

4-2016

# New Approaches to Energy Development in Indian Country: The Trust Relationship and Tribal Self-Determination at (Yet Another) Crossroads

Monte Mills

*Alexander Blewett III School of Law at the University of Montana, monte.mills@umontana.edu*

Follow this and additional works at: [http://scholarship.law.umt.edu/faculty\\_barjournals](http://scholarship.law.umt.edu/faculty_barjournals)

 Part of the [Energy and Utilities Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

---

## Recommended Citation

Monte Mills, *New Approaches to Energy Development in Indian Country: The Trust Relationship and Tribal Self-Determination at (Yet Another) Crossroads*, 63 Fed. Law. 50 (2016),

Available at: [http://scholarship.law.umt.edu/faculty\\_barjournals/114](http://scholarship.law.umt.edu/faculty_barjournals/114)

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of The Scholarly Forum @ Montana Law.


# New Approaches to Energy Development in Indian Country

## The Trust Relationship and Tribal Self-Determination at (Yet Another) Crossroads

MONTE MILLS







**T**he challenging and often conflicting forces of history, precedent, colonization, self-determination, and the federal government's trust responsibility to Indian tribes make for many crossroads within the field of federal Indian law. Scholars and practitioners have struggled with a number of these intersections, including animal law in Indian Country, the ongoing viability of precedent, protection of tribal sacred sites, and tribal–state relations.<sup>1</sup>

More recently, the expansion of tribal governmental capacity and a corresponding desire to exercise greater tribal self-determination has run headlong into the federal government's trust responsibility, which is rooted in false and historical notions of Indian incompetence.<sup>2</sup> The conflict between tribal self-determination and federal decision-making takes many forms, but one of the most active and promising fields for the discussion of new approaches is energy development on Indian lands. For many reasons, Congress, President Barack Obama's administration, and Indian tribes are now intensely focused on how federal oversight of energy development on tribal lands should be balanced with tribal self-determination. This attention has prompted a number of different proposals, some of which may lead to a fundamental redefinition of the federal–tribal relationship. Thus, energy development on Indian lands is the crucible for the latest Indian law crossroads, and, after describing the history and factors that have contributed to the current discussion, this article outlines pending administrative and legislative proposals, one of which may represent the road forward to a new era of tribal self-determination.<sup>3</sup>

### **Why a Crossroads?**

As mentioned above, the conflict between tribal self-determination and the trust responsibility is not confined to energy development in Indian Country. For example, nearly 10 years ago and prior to assuming his former post as assistant secretary for Indian Affairs, Kevin Washburn succinctly described the basic conflict when writing about tribal self-determination and federal criminal jurisdiction over Indian Country:

[R]eal self-determination has not been—and cannot be—achieved until tribes can determine for themselves what is right and what is wrong on their own reservations ... [i]n the absence of this power, Indian people must conform their actions to rules and value judgments imposed on them by outsiders. Such a scheme is a tremendous obstacle to true

self-determination. ... Increasing meaningful tribal self-determination almost necessarily requires restoring a greater measure of tribal autonomy and reducing federal control on Indian reservations.<sup>4</sup>

The legacy and history of federal Indian policy and federal policy toward energy resource development in Indian Country, the potential wealth of energy resources on tribal lands, the pressing need for economic development in Indian Country, and the impacts of the federal oversight and approval are all factors that have brought this conflict to the forefront in the field of energy development on tribal lands.

### **Challenges Presented by the History of Federal Indian Policy**

Like many resource-based issues in Indian Country, the legacy of the late 19th- and early 20th-century federal Allotment Era remains a challenge for energy development on tribal lands. The allotment of tribal lands resulted in tribes losing more than 90 million acres (an area about the size of Montana) and resulted in fractured ownership patterns of both the surface and subsurface estates on the remaining lands. In the century since allotment, these various interests have been further fractionated through their devise and descent over subsequent generations, and, more recently, both tribes and the federal government have worked to reacquire and consolidate these interests under tribal ownership. Nonetheless, on many reservations, allotment, non-Indian homesteading, and the passage of time have resulted in a checkerboard of surface and subsurface ownership. As a result, nontribal lands within a tribe's reservation may be more attractive for development, because those lands are not subject to federal oversight like tribal lands. This competitive disadvantage has motivated many tribes to seek a more level playing field for development of their own resources.<sup>5</sup>

In addition to the legacy of allotment, the history of federal–tribal relations plays a role in the current discussion over the federal–tribal relationship in energy development. Professor Judith Royster has aptly described federal policy toward energy

development in Indian Country as a “microcosm of the history of federal-tribal relations during the last century.”<sup>6</sup> Like those broad policies, the development of minerals and energy resources from tribal lands has evolved from an area of extensive federal control to one more balanced between tribal authority and federal oversight, although federal oversight remains.

The first comprehensive federal effort to address development in Indian Country came at the close of the allotment period and, consistent with overarching federal policy at the time, represented an attempt to spur tribal governance and economic development. To do so, the 1938 Indian Mineral Leasing Act (IMLA), 25 U.S.C. §§ 396a-396g, put tribes in the position of lessors of tribal minerals and required tribal consent, subject to the approval of the secretary of the Interior, for each mineral lease. Despite this statutory commitment to tribal authority, however, the role of the federal government, largely through the Bureau of Indian Affairs (BIA), remained pervasive, and, aside from a tribe’s consent to leasing, the federal government largely controlled the details of the lease negotiation process for decades after the passage of the IMLA.

that, unless tribes are authorized “... to assume final approval authority over transactions involving trust lands, economic progress in Indian Country will continue to be hindered by the trust.”<sup>10</sup> The need for federal approval of leases and agreements under the IMLA and IMDA—a requirement rooted in the federal trust responsibility—and the costs, burdens, and delays caused by that approval process have motivated tribes, particularly those with advanced governance and technical capabilities, to reconsider whether the current iteration of the trust relationship actually serves their best interests.

### **Indian Country’s Energy Potential**

The energy resource potential of Indian lands is also a driving factor behind the ongoing discussion of new approaches to energy development in Indian Country. Tribal lands offer significant opportunities for renewable and nonrenewable energy development. For example, according to a Department of Energy study, although tribal lands account for only 2 percent of the nation’s land base, they offer an estimated 5 percent of all of the nation’s renewable energy resources. Of these resources, tribal solar energy potential amounts to 5.1 percent

**Thus, under both the IMLA and the IMDA, some form of federal approval is required for most every potential development project on tribal land. This requirement, rooted in the federal government’s trust responsibility to protect tribes and their best interests, inherently conflicts with tribal autonomy over such projects and, by involving the federal bureaucracy in the review and approval process for each such project, often results in delays.**

Nearly 50 years later and largely in response to tribal frustration with their inability to exercise greater control and flexibility over resource development on their lands, Congress passed the 1982 Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-2108. Unlike the IMLA, which authorized only leases of tribal minerals, IMDA allowed tribes to negotiate and enter a variety of arrangements for mineral development, including a “joint venture, operating, production sharing, service, managerial, lease or other agreement ...”<sup>7</sup> The IMDA still mandated approval by the secretary of the Interior for each such agreement, however, and, in light of the greater risk of potential loss associated with a broader range of agreements, also provided that “the United States shall not be liable for losses sustained by a tribe” as a result of a mineral agreement.<sup>8</sup>

Thus, under both the IMLA and the IMDA, some form of federal approval is required for most every potential development project on tribal land. This requirement, rooted in the federal government’s trust responsibility to protect tribes and their best interests, inherently conflicts with tribal autonomy over such projects and, by involving the federal bureaucracy in the review and approval process for each such project, often results in delays.<sup>9</sup> Both the structure and the poor federal administration of the trust relationship prompted former Assistant Secretary for Indian Affairs Kevin Gover to assert

of the nation’s overall generation potential, while wind resources are approximately 3.4 percent of the total national technical potential.<sup>11</sup> Tribal lands also contain an enormous amount of traditional energy resources, including estimates of up to 5.3 billion barrels of oil, 37.9 trillion cubic feet of natural gas, and 53.7 billion tons of recoverable coal potential.<sup>12</sup>

### **Need for Economic Development**

The potential for energy development in Indian Country can perhaps only be matched by the need for successful and sustainable job creation and long-term tribal economic development. While some tribes have been able to capitalize on their resources, many in Indian Country still face grinding poverty and related social ills, while tribal governments rely heavily on federal funding to provide programs and services for their members.

The need for sustainable economic development in Indian Country combined with the substantial potential of tribal energy resources has led many to question why tribes are not better able to take advantage of their own energy resources. In fact, these questions have generated substantial bipartisan congressional attention in recent years, particularly among members of the Senate Indian Affairs Committee. Most recently, the chairman of that committee, Sen. John



Barrasso (R-Wyo.), commissioned the Government Accountability Office (GAO) to study the barriers to tribal energy development.

### **2015 GAO Report on Energy Development on Indian Lands**

The GAO's report, "Poor Management by BIA Has Hindered Energy Development on Indian Lands," was issued in June 2015 and documented a number of missed development opportunities, lost revenue, and threatened projects across tribal lands.<sup>13</sup> According to the GAO's analysis, many of the challenges to these projects were caused by or at least significantly due to delays in the federal review and approval process for the project documents. According to the GAO, the factors contributing to these delays were numerous and included administrative issues within the BIA, such as a lack of accurate data (compounded by the complex land ownership patterns resulting from allotment), staff limitations, and the absence of any system for tracking of review and response times on the part of the federal agency. The report also blamed the complex regulatory framework associated with federal review and approval of proposed projects on tribal lands, including review under the National Environmental Policy Act (NEPA), applicability of the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA), and the involvement of both the BIA and the Bureau of Land Management (BLM) as well as other federal agencies. In addition to these predominantly federal issues, the report also noted other challenges, such as the dual taxation of tribal projects, and tribal-specific issues, such as a challenging capital market, lack of infrastructure, and tribal capacity. The GAO report confirmed many tribal concerns with the federal role in energy development and underscored the issues on which recent proposals for promoting energy development in Indian Country focus.

The GAO report also addressed a separate but related topic that has prompted the move for reform. In addition to studying the impediments to tribal development, Barrasso also asked the GAO to study why no tribe had yet entered into a Tribal Energy Resource Agreement (TERA) pursuant to provisions of Title V of the Energy Policy Act of 2005, also known as the Indian Tribal Energy Development and Self-Determination Act (ITEDSDA), codified at 25 U.S.C. §§ 3501-3506. TERAs were intended to enhance and empower tribes to approve energy-related agreements as a way to ameliorate many of the issues found by the GAO's review. In fact, all of the same factors that are driving the current discussion of tribal energy development also motivated the enactment of the ITEDSDA in 2005. In addition, the more recent Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act, enacted in 2012 and codified in relevant part at 25 U.S.C. §415(h), sought to ameliorate the same issues as they relate to leasing tribal surface lands, including for solar and wind projects. Though each of these reforms has its own shortcomings, they are worthy of review, because they inform the most recent proposals for reform.

### **A Decade of New Approaches? TERAs and the HEARTH Act**

TERAs were intended to usher in the beginning of a new approach to tribal self-determination and potentially a new era in the federal-tribal relationship. Once negotiated between a tribe and the secretary of the Interior, a TERA would authorize the tribe to review and approve energy-related leases, business agreements, and rights-of-way for projects on tribal lands without the need for federal approval of each individual lease, agreement, or right-of-way. In doing so, TERAs changed the balance of the federal-tribal

relationship by empowering tribes to exercise decision-making authority over their own resources without federal oversight of each such decision. Ideally, this tribal authority in lieu of federal oversight would significantly minimize, if not eliminate, the problems associated with mismanagement by the BIA identified by the GAO in its 2015 report.

But, as is the case with other recent efforts to promote tribal authority, such empowerment came with conditions, many of which have been identified by tribes, scholars, and the GAO as disincentives for tribes to seek a TERA.<sup>14</sup> These issues include the requirement that, as part of a TERA, a tribe must provide an environmental review process allowing for public (including nontribal) review and comment on proposed leases, agreements, and rights-of-way. In addition, much like under IMDA, the federal government would be liable neither for "any negotiated term" of any such agreement, lease, or right-of-way approved by a tribe nor any losses therefrom, although this waiver presumably allows for liability that may result from other sources, such as non-negotiated terms of such agreements. The GAO also identified that tribes considering a TERA have been uncertain over the amount of authority for which they could actually negotiate, as the regulations implementing ITEDSDA allowed tribes to assume "activities normally carried out by the Department [of the Interior] except for inherently Federal functions."<sup>15</sup> This regulatory restriction came without definition of what might be considered an "inherently Federal function" and, therefore, left tribes guessing as to the potential scope of a TERA. The GAO also noted that tribes were concerned that their assumption of additional responsibilities under a TERA would come with no additional federal funding. Lastly, the ITEDSDA required the secretary of the Interior to determine the capacity of an applicant tribe to carry out the functions of a TERA—and the process for rendering that determination, along with the complex TERA application process, have also been disincentives to tribal participation. Thus, the promise of a new, more tribal sovereignty-oriented dynamic embodied by TERAs has not yet come to pass, leading some to question whether the TERA model is the right model for the future.<sup>16</sup>

Unlike the ITEDSDA, as of November 2015, some two dozen Indian tribes have taken advantage of the provisions of the HEARTH Act, which, like TERAs, authorize greater tribal authority and control over tribal lands. The foundational concepts underlying the HEARTH Act were first articulated in legislative amendments that authorized specific tribes, like the Navajo Nation, to lease their surface lands without the need for secretarial approval of each lease. Like those early tribal-specific models, under the HEARTH Act, tribes can now submit proposed leasing regulations to the secretary for approval and—provided the regulations are "consistent with" federal leasing regulations and include a tribal environmental review process similar to that required in a TERA—the secretary can approve the regulations and authorize a tribe to approve individual leases in accordance with those tribal rules. The HEARTH Act is limited, however, to surface leasing, which includes leases for business purposes, like solar, wind, and biomass development projects, but does not authorize tribal subsurface leasing or the granting of rights-of-way. In addition, the HEARTH Act waives the liability of the United States for any "losses sustained by any party to a lease" approved by a tribe pursuant to that tribe's regulations. This waiver of federal liability is broader than the waiver under a TERA, which is limited to waiving liability that flows only from a "negotiated term" of an agreement.

From enactment of the HEARTH Act in 2012 to November 2015, some 20 tribes have obtained secretarial approval of their tribal business leasing regulations. Even so, however, the GAO report found that, as of March 2015, only one utility-scale wind facility is in operation on tribal land, with one more such facility and one utility-scale solar facility under construction. By comparison, since 2005, 686 utility-scale wind projects and 778 utility-scale solar projects have been constructed on nontribal lands.<sup>17</sup> In addition, many of the same concerns that have been expressed about TERAs, such as the required environmental review process and waiver of federal liability, are equally applicable to the HEARTH Act.<sup>18</sup> Lastly, the HEARTH Act does not provide a tribe with comprehensive authority to pursue energy development, as it addresses only surface leasing authority and does not allow tribes to approve rights-of-way that might be necessary and incidental to such surface development.

Therefore, although recent attempts to reform and enhance the authority of tribes to develop their own energy resources began as early as the 2005 passage of ITEDSDA, the 2015 GAO report indicated significant impediments to such development remain. According to the GAO, many of those impediments result from the federal government's role in the process. Thus, the appropriate

### Administration Proposals

The GAO report included specific recommendations for executive action on the part of the BIA to address the administrative issues identified in the report. These recommendations included improving BIA's ability to determine ownership, collect data, and track review and response times, as well as providing additional guidance regarding "inherently Federal functions" and improving the efficacy of the agency's grant programs.<sup>19</sup> While these recommendations focus on specific aspects of the BIA's administrative management of the federal trust responsibility, officials who oversee BIA's functions within the Department of the Interior have also offered some proposals for broader reform.

In written testimony submitted to the Senate Committee on Indian Affairs for an oversight hearing on the GAO report before that committee, Larry Roberts, now acting assistant secretary of Indian Affairs, highlighted the agency's efforts to "break[ ] down the silos that create obstacles to close coordination in the federal bureaucracy ..." and proposed to continue that effort through the development of an Indian Energy Service Center.<sup>20</sup> The service center is proposed in Obama's 2016 budget and, according to Roberts' testimony, would consolidate federal resources, such as BIA, BLM, trust officers, and others, in one location "to maintain a responsive, administrative and technical

**In addition to studying the impediments to tribal development, Barrasso also asked the GAO to study why no tribe had yet entered into a Tribal Energy Resource Agreement (TERA) pursuant to provisions of Title V of the Energy Policy Act of 2005, also known as the Indian Tribal Energy Development and Self-Determination Act (ITEDSDA), codified at 25 U.S.C. §§ 3501-3506. TERAs were intended to enhance and empower tribes to approve energy-related agreements as a way to ameliorate many of the issues found by the GAO's review.**

balance between the federal trust responsibility and tribal self-determination is central to alleviating the challenges to tribal energy development. As a result, a number of the pending proposals could alter that balance and, potentially, lead to a new era of more meaningful tribal self-determination like that described by Washburn.

### Next Stop, True Self-Determination?

The current proposals to address the barriers to tribal energy development are varied in their approaches; some seek to amend specific parts of existing law by streamlining the present structure, while others envision entirely new approaches, and still others propose to apply existing structures in new ways. The current proposals also range from promoting nearly independent tribal autonomy (by authorizing a tribe to request that its lands be removed from federally owned trust status altogether) to seeking improvements in administration of the current federal trust model. The remainder of this article reviews each of these proposals in light of its respective approach to the federal-tribal relationship.

capacity, that when needed, can bolster local or regional staff faced with surging workload thus avoiding or eliminating backlogs."<sup>21</sup> Given the GAO's findings regarding the BIA's administrative issues and the complexity of the underlying federal regulatory process, however, it remains to be seen whether the service center would ameliorate these issues or compound them by consolidating them into one location. Regardless, the service center proposal would not realign the federal government's relationship with Indian tribes but, ideally, would streamline the federal role within that relationship.

Beyond streamlining the existing process, Interior officials also support broader legislative reform that would expand the HEARTH Act model to allow tribal authority over subsurface leasing. In 2014, Washburn urged the Senate Committee on Indian Affairs to consider broader application of the HEARTH Act instead of more detailed amendments to ITEDSDA.<sup>22</sup> More recently, Roberts further urged the committee to consider amending the IMDA to incorporate the HEARTH Act model.<sup>23</sup> In doing so, the department highlighted the HEARTH Act's promotion of tribal sovereignty and relative success



in comparison to the lack of tribes that have pursued a TERA. Washburn also indicated Interior's preference for the broader waiver of the federal government's liability under the HEARTH Act as compared with ITEDSA's narrower waiver for liability related to a "negotiated term" because, according to Washburn, the latter lacks clarity.<sup>24</sup>

As discussed in more detail below, although Interior officials prefer the HEARTH Act over the TERA model, Washburn has also recognized that expanding the HEARTH Act from surface leasing to subsurface mineral leasing and development presents a complex challenge. For example, while tribal surface leasing regulations under the HEARTH Act must be consistent with a single and fairly straightforward body of federal regulations, the IMLA and the IMDA each have their own separate and far more detailed regulatory schemes.<sup>25</sup> Therefore, while the HEARTH Act model has also found some support in pending congressional legislation, those bills have not yet been consistent with the department's position and include additional provisions that either support the TERA model or raise other objections from the Obama administration.

### **S. 209, ITEDSA Amendments of 2015**

Reintroduced in the 114th Congress by Barrasso and based on similar proposals in each of the last three Congresses, S. 209, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2015, aims to address many of the TERA-related issues identified in the 2015 GAO report. For example, the bill would provide additional funding for tribes seeking to develop capacity to enter a TERA and ease the secretary's standards for determining whether a tribe has sufficient capacity. Under this legislation, a tribe would only need to demonstrate successful management of a relevant self-determination contract to meet the capacity threshold to enter a TERA. Likewise, the bill would confine the TERA approval process to an established timeframe and limit the secretary's ability to decline a TERA. Importantly, the bill also confirms that ITEDSA does not waive any federal liability beyond that resulting from a "negotiated term" of an agreement approved by a tribe under a TERA, meaning that the United States could be liable under actions arising outside of the negotiated terms of an agreement. The bill also expands the coverage of a potential TERA to include a broader range of agreements, including communitization and pooling agreements. As passed by the Senate, the legislation also includes a number of non-ITEDSA-related provisions, including (1) authorizing tribal biomass demonstration and weatherization projects; (2) relaxing the federal appraisal requirements for energy-related projects; and (3) expanding the Navajo Nation's leasing authority to include the approval mineral leases of up to 25 years without secretarial approval.

S. 209 is focused on improving the TERA-model and fixing the issues identified by the GAO as disincentives for tribes considering a TERA. As such, the bill primarily recommits to the TERA model as the path forward for the federal-tribal relationship in the field of energy development. It remains to be seen whether, if enacted, the revisions to the TERA standards and process contained in S. 209 would be sufficient to overcome the challenges that have led many to consider the TERA approach a failure.

Of S. 209's non-TERA-focused provisions, the expansion of Navajo Nation leasing authority to subsurface resources also lends support to the HEARTH Act model but not in the same manner envisioned by the Department of the Interior. Just as the HEARTH Act's roots began with expansion of surface leasing authority on a

tribe-by-tribe basis (and the Navajo Nation was one of the first tribes to assume such authority), the proposal to expand Navajo leasing authority to subsurface resources could be a precursor to expanding the HEARTH Act beyond surface leasing.

Unlike the most recent proposal from Roberts to amend IMDA to incorporate concepts from the HEARTH Act, however, S. 209 proposes to incorporate subsurface leasing into the Navajo Nation's existing leasing authority by amending 25 U.S.C. § 415(e)(1) to include tribal authority to approve "lease[s] for the exploration, development, or extraction of any mineral resource," provided the Nation's leasing regulations have been approved by the secretary of the Interior.<sup>26</sup> When questioned about this proposal in an earlier version of S. 209, Washburn indicated that the department had some concerns because "mineral development is more complicated than business site leases ... or surface leases ... [and] ... there are some slight differences in the way the HEARTH Act works and the way energy leasing needs to work."<sup>27</sup> Thus, if S. 209 were enacted, it remains unclear whether and how the Department of the Interior would review and approve mineral leasing regulations proposed by the Navajo Nation.

Ultimately, expansion of the HEARTH Act model to subsurface development, whether through the Navajo Nation proposal in S. 209 or the IMDA amendment proposal of the Department of the Interior, is complicated by the differences between surface and subsurface leasing. Washburn recognized these differences in commenting on the Navajo Nation proposal, and the GAO report's description of the complex regulatory scheme applicable to energy development on tribal lands further highlights the potential challenges of marrying the HEARTH Act with mineral development. And, notwithstanding the 20 tribes that have taken advantage of the HEARTH Act for surface leasing, the Act's waiver of federal liability and required environmental review process may deter tribes from pursuing authority for subsurface leasing, as evidenced by apparent tribal reluctance toward TERAs based in part on related concerns. Therefore, while supported in some form by the Obama administration and proposed in Congress, expansion of the HEARTH Act to subsurface development will likely require significant additional analysis and consideration before becoming a reality. Even so, a bill including a provision like that of S. 209 that would expand HEARTH Act-like authority for subsurface leasing to the Navajo Nation has already passed the House, although its chances of success are likely doomed by its other provisions that would restrict the applicability of other federal laws and rules to energy-related projects on tribal lands.

### **H.R. 538, Native American Energy Act**

H.R. 538, the Native American Energy Act, was introduced by Rep. Don Young (R-Ark.), chair of the House Subcommittee on Indian, Insular, and Alaska Native Affairs, to address a variety of issues related to tribal energy development. Like S. 209, H.R. 538 includes provisions addressing appraisals and authorizing an expansion of leasing authority for the Navajo Nation. This bill would also limit NEPA and judicial review of energy-related projects on tribal lands and, absent tribal consent, would prohibit the application of the BLM's recently promulgated rule regarding hydraulic fracturing on tribal land. Thus, aside from promoting the possible expansion of the HEARTH Act model for subsurface leasing at the Navajo Nation, this bill primarily focuses on minimizing the existing federal review and approval process and potential for legal challenges to tribal projects rather than rebalancing federal and tribal responsibilities. Although

the bill passed the House, Obama, expressing displeasure with the bill's limits on NEPA, judicial review, and the BLM's rule regarding hydraulic fracturing, issued a Statement of Administration Policy opposing the bill.<sup>28</sup> Thus, H.R. 538 is unlikely to become law in its current form, but, given the inclusion of a few provisions also found in S. 209, it seems possible that a compromise measure could have some prospect of success, provided the political divide between the Obama administration and Rep. Young allows room for compromise.

### **H.R. 328, American Indian Empowerment Act**

Another potentially controversial measure, also introduced by Young, awaits further consideration in the House. H.R. 328, the American Indian Empowerment Act, would authorize an Indian tribe to request that lands held by the federal government in trust for its benefit be transferred to the tribe in restricted fee status. According to the bill, once transferred, the lands would retain their Indian Country status as well as restrictions on alienability and taxation, but a tribe would be able to approve leases and rights-of-way across such lands without the need for federal approval. In addition, tribal law would preempt federal laws and regulations on such lands provided, however, the tribal laws had first been published in the Federal Register. Notwithstanding the authority for a tribe to seek the withdrawal of its lands from trust status, the final section of the bill makes clear that nothing in the bill should be construed to diminish the federal government's trust responsibilities. The legislation does not specify the scope of those trust responsibilities for a tribe that elects to withdraw its lands from trust status. Thus, although the American Indian Empowerment Act presents the potential for enhanced tribal decision-making authority and self-determination over tribal lands, the removal of those lands from trust status and uncertainty over the resulting obligations of the federal government have raised for some the specter of the termination era of the 1950s, during which the federal government sought to end entirely its trust relationship with Indian tribes.<sup>29</sup> In response to these concerns, Young has sought to emphasize that he intended the legislation to begin a discussion on how federal policy can move toward increased tribal self-determination.<sup>30</sup> Nevertheless, aside from a 2012 subcommittee hearing on H.R. 328's predecessor, this proposal has not advanced in Congress.

### **S. 383, Indian Trust Asset Reform Act (also H.R. 812)**

An additional intriguing opportunity for promotion of tribal self-determination does not expressly focus on tribal energy development at all. Rather, S. 383 (and its House companion H.R. 812), the Indian Trust Asset Reform Act, addresses trust assets more broadly, but its proposed expansion of tribal responsibility for those assets, potentially including surface and subsurface trust resources, has particular relevance in the context of energy development and in comparison to the existing TERA and HEARTH Act models.

As a starting point, the bill would reaffirm the trust responsibility to "include a duty to promote tribal self-determination regarding governmental authority and economic development." In furtherance of that policy, Title II of the bill authorizes "trust asset management demonstration project[s]," which would allow a tribe to request and assume responsibility for the management of trust assets, including the authority to approve surface leasing or forest management agreements without secretarial review and approval in a manner consistent with existing statutory authority under the HEARTH Act (for surface leasing) or the National Indian Forest Management Act

(NIFRMA) (for forest management agreements).<sup>31</sup>

In order to enter such a demonstration project, a tribe would have to petition the secretary and develop a trust asset management plan, which must include a description of the trust assets to be managed, the tribal management objectives and priorities for those assets, funding sources, and dispute resolution mechanisms. In addition, the proposed plan need not be consistent with federal regulations but must "identify any Federal regulations that will be superseded by the plan."<sup>32</sup> Unlike the complicated and confusing capacity and application requirements for entering a TERA, the secretary must approve a trust asset management plan unless the plan (1) is inconsistent with the existing "treaties, statutes, Executive orders, and court decisions" applicable to the relevant trust assets or their management; (2) does not include one of the required components described above; or (3) will result in implementation costs that exceed available funding.<sup>33</sup>

With respect to the potential liability of the federal government, the bill confirms that neither the liability of the federal government nor that of an Indian tribe would be "independently diminish[ed], increase[d], create[d] or otherwise affect[ed]" by the legislation or by a trust asset management plan. Importantly, however, for trust assets managed by a tribe pursuant to a trust asset management plan, the bill would waive federal liability for losses that may result from a term of the plan that "provides for management" of the trust asset at a "less-stringent standard than the Secretary would otherwise require or adhere to in absence of an Indian trust asset management plan." This provision is remarkable in two respects. First, the waiver of federal liability is quite narrow but prompts due consideration of the risks associated with managing trust assets differently than the federal government. Second and perhaps more revolutionary, the provision recognizes that, although trust asset management must be consistent with broader applicable law, a tribe may decide to manage a trust asset differently than the federal government and may do so at a "less stringent standard."<sup>34</sup>

Although the current version of S. 383 does not authorize tribes to independently approve a lease or agreement unless done in accordance with the HEARTH Act, the bill would authorize a tribe to manage its own trust assets as the tribe sees fit, notwithstanding otherwise applicable federal regulations and even if federal management standards under those regulations would be more stringent. That recognition of tribal authority marks a step away from the notion that, in order to exercise authority over trust resources, tribes must conform to federal regulatory standards. Under the HEARTH Act, for example, tribal leasing regulations must be "consistent with" federal regulations. Similarly, the regulations implementing a TERA left uncertainty over what constitutes an "inherent Federal function" and, by doing so, potentially limited tribal authority under a TERA to activities that do not require the federal (i.e., more stringent) protection of tribal trust resources. As one tribal leader stated in written testimony discussing S. 383 in the context of a Senate Committee on Indian Affairs hearing on trust modernization: "Unlike existing legal authorities that authorize tribes to contract or compact federal functions under federal standards, this demonstration project is unique in that it would provide participating tribes the freedom to determine how their resources will be managed under tribal standards."<sup>35</sup> This small step, along with the legislation's express affirmation that the trust responsibility includes supporting tribal self-determination for economic development purposes, could be a significant starting point for a new



approach to tribal self-determination that would allow for greater tribal authority and flexibility in the management of trust assets, including surface and potentially subsurface resources for energy development.

## Conclusion

A number of factors continue to motivate the ongoing discussion of federal trust responsibility and tribal self-determination in the area of tribal energy development. The June 2015 GAO report described herein drew additional attention from Congress, interested tribes, and officials of the Obama administration. The future of energy development on tribal lands depends on whether this additional focus will result in broader support for a particular approach to addressing the issues identified by the GAO, many of which stem from the balance between tribal self-determination and the federal trust responsibility. As described above, the current proposals represent a broad range of perspectives on the future of self-determination and federal oversight, from maintaining the current tribal-federal relationship and working to improve the federal review and approval process to allowing each tribe to decide whether to remove tribal trust lands from federal ownership. Between these extremes lie proposals to expand or improve the existing TERA or HEARTH Act models, each of which presents its own complications. In addition, the Indian Trust Asset Reform Act proposes a recommitment of the federal trust responsibility but emphasizes the promotion of tribal self-determination for governmental authority and economic development, not just the federal protection and oversight of tribal resources. This commitment, along with the recognition that each tribe is in the best position to decide how to manage its own trust resources and may do so differently than the federal government, could help redefine the federal-tribal relationship in energy development and beyond. Ultimately, a new era of tribal self-determination appears just over the horizon, and, although the precise path from the current crossroads to that new era is presently unclear, it will most likely incorporate the concepts currently being debated in the context of energy development on tribal lands. ©

## Endnotes

<sup>1</sup>See Rob Roy Smith, *At a Complex Crossroads: Animal Law in Indian Country*, 14 ANIMAL L. 109 (2007); Judith V. Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631 (2006) (part of a 2005 symposium entitled “Indian Law at a Crossroads”); Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5 (1997); James T. Meggesto, *At a Crossroads: Promises and Puzzles for Tribal-State Relations After VAWA 2013*, EMERGING ISSUES IN TRIBAL-STATE RELATIONS 101 (Aspatore) (2014 ed.).



<sup>2</sup>See Kevin Gover, *A Trust for the 21st Century*, 46 NAT. RES. J. 317, 320-33 (2006).

<sup>3</sup>It is possible that, during the finalization of this article for publication, Congress or the Obama administration has further considered and enacted one or more of these proposals. For example, on Dec. 10, 2015, the Senate passed the Indian Tribal Energy Development and Self-Determination Act of 2015, S. 209, 114th Cong. (2015), discussed *infra*, and subsequently referred the bill to the House for further consideration. 161 CONG. REC. S8617 (Dec. 10, 2015). Hopefully, this article's analysis will broaden understanding and assist with implementation of any of these proposals that may ultimately be adopted.

<sup>4</sup>Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 786 (2006).

<sup>5</sup>See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 15.00-03, at 993-99 (on trust status of land); 5.02-03, at 391-405 (on federal authority over tribal trust land); 6.02[2][b], at 507-11 (on limits of tribal authority over non-Indian owned land) (Nell Jessup Newton, ed., 2012) [hereinafter, COHEN'S HANDBOOK].

<sup>6</sup>Judith Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L. J. 541, 543 (1993).

*continued on page 85*



Monte Mills is an assistant professor and co-director of the Margery Hunter Brown Indian Law Clinic at the Alexander Blewett III School of Law at the University of Montana. From 2005–15, Mills was the director of the legal department for the Southern Ute Indian Tribe in Colorado. © 2016 Monte Mills. All rights reserved.

<sup>7</sup>25 U.S.C. § 2102(a).

<sup>8</sup>25 U.S.C. § 2103(e).

<sup>9</sup>For background on the federal government's trust responsibility to Indian tribes, see COHEN'S HANDBOOK § 5.04[3], at 412-16.

<sup>10</sup>Gover, *A Trust for the 21st Century*, *supra* n. 2, at 350.

<sup>11</sup>U.S. DEP'T OF ENERGY, OFFICE OF INDIAN ENERGY, *Developing Clean Energy Projects on Tribal Lands: Data and Resources for Tribes*, 3 (2012), [www.nrel.gov/docs/fy13osti/57048.pdf](http://www.nrel.gov/docs/fy13osti/57048.pdf).

<sup>12</sup>See "Economic Development: Hearing Before the Senate Committee on Indian Affairs", 109th Cong. 112 (2006) (Statement of Dr. Robert W. Middleton) (also noting that these estimates may not adequately account for additional potential resources available through new recovery technologies, such as hydraulic fracturing).

<sup>13</sup>U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-50, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands* (2015).

<sup>14</sup>See, e.g., Elizabeth Kronk Warner, *Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811 (2012).

<sup>15</sup>25 C.F.R. § 224.52(c) (emphasis added).

<sup>16</sup>See, e.g., "S. 2132, Indian Tribal Energy Development and Self-Determination Act Amendments of 2014: Hearing Before the Senate Committee on Indian Affairs", 113th Cong. 4 (2014) (Statement of Hon. Kevin Washburn, asst. sec'y, Indian Affairs, U.S. Dep't of the Interior).

<sup>17</sup>U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* n. 13, at 2-3.

<sup>18</sup>See, e.g., Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, But Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031 (2013).

<sup>19</sup>U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 36-37.

<sup>20</sup>See Oversight Hearing on "The GAO Report on Indian Energy Development: Poor Management by BIA Has Hindered Development on Indian Lands" Before the Senate Committee on Indian Affairs, 114th Cong. (2015) (written testimony of Lawrence S. Roberts, principal deputy assistant secretary, Indian Affairs), 1, [www.indian.senate.gov/sites/default/files/upload/files/10.21.15%20Larry%20Roberts%20Testimony.pdf](http://www.indian.senate.gov/sites/default/files/upload/files/10.21.15%20Larry%20Roberts%20Testimony.pdf) (last visited Dec. 1, 2015).

<sup>21</sup>*Id.* at 6.

<sup>22</sup>Washburn statement, *supra* n. 16, at 15 (stating in response to questioning that "[s]ince [the HEARTH Act] is something we all agree on, we think that model is a good one to follow" because the HEARTH Act "deal[s] with some of the same issues we are trying to deal with ..." through amendments to the TERA process).

<sup>23</sup>Roberts statement, *supra* n. 20, at 4.

<sup>24</sup>Washburn statement, *supra* n. 16, at 6, 17.

<sup>25</sup>Compare 25 C.F.R. pt. 162 (surface leasing regulations) with 25 C.F.R. pt. 211 (implementing IMLA) and 25 C.F.R. pt. 225 (implementing IMDA).

<sup>26</sup>S. 209, 114th Cong. § 205 (2015).

<sup>27</sup>*Id.* at 15.

<sup>28</sup>OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, Statement of Administration Policy, H.R. 538—Native American Energy Act, [www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr538r\\_20151007.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr538r_20151007.pdf) (Oct. 7, 2015).

<sup>29</sup>See, e.g., Rob Capriccioso, *The American Indian Empowerment Act – A 'Radical' Tribal Land Plan*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (March 4, 2012), [available at indiancountrytodaymedianetwork.com/2012/03/04/american-indian-empowerment-act-radical-tribal-land-plan-101107](http://available.atindiancountrytodaymedianetwork.com/2012/03/04/american-indian-empowerment-act-radical-tribal-land-plan-101107).

<sup>30</sup>Don Young, *The American Indian Empowerment Act: Setting the Record Straight*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (March 30, 2012), [indiancountrytodaymedianetwork.com/2012/03/30/american-indian-empowerment-act-setting-record-straight](http://indiancountrytodaymedianetwork.com/2012/03/30/american-indian-empowerment-act-setting-record-straight).

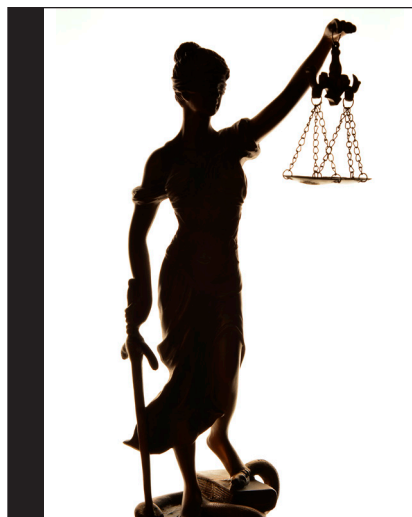
<sup>31</sup>S. 383, 114th Cong. §§ 102, 201-206 (as reported by S. Comm. on Indian Affairs, July 29, 2015).

<sup>32</sup>*Id.* at § 204(a)(2)(G).

<sup>33</sup>*Id.* at §§ 204(b)(1)(B), 204(c).

<sup>34</sup>*Id.* at § 206(b).

<sup>35</sup>See Oversight Hearing on "A Path Forward: Trust Modernization and Reform for Indian Lands," Before the Senate Committee on Indian Affairs, 114th Cong. (2015) (prepared statement of Hon. Ernest L. Stensgar, vice-chair Coeur d'Alene tribe; chair, Trust Reform Committee, Affiliated Tribes of Northwest Indians), 2, [www.indian.senate.gov/sites/default/files/upload/files/Stensgar-ATNI-CDA%20testimony%20for%20S.383.pdf](http://www.indian.senate.gov/sites/default/files/upload/files/Stensgar-ATNI-CDA%20testimony%20for%20S.383.pdf) (last visited Dec. 10, 2015) (emphasis in original).



## Foundation of the FBA Memorials and Remembrances Gift Program

With a tax-deductible gift to the Foundation of the FBA, members of the legal profession, the public, business organizations, charitable trusts, or other foundations may create a memorial to a deceased person. Gifts may also be made in honor of someone, an anniversary, birthday, or any other occasion. Your gift helps fund educational and charitable programs that promote public understanding of the law and enhance the cause of justice. Learn more and donate at [www.fedbar.org/Foundation](http://www.fedbar.org/Foundation).