

TRIBAL RENEWABLE ENERGY DEVELOPMENT UNDER THE HEARTH ACT: AN INDEPENDENTLY RATIONAL, BUT COLLECTIVELY DEFICIENT, OPTION

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Increased domestic energy production is of enhanced importance to the United States. Given the growing focus on domestic energy development, many, including tribal governments, have increasingly looked to Indian country for potential energy development opportunities. Such attention is warranted, as abundant alternative and renewable energy sources exist within Indian country. Many tribes are increasingly exploring possible opportunities related to alternative and renewable energy development. Despite this interest, large alternative and renewable energy projects are virtually absent from Indian country. This article explores why such little development is happening despite the great potential for alternative and renewable energy development in Indian country and strong tribal interest in such development.

Congress enacted the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act) in July 2012 to address one of the obstacles to alternative and renewable energy development in Indian country—federal approval for leases of tribal lands. In brief, the HEARTH Act allows tribes with tribal leasing provisions preapproved by the Secretary of the Interior to lease tribal land without Secretarial approval required for each individual lease.

To fully understand the potential implications of the HEARTH Act, this Article explores obstacles to effective energy development in Indian country, what the

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HEARTH Act is and how it supposedly addresses those obstacles, and some significant problems associated with enactment of the HEARTH Act—specifically, the mandatory environmental review provisions and waiver of federal liability, and the impact of the liability waiver on the federal government’s trust responsibility to federally recognized tribes. The article ends with some concluding thoughts on how the HEARTH Act and potential future reforms to the existing federal regulatory scheme applicable to energy development in Indian country might better address tribal sovereignty and the federal trust responsibility to Indian country.

TABLE OF CONTENTS

INTRODUCTION	1032
I. ADVANTAGES OF INCREASED ALTERNATIVE AND RENEWABLE ENERGY DEVELOPMENT FROM FEDERAL AND TRIBAL PERSPECTIVES	1036
II. OBSTACLES TO ENERGY DEVELOPMENT IN INDIAN COUNTRY	1041
III. THE HEARTH ACT	1048
A. What Is the HEARTH Act?	1048
B. The HEARTH Act: Potentially Alleviating a Hindrance to Renewable Energy Development in Indian Country	1052
IV. TROUBLING IMPLICATIONS OF THE HEARTH ACT	1053
A. Undermining Tribal Sovereignty: The HEARTH Act’s Environmental Review Requirement	1054
B. The Second Undercutting of Tribes: The HEARTH Act’s Potential Impact on the Federal Trust Relationship	1059
1. Introduction to the Federal Trust Relationship	1060
2. The HEARTH Act: Erosion of the Federal Trust Relationship Wrapped in a Pretty Bow	1065
V. CONCLUDING THOUGHTS	1070

INTRODUCTION

Energy development is the economic lifeblood of many Indian tribes.
—Judith V. Royster¹

Increased domestic energy production is of growing importance to the United States. Given the upward focus on energy development and, specifically domestic energy development, many, including tribal governments, have increasingly looked to Indian country for potential energy development opportunities.² As Joe Garcia, Vice President of the Southwest Area of the

1. Judith V. Royster, *Tribal Energy Development: Renewables and the Problems of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 92 (2012).

2. “Indian country” is a legal term of art, which refers to specific areas of land. “Indian country” includes:

National Congress of American Indians, concluded, “[i]f the nation seeks energy independence, it must call upon, and support, Indian tribes in their energy development efforts.”³

Increased attention on potential energy development opportunities in Indian country is warranted, as abundant alternative and renewable energy sources exist within Indian country.⁴ For example, the U.S. Department of Energy has identified lands within Indian country as prime areas for wind and solar energy development.⁵ By some estimates, “[u]sing solar and wind alone, Indian country has the capacity to produce ‘more than four times the amount of electricity generated annually in the United States.’”⁶ Several tribes also have substantial potential to develop geothermal⁷ and biomass resources.⁸ Overall, it is estimated that a possible \$1 trillion could be generated if Indian country fully develops its

(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

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

18 U.S.C. § 1151 (2012).

3. *Discussion Draft of the Indian Energy Promotion and Parity Act of 2010: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 9 (2010) (statement of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians) [hereinafter *Indian Energy Promotion and Parity*].

4. This Article focuses on alternative and renewable energy development in Indian country. Because the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 does not apply to “traditional” energy development, leases for “the exploration, development, or extraction of mineral resources” are not covered under the Act. 25 U.S.C. § 415 (2012).

5. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, ENERGY CONSUMPTION AND RENEWABLE ENERGY DEVELOPMENT POTENTIAL ON INDIAN LANDS 26–28 (2000).

6. Ryan D. Dreveskracht, *Alternative Energy in American Indian Country: Catering to Both Sides of the Coin*, 33 ENERGY L.J. 431, 440 (2012) (citing *Native American Tribal Lands Could Produce 17.5 Trillion Kilowatt Hours of Electricity from Wind and Solar Power*, NAT’L INDIAN ENERGY GRP. (Feb. 9, 2011), <http://nationalindianenergy.com/news/?p=8>).

7. ENERGY INFO. ADMIN., *supra* note 5, at 29.

8. *Id.* at 29–30. “Biomass” resources include “food crops, grassy and woody plants, residues from agriculture or forestry, oil-rich algae, and the organic component of municipal and industrial wastes.” *Learning About Renewable Energy*, U.S. NAT’L RENEWABLE ENERGY LAB., http://www.nrel.gov/learning/re_biomass.html (last updated May 30, 2012). Interestingly, Congress appears to be particularly interested in promoting biomass energy development in Indian country. Currently, it is considering an amendment to the Indian Tribal Energy Development and Self-Determination Act of 2005, § 1684, which “would establish biomass demonstration projects for federally recognized Indian tribes and Alaska Native corporations to promote biomass energy production.” S. REP. NO. 112–263, at 23 (2012).

energy potential, which is inclusive of both traditional energy sources⁹ and alternative and renewable energy development.¹⁰ In recognition of the energy potential within Indian country, Michael R. Smith, Deputy Bureau Director of Field Operations for the Bureau of Indian Affairs (“BIA”), told the Senate Committee on Indian Affairs that “[the BIA knows] that Tribal lands hold a great capacity for solar, wind and geothermal projects, and we are committed to helping Indian tribes unlock that potential.”¹¹

While tribes have historically focused on traditional energy development, many tribes are increasingly exploring opportunities related to alternative and renewable energy development. Although some media coverage has suggested that tribes do not want to participate in alternative and renewable energy development,¹² many tribes have expressed interest in developing alternative and renewable energy within their territories so long as such development is consistent with tribal culture and traditions.¹³ Despite this interest in alternative and renewable energy development in Indian country, large alternative and renewable energy projects are virtually absent.¹⁴ Specifically, it appears that only one commercial-scale renewable energy project is currently operating within Indian country.¹⁵ This Article explores why, despite the great potential for alternative and renewable energy development in Indian country, and the fact that many tribes

9. “Traditional energy sources” refers to nonrenewable sources of energy, including nuclear energy, electricity, and energy derived from fossil fuels. *See Energy Sources*, U.S. DEP’T OF ENERGY, <http://energy.gov/science-innovation/energy-sources> (last visited Oct. 2, 2013).

10. Jefferson Keel, President of the Nat’l Cong. of Am. Indians, State of Indian Nations Address: Sovereign Indian Nations at the Dawn of a New Era (Jan. 27, 2011).

11. *Overcoming Barriers to Economic Development in Native Communities: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Aug. 17, 2011) (statement of Michael R. Smith, Deputy Bureau Director, Field Operations, Bureau of Indian Affairs).

12. Some opposition to alternative and renewable energy development in Indian country may be a result of a lack of tribal consultation between third party energy developers, the federal government, and affected tribes. Dreveskracht, *supra* note 6, at 433. For example, “[i]n 2010, the [Bureau of Land Management] allowed a 709-megawatt solar farm planned for more than 6,000 acres of public land in the desert in California’s Imperial Valley to move forward without adequately consulting the tribe whose areas of cultural significance would be directly affected by the project.” *Id.* (citing *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1106–09 (S.D. Cal. 2010)). For a discussion of what type of consultation would generally be considered meaningful by tribes, see *id.* at 435.

13. *Id.* at 432 (“[C]ontrary to being opposed to alternative energy development, Tribes are very actively seeking to develop their lands, and to do so in a manner that is consistent with their cultures and traditions.”).

14. *Id.*

15. Van Jones, Bracken Hendricks & Jorge Madrid, *Clearing the Way for a Native Opportunity in America’s “Sputnik Moment,”* NATIVE AM. TIMES (Jan. 28, 2011), http://www.nativetimes.com/index.php?option=com_content&view=article&id=4853:clearing-the-way-for-a-native-opportunity-in-americas-sputnik-moment&catid=46&Itemid=22.

may be interested in such development, very little actual development seems to be occurring.¹⁶

This Article is the first to provide in-depth consideration of the impact of the Helping Expedite and Advance Responsible Tribal Homeownership Act (“HEARTH Act”) on renewable energy development in Indian country. The HEARTH Act is important to renewable energy development in Indian country because it affects arguably the most valuable resource in Indian country—tribal lands. Congress enacted the HEARTH Act in July 2012 to address one of the obstacles to alternative and renewable energy development in Indian country—federal approval for leases of tribal lands. In brief, the HEARTH Act allows tribes with tribal leasing provisions preapproved by the Secretary of the Interior to lease tribal land without Secretarial approval for each individual lease.¹⁷ At the time of writing this Article, three tribes—Federated Indians of Graton Rancheria,¹⁸ Pueblo of Sandia,¹⁹ and Pokagon Band of Potawatomi²⁰—have taken advantage of the HEARTH Act, submitting tribal leasing regulations for approval by the Department of the Interior, all of which have been approved.

To fully understand the potential implications of the HEARTH Act, this Article examines the overwhelming national interest in domestic alternative and renewable energy development and the specific benefits of such development to Indian country. The Article then explores obstacles to effective energy development in Indian country. The Article then focuses on what the HEARTH Act accomplishes and how it attempts to address some of the issues of energy development in Indian country. Next, the Article explores some significant problems with the HEARTH Act, namely, the Act’s mandatory environmental review provisions, the Act’s waiver of federal liability, and the impact of the

16. Under the current regulatory scheme, numerous obstacles to energy development in Indian country exist. This Article focuses on one of these substantial obstacles to development—the leasing of tribal lands. For an introduction to the scope of obstacles limiting energy development in Indian country, see Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 467–70 (2010).

17. 25 U.S.C. § 415 (2012).

18. FEDERATED INDIANS OF GRATON RANCHERIA, RESOLUTION APPROVING THE BUSINESS SITE LEASING STATUTE AND SUBMITTING THE BUSINESS SITE LEASING STATUTE TO THE UNITED STATES DEPARTMENT OF THE INTERIOR FOR APPROVAL, TRIBAL COUNCIL RESOLUTION NO.: # 12-48 (Dec. 12, 2012) (on file with author); U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, APPROVAL OF BUSINESS LEASING REGULATIONS (Feb. 1, 2013) (on file with author).

19. PUEBLO OF SANDIA, APPROVING PUEBLO OF SANDIA INDIAN LANDS LEASING REGULATIONS AND PROCEDURES, RESOLUTION 2013–037 (March 5, 2013) (on file with author); U.S. DEP’T OF THE INTERIOR, APPROVAL OF BUSINESS SITE LEASING REGULATIONS (March 14, 2013) (on file with author).

20. U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, APPROVAL OF RESIDENTIAL LEASING ACT (April 11, 2013) (on file with author); Letter from the Pokagon Band of Potawatomi Indians Tribal Council to Bryan Rice, Deputy Bureau Director, Trust Services of the Bureau of Indian Affairs in the Dep’t of Interior (April 3, 2013) (on file with author).

liability waiver on the federal government's trust responsibility to federally recognized tribes.²¹ As demonstrated in the ensuing discussion, the HEARTH Act both reduces the federal government's fiduciary obligation to Indian tribes under the federal trust responsibility and undermines tribal sovereignty. Accordingly, despite the fact that three Indian nations have taken advantage of the HEARTH Act leasing provisions, Indian country as a whole is worse off under the Act. The Article ends with some concluding thoughts on how the HEARTH Act and potential future reforms to the existing federal regulatory scheme applicable to energy development in Indian country might better address tribal sovereignty and the federal trust responsibility to Indian country. Ultimately, some tribes may be attracted to enacting tribal leasing provisions under the HEARTH Act because of the potential to expedite renewable energy development in Indian country. The HEARTH Act and other legislation patterned on it, however, may ultimately prove to be a collectively deficient option for all of Indian country because of its implications for the federal trust responsibility and tribal sovereignty, which are both foundations of federal Indian law.

I. ADVANTAGES OF INCREASED ALTERNATIVE AND RENEWABLE ENERGY DEVELOPMENT FROM FEDERAL AND TRIBAL PERSPECTIVES

This Section examines why increased alternative and renewable energy development is attractive from both federal and tribal perspectives. National interest in alternative and renewable energy development seems to be growing for reasons of national security, climate change, and rising energy prices. Tribes are also increasingly interested in such development. If done correctly, renewable energy development in Indian country has the capacity to provide stable economic growth that creates jobs while promoting tribal sovereignty and tribal environmental ethics. Each of these benefits is explored in this Section.

From the federal perspective, such development aids the country in several ways. As the population continues to grow, jobs are increasingly needed to stabilize the economy. Furthermore, an unstable Middle East threatens the primary source of fossil fuel for the United States.²² Thus, the search for domestic energy sources only continues to intensify.²³ Perhaps in recognition of this trend, Americans, regardless of political affiliation, overwhelmingly support the development of alternative and renewable energy within the United States.²⁴

21. The term "federally recognized" tribes refers to those tribes which the federal government has recognized as governments with which it has a government-to-government relationship. For a complete list of federally recognized tribes, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26384, 26385–89 (May 16, 2013).

22. John M. Broder, *Climate Change Seen As Threat to U.S. Security*, N.Y. TIMES, Aug. 8, 2009, at A1.

23. Royster, *supra* note 1, at 94.

24. John Arensmeyer, *Small Businesses Want Government to Invest in Clean Energy*, *Small Business America*, HUFF POST SMALL BUS. AM. (Apr. 30, 2012, 11:15

Moreover, the majority of Americans see a strong connection between the development of renewable energy and job creation.²⁵ In the current era of political acrimony, it appears that domestic development of alternative and renewable energies is one of the few things most Americans can agree on.²⁶ Consistent with this national support for alternative and renewable energy development, President Obama established a “goal of generating 80 percent of the Nation’s electricity from clean energy sources by 2035.”²⁷

The quest for increased alternative and renewable energy development has already moved into the heart of Indian country. Numerous alternative and renewable energy projects have been developed on public lands, mostly in the western United States.²⁸ Although public lands are not synonymous with Indian country, a large portion of both are located in the western United States, suggesting that there is opportunity for alternative and renewable energy development in the West.²⁹ Therefore, alternative and renewable energy development in Indian country is consistent with the nationwide movement to develop potential energy sources in the West.

In addition to benefiting the United States, alternative and renewable energy development in Indian country has the potential to greatly benefit many tribal governments. As Joe Garcia, Vice President of the Southwest Area of the National Congress of American Indians, explained:

As tribal lands are estimated to contain 10% of the nation’s traditional and renewable energy resources, realizing this potential is critical to the nation’s efforts to achieve energy independence, promote clean energy, and create jobs. Such efforts are especially needed in Indian Country, where unemployment rates are many times higher than most meaningful and sustainable economic

AM), http://www.huffingtonpost.com/johnarensmeier/small-business-clean-energy_b_1464549.html.

25. *Id.* (“71 percent [of Americans] believe government investments in clean energy play an important role in creating jobs now.”).

26. This Article uses both terms “alternative” and “renewable” energy in order to be inclusive of all sustainable energy solutions. For purposes of this Article, the terms “alternative” and “renewable” energy may be used interchangeably. The United States Energy Information Administration explains that, “[u]nlike fossil fuels, which are exhaustible, renewable energy sources regenerate and can be sustained indefinitely.” *Renewable Energy Explained*, ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=renewable_home (last updated Sep. 27, 2013). The Energy Information Administration goes on to state that the five most frequently used forms of renewable energy include: biomass, water (hydropower), geothermal, wind, and solar. *Id.*

27. THE WHITE HOUSE, PRESIDENT OBAMA’S PLAN TO WIN THE FUTURE BY PRODUCING MORE ELECTRICITY THROUGH CLEAN ENERGY (Jan. 25, 2011).

28. Dreveskracht, *supra* note 6, at 433.

29. For a map showing how Indian country has changed over time, see Saylor Found., *Saylor.org HIST002: “Native American Land Losses,”* YOUTUBE (Apr. 16, 2012), <http://youtu.be/ZZCvUroBpaE>.

development opportunities to ever arise for some tribes that have been mired in endemic poverty.³⁰

Successful energy development, then, will ideally result in increased jobs in Indian country. “Increased opportunity for economic development in Indian Country is the best way to raise the standards of living for tribal members.”³¹ Job growth in Indian country is particularly important given that many American Indians and Alaskan Natives live in poverty.³² Alternative and renewable energy development in particular seems to generate a significant number of jobs³³ as compared to other industries typically located within Indian country, which may mean that this type of tribal development would be especially helpful in alleviating tribal poverty. As a result, energy development in Indian country, especially alternative and renewable energy development, has the potential to alleviate some of the substantial poverty burdening many individual Indians and tribal governments.

Moreover, tribes may benefit from alternative and renewable energy development because such development supports and even promotes tribal sovereignty. For example, consultation between the federal government and tribal governments is an important expression of tribal sovereignty. If tribes can take an active role in the development of alternative and renewable energy in Indian country,³⁴ such development constitutes an exercise of sovereignty through government-to-government relationships. According to Professors Stephen Cornell and Joseph P. Kalt’s seminal work on effective economic development in Indian country, true expressions of tribal sovereignty are the cornerstone of successful tribal economic development.³⁵

From the federal perspective, President Obama seems to agree that tribal participation is key to building sound relationships. As President Obama stated in his 2009 Presidential Memorandum on Tribal Consultation:

30. *Indian Energy Promotion and Parity*, *supra* note 3, at 9 (statement of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians).

31. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Cole).

32. See Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 285 (2009) (“[T]he unemployment rate still hovers around fifty percent for Indians who live on reservations, nearly ten times that for the nation as a whole.”); *American Indian and Alaskan Native Poverty Rate About 50 Percent in Rapid City, S.D., and About 30 Percent in Five Other Cities*, U. S. CENSUS BUREAU (Feb. 20, 2013), http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb13-29.html.

33. Robert Glennon & Andrew M. Reeves, *Solar Energy’s Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL’Y 91, 93–94 (2010) (noting that photovoltaic jobs have grown 560 % from 1999 to 2008).

34. See generally Royster, *supra* note 1, at 95–96 (explaining that the existing federal regulatory framework does not—generally—promote tribal energy development).

35. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 15, 18 (Miriam Jorgensen ed., 2007).

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal[–]tribal relationship.³⁶

Moreover, in addition to potential economic benefits and increased expressions of tribal sovereignty associated with tribal alternative and renewable energy development, tribes may also be attracted to such development because it would potentially alleviate the impacts of climate change. Although most indigenous communities contribute little, if anything, to the global problem of climate change, tribes are being disproportionately impacted by its effects.³⁷ In some cases, the impacts of climate change on tribes are so extreme that tribes, such as the Native Village of Kivalina in Alaska, will be forced to relocate.³⁸ Because alternative and renewable energy development generally results in fewer greenhouse gas emissions than traditional energy development, tribes engaged in alternative and renewable energy development may help to alleviate the impacts of climate change on indigenous communities.

More broadly, alternative and renewable energy development in Indian country may also accord with tribal environmental ethics.³⁹ Although the stereotype of the tribal environmental steward should certainly be avoided because it is not true in every instance, many tribal cultures and traditions are tied to the environment and land in a manner that traditionally differs from other communities.⁴⁰ Land “is the source or spiritual origin and sustaining myth which

36. Memorandum for Heads of Executive Departments and Agencies on Tribal Consultation, 74 Fed. Reg. 57881, 57881 (Nov. 5, 2009).

37. For an introduction to the many negative impacts of climate change on indigenous communities around the world, see Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous People*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

38. Elizabeth Ann Kronk, *Effective Access to Justice: Applying the Parens Patriae Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RESOURCES L. REV. 1, 7 (2011). Very generally, climate change is occurring because of increased greenhouse gas emissions, which accumulate in the atmosphere, trapping the sun’s energy and causing the general global temperature to increase. For an in-depth discussion of the relationship between climate change and greenhouse gas emissions, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, 30–39 (2007).

39. See generally Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996) (discussing the importance of each tribe’s development of its own environmental ethics consistent with its individual culture and traditions).

40. Each tribal nation has a different relationship with its environment and there is not a common “Native experience,” but rather a broad diversity of thought and experience related to one’s relationship with land and the environment. In particular, traditional

in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.⁴¹ As a result of the similarity in connections to environment and the land, many tribes are “land-based,”⁴² meaning that their culture and traditions, the essence of their personhood, is connected to the land where they reside. Moreover, at an individual level, many Indians may possess a spiritual connection with land and the environment.⁴³ Indians with such a connection to the land:

continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamilial identities. Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places, and other places where ancestral communities remain alive.⁴⁴

In this regard, the spiritual connection many tribes and individual Indians share with their surrounding environment is crucial to the sovereignty of these nations.⁴⁵ Therefore, while traditional energy development may erode the environment that can be so important to tribes and individual Indians,⁴⁶ the movement toward alternative and renewable energy development may alleviate some of these impacts. Tribes engaged in such development may also have a

stereotypes of indigenous people as “Noble Savages” or “Bloodthirsty Savages” should be avoided. *See id.* at 270 (“The problems of cross-cultural interpretation and the attempt to define ‘traditional’ indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in ‘perfect harmony’ with nature (the ‘Noble Savage’ resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the ‘Bloodthirsty Savage’ resurrected).”); *see also* Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 465–69 (2010) (explaining the stereotype of Natives as environmental stewards and its likely origins).

41. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989); *see also* NAT’L CONG. OF AM. INDIANS, RESOLUTION #EWS-06-2004—SUPPORTING A NATIONAL MANDATORY PROGRAM TO REDUCE CLIMATE CHANGE POLLUTION AND PROMOTE RENEWABLE ENERGY (2006) (“[C]limate-related changes to the weather, food sources, and local landscapes undermine the social identity and cultural survival of American Indians and Alaskan Natives . . .”).

42. Tsosie, *supra* note 39, at 274.

43. *Id.* “American Indian tribal religions . . . are located ‘spatially,’ often around the natural features of a sacred universe. Thus, while indigenous people often do not care *when* the particular event of significance in their religious tradition occurred, they care very much about *where* it occurred.” *Id.* at 282–83.

44. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 381 (2008).

45. *Id.* at 424 (“Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.”).

46. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 38 (discussing how traditional energy development (e.g., fossil fuel extraction) is damaging the Earth’s environment).

strong interest in working to protect the environment and land that for many is so crucial to tribal identity, customs, and traditions.

It is therefore clear why alternative and renewable energy development is so attractive to Indian country. The nation as a whole appears increasingly interested in such development for a variety of reasons. Additionally, such development potentially brings more than just money to Indian country, as it also promotes tribal sovereignty and environmental ethics. Why then is there only one large scale commercial renewable energy project located in Indian country? The next Section explores some of the limitations of the existing regulatory scheme that impairs energy development in Indian country.

II. OBSTACLES TO ENERGY DEVELOPMENT IN INDIAN COUNTRY

Despite substantial interest in renewable energy development in Indian country, such development is generally not occurring on a large scale, as exemplified by the fact that there is only one large renewable energy project in Indian country.⁴⁷ In order to understand the potential impact of the HEARTH Act on alternative and renewable energy development in Indian country, it is helpful to first understand the existing obstacles to such development. This Section thus examines obstacles to energy development within Indian country. These include: (1) lack of access to the transmission grid; (2) state intrusion into tribal energy development through dual taxation; (3) leasing and siting requirements; (4) mandated appraisals; and (5) leases and rights of way, and financing.⁴⁸ The reality is that although substantial renewable resources exist in Indian country and many tribes are interested in developing such resources, development is generally not occurring in large part due to the burdensome regulatory scheme.

Many tribes, despite strong interest, have not engaged in renewable energy development because it takes too long to obtain the mandatory federal approvals and, even if the approvals are obtained, energy produced in Indian country may not be competitive with energy developed elsewhere because of double taxation by both the state and tribe⁴⁹ and inaccessible infrastructure. In totality, the obstacles are so substantial that there are “49 bureaucratic steps that tribes currently must go through to undertake energy development projects on tribal lands, and to ensure equitable access to the transmission grid, financing mechanisms, and federal programs for energy development and energy

47. Jones, Hendricks & Madrid, *supra* note 15.

48. *Indian Energy Promotion and Parity*, *supra* note 3, at 10–11 (statement of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians). For an extensive discussion of how the existing federal regulatory structure may impede the development of alternative and renewable energy development in Indian country, see generally Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449 (2010); Royster, *supra* note 1, at 95–96.

49. *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 115 (2005) (allowing the state of Kansas to apply its motor fuel tax to fuel that would eventually be sold on the Prairie Band Potawatomi Nation as long as the tax was applied to fuel before it was delivered to the reservation).

efficiency.”⁵⁰ The majority of these bureaucratic steps are applicable only because the development project is in Indian country; they do not apply to development occurring outside of Indian country. Energy developed in Indian country may be more costly and therefore not as attractive because of duplicative state taxation and increased costs associated with the wait time required for federal approvals.⁵¹ As a result, those interested in promoting energy development within Indian country are at a competitive disadvantage to similar projects located outside of Indian country.⁵²

Furthermore, many of these additional burdens placed on energy development within Indian country are placed on such lands by the federal government. As such, federal involvement in energy development within Indian country constitutes one of the most substantial obstacles to energy development in these lands. For example, the BIA, housed within the Department of the Interior and tasked with handling the majority of the federal government’s affairs within Indian country, may not have an adequate number of staff members to process requests quickly, communication may be ineffective between various departments within the Department of the Interior, and the BIA may hold incorrect land records.⁵³ At least one scholar has concluded that many of the obstacles inherent in the process related to energy development in Indian country are a direct result of the federal government’s involvement.⁵⁴

Scholars are not alone in recognizing obstacles to effective energy development inherent in the existing federal regulatory scheme. For example, Senator Daniel Akaka (D–HI), a member of the Senate Committee on Indian Affairs, explained that:

In recent years the [Senate Indian Affairs] Committee has heard concerns and complaints from Indian tribes and industry that the many Federal laws that govern the development of tribal energy resources are complex and often lead to significant cost, delay and

50. *Indian Energy Promotion and Parity*, *supra* note 3, at 9 (statement of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians) (emphasis added). Mr. Garcia went on to explain that it is crucial that such barriers to energy development in Indian country be removed “to ensure that tribes are placed on a level playing field to facilitate the realization of their energy potential for the benefit not only of tribal governments and peoples, but the entire nation.” *Id.* Generally, the steps required for alternative and renewable energy development outside of Indian country are not as cumbersome because development in Indian country requires an added layer of federal governmental oversight as discussed in Part II. For a complete discussion of the steps generally involved to develop renewable energy projects outside of Indian country, see, e.g., K.K. DUVIVIER, *THE RENEWABLE ENERGY READER* (2011).

51. *See generally* Dreveskracht, *supra* note 6, at 442.

52. *Indian Energy Promotion and Parity*, *supra* note 3, at 8 (testimony of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians).

53. *See* Dreveskracht, *supra* note 6, at 442 (discussing the potential obstacles to effective energy development in Indian country as a result of the federal government’s involvement).

54. *Id.* at 441–43.

uncertainty for all parties to proposed tribal energy transactions. These costs, delays and uncertainties tend to discourage development of tribal trust energy resources and drive development investments to private or non-tribal lands that are not subject to these same Federal laws.⁵⁵

Concerns about the potential barriers to effective energy development placed on tribes by the federal government are not limited to Senator Akaka or the Democratic Party. As Senator Barrasso (R-WY) explained:

For far too long, bureaucratic red tape has prevented Indian tribes from pursuing economic development and homeownership opportunities on tribal trust lands. For many years, Indian tribes have expressed concerns about the Federal laws and regulations governing surface leases of tribal trust lands. The delays and uncertainties inherent in the Bureau of Indian Affairs' lease approval process, as well as the restrictions on the duration of lease terms, create serious barriers to the ability of tribes to plan and carry out economic development and other land use activities on tribal lands.⁵⁶

Moreover, concern about the existing regulatory scheme as it applies to energy development in Indian country is not limited to the United States Senate. As explained by Joe Garcia, Vice President of the Southwest Area of the National Congress of American Indians:

[T]he challenges [to energy development in Indian country] are massive. For example, the vast majority of large scale renewable energy projects on tribal lands, even those which have made it through the maze of federal bureaucratic processes, are stuck in the pre-development phase among other things, for lack of financing, transmission access, and unfavorable tax structures. Furthermore, states and counties are increasingly keen on taxing tribal energy projects, threatening their very viability and siphoning off revenue that should be going to tribal governments for needed programs and services.⁵⁷

As a result, in part because of the cumbersome federal regulatory scheme enforced on Indian country, many are not investing in energy projects within

55. S. REP. NO. 112-263, at 1 (2012). Because of the problem created by the existing federal scheme, this report was submitted to support a bill calling for the amendment of the Indian Tribal Energy and Self-Determination Act of 2005. Pub. L. No. 109-58, 119 Stat. 594 (codified at various sections of Titles 2, 5, 7, 10, 15, 18, 20, 22, 23, 25, 30, 31, 33, 35, 40, 41, 42, 48, 49, and 50 of the U.S.C.). Accordingly, because of the strong interest in energy development in Indian country, and in recognition that the existing federal scheme is problematic, Congress appears to be actively working to improve the existing scheme.

56. 157 CONG. REC. S2048-01 (2011) (statement of Sen. Barrasso).

57. *Indian Energy Promotion and Parity*, *supra* note 3, at 9 (statement of Joe Garcia, Southwest Area Vice President of the National Congress of American Indians).

Indian country,⁵⁸ despite substantial opportunities for investment and development. Investors have shied away from energy development in Indian country, which may be more time consuming and costly overall than development outside of Indian country:

Private investment within Indian reservations—except in the anomalous case of Indian gaming . . . is about as scarce as it is in any nation where ownership of property is highly restricted by national governments. Investors cannot afford to wait the months or years it may take for BIA approval of a simple lease executed with a tribe. Investors simply put their money on the non-Indian side of the reservation.⁵⁹

One of the most significant obstacles to effective energy development in Indian country is the requirement that the Secretary of the Interior approve leases of Indian lands.⁶⁰ Though the lease is technically approved by the Secretary of the Interior, the BIA ultimately signs off on leases.⁶¹ In this regard, “the basic BIA land functions of title, leasing, acquisitions and probate are even more critical to Indian communities because these functions drive economic development.”⁶² Not

58. Dreveskracht, *supra* note 6, at 432, 441–42.

59. H.R. REP. NO. 112-427, at 454 (2012). The reference to “the non-Indian side of the reservation” is referring to land adjacent or very near a tribal reservation that possesses similar resources, but may be more attractive to investors by virtue of the fact that it is not located in Indian country and therefore the added layer of bureaucratic review, as detailed below, does not apply. *Id.*

60. Although this Article focuses on the impact of existing leasing regulations and the HEARTH Act as they pertain to energy development in Indian country, existing leasing regulations also have a profound impact on the ability of families to own homes within Indian country. Representative Heinrich explained:

We all know that a seller is rarely able to wait 2 years to sell their house, and banks are often unable to hold a mortgage approval for anywhere near that long. I know that there are many Native families who would prefer to stay and raise their children in the communities where their families have lived for generations, but instead would have had to move from Indian Country to nearby cities because they want to own a home. Families shouldn't be forced to make such an important decision based on how many months, or years, it will take a Federal bureaucracy to approve a mortgage on tribal land.

158 CONG. REC. H2682–01 (2012) (statement of Rep. Heinrich).

61. As Representative Richardson explained, the BIA plays a substantial role in Indian country because it oversees

the education, healthcare, infrastructure maintenance and law enforcement, among other services, for Native Alaskans and American Indians. The BIA oversees more than 55 million acres of some of the most economically depressed and isolated areas of the United States and is critical in improving the quality life [sic] of its members.

158 CONG. REC. H2682–01 (2012) (statement of Rep. Richardson).

62. *Barriers to Indian Job Creation: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the Comm. on*

only is the requirement of Secretarial approval itself and the time usually required to obtain such approval significant, but the federal government's involvement in leasing tribal lands is also significant because tribal lands are the most valuable resource for many tribes.

The requirement that the federal government approve leases of tribal land has its origin in *Johnson v. M'Intosh*, where the United States Supreme Court held that Indian tribes did not own in fee simple absolute the lands they occupied, but instead possessed a right of beneficial ownership.⁶³ The federal government is also involved because, currently, the vast majority of energy development within Indian country involves non-Indian third party partners.⁶⁴ The presence of these non-Indian partners triggers the application of the Nonintercourse Act,⁶⁵ which was originally enacted to protect Indian land from being transferred to non-Indians; in this regard, the Nonintercourse Act is a vestige of paternalistic federal policies applicable in Indian country.⁶⁶ Congress originally enacted the Nonintercourse Act "to 'protect' tribes from losing their land base through coercion, fraud, and trade conducted in bad faith."⁶⁷

Because the federal government owns the fee title to land within Indian country, such lands are held in trust or restricted status by the federal government, and the federal government therefore has a role in approving the lease of any such land. Such policies have taken on an air of paternalism.⁶⁸ Under the status quo, the Indian Long-Term Leasing Act of 1955 requires the Secretary of the Interior to

H. Oversight and Govt. Reform, 112th Cong. (2011) (statement of the Hon. W. Ron Allen, Chairman, CEO of the Jamestown S'Klallam Tribe).

63. See generally 21 U.S. 543 (1823). For an alternative look at *Johnson v. M'Intosh*, see ROBERT J. MILLER, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 3 (2010). The legal term "fee simple" refers to the absolute ownership of a particular piece of land. BLACK'S LAW DICTIONARY 691 (9th ed. 2009) ("An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.").

64. See Tracey A. LeBeau, *The Green Road Ahead: Renewable Energy Takes a Stumble but is on the Right Path, Possibly Right Through Indian Country*, 56 FED. LAWYER, Mar.-Apr. 2009, at 40-41 (explaining that non-Indian investors play a significant role in energy development within Indian country).

65. 25 U.S.C. § 177 (2012) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

66. It may be argued that the federal government actually protects tribal sovereignty by maintaining a role in approving leases of tribal lands and supposedly assuring the viability of such land well into the future. However, such provisions would, at best, only ensure that tribal land continues to be in existence into the future. Such federal paternalism is inconsistent with tribal sovereignty. Therefore, while the land base may continue into the future, the tribe's sovereignty is eroded as a result of the federal government's paternalistic policies.

67. H.R. REP. NO. 112-427, at 5 (2012), reprinted in 2012 U.S.C.C.A.N. 453, 453-54.

68. *Id.* ("Over time, this federal policy began to take on the form of paternalism over tribes, which persists to this day.").

approve the lease of tribal trust and restricted land for a variety of purposes.⁶⁹ Under this Act, the Secretary may approve leases for public, religious, educational, recreational, residential, or business purposes of Indian land for up to 25 years, with an option for an additional 25-year term.⁷⁰ Moreover, in determining whether or not to approve the lease, the Secretary will determine what is in the best interest of the tribe, which perpetuates a paternalistic relationship between the tribe and federal government.⁷¹ Representative Rob Bishop (R-UT) shared the view that the current leasing scheme perpetuates a paternalistic system upon tribes. He stated that:

Under current law, each and every nonmineral lease that a tribe executes with a third party is subject to approval of the Department of the Interior before it can take effect. It doesn't matter whether the tribe and a third party have negotiated the terms of a lease to their mutual satisfaction; Washington, D.C., ultimately decides because, after all, Washington, D.C., always knows better. Unfortunately, the result of this paternalism is predictable—the leases do not get approved on a timely basis, if at all. The government has erected all kinds of regulatory hurdles for tribes leasing their lands. In the private sector, time is money; and when the government delay costs money, investors take their business elsewhere.⁷²

Because the federal government must approve leases of tribal lands under the existing scheme, it can take substantially longer to put land in Indian country into renewable energy development. Under the existing scheme, it can take six months to two years for the Department of the Interior to approve the lease of land in Indian country.⁷³ As Representative Martin Heinrich (D-NM) concluded, “many tribal communities lose out on commercial investment because the process for securing a lease through the BIA takes so long.”⁷⁴ Such lengthy delays in approval of leases or even eventual denials may be a result of the fact that the federal government is risk averse. As Representative Heinrich explains:

Indians do not enjoy exclusive use and benefit of their lands, but such enjoyment is limited because the government will not, as a general rule, authorize leases or other uses of such lands if they entail any more than minimal risks, as taxpayers may be held liable

69. 25 U.S.C. § 415(a) (2012). The statute applies to the lease of “Indian land,” which is defined as “any tract in which any interest is . . . owned by a tribe or individual Indian in trust or restricted status.” What Key Terms Do I Need to Know for This Subpart?, 25 C.F.R. § 162.101 (2013).

70. 25 U.S.C. § 415(a).

71. See, e.g., What Are BIA's Objectives in Granting and Approving Agricultural Leases?, 25 C.F.R. § 162.107(a) (2013).

72. 158 CONG. REC. H2682-01 (May 15, 2012) (statement of Rep. Bishop).

73. H.R. 2523, “*Helping Expedite and Advance Responsible Tribal Homeownership Act or the HEARTH Act*,” Hearing Before the Comm. on H. Nat. Res., 111th Cong. 15 (2009) [hereinafter *Tribal Homeownership*] (statement of Gov. Everett Chavez, Pueblo of Santo Domingo) (“Once a tribe approves a lease, and it is submitted to BIA for federal approval, the wait time is typically between six months and two years.”).

74. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Heinrich).

for any losses. Minimal risk has, predictably, yielded minimal benefits.⁷⁵

Furthermore, the BIA, “which is responsible for managing these lands, must work within a federal legal system rife with confusing, outdated, and inconsistent laws, regulations and policies.”⁷⁶ As a result of the current cumbersome leasing provisions, many tribes have directly petitioned Congress for a waiver from such provisions on a tribe-by-tribe basis.⁷⁷ In fact, at least 45 federally recognized tribes have sought relief from Congress from the onerous leasing provisions.⁷⁸ Such petitioning of Congress by individual tribes is time consuming, inefficient, and expensive. The fact that approximately 10% of the federally recognized tribes in the United States have undertaken such high costs and extreme efforts to obtain an exemption from the current leasing system is evidence that the current system is not working efficiently. Representative Tom Cole (R–OK) has concluded that “[t]he [existing] secretarial [leasing] process is costly, time consuming, often results in lost business and economic opportunities for tribal communities, and is far too cumbersome to be helpful to those it’s designed to protect.”⁷⁹ Representatives of Indian country and members of Congress thus agree that the existing federal regulatory scheme applying to energy development in Indian country hinders energy development.

Some of the most onerous obstacles to effective and efficient alternative and renewable energy development in Indian country, at least according to the legislative history of the HEARTH Act, are the tribal land leasing provisions in place under the Indian Long-Term Leasing Act of 1955.⁸⁰ The HEARTH Act was

75. H.R. REP. NO. 112-427, at 4 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 454.

76. *Id.*

77. *Tribal Homeownership*, *supra* note 73 (statement of the Hon. Harvey Moses, Jr., Second Vice-President of the Affiliated Tribes of Northwest Indians) (“Since the enactment of the 1955 Act, a number of Indian tribes have successfully secured amendments to the 1955 Act that authorizes the Secretary to approve leases of up to 99 years for those particular tribes.”).

78. *Id.* at 25 (statement of Cheryl Parish, Executive Director of Bay Mills Housing Authority) (“Because of these delays [due to the existing leasing regulations], and the desire by the individual Indian tribes for more authority and latitude in the leasing of their own lands, some 45 Indian tribes have sought relief from Congress for amendments to the law through specific, tribe-by-tribe Federal legislation.”).

79. 158 CONG. REC. H2682–01 (2012) (statement of Rep. Cole).

80. *Tribal Homeownership*, *supra* note 73, at 7 (statement of Jerry Gidner, Director of the Bureau of Indians Affairs within the U.S. Department of the Interior) (“[T]he purpose of the HEARTH Act is to amend certain sections of 25 U.S.C. 415, the Indian Long-Term Leasing Act to allow tribes, at their discretion, to approve and enter into certain leases without prior express approval from the Secretary of the Interior. . . . The HEARTH ACT [sic] would provide the same authorities to any federally recognized Indian Tribes, at that Indian tribe’s discretion, to lease its lands, with the same restrictions in 25 U.S.C. § 415(e), without the requirement of the Secretary of the Interior’s approval of such leases, so long as such leases are executed under the Indian tribe’s regulations that have been approved by the Secretary of the Interior.”).

enacted in an effort to address this substantial obstacle to alternative and renewable energy development in Indian country.⁸¹ The next Section explains what exactly the HEARTH Act is and how it allegedly addresses this substantial obstacle to renewable energy development. Although the HEARTH Act streamlines the process for leasing tribal lands for renewable energy development, the question remains—at what cost to Indian country as a whole?

III. THE HEARTH ACT

Given that the current regulatory structure “is less than ideal for the development of renewable energy resources,”⁸² the HEARTH Act was enacted in part to help address some of the obstacles to alternative and renewable energy development in Indian country. Specifically, the HEARTH Act reforms the previous leasing regime that was in place under the Indian Long-Term Leasing Act of 1955. This Section begins by discussing what the HEARTH Act is and why it was enacted. It then explores how the HEARTH Act potentially addresses some of the obstacles to alternative and renewable energy development that were discussed above.⁸³

A. *What Is the HEARTH Act?*

The HEARTH Act amends the Indian Long-Term Leasing Act of 1955 by allowing tribes to approve leases for enumerated purposes without prior approval of the Secretary of the Interior, assuming “the lease is executed under the tribal regulations approved by the Secretary” under the terms of the Act.⁸⁴ In terms of leases for business and agricultural purposes (it is assumed that leases for alternative and renewable energy would fall under business leases),⁸⁵ the tribally approved lease may not exceed 25 years “except that any such lease may include an option to renew for up to [two] additional terms, each of which may not exceed

81. See, e.g., 158 CONG. REC. H2682-01 (2012) (statement of Rep. Markey); THE WHITE HOUSE OFFICE OF COMM’N, STRENGTHENING TRIBAL COMMUNITIES THROUGH THE HEARTH ACT I (2012).

82. Royster, *supra* note 1, at 95–96. For example, as Professor Royster explains, there is some confusion as to whether the Indian Mineral Development Act (“IMDA”) applies to the development of alternative and renewable energy because the Act is specific to “mineral” development. *Id.* at 97–98. Despite the fact that the legislative history behind the IMDA suggests that Congress intended the Act to apply broadly, it is unclear whether nonmineral development (i.e., alternative and renewable development) would fall under the Act. *Id.* at 99–101.

83. See *supra* Part III.B.

84. 25 U.S.C. § 415 (2012).

85. The HEARTH Act does not specifically speak to alternative and renewable energy development, and, therefore, there may be some ambiguity as to whether it applies in this context. See Royster, *supra* note 1, at 123–24. It is a reasonable assumption that the HEARTH Act does apply. First, the language used in the HEARTH Act (i.e., “business”) is sufficiently broad enough to cover alternative and renewable energy development. 25 U.S.C. § 415. Second, as explained below, Congress specifically contemplated the use of the HEARTH Act to promote such energy development in Indian country. See, e.g., 158 CONG. REC. H2682-01 (2012) (statement of Rep. Markey).

25 years.”⁸⁶ Before the Indian Long-Term Leasing Act of 1955 was amended by the HEARTH Act, individual tribes, with a few notable exceptions, such as the Navajo Nation and Tulalip Tribe, would have to get approval from the Secretary of the Interior for leases of tribal lands.⁸⁷

The HEARTH Act was first introduced in the House of Representatives on May 20, 2009. Representative Martin Heinrich (D–NM) first introduced the bill and focused on the bill’s potential benefit to Native families seeking to own their own homes on the reservation.⁸⁸ Ultimately, “the bill [enjoyed] strong bipartisan Congressional support, and the support of the [Obama] Administration, major tribal organizations including the National Congress of American Indians and the National American Indian Housing Council, and individual recognized tribes.”⁸⁹ The HEARTH Act essentially constituted an expansion of the Navajo Leasing Act of 2010 to all federally recognized tribes.⁹⁰ Under this latter Act, the Navajo Nation had the authority to approve leases of tribal lands without prior approval by

86. 25 U.S.C. § 415.

87. *Id.* § 415(a) (2012).

88. 155 CONG. REC. H5808-01 (2009) (statement of Rep. Heinrich).

Representative Heinrich explained that:

Purchasing a home is no easy process for any of us; but for many Native American families trying to buy a house on tribal land, they must also get lease approval from the Bureau of Indian Affairs for the land that the house sits on. This process can take between 6 months and 2 years, resulting in an intolerable delay for finalizing a home sale. This bill would eliminate this requirement and allow tribal governments to approve trust land leases directly, giving more Native American families the chance to own their own home.

Id.

89. H.R. REP. NO. 112-427, at 6 (2012), *reprinted* in 2012 U.S.C.C.A.N. 453, 455.

90. *Tribal Homeownership*, *supra* note 73, at 7 (statement of Jerry Gidner, Director of the Bureau of Indian Affairs within the U.S. Department of the Interior). Director Gidner explained that:

[T]he purpose of the HEARTH Act is to amend certain sections of 25 U.S.C. 415, the Indian Long-Term Leasing Act to allow tribes, at their discretion, to approve and enter into certain leases without prior express approval from the Secretary of the Interior. 25 U.S.C. § 415(e), specifically addresses the Navajo Nation’s current ability to lease any restricted Navajo Nation lands, with a few exceptions, for public, religious, educational, recreational, residential, or business purposes without the requirement of the Secretary of the Interior’s approval of such leases. . . . The HEARTH ACT [sic] would provide the same authorities to any federally recognized Indian Tribes, at that Indian tribe’s discretion, to lease its lands, with the same restrictions in 25 U.S.C. § 415(e), without the requirement of the Secretary of the Interior’s approval of such leases, so long as such leases are executed under the Indian tribe’s regulations that have been approved by the Secretary of the Interior.

Id.

the Secretary of the Interior.⁹¹ The Navajo Nation was allowed such leeway because the Secretary of the Interior previously approved the tribal leasing provisions that the Navajo Nation applied in making lease determinations.⁹² Furthermore, “[t]he Navajo Leasing Act limits the liability of the United States for losses sustained by any party to a lease approved pursuant to the Navajo Nation’s leasing regulations.”⁹³ Notably, the HEARTH Act is a voluntary mechanism, and, therefore, “[e]xpanding the already existing mechanism in the Navajo Leasing Act to other Indian tribes would provide those tribes that so desire an alternative to the current BIA approval process.”⁹⁴

In addition to expanding the Navajo Leasing Act of 2010 to all federally recognized tribes, the HEARTH Act was also designed to give tribes more choice as to which leasing provisions apply within their territories.⁹⁵ Some tribes may already have leasing provisions in place, so the HEARTH Act may build on existing tribal law.⁹⁶ Under the scheme in place before passage of the HEARTH Act, federally recognized tribes had the option of either operating under the Indian Long-Term Leasing Act of 1955 or individually petitioning Congress for an exemption from the 1955 Act.⁹⁷ The Department of the Interior recognized that the existing lease provisions substantially limited effective development within Indian country, and supported passage of the HEARTH Act, as passage was consistent with the Department’s support for tribal self-determination and self-government.⁹⁸

Many members of Indian country also supported passage of the HEARTH Act. For example, the Honorable Harvey Moses, Jr., Second Vice President of the Affiliated Tribes of Northwest Indians (“ATNI”), explained that “[b]ecause of the

91. 25 U.S.C. § 415(e).

92. *Id.*

93. *Tribal Homeownership, supra* note 73, at 17 (statement of the Hon. Harvey Moses, Jr., Second Vice-President of the Affiliated Tribes of Nw. Indians).

94. *Id.*

95. *Id.* (statement of Jerry Gidner, Director of the Bureau of Indian Affairs within the U.S. Dep’t of the Interior).

96. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Cole) (“Many tribes already have a lease approval process through their tribal government that approves land leases before they’re even sent to the [Bureau of Indian Affairs].”).

97. *Tribal Homeownership, supra* 73, at 27 (statement of Cheryl Parish, Exec. Dir. of the Bay Mills Housing Authority and a member of the National American Indian Housing Council) (“Under current law, Indian tribes (except the Tulalip Tribes and the Navajo Nation) are presented with two options: they may choose to operate under the strictures of the 1955 Act, complete with the requirement of Secretarial approval or, alternatively, they may secure 99-year lease authority through the enactment of tribe-specific Federal legislation.”).

98. *Tribal Ownership, Comm. on H. Nat. Resources, 111th Cong.*, (daily ed. October 21, 2009), 2009 WL 3368498 (testimony of Jerry Gidner, Director of the Bureau of Indian Affairs within the U.S. Department of the Interior) (“The [Obama] Administration and this Department support tribal self-determination and self-government. We want to work closely with tribes, this Committee and Congress to address the lease approval processes that hinder not just housing opportunities in Indian Country, but also economic and other development opportunities.”).

potential for this expanded authority to immediately benefit Indian tribes with the requisite capacity and the fact that Indian tribes would be able to decide for themselves whether or not to take advantage of this expanded authority, ATNI supports the legislation.”⁹⁹ In supporting passage of the HEARTH Act, the ATNI focused on the fact that the Act is a voluntary measure, allowing for tribes to individually determine whether or not opting into the new scheme would be advantageous.¹⁰⁰ Cheryl Parish, Executive Director of the Bay Mills Housing Authority and a member of the National American Indian Housing Council, supported passage of the HEARTH Act because it was “another important step in respecting tribal sovereignty and encouraging the development of tribal economies.”¹⁰¹ Ms. Parish went on to explain that the HEARTH Act promotes Indian self-determination and that “Indian Self-Determination is the hallmark of all successful initiatives aimed at improving the lives of Native people including health care, education, law enforcement and others.”¹⁰² The Obama Administration seems to agree that increased tribal control over economic development in Indian country is good, as “President Obama understands that by allowing greater tribal control over tribal assets, we encourage economic growth, promote community development in Indian Country, and support tribal self-determination.”¹⁰³ Specific to development of alternative and renewable energy in Indian country, some believe that passage of the HEARTH Act will act to spur energy development in Indian country because the HEARTH Act applies to leases undertaken for business purposes, which would seem to be inclusive of energy development.¹⁰⁴

In sum, the HEARTH Act essentially amended the Indian Long-Term Leasing Act of 1955 to incorporate the provisions of the Navajo Leasing Act of 2010 and apply those provisions to any federally recognized tribe interested in meeting the requirements of the Act. Federally recognized tribes interested in taking advantage of the HEARTH Act must submit for approval to the Secretary of the Interior tribal leasing regulations that include numerous provisions enumerated in the HEARTH Act, including environmental review requirements.¹⁰⁵ If the Secretary of the Interior determines that the tribe’s leasing regulations meet the enumerated requirements of the HEARTH Act, the Secretary must then approve

99. *Tribal Homeownership*, *supra* note 73, at 6 (statement of the Hon. Harvey Moses, Jr., Second Vice-President of the Affiliated Tribes of Northwest Indians).

100. *Id.* (“Because the HEARTH Act is voluntary, ATNI supports the bill because we believe that individual Indian tribes are in the best position to determine whether these considerations outweigh the potential benefits of the other act.”).

101. *Tribal Homeownership*, *supra* note 73 (statement of Cheryl Parish, Executive Director of the Bay Mills Housing Authority and a member of the Nat’l Am. Indian Housing Council).

102. *Id.*

103. THE WHITE HOUSE OFFICE OF COMM’N, *supra* note 81, at 1.

104. 158 CONG. REC. E889-03 (daily ed. May 25, 2012) (statement of Hon. Betty McCollum) (“This leasing structure [under the HEARTH Act] would also encourage community and economic development on tribal lands, and spur renewable energy development in Indian Country.”).

105. 25 U.S.C. § 415 (2012).

the regulations.¹⁰⁶ Following Secretarial approval, the tribe may move forward with approving leases of tribal lands under the approved leasing regulations. The HEARTH Act waives the federal government's liability for leases approved under these tribal regulations.¹⁰⁷

B. The HEARTH Act: Potentially Alleviating a Hindrance to Renewable Energy Development in Indian Country

With a clear understanding of what the HEARTH Act is and how tribes can take advantage of the provisions of the Act, it is now possible to turn to an examination of how the HEARTH Act may remove a hindrance to alternative and renewable energy development in Indian country. Very broadly, many hope that the HEARTH Act will help to alleviate some of the delays and costs associated with the preexisting federal regulatory scheme by empowering tribes to execute individual leases of tribal lands without having to wait for federal approval. Representative Ed Markey (D-MA) explained the potential of the HEARTH Act to improve efficient energy production in Indian country when he stated that:

A tribe could therefore use its authority under the HEARTH Act to engage in renewable energy projects on their lands. Indian country has the potential to develop millions of megawatts of wind and solar energy. This bill [then-pending HEARTH Act] will help Tribes pursue the economic, environmental and national security benefits that clean energy provides to all Americans.¹⁰⁸

Moreover, the White House concluded that “[b]y allowing tribes to more quickly and easily lease their lands, the bill promotes investment in tribal communities and more broadly facilitates economic development.”¹⁰⁹

On July 30, 2012, the Obama Administration elaborated on some additional benefits of the HEARTH Act, explaining that the Act promotes “greater tribal self-determination and will help create jobs in Indian Country.”¹¹⁰ Notably, however, passage of the HEARTH Act does not impact subsurface energy development, as “[a]ny lease involving the exploration for or extraction of natural resources would still require approval from BIA.”¹¹¹

As explained above, one of the substantial obstacles to alternative and renewable energy development prior to passage of the HEARTH Act was the length of time typically required to approve a lease of tribal lands.¹¹² The HEARTH Act addresses this obstacle by allowing tribes to opt into a system that authorizes pre-approved tribes to execute leases of their tribal lands in most cases.¹¹³ In this regard, the HEARTH Act hopes to “streamline” the existing lease

106. *Id.*

107. *Id.*

108. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Markey).

109. THE WHITE HOUSE OFFICE OF COMM’N, *supra* note 81, at 1.

110. *Id.*

111. H.R. REP. NO. 112-427 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 457.

112. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Heinrich).

113. 25 U.S.C. § 415 (2012).

process for tribal lands. However, such expedited approval may come at a cost that is too great for Indian country as a whole.

IV. TROUBLING IMPLICATIONS OF THE HEARTH ACT

The road to hell is paved with good intentions. —Proverb

In this case, the road to increased renewable energy development in Indian country may be “paved” with federal reforms that significantly erode both tribal sovereignty and the federal trust responsibility. While the reality is that very few tribes may be in a position to enter into a leasing agreement with the Secretary of the Interior under the HEARTH Act because of the environmental review requirements, delay, cost, and resource commitment necessary for initial approval from the Secretary,¹¹⁴ the HEARTH Act also represents some very troubling implications for tribal sovereignty and the federal trust relationship. Although several tribes and individuals working in Indian country supported passage of the HEARTH Act, energy development under the Act ultimately may be a decision that is individually rational for a specific tribe but collectively deficient for Indian country because of the erosion of two key principles of federal Indian law: tribal sovereignty and the federal government’s trust responsibility to tribal nations.

This Section examines the implications of the passage of the HEARTH Act on federal Indian law. First, the requirement that tribes applying for leasing approval from the Secretary of the Interior submit an environmental review process similar to the federal processes is examined. This requirement of the HEARTH Act requires tribes interested in renewable energy development to potentially incorporate aspects of federal environmental law, which may include provisions consistent with the National Environmental Policy Act (“NEPA”), into tribal law. As such, the environmental review provision undermines tribal sovereignty. Second, the Section considers how the HEARTH Act’s waiver of governmental liability potentially affects the federal government’s trust responsibility to Indian country. The HEARTH Act’s waiver of federal liability is a retreat from the federal government’s trust responsibility. The federal government wants to maintain control over development in Indian country, as demonstrated by the discussion of the environmental review provisions, but does not want to be liable for such control.¹¹⁵ Notably, even the Senate Committee on

114. Brian L. Pierson, *Developing Affordable Housing in Indian Country*, 19 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 367, 376 (2010) (“Tribes with significant administrative capacity will likely take advantage of [the HEARTH Act.] . . . but it may take several years for BIA to establish standards and procedures for approval of tribal leasing ordinances. Many tribes, particularly smaller ones, will likely continue to send their leases to BIA for approval because they do not wish to undertake the responsibility of conducting environmental reviews and other burdens associated with lease administration.”); Royster, *supra* note 1, at 124.

115. The HEARTH Act may be indicative of an emerging trend in federal reforms of the regulatory framework applicable in Indian country. Specifically, it would seem that Congress is moving away from any financial liability associated with developments in Indian country. This may be a result of the \$3.4 billion settlement reached in *Cobell v. Salazar* between the federal government and individual Indian trust account

Indian Affairs has acknowledged concerns related to such provisions that broadly waive the liability of the federal government.¹¹⁶

A. Undermining Tribal Sovereignty: The HEARTH Act's Environmental Review Requirement

Environmental review of federal decision-making is perhaps the norm under modern American environmental law. NEPA applies to major federal actions that may significantly affect the environment.¹¹⁷ In this regard, prior to enactment of the HEARTH Act, NEPA generally applied to most considerations of the Secretary of the Interior as to whether or not tribal lands should be leased. Perhaps to ensure the leases approved by tribes under the HEARTH Act undergo similar environmental review, the HEARTH Act requires tribes to incorporate environmental review provisions into leasing provisions submitted to the Secretary of the Interior for approval.¹¹⁸

holders. *See Cobell Settlement Final, Supreme Court Denies Appeals*, NAT'L CONG. OF AM. INDIANS (Nov. 20, 2012), <http://www.ncai.org/news/articles/2012/11/20/cobell-settlement-final-supreme-court-denies-appeals>. Although the *Cobell* settlement did not involve energy development in Indian country, Congress is certainly aware of the considerable size of the settlement and may, as a result, shy away from any potential future liability in Indian country. Whatever the federal government's motivations may be, its actions are at odds with existing United States Supreme Court precedent, examined below, which indicates that the federal government is generally liable to tribes when failing to manage resources. In the context of HEARTH, the federal government appears to want to maintain a significant management role by dictating environmental review and approving tribal leasing provisions, yet it also does not want to be liable for such a role.

116. S. REP. NO. 112-263, at 11 (2012). Specifically, this report considers suggested revisions to the Tribal Energy Resource Agreement (TERA) provisions of the Indian Tribal Energy Development and Self-Determination Act of 2005, *supra* note 55. Although the report does not directly speak to the HEARTH Act, TERA's environmental provisions and waiver of federal sovereign immunity are very similar to these provisions of the HEARTH Act. Accordingly, the Committee's discussion of the very similar provisions in TERA is helpful on this point.

117. *See* 42 U.S.C. §§ 4321-70(h) (2012). Very broadly, for major federal actions that may affect the environment, the federal government is supposed to evaluate the environmental impacts of the proposed action and consider alternatives to the proposed action. *Id.* § 4332(E).

118. The HEARTH Act provides, in pertinent part:

(B) considerations for approval.—The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

(i) are consistent with any regulations issued by the Secretary under subsection (a) (including any amendments to the subsection or regulations); and

(ii) provide for an environmental review process that includes—

(I) The identification and evaluation of any significant effects of the proposed action on the environment; and

(II) A process for ensuring that—

The HEARTH Act requires that tribes wanting to take advantage of the “streamlined” lease approval processes under the Act submit tribal leasing provisions for Secretarial approval.¹¹⁹ These tribal leasing provisions must include an environmental review requirement that is “consistent with” existing federal law.¹²⁰ Therefore, an initial concern associated with the HEARTH Act is whether the Act requires tribes to essentially adopt and apply federal environmental law. Such forced adoption of federal law would undermine tribal sovereignty, as tribes interested in benefitting from the HEARTH Act’s streamlined procedures would be forced to accept foreign law as their own rather than develop law that is consistent with their own environmental ethics, customs, and traditions. As explained above,¹²¹ tribal sovereignty is crucial to successful economic development in Indian country. Although the HEARTH Act may be attractive to some individual tribes because it potentially expedites the time required to approve a lease of tribal lands, the Act also undermines tribal sovereignty.

The HEARTH Act requires that the “public” have an opportunity to comment on tribal consideration of tribal land leases. This provision is particularly troubling to tribal sovereignty because it requires that “the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe.”¹²² Although the legislative history related to the HEARTH Act does not appear to specify who is included in the “public,” the legislative history related to an almost identical clause in the Tribal Energy Resource Agreement (“TERA”) provisions of the Energy Policy Act of 2005¹²³ explains that the “public” includes both tribal and nontribal citizens.¹²⁴ This requirement would allow nontribal citizens to have a role in tribal decisionmaking, which would potentially upset tribal sovereignty by creating space for foreign cultures, traditions, and laws to impact development within tribes.

If the HEARTH Act were limited to requiring that both tribal and nontribal citizens be given notice and an opportunity to be heard on tribal decisions, this would not in and of itself undercut tribal sovereignty. For example, under NEPA, the federal government may consider concerns raised by non-

(aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and

(bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

25 U.S.C. § 415(h)(3)(B) (2012).

119. *Id.*

120. *Id.*

121. Cornell & Kalt, *supra* note 35, at 15.

122. 25 U.S.C. § 415(h)(3)(B)(ii)(II)(aa).

123. 25 U.S.C. § 3504(e)(2)(C)(iii)(I)–(II) (2012).

124. Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended “Great Mischief for Indian Energy Development” and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811, 830–34 (2012).

Americans in relation to proposed federal action. What makes this requirement deeply troubling is that an aggrieved member of the public may petition the Secretary of the Interior for review of the tribe's actions, after exhausting any applicable tribal remedies.¹²⁵ If the Secretary of the Interior determines that the tribe has failed to comply with the tribal leasing provisions previously approved, "the Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands."¹²⁶ Therefore, if a member of the public thinks the tribe has not behaved appropriately and the Secretary of the Interior agrees, the Secretary has the authority under the HEARTH Act to sanction the tribe. This is inconsistent with true tribal sovereignty.

Not only is the ability of the Secretary to sanction a tribe under the HEARTH Act inconsistent with tribal sovereignty, but the reality is that many tribes taking advantage of the HEARTH Act are likely to incorporate federal environmental law into their tribal law. The HEARTH Act admittedly does not require that tribes incorporate NEPA into their tribal leasing requirements.¹²⁷ The enacted version of the HEARTH Act requires that the environmental review provision of the tribal leasing provisions submitted for approval by the Secretary of the Interior be "consistent with" existing federal law.¹²⁸ Based on the legislative history underlying passage of the Act, the HEARTH Act may not require tribes to exactly conform their tribal leasing laws to federal laws.¹²⁹

Congressman Heinrich introduced an amendment that would have changed the language of the then-pending HEARTH Act to say that tribal environmental regulations must "meet or exceed" federal environmental requirements.¹³⁰ This amendment was not adopted, and the language used in the

125. 25 U.S.C. § 415(h)(8)(A) ("An interested party, after exhausting of any applicable tribal remedies, may submit a petition to the Secretary . . . to review compliance of the applicable Indian tribe with any tribal regulations approved by the Secretary.").

126. *Id.* § 415(h)(8)(B).

127. Aside from the requirements of the HEARTH Act, tribes may want to consider the development of their own tribal environmental policy acts or TEPAs. For a discussion of the benefits to tribes associated with development of TEPAs, see Dean B. Suagee, *Tribal Environmental Policy Acts and the Landscape of Environmental Law*, 23 NAT. RESOURCES & ENV'T 12 (2009).

128. *See* 25 U.S.C. § 415(h)(3)(B)(i).

129. The HEARTH Act does not specifically require incorporation of federal law into tribal law. However, as explained below, the reality is that many tribes will likely either incorporate federal law or will use federal law as a template for development of tribal environmental law. Moreover, the HEARTH Act requires that some aspects of federal law be injected into tribal law. Specifically, it forces tribes to include provisions in their environmental review requirements that the public is provided notice, and "a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe." *Id.* § 415(h)(3)(B)(ii)(II)(aa). This provision is very similar to the notice and comment requirements of NEPA. 42 U.S.C. § 4332(G) (2012).

130. H.R. REP. NO. 112-427, at 6 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 455-56. ("During the Committee markup of H.R. 205 [then-pending HEARTH Act], an

HEARTH Act is “consistent with,”¹³¹ which suggests that tribal law does not have to directly mirror federal environmental law—as long as the tribal law is similar to federal environmental law. In sum, the legislative history surrounding this particular language suggests that the environmental review provisions adopted by tribes wanting to take advantage of the HEARTH Act will be measured against existing federal environmental regulations.

As previously explained, some tribes, such as the Navajo Nation and Tulalip Tribe, have already received approval from the Secretary of the Interior to approve leases of their own tribal lands. As such, tribal leasing provisions that may comply with the HEARTH Act requirements do exist. According to the legislative record, “[i]t is the expectation that tribes with environmental review processes already in place, such as the Navajo Nation and the Tulalip Tribes, could provide models for those tribes that seek to engage in similar leasing activities.”¹³²

However, despite the fact that the HEARTH Act does not specifically require adoption of federal environmental law and that the legislative history underlying the Act suggests a hope that tribes will turn to existing tribal law for models, there remains a strong likelihood that tribes seeking the benefits of the HEARTH Act will turn to federal law for guidance on the environmental law requirement. Using transplanted, foreign law as opposed to developing tribal law consistent with tribal culture, norms, and environmental ethics may prove dangerous, as the foreign law may conflict with existing tribal laws and result in the erosion of tribal sovereignty.¹³³ Ultimately, the tribes who enter into leasing agreements with the Secretary of the Interior under the HEARTH Act may, in reality, incorporate some vestiges of federal environmental law into tribal law. As Representative Markey explained:

H.R. 205 [the then-pending HEARTH Act] also requires that approved tribal regulations must be “consistent with” existing federal regulations. The United States recognizes tribal primacy for a number of programs under three critical environmental laws—the Clean Water Act, the Safe Drinking Water Act and the Clean Air Act. Tribes have successfully demonstrated their ability to implement these laws. I fully expect that tribes will do the same

amendment was filed by Congressman Martin Heinrich (D–NM) that would have increased the difficulties for a tribe to lease its lands efficiently. As introduced, H.R. 205 requires the Secretary to approve tribal leasing regulations if they are ‘consistent with’ the Secretary’s own regulations for the leasing of tribal lands. This language is critical to ensure a tribe has the flexibility to write regulations that result in more expeditious lease approvals than what the Secretary’s regulations result in. The Heinrich amendment would change ‘consistent with’ to ‘meet or exceed.’ This means that a tribe would have to craft leasing regulations that are identical to, or more burdensome than, the Secretary’s regulations. Rather than improve the bill, the amendment undercuts the incremental—yet important—policy step undertaken in H.R. 205.”).

131. *See id.* at 2.

132. *Id.* at 13.

133. *See Wenona T. Singel, Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL’Y 357, 362–65 (2006).

with the HEARTH Act requirement that their leasing regulations, at a minimum, meet existing federal standards and may even choose to regulate more stringently where appropriate.¹³⁴

As explained more fully below,¹³⁵ the environmental review provisions of the HEARTH Act are similar to the environmental review requirements under the TERA provisions of the Indian Tribal Energy Development and Self-Determination Act of 2005 (“ITEDSDA”). The legislative history underlying the TERA provisions suggests that several representatives of Indian country were concerned about mandated environmental review under TERA.¹³⁶ However, the substantial concerns regarding the environmental compliance requirement under the HEARTH Act seem to be lacking in the legislative history of the Act. In a report from the Senate Committee on Indian Affairs, the Committee concludes that:

[T]he broad tribal support for the recently adopted HEARTH Act suggests that, whatever the concerns over a statutory requirement of public input in a tribe’s energy development process may have been when the ITEDSDA [specifically, the TERA provisions] was adopted in the 109th Congress, those concerns appear to have diminished somewhat in the intervening years in light of the fact that the HEARTH Act has similar requirements for public involvement.¹³⁷

In its totality, this trend of mandating environmental review consistent with federal standards is deeply troubling. First, the foregoing analysis suggests that, while the HEARTH Act does not specifically require incorporation of federal law related to the environmental review provision, many tribes taking advantage of the provisions of the HEARTH Act are likely to do exactly that. Wholesale incorporation of foreign law, including federal law, threatens tribal sovereignty. Such “transplanted” law undermines tribal cultural sovereignty because tribes may enact the law without considering how it will coincide with existing tribal customs and traditions.¹³⁸ Of course, tribal governments are sophisticated entities and may adapt the federal environmental law so that it conforms to existing tribal environmental ethics. Incorporation of federal environmental law, however, is not without risk.

Furthermore, given the potential impacts on tribal sovereignty resulting from the required environmental review provisions, it is concerning that at least some members of Congress have taken the lack of discussion on the environmental review provision of the HEARTH Act as evidence that Indian country has generally come to accept such provisions.¹³⁹ Silence does not necessarily mean acquiescence. Such congressional assumptions may result in this type of

134. 158 CONG. REC. H2682-01 (2012) (statement of Rep. Markey).

135. See *infra* Section V.

136. See Kronk, *supra* note 124, at 828–31.

137. S. REP. NO. 112-263, at 12 (2012).

138. Singel, *supra* note 133, at 365–66.

139. S. REP. NO. 112-263, at 12 (2012).

mandatory environmental review provision, premised on federal law, being incorporated into every federal reform of the existing regulatory scheme impacting energy development in Indian country.¹⁴⁰ The emerging pattern, as demonstrated first by the TERA provisions and now enactment of the HEARTH Act, threatens tribal sovereignty. Although Congress and those supporting the HEARTH Act assert that the Act promotes tribal sovereignty, the reality is that it may in fact erode tribal sovereignty by resulting in the incorporation of federal environmental law into tribal law. Ultimately, an individual tribe may find such “transplanted” law to be acceptable, especially when balanced against the potential benefits gained by streamlined leasing of tribal lands. However, if every tribe were to incorporate such federal environmental law whole-cloth without consideration of tribal environmental ethics, customs, or traditions, the result is the same as if the federal government mandated adoption of federal environmental review provisions. The result is an erosion of tribal sovereignty.

B. The Second Undercutting of Tribes: The HEARTH Act’s Potential Impact on the Federal Trust Relationship

At the same time that the HEARTH Act potentially undermines tribal sovereignty throughout Indian country, it also weakens the federal government’s fiduciary obligation to Indian country under the federal trust responsibility. The HEARTH Act contains a general waiver of the federal government’s liability, stating “[t]he United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations.”¹⁴¹ Given the breadth of this waiver, concerns arise regarding whether the federal government will uphold its trust responsibility to federally recognized tribes under the HEARTH Act.¹⁴² To fully consider the legitimacy of such concerns, this Section will first provide a brief introduction to the federal trust relationship between the federal government and federally recognized tribes. The Section will then examine modern treatment of the federal trust relationship by the United States Supreme Court in order to illuminate the federal government’s present day responsibility to Indian country under the federal trust doctrine. Finally, this Section will consider how the general waiver of

140. The fact that Congress appears to be following a pattern by requiring environmental review provisions in both the TERA provisions of the Energy Policy Act of 2005 and the HEARTH Act suggests that Congress may increasingly require the incorporation of federal law into tribal law. *See generally* Royster, *supra* note 1, at 122 (recognizing that the TERA provisions and the then-pending HEARTH Act bore many similarities); *see also* Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1067 (2008).

141. 25 U.S.C. § 415(h)(7)(A) (2012).

142. The HEARTH Act goes on to address the federal government’s trust responsibility. Specifically, the Act states that “[p]ursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe. . . .” *Id.* § 415(h)(7)(B).

the federal government's liability under the HEARTH Act fits into this larger scheme of the federal trust responsibility.

1. Introduction to the Federal Trust Relationship

The federal trust relationship between the federal government and federally recognized Indian tribes is a longstanding legal doctrine and cornerstone of federal Indian law. As explained by Ray Halbritter, Nation Representative of the Oneida Indian Nation of New York:

[T]he trust obligation of the Federal government to Native people is fundamentally different from any other relationship the United States has with any other distinct group of people and carries elevated obligations. . . . The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.¹⁴³

To understand why this relationship “is fundamentally different” and “carries elevated obligations,” it is helpful to briefly explore the origins of the federal trust relationship.

The modern federal trust responsibility has its origins in the Marshall trilogy of cases.¹⁴⁴ The first of these cases was *Johnson v. M'Intosh*,¹⁴⁵ wherein the United States Supreme Court considered whether Indian tribes maintained title to their property and could, therefore, sell the property, or whether the United States had obtained title through Great Britain's discovery of the property in question.¹⁴⁶ Ultimately, Chief Justice Marshall determined that the Doctrine of Discovery applied and that Indians therefore had the right to occupy the land in question, but that the exclusive title rested with the discoverer, the United States (who stood in the place of its predecessor, Great Britain).¹⁴⁷ Furthermore, Marshall explained in his decision that the United States, as the exclusive owner of the property,

143. *Fulfilling the Federal Trust Responsibility: Oversight Hearing Before the S. Comm. on Indian Affairs*, 158th Cong. (2012) (statement of Ray Halbritter, Nation Representative of the Oneida Indian Nation of New York).

144. The three cases, *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), are commonly referred to as the “Marshall trilogy” because Chief Justice Marshall authored all three majority opinions.

145. 21 U.S. at 543.

146. Given Great Britain was the legal predecessor to the United States, the United States assumed Britain's legal rights to the property in question upon the United States' independence from Great Britain. *Id.* at 584.

147. *See id.* at 588.

maintained the legal right to extinguish the Indian right of occupancy at any time.¹⁴⁸

The other two cases of the trilogy are *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.¹⁴⁹ Both *Cherokee Nation* and *Worcester* dealt with the State of Georgia's efforts to assert its sovereignty over the Cherokee Nation, located within the boundaries of Georgia at the time. Toward this end, Georgia passed laws abolishing the boundaries of the Cherokee Nation and asserting the laws of Georgia over the Cherokee Nation.¹⁵⁰ In *Cherokee Nation*, the United States Supreme Court addressed whether its original jurisdiction extended to Indian nations.¹⁵¹ In holding that it did not, the Court reasoned that Indian nations were not foreign nations, but rather, "domestic dependent nations."¹⁵²

In *Worcester*, Georgia had imprisoned missionaries working within the Cherokee Nation's territory for failure to comply with Georgia law.¹⁵³ The United States Supreme Court therefore considered whether the laws of the State of Georgia applied within the territory of the Cherokee Nation and concluded that the laws of the State of Georgia had no force or effect within Indian country.¹⁵⁴

Taken in their totality, the Marshall trilogy of cases serves as the bedrock of the federal trust responsibility between the federal government and federally recognized tribes for a variety of reasons. First, under *Johnson*, the federal government maintains a role in Indian country by virtue of its naked fee title in land held in trust for tribes.¹⁵⁵ Second, as developed in *Cherokee Nation* and *Worcester*, the federal government and tribal governments have a mutually beneficial relationship.¹⁵⁶ In exchange for tribes giving up vestiges of their external sovereignty, the federal government has a responsibility to act in the best interests of tribes.¹⁵⁷

148. *Id.*

149. *Worcester*, 31 U.S. at 515; *Cherokee Nation*, 30 U.S. at 1.

150. *Worcester*, 31 U.S. at 542; *Cherokee Nation*, 30 U.S. at 2.

151. The United States Supreme Court has original jurisdiction, meaning the parties can file directly to the Supreme Court, in claims between states and claims between states and foreign nations. U.S. CONST. art. III, § 2, cl. 1.

152. *Cherokee Nation*, 30 U.S. at 17.

153. *See Worcester*, 31 U.S. at 531–32.

154. *Id.* at 520.

155. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

156. *Worcester*, 31 U.S. at 548–49, 555; *Cherokee Nation*, 30 U.S. at 5–6.

157. The Marshall trilogy of cases not only forms one of the origins of the federal trust relationship, but also embodies paternalism toward tribes. The federal trust relationship is therefore connected to federal paternalism. The federal government and tribes must decide whether they are willing to continue with the existing scheme. If federal tribes do consent, the federal government should be bound to make decisions in the tribes' best interest or expand its policy of self-determination described in President Nixon's message to Congress in 1970. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91–363, (2d Sess. July 8, 1970); *see also* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 216–42 (6th ed. 2011)

In the modern era, Indian tribes may bring one of three categories of claims against the federal government based on an alleged breach of the federal trust responsibility. These three categories are: (1) general trust claims; (2) bare or limited trust claims; and (3) full trust claims.¹⁵⁸ The Marshall trilogy of cases may form a claim under the first category of trust responsibility cases, a general trust claim.¹⁵⁹ Based on these cases and the historic relationship between the federal government and federally recognized tribes, one may claim that liability exists. A claim based solely upon a general trust responsibility, however, is almost always unsuccessful. As a sovereign nation, the United States must explicitly accept obligations in order to be legally responsible for them.¹⁶⁰

The United States Supreme Court has also recognized a second category of liability under the federal trust responsibility, a claim for breach of a bare or limited trust responsibility. Such bare or limited trust responsibility claims have been deemed legally unenforceable. In 1980, the Supreme Court decided *United States v. Mitchell*.¹⁶¹ In *Mitchell I*, the Court considered whether the Secretary of the Interior was liable under section five of the General Allotment Act¹⁶² for an alleged breach of trust related to the management of timber resources and related funds.¹⁶³ Although the General Allotment Act included language that land was to be held “in trust,” the Court concluded that this language only created a bare trust responsibility because the Act did not require that the federal government manage

(discussing the modern era of tribal self-determination). President Obama believes that passage of the HEARTH Act is consistent with tribal self-determination. THE WHITE HOUSE OFFICE OF COMM’N, *supra* note 81, at 1. Paternalism, however, is not consistent with self-determination. The HEARTH Act should be amended to be consistent with either the federal trust responsibility or tribal self-determination. *Infra* Part V.

158. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW 300–01 (2002).

159. A “general trust claim” refers to a claim based on the relationship formed between tribal nations and the federal government in part due to the United States Supreme Court’s decisions in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *United States v. Kagama*, 118 U.S. 375 (1886), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1831). Taken together, these cases stand for the proposition that the federal government has restricted tribal expressions of external sovereignty. Because the federal government has limited the ability of tribal nations to exercise their external sovereignty, the federal government owes a duty of protection to tribal nations and a duty to act in the best interests of tribal nations. Because this duty is not premised on any specific congressional statement or enactment and such a duty has never been found to be legally enforceable against the United States, it is said to be a general duty or a moral obligation. Although these types of claims are generally not enforceable today, the United States Supreme Court described the obligation of the federal government to tribes as a “moral obligation[] of the highest responsibility and trust.” *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

160. See *United States v. Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*).

161. 445 U.S. 535 (1980) (*Mitchell I*).

162. 25 U.S.C. § 348 (2012).

163. *Mitchell I*, 445 U.S. at 536–38.

the land.¹⁶⁴ Because the Act did not place any affirmative management duties on the federal government, the Court held in favor of the Secretary.¹⁶⁵

On remand to the Court of Claims, the Indian Tribe renewed its claims for the federal government's breach of its trust responsibility in the management of the Indian Tribe's timber resources.¹⁶⁶ On remand, however, the Indian Tribe based its claims on a combination of timber sales and highway rights-of-way statutes that the Indian Tribe argued combined to create a legally enforceable responsibility on the United States.¹⁶⁷ In 1983, the United States Supreme Court considered the matter again.¹⁶⁸ *Mitchell II* differed from *Mitchell I* because the Tribe now based its claim on the timber sales and highway rights-of-way statutes that had not been at issue in *Mitchell I*, arguing that these statutes created an affirmative duty for the Secretary to manage the lands in question.¹⁶⁹ The Supreme Court agreed, finding that the statutes in question "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians."¹⁷⁰ Having determined liability for the breach of trust, the Supreme Court then turned to private trust law precedent to determine the extent of the federal government's liability, as the statutes did not expressly require compensation.¹⁷¹ The Court's decision in *Mitchell II* is an example of the third category of trust cases—a legally enforceable claim based on a full trust responsibility.

In 2003, the Supreme Court handed down two decisions that impacted the development of the law related to the federal trust responsibility. In *United States v. White Mountain Apache*, the White Mountain Apache Tribe claimed that the federal government had failed to adequately manage Fort Apache, which was held in trust for the Indian Tribe. As a result of this mismanagement, the Indian Tribe claimed it was entitled to compensation for Fort Apache's upkeep.¹⁷² The statute at issue required that the federal government hold Fort Apache in trust for the Tribe and, importantly, gave the federal government "authority to make direct use of portions of the trust corpus."¹⁷³ As a result of these two facts, the Court determined that the Indian Tribe had sufficiently alleged a breach of trust claim on a full trust similar to the trust at issue in *Mitchell II*, awarding the Indian Tribe damages.¹⁷⁴

Also in 2003, the Court decided *United States v. Navajo Nation*, again addressing the federal trust responsibility to Indian tribes.¹⁷⁵ Here, the Navajo Nation alleged that the Secretary of the Interior acted inappropriately in his role in

164. *Id.* at 541–42.

165. *Id.* at 545.

166. *Mitchell v. United States*, 664 F.2d 265, 267 (Ct. Cl. 1981), *aff'd* 463 U.S. 206 (1983).

167. *Id.* at 269–73.

168. *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

169. *Id.* at 219–25.

170. *Id.* at 224.

171. *Id.* at 226.

172. 537 U.S. 465, 469 (2003).

173. *Id.* at 474–75.

174. *Id.*

175. 537 U.S. 488 (2003).

the negotiation of mineral leases on the Navajo Nation.¹⁷⁶ At issue in the case was the Mineral Leasing Act of 1938 and other related regulations.¹⁷⁷ Ultimately, the United States Supreme Court did not find in favor of the Navajo Nation.¹⁷⁸ Although the Court acknowledged the unprofessional behavior of the Secretary of the Interior in withholding valuable information from the Navajo Nation, the Court held that the Navajo Nation had failed to establish a full trust responsibility that was binding on the federal government.¹⁷⁹ This was because the Mineral Leasing Act of 1938 gave the Nation the right to negotiate leases and, as a result, the Secretary of the Interior did not have full authority over management of the resources in question.¹⁸⁰

In both *White Mountain Apache* and *Navajo Nation*, the United States Supreme Court seemed to focus its analysis on the amount of control by the federal government over the trust corpus in question.¹⁸¹ Where the federal government had near complete control over the trust corpus, as in *White Mountain Apache*, the United States Supreme Court found in the Indian Tribe's favor.¹⁸² Where the statute in question had given the tribe increased authority to negotiate leases, as in *Navajo Nation*, however, the Court found in favor of the federal government.¹⁸³ "After these cases, finding a 'network' of statutes to base a breach of trust damages claim depends on: 1) express statutory language supporting a fiduciary relationship and 2) comprehensive control over government property."¹⁸⁴

On June 13, 2011, the United States Supreme Court revisited the scope of the federal government's trust responsibility to federally recognized tribes in *United States v. Jicarilla Apache Nation*.¹⁸⁵ At issue in the underlying litigation was the federal government's management of the Jicarilla Apache Nation's trust accounts from 1972 to 1992.¹⁸⁶ Asserting the attorney-client privilege and attorney work product doctrine, the federal government declined to turn over 155 documents requested by the Nation.¹⁸⁷ The issue before the Supreme Court was whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when acting in its capacity as trustee for tribal trust assets.¹⁸⁸ In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited

176. *Id.* at 500.

177. *Id.* at 493.

178. *Id.* at 514.

179. *See id.* at 513.

180. *See id.* at 510–11.

181. *See id.* at 509; *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–76 (2003).

182. *White Mountain Apache Tribe*, 537 U.S. at 474–76.

183. *Navajo Nation*, 537 U.S. at 510–11.

184. GETCHES, WILKINSON, WILLIAMS, & FLETCHER, *supra* note 157, at 342.

185. 131 S.Ct. 2313 (2011).

186. *Id.* at 2319.

187. *Id.*

188. *Id.* at 2319–20.

instances.¹⁸⁹ Furthermore, the Court reasoned that “[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a ‘trust,’ see, *e.g.*, 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law.”¹⁹⁰ Ultimately, the Court concluded that while common law principles may “inform our interpretation of statutes and . . . determine the scope of liability that Congress has imposed. . . . the applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibility.”¹⁹¹

The foregoing brief introduction demonstrates the development of the federal trust relationship and illustrates how the relationship between the United States and tribal governments began. Increasingly, however, the United States Supreme Court has narrowed the enforceable trust relationship between the federal government and federally recognized tribes so that tribes may only succeed in claims against the United States in exceptionally narrow circumstances, such as where the statute at issue specifically speaks to the federal government’s responsibility in managing the trust corpus at issue.¹⁹² Congress’s narrowing of the federal responsibility to Indian country under the HEARTH Act may therefore be seen as a legislative extension of a trend that has been developing for some time within the judiciary.

2. The HEARTH Act: Erosion of the Federal Trust Relationship Wrapped in a Pretty Bow

The previous Subsection demonstrated the United States Supreme Court’s increasingly narrowed interpretation of the federal trust doctrine. Nonetheless, absent the waiver of federal liability contained in the HEARTH Act,¹⁹³ tribes bringing a claim under the HEARTH Act or the Indian Long-Term Leasing Act of 1955 would likely have a fully enforceable claim based on the federal trust relationship. Taken in their totality, the modern federal trust responsibility cases stand for the proposition that tribes must be able to present express statutory language and comprehensive federal control in order to succeed on a claim that the United States violated its trust responsibility to tribes.¹⁹⁴ Here, the HEARTH Act explicitly references the federal government’s trust responsibility to tribes under the Act, providing that “[p]ursuant to the authority of the Secretary to *fulfill the trust obligation of the United States to the applicable Indian tribe . . . the Secretary may . . . enforce the provisions of, or cancel, any lease executed by the Indian*

189. *Id.* at 2323.

190. *Id.*

191. *Id.* at 2325 (citing *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*)).

192. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–75 (2003).

193. *See* 25 U.S.C. § 415(h)(7)(A) (2012).

194. GETCHES, WILKINSON, WILLIAMS & FLETCHER, *supra* note 157, at 342.

tribe.”¹⁹⁵ The Act therefore explicitly references the federal trust responsibility, as required by the Supreme Court in *Jicarilla Apache Nation*.¹⁹⁶

Furthermore, the HEARTH Act and the underlying Indian Long-Term Leasing Act of 1955 together establish a comprehensive regulatory structure with which tribes must comply in order to successfully lease their lands. In this regard, the federal government possesses “comprehensive control” over the leasing of tribal lands, which is a required element of a successful breach of federal trust responsibility claim under the recent federal trust responsibility cases.¹⁹⁷ The type of comprehensive control over the leasing of tribal lands under the Indian Long-Term Leasing Act of 1955 and HEARTH Act is very similar to the federal management scheme applicable to tribal timber, which the Supreme Court found to be the basis of an enforceable breach of trust responsibility claim in *Mitchell II*.¹⁹⁸ Therefore, the statutory language of the HEARTH Act and Indian Long-Term Leasing Act of 1955 likely create an enforceable obligation on the part of the United States to act in the best interests of tribes under the federal trust relationship. Once the responsibility is triggered through binding statutory language, the federal government is also bound by common law fiduciary responsibilities in deciding what is in the best interest of tribes.¹⁹⁹ Accordingly, but for the HEARTH Act’s waiver of liability, the United States may otherwise owe a substantial duty to tribes whose land was leased under the HEARTH Act and Indian Long-Term Leasing Act of 1955.

Given that Congress explicitly recognized its trust responsibility in the HEARTH Act, why would it, in the same provision, also waive the liability of the federal government? It would appear that the HEARTH Act is a congressional extension of what the United States Supreme Court has already started through its federal trust relationship precedent. The HEARTH Act thus represents an erosion of the federal trust relationship to federally recognized tribes because it contains a general waiver of the federal government’s liability for leases entered into under approved tribal leasing provisions.²⁰⁰

Despite the waiver of federal liability, the federal government maintains a substantial role in the leasing of tribal lands under the HEARTH Act. In passing the HEARTH Act, it was the view of Congress that the Act “enables tribes to exercise their powers of inherent tribal sovereignty to lease their own lands without federal oversight under certain conditions.”²⁰¹ However, federal oversight remains, albeit perhaps streamlined, under the HEARTH Act. Consistent with the fact that the federal government remains involved in tribal land leasing even following adoption of HEARTH regulations, Representative Bishop acknowledged

195. See 25 U.S.C. § 415(h)(7)(B) (emphasis added).

196. See 131 S.Ct. 2313, 2323 (2011).

197. See GETCHES, WILKINSON, WILLIAMS & FLETCHER, *supra* note 157, at 342.

198. 463 U.S. 206, 224–28 (1983).

199. *Jicarilla Apache Nation*, 131 S.Ct. at 2323.

200. 25 U.S.C. § 415(h)(7)(A).

201. H.R. REP. NO. 112-417 at 13 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 459.

that the HEARTH Act did not remove the federal government from involvement in leasing decisions of tribal lands.²⁰² Representative Bishop indicated, however, that the eventual goal should be to remove the federal government entirely from such decisionmaking.²⁰³

Given that the federal government maintains a substantial role under the Act and that the Act also acknowledges the federal government's trust responsibility to Indian country, why then would Congress include the waiver provision in the Act? Representative Cole, in speaking in support of the then-pending HEARTH Act, explained that "[p]assage of H.R. 205 will enable tribal governments to assume responsibility for the management of their lands, reduce Federal costs and government liability, and encourage more housing and economic development on Indian lands, resulting ultimately in job creation."²⁰⁴ Representative Cole concluded that "[the HEARTH Act] empowers tribes, encourages tribal self-government, decreases the dependency of tribes on the Federal Government, and speeds up economic development in Indian Country."²⁰⁵ The legislative history of the HEARTH Act suggests that Congress viewed decreased federal liability as a benefit of the legislation because "it protects taxpayers from liability for a tribe's business decisions."²⁰⁶

Donald Laverdue, then Principal Deputy Assistant Secretary of Indian Affairs, stated to the Senate Committee on Indian Affairs that passage of the then-pending HEARTH Act exemplified the tension between the Act and federal trust responsibility.²⁰⁷ Mr. Laverdue explained that:

The HEARTH Act ensures that the Department will retain the authority to fulfill its trust obligation to protect tribal trust lands through the enforcement or cancellation of leases approved under tribal regulations, or the rescission of Secretarial approval of tribal leasing regulations, where appropriate. At the same time, the HEARTH Act ensures that the United States will not be liable for losses incurred as a result of leases approved under tribal leasing regulations.²⁰⁸

From the foregoing, it appears that the federal government has decided to "have its cake and eat it too." On the one hand, the HEARTH Act allows the federal government to maintain a substantial role in the leasing of tribal lands and to promote alternative and renewable energy development in Indian country,

202. 158 CONG. REC. H2682-01 (daily ed. May 15, 2012) (statement of Rep. Bishop).

203. *Id.*

204. *Id.* (statement of Rep. Cole).

205. *Id.*

206. H.R. REP. NO. 112-427, at 6 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 455.

207. *Statement of Donald "Del" Laverdue, Principal Department Assistant Secretary for Indian Affairs U.S. Department of the Interior Before the S. Comm. on Indian Affairs on S. 636, 112th Cong.* (2011).

208. *Id.*

which benefits its citizens. On the other hand, the federal government absolves itself of any potential liability associated with the leasing of tribal lands. The federal government gets the best of both worlds—continued paternalism and potentially increased alternative and renewable energy development benefiting its citizenry—without any risk. This is not only troubling within the context of the federal trust relationship but also seems exploitative of Indian country, as tribal governments bear all of the expense associated with having tribal leasing regulations approved, as well as the risk of potential liability, while the federal government only stands to benefit from increased alternative and renewable energy development.²⁰⁹

The waiver of federal liability contained within the HEARTH Act is also troubling given that it may signal a growing trend in congressional actions related to energy development in Indian country. As previously explained, the TERA provisions of the Indian Tribal Energy Development and Self-Determination Act of 2005 and the HEARTH Act are similarly structured. Specifically, both contain waivers of federal liability for actions taken under approved TERAs and tribal leasing regulations, respectively. The legislative history behind the TERA provisions suggests that several representatives from Indian country were very concerned about the impact of the waiver of federal liability in the TERA provisions on the federal government's trust responsibility.²¹⁰ However, a similar level of concern does not appear to be represented in the legislative history of the HEARTH Act. As a result, the Senate Committee on Indian Affairs concluded that “despite the fact that the recently enacted HEARTH Act has [a] very explicit and direct liability waiver clause, the tribes vigorously supported the adoption of that act in 2012, suggesting that many tribes have reached some level of comfort with the implications of these clauses.”²¹¹

Despite the Senate Committee on Indian Affairs's suggestion that the lack of opposition to the waiver of federal liability in the HEARTH Act means that “many tribes have reached some level of comfort with the implications of these clauses,” the Committee is still proposing to amend the liability waiver provision of the TERA provisions of the Indian Tribal Energy Development and Self-Determination Act of 2005.²¹² Specifically, the Committee supports amending the waiver provision of TERA in order to “clarify that the liability waiver clause

209. It may be argued that tribes are in the same position as private industry and may be interested in alternative and renewable energy development. However, tribes are not similarly situated to private entities for a variety of reasons. First, the federal trust relationship applies to the relationship between the federal government and federally recognized tribes. This means that the federal government has an obligation to act in the best interest of tribes because they surrendered their external sovereignty to the federal government. Second, tribes are subjected to an additional layer of federal oversight related to alternative and renewable energy development by virtue of the federal trust relationship. Accordingly, it seems exploitive that the federal government should only benefit from a burdensome scheme it has placed upon tribes.

210. Kronk, *supra* note 124, at 830–34.

211. S. REP. NO. 12-263, at 13 (2012).

212. *Id.* at 15.

reaches only losses resulting from ‘negotiated terms’ and is not a blanket waiver covering all losses.”²¹³ In this regard, Congress is currently considering narrowing the interpretation of the waiver limiting federal liability under the TERA provisions from a “blanket waiver covering all losses” to a waiver only applying to “negotiated terms.”²¹⁴

Taken in totality, this specific proposed amendment, coupled with the overall report from the Senate Committee on Indian Affairs regarding the need to amend the TERA provisions, suggests that the blanket waiver contained in the existing TERA provisions and the HEARTH Act does not work to encourage effective energy development in Indian country. Otherwise, an amendment of the TERA provisions would not be necessary after only eight years since enactment. The need for such an amendment suggests that, while there is strong interest in developing energy resources in Indian country, tribes are unwilling to waive the federal government’s trust responsibility in order to expedite such development.

The waiver of federal liability contained in the HEARTH Act is troubling both in itself and because, coupled with other legislation, it signals a potential pattern in congressional reform. As explained above,²¹⁵ the waiver of federal liability is inconsistent with the federal trust relationship, especially given that the federal government maintains a substantial role in approving and conditioning the leasing of tribal lands under the HEARTH Act. Moreover, this waiver of liability may be part of a larger trend, started in the United States Supreme Court and now being adopted by Congress, to explicitly limit the federal government’s liability to Indian country under the federal trust relationship. As demonstrated by the Marshall trilogy, tribes surrendered aspects of their external sovereignty in exchange for the United States’s willingness to act in the best interests of tribes. That the federal government may now be moving away from this sacrosanct agreement with tribes is untenable. Accordingly, while some individual tribes may benefit in the short term from the streamlined approval process offered by the HEARTH Act, the damage done by the Act and other future legislation based on it is detrimental to Indian country as a whole.

In sum, Indian country as a whole is worse off under the HEARTH Act. As any student of federal Indian law knows, tribal sovereignty and the federal trust relationship are two inconsistent doctrines, yet both are cornerstones of federal Indian law. The federal trust relationship is inconsistent with true tribal sovereignty, as sovereign nations do not typically interfere in the day-to-day affairs of other sovereign nations. Yet, the federal trust responsibility remains a key component of federal Indian law because tribes relinquished their external sovereignty to the United States in exchange for the federal government’s protection and agreement to act in the best interests of the tribes. Today, some tribes may be in the position to exercise increased independence from the federal government and tribal sovereignty, while some tribes may choose to continue to hold the federal government to its responsibilities under the federal trust

213. *Id.*

214. *Id.*

215. *See supra* Part IV.B.

relationship. The reforms contained in the HEARTH Act benefit neither category of tribe, as the Act undermines tribal sovereignty through its mandated environmental review provisions while at the same time reducing federal liability under the federal trust doctrine.²¹⁶ On the whole, Indian country is better off without the HEARTH Act, as the costs are simply too high.

V. CONCLUDING THOUGHTS

The HEARTH Act certainly appears to offer some advantages over the status quo in terms of potentially streamlining the process of leasing tribal lands, which is so crucial to alternative and renewable energy development in Indian country. Such advantages, however, come with a cost. Specifically, the environmental review and liability waiver provisions of the HEARTH Act undermine a tribe's status under existing federal Indian law, as the provisions undercut tribal sovereignty and the federal government's fiduciary obligation under the federal trust doctrine.

The existing HEARTH Act is problematic because it attempts to accomplish two inherently conflicting goals: the promotion of tribal self-determination, and maintenance of the federal supervisory role over energy development in Indian country. In reality, however, it accomplishes neither goal. Ultimately, if Indian country is to reap benefits beyond the status quo, the HEARTH Act should be reformed so that it promotes either tribal sovereignty or the efficient involvement of the federal government in energy development in Indian country. In this regard, effective alternative and renewable energy development in Indian country may require that (1) the federal government, by virtue of the federal trust relationship, maintain both a role in alternative and renewable energy development in Indian country and, because of that role, remain liable;²¹⁷ or (2) the federal government relinquish its obtrusive role in favor of true tribal sovereignty. In reviewing 2011 testimony to the House of Representatives on issues related to energy development in Indian country, one scholar concluded that tribal "self-determination must also include freedom from the yoke of federal energy oversight and regulation."²¹⁸

216. Even tribes that opt out of the HEARTH Act's scheme may be negatively impacted by enactment of the Act itself. As explained in Part IV of this article, the environmental review provisions and federal liability waiver that create this concern are contained in the TERA provisions of the Energy Policy Act of 2005 and the HEARTH Act. Because Congress appears to be using these provisions to increase federal environmental oversight—while reducing federal liability—its efforts will likely have profound implications for Indian country. *See supra* Part IV.

217. Although this solution may seem untenable to those who promote true tribal sovereignty, the reality is that Congress does not appear to be interested in relinquishing the federal role in development of Indian country. This is apparent given the fact that proposed legislation regarding the issue promotes a clear federal role. Given the short-term reality of politics, the only workable option may be to maintain a federal role with trust liability in place.

218. Dreveskracht, *supra* note 6, at 446 (citation omitted).

Under the existing HEARTH Act, tribes lose. They lose because the Act undercuts their ability to freely develop law consistent with their tribal environmental ethics, customs, and traditions, which is a key expression of tribal sovereignty. At the same time, the Act also undermines the federal government's responsibility to tribes under the federal trust responsibility. Although tribal sovereignty and the federal trust relationship are conflicting legal concepts, neither is advanced by the HEARTH Act. Amending the HEARTH Act in either manner suggested in the previous paragraph would go a long way in addressing the inherent inconsistencies present in the existing Act.

Also troubling is the fact that the HEARTH Act appears to be patterned on the TERA provisions of the Energy Policy Act of 2005.²¹⁹ Generally, both the TERA provisions and HEARTH Act are structured in similar ways to achieve comparable results.²²⁰ As Professor Royster explains, it would appear that there are several notable similarities between the HEARTH Act and TERA provisions:

Like the TERA provision of ITEDSA, the proposed HEARTH Act is intended to promote tribal self-determination and control over tribal lands. Like the TERA provision, the proposed HEARTH Act would authorize a sufficiently long lease term, especially with the options to renew, to encourage both tribal and non-Indian investment. Like the TERA provision, the proposed HEARTH Act would remove the delay and other frustrations attendant on secretarial approval of each specific instrument authorized by the tribe. But also like the TERA provision, the proposed HEARTH Act requires any interested tribe to engage in a lengthy and costly process of developing approvable regulations, and to agree to undertake lengthy and costly environmental reviews.²²¹

More specifically for purposes of this Article, both would waive the federal government's liability for actions and leases respectively taken under either.²²² Moreover, both require interested tribes to include substantial environmental review processes in their original applications to the Secretary.²²³ While Congress seemed aware of the need to streamline the federal regulatory scheme, as demonstrated by the legislative history of both the HEARTH Act and TERA provisions,²²⁴ "it is equally clear that Congress wants some level of federal oversight for long-term encumbrances of Indian lands. It is willing to have that oversight one step removed from specific development instruments, but not removed altogether."²²⁵ Although Congress may currently be considering

219. See 25 U.S.C. §§ 3502–04 (2012).

220. Royster, *supra* note 1, at 122.

221. *Id.* (citations omitted).

222. 25 U.S.C. § 415(h)(7)(A) (2012); 25 U.S.C. § 3504(e)(6)(D)(ii).

223. 25 U.S.C. § 415(h)(3)(B); 25 U.S.C. § 3504(e)(2)(C).

224. Kronk, *supra* note 124, at 821.

225. Royster, *supra* note 1, at 132.

amending the TERA provisions,²²⁶ even the proposed amended TERA provisions would remain very closely aligned to the HEARTH Act.²²⁷

Given the substantial similarities between the TERA provisions and HEARTH Act, and the closeness in timing between the passage of both, Congress may be using the structure seen in both—streamlining the federal approval process in exchange for tribal environmental compliance and waiver of federal liability—as a template for reforming the existing regulatory structure. While such streamlining may be attractive to individual tribes, as discussed in Part III,²²⁸ these changes are detrimental to Indian country as a whole. Such reform marks the federal government’s retreat from its responsibilities to Indian country under the federal trust responsibility. As such, alternative and renewable energy development under the HEARTH Act, while an individually rational decision for some tribes, is ultimately a deficient option for Indian country as a whole.

226. S. REP. NO. 112–263, at 9 n.58 (2012). Evidence suggests that Congress is interested in reforming the existing federal regulatory scheme beyond the TERA provisions. In a cover letter to the Indian Energy Concept Paper released in 2009, Senators Byron Dorgan (D–ND) and John Barrasso (R–WY) stated that “[t]he Senate Committee on Indian Affairs is developing legislation to help unlock the potential of tribal energy resources and increase energy efficiency programs in Indian Country.” Letter from Senators Byron L. Dorgan, Chairman Senate Comm. on Indian Affairs and John Barrasso, Vice Chairman, Senate Comm. on Indian Affairs to Tribal Leaders (Sept. 10, 2009). This language suggests the possibility of broad reform. The Indian Energy Concept Paper enclosed with that letter suggests that the Indian Mineral Development Act may be modified in a manner consistent with the TERA provisions to allow individual Indians to enter into mineral leases. SENATE COMM. ON INDIAN AFFIARS, INDIAN ENERGY AND ENERGY EFFICIENCY CONCEPT PAPER (2009). This may suggest an emerging pattern of congressional reform of federal regulations related to energy development in Indian country.

227. S. REP. NO. 112–263, at 9 n.58 (2012).

228. As previously noted, three tribes—the Federated Indians of Graton Rancheria, Pueblo of Sandia, and Pokagon Band of Potawatomi—already had tribal leasing provisions approved by the Bureau of Indian Affairs under the HEARTH Act at the time of writing this Article. *See supra* notes 18–20.