

ENERGY DEVELOPMENT IN INDIAN COUNTRY:
WORKING WITHIN THE REALM OF INDIAN LAW AND MOVING
TOWARDS COLLABORATION¹

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I. INTRODUCTION

American Indian tribes are uniquely poised to influence the energy landscape in the twenty-first century. Indian reservations and trust lands outside of Alaska contain a wealth of energy resources, including an estimated four percent of known U.S. oil and gas reserves, forty percent of uranium deposits, and thirty percent of western coal reserves.² As of 2001, annual production from Indian lands totaled 13.1 billion barrels of oil, 280 billion cubic feet of natural gas, and 29.4 million tons of coal.³ Tribal lands also contain unconventional hydrocarbon resources, such as oil shale and tar sands. In Utah, roughly twenty percent of the state's total oil shale resource is located on tribal lands.⁴ Likewise, approximately seventy-one

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² COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.01 (Nell Jessup Newton et al. eds., 2005 ed. & Supp. 2009) [hereinafter COHEN] (citing JOE MITCHELL, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIANS AND ALASKA NATIVE RELATIONS, App. D, D.-1 (1997), *available at* <http://www.fs.fed.us/people/tribal/tribexd.pdf>).

³ NEIL G. WESTESEN, ROCKY MOUNTAIN MINERAL LAW FOUND., FROM MONTANA TO PLAINS COMMERCE BANK AND BEYOND: THE SUPREME COURT'S VIEW OF TRIBAL JURISDICTION OVER NON-MEMBERS, NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS, PAPER NO. 9, at 2 (2011).

⁴ MICHAEL D. VANDEN BERG, UTAH DEP'T OF NATURAL RES., SPECIAL STUDY 128, BASIN-WIDE EVALUATION OF THE UPPERMOST GREEN RIVER FORMATION'S OIL-SHALE

percent of the surface estate underlying the Hill Creek Special Tar Sands Area is under tribal control.⁵ Although a commercial oil shale or tar sands industry has not yet developed in the United States, interest in these unconventional fuels remains high. Finally, tribes have tremendous potential to generate renewable energy through wind and solar power. An estimated 535 billion kWh/year of wind energy (equivalent to fourteen percent of current U.S. total annual energy generation) and 17,600 billion kWh/year of solar energy potential (equivalent to 4.5 times the total U.S. electric generation in 2004) exist on Indian lands.⁶ Overall, the Bureau of Indian Affairs estimates that while Indian lands comprise only five percent of the United States, they contain approximately ten percent of all energy resources.⁷

Despite the extensive availability of energy resources on tribal lands, development is often a slow and encumbered process. Energy development within Indian country is subject to unique requirements, and an understanding of both the underlying federal law and jurisdictional requirements is necessary. American Indian law is a complicated area of law, subject to different interpretations and persistent uncertainty. However, the notion of tribal sovereignty creates the bedrock upon which tribes stand as independent political entities. Armed with sovereignty and a unique trust relationship with the United States, “tribes have the potential to play an increasingly important role in the nation’s energy supply” and should not be ignored.⁸

Over 560 tribes are federally recognized in the United States, each with varying amounts of land and resource potential. While northern plains tribes have extensive renewable energy resources,⁹ other tribes have focused on oil and gas development. Indeed, during 2010, 31.3 percent of oil production and 6.2 percent

RESOURCE, UINTAH BASIN, UTAH AND COLORADO 1 (2008), *available at* <http://geology.utah.gov/online/ss/ss-128/ss-128txt.pdf>.

⁵ ROBERT KEITER ET AL., UNIV. OF UTAH, LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES: TOPICAL REPORT OCTOBER 1, 2009 TO DECEMBER 31, 2010 30 (2011), *available at* <http://repository.icse.utah.edu/dspace/handle/123456789/11026>.

⁶ DOUGLAS C. MACCOURT, RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY: A HANDBOOK FOR TRIBES 1–2 (2010).

⁷ LIZANA K. PIERCE, DEP’T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY (EERE), DOE’S TRIBAL ENERGY PROGRAM, PowerPoint Presentation, *available at* http://apps1.eere.energy.gov/tribalenergy/pdfs/0510review_tep.pdf.

⁸ John L. Williams, *Energy Development in Indian Country*, @LAW, Summer 2010, at 12, *available at* <http://www.cwlaw.com/wp-content/uploads/2010/03/Energy-Development-in-Indian-Country.pdf> (emphasizing the opportunity for tribes to become involved in energy development and the need for investors “to understand the interplay among federal Indian law, energy law, energy markets, tribal culture, and tribal politics”).

⁹ *Energy Development for Indians: Harvesting the Air – Tribes Struggle to Develop New Projects on the Plains*, THE ECONOMIST (Mar. 31, 2010), <http://www.economist.com/node/15819117> (“Tribes in the Dakotas and Montana alone have enough wind to generate more than 886m megawatt hours a year.”).

of natural gas production within Utah occurred on Indian land.¹⁰ Regardless of the specific resource type, the ability to develop their own energy resources allows tribes to assert more control over their land by exercising their sovereignty to make land decisions previously controlled by the federal government and to achieve economic independence. Moreover, such development helps contribute to the general energy security of the United States.

This Article seeks to outline the major issues related to tribal jurisdiction and energy development in Indian country. Section II explores the legal landscape by considering the unique relationship between the federal government and tribes, defining Indian country, and analyzing the regulatory framework that exists within it. In light of the complex legal backdrop behind energy development in Indian country, Section III discusses what tribes and investors should be aware of if they move forward with development, primarily the leasing process involved. Finally, Section IV discusses the implications of energy development in Indian country and the likelihood of achieving true collaboration in such development.

II. UNDERSTANDING THE LEGAL LANDSCAPE: SOVEREIGNTY, INDIAN COUNTRY, AND THE REGULATORY FRAMEWORK

Energy development in Indian country is guided by Indian law principles; namely, a tribe's ability to assert itself as a sovereign entity and to exercise various sovereign powers. However, tribal sovereignty and jurisdiction are evolving concepts, and the extent of tribal authority is often subject to dispute. Likewise, what constitutes Indian country is not always clear, and even if boundary lines are well settled, tribal regulation may be limited to Indians or retained by the federal government. As a result, "[f]ew areas of federal Indian law rival the controversy surrounding the nature and scope of tribal sovereignty and jurisdiction."¹¹

In order to set the stage for discussing energy development in Indian country, this section provides an overview of applicable Indian law. First, the concept of tribal sovereignty is discussed, followed by an explanation of Indian country. The section concludes with an analysis of the regulatory framework that exists within Indian country.

A. Tribal Sovereignty: The Power to Govern and Shape a Society

*Tribal sovereignty today finds at least as much meaningful definition in the growth, development and day-to-day functioning of effective tribal governments as it finds in the volumes of the law library. Far from being relics of a bygone era, Indian tribal powers bear the fine burnish of everyday use.*¹²

¹⁰ Email from John Rogers, Assoc. Dir., Utah Div. of Oil, Gas and Mining, to John Ruple (Feb. 17, 2011, 5:27:47 PM MST) (on file with authors).

¹¹ N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 5 (2008).

¹² MacArthur v. San Juan County, 391 F. Supp. 2d 895, 940 (D. Utah 2005).

Sovereignty is a powerful asset, woven into the complex realm of federal Indian law. Simply stated, Indian sovereignty is the exercise of the powers of self-government.¹³ “Understanding history is crucial to understanding doctrinal developments in the field of Indian law.”¹⁴ Indian tribes are sovereign nations because they existed before the founding of the United States and dealt with the federal government not as a political subdivision, but as independent governments.¹⁵ In entering into agreements with the federal government, tribes retained those powers not expressly granted away.¹⁶ While tribes have lost much to wars, treaties, and unilateral federal acts, they retain important, though somewhat limited, powers of sovereigns.

Sovereignty is “the most commanding concept in all of Indian law”¹⁷ and “provides a backdrop against which applicable treaties and federal statutes must be read.”¹⁸ As sovereign nations, Indian tribes have a unique legal status that differentiates them from other racial or ethnic groups.¹⁹ Indeed, “tribes are the only political entities or groups, besides the federal government and states, to be formally recognized as possessing some degree of inherent sovereignty within the United States.”²⁰ Early Supreme Court cases affirmed this legal status, referring to tribes as “domestic dependent nations.”²¹ Consequently, tribes have a trust

¹³ See Alex Tallchief Skibine, *Deference Owed Tribal Courts’ Jurisdictional Determination: Towards Co-Existence, Understanding and Respect Between Different Judicial Norms*, 24 N.M. L. REV. 191, 191 (1994). See also Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 318 (2009) (“Sovereignty has a thousand shades, but at its core, sovereignty means power: the power to govern, the power to determine the shape of a society.”).

¹⁴ COHEN, *supra* note 2, § 1.01.

¹⁵ *Id.* § 1.02 (providing background on the treatment of tribes under international law).

¹⁶ *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) (“[O]ur cases recognize that the Indian tribes have not given up their full sovereignty The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status”).

¹⁷ WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW IN INDIAN COUNTRY* § 1.1, 5 (2005).

¹⁸ *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172 (1973).

¹⁹ See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (finding that the federal “Indian preference” within the Bureau of Indian Affairs creates a political, rather than racial, classification).

²⁰ Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1020 (2008).

²¹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) *accord* COHEN, *supra* note 2, at 1 (“They are denominated domestic because they are within the United States and dependent because they are subject to federal power.”).

relationship with the United States that serves as the basis for the Indian trust doctrine.²² The doctrine recognizes a “sovereign trusteeship” that is codified in the Northwest Ordinance of 1787 and explained by Chief Justice John Marshall: “This relation [is] that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”²³ Therefore, tribes retain a government-to-government relationship with the United States and are able to exercise inherent powers in furtherance of self-determination.

Due to the course of dealing between the federal government and Indians, a “duty of protection” arose and constitutes one component of the trust doctrine.²⁴ Under the trust doctrine, the United States has a duty to act in good faith toward tribes in the exercise of its duty to protect them, similar to that of a trustee and beneficiary.²⁵ Because of its trust duties, Congressional actions toward tribes are reviewed under a rational basis test.²⁶ Unique canons of construction, specific to tribes, also stem from the trust relationship between the United States and Indian tribes, and include the following presumptions: 1) clear and unequivocal evidence of congressional intent is required to reduce reservation boundaries, and 2) ambiguities are to be resolved in favor of the Indians.²⁷ “Chief Justice Marshall grounded the Indian law canons in the values of structural sovereignty, not judicial solicitude for powerless minorities. . . . Accordingly, statutes and treaties are broadly construed in favor of protecting tribal property and sovereignty.”²⁸

Despite these strong affirmations of tribal rights and powers, federal policies have not always supported tribal sovereignty and in some cases, have sought to

²² RODGERS, JR., *supra* note 17, § 1:9, at 219–20 (this duty has been expressed in various ways, such as acting in the best interest of Indians, demonstrating the highest fiduciary standards, acting as a friend and protector, and dealing fairly with the Indians).

²³ *Worcester v. George*, 31 U.S. 515, 555 (1832).

²⁴ *See United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

²⁵ *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (describing Indians as in a “state of pupilage[;] [t]heir relation to the United States resembles that of a ward to his guardian.”).

²⁶ Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 277 (2003) (“Congress’ actions must be ‘tied rationally to the fulfillment of [its] unique obligations toward the Indians.’” (citing *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977))).

²⁷ *Hagen v. Utah*, 510 U.S. 399, 422 (1994) (Blackmun, J., dissenting); *see also Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (“[A]ny Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes.”) (emphasis added); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (“[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” (quoting *McCalanhan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 174 (1973))).

²⁸ COHEN, *supra* note 2, § 2.02[2], at 123. *See also* Alexander Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 269–73 (2010) (discussing when to apply the Indian canons of statutory construction).

limit the reach of the trust doctrine.²⁹ However, since the 1970s, both the president and Congress have supported tribal self-governance and implemented policies to promote it.³⁰ President Obama released his Indian policy early in his presidency, making him the fifth consecutive president to issue a formal Indian policy.³¹ Among other federal initiatives, Executive Order 13,175 requires federal agencies to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”³²

Furthermore, the Supreme Court has recognized that “Congress’ objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress’ overriding goal of encouraging ‘tribal self-sufficiency and economic development.’”³³ As part of this broad federal commitment, tribes have the power to manage the use of their land and resources,³⁴ which allows them to influence energy development within Indian country.

B. Indian Country: What Is It and What Does It Mean?

Natural resource development in Indian country raises unique questions of law, including who has the jurisdiction to issue leases and required environmental permits, as well as the jurisdiction to levy taxes. Not surprisingly, jurisdictional disputes frequently arise among states, tribes, and the federal government since all three entities are reluctant to cede jurisdiction or sovereignty. Determining proper jurisdiction depends heavily on two questions: 1) who are the parties involved, and 2) where did the event take place? Under the first step, tribal jurisdiction over tribal members is a matter of internal tribal law and unlimited by federal law.³⁵

²⁹ See generally DUTHU, *supra* note 11, at 3–62 (illustrating the division among the federal branches in their view of tribal sovereignty and federal Indian policy).

³⁰ Subsequent cases have consistently recognized the federal government’s commitment to promoting Indian self-determination. See, e.g., *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (emphasizing that the federal government is “committed to a policy of supporting tribal self-government . . .”). For a history of the federal policies, see ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 15–162 (2 ed. 2008).

³¹ See EPA, American Indian Environmental Office Tribal Portal, www.epa.gov/tp/basicinfo/presidential-docs.html (last visited Nov. 11, 2011).

³² Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000); see also Government-to-Government Relationship with Tribal Governments, Executive Memorandum (Sept. 23, 2004) (recommitting the federal government to work with tribal governments on a government-to-government basis and to support tribal sovereignty and self-determination), available at <http://www.epa.gov/tp/pdf/president-bush-2004.pdf>.

³³ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

³⁴ *MacArthur v. San Juan County*, 391 F.Supp.2d 895, 941 (D. Utah 2005).

³⁵ COHEN, *supra* note 2, § 7.02[1][a], at 599.

However, jurisdiction over non-Indians or nonmembers is more complex and depends on the geographic context. Therefore, this section will focus on the second step in determining jurisdiction by identifying what constitutes Indian country. As the most prominent type of Indian country, the section concludes by discussing reservations and the difficulty in determining their boundaries.

1. Defining “Indian country”

Indian country, for jurisdictional purposes, was first defined by Congress in the Indian Trade and Intercourse Act of 1834:

Be it enacted . . . [t]hat all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purpose of this act, be taken and deemed to be the Indian country.³⁶

This statutory definition was ultimately repealed when the compilers of the U.S. Revised Statutes omitted it in 1874.³⁷ However, courts continued to apply the definition in cases arising under statutes referencing “Indian country.”³⁸ As a result, the 1834 title-dependent definition of Indian country became federal common law and remained controlling until the Supreme Court expanded the judicial definition of Indian country in 1913.³⁹

Based on title, the Supreme Court initially differentiated between Indian country and Indian reservations. Indian country initially included lands to which the Indians retained original title.⁴⁰ Absent a treaty provision or act of Congress,

³⁶ Indian Trade and Intercourse Act of June 30, 1834, Sess. 1, ch. 161, 4 Stat. 729.

³⁷ See omissions from 18 Stat. 1085, tit. 74 (1874) (omitting the definition of Indian Country from Rev. Stat. § 5596 (1873)). See also Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517, 525 (2009) (discussing omission).

³⁸ See, e.g., *Donnelly v. United States*, 228 U.S. 243, 268–69 (1913) (explaining that the 1834 act was not reenacted in the Revised Statutes, yet the Supreme Court continued to apply its definition of Indian country in court decisions); *Ute Indian Tribe v. Utah Ute Indian Tribe I*, 521 F. Supp. 1072, 1082 (D. Utah 1981).

³⁹ See *Ute Indian Tribe*, 521 F. Supp. at 1082–84 (discussing the judicial definition of Indian country).

⁴⁰ See *United States v. Celestine*, 215 U.S. 278, 285 (1909).

land ceased to be Indian country if title was lost.⁴¹ The federal government can extinguish Indian title by purchase or simply taking possession of the land.⁴²

In contrast to Indian country, a reservation was defined as any body of land Congress reserved from sale or other means of disposal for any purpose, such as military or Indian occupancy and use.⁴³ Once established, all tracts were included within the reservation until separated by Congress.⁴⁴ While the term Indian country was directly tied to Indian land ownership, Indian reservations, as a result of allotment and other federal policies, might potentially contain lands to which Indian title had been extinguished.⁴⁵ Therefore, some lands, although within the boundaries of an Indian reservation, were not considered Indian country if title to those lands had been terminated.⁴⁶ Four years after “reservation” was first defined, the judicial definition of Indian country was expanded to include lands that had been reserved and lawfully set apart as an Indian reservation.⁴⁷ Thereafter, reservation boundaries became the material jurisdictional question, regardless of how title was secured.

Ultimately in 1948, Congress codified a statutory definition of Indian country as:

- (a) all land within the limits of any *Indian reservation* under the jurisdiction of the United States government, notwithstanding 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

⁴¹ See *id.* (Tribes hold their lands by “Indian title,” which gives tribes the right to occupy the land and to retain possession of it). See also *Johnson v. M’Intosh*, 21 U.S. 543, 604 (1823) (holding that with an “Indian title,” tribes are incapable of conveying their land directly to individuals, through sale or other means).

⁴² *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974) (“Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.”).

⁴³ *Celestine*, 215 U.S. 278, at 285–86. Notably, the Supreme Court also recognized that reservations may be created by executive order or treaty. *Id.*

⁴⁴ *Id.* at 285 (“[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated there from by Congress.”).

⁴⁵ Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517, 525 (2009). During the allotment era, the federal government divided tribal lands into individual allotments for tribal members and opened surplus land to settlement by non-Indians, extinguishing Indian title in many cases.

⁴⁶ *Id.* at 522–23.

⁴⁷ *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (“[Indian country] cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed ‘Indian country,’ . . . than a tract of land that, being a part of the public domain is lawfully set apart as an Indian reservation.”).

(c) all *Indian allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same.⁴⁸

As a result, Indian country today includes the following: Indian reservations, dependent Indian communities, and Indian allotments. Although originally enacted as part of the Federal Criminal Code, this definition has been extended to civil cases as well.⁴⁹ Each of these three categories of land deserves further attention.

Section 1151(a) of the 1948 Act recognizes any Indian reservation as Indian country, whether established by a treaty, statute, executive order, or administrative proclamation authorized under 25 U.S.C. § 467. The term also includes informal reservations created without formal declaration,⁵⁰ as well as rights of way running through the reservation.⁵¹ Even land owned by non-Indians in fee simple is Indian country if it is located within the exterior boundaries of an Indian reservation.⁵² Additionally, “[t]he Supreme Court has held that tribal trust land is the equivalent of a reservation and thus Indian country.”⁵³ While the 1948 Act helped clarify what constitutes Indian country, the use of the phrase “within the limits of any Indian reservation” has led to extensive reservation boundary litigation, which will be discussed in more detail later.

Dependent Indian communities refer to “Indian lands that are neither reservations nor allotments . . . and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian

⁴⁸ 18 U.S.C. § 1151 (2006) (emphasis added). The 1948 codification of Indian country relied on previous Supreme Court cases finding dependent Indian communities and Indian allotments to be Indian country. *See also* *United States v. Sandoval*, 231 U.S. 28 (1913) (upholding congressional designation of Pueblo Indian lands in New Mexico as Indian country); *United States v. Pelicans*, 232 U.S. 442, 449 (1914) (finding specified allotments to be Indian country since they were “validly set apart for the use of the Indians as such, under the superintendence of the government.”).

⁴⁹ *See, e.g.*, *Alaska v. Native Vill. of Venetie Trib. Gov’t*, 522 U.S. 520, 527 (1998); *Brough v. Appawora*, 553 P.3d 934, 936 (Utah 1976) (Tuckett, J., dissenting) (citing *Decoteau v. District County Court*, 420 U.S. 425 (1975); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164 (1973); and *United States v. Celestine*, 215 U.S. 278 (1909)). *See also* 40 C.F.R. § 144.3 (2011) (EPA regulations defining “Indian lands,” over which it retains jurisdiction, as synonymous with “Indian country” under § 1151 for purposes of administering the Safe Drinking Water Act).

⁵⁰ *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995) (citing *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993)). *See also* CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* 54 (Clay Smith ed., 3rd ed. 2004) [hereinafter *AMERICAN INDIAN LAW DESKBOOK*].

⁵¹ 18 U.S.C. § 1151(a) (2006).

⁵² *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (finding that “patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike”).

⁵³ COHEN, *supra* note 2, § 3.04[2][c], at 191 (citing *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)) (“[T]rust land is ‘validly set apart’ and thus qualifies as a reservation . . .”).

land; second, they must be under federal superintendence.”⁵⁴ Dependent Indian communities need not be located within a recognized reservation, but must be set aside by “some explicit action by Congress (or the Executive, acting under delegated authority) . . . to create or to recognize Indian country.”⁵⁵ Additionally, a dependent Indian community does not have to be held in trust by the federal government.⁵⁶ However, it must be “sufficiently ‘dependent’ upon the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.”⁵⁷

Finally, trust allotments⁵⁸ include land allotted in trust to a tribal member under an allotment act.⁵⁹ Such lands may remain in trust, or be owned in fee by an Indian with a restriction on alienation in favor of the United States.⁶⁰ Allotments generally occurred during the allotment era as a means of instilling in Indians “the idea of individual property and, through it, civilization.”⁶¹ Following the Civil War, theories of “civilization” and assimilation gained prominence, and in 1871, Congress formally ended the treaty-making era.⁶² Proponents of assimilation argued that if Indians adopted the habits of a civilized life, they would need less land and the surplus could be made available to white settlers.⁶³

Under the General Allotment Act of 1887 (also known as the Dawes Act), tribal members surrendered their undivided interest in the tribally owned reservation in return for a personally assigned divided interest that was allotted to them individually.⁶⁴ Allotment acts varied greatly, including provisions for outright

⁵⁴ *Native Vill. of Venetie Trib. Gov’t*, 522 U.S. at 520.

⁵⁵ *Id.* at 531 n.6; see also ALEXANDER TALLCHIEF SKIBINE, ROCKY MOUNTAIN MINERAL LAW FOUND., JUDICIALLY DISMANTLING INDIAN COUNTRY IN THE 10TH CIRCUIT: LESSONS FROM HYDRO RESOURCES AND OSAGE NATION, PAPER NO. 10 (2011) (discussing relevant case law and how to distinguish dependent Indian communities).

⁵⁶ See *United States v. Sandoval*, 231 U.S. 28, 48–49 (1913) (holding that Pueblo owned land in fee in communal title was a dependent community).

⁵⁷ *Native Vill. of Venetie Trib. Gov’t*, 522 U.S. at 531.

⁵⁸ Trust allotments are distinct from “trust lands,” which are lands acquired by the United States on behalf of individual Indians and tribes under 25 U.S.C. § 465, or another express congressional grant. See AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 57–59 (discussing the difference between trust allotments and trust lands).

⁵⁹ See *United States v. Pelican*, 232 U.S. 442, 449 (1914) (“[T]he [allotted] lands remained Indian lands, set apart for Indians under governmental care.”). The Allotment policy was abandoned in 1934. See Indian Reorganization Act of 1934, ch. 576, § 1, 48 Stat. 984 (1934) (current version at 25 U.S.C. § 461 (2006)).

⁶⁰ *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999).

⁶¹ COHEN, *supra* note 2, § 1.03(6)(b).

⁶² See 25 U.S.C. § 71 (2006) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as . . . [a] power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.”).

⁶³ COHEN, *supra* note 2, § 1.04.

⁶⁴ 28 Stat. 388.

cession, cession in trust, restoration to the public domain, opening for settlement, or mandated allotment without opening the reservation at all.⁶⁵ However, allotment did not turn Indians into farmers as the reformers had hoped, and a substantial portion of the remaining Indian land passed out of native hands. “Of the approximately 156 million acres of Indian land in 1881, less than 105 million remained by 1890, and less than 78 million by 1900.”⁶⁶

Ownership became fragmented when Congress opened surplus or unallotted land to non-Indian settlement; however, whether surplus lands were removed from reservation status is a question of congressional intent.⁶⁷ In some instances, the original (exterior) reservation boundary may remain intact, even where lands within the original reservation boundary were dedicated to non-reservation purposes. Therefore, each act affecting land tenure within the reservation must be examined to determine whether Congress intended to diminish the reservation by looking at the face of the act, legislative history, events surrounding the act’s passage, and subsequent treatment of the opened lands.⁶⁸ This determination can be a daunting task as revisions and allotments may be contained in dozens of statutes, executive orders, and secretarial orders.⁶⁹ Nonetheless, determining reservation boundaries is an important issue, and therefore, warrants separate consideration below.

2. *Adjudicating Reservation Boundaries: A Matter of Congressional Intent*

Courts have struggled to determine the extent and limitations of tribal jurisdiction, often resulting in conflicting holdings. A major factor in this analysis is identifying the boundaries of Indian reservations. Although a seemingly easy task, reservation boundaries have not remained static, requiring courts to conduct extensive historical investigations into records that often date back more than a century. A series of cases involving the Ute Indian tribe’s reservation illustrate the difficulty in adjudicating reservation boundaries to ascertain proper jurisdiction.

In 1976, the Supreme Court of Utah upheld the Utah district court’s imposition of a default judgment against an enrolled member of the Ute Indian

⁶⁵ See *Ute Indian Tribe I*, 521 F. Supp. at 1152; see also D. Otis, *The Dawes Act and the Allotment of Indian Lands* (Prucha ed. 1973), originally printed as a *History of the Allotment Policy, in Readjustment of Indian Affairs, Hearings, House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 9, at 428–89 (1934)*.

⁶⁶ COHEN, *supra* note 2, § 1.04.

⁶⁷ *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (notably, tribal consent is not necessary); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress can allot and open an Indian reservation without tribal consent).

⁶⁸ AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 74 (citing *United States v. Web*, 219 F.3d 1127, 1132 (9th Cir. 2000)).

⁶⁹ Many of the acts and orders impacting land tenure within the Ute Indian Tribe’s reservation are contained in an appendix to *Ute Indian Tribe I*, 521 F. Supp. at 1157–88.

tribe who had been involved in an automobile accident on the reservation.⁷⁰ The case revolved around whether district courts had jurisdiction over tribal members within an area of the reservation that had previously been subject to allotment. Ultimately the State Supreme Court held that district courts had jurisdiction and based its holding on the premise that the tribe had lost all rights in lands not allocated to it.⁷¹ The Ute Indian tribe appealed to the United States Supreme Court, which vacated and remanded the state court decision for further consideration,⁷² in light of its recently issued opinion in *Rosebud Sioux Tribe v. Kneip*.⁷³ In *Rosebud Sioux Tribe*, the United States Supreme Court clarified that opening a reservation to settlement does not automatically deprive the opened area of its status as a reservation.⁷⁴ The Court emphasized that only Congress can terminate a reservation and that intent to terminate must either be expressed on the face of the congressional act or clear from the surrounding circumstances and legislative history.⁷⁵

Five years later, the judicial system was called upon again to conduct a lengthy investigation into legislative intent when the Ute Indian Tribe sought declaratory relief to establish the exterior boundary of their reservation, define the force and effect of the tribe's Law and Order Code within those boundaries, and enjoin the State of Utah from interfering with the tribe's enforcement of that Code.⁷⁶ Even though lands within the reservation were opened to homesteading by non-Indians in 1905, the Ute Indian Tribe argued that it should have legal jurisdiction because Congress never intended the tribe to lose such jurisdiction. After an extensive historical review, including a discussion of how multiple reservations had been created, combined, and opened to non-Indian settlement, the district court held that:⁷⁷ 1) the Uncompahgre Reservation was disestablished by Congress,⁷⁸ 2) the Uintah Valley Indian Reservation was diminished by Congress through various withdrawals,⁷⁹ and 3) the Uintah Valley Indian Reservation is Indian country and includes the Hill Creek Extension.⁸⁰ In support of its decision,

⁷⁰ *Brough v. Appawora*, 553 P.2d 934 (Utah 1976), *vacated and remanded in* *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

⁷¹ *Brough*, 553 P.2d at 935.

⁷² *Appawora v. Brough*, 431 U.S. 901 (1977).

⁷³ *Rosebud Sioux Tribe*, 430 U.S. 584 (1977).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Ute Indian Tribe I*, 521 F. Supp. 1072.

⁷⁷ *Id.* at 1153–54.

⁷⁸ *Id.* at 1106 (discussing the Act of June 7, Ch. 3 1897, 30 Stat. 62, 87).

⁷⁹ *Id.* at 1099–1100 (discussing the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069 (National Forest withdrawal); Act of April 4, 1910, ch. 140, 36 Stat. 269, 285 (Strawberry Reclamation Project)).

⁸⁰ *Id.* at 1148 (discussing the Act of March 11, 1948, ch. 108, 62 Stat. 72). The Hill Creek Extension describes grazing lands that fall largely within the original boundaries of the Uncompahgre Reservation. After the Uncompahgre Reservation was disestablished, the Hill Creek Extension was set apart and added to the “new” Ute Reservation (i.e., the Uintah and Ouray Reservation).

the district court reasoned that Congress would not intend the impractical result of “checkerboard jurisdiction” over trust and fee lands, absent specific language to that effect.⁸¹

Despite the district court’s careful analysis of legislative history, the case was appealed multiple times. The Court of Appeals in *Ute Indian Tribe II* found congressional intent to diminish the reservation and held that none of the disputed lands remained within the original reservation boundaries.⁸² On rehearing before an en banc panel of the Court of Appeals, *Ute Indian Tribe III* held that Congress had not expressed such clear intent and that all of the disputed lands retained their reservation status, including both lands withdrawn and the Uncompahgre Reservation.⁸³ However, in a subsequent unrelated action, the United States Supreme Court analyzed congressional intent to determine the boundaries of the same reservation and ruled that the Uintah Indian Reservation had been diminished.⁸⁴ Ultimately, the Tenth Circuit Court of Appeals modified its judgment in *Ute Indian Tribe V* to be consistent with the United States Supreme Court decision, holding that the Uintah Valley Reservation had been “‘diminished’ – not ‘disestablished,’ ‘eliminated,’ or ‘terminated.’”⁸⁵ Diminishment did not remove lands from the reservation, leaving the external boundary of the reservation intact, as set forth in *Ute Indian Tribe III*.⁸⁶

The present reservation serving the Ute Indian Tribe is known as the Uintah and Ouray Reservation.⁸⁷ The reservation’s exterior boundary is defined by the original boundaries of the Uintah Valley Reservation and the Uncompahgre Reservation plus the Hill Creek Extension. However, the current reservation was diminished to a subset of lands within the exterior boundary, by allotment coupled with congressional and executive department action dedicating reservation lands to other purposes. More specifically, the Uintah Valley Reservation was allotted and reduced to the extent that unallotted lands within the reservation were opened for settlement under the 1902–05 legislative acts and not returned to tribal

⁸¹ *Id.* at 1092.

⁸² *Ute Indian Tribe v. Utah (Ute Indian Tribe II)*, 716 F.2d 1298 (10th Cir. 1983).

⁸³ *Ute Indian Tribe v. Utah (Ute Indian Tribe III)*, 773 F.2d 1087, 1093 (10th Cir. 1985).

⁸⁴ *Hagen v. Utah*, 510 U.S. 399 (1994).

⁸⁵ *Ute Indian Tribe v. Utah (Ute Indian Tribe V)*, 114 F.3d 1513, 1530 (10th Cir. 1997). Notably, the United States was not a party to any of the *Ute Indian Tribe* cases even though the United States may have had a trust obligation to intervene to protect the rights of the tribe. The potential effect of the federal government’s absence from this litigation is unclear.

⁸⁶ *Id.*

⁸⁷ Also called the Northern Ute Tribe, the Ute Indian Tribe is a single, federally recognized tribe comprised of three bands: the Whiteriver Band, Uncompahgre Band and the Uintah Band. “The Uintah band was the first to call the Uintah Basin their home, later the Whiteriver and Uncompahgre bands were removed from Colorado to the Uintah Valley Reservation, thus creating the Uintah & Ouray Reservation.” *Ute Indian Tribe Pub. Rel.* UTETRIBE.COM, <http://www.utetribe.com/memberServices/publicRelations/publicRelations.html> (last visited Sept. 11, 2011).

ownership.⁸⁸ The 1905 National Forest withdrawals dedicated land to non-reservation purposes, but did not disturb the external reservation boundaries; nor did the 1894 and 1897 allotment legislation diminish or disestablish the Uncompahgre Reservation, even though almost all of the land within the Uncompahgre Reservation was transferred out of Indian control.⁸⁹ As a result, the tribe and federal government retain some level of jurisdiction over all trust lands, National Forest lands, the Uncompahgre Reservation, and the three categories of non-trust lands under 18 U.S.C. § 1151 that remain within the boundaries of the Uintah Valley Reservation.⁹⁰

Determining the geographic boundaries of reservations is crucial to resolving jurisdictional issues. Since the principles and doctrines of Indian law generally operate only in Indian country, tribal exercise of their sovereign powers is often limited to within Indian country.⁹¹ The *Ute Indian Tribe* case law illustrates the complexity involved in adjudicating reservation boundaries. While the guiding principle of congressional intent may appear to be a straight-forward concept, in reality, its application is challenging and subject to different interpretations. Despite a presumption in favor of the continued existence of reservations⁹² and review of the same historical facts, the district court, state court, and United States Supreme Court arrived at varying conclusions regarding the Ute Indian Tribe reservation. Moreover, such “litigation shows no sign of abating”⁹³ and will play an important role in shaping the present day borders of Indian country, which in turn affects who has proper jurisdiction.

C. The Regulatory Framework: Navigating the Jurisdictional Maze in Indian Country

Once the status of the land in question is ascertained, the next issue is to resolve the relative powers of the local tribe, the state, and the federal government

⁸⁸ *Ute Indian Tribe V*, 114 F.3d at 1528. In other words, lands, which passed in fee to non-Indians pursuant to the 1902–1905 allotment legislation, are no longer Indian country.

⁸⁹ *Id.* at 1528–29.

⁹⁰ *Id.* at 1530. A map of the current Uintah and Ouray reservation boundary and associated Indian country can be found in KEITER ET AL., *supra* note 5, at 54. A time line of major federal actions affecting reservation lands and Indian country jurisdiction can be found in *id.* at App. B.

⁹¹ Slonim, *supra* note 45, at 519. As discussed further in the Regulatory Framework section, in some circumstances, jurisdiction is no longer tied directly to geographic boundaries. With this shift, an argument exists that tribal sovereign interests may extend beyond tribal territories. *See* Skibine, *supra* note 20.

⁹² *Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

⁹³ Slonim, *supra* note 45, at 520 (“The United States Supreme Court itself decided seven reservation boundary cases between 1962 and 1998 Within the last year, the Seventh Circuit, the Eighth Circuit, and the Wyoming Supreme Court have all decided reservation boundary cases, and there are pending cases in the federal courts involving reservations in Michigan, Oklahoma, and elsewhere.”).

within that given area. Even when a tribe or state is able to establish jurisdiction, the actual exercise of that power often ignites heated debate. “No other issue in Indian law raises the emotional response from the non-Indian community as does the actuality of or the prospect of Indian tribes exercising jurisdiction over non-Indians, which has generated much hostility and emotionalism in both the non-Indian community and Indian communities.”⁹⁴ In the same way non-Indians fear Indian jurisdiction, Indians do not want to be subject to state jurisdiction. “[Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”⁹⁵ This section outlines the tribal, state, and federal governments’ ability to exercise civil and environmental regulatory control in Indian country, once jurisdiction has been established.⁹⁶

1. Tribal Civil Jurisdiction

Within Indian country, tribes retain inherent power to exercise some civil and regulatory control over non-Indians on both tribal lands and lands held in fee by non-Indians.⁹⁷ As the source of tribal jurisdiction,

[tribal sovereignty is] at its strongest when explicitly established by a treaty or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe. . . . Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest.⁹⁸

Therefore, a tribe’s civil regulatory power diminishes the further it moves away from the internal governing of its own members.

⁹⁴ JAMES M. GRIJALVA, *CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY* 111 (2008).

⁹⁵ *United States v. Kagama*, 118 U.S. 375, 384 (1886); *see also* *Am. Vantage Co., Inc. v. Table Mtn. Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002) (“Rather than belonging to state political communities, [tribes] are distinct independent political communities. Tribes also owe no allegiance to a state.”).

⁹⁶ Criminal jurisdiction within Indian country, while often hotly debated, is beyond the scope of this Article. For more information on criminal jurisdiction in Indian country *see* COHEN, *supra* note 2, §§ 9.01-.09; *AMERICAN INDIAN DESKBOOK*, *supra* note 50, ch. 4.

⁹⁷ Conversely, tribes lack authority to try and punish non-Indians for criminal offenses. *Montana v. United States*, 450 U.S. 544 (1981). Tribes may make and enforce criminal and civil laws governing their members and nonmember Indians within their territory. *See Duro v. Reina*, 495 U.S. 676 (1990) (holding that Indian tribes lack inherent sovereign authority to prosecute nonmember Indians); *United States v. Lara*, 541 U.S. 193 (2004) (upholding the legislative “Duro Fix,” which amended the Indian Civil Rights Act to allow tribes to exercise criminal jurisdiction over all Indians). Therefore, tribal jurisdiction over Indians is well settled and not discussed in this Article.

⁹⁸ *San Manuel Indian Bingo v. NLRB*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007).

In *Montana v. United States*, the United States Supreme Court stated that inherent tribal sovereign power presumptively did not extend to regulation of non-Indian activities on non-Indian fee land within Indian country.⁹⁹ However, the Court set out two possible exceptions to that general rule.¹⁰⁰ First, tribes “may regulate through taxation, licensing, or other means the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”¹⁰¹ Second, a tribe may also “exercise civil authority over the conduct of nonmembers on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”¹⁰²

Under the first exception, courts have consistently upheld tribal authority to tax non-Indians entering the reservation to engage in economic activity. In *Merrion v. Jicarilla Apache Tribe*, the United States Supreme Court upheld a tribal severance tax on oil and gas as a valid exercise of the tribe’s inherent sovereign power to govern.¹⁰³ Three years later, the Court again stressed that the tribal power to tax derives from inherent sovereignty.¹⁰⁴ However, eventually the power to tax was limited to tribal lands, and no longer pertains to activities on non-Indian fee lands.¹⁰⁵ In *Atkinson Trading Co.*, a non-Indian alleged that a tribal hotel occupancy tax was improperly imposed upon his hotel, which, although within the reservation, was located on non-Indian fee land.¹⁰⁶ The Court acknowledged that “the power to tax derives not solely from an Indian tribe’s power to exclude non-Indians from tribal land, but also from an Indian tribe’s ‘general authority, as sovereign, to control economic activity within its jurisdiction.’”¹⁰⁷ However, the Court ultimately applied the *Montana* rule, and limited this power to tax to tribal land.¹⁰⁸ Therefore, as a general rule, tribes presently lack civil authority over nonmembers on non-Indian fee land.

The second exemption, the tribe’s civil authority to protect its interests (e.g., health or welfare), is broader and allows regulation of non-Indian conduct on all land within Indian country, regardless of ownership. However, like the first

⁹⁹ *Montana*, 450 U.S. at 565. See also *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (“[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others.”).

¹⁰⁰ *Montana*, 450 U.S. at 565.

¹⁰¹ *Id.*; see *Strate v. A1 Contractors*, 520 U.S. 438, 457 (1997) (requiring a nexus or connection between the consensual relationship and the assertion of jurisdiction).

¹⁰² *Montana*, 450 U.S. at 566.

¹⁰³ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

¹⁰⁴ *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (upholding tribal tax on mineral leases).

¹⁰⁵ *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645, 647 (2001).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 652.

¹⁰⁸ *Id.* (finding that neither of the two *Montana* exceptions were applicable).

exception, recent court decisions have limited the reach of the second exception. Originally viewed as a catchall provision, the United States Supreme Court restricted the second *Montana* exception to situations where non-member conduct “‘imperil[s] the subsistence’ of the tribal community.”¹⁰⁹ While tribes have decision-making power over activities occurring in Indian country, tribal inherent powers do not extend beyond what is “necessary to protect tribal self-government” or to control internal relations.¹¹⁰ Therefore, it appears that the second *Montana* exception will apply only when tribal power is “necessary to avert catastrophic consequences.”¹¹¹

Energy development on Indian reservations can trigger both *Montana* exceptions. The first exception may arise in mineral leases executed by the tribe. Tribal leases often include clauses requiring the non-Indian developer to acquiesce to jurisdiction in tribal court. Many tribes also require non-member mineral developers to enter into tribal business license agreements and tribal employment right ordinance (TERO) agreements.¹¹² These agreements generally require developers to consent to tribal civil jurisdiction within a reservation.¹¹³ Tribes also routinely tax oil and gas extracted from Indian country.¹¹⁴ For example, the Ute Indian Tribe’s Energy & Minerals Department promotes mineral development of tribal resources with the goal of obtaining maximum economic recovery, including severance tax and royalty payments.¹¹⁵ The second *Montana* exception has been more difficult to establish, but may arise if development activities pose serious threats, such as water contamination, that could adversely affect the entire tribal community.¹¹⁶

¹⁰⁹ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (holding that the tribe’s limited authority to regulate nonmember activities on the reservation did not permit the tribe to regulate the sale of non-Indian fee land).

¹¹⁰ *Strate v. A1 Contractors*, 520 U.S. 438, 459 (1997) (holding that a tribe lacked inherent power to hear a private lawsuit between two non-Indians involving an automobile collision that occurred on a state-managed highway running through the reservation).

¹¹¹ *Plains Commerce Bank*, 554 U.S. at 341.

¹¹² JENNIFER H. WEDDLE & ROBERT S. THOMPSON, ROCKY MOUNTAIN MINERAL LAW FOUND., PITFALLS AND POSSIBILITIES: UNDERSTANDING TAX ISSUES IMPACTING DEVELOPMENT IN INDIAN COUNTRY, NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS, PAPER NO. 11, at 5 (2011).

¹¹³ *Id.*

¹¹⁴ Christopher S. Kulander, *Split-Estate and Site Remediation Issues on Tribal Lands*, 2 TEX. J. OIL GAS & ENERGY L. 125, 131 (2007).

¹¹⁵ *Ute Indian Tribe, Energy & Minerals Dept.*, UTETRIBE.COM, <http://www.utetribecom/mineralResourcesDevelopment/energyMinerals.html> (last visited Sept. 12, 2011).

¹¹⁶ *Id.*

2. State Civil Jurisdiction

Generally, states do not have civil regulatory authority over tribal activities in Indian country, absent express congressional authorization.¹¹⁷ However, even without congressional approval, in some cases a state may be able to show a strong enough state interest to warrant jurisdiction. For example, the United States Supreme Court has upheld state taxation of nonmember mineral leases. In *Cotton Petroleum Corp. v. New Mexico*, the Supreme Court used a cost-benefit test to determine whether state taxation of a nontribal oil and gas lease on the reservation was justified by the state's contact with the activity.¹¹⁸ The non-Indian lessee argued that the state tax unduly interfered with the federal interest in promoting tribal economic self-sufficiency and was not justified by an adequate state interest.¹¹⁹ However, the Supreme Court held that although the Indian Mineral Leasing Act was intended to provide Indian tribes with revenue, Congress did not intend to remove all barriers to profit maximization.¹²⁰ Ultimately the Court found that the state tax's impact was indirect and insubstantial, and therefore, permissible.¹²¹ Critically, the primary burden of the state taxation fell on the non-Indian lessee and the state provided substantial services to both the tribe and the lessee.¹²²

Overall, courts apply a "flexible preemption analysis sensitive to the particular facts and legislation involved" to determine whether states can impose taxes on non-Indians.¹²³ State taxation may be prohibited if it is preempted by federal law or would interfere with tribal exercise of sovereign functions.¹²⁴

The preemptive power of tribal interests is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal

¹¹⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973) ("State laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply.").

¹¹⁸ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 169–70 (1989).

¹¹⁹ *Id.* at 177–78.

¹²⁰ *Id.* at 180.

¹²¹ *Id.* at 186–88. *Cf. Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987) (state severance tax on coal preempted because it was so high that it significantly affected the marketability of the coal, therefore imposing a substantial burden on the tribe).

¹²² *Cotton Petroleum Corp.*, 490 U.S. at 186–87. Notably, the Supreme Court stated that a state's power to tax an activity is not limited to the value of the services provided in support of that activity. *Id.* at 172.

¹²³ *Id.* at 176; COHEN, *supra* note 2, § 8.03[1][d].

¹²⁴ COHEN, *supra* note 2, § 8.03[1][d] (citing *Ramah Navajo Sch. Bd. v. Bureau. of Revenue of New Mexico*, 458 U.S. 832, 837 (1982); *White Mountain Apache Tribe v. Backer*, 448 U.S. 136, 142 (1980)).

services.” With respect to state interests, the Supreme Court has declared that a “generalized revenue raising interest” alone should not be sufficient to justify state taxation, nor should services provided to the taxpayer off-reservation. Rather, the state should have a “specific, legitimate regulatory interest” in the activity taxed.¹²⁵

However, as the *Cotton Petroleum* case illustrates, a state tax may be upheld when the incidence falls primarily on the non-Indian lessee and substantial state services are provided to the tribe. Currently, many states impose taxes on oil, gas, and other hydrocarbon substances produced from wells on Indian lands by non-Indian lessees. For example, in Utah, the UTAH CODE ANN. § 59-5-116 specifically provides for the disposition of certain taxes collected on Ute Indian land.

Many tribes are concerned about dual taxation and believe it may require offsetting concessions from the tribes in order for developers to remain competitive in the market.¹²⁶ The Ute Mountain Ute Tribe, whose reservation straddles the Colorado-New Mexico border, is currently seeking injunctive relief against the imposition of New Mexico state oil and gas production tax on non-tribal operators extracting tribal minerals located on tribal land. The tribe is attempting to distinguish *Cotton Petroleum*, arguing that they do not receive any services from the state and no tribal members reside on the portion of the reservation that is within the State of New Mexico. While the tribe prevailed at the district court level,¹²⁷ the Tenth Circuit Court of Appeals reversed the district court’s decision.¹²⁸ The Ute Mountain Tribe is seeking Supreme Court review of the Tenth Circuit decision. For now, *Cotton Petroleum* continues to control and allows state taxation in circumstances where such a tax does not present an economic burden on the tribe and the state provides tribal services.¹²⁹

As a result, energy development on Indian lands may be less appealing to developers if double taxation undercuts the rate of return required to justify the

¹²⁵ *Id.* (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156–57 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 (1982)).

¹²⁶ See Indian Energy Solution Conference, Las Vegas, Nevada (Aug. 5, 2008), Federal Tax Policy and Incentives for Development – Morning Session, Transcript of Proceedings, at 17, <http://74.63.154.129/pdfs/Presentations/2008/FEDERALTAXPOLICYANDINCENTIVESFORDEVELOPMENTTAM.pdf>. For example, an operator in lease negotiations may insist that tribal royalties be reduced if the taxes total a certain percentage. *Id.*

¹²⁷ *Ute Mountain Ute Tribe v. Homans*, 775 F. Supp 1259 (D. N.M. 2009), rev’d and remanded sub nom. *Ute Mountain Ute Tribe v. Rodriguez*, No. 09-2276, 2011 WL 3134838 (10th Cir. July 27, 2011).

¹²⁸ *Ute Mountain Ute Tribe v. Homans*, No. 09-2276, 2011 WL 3134838 (10th Cir. July 27, 2011).

¹²⁹ Of course, as *Cotton Petroleum Corp.* notes, Congress retains the power to grant immunity from state taxation on Indian lands. 490 U.S. 163, 175 (1989).

project.¹³⁰ However, many utility companies operate in Indian country despite double taxation since the tribal tax has been upheld as prudent to include in the rate base.¹³¹ As a general rule, utilities are entitled to rates that are just, fair, reasonable and sufficient.¹³² Prudent expenses, including valid taxes imposed upon and paid by utilities, can be included in utility base rates.¹³³ In *William v. Washington Utilities & Transportation Commission*, the Utilities and Transportation Commission allowed utilities to pass costs imposed by the Yakima Indian Nation onto the utility bills of its customers within the taxing jurisdiction (i.e., the reservation).¹³⁴ Energy developers may seek to offset the costs of business in Indian country by applying similar practices, namely passing off the tax (state, tribal, or both) to their customers.

3. Environmental Regulation

Most modern federal environmental laws involve elements of what has variously been called “cooperative federalism,” “new federalism,” or simply “federalism,”¹³⁵ a “term loosely meaning shared governmental responsibilities for regulating private activity.”¹³⁶ Under statutes such as the Clean Air Act (CAA) and Clean Water Act (CWA), Congress sets forth policy goals such as protecting and enhancing air quality to promote public health and welfare,¹³⁷ and restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters.”¹³⁸ Congress then delegates to the Environmental Protection Agency (EPA) the power to craft regulations limiting pollution consistent with these policies. The EPA promulgates regulations establishing substantive and procedural requirements such as National Ambient Air Quality Standards (NAAQS) and permitting programs regulating the discharge of pollution into waters of the United States. Under several key statutes, including the CAA and CWA, states have the option to draft legislation and promulgate regulations assuming primary

¹³⁰ Notably, tribal taxation has increased recently as a means of 1) increasing social services and programs available for their members and 2) strategically exercising their inherent sovereign authority. WEDDLE & THOMPSON, *supra* note 112, at 1.

¹³¹ *Willman v. Wash. Utils. & Transp. Comm’n*, 117 P.3d 343, 346 (Wash. 2005).

¹³² *Id.* at 345.

¹³³ *Id.*

¹³⁴ *Id.* at 344–45. The court distinguishes the tax from a franchise fee, which is a cost of doing business and can be distributed only as an expense to all ratepayers served, system-wide. *Id.* at 808–09.

¹³⁵ See SHELDON M. NOVICK ET AL., LAW OF ENVIRONMENTAL PROTECTION § 7.5 (updated annually).

¹³⁶ GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 5.3 (2d ed. 2007 & supp.).

¹³⁷ 42 U.S.C. § 7401(b)(1) (2009).

¹³⁸ 33 U.S.C. § 1251(a) (2010).

responsibility in administering regulatory programs under the federal statute.¹³⁹ These programs, which can be no less protective than their federal counterparts,¹⁴⁰ allow states to tailor their regulatory efforts to unique local conditions. The parent federal statute effectively establishes a regulatory floor, but allows states to adopt programs that are sensitive to local conditions and needs.

Many environmental statutes have been amended to also include tribes as entities eligible to administer federal environmental regulatory programs. Three major environmental statutes triggered by energy development, the CAA, CWA, and Safe Drinking Water Act (SDWA), have been amended to treat tribes as states (TAS).¹⁴¹ Basically, tribes are treated as states and given primacy if three requirements are met: 1) the tribe has a governing body carrying out substantial governmental duties and powers; 2) functions exercised by the tribe pertain to the management and protection of resources within exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and 3) the tribe reasonably is expected to be capable of carrying out the functions.¹⁴²

Because the federal recognition and government requirements of the [CAA, CWA, and SDWA] are essentially identical, however, a tribe need establish those factors only once; if a tribe has demonstrated that it meets the recognition and governmental factors under any one of the statutes, it has established those factors for purposes of all three statutes.¹⁴³

While the United States Supreme Court has limited tribal authority to regulate non-Indians on non-Indian fee land inside Indian country, the extent of tribal jurisdiction under TAS programs depends upon the specific statutory language. In some instances, jurisdiction may extend over non-members and non-Indian land.

¹³⁹ For example, section 110 of the CAA requires each state to develop a plan for the implementation, maintenance, and enforcement of air quality standards. 42 U.S.C. § 7410(a)(1). The Administrator of the EPA may delegate authority to implement and enforce state plans to any general purpose unit of local government possessing adequate authority. 42 U.S.C. § 7410(c)(3). Under section 301 of the CWA, the discharge of any pollutant into navigable waters is prohibited unless authorized by statute, rule, or permit. 33 U.S.C. § 1311(a). Governors wishing to administer permitting programs for discharges into navigable waters may petition for and obtain lead permitting authority. 33 U.S.C. § 1342(b).

¹⁴⁰ See, e.g., 33 U.S.C. § 1370, as applied to tribes in *Albuquerque v. Browner*, 97 F.3d 415, 422–23 (10th Cir. 1996).

¹⁴¹ Clean Air Act Amendments of 1990, 42 U.S.C. § 7601(d); Clean Water Act Amendments of 1987, 33 U.S.C. § 1377. See also 42 U.S.C. § 7601(d)(2); 33 U.S.C. § 1377(e) (for requirements).

¹⁴² 42 U.S.C. § 7601(d)(2); see also *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1284–85 (D.C. Cir. 2000). The same basic requirements apply for setting water quality standards under the CWA, 33 U.S.C. §§ 1377(e)(1)–(3), and the SDWA, 42 U.S.C. § 300j-11(b)(1).

¹⁴³ COHEN, *supra* note 2, § 10.03[1].

The EPA, however, has not interpreted the federal TAS provisions to extend tribal authority over non-Indians and non-Indian lands in every instance.¹⁴⁴ Instead, the EPA determines tribal authority over non-Indians on a “Tribe-by-Tribe basis.”¹⁴⁵ In accordance with United States Supreme Court decisions, the EPA requires “a showing that the potential impacts of regulated activities on the tribe are serious and substantial” before granting tribes TAS status throughout the reservation.¹⁴⁶ However, the EPA has stated that, “activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare.”¹⁴⁷ Therefore, tribes will usually be able to make the showing necessary to obtain program delegation over all pollution sources within the exterior boundaries of the reservation.¹⁴⁸

The federal government, individual states, and individual tribes may all assert jurisdiction over portions of the same geographic area. Consequently, three different governments may be involved in regulation, depending on the location and applicable laws. Determining the circumstances under which federal regulatory program administration may be assumed, the scope of its jurisdiction, and its application across a checkerboard landscape can prove challenging.

Because the relevant provisions often are worded awkwardly and because each statute defines somewhat differently the conditions under which primacy may be granted to the tribes, questions exist over the appropriate allocation of state and tribal regulatory authority. This jurisdictional complexity is compounded by the fact that all states and many tribes address environmental concerns through laws that operate independently of the primacy determination and, at least arguably, concurrently with the federal statutes.¹⁴⁹

In order to understand the federal government’s stance on environmental regulation within Indian country, the EPA Policy for the Administration of Environmental Programs on Indian Reservations (EPA Policy)¹⁵⁰ will be discussed, followed by an analysis of the main environmental statutes: the Clean

¹⁴⁴ Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 627 (1994) (citing 56 Fed. Reg. 64,876, 64,880 (1991)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The “serious and substantial” test applies to TAS decisions regarding control of activities of non-Indians on fee land and therefore, stems from the *Montana* test previously discussed (*Montana v. United States*, 450 U.S. 544, 566 (1981)).

¹⁴⁷ Royster, *supra* note 144, at 627.

¹⁴⁸ *Id.*

¹⁴⁹ AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 343.

¹⁵⁰ EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) [hereinafter EPA 1984 Policy], *available at* www.epa.gov/tp/pdf/indian-policy-84.pdf.

Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act.

(a) The EPA Policy: Maintaining a Government-to-Government Relationship

In recognition of the federal trust responsibility to Indian tribes, the EPA Policy has generally supported tribal involvement and assumption of applicable programs in Indian country. In 1984, the EPA issued a policy statement to clarify its position on tribal environmental programs.¹⁵¹ Intended as a guidance document, the EPA Policy promotes working with tribal governments on a “one-to-one basis” through a government-to-government relationship; and recognizes tribes as the primary parties for setting standards and managing programs for reservations.¹⁵² Until tribal governments are able to assume full responsibility for delegable programs, the EPA retains responsibility for managing such programs, but still encourages tribal participation. Furthermore, the EPA stated that it would promote cooperation between federal agencies to assist tribes in developing and managing environmental programs.

Finally, the EPA Policy addresses compliance with environmental statutes and regulations on reservations. If a non-compliant facility is tribally owned or managed, the EPA will work cooperatively with the tribe to achieve compliance and take direct EPA action through judicial/administrative process only if “1) significant threat to human health or the environment exists; 2) such action would reasonably be expected to achieve effective results in a timely manner, and 3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.”¹⁵³ However, if the facility is owned or managed by private parties without substantial tribal interest or involvement, the agency will respond as it would to noncompliance by the private sector elsewhere in the country.¹⁵⁴

Overall, the EPA Policy recognizes tribal sovereignty and encourages tribal participation, if not complete management, of delegable environmental programs.

¹⁵¹ *Id.* The EPA issued a previous policy statement in 1980 proclaiming that the agency would implement environmental programs on reservations directly, working closely with tribes until “the ultimate goal of full program assumption by the tribe was realized.” EPA, Policy for Program Implementation on Indian Lands 4 (Dec. 19, 1980). See GRIJALVA, *supra* note 94, at 15–33 (2008) (providing background on EPA policy in Indian country).

¹⁵² The EPA’s approach toward inherent tribal authority is set forth in the Water Quality Standards Final Rule. Amendments to Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991). The EPA explained that it will determine whether a tribe possesses inherent tribal authority over non-consenting nonmembers on fee lands based on federal common law principles, including *Montana v. United States*. *Id.* at 64,876, 64,880.

¹⁵³ EPA 1984 Policy, *supra* note 150, at 4.

¹⁵⁴ *Id.*

The EPA has supported its policy by emphasizing the unique connection between tribes and their land.

Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining reservation land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others. For these reasons, Indian tribes have insisted that tribal governments be recognized as the proper governmental entities to determine the future quality of reservation environments.¹⁵⁵

Under modern environmental laws, the EPA has linked Congress' preference for local program implementation with the Indian law doctrine of tribal sovereignty "in a legal and administrative framework effectively offering tribes a coequal seat at the table."¹⁵⁶ Furthermore, courts have frequently deferred to the EPA's discretion and expertise in reconciling environmental law and policy with Indian law and policy,¹⁵⁷ including the EPA's interpretation that states lack regulatory jurisdiction on Indian reservations.¹⁵⁸

In 1991, the EPA issued a "state-tribe concept paper" reaffirming the 1984 EPA Policy.¹⁵⁹ More recently, the EPA issued a final consultation policy to fully implement the 1984 EPA Policy, "with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and the EPA."¹⁶⁰ Like its previous policies, the Consultation Policy aims to involve tribal

¹⁵⁵ EPA, Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments 1 (July 10, 1991) [hereinafter Federal, Tribal, and State Roles], available at http://www.epa.gov/region4/indian/EPASfTri_relations.pdf.

¹⁵⁶ GRIJALVA, *supra* note 94, at xi.

¹⁵⁷ *Id.*

¹⁵⁸ See Wash., Dep't of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (rejecting state authority over hazardous waste facilities located on Indian lands). Notably, the court in *Dep't of Ecology* did not decide the question of whether the state was empowered to reach non-Indians in Indian country. 752 F.2d at 1467-68. However, the EPA subsequently rejected the state's application for an underground injection program on non-Indian fee simple lands within Washington Indian reservations, stating that federal and tribal interests at stake would be hindered by state regulation. GRIJALVA, *supra* note 94, at 40. See also COHEN, *supra* note 2, § 10.02[1] (discussing EPA's interpretation of federal environmental laws and state's limited jurisdiction).

¹⁵⁹ Federal, Tribal and State Roles, *supra* note 155. ("Consistent with the EPA Indian Policy and the interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes.")

¹⁶⁰ EPA, EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011) [hereinafter EPA Policy on Consultation], available at <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>. See also Request for Public Comment on Proposed Final Policy, 75 Fed. Reg. 78198 (Dec. 15, 2010).

officials when the EPA takes actions or implements decisions that may affect tribes. However, the policy goes one step further to identify clear standards for the consultation process, to designate specific EPA personnel responsible for serving as consultation points of contact, and to establish a management oversight and reporting structure to ensure accountability and transparency.¹⁶¹ Overall, the EPA's various policies have consistently affirmed the federal government's commitment to seek meaningful tribal involvement in environmental regulation in Indian country.

(b) *The Clean Air Act*

Management of air pollution control is an example of cooperative federalism. Until enactment of the Air Pollution Control Act of 1955,¹⁶² air pollution control was a largely state and local responsibility. The initial CAA was adopted in 1963,¹⁶³ authorizing the Department of Health, Education, and Welfare to establish air quality criteria through collaborative processes involving polluters and state governments. Amendments in 1965 authorized regulation of automobile emissions.¹⁶⁴ The Air Quality Act of 1967¹⁶⁵ represented the first comprehensive program requiring states to set standards to limit pollution in accordance with federal air quality control documents. The EPA was created in 1970¹⁶⁶ and began CAA administration shortly thereafter. The CAA Amendments of 1970¹⁶⁷ provided the basic structure of the current CAA, under which the federal government sets uniform ambient air quality standards and technology based standards for individual emission sources. The state's role was to enforce the standards through implementation plans, thereby assuring attainment of National Ambient Air Quality Standards (NAAQS). Amendments in 1977 included provisions for the Prevention of Significant Deterioration (PSD) of air quality in areas attaining the NAAQS, and requirements pertaining to sources in non-attainment areas for

¹⁶¹ EPA Policy on Consultation, *supra* note 160; *see also* EPA, EPA Seeks Public Comment on Policy for Consultation and Coordination with Indian Tribes (Dec. 16, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/709d13c494e25ae78525735900404440/017ee6945d7f0e5f852577fb0062fb2f!OpenDocument>.

¹⁶² Air Pollution Control Act of 1955, Pub. L. 84-159, 69 Stat. 322.

¹⁶³ Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 402.

¹⁶⁴ Clean Air Act, Pub. L. 89-272, 79 Stat. 392 (1965 Amendments).

¹⁶⁵ Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485.

¹⁶⁶ President Nixon, by Executive Order "reorganized" the Executive Branch by transferring fifteen units from existing organizations into a now independent agency, the EPA. Four major Government agencies were involved. *See* Reorganization Plan No. 3 of 1970, *available at* <http://www.epa.gov/history/org/origins/reorg.html>.

¹⁶⁷ Clean Air Act, Pub. L. 91-604, 814 Stat. 486 (1970 Amendments).

NAAQS.¹⁶⁸ Amendments occurred again in 1990,¹⁶⁹ substantially increasing federal authority and responsibility.

The CAA authorizes tribes and states to implement certain federal programs to protect air quality related values through implementation plans. These plans estimate the emission reductions necessary to attain NAAQS and establish control programs to make the necessary reductions.¹⁷⁰ Title V of the 1990 CAA Amendments¹⁷¹ also established a centralized operating permit program to be administered by states and tribes,¹⁷² subject to the EPA's oversight.¹⁷³ The 1999 EPA Final Rule, governing issuance of operating permits to stationary sources in Indian country, clarified that absent an approved tribal program the EPA exercises Title V permitting authority over sources located within Indian country.¹⁷⁴ Therefore, the EPA and tribes have exclusive CAA jurisdiction within Indian country.

The EPA treats the CAA as an express delegation of federal authority to the tribes to control the air quality within the exterior boundaries of their reservation; whether non-Indian holdings exist within the exterior boundary is irrelevant.¹⁷⁵ More specifically, CAA jurisdiction is recognized if “the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas with the tribe’s jurisdiction.”¹⁷⁶ Therefore, tribes with primacy can assert CAA regulatory authority over all activities within the exterior boundaries of their reservation to protect air quality related values, regardless of whether the conduct occurs on land owned by the tribe or non-Indian owned fee lands.¹⁷⁷ Tribes may even regulate

¹⁶⁸ Clean Air Act, Pub. L. 95-95, 91 Stat. 685 (1977 Amendments). PSD does not necessarily prevent sources from increasing emissions, but ensures that economic growth will occur in a manner consistent with preservation of existing clean air resources.

¹⁶⁹ Pub. L. 101-549, 104 Stat. 2399 (1990 Amendments).

¹⁷⁰ 42 U.S.C. § 7410 (2009).

¹⁷¹ Clean Air Act, Pub. L. No. 101-549, §§ 107(d), 108(I), 104 Stat. 2399, 2464, 2467 (1990 Amendments).

¹⁷² 42 U.S.C. § 7601(d)(2)(B) (authorizing tribes to assume program authority if governmental organization and capability requirements are met and “the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation and other areas within the tribe’s jurisdiction.”).

¹⁷³ AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 363–69.

¹⁷⁴ 64 Fed. Reg. 8247, 8249–50 (Feb. 19, 1999).

¹⁷⁵ *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000); *see also* S. Rep. No. 101-228, at 79 (1989) (legislative history describing the CAA as an express delegation to tribes).

¹⁷⁶ 42 U.S.C. § 7601(d)(2)(B).

¹⁷⁷ For example, tribal implementation plans are applicable to all areas located within the exterior boundaries of the reservation, notwithstanding the issuance of fee patents and rights-of-way running through the reservation. 42 U.S.C. § 7410(o). Tribes may also assume Title V permitting to regulate emission sources on tribal lands and non-Indian holdings under the CAA. *See* 42 U.S.C. § 7661; 40 C.F.R. § 7 1.10.

areas outside the reservation if the tribe has inherent jurisdiction over those areas (e.g., allotted land, dependent Indian communities).¹⁷⁸ This broad authority is reflected in the EPA's 1998 Final Tribal Authority Rule to implement the 1990 statutory amendments, which grants tribal regulatory authority of all air resources within the exterior boundaries of a reservation as well as "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation."¹⁷⁹ The EPA's Final Tribal Authority Rule and broad definition of "reservation" was upheld in *Arizona Pub. Serv. Co. v. EPA* to support uniform enforcement through the reservation.¹⁸⁰

Finally, the CAA authorizes tribes to redesignate the PSD status of lands within the exterior boundaries of their reservation, thereby allowing tribes to indirectly limit or promote industrial development on reservations and potentially control off-reservation activities if they affect the air quality on the reservation.¹⁸¹ Indeed, in *Nance v. EPA*, the court upheld the EPA's approval of the Northern Cheyenne Tribe's redesignation.¹⁸² Outside the tribe's reservation, the Montana Power Company and four northwestern utilities proposed to build two coal-fired power plants. In order to protect their air quality, the tribe redesignated their reservation to Class I, the most protective class under the CAA and more restrictive than Montana's Class II air status that required comparatively minimal emission controls. As the tribe explained, they could not "conceive that Congress intended the Clean Air Act Amendments to serve as the vehicle for the transformation of their homeland into a dumping ground for the dirty industries whose pollution cities will no longer tolerate, but whose products they claim to need desperately."¹⁸³ The CAA now provides for an intergovernmental dispute resolution mechanism between states and tribes due to the redesignation of PSD or proposed issuance of a permit for a new major emitting facility.¹⁸⁴ However, this process did not apply to the Northern Cheyenne redesignation since the amendments took effect after the redesignation was approved and the tribe's redesignation was upheld.¹⁸⁵

As of 2011, thirty-two tribes have received TAS status under the CAA, two tribes have been approved to implement tribal implementation plans, and one tribe has received a delegation to implement a title V operating permit program for their reservation.¹⁸⁶ Within Utah, the Ute Indian Tribe has not petitioned for or obtained

¹⁷⁸ *Ariz. Pub. Serv. Co.*, 211 F.3d at 1291; 63 Fed. Reg. 7254, 7259 (Feb. 12, 1998) (discussing other areas within the tribe's jurisdiction).

¹⁷⁹ Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254.

¹⁸⁰ *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000).

¹⁸¹ AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 366.

¹⁸² *Nance v. EPA*, 645 F.2d 701,704 (9th Cir. 1981), *cert. denied sub nom.*

¹⁸³ AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 366. See Brief for The Jicarilla Apached Tribe of Indians et al. as Amici Curiae Supporting Respondents, *Ruckelshaus v. Sierra Club*, 412 U.S. 541 (1973) (No. 72-804) 4-5.

¹⁸⁴ 42 U.S.C. § 7474(e) (2006).

¹⁸⁵ GRIJALVA, *supra* note 94, at 114-15.

¹⁸⁶ EPA, TRIBAL AIR, (Jul. 26, 2011), <http://www.epa.gov/oar/tribal/backgrnd.html>.

authorization to implement the CAA. Accordingly, the EPA retains primary authority to regulate activities impacting air quality related values. The geographic extent of the EPA's jurisdiction is set forth in the order approving Utah's state permitting program.¹⁸⁷ Final approval of Utah's program exempted from state jurisdiction all "lands within the exterior boundaries of Indian Reservations . . . and other areas which are 'Indian country' within the meaning of 18 U.S.C. 1151."¹⁸⁸ The EPA, therefore, will continue to play a leading role in regulating energy development within Utah, at least to the extent that development threatens to impact air quality related values.

(c) *The Clean Water Act*

The CWA establishes water quality standards for surface waters and creates the basic structure for regulating discharges of pollutants into the waters of the United States.¹⁸⁹ Under the CWA, it is unlawful to discharge any pollutant from a point source into navigable waters, unless the discharge is authorized by a rule or permit.¹⁹⁰ The CWA authorizes states and tribes to promulgate their own water quality standards and assume primacy in CWA administration, if approved by the EPA and the state or tribal water quality standards are at least as stringent as the national standards.¹⁹¹ "By 1987 when Congress substantially amended the Clean Water Act, the EPA's vision of cooperative federalism in Indian Country, as articulated in its 1980 and 1984 Indian Policies, was taking shape."¹⁹² As a result, Section 518 of the CWA amendments allows eligible tribes to play key regulatory roles in the implementation of water quality standards within the borders of their reservation.¹⁹³

Unlike the CAA, the CWA does not include an express delegation of power to tribes.¹⁹⁴ Instead, the EPA interprets the CWA as authorizing tribes to implement

¹⁸⁷ Clean Air Act Final Approval of Operating Permits Program; Approval of Construction Permit Program Under Section 112(l); State of Utah, 60 Fed. Reg. 30192, 30195 (June 08, 1995).

¹⁸⁸ *Id.*

¹⁸⁹ References to the CWA refer to the compiled 1972 Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), and the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

¹⁹⁰ 33 U.S.C. § 1311(a) (2006).

¹⁹¹ 33 U.S.C. § 1377(e) (2006) (providing that tribes may be treated as states); 33 U.S.C. § 1313(a) (2006); AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 355-60.

¹⁹² GRIJALVA, *supra* note 94, at 72.

¹⁹³ 1987 Clean Water Act Amendments, Pub. L. No. 100-4, Title V, § 506, 101 Stat. 76 (Feb. 04, 1987) (codified at 33 U.S.C. § 1377(e) (2006)); 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (the EPA interprets the term "reservation" to encompass not only formal reservations, but trust lands set aside for tribal use as well); 58 Fed. Reg. 67,966 (Dec. 22, 1993).

¹⁹⁴ *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) (holding that state ownership of a lake waterbed did not preclude federally-approved regulation of the quality of water

the federal program as an exercise of their inherent powers.¹⁹⁵ Under the CWA, the EPA treats a tribe as a state if the regulated activities involve “the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation”¹⁹⁶ Therefore, the EPA requires tribes to show that they possess inherent authority over the activities affected by the water regulations.¹⁹⁷ Consistent with the *Montana* exceptions, the EPA’s regulations allow a tribe to establish this authority by showing that impairment of the reservation’s waters would have a “serious and substantial”¹⁹⁸ effect upon “the political integrity, the economic security, or the health or welfare of the tribe.”¹⁹⁹

Under the CWA, tribes with TAS status have the ability to affect activity in neighboring states. In *Albuquerque v. Browner*, the court of appeals found that the CWA allowed the EPA to authorize tribal water quality standards more stringent than those of the state.²⁰⁰ The court reasoned that Section 518 of the CWA²⁰¹ allows tribes, like states, to adopt programs with the EPA’s approval; and Section 510²⁰² allows states to adopt more stringent requirements than the federal program. Therefore, once a tribe is given TAS status, the CWA grants it the same right as states to object to permits issued for upstream off-reservation activities.²⁰³ Although a tribe technically cannot force upstream state dischargers to comply with downstream tribal standards, the EPA’s jurisdiction extends across state lines to enforce water quality standards.²⁰⁴

As a result, conflicts may arise between adjoining jurisdictions when a tribe or state sets more stringent standards than the upstream entity. Like the CAA, the CWA provides a regulatory dispute resolution mechanism to resolve “unreasonable consequences that arise as a result of differing water quality standards that may be set by States and Indian tribes”²⁰⁵

under the CWA by the tribe that occupied the reservation on which the lake was located); see also 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991).

¹⁹⁵ 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991).

¹⁹⁶ 33 U.S.C. § 1377(e)(2) (2006).

¹⁹⁷ *Wisconsin*, 266 F.3d at 748. *Montana*, 137 F.3d at 1135 (held that the EPA can require the tribe to show jurisdiction over the watercourse as a pre-requisite to TAS. However, the tribe only has to assert that there are waters on the reservation protected under the CWA and impairment of those waters would have a serious impact. Furthermore, there is a presumption that health and welfare will always be impacted by water pollution.).

¹⁹⁸ 56 Fed. Reg. at 64,878–79.

¹⁹⁹ *Wisconsin*, 266 F.3d at 748; see also 56 Fed. Reg. at 64,877.

²⁰⁰ *Albuquerque v. Browner*, 97 F.3d 415 (9th Cir. 1996).

²⁰¹ 33 U.S.C. § 1377 (2006).

²⁰² 33 U.S.C. § 1370 (2006).

²⁰³ *Wisconsin*, 266 F.3d at 749; see also 56 Fed. Reg. 64,876, 64,887 (Dec. 12, 1991).

²⁰⁴ See *Wisconsin*, 266 F.3d at 750 (holding that the EPA, not the tribe or the state, has the ultimate authority to decide whether or not to issue a permit).

²⁰⁵ 33 U.S.C. § 1377(e) (2006); see also Water Quality Standards Regulation, 40 C.F.R. § 131.7 (2010) (establishing a process of mediation and nonbinding arbitration).

Currently, forty-seven tribes administer water quality standard programs.²⁰⁶ However, the Ute Indian Tribe has not petitioned for or obtained TAS status under the CWA. Therefore, the EPA retains primary authority to regulate activities impacting surface water quality on the Uintah and Ouray reservation.²⁰⁷ “Utah’s water quality standards are applicable to all waters within the State of Utah, with the exception of those waters that are within Indian Country, as defined in 18 U.S.C. § 1151.”²⁰⁸

(d) *The Safe Drinking Water Act*

Congress passed the SDWA in 1974 to protect public drinking water systems, whether drawn from surface or subsurface sources.²⁰⁹ The SDWA requires the EPA to protect against health risks by promulgating regulations, known as National Primary Drinking Water Regulations, for contaminants in America’s drinking water.²¹⁰ Authorized by the SDWA, the Underground Injection Control (UIC) program is intended to prevent ground water contamination by regulating the construction, operation, permitting, and closure of wells that place fluids underground for storage or disposal.²¹¹

Like the CAA and CWA, the SDWA employs a cooperative federalism model allowing states to implement the SDWA within their jurisdiction, including UIC programs, so long as state programs are consistent with federal minimum requirements. The SDWA was amended in 1986 to include a TAS provision, allowing tribes to assume primacy for SDWA environmental programs established in the statute, specifically the public water systems and UIC programs.²¹² The EPA has interpreted tribal implementation of the SDWA to be an inherent governmental authority to regulate, rather than a federal delegation.²¹³ Therefore, in order to gain

²⁰⁶ EPA, STATE, TRIBAL & TERRITORIAL STANDARDS, INDIAN TRIBAL APPROVALS (May 09, 2011), <http://water.epa.gov/scitech/swguidance/waterquality/standards/wqslibrary/approvable.cfm>.

²⁰⁷ See EPA, AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (Sept. 01, 2010), *available at* http://www.epa.gov/region8/water/npdes/NPDES_UtahPermit2010.pdf (example of the EPA permitting the discharge of operators of wastewater treatment lagoons, mainly domestic sewage, located within Indian country in the state of Utah).

²⁰⁸ EPA, STATE, TRIBAL & TERRITORIAL STANDARDS, UTAH (May 13, 2011), http://water.epa.gov/scitech/swguidance/waterquality/standards/wqslibrary/ut_index.cfm.

²⁰⁹ EPA, Understanding the Safe Drinking Water Act (June 2004), *available at* http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009_08_28_sdwa_fs_30ann_sdwa_web.pdf.

²¹⁰ 42 U.S.C. § 300(g)-(1) (2006).

²¹¹ Underground Injection Control Program, 40 C.F.R. § 144-(2006); State UIC Program Requirements, 40 C.F.R. § 145 (2010); Underground Injection Control Program, Criteria and Standards, 40 C.F.R. § 146 (2010).

²¹² 42 U.S.C. § 300(j)-(11)(a) (2006); *see also* 42 U.S.C. § 300(j)-(11)(b)(1) (2006) (for requirements).

²¹³ COHEN, *supra* note 2, § 10.03[2][b].

TAS status under the SDWA, a tribe “must make the same showing of inherent regulatory authority as a tribe seeking TAS under the Clean Water Act.”²¹⁴ Once granted TAS status, a tribe may regulate “the area of the Tribal Government’s jurisdiction.”²¹⁵ While the EPA has not expressly limited SDWA authority to reservations, it does not equate the statutory phrase with Indian country.²¹⁶ Instead, the EPA promulgates final programs without specifically identifying particular Indian lands covered.²¹⁷ When disputes arise regarding decisions on individual wells, the EPA assumes the disputed land is within the tribe’s jurisdiction and implements the federal program until a contrary judgment is reached. In *HRI, Inc. v. EPA*, the court validated the EPA’s disputed lands approach.²¹⁸

“In rural areas like Indian country, nearly ninety percent of drinking water comes from underground.”²¹⁹ Regulation of underground water sources is critical to protecting drinking water, and therefore the health of many American Indians. Currently, the UIC program is primarily enforced by the EPA in Indian country since few tribes are authorized to administer the program.²²⁰ Four tribes currently have TAS status under the SDWA, but only the Fort Peck tribes and the Navajo Nation have applied for and been granted primacy for UIC Class II programs.²²¹

²¹⁴ *Id.* See also 53 Fed. Reg. 37,396 (Sept. 26, 1988) (EPA regulations to treat tribes as states under the SDWA).

²¹⁵ 42 U.S.C. § 300(j)-(11)(b)(1) (2006); see also National Primary Drinking Water Regulations Implementation, 40 C.F.R. § 142.72 (2010); State UIC Program Requirements, 40 C.F.R. § 145.52 (2010).

²¹⁶ COHEN, *supra* note 2, § 10.03[2][b]. In rejecting the Indian country definition set forth at 18 U.S.C. § 1151, the EPA explained that the “basic concern addressed by these regulations is to allow an eligible Indian tribe to regulate public water systems and underground injection activities located only on those lands over which the Tribe adequately demonstrates jurisdiction.” 53 Fed. Reg. 37,396, 37,400 (Sept. 26, 1988). However, in the absence of an approved UIC tribal program, the EPA will regulate injection wells on all “Indian lands,” defined as all land within Indian country. COHEN, *supra* note 2, § 10.03[2][b].

²¹⁷ Underground Injection Control Programs for Certain Indian Lands, 53 Fed. Reg. 43,096 (Oct. 25, 1988).

²¹⁸ *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000). Although the EPA’s approach was upheld, subsequent appellate history reveals the difficulty in making land determinations based off this rule. See, e.g., *Hydro Res. Inc. v. EPA*, 608 F.3d 1131 (10th Cir. 2010) (vacating the EPA’s final land determination of a dependent Indian community, which was upheld in *Hydro Resources I*).

²¹⁹ GRIJALVA, *supra* note 94, at 43.

²²⁰ The EPA’s authority to run UIC programs in Indian country, as well as the inability of states to do so, was upheld in *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986) (oil company challenging EPA’s authority to promulgate the Osage Tribe’s UIC program).

²²¹ Email from Jeff Jolie, EPA, Office of Ground Water and Drinking Water to Heather Tanana (Feb. 15, 2011, 12:02:58 PM MST) (on file with authors).

(e) *The Resource Conservation and Recovery Act*

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) as a cradle-to-grave tracking and management system for hazardous waste.²²² Generally speaking, RCRA regulates the ongoing generation, transportation, storage, treatment, and disposal of hazardous waste in order to advance several national objectives: fostering recycling and promoting reductions in solid waste generation; encouraging alternatives to land disposal; increasing the safety of unavoidable land disposal; and maintaining state responsibility for solid waste disposal by delegating to states the responsibility for permitting solid waste facilities.²²³ The 1986 amendments to the act enabled the EPA to address environmental problems resulting from underground storage tanks storing petroleum and other hazardous substances.²²⁴ As part of the Energy Policy Act of 2005, the EPA was required to develop a strategy for addressing environmental issues related to underground storage tanks in Indian country.²²⁵ The EPA issued a tribal strategy to implement the Energy Policy Act by strengthening the relationship between the EPA and tribes; improving information sharing; building tribal capacity; and furthering the cleanup and compliance of underground storage tanks on Indian lands.²²⁶

As the only major federal environmental statute without a TAS provision, RCRA does not explicitly authorize delegation of authority to tribes to assume responsibility for development of hazardous and solid waste management programs on the reservation. TAS amendments have been proposed for RCRA, but none have made it out of committee.²²⁷ Additionally, the EPA attempted to adopt administrative rules addressing TAS under RCRA; however, the D.C. Circuit rejected such attempts, finding that a Congressional amendment to RCRA was required.²²⁸ Currently, Indian tribes are treated as municipalities under RCRA,²²⁹

²²² 42 U.S.C. §§ 6901-6992(k) (2006).

²²³ *Id.* §§ 6901, 6902.

²²⁴ *See id.* § 6991.

²²⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 101, § 1529 (2005).

²²⁶ EPA, EPA-510-R-06-005, STRATEGY FOR AN EPA/TRIBAL PARTNERSHIP TO IMPLEMENT SECTION 1539 OF THE ENERGY POLICY ACT OF 2005, at 4-7 (Aug. 2006), available at http://www.epa.gov/oust/fedlaws/Tribal%20Strategy_080706r.pdf.

²²⁷ COHEN, *supra* note 2, § 10.04[1] (referencing S. 286, 104th Cong., 1st Sess. (1995); H.R. 1267, 103d Cong., 1st Sess. (1993)). The Indian Tribal Government Waste Management Act of 1992 sought to recognize the inherent authority of tribes to regulate waste generated on Indian land, subject to the standards and criteria under RCRA's predecessor, the Solid Waste Disposal Act. S. 1687, 102nd Cong. 1992. GRIJALVA, *supra* note 94, at 151. The Act envisioned a state-like tribal role in waste management, but was never passed. *Id.*

²²⁸ *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996) (finding clear Congressional intent that tribes are municipalities, not states, under RCRA).

²²⁹ 42 U.S.C. § 6903(13)(A) (2006). As municipalities, tribes may apply for federal funding to develop solid waste management programs and are subject to citizen suits to

which “serve program goals only indirectly through environmental planning exercises, demonstration projects, and occasional consultations with the state or EPA on specific initiatives.”²³⁰

Despite tribal treatment as municipalities, states are prohibited from exercising jurisdiction in Indian country under RCRA. In *Washington, Dept. of Ecology v. EPA*, Washington State applied for approval of its hazardous waste program, including regulation of Indian activities on trust and tribal lands.²³¹ The EPA refused to delegate RCRA authority to the state, contending that RCRA does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by agreement, which the State of Washington had not demonstrated. Since Washington State did not cite independent authority for its jurisdictional claim, the EPA retained jurisdiction to operate the federal hazardous waste management program “on Indian lands in the State of Washington.”²³² The court of appeals held that under RCRA, the EPA rather than the state, had jurisdiction within Indian country.²³³

The court of appeals reasoned that Congress, in enacting RCRA, had not spoken directly to state jurisdiction over Indian lands, and that under settled principals of law, the court was required to defer to the agency’s reasonable statutory interpretation.²³⁴ Noting that states are generally precluded from exercising jurisdiction over Indians within Indian country unless Congress has expressly authorized state oversight,²³⁵ the court upheld the EPA’s determination that RCRA does not authorize states to regulate Indians on Indian lands. Therefore, even though tribes are not given primacy under RCRA, they remain free from state regulation.

Unlike the environmental statutes addressed above, RCRA has limited impact on most forms of energy development. Commonly referred to as the Bentsen and Bevill Amendments, certain special wastes are exempted from regulation as hazardous wastes under RCRA Subtitle C.²³⁶ The Bentsen Amendment²³⁷ exempts

enforce applicable solid waste management regulations. *See* *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (citizen suit brought against tribe to bring dump sites into compliance under RCRA); AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 366–69.

²³⁰ GRIJALVA, *supra* note 94, at 152.

²³¹ *Wash., Dep’t of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

²³² *Id.* at 1467.

²³³ The decision was upheld on appeal, however the court of appeals’ holding only pertained to the EPA’s decision not to allow the state to exercise authority under RCRA with respect to Indian activities on trust lands. *Id.* at 1467–68. The court left open the question on whether the tribe or state had authority over nonmembers on fee land. *Id.*

²³⁴ *Id.* at 1469 (discussing court deference to agency decisions under *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

²³⁵ *Id.* at 1469–70.

²³⁶ *See* EPA, EXEMPTION OF OIL AND GAS EXPLORATION AND PRODUCTION WASTES FROM FEDERAL HAZARDOUS WASTE REGULATIONS (Oct. 2002), *available at* <http://www.epa.gov/osw/nonhaz/industrial/special/oil/oil-gas.pdf> (last visited Nov. 11, 2011) (for discussion of exemption).

drilling fluids, produced waters, and other wastes associated with the exploration, development and production of crude oil, natural gas, or geothermal energy; while the Beville Amendment²³⁸ exempts fossil fuel combustion waste and waste from the extraction, beneficiation, and processing of ores and minerals, including unconventional fuels such as oil shale and tar sands. The EPA has also stated that spent oil shale is not likely to be a hazardous waste.²³⁹ Therefore, oil, gas, and other energy wastes are only subject to non-hazardous solid waste regulation under RCRA Subtitle D. States have chosen to regulate conventional hydrocarbons with varying intensity;²⁴⁰ however, neither the EPA nor any state has promulgated specific regulations for oil shale or tar sands under the non-hazardous solid waste program.

Environmental regulation in Indian country can be a heated topic since it allows tribes to exert regulatory control over non-Indians in some circumstances. Many tribes, including the Ute Indian Tribe, have not sought or obtained TAS status under the CAA, CWA, or SDWA. Therefore, the EPA retains regulatory jurisdiction over activities occurring within much of Indian country (e.g., the external boundaries of the Uintah and Ouray Reservation).²⁴¹ Consequently, most energy developers must currently work with the EPA to obtain the appropriate environmental permits for operation. However, developers may be subject to more stringent tribal standards in the future as additional tribes assume primacy over environmental regulation on their lands.

²³⁷ 42 U.S.C. § 3001(b)(2)(A) (2006); 42 U.S.C. § 6921(b)(2)(A) (2006).

²³⁸ 42 U.S.C. § 6921(b)(3)(A)(ii)(2006) (exempting solid waste from the extraction, beneficiation, and processing of ores and minerals); 40 C.F.R. § 261.4(b)(7)(2006); *id.* § 261.4(a)(5) (exempting materials subject to in-situ mining techniques that are not removed from the ground as part of the extraction process); Hazardous Waste Management System, 45 Fed. Reg. 33066, 33101 (May 19, 1980) (discussing in-situ solvent contaminated earth).

²³⁹ EPA, SPENT OIL SHALE (OCT. 2010), *available at* www.epa.gov/wastes/nonhaz/industrial/special/oil/oilshale.htm (last visited Sept. 11, 2011).

²⁴⁰ For example, in 2008, New Mexico increased its regulation of oil and gas wastes under Subtitle D by requiring that oil and gas waste pits be lined and registered with the state. N.M. CODE R. § 19.15.17.8 (LexisNexis 2008). Notably, the state's new governor, Susana Martinez, campaigned on a promise to overturn the rule. *Pit Rule Fact Sheet*, NEW MEXICO WILDERNESS ALLIANCE (Jan. 2011), *available at* <http://org2.democracyinaction.org/o/6812/images/NMWA%20Pit%20Rule%20Factsheet.pdf> (last visited Sept. 8, 2011). The freeze on the rule was challenged in *New Energy Econ., Inc., v. Martinez*, 2011-NMCA .006, 149 N.M. 207, 247 P.3d 286 (issuing writ of mandamus ordering the State Records Administrator to publish the regulations).

²⁴¹ *See, e.g.*, Final approval of Utah's CAA program exempted all "lands within the exterior boundaries of Indian Reservations" from state jurisdiction. Clean Air Act Final Full Approval of Operating Permits Program; Approval of Construction Permit Program Under Section 112(l); State of Utah, 60 Fed. Reg. 30,192 (June 8, 1995).

III. DEVELOPING ENERGY RESOURCES IN INDIAN COUNTRY: OVERCOMING BARRIERS THROUGH COLLABORATION

*Indian tribes and individuals own approximately 56.6 million acres of land, 4.2% of the land in the U.S., and the amounts are increasing as a result of reacquisition campaigns. In the law and politics of environmental policy, Indian people are suddenly a presence that is heeded or honored, skirted or feared but no longer ignored.*²⁴²

Given the fragmented nature of land ownership within Indian country and the complex legal framework behind Indian law and environmental regulation, energy development in Indian country triggers unique concerns. Specific leasing procedures must be followed, and fragmented management and regulation may lead to inefficient development. This section provides background on the laws regulating leasing and development of minerals within Indian country, followed by a discussion of the challenges inherent in regulatory ambiguity. Ultimately, a collaborative approach is proposed to achieve efficient and environmentally sound development.

A. *The Leasing Process in Indian Country*

Natural resource development is the primary means of economic development for many tribes.²⁴³ “Production of energy resources on Indian lands represents more than ten percent of the total of federal on-shore energy production.”²⁴⁴ While some tribes engage directly in energy production, most large-scale development is accomplished through non-Indian leasing and other agreements with tribes.²⁴⁵ How leasing proceeds depends on ownership of the lands and resources involved. Tribes have the sole authority for leasing mineral rights on tribal lands owned in fee. The Department of the Interior, through the Bureau of Indian Affairs and in association with the tribe, administers the mineral estate for lands held in trust by the federal government.²⁴⁶ In order to better understand the leasing process, the statutes governing leasing in Indian country will be outlined, followed by an examination of what happens when split estates are involved.

²⁴² RODGERS, JR., *supra* note 17, at 192.

²⁴³ Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1066 (2008).

²⁴⁴ *Id.*

²⁴⁵ THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION, 4 (2008).

²⁴⁶ Under the trust doctrine, Congress enjoys a fiduciary’s power to manage the affairs of the Indian nations, including their lands and resources. Tsosie, *supra* note 26, at 277; *see also* United States v. Sioux Nation, 448 U.S. 371 (1980).

1. Leasing Statutes: Opening Indian Country to Development

Leasing Indian land for mineral development is governed primarily by the Indian Mineral Leasing Act of 1938, the Indian Mineral Development Act of 1982, and the Indian Tribal Energy Development and Self-Determination Act of 2005.²⁴⁷ Each of these statutes warrants brief discussion.

The Indian Mineral Leasing Act of 1938²⁴⁸ (IMLA) has three main goals: 1) to provide uniformity to leasing laws of tribal lands; 2) to bring leasing matters into harmony with the Indian Reorganization Act;²⁴⁹ and 3) to ensure Indians receive the greatest return from their property.²⁵⁰ Under the IMLA, Congress allowed Indian lands to be leased for a term of ten years and “as long thereafter as minerals are produced in paying quantities,” subject to tribal consent and the approval of the Secretary of the Interior.²⁵¹ The secretary’s decision on whether to approve a lease is a discretionary matter not subject to review under the Administrative Procedures Act.²⁵²

Although the IMLA helped consolidate and streamline federal mineral leasing statutes, “tribes had more authority over resource development on paper than in practice.”²⁵³ Moreover, some leases provided low financial return to tribes, leading to tribal claims that the federal government’s trust responsibility was not met. However, such claims are difficult to establish and rely on the underlying statute. For example, in *U.S. v. Navajo Nation*,²⁵⁴ the United States Supreme Court held that the IMLA did not give rise to a fiduciary duty enforceable for damages when the Secretary of Interior allegedly caused the tribe to receive below-market royalties for its coal.²⁵⁵

Building upon the foundation provided by the IMLA, the Indian Mineral Development Act of 1982 (IMDA)²⁵⁶ has a two-fold objective: “to further the policy of self-determination and second, to maximize the financial return tribes can

²⁴⁷ See AMERICAN INDIAN LAW DESKBOOK, *supra* note 50, at 85 (providing a history of mineral leasing and related statutes); Royster, *supra* note 243, at 1072–73 (discussing the history of leasing prior to enactment of the IMLA in 1938).

²⁴⁸ Act of May 11, 1938, Pub. L. No. 506, 52 Stat. 347 (codified as amended at 25 U.S.C. § 396-(a)-(g) (2009)).

²⁴⁹ Pub. L. No. 73-383, June 18, 1934, 48 Stat. 987 (1934) (codified at 25 U.S.C. § 476 (2009)).

²⁵⁰ *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5 (1985).

²⁵¹ 25 U.S.C. § 396a (2009), 25 U.S.C. § 415 (2006).

²⁵² *Sessions Inc. v. Morton*, 348 F. Supp. 694 (C.D. Cal. 1972), *judgment aff’d on other grounds*, 491 F.2d 854 (9th Cir. 1974) (construing 25 U.S.C. § 415).

²⁵³ Royster, *supra* note 243, at 1074 (“Royalty rates were low, and industry often nominated tracts for sale, reducing the tribal role to simple consent.”).

²⁵⁴ 537 U.S. 488 (2003).

²⁵⁵ *Id.* at 508 (finding that the Secretary of the Interior did not breach fiduciary duties owed to tribe with respect to coal mining royalties on mineral lease).

²⁵⁶ 25 U.S.C. §§ 2101-2108.

expect for their valuable mineral resources.”²⁵⁷ The IMDA authorized tribes to enter into minerals agreements, including “any joint venture, operating, production sharing, service, managerial, lease or other agreement,” subject to the approval of the Secretary of the Interior.²⁵⁸

As a result, tribes are empowered to participate more fully in the decision-making process regarding development of their mineral resources. No longer limited to a lessor-lessee relationship, tribes can choose what degree of control to exercise, and what degree of risk to take, by directly negotiating the terms of their mineral agreements.²⁵⁹ Additionally, the IMDA obliges the Secretary of the Interior to provide advice, assistance, and information to tribes during the minerals agreements negotiations, upon the request of the tribe and to the extent of available resources.²⁶⁰ Although some tribes were concerned about the uncertainties of IMDA agreements (e.g., potential financial risk), IMDA agreements were widely adopted.²⁶¹ However, required secretarial approval of each individual lease or agreement remained a cumbersome process and was not addressed until 2005.²⁶²

Congress continued to expand direct tribal control over energy resources when it passed the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) as part of the Energy Policy Act of 2005.²⁶³ Under ITEDSA, tribes can enter into tribal energy resource agreements (TERAs) with the Department of the Interior.²⁶⁴ The secretary must approve a TERA if the proposed agreement meets the statutory requirements, including a provision that the tribe demonstrate “sufficient capacity to regulate the development” of tribal resources.²⁶⁵

An approved TERA allows tribes to enter into leases and business agreements²⁶⁶ for energy resource development and to grant rights of way for such

²⁵⁷ S. REP. NO. 97-472, 97th Cong. 2d Sess. 2 (1982).

²⁵⁸ 25 U.S.C. § 2102(a) (2009).

²⁵⁹ Tsosie, *supra* note 26, at 277; *see also* Royster, *supra* note 243, at 1076 (“The IMDA was thus a significant leap: not only were tribes authorized for the first time to directly negotiate the terms of their mineral development, but they were also authorized to move beyond leases into any type of arrangement they found beneficial.”).

²⁶⁰ 25 U.S.C. § 2106 (2009).

²⁶¹ Royster, *supra* note 243, at 1076. The lack of litigation concerning IMDA mineral agreements suggests that the IMDA worked well “as a form of both political and practical sovereignty for tribes.” *Id.* at 1077.

²⁶² Notably, Congress amended 25 U.S.C. § 415, the general surface leasing statute, to authorize the Tulalip Tribes and the Navajo Nation to issue certain leases without secretarial approval. *See* Royster, *supra* note 243, at 1079–80 (discussing these amendments in more detail).

²⁶³ 25 U.S.C. §§ 3501-3506 (2009).

²⁶⁴ 25 U.S.C. § 3504(e) (2009). *See* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,808 (Mar. 10, 2008).

²⁶⁵ 25 U.S.C. § 3504(e)(2)(B)(i) (2009).

²⁶⁶ A business agreement is defined as “[a]ny permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land,” and includes any amendment, supplement, and

development.²⁶⁷ Unlike previous mineral leasing statutes, which require secretarial approval for each lease or minerals agreement that a tribe enters into, ITEDSA abolishes the need for secretarial approval of the specific development instrument, such as a lease or mineral agreement, once a TERA has been approved.²⁶⁸ Oil and gas leases may be made for the standard term of ten years and as long thereafter as the oil or gas is produced in paying quantities, while all other energy leases, business agreements, and rights of way may be made for terms not to exceed thirty years.²⁶⁹

Other aspects of ITEDSA include a provision for scientific and technical help as well as the opportunity for public comment. ITEDSA directs the Secretary of the Interior to “ensure, to the maximum extent practicable and to the extent of available resources, that on the request of an Indian tribe, the Indian tribe shall have available scientific and technical information and expertise, for use in the regulation, development, and management of energy resources of the Indian tribe on Indian land.”²⁷⁰ Additionally, a proposed TERA is subject to public notice and comment, which the Secretary of the Interior must take into account when deciding whether to approve a TERA.²⁷¹ Even after a TERA has been approved, the tribe must provide public notice of final approvals of development instruments and establish an environmental review process.²⁷² The environmental review process identifies significant environmental effects and proposes appropriate mitigation measures.²⁷³ A tribe must also provide a process for consultation with the state regarding any off-reservation impacts.²⁷⁴ Finally, any “interested party” may petition the secretary to review the tribe’s compliance with its TERA, but only after exhausting tribal remedies.²⁷⁵

The final ITEDSA regulations went into effect on April 9, 2008.²⁷⁶ However, whether ITEDSA will substantially improve the leasing process in Indian country remains to be seen.²⁷⁷ Currently, there are no TERAS in place with any tribes.²⁷⁸

modification to the agreement, as well as “[a]ny other business agreement entered into or subject to administration under a TERA.” 25 C.F.R. § 224.30 (2008).

²⁶⁷ 25 U.S.C. § 3504(a)-(b) (2009). Leases, business agreements, and rights of way may be made for terms up to thirty years while oil and gas leases may be made for ten years and as long thereafter as the oil or gas is produced in paying quantities. *Id.* §§ 3504(a)(2)(B), (b)(2).

²⁶⁸ Royster, *supra* note 243, at 1081.

²⁶⁹ 25 U.S.C. § 3504 (2009).

²⁷⁰ 25 U.S.C. § 3503 (2009).

²⁷¹ 25 U.S.C. § 3504(e)(3) (2009); 25 C.F.R. § 224.68 (2008).

²⁷² 25 U.S.C. § 3504(e)(2)(B)(iii)(IX).

²⁷³ 25 U.S.C. § 3504(e)(2)(C).

²⁷⁴ 25 U.S.C. § 3504(e)(2)(B)(iii)(X).

²⁷⁵ 25 U.S.C. § 3504(e)(7).

²⁷⁶ 73 Fed. Reg. 12,808 (Mar. 10, 2008).

²⁷⁷ See Royster, *supra* note 243, at 1082–97 (discussing the limitations and concerns with ITEDSA, such as the availability of financial resources and technical and scientific expertise, capacity, required public input, and costly environmental reviews).

Obtaining a TERA is an extremely complicated process and constitutes approximately twenty-five pages in the Code of Federal Regulations. However, six tribes informally have been in contact with the Office of Indian Energy and Economic Development, at the Department of the Interior, and one California tribe is in pre-application consultation for a TERA regarding wind energy.²⁷⁹

Aside from the leasing procedures, many issues arise with subsequent development that may deter developers from proceeding in Indian country. Post-lease development raises complicated jurisdictional questions that are beyond the scope of this Article, but warrant further investigation. For example, regardless of the method of leasing, the 2010 Interior Appropriations Act imposes a \$6,500 filing fee on all Applications for Permit to Drill (APD) that are filed on federal lands, which the BLM has interpreted to include Indian lands.²⁸⁰ Combined with the possibility of double taxation, lack of infrastructure, and an unresponsive federal bureaucracy, the rising APD fee is yet another barrier to developing tribal energy resources by potentially making state and private lands more attractive to developers.²⁸¹

2. *Split Estates: The Impact of Separate Surface and Mineral Rights on Development in Indian Country*

When attempting to develop energy resources in Indian country, developers may come across split estates, further complicating the leasing process. Split estates exist any time the ground surface and the minerals beneath it are controlled by different entities. “[The] severance reflects the aim of public policy to assure a

²⁷⁸ Email from Thomas Kotek, Env'tl Sci. Div., Argonne National Laboratory, to Heather Tanana (Feb. 15, 2011, 10:33:33 AM MST) (on file with authors).

²⁷⁹ ROBERT HALL, ASST. REG'L SOLICITOR OFFICE OF THE SOLICITOR, DEP'T OF INTERIOR & JOHANNA BLACKHAIR, REGIONAL REALTY OFFICER, BUREAU OF INDIAN AFFAIRS, DEP'T OF INTERIOR PRESENTATION, ROCKY MOUNTAIN MINERAL LAW FOUND., FEDERAL APPROVAL & OVERSIGHT OF NATURAL RESOURCES LEASES, PERMITS & AGREEMENTS ON INDIAN LANDS, NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS (2011).

²⁸⁰ See BUREAU OF LAND MGMT., *Budget Justifications and Performance Information Fiscal Year 2011*, at IV-126, available at http://www.doi.gov/budget/2011/data/greenbook/FY2011_BLM_Greenbook.pdf (last visited Sept. 9, 2011) (providing background on BLM funding history). The 2008 Omnibus Appropriations Bill initially established the fee at \$4,000 and the 2009 Omnibus Appropriation Act provided for continuation of the \$4,000 APD fee. Act of Sept. 30, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2008); see also 43 C.F.R. § 3162.3-1 (2010) (for drilling application and plan requirements).

²⁸¹ See Paul G. Moorehad, Moderator, Partner Drinker Biddle & Reath, LLP, Tribal Management and Tribal Energy Resource Agreements (TERAs), Remarks at the Indian Energy Solution Conference, Morning Session, Las Vegas, Nev. (Aug. 6, 2008) (transcript of proceedings), at 69–70, available at <http://74.63.154.129/pdfs/Presentations/2008/TRIBALMANAGEMENTANDTRIBALENERGYRESOURCEAGREEMENTSWAM.pdf> (discussing the Application to Drill fee and tribal frustration).

useable mineral supply and energy derived from the minerals, while keeping land surfaces available for individuals.”²⁸² The separation of surface and subsurface rights may occur through a variety of means, including by deed or reservation.²⁸³ Once the minerals are severed from the surface, a split estate is created whereby the owners of the land are not the owners of the underlying minerals. Two main issues create tensions between surface and mineral owners: 1) what materials are included within a specific mineral reservation; and 2) the extent to which a surface owner must accommodate the mineral owner. Developers will most likely need to resolve both of these concerns before deciding to lease in Indian country.

The materials included in a specific mineral reservation typically depend on the underlying instrument that divided the estate. In *Amoco Production Co. v. Southern Ute Indian Tribe*, the federal government issued surface land patents to various settlers, but reserved coal rights to the Southern Ute Indian Tribe.²⁸⁴ Despite arguments from the tribe to the contrary, the United States Supreme Court held that coal-bed methane gas (CBM) was not a substance reserved in “coal” subsurface ownership.²⁸⁵ The Supreme Court reasoned that the applicable statute only covered the minerals that were specifically contemplated for reservation by Congress at the time the statute was enacted, which did not include CBM.²⁸⁶ Therefore, developers must proceed with caution when dealing with split estates to ensure that they lease from the correct entity for any given mineral.

As the dominant estate, subsurface mineral rights take precedence over other rights associated with the property.²⁸⁷ The severance of the mineral and surface estates requires that an easement in favor of the mineral estate be implied to assure access to the surface for developing the underlying minerals, even when the severing document does not mention a right to use the surface. Consequently,

²⁸² James L. Ryan, *SAND WARS: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert*, 37 LOY. U. CHI. L.J. 213, 230 (2005).

²⁸³ Severance by deed occurs when the owner of both the surface and mineral rights chooses to sell all or a portion of the mineral rights to another party. *Split Estate Information*, EARTHWORKSACTION.ORG, available at <http://www.earthworksaction.org/SplitEstate.cfm> (last visited Sept. 10, 2011). A severance by mineral reservation occurs when the owner of the surface and mineral rights sells the land, but reserves all or a portion of the mineral right. *Id.* The Stock-Raising Homestead Act of 1916 is an example of a mineral reservation where Congress provided homesteaders with surface rights, but retained the mineral estate for the federal government.

²⁸⁴ *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999).

²⁸⁵ *Id.* See also *Rosette v. United States*, 277 F.3d 1222 (10th Cir. 2002) (holding that geothermal resources are reserved in subsurface rights since Congress most likely did not intend such rights to be retained in the surface owners for agricultural purposes); *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967) (holding that oil shale is included in the reservation of “oil” in the Agricultural Entry Act of 1914).

²⁸⁶ *Amoco Prod. Co.*, 526 U.S. at 880; Ryan, *supra* note 282, at 243–44.

²⁸⁷ See *Pa. Coal Co. v. Sanderson*, 6 A.453, 459 (Pa. 1886) (“[T]o encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.”).

ownership of a mineral estate typically includes the right to access, use and occupy the surface as necessary for mineral development.²⁸⁸ Generally, the surface owner must accommodate the mineral owner, even if doing so causes harm to the surface. However, courts eventually limited the harm to surface owners through the common law “Accommodations Doctrine,” which requires the mineral owner to show due regard for the interests of the surface estate owner and occupy only those portions of the surface that are reasonably necessary to develop the mineral estate.²⁸⁹ While developers may be accustomed to working in sensitive areas, tribal lands contain unique surface interests that may limit development, such as sacred religious and cultural sites.²⁹⁰

Approximately 9.7 million acres of split estates exist in Utah and have the potential for energy development,²⁹¹ including lands within Indian country. Located within a three-county area in northeastern Utah, known as the Uintah Basin, the Ute Indian Tribe represents tribes who must deal with split estates when developing their energy resources.²⁹² The Ute Indian Tribe controls only about one-third of mineral estates underlying tribally owned surfaces.²⁹³ When the reservation boundary was expanded to include lands previously included within the reservation, but later withdrawn for other federal purposes, Congress retained key mineral rights.²⁹⁴ As a result, Indian properties on the Uintah and Ouray Reservation currently cover approximately 1.2 million surface-owned acres (approximately 1,875 square miles), and 400,000 mineral-owned acres

²⁸⁸ For example, the surface use is for the limited purpose of oil and gas development and does not include other uses, such as residential or agricultural. 38 AM. JUR. 2D Gas and Oil § 110 (2010). *See also* 43 U.S.C. § 299 (2009) (providing that any person who acquired from the U.S. the right to mine and remove mineral deposits may enter and occupy the surface as required for all purposes reasonably incident to the mining).

²⁸⁹ Ryan, *supra* note 282, at 230; *see also* Sanford v. Arjay Oil Co., 686 P.2d 566, 572 (Wyo. 1984) (holding that the amount of land reasonably necessary is a question of fact, but includes space required for mining purposes, such as storage and removal). The Accommodations Doctrine has also been called the “alternative means doctrine” and “due-regard” approach.

²⁹⁰ Kulander, *supra* note 114, at 145–46. *See id.* generally for discussion on split estates and site remediation issues on tribal lands.

²⁹¹ Robert E. Forbis, *Why Split-Estate Energy Development Should Concern Utah’s Policymakers*, Center for Public Policy & Administration, University of Utah, ENERGY Vol. 2, Issue 8 (Aug. 30, 2006), available at http://www.imakenews.com/cppa/e_article000638684.cfm?x=b11,0,w#_ednref1 (last visited Nov. 17, 2011) (citing Environmental Working Group Report, *Who Owns the West: Oil and Gas Leases* (2004)).

²⁹² The Ute Indian Tribe occupies the second largest reservation in the United States, covering over 4.5 million acres. THE UTE INDIAN TRIBE, <http://www.utetribes.com> (last visited Sept. 13, 2010).

²⁹³ BUREAU OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, MINERAL & DEVELOPMENT GUIDE: HOW TO DO BUSINESS ON THE UINTAH & OURAY RESERVATION 2–3 (2006) [hereinafter HOW TO DO BUSINESS ON THE UINTAH & OURAY RESERVATION], available at <http://www.utetribes.com/mineralResourcesDevelopment/DoBusinessOnUO.pdf>.

²⁹⁴ *See* Act of Mar. 11, 1948, ch. 108, 62 Stat. 72, 77 (1948).

(approximately 625 square miles).²⁹⁵ These resources are owned by Ute Indian Allottees, the Ute Indian Tribe, or jointly managed by the Ute Indian Tribe and Ute Distribution Corporation.²⁹⁶ The Tribe also controls surface rights over more than 86,000 acres within federally-designated Special Tar Sands Areas and 286,000 acres of surface overlying oil shale bearing lands.²⁹⁷

Despite the complicated surface and subsurface ownership pattern within their reservation, the Ute Indian Tribe has managed to develop significant energy resources. The Ute Energy and Minerals Department is responsible for the development of natural resources on the Reservation and works closely with state and federal agencies.²⁹⁸ The department has issued over forty leases and 300 rights of way for oil and gas exploration ventures.²⁹⁹ Minerals jointly managed by the Tribe and Ute Distribution Corporation may be leased by contacting the Bureau of Indian Affairs (BIA), which will then contact the Ute Indian Tribe and Ute Distribution Corporation.³⁰⁰ Similarly, “[t]he BIA will notify Indian Allottees for a proposal of leasing or right-of-way consent.”³⁰¹ Most leasing of trust assets on the Ute Indian Reservation occurs through mineral agreements under the IMDA. However, much of the oil and gas development within Indian country comes from aging wells. As the old wells decline in production, the tribe will receive fewer revenues creating an incentive to enhance production, either through enhanced production methods (e.g., CO₂ flooding), development of new fields, or development of unconventional resources (e.g., oil shale and tar sands).

While energy development is occurring in Indian country, but the process is far from smooth. The U.S. Senate Committee on Indian Affairs cited “outdated laws and cumbersome regulations” as one of the major barriers to tribal energy development.³⁰² Lease review and approval processes for Indian lands can take two to three years longer than the equivalent process on state and private lands.³⁰³

²⁹⁵ HOW TO DO BUSINESS ON THE UINTAH & OURAY RESERVATION, *supra* note 293.

²⁹⁶ *Id.*

²⁹⁷ KEITER ET AL., *supra* note 5, at 25, 30.

²⁹⁸ ENERGY & MINERALS DEP’T, THE UTE INDIAN TRIBE, <http://www.utetribes.com/mineralResourcesDevelopment/energyMinerals.html> (last visited Sept. 13, 2010). The Department monitors business licenses for compliance and enforcement, and handles severance tax and royalty payments. *Id.*

²⁹⁹ *Id.*

³⁰⁰ HOW TO DO BUSINESS ON THE UINTAH & OURAY RESERVATION, *supra* note 293.

³⁰¹ *Id.*

³⁰² S., COMM. ON INDIAN AFFAIRS, 111TH CONG., INDIAN ENERGY AND ENERGY EFFICIENCY CONCEPT PAPER (Comm Print 2009), *available at* <http://indian.senate.gov/issues/upload/Indian-Energy-and-Energy-Efficiency-Concept-Paper.pdf>. Other barriers identified include “lack of tribal access to the transmission grid; and . . . difficulty in obtaining financial and investment for energy projects.” *Id.*

³⁰³ Phil Taylor, *Tribal Leaders Urge Energy Policy Reforms for Indian Country*, N.Y. TIMES, Oct. 23, 2009, <http://www.nytimes.com/gwire/2009/10/23/23greenwire-tribal-leaders-urge-energy-policy-reforms-for-63893.html> (last visited Nov. 11, 2011). Development permitting for federal public lands already takes much longer than permitting for comparable state lands. INDEP. PETROL. ASS’N OF MOUNTAIN STATES, ROCKIES

Some tribal leaders have asked Congress “to streamline the development of energy projects on tribal lands by curbing some federal oversight and providing incentives for companies to strike deals with reservations.”³⁰⁴ More specifically, some “tribes want to eliminate federal drilling fees, pare down the Interior Department’s bureaucracy, and shield tribes from state and local taxes on energy projects.”³⁰⁵ While various bills have been proposed to streamline permit issuance,³⁰⁶ none have passed. Admittedly, the ITESDA “afforded Indian Tribes unparalleled opportunities to develop their energy resources, whether renewal or nonrenewable, and to develop and manage environmental programs related to energy activities.”³⁰⁷ However, while the ITESDA represents increased tribal control, tribes have been slow to participate since they lack capacity and are concerned about liability.³⁰⁸ Therefore, most of the leasing in Indian country occurs under the IMDA, which remains a slow and cumbersome process.

B. Moving Towards Collaboration

A collaborative approach in and around Indian country is needed to ensure efficient energy development. Land and resource ownership is highly fragmented, and Indian country jurisdiction remains a complicated and often misunderstood concept. Agency personnel may not understand the geographic extent of Indian country or why Indian country is not synonymous with current reservation boundaries. Formal agreements and maps of the geographic extent of Indian country and associated state regulatory jurisdictional limits are rare.³⁰⁹ As a result, federal, state, and tribal officials must rely on informal understandings and ad-hoc

REGIONAL COMPETITIVENESS: IPAMS MEMBER REGIONAL SURVEY RESULTS (2010), available at <http://westernenergyalliance.org/wp-content/uploads/2010/02/IPAMS-Survey-Results-Regional-Competitiveness-updated-May-2010.pdf>. Therefore, tribes seeking to develop their oil and gas are at a significant disadvantage when compared to state and private resource owners.

³⁰⁴ Matthew Brown, *Indian Tribes to Congress – Streamline Energy Development*, ASSOCIATED PRESS, Apr. 23, 2010, <http://buffalopost.net/?p=8525> (last visited Nov. 11, 2011).

³⁰⁵ *Id.*

³⁰⁶ See, e.g., Indian Energy Parity Act of 2010, S.B. 3752, 111th Cong. (2010). The Act focuses on improving energy planning, development and efficiency, and financing, including an amendment to prohibit the BLM from levying and collecting APD fees on Indian land. See *id.*

³⁰⁷ Wynona Sinyella, Council Member, Hualapi Tribe, *Nuclear Power*, Remarks at the Indian Energy Solution Conference 2–3 (Aug. 06, 2008) (reporter’s transcript by Mary C. Daniel), available at <http://74.63.154.129/pdfs/Presentations/2008/NUCLEARPOWER WAM.pdf>.

³⁰⁸ *Id.* at 31–34, 51.

³⁰⁹ Some states have formal agreements with respect to criminal jurisdiction. See Michael L. Barker & Kenneth Mullen, *Cross-Deputization in Indian Country*, 16 POLICE STUD. INT’L REV. POLICE DEV. 157, 157–166 (1993). A map of Indian country within eastern Utah is available in KEITER ET AL., *supra* note 5, at 54.

decision-making processes. The lack of clarity can create uncertainty for those potentially subject to regulation, as they legitimately question who will regulate their development and fear that a project extending across jurisdictional boundaries could be subject to multiple and conflicting requirements or worse, a jurisdictional battle between governments or agencies. Moreover, energy developers may be forced to configure proposals to address regulatory rather than resource constraint, which may in turn lead to inefficient development, redundant infrastructure, and a greater overall level of environmental impact.

Where jurisdiction is unclear, the risk of inconsistent regulation increases, uncoordinated cumulative effects assessments become more likely, and inadequate protection of transient resources, such as migrating wildlife and air quality related values, is more likely to occur. Energy resources within Indian country hold tremendous promise to reduce dependence on foreign oil and spur economic development. However, in order to prevent haphazard development, federal, state, and tribal governments must work together. Failure to coordinate plans among federal agencies, tribal governments, state governments, and the general public can lead to program duplication and inefficient accomplishment of governmental programs.³¹⁰ It is essential to bring all the relevant players into the land use planning process “so that they will have a voice in decisions that affect their interests.”³¹¹

Presently, energy resources are managed by different parties under different requirements, advancing different interests. Fragmented ownership, combined with divergent management objectives, threatens to either impede development or result in development that neither maximizes efficiencies nor minimizes environmental degradation. In order to prevent such outcomes, it is critical that federal, state, and tribal leaders coordinate their efforts to create synergies rather than conflicts.

Intergovernmental coordination can be facilitated by cross-jurisdictional, landscape-level land and resource management strategies, such as an ecosystem co-management agreement.³¹² “[E]cosystem management focuses on entire ecosystems, not just individual resources, emphasizing the need for inter-jurisdictional coordination to ensure ecological integrity and sustainable resource systems.”³¹³ Such agreements, when done appropriately, can bring multiple sovereigns together to address and resolve matters of mutual concern to each

³¹⁰ PUBLIC LAND LAW REVIEW COMM’N, ONE THIRD OF OUR NATION’S LAND 57 (1970).

³¹¹ *Id.*

³¹² See Mary Ann King, *Co-Management of Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007) (discussing the 1994 Tribal Self-Governance Act as a mechanism for sharing authority between tribes and federal land management agencies).

³¹³ Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97, 98 (2008).

other.³¹⁴ Co-management agreements can also help avoid litigation and overcome situations when limited tribal capacities impede independent resource management.³¹⁵ Different levels of power sharing can be utilized in a co-management approach as well, ranging from joint decision-making to mere notification.³¹⁶ This flexibility allows agreements to be tailored to the individual needs and capabilities of a given area.

Overall, “[i]ntergovernmental agreements can serve both Indian and non-Indian communities by reducing cross-jurisdictional disputes and providing flexible and effective ways to manage inter-jurisdictional environmental resources.”³¹⁷ Given the overlapping concerns and impacts of energy development, including the mobility of pollutants, such agreements provide an ideal solution for federal-tribal-state conflicts.

Neither tribes nor states can effectively regulate regional environmental quality without the cooperation of the other. Joint regulatory programs avoid jurisdictional disputes by allowing the parties to agree on who will regulate a particular activity for a particular period of time. Moreover, cooperative agreements lower intergovernmental tensions that can damage the overall quality of state/tribal relations and also provide greater flexibility for both tribal and state policy-makers in the future.³¹⁸

In order to be successful, one scholar suggests that co-management must include the following principles: 1) recognition of tribes as sovereign governments; 2) incorporation of the federal trust responsibility; 3) legitimate structures for tribal involvement; 4) integration of tribes early in the decision-making process; 5) recognition and incorporation of tribal expertise; and 6) dispute resolution mechanisms.³¹⁹ As the next section discusses, there are various obstacles in achieving each of these principles.

³¹⁴ *Id.* at 106. Notably, many scholars have written on the need to change the trust doctrine and to modify the relationship between the federal, state, and tribal governments. See Skibine, 42 ARIZ. ST. L.J. 253 (2010); Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES. J. 317 (2006) (discussing the need for Congress to change the trust doctrine to remove federal supervision). However, this Article looks at how best to improve resource management given the current legal backdrop.

³¹⁵ Sanders, *supra* note 313, at 106.

³¹⁶ *Id.* at 107.

³¹⁷ *Id.*

³¹⁸ Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 250 (1993).

³¹⁹ Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENVTL. L. 279, 343–48 (2000).

IV. MOVING TOWARDS COLLABORATION

*Competition between tribes and states is mutually destructive, wastes taxpayer dollars, impedes economic development, and is based on racism and self-defeatism. Only through communication, cooperation, and understanding can sovereignty be made a positive force for the continued growth of both sovereigns and the people they serve.*³²⁰

While co-management between federal, state, and tribal governments may represent one advantageous path forward, achieving true collaboration will be difficult. This section addresses the barriers that must be overcome to pave the way for future partnerships and concludes with examples of innovative agreements to share regulatory responsibilities across jurisdictional boundaries.

A. Stumbling Blocks to Reaching Collaboration

Various hurdles stand between current practices and effective cooperative management. First, deep-rooted mistrust between the sovereign entities must be overcome. “Even where cooperative agreements prove, on balance, beneficial to tribes, it may be difficult to sustain them if . . . mistrust make[s] them politically controversial.”³²¹ Historic federal policies and state mistreatment resulted in harm to tribes, culminating in mistrust of these entities. For example, the allotment era left many tribal communities in a state of disarray, and the subsequent termination era called for an end to the trust relationship between the federal and tribal governments. As a result, more than 100 tribes and bands lost federal recognition and were terminated.³²²

Additionally, tribes have historically battled states over resources, boundaries, and jurisdiction. Disputes over natural resources within the Uintah Basin have been contentious, with the tribe deferring development of the promised Ute Indian Water Project until other portions of the Central Utah Project (CUP) could be completed, delivering water to non-Indians along the Wasatch Front.³²³ When the promised Ute Indian Water Project was not built, the tribe declared the deferral agreement null and void and obtained a \$198 million settlement from the federal

³²⁰ Korey Wahwassuck, John P. Smith & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 874 (2010) (quoting Vincent Knight, Executive Director, National Tribal Justice Resource Center).

³²¹ Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 728–29 (2006) (discussing law enforcement agreements, but equally applicable to other agreements).

³²² See ANDERSON ET AL., *supra* note 30, at 139–49 (discussing the termination era).

³²³ See WATERS OF ZION: THE POLITICS OF WATER IN UTAH 15–16, 43–44 (Daniel C. McCool ed., Univ. of Utah Press 1995).

government.³²⁴ The State of Utah continued to negotiate settlement of Indian water right claims, but with the atmosphere tainted by cases such as *Hagen* and *Brough*³²⁵ and continuing concerns over administration of tribal water rights, no resolution could be obtained.³²⁶

Consultation with tribes is the first step towards remedying past harm and providing tribes with an equal seat at the table. Historic adversaries must be able to sit face-to-face before they can see eye-to-eye. While current federal policy encourages consultation and coordination with Indian tribes,³²⁷ in the eyes of some, it remains “difficult to avoid the conclusion that ‘consultation’ is the latest federal codeword for lip service.”³²⁸ Despite the existence of internal agency policies advocating government-to-government relations with tribes, “the ability of tribes to participate as decision makers with enforceable rights is often ambiguous,” leaving open the question of what it means to have meaningful consultation.³²⁹ Similarly,

³²⁴ DANIEL C. MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 180* (Ariz. Univ. Press 2002) (the \$198 million does not include payment for the water diverted into the CUP).

³²⁵ In *Hagen v. Utah*, the Indian defendant was convicted of distribution of a controlled substance and challenged state court jurisdiction since the crime was committed within the former boundaries of a reservation. 510 U.S. 399 (1994). The lower courts disagreed over whether the reservation had been diminished by Congress. Ultimately the United States Supreme Court granted certiorari and held that the state courts properly exercised criminal jurisdiction over the defendant since the reservation had been diminished and therefore, the crime was not committed within the boundaries of the reservation. *Id.* Jurisdiction was similarly challenged in *Brough v. Appawora*, when another Indian defendant claimed that an accident took place on reservation land and therefore, the state court had no jurisdiction over him. 553 P.2d 934 (Utah 1976). However, the Utah Supreme Court affirmed state jurisdiction, noting that “[t]o declare the law to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts at will and be immune from any accountability to the law of the land.” *Id.* at 936.

³²⁶ The Ute Indian Water Compact is codified into Utah law, but without force or effect because the compact was not ratified by the tribe. *See* UTAH CODE ANN. § 73-21-2.

³²⁷ *See, e.g.*, Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) (obliging agencies that manage federal lands to accommodate access to and ceremonial use of Indian sacred sites); Exec. Order No. 13,084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998).

³²⁸ RODGERS, JR., *supra* note 17, at 202 (quoting Derek C. Haskew, Managing Attorney, DNA-People’s Legal Services, Inc., Halchita, Navajo Nation, 2000). However, “it is staggering to consider the many decades that Indians were not even allowed this much say in their policies that so intimately affect their lives.” *Id.*

³²⁹ Sanders, *supra* note 313, at 117. Several courts have been called upon to interpret “meaningful” consultation. *See, e.g.*, *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969) (discussing meaningful participation of tribes in resource management and encouraging tribes and states to pursue a “cooperative approach” in managing fisheries); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (finding that two meetings with

few states include a tribal consultation requirement in their state environmental review laws.³³⁰

To help ensure substantive tribal involvement, the EPA established the National Environmental Justice Advisory Council; the Council's Indigenous Peoples Subcommittee prepared a guide on consultation and collaboration with tribes, specific to environmental decision-making.³³¹ The Subcommittee distinguished consultation within the realm of environmental law from the unique context of interaction with tribes.

[C]onsultation between the federal and tribal governments should be a collaborative process between government peers that seeks to reach a consensus on how to proceed. Many federal statutes specifically recognize the obligation of the federal government to consult with tribal officials on a government-to-government basis. Moreover in some instances specific requirements demand the federal government give special deference to tribal preference.³³²

The Subcommittee further identifies guiding principles to facilitate effective consultation and collaboration with tribes.³³³ These principles include the following: 1) know the tribes; 2) build on-going consultation relationships with tribes; 3) institutionalize consultation and collaboration procedures; 4) contact tribes as early as practicable and allow sufficient time for the consultation process; 5) establish training programs for all staff on consultation with tribes; 6) maintain honesty and integrity in their consultation process; and 7) view tribal consultation as an integral and essential element of the government-to-government relationship

tribal officials is not meaningful consultation); *Lower Brule Tribe v. Deer*, 911 F. Supp. 395, 401 (D. S.D. 1995) (Meaningful consultation "means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker.").

³³⁰ Royster, *supra* note 243, at 1094.

³³¹ INDIGENOUS PEOPLE SUBCOMM., NAT'L ENVTL JUSTICE ADVISORY COUNCIL, EPA, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (EPA/300-R-00-009, 2000) [hereinafter GUIDE ON CONSULTATION AND COLLABORATION], available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1006OJ9.txt>. The National Environmental Justice Advisory Council was created in 1993 to provide stakeholder advice to the EPA Office of Environmental Justice, which is charged with integrating environmental justice into EPA's policies, programs, and activities. EPA, National Environmental Justice Advisory Council, (Mar. 15, 2011), <http://www.epa.gov/compliance/ej/nejac/index.html>. The Council includes members of the community, academia, industry, environmental, indigenous, and state/local/tribal government groups. *Id.*

³³² GUIDE ON CONSULTATION AND COLLABORATION, *supra* note 331, at 5.

³³³ *Id.* at 16–17. Recognizing the great diversity among tribes, the Subcommittee acknowledges that principles should be adapted when dealing with specific tribes if necessary. *Id.*

with tribal governments, and not simply as a procedural requirement.³³⁴ Principles like those developed in the Subcommittee's guide should be utilized to build trust with tribes through real consultation.

Another hurdle to collaboration is the lack of tribal capacity. Even if tribes are given a chance to participate, many tribes may lack the technical expertise to be true partners in energy development. "When considering the co-management approach for the conservation and restoration of inter-jurisdictional natural resources, tribes must be prepared to 'hold their own' at the negotiation table."³³⁵ Fortunately both tribal and agency efforts are improving tribal capacity. For example, the Council of Energy Resource Tribes (CERT) "was founded by Indian Tribes as a distinct resource providing advice and support for Tribes in developing and sustaining long-term energy goals."³³⁶ Overall, the goal of CERT is "to help Tribes build stable, balanced, self-governed economies, according to each Tribe's vision and priority."³³⁷ CERT is currently comprised of fifty-four federally recognized U.S. tribes, including the Ute Indian Tribe, and four First Nation Treaty Tribes of Canada.³³⁸

Additionally, many federal agencies have programs dedicated to working with tribal governments. The Department of Energy created the Tribal Energy Program in 1992 to help tribes develop renewable energy resources on their land.³³⁹ The Department of the Interior has an Office of Indian Energy and Economic Development to develop managerial and technical capacity for energy resource development and integration for energy resources. An American Indian Environmental Office also exists at the EPA to help coordinate agency efforts on environmental protection in Indian country and to help tribes administer their own environmental programs.³⁴⁰ Sometimes statutes specifically provide for tribal assistance as well. For example, the Energy Policy Act of 2005 authorizes the Secretary of Interior to provide assistance to tribes for energy development and appropriates funds for such projects on a year-to-year basis.³⁴¹ When funding is available, the Office of Indian Energy and Economic Development solicits proposals for capacity building projects for tribal energy resource development on Indian land.

³³⁴ *Id.*

³³⁵ Sanders, *supra* note 313, at 173 (emphasizing the need to build up tribal expertise and management capabilities).

³³⁶ *Welcome to CERT*, COUNCIL OF ENERGY RES. TRIBES, <http://74.63.154.129/> (last visited Sept. 15, 2011).

³³⁷ *Id.*

³³⁸ *About CERT*, COUNCIL OF ENERGY RES. TRIBES, <http://74.63.154.129/aboutus-philosophyHistory.html> (last visited Sept. 15, 2011).

³³⁹ *See About the Program*, TRIBAL ENERGY PROGRAM, DEP'T OF ENERGY, (Mar. 04, 2011), <http://apps1.eere.energy.gov/tribalenergy/about.cfm>.

³⁴⁰ *AIEO Mission*, AM. INDIAN ENVTL OFFICE, EPA, (Aug. 23, 2011), <http://www.epa.gov/owindian/>.

³⁴¹ 25 U.S.C. § 3502 (2006).

Finally, the federal government, states, and tribes each place different values on resources and will likely need to reconcile any differences in order to obtain a unified approach towards ecosystem management and energy development.³⁴² The notion that tribes have a different land ethic is widely embraced. “Non-Indian environmental management relies on written regulations and judicial enforcement while traditional tribal society achieves the same through reliance on cultural norms and spiritual mandates.”³⁴³ Most American Indians view their land as sacred and culturally important.³⁴⁴ Tribes often cite the importance of “‘proper and meaningful consideration of environmental, cultural, historical, and ecological factors’ before development occurs, and the need ‘to protect and preserve’ the reservation and ‘to provide a safe and habitable homeland’ for the generations.”³⁴⁵

However, the existence of unique Indian values and belief systems “does not mean that tribal lands should never be used by the people.”³⁴⁶ “[E]ven though all land is sacred, a specific area may be considered as having less sacred value and development may be pursued on it.”³⁴⁷ A balance is required. As Joe Shirley, Jr., the former Navajo Nation President, explains: “The Navajo Nation is part of the modern economy. We do not oppose creating jobs, but there are lines we will not cross in order to make money.”³⁴⁸ It is up to federal, state, and tribal representatives to communicate their respective land ethics to each other and clarify what type of development would be “crossing the line.”

True collaboration requires equal partnerships among federal, state, and tribal governments. As a preliminary step, tribes and states must overcome their historic mistrust of each other and the federal government, and possess the capability to manage their resources. Consultation policies should be established within every federal agency as well as at the state-level. While the policies need to have some flexibility to account for the individual differences between tribes, sound principles should be followed, such as those developed in the Subcommittee Guide. Additionally, tribes should take advantage of opportunities to build infrastructure, whether through tribal organizations (e.g., CERT) or agency programs. Once these barriers are overcome, collaborative efforts, such as ecosystem co-management agreements, will be more likely to succeed.

³⁴² See Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 478–86 (2010) (discussing the tension between Indian interest and industrial interests in resource management, with San Francisco Peaks and the mandatory livestock reduction as specific examples).

³⁴³ Sanders, *supra* note 313, at 104.

³⁴⁴ Skibine, *supra* note 20, at 1004.

³⁴⁵ Royster, *supra* note 243, at 1093.

³⁴⁶ Rosser, *supra* note 342, at 472.

³⁴⁷ *Id.* at 504.

³⁴⁸ *Id.* at 477.

B. Learning from Current Strategies

Although not abundant, innovative agreements exist between federal, state, and tribal governments. Such agreements suggest that collaborative approaches in energy development are also feasible. For example, state-tribal environmental programs may be one way to promote efficient energy development and should not be overlooked.³⁴⁹ In 2003, the EPA Region 10 signed a Memorandum of Agreement (MOA) with the Nez Perce Tribe, Idaho Department of Environmental Quality, and Idaho Department of Agriculture on Agricultural Smoke Management in the Clearwater Airshed.³⁵⁰ The MOA sets forth the smoke management program operations for both the State of Idaho and the Nez Perce Tribe, whereby the parties agree to work collaboratively and to share responsibilities. The Arizona Department of Environmental Quality also entered into a state-tribal agreement with local tribes. Arizona's Tribal Government Policy recognizes that "the environmental integrity of entire ecosystems cannot be regulated in isolation; pollution is not restricted by political boundaries."³⁵¹ As a result, the policy aims to encourage cooperation in environmental protection through coordinated efforts.

States and tribes have also entered into wildlife management and harvest agreements. In the 1988 Columbia River Fish Management Plan, the federal government, state, and local tribe "exercise[d] their sovereign powers in a coordinated and systemic manner in order to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-Indian fisheries."³⁵² Notably, the Plan contained a provision providing for federal court jurisdiction if the parties were unable to resolve a dispute.³⁵³ Recognizing that wolf conservation was an area of mutual concern to the State of Idaho and the Nez Perce Tribe, the parties entered into a similar agreement for wolf conservation and management. More specifically, the tribe and state agreed to work together, "in concert as sovereign governments to maintain self sustaining wolf populations."³⁵⁴ The MOA emphasized the collaborative nature of the agreement

³⁴⁹ See RODGERS, JR., *supra* note 17, at 336 (discussing state initiatives).

³⁵⁰ MEMORANDUM OF AGREEMENT AMONG THE NEZ PERCE TRIBE, THE IDAHO DEP'T OF ENVTL. QUALITY, IDAHO STATE DEP'T OF AGRICULTURE, AND THE EPA RELATING TO AGRICULTURAL SMOKE MGMT. IN THE CLEARWATER AIRSHED (2003), *available at* http://www.deq.idaho.gov/rules/mous/air_clearwater_airshed_smoke_management_2002_274.pdf.

³⁵¹ ARIZ. DEP'T OF ENVTL. QUALITY, *A DEQ Tribal Government Policy*, STATE OF ARIZ. TRIBAL CONSULTATION POLICIES 1 (2003), *available at* http://azcia.gov/Documents/TCP/ADEQ%20TCP_200304.pdf.

³⁵² COLUMBIA RIVER FISH MNGT. PLAN, Preamble (as amended by the Court Oct. 7, 1988). *See also* Sanders, *supra* note 313, at 132–41 (discussing the Plan in more detail).

³⁵³ COLUMBIA RIVER FISH MNGT. PLAN, *supra* note 352, at §§ I(C), IV(D) (as amended by the Court Oct. 7, 1988).

³⁵⁴ MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF IDAHO AND THE NEZ PERCE TRIBE CONCERNING COORDINATION OF WOLF CONSERVATION AND RELATED

while acknowledging that each party retained their sovereign status and “authorities independent of each other.”³⁵⁵ Unlike the Columbia River Plan, disagreements were to be resolved by a mutually agreed upon outside facilitator, rather than through litigation.³⁵⁶

Finally, states and tribes have entered into tax compacts with one another. Michigan tribes have utilized tax compacts with the state to allow tribal exemptions from state taxing authority in “agreement areas.”³⁵⁷ Such “agreement areas” need not have any relationship to reservation lines, and therefore, can smooth over the difficulties created by uncertain boundaries in Indian country.³⁵⁸ Within the Uintah Basin, the Ute Indian Tribe currently is in discussions with Uintah and Duchesne counties over a proposed law enforcement MOU.³⁵⁹ While the initial meetings have been heated,³⁶⁰ the criminal enforcement MOU could potentially be used as a springboard for a broader energy development agreement.

Each of these coordinated efforts illustrates how the federal, state, and tribal governments can work together to reach a common goal. However, regardless the type of agreement sought, it is important to recognize the limits of collaboration. Collaboration does not necessarily equate to co-management. While collaboration can provide an adequate opportunity for all relevant parties to have meaningful involvement in decision-making processes, parties cannot be forced into agreement. The main goal of collaboration is to reach consensus on how to proceed, but “[c]onsultation is not the same as obeying those who are consulted.”³⁶¹ Moreover, agency action is limited by the delegation doctrine, preventing agencies from exceeding their delegated authority.³⁶²

Collaborative approaches, such as ecosystem co-management agreements, have the potential to facilitate coordinated development of energy resources.

ACTIVITIES IN IDAHO § 2 (2005), *available at* <http://fishandgame.idaho.gov/public/docs/wolves/memoOfAgreement2.pdf>.

³⁵⁵ *Id.* § 4.

³⁵⁶ *See Sanders, supra* note 313, at 159–60 (discussing the MOA in more detail).

³⁵⁷ Skibine, *supra* note 20, at 1019.

³⁵⁸ *Id.*

³⁵⁹ Ute Bulletin, (Ute Indian Tribe, Fort Duchesne, Utah), Mar. 02, 2011, *available at* <http://www.utetribe.com/memberServices/uteBulletin/BulletinMarch2.pdf>.

³⁶⁰ Geoff Liesik, *Counties, Tribe Talk Jurisdiction*, VERNAL EXPRESS, Feb. 23, 2011, <http://www.vernal.com/stories/Counties-tribe-talk-jurisdiction%2C1168671>. A previous law enforcement agreement between the tribe, State of Utah, and Uintah and Duchesne Counties expired in November 2008. Geoff Liesik, *Ute Indian Tribe Issues Resolution on Jurisdiction Changes*, DESERET NEWS, Dec. 08, 2010, <http://www.deseretnews.com/article/700089351/Ute-Indian-Tribe-issues-resolution-on-jurisdiction-changes.html>.

³⁶¹ *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986).

³⁶² The delegation doctrine was “developed to prevent Congress from forsaking its duties.” *Loving v. U.S.*, 517 U.S. 748, 758 (1996). Therefore, Congress’ power can only be delegated if it makes the basic policy choices and provides sufficient guidance on how the delegated power is to be exercised. *See J.W. Hampton v. U.S.* 276 U.S. 395, 409 (1928) (discussing the need for adequate standards or an “intelligible principle” to guide agency discretion).

However, certain principles must be followed and various hurdles overcome to increase the chances of success. While the agreements above represent a step towards true collaboration, they could be strengthened to include principles discussed previously. Future ecosystem co-management agreements should build upon past efforts by recognizing sovereignty, obtaining meaningful tribal involvement, and incorporating a dispute resolution mechanism to avoid further litigation in an already contested area. These basic steps will bring the federal government, states, and tribes closer to reaching true collaboration in managing important intergovernmental resources in an efficient manner with minimal environmental harm.

V. CONCLUSION

Indian country contains a wealth of natural resources, including significant energy resources that could help secure energy independence for the United States. Armed with sovereignty, tribes are becoming an increasingly important player in the energy arena. However, navigating the jurisdictional maze can be a daunting task and impede development. Furthermore, without a coordinated approach, the federal, state, and tribal governments are more likely to proceed in a haphazard manner that results in inefficient development and environmental degradation. These governmental entities can expand upon previous efforts to encompass greater tribal involvement and key components, such as sovereignty and the trust doctrine. If true collaboration is achieved, the federal government, states, and tribes can become partners in the twenty-first century to ensure smart energy development, rather than allowing it to be determined by the judicial system through costly, and contentious, litigation.