

Native American Sovereignty

Should Indians have more control over their land?

Native American lands contain \$1.5 trillion in untapped coal, oil and other energy resources. The potential bounty is raising hopes among many Indians that energy development can help tribes reduce poverty on their reservations, where unemployment averages 19 percent. But development also is raising fears that it will threaten Indians' traditional way of life and harm the Earth. In addition, the dispute is raising tough questions among Indians, lawmakers and others about energy development and the limits of tribal sovereignty. The Navajo and like-minded tribes want federal regulations relaxed so Indians can develop their energy resources, providing jobs and other benefits. But other tribes argue the federal government remains obligated under treaties to protect Indian land from commercial exploitation. They are further worried about the Trump administration as it relaxes regulations on the energy industry and federal lands. Meanwhile, controversy has arisen over some tribes' disenrolling of members. Critics say the practice is a power grab by tribal leaders, but defenders say tribes have a right to decide who is a member.



Protesters demonstrate in Washington, D.C., on March 10, 2017, against the Dakota Access Pipeline, which runs near the Standing Rock Sioux reservation in North Dakota. Tribal members say the controversial oil project infringes on their sovereignty and will desecrate sacred land and pollute groundwater.

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Native American Sovereignty

BY CHRISTINA L. LYONS

THE ISSUES

On rolling hills in south-central Montana, near where Lt. Col. George Armstrong Custer and his 7th Cavalry made their Last Stand in 1876, the Crow Nation sees the future.

The tribe's 2.2-million-acre reservation is rich in coal, and unlocking its potential is critical to the tribe's economy, tribal leaders say. The Crow's main source of income is the 43-year-old Absaloka Mine in Hardin. The tribe for the past several years has pushed to open a second mine that could produce 1.4 billion tons of coal and generate \$10 million for the tribe in five years.

But the tribe's attempts to open the new mine have been stymied in part by federal land-use and environmental rules that the tribal government says tread on its sovereignty.¹

"I don't want to be dependent on the U.S. government," former Crow tribal Chairman Darrin Old Coyote said. "We have the resources, we have the manpower, we have the capability of being self-sufficient." Noting that the tribe's unemployment rate ranges between 25 percent and 50 percent, he added, "There's no reason why we should be this poor."²

But nearby tribes say fossil fuel development threatens the environment and Native Americans' distinct way of life, which they believe the federal government is obligated to protect under centuries-old treaties. Energy development "threatens the cultural heritage of what it means to be Northern Cheyenne," tribal council member Conrad Fisher said. "It has to do with being environmental stewards of the



AP Photo/The Billings Gazette/Casey Page

Former Crow Nation Chairman Darrin Old Coyote says the tribe has the right to develop coal reserves on its vast Montana reservation. Other tribes nearby, however, oppose fossil fuel development as a threat to Native Americans' distinct way of life and want the federal government to protect the land.

land and appreciating this beautiful country we call home."³

The tribes' contrasting views highlight a spirited debate among Native Americans, economists, environmentalists, scholars and lawmakers about energy development and tribal sovereignty. Some tribal governments — including the Navajo in the Southwest and the Southern Ute in Colorado — favor authorizing tribes to develop their energy resources or implement their own environmental safeguards without restrictions from the federal government and outsiders.

"It's about sovereignty," said Mark Fox, chairman of the Three Affiliated Tribes of the Mandan, Hidatsa and Arikara Nation, known as MHA Nation,

which has profited from an oil and gas boom on its Fort Berthold reservation in North Dakota.⁴

But other tribal governments, numerous individual natives and environmentalists say the federal government remains obligated to protect Indian land and natural resources from outside commercial exploitation or corrupt tribal governments.

"It's not about business anymore," David Kenny, a member of the Seneca Nation, said as he marched past the White House on March 17 protesting the completion of the Dakota Access Pipeline. The controversial oil pipeline runs under land sacred to Native Americans just outside the Standing Rock Sioux's reservation in North Dakota. "Everybody is going to die if this continues. The Earth is dying."⁵

The debate over energy development has taken on added urgency in recent years because of entrenched

poverty on reservations and the growing lure of energy and mineral riches, driven in part by the Trump administration's plans to revitalize the domestic energy industry.

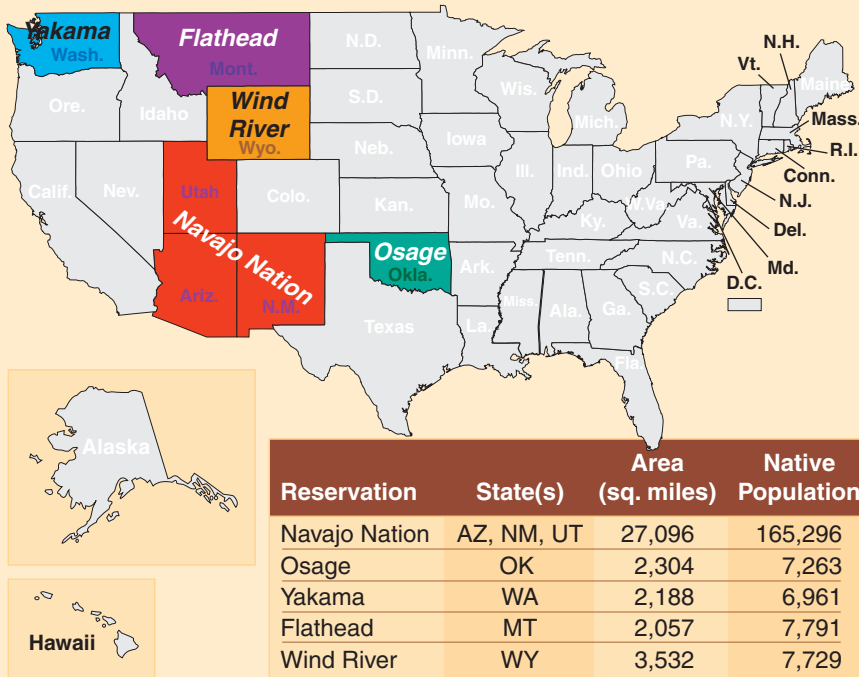
In 2010, 5.2 million people identified as members of one of the nation's 567 American Indian or Alaska Native tribes. About 22 percent of the Native Americans live on one of 334 reservations, which cover 100 million acres scattered across 35 states.

Those reservations contain almost 30 percent of the nation's coal reserves west of the Mississippi River, half of its potential uranium reserves and one-fifth of the known oil and natural gas reserves. Yet the Interior Department in 2008 estimated that 15 million acres

Navajo Nation Is Biggest U.S. Tribe by Far

The five largest Indian reservations in the continental United States are in the West. The Navajo Nation — spanning Arizona, New Mexico and Utah and covering nearly 27,100 square miles — is nearly eight times bigger than the second-largest reservation. It also has the largest population.

Five Largest Native American Reservations



Sources: Amber Pariona, "Biggest Indian Reservations In The United States," World Atlas, July 20, 2016, <http://tinyurl.com/lzve6ne>; Tina Norris, Paula L. Vines and Elizabeth M. Hoeffel, "My Tribal Area," U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, <http://tinyurl.com/lwavjnn>; "Indian Lands of Federally Recognized Tribes of the United States," Bureau of Indian Affairs, <http://tinyurl.com/lm2vekh>

of reservations' energy rich lands were undeveloped.⁶

Some tribes reside on lands with abundant natural resources for timbering, agriculture or fishing — such as in the Pacific Northwest or Great Lakes areas. Other tribes have rich fossil fuel or mineral reserves, but not all want to harvest them.

The issue of whether to exploit fossil fuel or mineral resources can put tribes at odds with each other or cause divisions within tribes.

"The Navajo Nation has some members who are pro-economic develop-

ment and want to provide jobs [in areas] where there is significant unemployment," says Walter Stern, a lawyer in New Mexico who represents energy companies. "And there are members who are opposed to any kind of disturbance of Mother Earth, so they don't want to see any coal development or anything."

Federal regulations can limit resource development on tribal lands, legal experts say. The regulations are based on the "trustee doctrine," which stems from an 1831 Supreme Court ruling describing tribes as "domestic depen-

dent nations" with a relationship to the U.S. government similar to that of wards to guardians.⁷

Much of the energy development that has occurred on reservations was initiated decades ago, when changing federal policies left reservations with checkerboard land ownership patterns. The Dawes Act of 1887 divvied up native territories and allotted plots to individual Indians, to be held in trust for 25 years or until the United States deemed the individuals competent to be granted ownership. Surplus lands were sold to non-Indians.

When the allotment process ended in 1934, lands remaining in trust were frozen in the trust, while any individuals who had been granted deeds to their lots were free to lease or sell them. According to a 2011 study, about 75 percent of tribal land remains in trust protection for the tribe, 20 percent entail individual lots held in trust (primarily for heirs of the Indians originally granted the lots) and 5 percent is privately owned by Indians or non-Indians.⁸

Before Congress ended the allotment process, it allowed the U.S. government to approve any energy development contracts on tribal trust lands. Many contracts provided only limited royalties to tribes. Tribes regained some authority over development projects on their lands in the 1980s, but the Bureau of Indian Affairs (BIA) retained final approval.

Today, a "complex" regulatory framework governs BIA management of energy development on trust lands, according to the Government Accountability Office (GAO).

"Trusteeship wraps these reservations in red tape," says Terry Anderson, a senior fellow at the Property and Environmental Research Center in Bozeman, Mont., noting that energy development proposals require approval from four federal agencies and compliance with 49 regulations.

He says tribes should have "authority over the land within reservation bound-

aries. I think from there, tribes can decide what they want to do.”

But Jacqueline Pata, executive director of the National Congress of American Indians, a lobbying organization for tribal interests based in Washington, D.C., says the trust status is necessary to prevent exploitation. “The protection of our land is so important to tribes,” she says.

At the same time, Pata says, the government must recognize tribes’ sovereignty. Various laws, court rulings and treaties pledged the U.S. government to honor tribal self-governance while also providing support for health care, education, housing and economic development.⁹

Yet in 2011 an estimated 40 percent of the American Indians and Alaska Natives on reservations were living in poverty. The unemployment rate averages about 19 percent, nearly a quarter of reservation homes lack plumbing, and health, education and income statistics rank near the bottom of all minority groups nationwide. (*See graph, right.*) Employment options are few. According to the National Congress of American Indians, 4 percent of Indians work in agriculture, forestry, fishing/hunting or mining. About one-third work in education, health care or social services; the rest are in public administration, hold odd jobs or are unemployed.¹⁰

Because tribes cannot tax property, they must get innovative to generate more revenue, experts say.*

Since the 1970s, many tribes have opened casinos or run bingo games. In 2015, 474 tribal gambling operations generated nearly \$30 billion in revenue nationwide.¹¹ The most successful operations, experts note, are those located near major metropolitan areas.

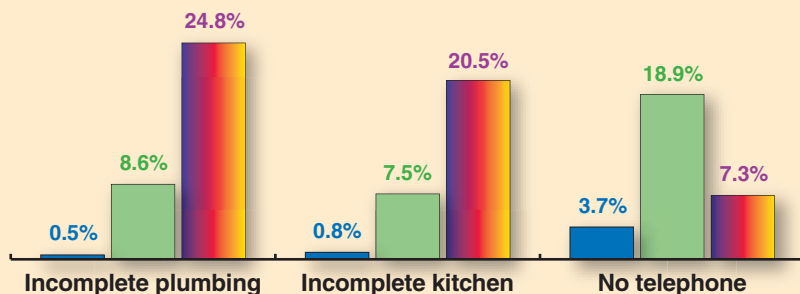
The Southern Ute tribe now generates about 30 percent of its income from oil and natural gas production.

* Tribes cannot levy property taxes because of the trust status of their land. They can impose sales and excise taxes.

Many Native Homes Lack Phones, Plumbing

Homes on Indian reservations and in Alaska Native villages are in poorer condition than in the general U.S. population, according to the latest census data. Nearly one-fifth of reservation households had no telephone in 2006-10, and a quarter of the homes in Alaska Native villages lacked complete plumbing.

Native American and Alaska Native Households, 2006-10



Source: “Tribal Nations and the United States: An Introduction,” National Congress of American Indians, Jan. 15, 2015, pp. 38-39, <http://tinyurl.com/kzt5has>

But navigating the regulatory process took eight years, during which the tribe lost more than \$95 million in potential revenue from permitting fees, oil and gas severance taxes and royalties, according to the GAO.¹²

Matthew Fletcher, a University of Michigan law professor and member of the Grand Traverse Band in Michigan, says the Southern Ute’s success is unusual. Energy development often devastates Native American lands. Radioactive material from fracking — the process of injecting high-pressure liquid into underground rock to reach oil or gas — has been dumped on reservation lands, and heavy trucks have damaged roads. In addition, with non-natives entering the reservation to work, crime has risen.¹³

Kevin Washburn, former BIA director for the Obama administration, says Congress needs to alter some outdated, “paternalistic” regulations on Indian lands, but he is wary of too much deregulation.

“All over Indian country are abandoned mines where someone made a lot of money and then left,” he says.

“We can’t just say we trust the oil and gas companies to do the right thing.”

As debate continues, these are some of the questions being considered:

Should tribes have full control over their reservations?

MHA Nation council member Fred Fox said the United States should treat tribes on reservations as sovereign nations. “We have ancestors that owned these lands. . . . Let us collect our own taxes. Let us create economic viability for our people. Let us create the regulatory system.”¹⁴

Former *Wall Street Journal* reporter Naomi Schaefer Riley in her 2016 book, *The New Trail of Tears*, suggests tribes could become more economically self-sufficient if the federal government granted natives private-property rights over the trust lands so they can use it as collateral to start businesses.¹⁵

Chris Edwards, director of tax policy studies at the Cato Institute, a libertarian think tank in Washington, D.C., agrees. He suggests if the government ended the trustee relationship and created private property, reservations could reach their economic potential.

Most tribal leaders reject any proposals that would move the land out of trust protection and into private ownership. Indeed, many tribes were fearful when they read news accounts in late 2016 indicating that Donald Trump intended to privatize Indian lands after becoming president, accounts the new administration has denied.

Many experts say the current system holds several advantages for tribes, particularly financial. Federal subsidies to Native American tribes total about \$20 billion a year, although the level of support varies widely by tribe.¹⁶

"There are tribes that are worried that if you end the trust responsibility, you will simultaneously end funding" from the federal government, says Joseph Kalt, co-director of the Harvard Project on American Indian Economic Development in Cambridge, Mass.

Furthermore, the trust system gives tribes some political voice, Kalt says. The Indian population is tiny — about 1.5 percent of the U.S. population — "so, a city like Tucson with a million people might be [able to adequately represent itself on a bigger stage, but not] a Potawatomi tribe with just a couple thousand people," he says.

Other experts question tribes' ability to manage their affairs, citing poorly run councils as well as political and regulatory instability that makes companies reluctant to invest in Native American projects. At Fort Berthold, for example, former Chairman Tex Hall lost re-election in 2014 after many tribal members accused him of improperly benefiting from oil business contracts.¹⁷

Many tribes, however, have successfully exercised their sovereignty and built solid regulatory and economic systems and could thrive outside the trust system, Kalt says. The Confederated Salish and Kootenai Tribes on the Flathead Reservation in Montana oversees everything from road construction and maintenance to schools and natural resources. The tribal nation formed a professional services company, S&K Technologies, in

1999. Since 2002, S&K has obtained federal and commercial contracts, generating more than \$25 million — paid in yearly dividends — to run the tribal government and employs about 400 tribal members.¹⁸

"Tribes are not perfect institutions, nor is the federal government," says Brian Gunn, an attorney in Washington, D.C. who represents tribal groups. "They go through election cycles. Sometimes a tribe will have good leadership, other times not so good."

But the U.S. government should be willing to allow tribes to try and even to fail, suggests Gunn, a member of the Confederated Tribes of the Colville reservation in Washington state.

He says lawmakers are moving in that direction. The Indian Trust Asset Reform Act, passed by Congress last year, allows tribes to manage their assets at a lesser standard than the BIA's standard, but waives the U.S. government's liability if something goes wrong, Gunn says. "So basically it puts the choice in the tribe's hands."¹⁹

A 2005 law similarly allowed tribes to enter agreements with the BIA to pursue land agreements for energy development on their own. But the law left in place a maze of regulations, which dissuade tribes from pursuing lease agreements, the GAO reported in 2015.²⁰

Elizabeth Kronk Warner, director of the Tribal Law and Government Center at the University of Kansas and a member of the Sault Ste. Marie Tribe of Chippewa Indians, criticizes the law because it waives the government's liability if anything goes wrong with the project, even though the government retains supervisory authority. "I think tribes should be . . . fully sovereign and liable, or the federal government [should] maintain its management responsibility" and liability, she says.

Most Native Americans like the idea of federal protection entailed in the government's trust responsibility, "but they don't want the . . . government making decisions," Kalt says.

Kevin Gover, former assistant secretary for Indian affairs under President Bill Clinton and a member of the Pawnee Nation of Oklahoma, has suggested Congress change the trust system by making tribal governments "permanent components of the American federalist system."²¹ In other words, tribal reservations would be treated as jurisdictions much like counties or states, he says.

Gover, who now is director of the Smithsonian's National Museum of the American Indian in Washington, says the government could grant tribes the option of managing their own lands — including leveraging them as a capital asset — without federal oversight. If their economic enterprises fail, the land could be foreclosed upon but remain within the tribal jurisdiction.

Fletcher says he can't see how a system outside the trust could work. "The over-arching theory of federal Indian affairs is that the United States has a trust obligation to Indian tribes — that goes back to the original treaties that say the U.S. has a duty of protection to Indian tribes. . . . I do believe that duty of protection is something that can't and should never be given up."

Would energy development improve tribes' economies?

Some economists and legal experts say energy development could help tribes, especially in places like Oklahoma or Wyoming, where large oil reserves are located, or Montana and North Dakota, with their rich coal deposits. "Some reservations have energy resources worth developing, and others [are] less fortunate," attorney Stern says.

In February, Tyson Thompson, a Southern Ute tribal council member, urged Congress to ease federal regulations to encourage more energy development on Indian lands. "Our energy-related economic successes have resulted in a higher standard of living for our [approximately 1,400] tribal members," Thompson told the House Oversight and Government Reform Committee.²²

In October, Bloomberg News had reported that the tribe “has a higher long-term credit rating than Wells Fargo and Co. and more oil and natural gas wells than it has members.” The Ute now control 1,600 wells across four states and are one of the richest tribes in the nation.²³

Anderson of the Property and Environment Research Center says if federal lawmakers streamline regulations to make it easier for tribes to tap into the energy reserves on their lands, badly needed jobs and royalties would be generated for tribal members.

The Navajo Nation formed the Navajo Transitional Energy Co. in 2013. It purchased a coal mine from BHP Billiton and has signed coal agreements with North American Coal subsidiary Bisti Fuels Co. and the Four Corners Power Plant. It has about 800 employees and announced a year ago it had returned \$35 million in royalties to the tribe in 2015.²⁴

The Crow government generates 70 percent of its revenue from a coal mining operation on the edge of its reservation, says James Allison, an assistant professor of history at Christopher Newport University in Newport News, Va. The revenue enables it to provide housing, police, water services and more. At the same time, he says, “you wouldn’t go onto the Crow reservation and say, look at the prosperity it has produced.”

History has proven that energy development is no panacea, he says; successful energy development also depends on timing, Allison warns.

A downturn in oil prices from \$100 per barrel in 2013 to \$30 per barrel in 2016 particularly hurt the Northern Arapaho and Eastern Shoshone on the Wind River Reservation in central-western Wyoming. Both tribes have long been dependent on oil revenues. Now the Northern Arapaho are investigating solar and wind projects, Allison says.²⁵

Many tribes worry a hunger for profit will destroy their culture and ultimately erode their communities.

The Turtle Mountain Band of Chippewa Indians in north-central North Dakota, located about 190 miles from the Fort Berthold reservation, banned fracking because of concerns about its potential to contaminate drinking water and lakes and produce large volumes of waste.²⁶ Many other tribes also oppose fracking.²⁷

In Minnesota, the Fond du Lac Band of the Lake Superior Chippewa Indians sees mining as a threat to its culture. For years the tribe has tried to halt or reverse environmental damage from a century-old iron mine. And it is fighting plans

In the Pacific Northwest, the Lummi Nation, along with other area tribes, has battled the proposed Gateway Pacific Terminal near Bellingham, Wash., that would export coal and other commodities to Asia. The Lummi said spills or maritime accidents could destroy fishing beds and threaten its treaty-protected fishing rights. The Army Corps of Engineers agreed and denied a permit for the project last May. The Crow Nation, however, continues to push for the terminal so it can sell to coal markets in Southeast Asia.²⁸



Getty Images/The Washington Post/Linda Davidson

An oil and natural gas boom on the MHA Nation’s Fort Berthold reservation in North Dakota has been at the center of the ongoing debate over Indian sovereignty versus what some see as the federal government’s obligation to protect Indian land and natural resources. Entrenched poverty on reservations and the growing lure of energy and mineral riches have intensified the debate in recent years.

for a copper mine on land the tribe ceded to the U.S. government in 1854 in exchange for continued rights to its hunting, fishing and gathering resources.

“A hundred years of mining has already left a pretty rugged footprint on the landscape, and it has destroyed wild rice waters,” says Nancy Schuldt, water projects coordinator for the Fond du Lac Environmental Program in Cloquet, Minn. “It has exacerbated a problem with mercury in fish, it has destroyed wetlands, it has destroyed headwater streams, destroyed habitat for important species, destroyed cultural resources, sacred sites, all of that.” (See sidebar, p. 396.)

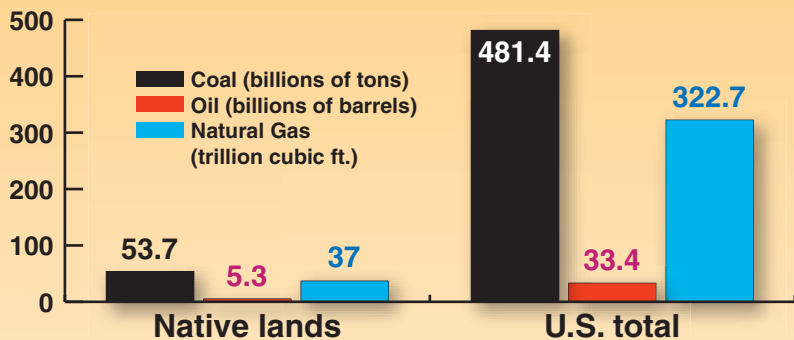
Conservationists at Fort Berthold for years have denounced the tribal council’s oversight of energy development, accusing it of choosing monetary profit over the well-being of the land and the people.²⁹

At a February hearing in New Mexico before a United Nations representative, Navajo tribal member Leoyla Cowboy said she wanted help for her people to restore sacred lands and build infrastructure for renewable energy. Between 1944 and 1986, uranium extraction on Indian land created hazardous waste sites and contaminated drinking water. “Coal, oil and gas, as well as uranium, have had a huge negative

Native Lands Hold Vast Resources

Untapped energy resources on Indian lands were valued at \$1.5 trillion in 2012, the most recent data available. The largest reserves are in coal and natural gas; the Crow reservation alone has 17 billion tons of coal, according to the Department of the Interior.

Energy Potential on Native Lands, 2012



Sources: Shawn Regan and Terry L. Anderson, "The Energy Wealth of Indian Nations," George W. Bush Institute, Property and Environment Research Center, pp. 17, 19, <http://tinyurl.com/jwoxgfl>; "Annual Coal Report 2012," U.S. Energy Information Administration, December 2013, p. 23, <http://tinyurl.com/n5j6gh9>; "U.S. Crude Oil and Natural Gas Proved Reserves, Year-end 2015," U.S. Energy Information Administration, December 2016, p. 2, <http://tinyurl.com/lzw3579>

impact on our lands, and have taken us away from our lands," she said.³⁰

Fletcher says energy is not the answer for struggling reservations. "It gives a windfall to political and economic elites in Indian country, just as it does elsewhere in the country. There'll be an influx of cash, and then you'll have a series of tribal governments who fight over that cash, just as the MHA Nation does at Fort Berthold," he says. "That is just going to repeat over and over again if there's a so-called successful influx of cash resources into a tribal community where a tribe is just not used to that sort of thing."

He adds: "What I do see is massive amounts of environmental devastation and cultural devastation too."

Must tribes be consulted on projects outside their borders?

The Standing Rock Sioux tribe and its supporters protesting the completion of the Dakota Access Pipeline said they were

demanding their right to "sovereignty" — in this case, their right to protect sacred land and block potential threats to their groundwater from a project that snaked near the reservation boundary.

"It's not that they are against development," says Pata of the National Congress of American Indians, "but they want to make sure the tribe's considerations and concerns are part of the discussion."

In the 18th and 19th centuries, hundreds of tribes signed treaties with the U.S. government where they agreed to smaller territories in return for continued rights to the ceded land for spiritual, cultural or economic purposes. In the case of the Sioux, supporters say the tribe did not legally cede rights to the Missouri River or its shoreline when the government constructed five major dams between the 1930s and 1950s. They say the construction also contravened a 1908 Supreme Court decision, known as the Winters Doctrine,

which guaranteed tribes water rights on their reservations.³¹

But disagreements remain about how much say tribes actually have on projects outside their borders, even if the tribes believe the project could affect treaty land or ultimately impede life on their reservations.

In recent years, tribal lawyers have successfully convinced courts of tribes' treaty rights, according to Jan Hasselman, a staff attorney for the nonprofit environmental law firm EarthJustice, based in San Francisco. "Federal court precedent says that where a tribe opposes a project based on its impacts on treaty-reserved fishing, a federal agency cannot authorize anything more than a 'de minimis' [minimal] impact," he said.³²

Kandi Mossett, organizer of the Native Energy and Climate Campaign for the Indigenous Environmental Network, a grassroots organization in Bemidji, Minn., joined thousands of Dakota Access Pipeline protesters who ultimately were removed from their campsites outside the Sioux reservation. "We were forced off of our treaty land again. In 2017," she said. "Because that is what this country was founded upon: the taking, raping and pillaging of Native American land."³³

Schuldt warns that tribes don't have veto power over land ceded to the government now outside their reservations. "If you go back before 1492, everything was tribal land." She adds that some tribes are looking for a "free prior informed consent right or . . . a veto right as it relates to things even off the reservation. I don't think that, frankly, is workable."

However, many tribes — but not all — do have clearly outlined treaty rights to hunt, fish, collect plants on and off reservation land, she says.

Victoria Tauli-Corpuz, a United Nations special rapporteur, in March faulted the federal government for frequently failing to consult with Native Americans on issues "affecting their land, territory and resources." In a draft report, she

said, the Army Corps of Engineers approved an environmental assessment regarding the Dakota Access Pipeline that ignored tribal interests.³⁴

Native Americans say the federal government thus violated the 2007 U.N. Declaration on the Rights of Indigenous Peoples, which President Barack Obama in 2010 said the United States would support. The declaration, in part, requires governments to obtain tribes' "free and informed consent" prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.³⁵

Even before adopting that declaration, however, previous administrations had mandated such consultation. Museum Director Gover says that, during the Clinton administration, "our big mantra was consultation." The Bush and Obama administrations adopted the same policy by executive memoranda, although the Trump administration has not reissued the same policy or clearly withdrawn it.

Nevertheless, Gover says the requirement that tribes be consulted is scattered through some federal statutes. "But it's not thorough going," he says.

Former BIA Director Washburn says the National Historic Preservation Act, a 1966 law that seeks to protect the nation's historical and archaeological sites, clearly states that tribes must be consulted. However, "consultation [is a] word that gets thrown around a lot of different ways," he says. It's unclear how much weight a tribal vote has on a project outside its boundaries. "That's the issue. If it's outside tribal lands, they just don't really have sovereignty," Washburn says. "But it's not a matter of sovereignty; it's a matter of . . . good government relations."

Attorney Stern says various statutes, regulations, executive orders and other policy statements describe the federal government's obligations to consult with tribes.

"It's my view, however, that the consultation obligation that is required under the National Historic Preservation Act is not clear," he says. "For example, that statute and its regulations require that federal agencies exercise 'reasonable good faith' in consulting with the tribes. That term 'reasonable good faith,' to my mind, doesn't really provide clear guidance on the extent of consultation that must be required along the way." ■

BACKGROUND

Allies and Enemies

The treatment of indigenous people in North America by white settlers and later the U.S. government has fluctuated since 1492, when Italian explorer Christopher Columbus stepped foot on what is now the Bahamas.

Many of the earliest Europeans settlers were eager to trade with Native Americans and saw them as allies in their efforts to survive in the New World. However, the European powers also wanted to exploit North America's minerals, furs and fish, while colonists desired land to farm and to establish settlements.³⁶

Over time, increasingly violent battles ensued between the settlers and tribes. On March 22, 1622, the Powhatan Confederacy, angry over English expansion in Virginia, launched surprise attacks on settlements along the James River, nearly wiping out the fledgling colony. A few years later, the director of the New Netherland colony, Willem Kieft, tried to tax natives on behalf of the Dutch West India Company. When the Indians refused to pay, Kieft ordered attacks on their villages, prompting the tribes to counterattack.³⁷

During the French and Indian War (1754-63), the European combatants

wanted the tribes as allies, as did the Americans and British during the American Revolution. Each side attacked tribes that sided with their enemies. After the Revolution, European immigration resumed and settlers pushed farther west, forcing tribes off their lands and leading to more friction.³⁸

The Second Continental Congress adopted the Northwest Ordinance in 1787, which allowed new states to be added to the Union but said, "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent."³⁹

Two years later, the U.S. Constitution empowered Congress to "regulate Commerce with . . . the Indian Tribes" and declared treaties to be the "supreme law of the land." And in 1790, Congress barred the purchase of Indian land without federal approval.⁴⁰

But "a relentlessly expansionist white population [drove] the Indians westward without regard to treaty obligations, or . . . even simply humanity," historian Peter Cozzens said.⁴¹

President James Monroe told Gen. Andrew Jackson in 1817 that "the savage requires a greater extent of territory to sustain it than is compatible with the progress and just claims of civilized life, and must yield to it."⁴²

Whites believed they possessed "discovery rights" to the land — a position upheld by the Supreme Court in 1823, which stated that only the federal government, and not the tribes, could sell land to private interests.⁴³

Congress in May 1830 passed the Indian Removal Act, allowing Jackson, who by then was president, to grant Indians lands west of the Mississippi in exchange for their lands within existing state borders.⁴⁴ The Cherokee Nation tried to stop the state of Georgia from clearing its members from the land, but in 1831 the Supreme Court refused to hear the case, declaring the tribe a dependent nation under the care of the federal government.⁴⁵

A year later, the court ruled that the federal government, and not states, could regulate Indian affairs and said the Cherokees had rights acknowledged by the U.S. government. Jackson refused to enforce the ruling, however, and Georgia seized the tribe's lands for whites eager to mine newly discovered gold.⁴⁶

About 4,000 out of 15,000 Cherokees died in the 1838-1839 march, known as the Trail of Tears, to lands west of the Mississippi River.⁴⁷

More Indians found themselves in the whites' path after the 1848 Treaty of Guadalupe Hidalgo ended the Mexican-American War, paving the way for U.S. expansion to the Pacific Ocean.

As whites occupied more and more territory, Native Americans lost their traditional hunting grounds and much of their land and way of life. White hunters wiped out the buffalo on the Great Plains, and deadly European diseases for which Native Americans had no immunity decimated many tribes. In 1849 alone, cholera killed half of the native population in the southern plains.⁴⁸

By 1871, when Congress limited the president's power to enter into treaties, the federal government had signed more than 400 treaties, many of which were broken by subsequent waves of settlers, or challenged by tribes throughout the "Indian wars" (about 1860 to 1880).⁴⁹

Forced Assimilation

On July 18, 1885, Republican Sen. Henry Laurens Dawes of Massachusetts wrote to a white-run advocacy group called the Indian Rights Association, lamenting the continued fighting between whites and Indians. He urged work be done with "haste to teach [the Native American] habits of industry, self-reliance, knowledge of property, and a desire for its acquisition."⁵⁰

Two years later, Congress passed the General Allotment Act, or Dawes Act, subdivided reservations into plots and aimed to assimilate Indians into white

society by making them landowners and farmers in the European tradition. Non-native settlers rushed to claim surplus lands not given to Indians. In one day in April 1889, 50,000 prospective settlers raced across Oklahoma and claimed nearly 2 million acres by the end of the day.⁵¹ The allotment process ultimately resulted in more than half of those living on reservations to be non-Indians.⁵²

A number of whites cheated Indians out of their land. "Indians were easy marks, especially in a place like Oklahoma, where there was very valuable land, mostly because of oil and gas," Gover of the National Museum of American Indians says.

By the late 1920s, "Indians were poorer than ever," Gover says. "They were still uneducated, and under the thumb of a very oppressive bureaucracy that had told them you may not practice your religion, you may not practice your traditional means of governance, you may not speak your language. Your children will be taken and sent away for education."

The policies "were, in fact, meant to exterminate not the individual Indians but certainly the Indian nations as effective polities and social and cultural institutions," he says.

Many U.S. lawmakers did raise concerns about the natives' plight. In 1921, Congress passed the Snyder Act requiring the federal government to direct money "from time to time" for health care, education, economic development, governing and policing. A 1924 law awarded citizenship to many American Indians and Alaska Natives.⁵³

The measures, however, did not reverse the effects of forced assimilation. In 1928, the Institute for Government Research (later renamed the Brookings Institution) reported to the Department of the Interior: "An overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization." Among other deficiencies, the report cited the exclusion of Indians from

management of their own affairs and the poor quality of public services.⁵⁴

In the 1930s, Commissioner of Indian Affairs John Collier decried the plight of the estimated 350,000 Native Americans. He created the Emergency Conservation Work program for Indians, focused on training natives to use their own lands and resources. Before its demise in 1943, the program employed 85,349 natives from 71 reservations.⁵⁵

In 1934, the Indian Reorganization Act ended the allotment process and began returning Indian land to the federal trust.

The Supreme Court in 1938 recognized the Native Americans' ownership of minerals and timber on their land, and Congress authorized them to lease their minerals through the Indian Mineral Leasing Act of 1938 with approval from the federal government. And Congress in 1942 passed the Indian Claims Commission Act to allow Native Americans to sue the government for compensation for lands taken from them.⁵⁶

But tribes faced renewed threats as federal policy shifted again.

Termination Period

In 1944, Congress' Pick-Sloan Plan aimed to provide irrigation, generate hydropower and employ World War II veterans by constructing five dams on the Missouri River (including a dam already built at Fort Peck, Mont., in 1937). The Army Corps of Engineers saw condemnation as the best way to acquire Native American lands needed for the project.⁵⁷

The plan reduced the land base of the five Missouri River Sioux reservations by 6 percent and forced the relocation of one-third of the population. The tribes' best land was flooded, and residents were forced to move to land barren of natural resources.⁵⁸

Then, with the BIA under attack and the belief growing that Indians

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Chronology

1700s-1850s

Federal government forces tribes from their lands.

1789

Constitution empowers federal government to negotiate with tribes.

1790

Congress enacts the first of six Non-Intercourse Acts, requiring federal approval for any private purchase of Indian land.

1824

Secretary of War John C. Calhoun creates Office of Indian Affairs, which later becomes Bureau of Indian Affairs (BIA).

1838-39

After gold is discovered on Cherokee lands in Georgia, tribe is forced to move west; thousands perish during infamous "Trail of Tears" march.

1831

Supreme Court rules tribes are dependent nations under U.S. guardianship.

1851

Indian Appropriations Act allocates funds to move Western tribes onto reservations.

1880s-1930s

Federal government seeks to force Native Americans to assimilate.

1887

Dawes Act divides Indian lands into parcels to be allotted to Native and non-Native Americans.

1903

Supreme Court says treaties can

be modified or terminated without tribes' consent.

1924

Indian Citizenship Act grants constitutional rights to Native Americans.

1934

Indian Reorganization Act ends land allotment process.

1938

Indian Mineral Leasing Act restores tribal control over energy development on reservations.

1970s-1980s

U.S. limits tribes' sovereignty, then promotes self-determination.

1975

Indian Self-Determination and Education Assistance Act funnels federal grants directly to tribes.

1982

Indian Mineral Development Act enables tribes to negotiate energy extraction agreements.

1984

A Reagan administration report assails BIA, says it "thrives on the failure of Indian tribes."

1987

In *California vs. Cabazon Band of Mission Indians*, Supreme Court says tribes can open casinos.

1990s-Present

Federal government increasingly recognizes tribal self-government.

1996

Blackfeet activist Elouise Cobell files

class-action suit against federal government for mismanaging trust lands.

2002

U.S. government settles Indian claims over Missouri River dams.

2005

Indian Tribal Energy Development and Self-Determination Act gives tribes greater control over energy development on their lands.

2009

Settlement of Cobell lawsuit awards plaintiffs \$3.4 billion.

2010

President Barack Obama signs Tribal Law and Order Act giving tribal courts more authority.

2011

National Wildlife Federation study finds reservations disproportionately suffer more from climate change.

2015

Government Accountability Office concludes BIA mismanagement hinders energy development on Indian lands.

2016

Indian Trust Asset Management Reform Act gives tribes more control over trust lands.

2017

A federal judge refuses request by the Standing Rock Sioux to block Dakota Access Pipeline; Indians march in Washington, D.C., to protest its completion. . . . Trump administration ends moratorium on new coal leasing on federal, including some Indian, lands. Over the objections of Native Americans, the administration also approves completing the 1,179-mile Keystone XL oil pipeline that would cross the land of numerous tribes.

Climate Change Threatens Tribal Lands

"It is the federal government's responsibility to protect our fishing rights."

Ancestors of the Fond du Lac Band of Lake Superior Chippewa settled centuries ago near the headwaters of the St. Louis River in Minnesota, where lush wild rice grasses swayed above wetlands, sustaining the tribe with nutrients and an abundance of wildlife.

White settlers later moved the band to a 100,000-acre reservation off the lake in northeastern Minnesota. Treaties signed in 1837 and 1854 guaranteed tribal members harvesting rights on their original lands crossing into Wisconsin. But years of pollution and climate change-related shifts in weather patterns have diminished the grasses.

"We are doing all we can to restore our wild rice resources," says Nancy Schultdt, water projects coordinator for the tribe. "We're already seeing impacts from climate change. . . . We've had whole years [of harvests] wiped out from big storms."

The Fond du Lac Band and hundreds of other Native American groups say they didn't contribute to the greenhouse gases linked to global warming, and they insist the federal government is duty-bound to protect them.

"Tribes are really contributing very little, if anything, to the [carbon] footprint and are really the ones who are getting" hurt by climate change, says Elizabeth Kronk Warner, director of the Tribal Law and Government Center at the University of Kansas. She says the U.S. government is legally and morally obligated to protect tribes that it forced onto lands now among the most vulnerable to environmental change.

In 2011, the National Wildlife Federation, with several other environmental groups, detailed how climate change disproportionately affects tribal communities because they are more heavily dependent on natural resources for economic, cultural and spiritual purposes.¹

Many indigenous communities in the United States "are literally on the forefront of losing their land . . . because of climate change," Warner says. Coastal tribal villages in Alaska, Louisiana and South Carolina lose land every year due to rising seas and severe storms, she says.

Fawn Sharp, president of the Quinault Indian Nation in Taholah, Wash., is working with specialists to relocate her tribe's village to higher ground. Rising seas caused by melting glaciers have breached barriers, and storms frequently flood the village.²

The Trump administration's stance on climate change has further alarmed Native Americans.

President Trump's fiscal 2018 budget blueprint, submitted to Congress on March 16, would cut \$2.6 billion from the Environmental Protection Agency (EPA). Climate change programs would be hit particularly hard.³

"We're not spending money on that anymore," Mick Mulvaney, director of the Office of Management and Budget, told reporters. "We consider that to be a waste of your money to go out and do that."⁴

Trump also has ordered the rollback of regulations, including the landmark Clean Power Plan, designed to reduce carbon emissions.

Many tribes fear these actions will hamper their efforts to adjust to climate change.

"The utter disdain for science demonstrated by this administration is insufferable," Sharp wrote in a blog shortly after Trump revealed his budget.

She called the administration's plans unconstitutional and a violation of treaty rights. She said "it is the federal government's responsibility to protect our fishing, hunting and gathering rights, on our ceded areas and in the ocean."⁵

Warner agrees that multiple treaties obligate the government

Continued from p. 394

were ready to assimilate, Congress in 1953 adopted a resolution that Native Americans should no longer be treated as wards of the United States. Between 1953 and 1964, approximately 2.5 million acres of tribal lands were removed from protection under the trust. The losses affected over 100 tribes occupying valuable lands, including the Klamath in Oregon's timber forests.⁵⁹

Gover says federal leaders believed the so-called termination policy was in the best interest of Native Americans, 10 percent of whom served in the

armed forces during World War II. "It occurred to everybody they don't need protection, they're perfectly capable," he says.

But federal lawmakers gradually came to realize the policy wasn't helping Indians and renewed support for tribes.

Presidents John F. Kennedy (1961-63) and Lyndon B. Johnson (1963-68) called for investments in economic development on reservations. The 1968 Indian Civil Rights Act prevented states from assuming jurisdiction over Indian lands without tribal consent and barred Indian tribes from impeding on the constitutional rights of their people.⁶⁰

President Richard M. Nixon (1969-74) formally denounced termination, mandated BIA reform and recognized the rights of tribal governments. On July 8, 1970, he told Congress: "Self-determination among the Indian people can and must be encouraged. . . . This, then, must be the goal of any new national policy toward the Indian people."⁶¹

Initially, however, internal conflict impeded BIA reform efforts aimed at improving relations with the tribes and led to a series of Native Americans protests. In spring 1973, 200 followers of the militant American Indian Movement occupied the village of Wounded Knee on

to protect tribes and their critical natural resources. The federal government has recognized such obligations in recent years. Since 1980, the EPA has funded 6,179 grants, totaling \$1.7 billion, for tribal projects, many of which have supported innovative ways to protect natural resources and respond to climate change.⁶

Trump's budget plan also would cut \$6 billion from the U.S. Department of Housing and Urban Development, which awarded the Biloxi-Chitimacha-Choctaw tribe a \$48 million natural disaster grant last year to move from its flooding land.⁷

Not all tribes can easily relocate, says Warner, a member of the Sault Ste. Marie Tribe of Chippewa Indians. "While they could theoretically leave, they would lose all their legal protection and legal status," she says. Many tribes also have cultural and spiritual connections to the land. "For a lot of us, our religious practices are land-based, so we're connected to a particular area," Warner says.

The Fond du Lac Band developed air and water quality monitoring programs and pursued alternative and renewable energy sources. In 2007, it adopted the international Kyoto Protocol on climate change and committed to reducing its fossil fuel use by 20 percent by 2020 — a target it hit last year. But the band can't completely avoid the greenhouse gases around it.

The Bureau of Indian Affairs under the Obama administration oversaw a Tribal Climate Resilience Program to provide resources to tribes to help them adapt to changes. But it is unclear how funding for the program will be affected under Trump.

The tribe, however, is bracing for broad federal budget cuts that could affect their local efforts. "We have tried to prepare our tribal leadership to anticipate if all our tribal grants were zeroed out," Schuldt says. "I honestly don't know what is going to happen."

— Christina L. Lyons



Getty Images/Andrew Burton

A Yupik child crosses a boardwalk in Newtok, Alaska. Rising temperatures from global climate change are threatening this and other indigenous villages with flooding.

¹ "Facing the Storm: Indian Tribes, Climate-Induced Weather Extremes, and the Future for Indian Country," National Wildlife Federation, 2011, <http://tinyurl.com/mcjmprg>.

² "Climate stressors on the Olympic Peninsula," U.S. Climate Resilience Toolkit, National Oceanic and Atmospheric Administration, accessed April 6, 2017, <http://tinyurl.com/ltk3hvm>.

³ Ben Wolfgang, "Trump's EPA budget proposes harshest funding, staffing cuts in agency's history," *The Washington Times*, March 21, 2017, <http://tinyurl.com/jvt28j3>.

⁴ Dan Merica and Rene Marsh, "Trump budget chief on climate change: 'We consider that to be a waste of money,'" CNN, March 16, 2017, <http://tinyurl.com/n4jbu3l>.

⁵ Fawn Sharp, "Trump's utter disdain for science is 'insufferable,'" *The Daily World*, March 31, 2017, <http://tinyurl.com/lzhyp4>.

⁶ Grant Awards Database, Environmental Protection Agency, updated March 17, 2017, <http://tinyurl.com/m7oygy8>.

⁷ Autumn Spanne, "The lucky ones: Native American tribe receives \$48m to flee climate change," *The Guardian*, March 23, 2016, <http://tinyurl.com/kg9yax>; Jose A. DelReal, "Trump budget asks for \$6 billion in HUD cuts, drops development grants," *The Washington Post*, March 16, 2017, <http://tinyurl.com/mu9a7yx>.

the Pine Ridge Reservation in South Dakota, demanding that the federal government fulfill its treaty obligations. Two Indians died and an FBI agent was critically wounded in a shootout, violence that cost the movement critical support.⁶²

Meanwhile, multinational companies began encroaching on tribal lands seeking subbituminous coal found under the Northern Cheyenne and Crow reservations in Montana. "To access this coal, . . . multinational companies exploited a broken and outdated legal regime that sought to promote the development of western resources at the expense of tribal sovereignty, ecological

health, and simple equity," Allison of Christopher Newport University said in his 2015 book, *Sovereignty for Survival: American Energy Development and Indian Self-Determination*.⁶³

By 1973, energy companies controlled hundreds of thousands of acres on Indian lands. On Northern Cheyenne and Crow reservations, more than 600,000 acres were opened for mining, causing John Woodenlegs of the Northern Cheyenne to lament, "The impact of uncontrolled coal development could finish us off."⁶⁴ He and other natives feared multinationals would destroy their land and way of life.

Other tribes complained the federal bureaucracy barred them from seeking economic self-sufficiency. In October 1973, Navajo Chairman Peter MacDonald told the U.S. Commission on Civil Rights that federal bureaucrats had sabotaged or ignored the council's development programs for its 14-million-acre reservation.

"Most Indian tribes know what they want, where they want programs and in what time frame they want to accomplish these things, but the problem comes at the top," he said.⁶⁵

A series of court rulings and laws gave tribes slightly more control over their affairs. In 1974, the *Boldt* decision,

Tribal Councils Increasingly Expel Members

“Disenrollment is never about who belongs in the tribe.”

The U.S. government's growing recognition of tribal sovereignty has correlated with a trend that worries many Indian law experts: tribal councils disenrolling members.

From 2009-16, up to 79 tribes in 20 states disenrolled 9,000 tribal members, costing those individuals their cultural identity, civil rights, federal subsidies and — in many cases — royalties from tribal enterprises, says David Wilkins, a professor of American Indian studies at the University of Minnesota Law School.

Gabriel S. Galanda, a Native American attorney who is fighting the disenrollment of more than 300 members of the Nooksack Indian Tribe in northwest Washington state, attributes the trend to “power and greed” sparked by increasing economic capitalism on native lands.

But the Nooksack government said the members it disenrolled lacked proof of ancestry. Most had enrolled in the 1980s, basing their eligibility on an ancestor named Annie George. But George was not in the 1942 census, the tribal government said, and lineage could not be verified.¹

Other tribal councils said they disenroll members because the individuals did not have sufficient “blood quantum” — the percentage of their tribal blood is too low due to generations of intermarriage with outsiders. Each of the 567 federally recognized tribes sets its own criteria for membership, usually based on a blood quantum or lineal descent from a tribal member.²

Wilkins' studies suggest that tribal leaders sometimes seek to disenroll members because of family feuds or to secure political power or limit distribution of royalties.

The first documented case of a tribe disenrolling members involved the Northern Ute in Utah. The disenrollments began in 1951 after the tribe received a \$17.5 million federal payout, under the Indian Claims Commission Act, for its claim that the government improperly took its land.³

The payout — most of which was to be used for tribal projects, with some of the money distributed as per capita payments to tribal members — widened an existing rift between full-blood Utes and “mixed-blood” Utes, Wilkins says. Full-blood Utes wanted to maintain a relationship with the government and disenrolled the mixed-blood Utes who disagreed, he says.

The government has stayed out of such battles, particularly after the Supreme Court in 1978 affirmed a tribe's right to establish its own membership requirements.⁴

In 2009, the Bureau of Indian Affairs announced it would adhere to a “policy of Indian self-determination and self-government,” Galanda says. Based on that decision, the U.S. District Court in *Timbisha Shoshone Tribe v. Kennedy* said in 2009 it would not interfere in disenrollment.⁵

More recently, some groups have pushed for a new policy. In June 2015, the National Native American Bar Association said stripping tribal citizenship without due process was a human rights issue.⁶ Later that year, the Association of American Indian Physicians passed a resolution asking tribes to reconsider the disenrollment of members on health grounds, saying the process caused grief and depression for those cast aside.⁷

Galanda says disenrollment is a non-native concept that stems from federal policies that required tribes to determine who belonged.

Wilkins says when tribes began banishing members charged with committing crimes in the 1980s, tribal leaders said it was a tradition to expel members who violated social norms. But he notes that the disenrollments also coincided with increased casino gambling on tribal lands. In California, among 30 tribes that are now disenrolling members, about 23 distribute gambling royalties on a per-capita basis, Wilkins has found. “In some cases, tribes appear to be making rational, economic-based calculations,” he says.

drafted by George Boldt, the U.S. District judge for the Western District of Washington, granted fishing rights to Indians in the Pacific Northwest. And the Indian Self-Determination and Education Assistance Act of 1975 funneled federal money to tribes through contracts and grants to enable tribal councils — rather than the federal government — to control school, health, housing, law enforcement and other programs.⁶⁶

Rise of Casinos

In the 1980s, President Ronald Reagan (1981-89) reaffirmed support for In-

dian self-determination, but his federal budget cuts sharply reduced funding for tribes, which were struggling with poverty and high unemployment.

Congress, meanwhile, passed the Indian Mineral Development Act of 1982 to allow tribes to enter into energy extraction agreements and set lease terms and royalty amounts. Allison said this gave tribes more control over reservation development.⁶⁷

In 1984, the President's Commission on Indian Reservation Economies assailed the BIA system, saying it “is designed for paternalistic control, and it thrives on the failure of Indian tribes.”⁶⁸

Tribal leaders, however, balked at the commission's calls to develop reservations through private ownership and profit models. They rejected recommendations to abolish the bureau and waive the tribes' immunity from lawsuits on some issues, and to subordinate tribal courts to the federal judiciary on certain questions. The commission also proposed forming an Indian Trust Services Administration aimed at protecting oil, gas, minerals, timber, water and agricultural land.⁶⁹

In 1987, the Supreme Court opened the door for a new economic enterprise on reservations: gambling. The court,

In Washington state, meanwhile, the battle over the Nooksack disenrollments continues. Tribal Chairman Bob Kelly said a Nov. 4 referendum — in which those facing disenrollment were barred from voting — showed overwhelming support for disenrollment.⁸

But the Interior Department said the election was illegitimate because the members under a disenrollment cloud were not allowed to vote, and it threatened to withhold federal funds from the Nooksack Tribe until a legitimate vote took place. The department and other agencies did cut off tribal funding earlier this year.⁹

The tribe, in turn, sued the U.S. government, saying it wrongfully denied the Nooksack \$13.7 million in federal and state funds. The Nooksack government argued it has the power to disenroll members who had “failed to demonstrate legally sufficient blood connections to the tribe,” and it has authority to interpret tribal law and determine the legitimacy of the governing body.¹⁰

For four years, Galanda has represented Nooksack members facing disenrollment. He says finding proof, such as a birth or death certificate, to confirm proper enrollment of an ancestor — and thereby establish a member’s direct lineage to the tribe — can be nearly impossible. “Indians were not [U.S.] citizens until 1924,” Galanda says.

But he says he remains hopeful about a possible reversal of the disenrollment trend. The Grand Ronde Tribal Appeals Court in Oregon last year reversed the disenrollment of 66 members who were descended directly from Tumult, the chief who signed the Willamette Valley Treaty of 1855.¹¹

Others, like the Graton Rancheria Tribe in California and the Spokane Tribe in Washington state, have in recent years modified their constitutions to bar disenrollment of tribal members, according to Galanda.

— Christina L. Lyons



Courtesy of Gabriel S. Galanda

Native American attorney Gabriel S. Galanda says “power and greed” are behind efforts to disenroll more than 300 members of the Nooksack Indian Tribe in northwest Washington state.

¹ Liz Jones, “Nooksack Tribe Cites ‘Missing Ancestor’ As Reason to Disenroll 306 Members,” KUOW, Dec. 17, 2013, <http://tinyurl.com/kcnar8m>.

² For more on disenrollment, see David E. Wilkins and Shelly Hulse Wilkins, *Dismembered: Native Disenrollment and the Battle for Human Rights* (2017).

³ *Ibid.*, pp. 60-62. Also see Public Law 671, Chapter 1009, 68 Stat. 868.

⁴ The case is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), <http://tinyurl.com/madukjt>.

⁵ Gabriel S. Galanda, “Obama’s Disenrollment Legacy,” Indian Country Media Network, Jan. 25, 2017, <http://tinyurl.com/m6b2vcp>.

⁶ “Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment,” National Native American Bar Association, June 26, 2015, <http://tinyurl.com/15jccn>.

⁷ “AAIP Resolution on Disenrollment,” Association of American Indian Physicians, Oct. 22, 2105, <http://tinyurl.com/mnsjf22>.

⁸ Gene Johnson, “Nooksack Tribe says it has booted 289 people off rolls,” *The Bellingham Herald*, Nov. 23, 2016, <http://tinyurl.com/kb6nqr>.

⁹ Nina Shapiro, “Feds call Nooksack tribal council ‘illegitimate’ and ‘abusive,’” *The Seattle Times*, April 6, 2017, <http://tinyurl.com/m6pje5k>.

¹⁰ *Ibid.*

¹¹ Dean Rhodes, “Tribal Appeals Court reverses disenrollments,” *The Confederated Tribes of Grand Ronde*, Aug. 9, 2016, <http://tinyurl.com/13q6869>.

in *California vs. Cabazon Band of Mission Indians*, said tribes could legally engage in gambling not expressly prohibited by the state, and it barred states from regulating tribal gaming.⁷⁰

Complaints about a “wasteful and patriarchal” Bureau of Indian Affairs persisted into the 1990s. Rep. Bill Richardson, D-N.M., chairman of the Subcommittee on Native American Affairs, in 1993 said the bureau “has held back tribes from helping themselves.”⁷¹

Then in 1996, Blackfeet activist Elouise Cobell launched the largest class-action lawsuit ever filed against the federal government. She accused

the BIA of mismanaging payments for allotted property and said many allotment landowners lived in poverty despite the drilling of oil and gas on their property under lease arrangements. The lawsuit was settled in 2009 for about \$3.4 billion; \$1.9 billion went to a Trust Land Consolidation Fund set aside to buy back tribal trust lands, and \$1.5 billion was to be disbursed to individual plaintiffs.⁷²

President Clinton vowed to change federal attitudes toward tribes. After listening to more than 300 tribal leaders, he issued an executive memorandum mandating federal consultation with

tribes “in order to ensure that the rights of the sovereign tribal governments are fully respected.”⁷³

President George W. Bush continued Clinton’s efforts to make amends to tribes and to recognize their sovereignty. He signed a law providing \$28 million to the Yankton Sioux of South Dakota and the Santee Sioux of Nebraska for damage caused by the government when the Missouri River, as a result of dams built in the 1950s and 1960s, submerged about 4,000 acres of their land.⁷⁴

Nevertheless, tribes remained poor. The U.S. Commission on Civil Rights



Getty Images/Chip Somodevilla

Many tribal leaders view Interior Secretary Ryan Zinke, here testifying before the Senate Indian Affairs Committee on March 8, 2017, as a supporter of Native American interests. “Our sovereign Indian nations and territories must have the respect and freedom they deserve,” Zinke said when his nomination was announced.

in 2003 reported that federal funding “has not been sufficient to address the basic and very urgent needs of indigenous” people in health care, education, public safety, housing and rural development.”⁷⁵

Many tribes also fared poorly when outside companies made deals directly with the government — deals that the Supreme Court upheld in 2003. In *United States v. Navajo Nation*, the court ruled against the tribe, which had sought to negotiate royalties for coal from a mining company. The court said only federal officials could approve the final rate and determine what was in the tribe’s best interest. The Navajo Nation later sued the government when it learned the coal company had lobbied the Interior secretary to reject the tribe’s higher price and forced it to accept a minimum royalty rate. The Supreme Court, however, ultimately denied the tribe’s claim.⁷⁶

In 2005, Congress sought to give tribes more autonomy by passing the Indian Tribal Energy Development

and Self-Determination Act. It allowed tribes to enter agreements with the BIA to pursue lease agreements with energy companies on their own, but the law left in place the thicket of rules and regulations that have discouraged tribes from pursuing such agreements.⁷⁷

During the Obama administration, lawmakers made some progress for self-determination. In 2012, Obama signed the HEARTH Act — Helping Expedite and Advance Responsible Tribal Home Ownership — which aimed to create an alternative process for tribes to lease trust land without further approval of the government. He also signed the Trust Asset Management Reform Act, and during his tenure returned about 542,000 acres to federal trust protection for Native Americans.⁷⁸

Tribes frequently embraced Obama as a strong supporter of sovereignty, although some became disenchanted when his administration waited until December 2016 to halt completion of the Dakota Access Pipeline. ■

CURRENT SITUATION

Questions About Trump

Native Americans are uncertain about plans of the Trump administration and the Republican-controlled Congress, but they hope to have a voice in discussions on energy regulation, tax reform and other issues vital to Indians.

When Trump took office, many tribes recalled his 1993 testimony before a House Natural Resources Committee on gambling when he said he thought the Indian Gaming Regulatory Act gave tribes an unfair advantage over his own casinos. “Go up to Connecticut,” he said, referring to the Mashantucket Pequot tribe, which owned Foxwoods Resort Casino. “They [the Pequot] don’t look like Indians to me.”⁷⁹ And during the 2016 presidential campaign, he repeatedly called Democratic Sen. Elizabeth Warren of Massachusetts “Pocahantas” after she said she was part Native American.

Trump’s decision to create a Native American Coalition during the presidential transition and to appoint Rep. Markwayne Mullin, R-Okla., a Cherokee tribal member, as its chairman, reassured some tribes.⁸⁰

Some Indians believe Trump’s attitude toward tribal sovereignty was reflected in his decision to ignore the wishes of the Standing Rock Sioux and allow completion of the Dakota Access Pipeline under Lake Oahe, just north of the tribe’s reservation. Over the objections of Native Americans, he also approved Keystone XL, the 1,179-mile oil pipeline that would cross the land of numerous tribes.

But others are not sure where the president stands on Indian sovereignty.

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At Issue:

Could energy development lift tribes out of poverty?



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ENVIRONMENT RESEARCH CENTER

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indian country contains almost 30 percent of the nation's coal reserves west of the Mississippi, as well as significant deposits of oil, natural gas and uranium.

The Council of Energy Resource Tribes, a tribal energy consortium, estimates the value of these resources at nearly \$1.5 trillion. Yet these resources remain largely untapped. Developing them could help lift Native Americans out of poverty.

The negative effects of federal regulations can be seen in former President Barack Obama's "war on coal." The Crow tribe has 9 billion tons of coal that could easily be shipped to generating plants anywhere in the United States or exported to Asia. But many cities and towns along rail routes, citing concerns about train safety and the health effects of coal dust, are trying to limit coal-train traffic. And port cities such as Seattle and Portland, Ore., are holding up construction of export terminals on the ground that coal, including that from the Crow reservation, would exacerbate global warming.

Making matters worse, the Bureau of Indian Affairs (BIA) limits energy development on reservations. On the Fort Peck reservation in northeastern Montana, the BIA required an archaeological assessment before a company could begin oil and gas exploration. Fort Peck tribal councilman Stoney Anketell noted the absurdity of this requirement: "We're not short-changing the need for archaeological reviews, but on land that has been farmed for 70 years? It's been tilled, plowed, planted, harvested. There's no teepee rings."

Legislation passed in 1999 for the Fort Berthold reservation in North Dakota reduced from 49 to four the number of regulations from four different federal agencies that must be met before oil and gas can be leased on the reservation. As a result, since the Bakken shale-oil boom started in 2000, hundreds of reservation wells have earned the tribal nation more than \$500 million. Still, roughly twice as many oil and gas wells are drilled per acre outside the reservation as inside.

Some bright spots regarding potential development on reservations have come from the Trump administration. For example, the president's executive order "Promoting Energy Independence and Economic Growth" will make it more likely that Indian coal reserves can be developed. In addition, Interior Secretary Ryan Zinke issued a secretarial order to end the coal-leasing moratorium and reinstate the department's royalty advisory committee.



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no population needs economic development more than the first Americans. The poverty rate among Native Americans runs north of 25 percent and unemployment remains mired in double-digits. As recently as November, the U.S. Census Bureau declared American Indians the country's most impoverished racial group. Sadly, this is an annual tradition.

Yet since the 1930s, when federal Indian policy shifted to halt previous attempts at cultural genocide, tribal and federal officials alike have pointed to Native Americans' abundant energy resources as the panacea for Indian poverty. In oft-cited statistics, we are told that reservations contain almost 30 percent of all coal west of the Mississippi, as much as 50 percent of the nation's uranium deposits and upwards of 20 percent of known oil and gas reserves. As LaDonna Harris, a Comanche who founded Americans for Indian Opportunity, once said: "Collectively, [we] are the biggest private owners of energy in the country."

During the 1970s energy crises, Harris and others orchestrated a pan-tribal movement to throw off decades of paternalistic mismanagement by federal officials, who had transferred control over Indian energy to multinational firms for minuscule royalties. By 1982, efforts to undue this injustice had equipped Indians with expertise in managing minerals and produced legal changes that recognized Native American control over tribal resources. It was a remarkable victory.

But then little changed, and herein lies the hard lesson for any group dependent upon a single commodity, such as a fossil fuel, for economic prosperity. After securing the right to manage their own minerals, tribes watched as global events transformed the energy scarcity of the 1970s into the "oil glut" of the 1980s. A world flooded with cheap oil left little room for rural reservation development, and projects were scrapped by the dozens. Meanwhile, intense internal debates raged over the social and environmental costs of reservation mining. All the while poverty deepened.

The lesson here is not that fossil fuel development cannot help tribal communities. It can. But rarely do nations build sustainable prosperity on fossil fuel foundations alone. Those that have — such as in the Middle East — possessed full sovereignty and popular support for such development. They also happened to be on the right side of market trends. Tribal nations do not enjoy such benefits, and so should focus on projects that align better with long-term economic forecasts; federal Indian, environmental and energy policies; and a broader range of communal values. On many reservations, alternative energy presents one such option.

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Many tribal leaders see Interior Secretary Ryan Zinke, a former one-term Republican congressman from Montana, as a supporter of Native American interests. When his nomination was announced, Zinke said, “Our sovereign Indian nations and territories must have the respect and freedom they deserve.” And during his Senate confirmation hearing, he said he had no intention of selling federal lands.⁸¹ The National Congress of American Indians supported his nomination.

Sen. Maria Cantwell, D-Wash., ranking member of the Senate Energy and Natural Resources Committee, opposed Zinke’s confirmation, in part because of his support for the Dakota Access Pipeline and his opposition to Obama’s coal-leasing moratorium. And Cantwell worried about Zinke’s support for energy development on federal lands, noting it clashes with the government’s obligation to protect tribal trust lands.⁸²

Zinke also expressed support for the proposed Gateway Pacific Terminal, calling it “literally the gateway to economic prosperity” for the Crow tribe and for blue-collar workers in Washington state.⁸³

Meanwhile, Trump’s budget blueprint would slash funding for the Environmental Protection Agency by one-third while increasing spending for energy development on federal lands. Under the executive order he issued in March, the president plans to dismantle the Clean Power Plan that would have led to the closure of many coal-fired power plants, halted construction on new plants and replaced them with wind and solar farms. Tribes are split on the power plan.⁸⁴

In Congress

Many tribes are closely watching as Congress considers legislation to ease energy regulations on tribal lands — legislation that failed to move

during previous sessions of Congress despite bipartisan support. The Senate Indian Affairs Committee in February approved a bill by its chairman, John Hoeven, R-N.D., that aims to simplify the regulatory process for energy projects on reservations by establishing a pilot program.⁸⁵

Hoeven told the National Congress of American Indians in February that the bill is “a big step toward tribal self-determination in developing its tribal resources.”

Other committees are exploring the issue as well. In February, Frank Rusco, the GAO’s director of natural resources and environment issues, told a House oversight panel that regulatory uncertainty continues to impede tribal energy projects.⁸⁶

House Natural Resources Committee ranking member Raúl Grijalva, D-Ariz., has long opposed easing regulations for energy development for tribal and other federal lands.

“There’s a fundamental lust on the part of industry for the extraction that they want out of the public lands, and there is a fundamental lust by industry for what they see in Indian country on reservations as possibilities as well,” Grijalva said. He said he is particularly concerned about a controversial copper mine being reviewed for federal permits, because Congress authorized a land swap allowing the Rio Tinto Group to open the mine on former federal land sacred to Native Americans.

“If the Trump administration and [the Interior Department] go through this whole deregulation agenda that they’re on — expediting, streamlining, whatever euphemism they want to use — on the public lands for extraction purposes, then what’s happening with Resolution Copper and Oak Flat and those areas is the harbinger of what can happen, across the West,” he said.⁸⁷

Grijalva also wants Zinke to testify on Trump’s proposed \$1.5 billion budget cuts to the Interior Department. He asked how the department would

“honor the federal government’s trust responsibilities to Native American tribes using \$1.5 billion less in funding.”⁸⁸

Meanwhile, tribes, including the MHA Nation at Fort Berthold, intend to push Congress and the administration to bar states from taxing non-Native American energy companies that extract resources on tribal lands. They say only tribal governments should be able to levy taxes on those projects.⁸⁹

The GAO in 2015 listed dual taxation of energy projects (by states and tribes) as impediments to Indian energy development, along with tribes’ limited access to capital and federal tax credits.⁹⁰

In the Courts

The National Congress of American Indians supported the Supreme Court nomination of U.S. Appeals Judge Neil M. Gorsuch, who was confirmed on April 7.

Gorsuch’s “opinions recognize tribes as sovereign governments and address issues of significance to tribes,” the group’s president, Brian Cladoosby, and Native American Rights Fund Executive Director John Echohawk wrote in a letter. “Judge Gorsuch appears to be both attentive to the details and respectful to the fundamental principles of tribal sovereignty and the federal trust responsibility.”⁹¹

A series of cases regarding tribal sovereignty and land rights is making its way through the courts and could end up before the Supreme Court.

In what some consider a potentially landmark decision, a federal appeals court in Palm Springs, Calif., in March upheld a ruling that the Agua Caliente Band of Cahuilla Indians has federally established rights to groundwater beneath its reservation in Palm Springs and surrounding areas. The appeals court said the creation of the Agua Caliente reservation in the 1870s “carried with it an implied right to use water

from the Coachella Valley aquifer.” The local water districts could appeal to the U.S. Supreme Court.

Meanwhile, a lawsuit filed by the Standing Rock Sioux and Cheyenne River Sioux tribes accuses the Army Corps of Engineers and the company building the Dakota Access Pipeline of ignoring the risk of oil spills and their potential effects on the tribe. The project, the suit said, violates the 1970 National Environmental Policy Act requiring federal agencies to conduct environmental assessments on projects submitted for federal approval or funding.⁹²

The Northern Cheyenne Tribe is suing the Interior Department over the Trump administration’s decision to lift the moratorium on coal leasing on federal lands. The tribe said it should have been consulted. Tribe President L. Jace Killsback said he is worried about mining’s effect on “our pristine air and water quality . . . [and] sacred cultural properties and traditional spiritual practices.”⁹³ ■

OUTLOOK

“Backsliding” Feared

Christopher Newport University’s Alison says he expects to see tribes gaining more control over their land.

Former Bureau of Indian Affairs Director Washburn, however, warns that federal regulations could tip the other way, as evidenced by Trump’s push to complete the Dakota pipeline over tribes’ objections. “I hope we don’t get backsliding to a federal-control model where tribes are shut out of their own decisions on their land,” he says, but adds that “tribes have a lot more clout now. . . . We may see a rolling back of baseline protections of tribal lands, but we may also see tribes creating their own regimes.” ■

Another possibility, Washburn says, is that under the Trump administration’s crusade to roll back federal regulations, the president may grant more control to tribes, “so we might see more tribal self-determination and self-governance.”

Many legal experts, economists and scholars say the federal government still needs to find a way to resolve the checkerboard pattern of property ownership that remains from the allotment era and complicates tribal governing on reservations.

A “fractionalized” ownership of lots remains an issue that vexes economists and developers, and which the GAO has noted continues to impede energy development on many reservations.

Fractionalized interests refers to lots held in trust by hundreds of individuals. When owners of allotted land died without wills, heirs inherited the property under U.S. law, a process that has continued through the generations with the property divided further among subsequent heirs. Anderson at the Property and Environment Research Center says many of those lots remain undeveloped because of the difficulty in obtaining consensus from all the property owners.

“Every administration since Kennedy has looked at those reservations and said, ‘We’ve got to do something,’ including the Obama administration,” Gover of the National Museum of American Indians says.

“And everyone walks away saying, ‘I don’t know what the hell to do.’ It’s not an absence of caring. It’s not an absence of good will,” Gover says. “To really turn those reservations around would require an enormous influx of money. Just good-old Yankee dollars that would allow an economy to begin to grow.” ■

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