *Id.* § 3113(c).

Also 25 U.S.C. § 3114 requires the Secretary to establish and maintain a program to attract Indian and Native Alaskans who have already graduated with a degree in forestry to seek employment in the BIA or tribal forestry departments.

Lupe spoke directly on point to the education issue when he related to Congress that under 25 U.S.C. § 3114 his tribe requested $5000 per year to be used as tuition costs for two students for a period of three years and received $3,300 for two years. Of the two students, only one received funding for the intern program; the funding has now disappeared. Lupe stated that this is contra to the NIFRMA purpose in the White Mountain Apache Tribe's view, for they encourage tribal members to obtain forestry degrees so that the tribe can take over the BIA forestry programs on their reservation.

Several of the comments on the proposed final rule, published in the Federal Register, as previously discussed above, pertained to the educational funding in the NIFRMA.[104] Although Congress has been moving in the right direction, funding has not been appropriated for education other than the intern program.

With financial aid available from various other federal programs, it appears that tribes will greatly enhance the staffing on their reservations through educational efforts of their members. This is logically the best solution to the existing problem confronting tribes from inadequate staffing by the BIA.

4. Task D

In the fourth task the *IFMAT* report delineates six elements that are required for tribes to get full benefits from timber harvesting on their reservations.[105] First, timber sale preparation should include the development of efficient harvesting and transportation plans. Second, the timber to be sold must be clearly identified before sale. Third, there must

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104. 60 Fed. Reg. 52,250 (1995) (codified at 25 C.F.R. § 163 (proposed Jan. 27, 1994)). Comment 132 states:

> Comment: The scope of the intern program provided for in §163.40(b) of the rule should be increased to provide training needed to develop forestry technicians as well as professional resource managers.
>
> Response: The rule has not been revised because the purpose of the intern program is to develop professional Indian foresters and resource managers which, historically, have been in critical short supply.

Id. at 52,259.

105. IFMAT REPORT, *supra* note 1, at V-32. The level of detail for planning sale and administration is evident in the fact that in some cases a single forester is responsible for timber sales on 20,000 or more acres. *Id.*

The revenue from timber sales is turned over to the BIA's Office of Trust and Economic Development, Division of Forestry. The U.S. Treasury Department does not receive any portion of the remuneration from tribal sales.

be open bidding for sales and logging contracts. Fourth, the size of timber sales should not excessively exclude bidders. Fifth, timber sale policies must encourage efficient use of raw material and must be enforced through effective field supervision. Sixth, timber products removed from the forest must be accurately measured.

In some timber sales, the timber has not been marked before the sale. This produces buyer uncertainty, and lower bids to reduce risk. When the sale involves more than one species, speculative overbidding on the species may occur; such as when timber buyers speculate on the amount of each species by overbidding on species the buyer believes is not properly represented in the bid. If the timber offered for sale is not clearly demarcated, or adjustment policies are not in place to prorate overbids among species, pressure is placed on the sale administrators to "find" the volume during the sale.[106] In some cases the *IFMAT* found that due to staffing problems and low efficiency from an overworked staff, the timber sales were so large that they excluded bidders who would have bid on smaller sales.[107]

Many tribes have tribal forest products enterprises; when it is the enterprise purchasing the timber harvest, open bidding is not required. A transfer price procedure is established by an appraisal by a BIA official.[108] The *IFMAT* report suggests that if the BIA increases staffing and training for timber sale preparation and administration it can lead to increased utilization of the timber by the tribal forest product enterprises.

From the recommendation of the *IFMAT*, the timber sale policies appear as being extremely critical to tribal economics. The tribes need guidelines to insure that they are realizing maximum benefits from the sales: size of sale is imperative for price setting; size of log is crucial to utilization; and quality control is crucial to capture the highest dollar returns. Pricing by diameter classes and/or log grades and "lump-sum" sales may increase revenue while decreasing waste.[109] Many tribes have experienced dramatic financial reversals from a lack of knowledge of the details of successful timber sales.

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106. *Id.* at V-33.

107. *Id.* at V-34.

108. *Id.* Normally, the stumpage price is the minimum price offered at open bidding. The price paid determines how the forestry enterprise will use the logs purchased: if the price is low, full utilization is not as important as when the price is high.

Title 25 C.F.R. § 163.14 (1995) established uniform operating policy for the sale of Indian forest products. Comment #41 inquired if a more detailed instructions on timber sale procedures should be implemented. The response was, "Specific procedural information is more appropriately a matter for inclusion in the BIA forestry manual." 60 Fed. Reg. 52,250, 52,252 (1995). This seems to take back some of the control of timber sales from the Indians.

109. *Id.* at V-35. Lump sum sales work well with a clear-cut purchase: since the purchaser essentially bought everything, full utilization of all the logs is more likely.

Recently in Oregon, the Warm Springs Confederated Tribes made their first off-reservation sale to foreign investors from Japan.[110] The Warm Springs tribe is small, with only 3200 members; however, the reservation has 350,000 acres of mixed species, high quality forest lands.[111] The tribe has a forest products enterprise, the Warm Springs Forest Products Industries, (WSFPI) and, up until the recent sale of logs to Japan, was the only purchaser of the timber sold from harvests on the reservation. The WSFPI has a plywood mill, a large pine log sawmill, and a new small log sawmill.

Tribal members make up the majority of the employees of the enterprise, thus creating an economic base for the tribe. However, there has not always been success; when prices of plywood fell in the early 1990's the WSFPI reduced wages rather than place some members in financial jeopardy. But this only exacerbated the problem: without income from the sawmills, the bank loans for equipment went into default. Overall losses for the early 1990's was over $10 million dollars. In dire economic straights, the tribe secured the services of Clyde Hamstreet, a specialist in business management from Portland, Oregon, who assessed the WSFPI situation.[112]

Hamstreet found that the tribe was not utilizing its best asset: fine timber. The tribe was using the high quality large logs to make plywood. Hamstreet's detailed research revealed that the overhead was too high; alcoholism cut down on employee attendance; and a lack of training in forestry was responsible for the over cutting occurring on the tribes forests.[113]

Given complete discretion to restructure the enterprise, Hamstreet instituted key changes to make the WSFPI profit oriented: he reduced the amount of employees by a massive layoff; restructured the company's debt; sold a portion of the timber off-reservation to a foreign buyer (Japan); closed the plywood and large log sawmills; with the help of foresters put in place a five year harvesting plan; and initiated a purchasing contract between the tribe and WSFPI. Additionally important, the logging season was extended into the winter months to ensure a continued cash flow.[114]

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110. *The Turnaround of an Oregon Indian Tribe*, 26 BANKR. CT. DEC. (LRP) No. 21, at 1 (Apr. 4, 1995). Clyde Hamstreet, of Hamstreet and Company in Portland, Oregon, dug the Warm Springs tribe out of a financial quagmire. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Hamstreet had to employ considerable persuading to convince the Warm Springs tribe to sell to the Japanese. Several members of the tribe accompanied Hamstreet to Japan to meet their potential customers. At first, there was tension, but that was displaced when the Japanese delegates began singing American college songs. This prompted the tribal members to sing an old tribal song. After this diversion, negotiations went smoothly. *Id.*

The Navajo Nation has retained the services of Hamstreet to assist them restructure the Navajo Nation forest products enterprise.[115] It may be that it will take an "outsider" like Hamstreet to effectuate the vision that the tribes see for the future of their forests. In so doing, they will not only reap the benefit of more productive forests, but will enhance the economic revenue generated from this valuable resource.

Unlike the Warm Springs Tribe, the Menominee Tribe has attained a successful timber sale program which has flourished for many years. Waukau, President of the Menominee Tribal Enterprises, stated to Congress that the forested lands on the Menominee reservation are worth over $500 million dollars due to the Menominee's stewardship and dedication to sustained yield principles.[116] However, Waukau informed the Committee, that this will not continue in the future without over cutting the forests if Congress cuts the amount of funding the for Indian tribes to totally implement the NIFRMA. The Menominee tribe will continue every effort towards sustained-yield management by shifting the pressure from the forest to achieve value added manufacturing.

Regarding trust relationship, Waukau said that the Congress has failed to comprehend the most essential aspect of its relationship with the Indian people: trust protection flowing from its solemn treaty obligations. He stated that the NIFRMA will neither improve the condition of Indian forest land nor reduce tribal dependency upon the federal government if the federal governments trust responsibility to the Indian people is diminished or abrogated.[117]

To achieve better administration of timber sales the IFMAT recommends that the NIFRMA will achieve the intended results if there is a procedural guideline for tribes to follow in sales preparation and administration; training which would increase forestry staff awareness of the value of improved log utilization. The BIA could be required to review the timber sale policies to ascertain that the sale procedures being used are designed as to result in maximum benefits for the tribes.

5. Task E

Task five examines the administrative relationship between the tribes and the BIA. The *IFMAT* report concludes that the relationship is the most important aspect of the realization of the tribes "seeing their vision" of the forests in the future.[118] The report exposes the nature of the problem that

115. Telephone Interview with Attorney Anthony Aguiree of the Department of Justice, Navajo Nation, Window Rock, Ariz. (Sept. 16, 1996).

116. *NIFRMA Oversight Hearing*, *supra* note 60, at 42.

117. *Id.*

118. IFMAT REPORT, *supra* note 1, at V-36.

exists today on all but one reservation: dual lines of authority for forestry and natural resource management.[119]

The trust responsibility figures quite prominently is this "delegation of duties" area. Returning to the purpose of enacting NIFRMA, the congressional intent was to place primary responsibility of Indian forests in Indian hands.[120] In furtherance of this objective, the *IFMAT* report recommends that standards of whether the BIA meets its trust responsibility should be agreed upon between each individual tribal government and the Secretary of the Interior. Under the current regulatory scheme, the BIA is responsible for providing technical assistance, and at the very same time has responsibility to decide if that assistance is "adequate"; in other words, the trust "service" and the trust "oversight" are both executed and judged by the executer.[121]

The *IFMAT* report suggests that the tribal vision should transmitted through the tribal government to the tribal natural resource manager. The tribal staff then develops a coordinated plan, which defines the objectives, standards, operation plans, and monitoring procedures to be followed, under the direction of the natural resource manager and with the technical assistance and research access from the U.S. government. Funding from the U.S government is provided to tribal governments under the provisions of the trust standard to which the tribal and the Secretary have agreed upon.[122]

Viewing the administrative shortcomings as barriers essentially blocking out their vision, tribes are confronting the Congress and requesting that the changes the IFMAT report suggested are implemented.

The requested changes are:

(a) Each distinct tribal government should be the principal agent responsible for crafting, implementing, and monitoring a coordinated resource management plan congruent with its vision for forests and forest management.

(b) Standards for evaluating the performance in meeting the trust responsibility should be agreed upon between each tribal government and the Secretary of the Interior. Ultimately the Secretary's responsibility should be moved from signing off on individual timber sales, as is now done, to signing off on coordinated resource management plans.

(c) Technical assistance should be separated from trust oversight.

(d) The BIA should provide full support, including the appropriate range of natural resource expertise, for coordinated resource planning and management and also provide research access.

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119. *Id.*
120. 60 Fed. Reg. 52,250 (1995).
121. IFMAT REPORT, *supra* note 1, at V-36.
122. *Id.* at V-38.

(e) A single manager should be responsible for delivering the entire natural resource program at the local level.[123]

For consistency with the duty imposed on the federal government as trustee of Indian lands, the BIA should be relieved of the forestry functions they have historically performed. The Congress has in the past, as well as now, failed to give the tribes the necessary funding for implementing forestry programs.[124] However, attention must be given to the inequality of funding by Congress for Indian forestry programs.

Additionally, the attitude of other federal agencies impedes cooperative agreements and compacting; to fully exercise the trust responsibility, it is incumbent on all federal agencies to give credence to the visions held by each tribe. By changing the policy of requiring the Secretary to sign off on individual timber sales contracts, to signing off on a coordinated resource management plan comports with tribal control and effectuates "self-determination."

6. Task F

The sixth task called for a review of Indian forest management plans generated in response to NIFRMA. The review by the *IFMAT* indicated that the plans have the potential for meeting tribal visions; however, the lack of funding and personnel is a detriment to the fruition of the vision.[125] Federal regulations provide the basis for a number of stated goals: the General Forest Regulations form the foundation for the standards to be followed.[126] The *IFMAT* report contains a comparison of the differing objectives in the current regulations implementing NIFRMA and the proposed regulations. One objective is clearly in the line of sight of the end sought by Indian tribes: requiring sustained-yield management to be the guiding light of forest management plans.[127] Included as a goal is the retention of Indian Forest land in its natural state when an Indian tribe determines that the recreational, cultural, aesthetic, or traditional values of the Indian forest land represents the highest and best use of the land.[128]

Suggestions that the regulations be amended to include improvements in grazing, wildlife, fisheries, recreation, aesthetic, cultural and other traditional values comports with the Indian "way of life in harmony with

123. *Id.* at V-37.

124. The tribes are permitted to participate in all federal programs which pertain to them.

125. IFMAT REPORT, *supra* note 1, at V-38.

126. Title 25 C.F.R. § 163.3 (1995) is the currently controlling law; however, section 163.3 may be supplanted by the suggestions by as proffered in the IFMAT report.

127. IFMAT REPORT, *supra* note 1, at V-39. As it stands today, the definition of sustained yield in the current regulations is overly restrictive and essentially prevents the tribal vision from being a reality. *Id.* at V-40.

128. *Id.* at V-39. The Indian tribes also seek to protect forest resources to retain the beneficial effects to forest land by regulating water run-off and minimizing soil erosion.

Mother earth."[129] "Sustained-yield" is currently defined in the regulations as: the yield of forest products that a forest can produce continuously at a given intensity of management.[130] Under the section on "sustained-yield management" the regulations state that harvest schedules shall be directed toward achieving an approximate balance at the earliest practical time between net growth and harvest.[131] The *IFMAT* report contends that this incongruence forecloses the realization of tribal goals in four ways: first, it can cause acceptance of a particular forest future, one that maximizes tree growth, whether or not that fits their goals; second, it can cause overly rapid harvest of slow-growing, old growth trees and stands; third, it does not acknowledge the importance of a stable level of harvest and income in the near future; and fourth, it does not relate sustained-yield to the forests underlying processes and functions that help determine forest sustainability.[132]

Placed in perspective, concentrating on only the commercial aspect of Indian forests has hindered the results desired by the Indian tribes. The overly restrictive definition of sustained-yield management, lack of funding, and lack of natural resource professionals strongly supports and fosters the problem advanced by the tribes in the proposed regulations. The definition of "sustained-yield" should be consistent with ecological goals.

Indian forest management plans are further hindered by jurisdictional interests within the reservations themselves: allotment lands.[133] Allotments lands, although trust lands, are private beneficial ownership lands;[134] the land is held in trust for one individual or more, and can be found both within or outside of the forest lands. There can be, and usually are, different objectives guiding management on tribal reservation land and private land existing on the reservation. The BIA is often caught in the middle, where its trust responsibility extends to both tribal lands and allotment lands.[135] The tribes are willing to buy the allotment lands as a method of attaining uniformity, however the funding to carry out this intent is lacking in a number of tribes.

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129. *Id.*

130. *Id.* at Glossary-9.

131. *Id.* at V-40. The balance can be struck when productivity does not supplant the ability of the forest to exist in perpetuity.

132. *Id.*

133. *Id.* at V-45. As described earlier in this article, federal grants of Indian land during the allotment period has created a potential wall on tribal reservations.

134. Hill & Arnett, *supra* note 38, at 40.

135. IFMAT REPORT, *supra* note 1, at V-46. Some million acres of trust land are owned by allotment. This land comprises almost 18% of forested lands.

The federal trust responsibility extends to allotment lands, but multiple ownership makes any attempt at coordination almost impossible. On some allotments, as many as 400 hundred individuals own one 80-acre parcel.

Section 3103 (15) of the NIFRMA defines "integrated resource management plans"; this tenet is defined as: a plan that integrates the goals, objectives and operations of all the natural resource management programs (e.g., forestry, fish, wildlife, range, water and cultural resources).[136]

Lack of funding has precluded any evaluation of the Indians tribes ability to meet the priorities they envision as important; until the funds are appropriated, a conclusion as to the adequacy is hollow. The NIFRMA was drafted in the spirit of self-determination; Congress must now provide the means to reach the end sought: transference of the responsibility for forested tribal lands from the BIA to the individual tribes.

Of equal importance to the forest lands is the protection of sacred burial or archaeological sites located on tribal lands. With this in mind, the NIFRMA provides for civil fines for any one committing a trespass on tribal forested lands.[137] However, only forest products are covered by the trespass protection,[138] thus, tribes must rely upon the National Historic Preservation Act for any protection of their sacred sites. In reality, the forest management plans can act as a protector of the cultural land while preserving the forest.

Cultural values and associated tangible resources — medicine, craft, food plants, sacred or special areas, and burial or archaeological sites — are related to the landscape. The failure of the NIFRMA to specifically address these important issues minimizes Indian heritage and tradition, and evidences a lack of knowledge or interest in preservation of Indian distinctiveness.[139]

7. Task G

Task seven involved a consideration of whether there should be articulated minimum standards to be used as a gauge to assess if the BIA's is fully putting the best interest of the beneficiary tribes to the forefront of decisions vis-à-vis the forestry programs. The *IFMAT* makes note of the lack of clear guidelines in the laws or regulations.[140]

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136. *Id.* at Glossary-5.

137. 25 U.S.C. § 3106 (1994). The Department of Interior has the responsibility to investigate forest trespass. Tribes adopting the regulations promulgated by the Secretary have concurrent jurisdiction with the federal courts to prosecute trespass.

138. *Id.* There were extensive comments in 60 Fed. Reg. 52,250 (1995) regarding the enforcement of the trespass statute.

139. IFMAT REPORT, *supra* note 1, at V-43. Many tribes may set aside certain sacred areas from being harvested. The relationship of the earth to the tribe's life is expressed as one of reverence; areas that are the site of a celebration could be eliminated from the harvest area.

140. *Id.* at V-51. Both the tribes and the BIA are keenly aware that the federal government is the trustee for Indian tribes. This imposes restrictions on Indian tribes: as beneficiaries they cannot sell their trust land; they cannot use tribal lands as collateral; and they must manage tribal forest lands under a sustained-yield basis (25 C.F.R. § 163.3 (1995)). Under title 25 of the CFR, tribes must approve harvesting decisions, but the Secretary of the Interior has the final authority

Most tribes have forest product enterprises,[141] which are managed and run without BIA technical advice. This is due to a determination that the trust responsibility does not require the BIA to provide information to the tribes on how to operate their lumber enterprises. The lack of communication between forest managers and managers of forest enterprises essentially hinders effective planning in both spheres.[142] As a result, some enterprises are not run as efficiently as possible; the tribes believe the BIA should be offering advice, and the BIA is uncertain if the trust responsibility incorporates tribal businesses.

The *IFMAT* report supports BIA involvement in this sphere of forest land, due to the fact that forest-product enterprises often determine forest management decisions. The *IFMAT* reports that the BIA as trustee should (a) require that coordinated resource plans be developed showing cumulative effects from enterprise decisions; and (b) inform the tribes of possible consequences from decisions.[143]

To ensure a level of compliance, trust standards and responsibilities must be embodied in each tribe's coordinated resource management plan. The IFMAT stresses the importance of a trust oversight commission, an body separate and independent from the BIA, to examine the resource management plans for evidence of whether the trust standard has been followed.[144] As a result of the oversight commission, there may be increased interest in tribal education in forestry enterprises, and natural resources.

The tribes should take a greater responsibility for their actions, with an insight and knowledge gained from BIA actions and the consequences of poor management. The *IFMAT* report finds six principles which can be instrumental in developing the trust standards:

> (a) tribal vision for forests and their management should be articulated where one does not now exist;
>
> (b) trust standards should be linked and relative to this tribal vision;
>
> (c) each tribal government should, in cooperation with the Secretary, develop the standards with local involvement;

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to sign off on the presented plans. 25 C.F.R. § 163.11(a) (1996).

141. The Warm Springs Confederated Tribes are an example of a successful enterprise. Most, if not all, tribes with forest lands have forest product entities, such as the Navajo Nation Wood Products, Inc.

142. IFMAT REPORT, *supra* note 1, at V-51. The concept of trust responsibility in relation to Indian forests has not been defined in law or in regulations. Without clarity, the standard becomes subjective.

143. *Id.*

144. *Id.* Interim procedures need to be established until adopted by the Secretary of the Interior.

(d) the agreed-upon standards should have measurable yardsticks for achieving trust responsibility, with measurement techniques determined before standards are approved;

(e) to the degree possible, standards should measure achievement of desired conditions and outcomes (performance) rather than inputs, techniques, or technologies; and

(f) standards should encourage and reward compliance and promote efficient use of resources.[145]

There can be some flexibility from tribe to tribe, however a tribe should endeavor to adhere to the above principles if the tribal forests are to flourish in the future. The above principles may assist the tribes and the Secretary in developing clear standards of what is expected of both trustee and beneficiary.

8. Task H

The final task for the *IFMAT* was to recommend reforms or increased federal funding levels necessary for the objective of state of the art management of tribal forest land. The *IFMAT* reported that there is a gap between the vision the tribes foresee, and the past management of their forests; there is a wide disparity between the federal funding on Indian lands as compared to the funding of federal and private lands; the lack of coordinated resource planning and management is apparent; and the current method of overseeing and creating trust standards needs to be improved upon.[146] The probability of a continuing shrinking federal budget in Indian matters highlights the need for better management of tribal forest lands. Apparently this may have to come from the tribes, as best as their funding allows if federal funding is not forthcoming.

The lack of federal funding is a current theme, running throughout the recommendations of the *IFMAT* report. Moveover, there is a lack of funding hampering implementation of another Indian self-determination act: the American Indian Agricultural Reform Act.[147]

III. Long-term Impact of NIFRMA

A. NIFRMA Regulations Five Years After Enactment

The regulations were not published in final form until October 5, 1995, five years after the NIFRMA was enacted; many tribes have endured significant problems resulting from the five-year delay.[148] During the

145. *Id.* at V-52.

146. *Id.* at V-53.

147. 25 U.S.C. § 3701 (1994). There has been no funding of this Act since it was passed. Without the funds, the Act is form without substance.

148. Telephone Interview with Attorney Anthony Aguiree, *supra* note 115. The Navajo tribal

developmental stage of the NIFRMA, the ITC offered suggestions and helpful comments to the Senate Committee on Indian Affairs. Moreover, after the NIFRMA was signed into law, the tribes with timber harvesting operations were able to voice their opinions on the directives to be placed in the regulations. Tribal input was facilitated and coordinated by the ITC; the BIA and the ITC worked closely together to fashion the regulations implementing the NIFRMA. Four subject-matter groups were discussed: education; management and operations; Alaska technical assistance; and general regulations.[149]

An extensive effort was made to afford access to the public hearings on the regulations, largely due to the longstanding problems of administration of Indian forest land. To afford complete coverage, hearings were held in the midwest, the Pacific Northwest, the southeast, and Alaska.[150]

The reason the regulations were delayed for such considerable time was due to the Interior Department's Office of Regulatory Affairs. The Office wanted to translate the proposed regulations into "plain English." The result of translation into "plain English" would be a substantial change from what the tribes advanced as important concerns; changes which would create numerous unanticipated and undesirable repercussions.[151]

In response to the threat of alterations, the ITC requested that the Senate Committee on Indian Affairs convince the Office of Regulatory Affairs to use the regulations as written, for to not do so would make a mockery of the dedication and commitment of the BIA and the affected timber tribes. The regulations that are in effect today largely track the proposals as laid out by the BIA and the tribes.

B. The NIFRMA and Expired Forest Management Plans

On August 24, 1995 the United States District Court for the District of Arizona issued a decision in *Silver v. Babbit*,[152] the first time the NIFRMA was raised as an issue in a case in federal court. The plaintiffs (environmental guardians) sought a determination that the United States Forest Service and the BIA violated 16 U.S.C. § 1536(a)(2) of the Endangered Species Act when they failed to consult with the Fish and Wildlife Service about programmatic land management plans that affect the threatened Mexican spotted owl and its habitat.[153] Injunctive relief was

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enterprise has been unable to meet its loan obligations on sawmill equipment due to the lack of funding of the Act.

149. ITC member Gary S. Morishima of the Quinalt Nation, speaking before the Senate Indian Affairs Committee Oversight Hearing on NIFRMA on September 20, 1995. *NIFRMA Oversight Hearing, supra* note 60, at 26.

150. *Id.*

151. *Id.*

152. 924 F. Supp. 976 (D. Ariz. 1995). Judge Carl Muecke's opinion was not well received by timber interests.

153. *Id.* at 980; *see* Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (1994); 58 Fed.

sought and motions for summary judgment were filed by the plaintiffs. The Mexican spotted owl, the subject of the suit, had been placed on the threatened species list on April 15, 1993.[154]

As to the BIA, the court relied on the fact that in 1982, the BIA approved a Navajo Nation forest management plan, which was to last ten years. The plan expired on January 1, 1993 and a new plan has not been issued, nor has the expired plan been extended.[155] Before a new forest management plan will be approved, the FWS must review the plan and ascertain if the requirements of ESA and the National Environmental Policy Act are met.[156] The BIA approved one timber contract sale after the expiration of the old plan (after the expiration but before the Mexican spotted owl made the threatened species list). Cutting occurred during the spring and into the summer months, after the expiration *and* after the Mexican spotted owl was listed as a threatened species.

As required under the NIFRMA, since the Mexican spotted owl was listed, the BIA has not authorized any harvests in the Navajo Nation forests. In spite of this, the Navajo Nation entered into a timber sale in October of 1993 without BIA approval.[157] The BIA withheld approval due to the fact that there was no forest management plan that comported with the NIFRMA, which requires compliance with the ESA and NEPA. The BIA is named as a defendant based on the actions of the Navajo Nation.[158]

The plaintiff based their arguments for a finding of partial summary judgment in their favor on the claim that the defendants have violated section 1536(d) of the ESA by failing to consult with the FWS on their programmatic land management plans; the USFS Land and Resource Management Plans (LRMP); Interim Directive Number Two (ID2); Management Recommendations for the Northern Goshawk (MRNG); and

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Reg. 14,248 (1993).

154. *Silver*, 924 F. Supp. at 981. The northern goshawk's habitat is included in the guidelines and standards. During 1985 to 1988, the USFS approved land and resource management plans for national forests in the southwestern region of the United States. In 1993, the USFS consulted with the FWS in a desire to amend the land resource management plans to include management directions relative to the Mexican spotted owl.

Guidelines and standards were to be incorporated into all USFS forest plans as of early July, 1995. On July 14, 1995, formal consultation between the USFS and the FWS began over the "effects of the Mexican spotted owl and its critical habitat from implementation of all eleven forest plans as amended, with the new guidelines as standards." *Id.*

155. *Id.* at 980. The Navajo Nation is in the process of preparing a new forest management plan with the assistance of the BIA; the plan will be drawn up in conjunction with a "habitat conservation plan" which includes twenty-seven species in need of protection either by the federal government or the tribal government. *Id.* at 981.

156. 42 U.S.C. §§ 4321-4370d (1994).

157. *Silver*, 924 F. Supp. at 981.

158. *Id.* The BIA maintain that they did not take any action or make an omission relative to the Navajo Nation timber sale.

the BIA approved Forest Management Plans (FMP). The plaintiffs argued that the USFS's land resource management plans and the BIA's adoption of forest management plans on reservations are, as a matter of law, agency actions that could affect threatened species, and therefore trigger the ESA's requirement of consultation with the WFS.[159]

The defendant USFS argued that they met the standard for partial summary judgment due to the fact that on the same day as the plaintiffs filed their motion, they initiated consultation on the effects of the LRMP's on the Mexican spotted owl; thus, the plaintiffs motions were moot.[160] An agency must hold an action in abeyance until the required consultation is complete. Title 16 U.S.C. § 1536(d) provides:

> After initial consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.[161]

As to the timber harvest on Indian lands, the defendant BIA argued that the their agency had not approved a new FMP, and the old FMP was not extended. Therefore, they claimed the BIA did not take any action or commit any omission as to the Mexican spotted owl.

The Court cited *Pacific Rivers Council v. Thomas*[162] as precedent which established that any agency action, in this case the LRMP and the FMP, that is implemented prior to completion of consultation is a violation of ESA and is a "per se" irreversible and irretrievable commitment of resources under 16 U.S.C. § 1536(d) and cannot go forward during the consultation period.[163]

The first issue under consideration by the Court was the question of whether the LRMP's, ID2, MRNG and the FMP at issue in the case are "agency actions." The Court announced that this issue has been decided in *Lane County Audubon Society v. Jamison*,[164] which concluded that programmatic planning documents fell within the scope of section 1536(d). This holding was expanded in *Pacific Rivers Council*, finding that "[g]iven the importance of LRMP's in establishing resource and land use policies for

159. *Id.*

160. *Id.* Title 50 C.F.R. § 402.14(a) (1996) requires the FWS be consulted on every "action" which may "affect" a threatened or endangered species.

161. 16 U.S.C. § 1536(d) (1994).

162. 30 F.3d 1050 (9th Cir. 1994).

163. *Silver*, 924 F. Supp. at 982 (quoting *Pacific Rivers Council*, 30 F.3d at 1057).

164. 958 F.2d 290 (9th Cir. 1992).

the forests in question, there is little doubt that they are continuing agency action under § 7(A)(2) of the ESA."[165]

Thus, the Court found that the undisputed facts establish that the USFS LRMP's were being amended due to the Mexican spotted owl's inclusion on the ESA's threatened species list. The FMP relevant to the BIA, which must approve any Navajo Nation FMP, is as a matter of law under Audubon Society an action by an agency. Further the Court stated that it is agency action that trigger consultation with the FWS.[166] The FMP is a programmatic planning document that guides and constrains the implementation of a tribal timber harvest operation, and under the NIFRMA, all timber harvests on tribal lands must be consistent with a BIA approved FMP.[167]

Secondly, the Court had to determine if the adoption of the LRMP's, ID2, MRNG, and FMP in this case "may affect" the Mexican spotted owl. The Court looked again at the Ninth Circuit's holding in *Pacific Rivers Council*; finding that an agency action "may affect" the spotted owl because it set forth criteria for harvesting an owl habitat.[168] The Court went further and found that the programmatic planning documents in this instant case were similar to the documents in both *Audubon Society* and *Pacific Rivers Council.*

The first question the Court considered for a finding of summary judgment in favor of the BIA was "whether consultation was required when there is no plan."[169] The BIA rested its argument on the fact since they had not approved, extended not implemented any Navajo Nation forest plan since the Mexican spotted owl was listed, they were not required to "consult" per the ESA. The Court included, as part of its deliberation, the fact that the BIA did constructively approve a timber sale *after* the Navajo Nation's FMP expired;[170] the Court also noted that timber harvesting at the Wheatfield and Whiskey Creek sites on the Navajo Nation reservation occurred in June and July, only one month before the suit. Under the Pacific Rivers Council doctrine, federal agencies may not approve timber sales unless and until the programmatic land management document authorizing those sales has been the subject of a consultation with the ESA.

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165. *Pacific Rivers Council*, 30 F.3d at 1056.

166. *Silver*, 924 F. Supp. at 983.

167. 25 U.S.C. § 3104(b) (1994).

168. *Pacific Rivers Council*, 30 F.3d at 1055.

169. *Silver*, 924 F. Supp. at 985.

170. *Id.* at 981. The BIA approved one timber sale contract in January 1993, after the expiration of the 1982 FMP, in an area called the "Wheatfields." This was prior in time to the listing of the Mexican spotted own on the endangered species list. The court found determinative the fact that after the Mexican spotted owl was listed, the BIA did not take any action to stop harvesting in the "Wheatfields" timber sale area.

Thus, the Court found the BIA's January approval pursuant to the 1982 FMP must be enjoined until consultation is complete.[171]

The second question addressed the ripeness of the plaintiffs claim as to the BIA. The BIA argued that the claim is not ripe for review because it has taken no action reviewable by a court. The plaintiff's posture was that the BIA continued to authorize sales pursuant to an expired FMP. The Court found that from the continued cutting the claim was ripe for review.

Third, the BIA argued that there was no "case or controversy" because there was no plan; therefore, the plaintiffs lack standing to sue. The Court examined the Constitution of the United States, Article Three, Section 2, which limits judicial power of the federal courts to cases or controversies, and decided based upon precedent that the plaintiffs had standing in this case.[172]

Fourth, the Court undertook an examination of whether the plaintiffs failed to "exhaust their administrative remedies" before bringing the suit in federal court.[173] The Court concluded that actions under the ESA are unique in that they involve at least two different federal agencies; the agency taking action and the agency with which it must consult before taking action.[174] Finding that even if the plaintiffs were required to exhaust all administrative remedies prior to bringing suit, the court found that requiring exhaustion in this instant case would be futile.[175]

The Court entered its findings for partial summary judgment for the plaintiff and directed that the BIA:

> (4) Shall immediately commence re-consultation on the existing expired (Navajo Nation) FMP in compliance with § 7(A)(2) of the ESA and its relevant regulations to consider the listing of the Mexican spotted owl as threatened.
>
> (5) Pursuant to § 7(D) of the ESA, the BIA shall defer or suspend all timber harvest activities until the re-consultation on the (Navajo Nation) FMP is complete.[176]

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171. *Id.* at 986.

172. SEC v. Medical Communities for Human Rights, 404 U.S. 403, 407 (1972). A party seeking to invoke federal jurisdiction under the ESA must allege: (1) injury in fact; (2) a casual connection between the injury and the challenged action and; (3) that the injury is likely to be redressed by the relief sought. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

173. The plaintiffs offered that they were not required to exhaust administrative remedies as exhaustion would serve no purpose, exhaustion would be futile, and the BIA's appeal regulations did not apply to legal claims made pursuant to the ESA.

174. *Silver*, 924 F. Supp. at 986 n.5.

175. *Id.* Under certain circumstances, courts may depart from the requirement that a plaintiff exhaust all his administrative remedies, if the remedies would prove to be meaningless (quoting White Mountain Apache v. Hodel, 840 F.2d 675, 677 (1988)).

176. *Id.* at 989.

This seems to be inverted logic: why did Judge Muecke order the BIA to reconsult on an "expired" FMP? Under the NIFRMA, it would have been proper and consistent to order a new FMP.[177] Comments on this tortured logic have appeared in many newspaper editorials in the affected southwest.[178]

As a result of the holding in *Silver v. Babbit*, logging has ceased on the Navajo Nation and all United States forests in the southwest until compliance with the ESA. With the shutdown, all sawmills on the Navajo Nation are idle. Because of complete cessation of operation, the Navajo Nation timber enterprise is facing a sever financial crisis on outstanding debts of the company. The Navajo Nation government has had to take over payments on the enterprises' equipment loans. In order to begin harvesting timber, the Navajo must comply with the mandates of the NIFRMA. The Navajo Nation has hired Hamstreet to employ his "turnaround" specialty on the reservation. This might be prudent business practice, however, the NIFRMA commands more than sound financial judgment. For the first time, the Navajo Nation can draft a forest management plan that is based on their vision of timber harvesting.

IV. Conclusion

The various Indian tribes which were visited by the *IFMAT* have espoused realistic visions for their forests. As Ronnie Lupe stated to the Senate,

> we have lived for centuries in harmony with our life giving forests. Our lands and my people have suffered over a hundred years of abuse. Give us the financial means to correct past Federal Government management abuses . . . . If this is done, our forests will again have the opportunity to flourish under our stewardship.[179]

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177. Prior to the NIFRMA, the BIA was solely responsible for planning the tribal forest management plans. The stated purpose of the NIFRMA is to allow the Secretary of the Interior to take part in the management of Indian forest lands, with the participation of the land beneficial owners, in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners. 25 U.S.C. § 3102(1) (1994). The summary of the final rule in the federal register provides for "Secretarial recognition of tribal laws pertaining to Indian forest lands, Indian forestry program assessments, Indian forest land assistance accounts, tribal forestry programs, Alaska Native technical assistance and forestry education assistance." 60 Fed. Reg. 52,250 (1995).

This has been interpreted to mean that when an existing BIA FMP expires, a new one will be written, with the tribes participating and incorporating their visions.

178. *Timber Firms Endangered by Judge's Owl Ruling*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Aug. 26, 1995, at B1.

179. *NIFRMA Oversight Hearing*, *supra* note 60, at 35.

And Jaime Pinkham of the Intertribal Timber Council emphasized that "Indian tribes are here to stay. We will not sell our land or shear down our forests during wavering economic times and relocate our operations elsewhere. Our ancestors — our culture — is committed to the land upon which we live."[180]

This article recommends the Congress provide the NIFRMA with adequate funding, without any delay. There is documentation of significant economic losses from prior mismanagement of Indian forests.[181] The NIFRMA itself declares that "nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom."[182] The trust relationship is nebulous at best; and, drawing from the inherent tension between "what is the trust duty," and "when the duty is imposed," there needs to be a restructuring in the Department of Interior's Bureau of Indian Affairs. This article strongly urges that a Trust Oversight Commission be established to determine if the BIA's actions, now and in the future, are consistent with the notion of the "trustee" status under the NIFRMA.[183]

As long as the federal government continues treating tribes in the same vein as they did in Chief Justice John Marshall's day, as "domestic, dependent nations," there will always be the cloud of duty hanging over the government's head. It should be remembered that Indian tribes are governments in their own right. Considering the historical fact that Indians managed "their land" for thousands of years, long before the Anglo-Saxon stepped on the this soil, gives credence to the Indian's ability to manage their forests. This ability may be further bolstered by referring to the Indian's "spirituality"; however, the dominant force for allowing Indian tribes more control of their land is the salient fact that they are sovereign governments. And, as such, they should have the legal right to exercise power over reservation activities.[184]

Returning control of Indian timber management to the hands of the Indians themselves, does not only make sense from a cultural viewpoint, it makes better economical sense as well. Better forests make better harvests, and better harvests will result in higher revenues for the tribes.

With the NIFRMA firmly in place the tribes will have the opportunity to apply their "vision" to the forest lands on their reservation.[185] In time, a

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180. *Id.* at 23.

181. Sen. John McCain (R.-Ariz.) calls the BIA's failures to implement the regulations as written "unconscionable." *Id.* at 15.

182. 25 U.S.C. § 3120 (1994).

183. This notion of a separate body overseeing the "trust responsibility" could set the standard for all areas where the "trust duty" lies on the government's doorstep.

184. Robert A. Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307, 320 (1991-1992). Professor Laurence states, "Most people today who study and write and work with Indian law and policy regard this tribal sovereignty with substantial respect. It is tribal sovereignty, not individual spirituality, that makes Indians Indians. Or, at least, that makes Indian law Indian law." *Id.* at 320.

185. *Id.* at 344. Professor Laurence criticizes the failure of the United States Government

determination can be made if the Indians can better see the "forest for the trees." Is it not the tribes themselves to value when, where, and for whom the use of the land comports with their vision. It is their right to practice their respective cultures and traditions on their lands, as did their past generations; the trees at one time provided more to them than just lumber. After all, as one Indian man observed, the trees and the land are "what makes them what they are."

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to provide proper funding for the operation of tribal judicial systems; the failure to fund the NIFRMA is not unique.

In May 1996, the Twentieth Annual Indian Timber Symposium was held in Ketchikan, Alaska. The symposium was hosted by Sealaska Corporation and was held at the Ted Ferry Civic Center. One of the workshops was devoted to the IFMAT, focusing on the changes in the political mood and budgetary constraints since the implementation the IFMAT.