INDIAN LAW SYMPOSIUM: THE NAVAJO NATION'S ANETH EXTENSION AND THE UTAH NAVAJO TRUST FUND: WHO SHOULD GOVERN THE FUND AFTER YEARS OF MISUSE?

Michaelmas Term, 1997

Reporter
14 T.M. Cooley L. Rev. 555 *

Length: 24562 words

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Text

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I. Introduction

Ideally, sovereignty is the unrestricted right of groups of people to organize themselves in political, social and cultural patterns that meet their needs. It is the right of people to freely define ways in which to use land, resources and manpower for their common good. Above all, sovereignty is the right of people to exist without external exploitation or interference. [1]

Tribal sovereignty has always been the focal point of American Indian law. [2] Every tribe begins its relationship with the federal government as a sovereign power. [3] However, tribal sovereignty is limited. [4] Indeed, Felix S. Cohen, the eminent authority on American Indian law, wrote that "the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." [5]

However, this limited sovereignty has continuously been challenged by both state and federal officials. [6] Every tribe vies for **[*556]** sovereignty. [7] The powers a particular tribe possesses depends on its history, its relationship

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[1] Kirke Kickingbird et al., Indian Sovereignty, reprinted in 6 NATIVE AMERICANS AND THE LAW 2 (John R. Wunder ed., 1996) (quoting Mike Myers, a Seneca consultant to the Institute for the Development of Indian Law).

[2] See Kirke Kickingbird et Al., Indian Sovereignty 1-13 (Gilbert L. Hall et al. eds., 3d ed. 4th prtg. 1979).

[3] See FELIX S. COHEN, Felix S. Cohen's Handbook of Federal Indian LAW ch. 7, 1, at 122 (photo. reprint 1971) (1942).

[4] See id.

[5] Id. (emphasis omitted).

[6] See, e.g., Rebecca L. Robbins, Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance, in The State of Native America: Genocide, Colonization, And Resistance 87-121 (M. Annette Jaimes ed., 1992) (discussing various challenges to Native American sovereignty).

with the United States, the status of its tribal government, and the will of its people. [8] Throughout the political history of Indian nations, the United States, and state governments, the battle over which governing entity may exert its sovereign powers in a specific situation has been critical to each respective government. [9]

One of the greatest battles waged among these governmental entities has concerned each entity's respective land base. The United States has always sought to control its land base. [10] Indeed, the United States' political and economic well-being has rested on its ability to control its land interests. [11]

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Further, the governmental entity that has controlled the land has also controlled the resources. [12] Such control has enabled United States' citizens to reap the profits generated from those resources. Accordingly, as the United States expanded, the federal government sought to ensure that these priceless treasures remained within its possession and control. [13]

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[7] See, e.g., Kickingbird et al., supra note 2, at 1-13.

[8] See id. at 12.

[9] See id. at 7.

[10] See, e.g., John Charles Fremont, Report of the Expedition to Oregon, reprinted in Expansion And Reform 1815-1850, at 185-200 (Charles M. Wiltse & George H. Knoles eds., Sources in American History No. 4, 1967) (discussing the controversy between the United States and Great Britain over Oregon and Washington territory); Ronald N. Satz American, Indian Policy in The Jacksonian Era 1-31 (1975) (discussing the United States' policy of removal during the Jackson presidency). See generally Robert M. Utley, The Indian Frontier of The American West 1846-1890 (discussing the United States' policy towards the Indians in the West); Wilcomb E. Washburn, Red Man's Land/white Man's Law (2d ed. University of Okla. Press 1995) (1971) (discussing various facets of the United States' attempt to secure its land base). Many leaders have attempted to justify the United States' expansionist policies. For example, President Thomas Jefferson observed: That the lands of this country were taken from [the Indians] by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtlessly be found on further search. The upper country we know has been acquired altogether by purchases made in the most unexceptionable form. WASHBURN, supra, at 109 (quoting Thomas Jefferson, Notes on the State of Virginia 96 (William Peden ed., University of North Carolina Press 1995) (1787)). Over 125 years later, President Theodore Roosevelt noted: Of course our whole national history has been one of expansion . . . . That barbarians recede or are conquered, with the attendant fact that peace follows their retrogression or conquest, is due solely to the power of the mighty civilized races which have not lost their fighting instinct, and which by their expansion are gradually bringing peace into the red wastes where the barbarian people of the world hold sway. Ward Churchill, The Earth is Our Mother, in *The State of Native America, supra* note 6, at 139 (quoting Theodore Roosevelt, The Strenuous Life (1901)).

[11] See John R. Howe, From the Revolution Through The Age of Jackson 91- 174 (Leon Litwack ed., 1973) (discussing the United States' interest in securing land to stimulate the economy and eliminate foreign threat possibilities).

[12] This resource base is fairly vast and includes minerals, water, agricultural production, livestock production, grazing rights, etc.

[13] See HOWE, supra note 11, at 91-174. Numerous examples could be cited to denote this proposition. However, since this Article discusses the land base of the Navajo Nation, the following example is remarkably appropriate. Indeed, General Carleton, in an 1863 letter written to Major General Harry Halleck, discussed the possible reduction of the Navajo land base to satisfy white settlers. See Robert A. Roessel, Jr., Select Navajo Historical Occurrences 1850-1923, at 9 (1974) (Letter from General Carleton to General Halleck on May 10, 1863). In the letter, General Carleton stated: "Among all my endeavors since my arrival here, there has been an effort to brush back the Indians so that people could get out of the Valley of the Rio Grande, and not only possess themselves of the arable lands in other parts of the Territory, but [also] veins and deposits of . . . precious metals." Id. (quoting Letter from General Carleton to General Halleck on May 10, 1863.).

Unfortunately, this federal insurance cost Native Americans. [14] Indeed, as Native Americans lost their lands, they also lost control over their land's valuable resources. [15] Even on lands retained by the Native Americans, the federal government asserted its regulatory power. [16] These losses cost the American Indian governmental entities **[*558]** a viable basis for economic survival. [17] However, since the United States encourages tribal development, [18] it should allow tribal entities to have more control over their own resources and the profits. [19]

This Article examines who should govern and control the natural resource royalties obtained from the Navajo Nation's Aneth Extension-the State of Utah, the Navajo Nation, or the Utah Navajos. The Aneth Extension, a very small strip of land located in southeastern Utah, [20] was added to the Navajo Reservation in 1933. [21] Under the Act of 1933, Congress provided that if oil and gas were found on the Aneth Extension, 37.5% of all royalties would go to the State of Utah for "payment of the tuition of Indian children in white schools, and/or in the building or maintenance of roads across the lands . . . for the benefits of Indians residing [on the Aneth Extension]." [22] In 1968, Congress amended the 1933 Act by broadening the class of recipients entitled to benefits, and requiring the

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[14] See Kickingbird et al., supra note 2, at 38. Land has always maintained an important place in American Indian cultures. See id. "Indians believed and still believe, that because of the sacredness of the land it could not be owned, could not be partitioned, fenced and developed for one individual. Territories were looked upon in the context of tribal use over individual use." Id.

[15] See, e.g., Ward Churchill & Winona LaDuke, Native North America: The Political Economy of Radioactive Colonialism, in *THE STATE OF NATIVE AMERICA, supra* note 6, at 241 (discussing the United States' land and resources policies with regard to Native Americans).

[16] See *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).* Title to American Indian lands is actually owned by the United States. See, e.g., GILBERT L. HALL, THE FEDERAL INDIAN-TRUST RELATIONSHIP 1-3 (2d ed. 1981). The land is held in trust for the tribes. See id. Congress assumed authority over American Indian relations under the Act of 1871. See *25 U.S.C.A. 71* (West 1983 & Supp. 1997). Congress, in the 1938 Mineral Leasing Act, determined that Indians should receive "the greatest return from their property" and that the Bureau of Indian Affairs should insure such. S. REP. NO. 75-985, at 2 (1938). At least one scholar has argued that American Indians should have the right to autonomy in any matters relating to internal self-government including sole control and management over their resources. See Alex Tallchief Skibine, Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination, *1995 UTAH L. REV. 1105, 1108-09 (1995).*

[17] See, e.g., Judith V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources, *29 TULSA L.J. 541, 543-44 (1994)* (arguing that tribal control over mineral resources is critical from economic, environmental, and regulatory perspectives and in some circumstances may represent the best hope for economic development on a reservation).

[18] Since Congress passed the Wheeler-Howard Act of 1934, the federal government has encouraged tribal self-government and tribal self-sufficiency. See Indian Reorganization Act of 1934, *25 U.S.C.A. 461*-479 (West 1983 & Supp. 1997). The 1934 Act, although attacked during the Termination Era, regained its full force when President Nixon encouraged tribal self-determination. See Stephen L. Pevar, The Rights of Indians and Tribes ch. I, H, at 8 (Norman Dorsen ed., 2d ed. 1992).

[19] See Kickingbird et al., supra note 2, at 39-41. Indeed, Kickingbird stated that "[a]s Indian nations assert more control over their land and resources and achieve a greater degree of economic self-sufficiency, they will become financially able to undertake more governmental functions and reduce their dependence on non-Indian governments." Id. at 39.

[20] The 1933 Act added 552,000 acres of land to the Navajo Reservation- 500,000 acres in the Paiute Strip and 52,000 acres along the Utah-Colorado border known as the Aneth Extension. See Act of March 1, 1933, ch. 160, *47 Stat. 1418, 1418-19* (as amended by Pub. L. No. 90-306, ***82 Stat. 121 (1968)).*** Over a 60 year period, various portions of land were both added to and subtracted from the Navajo Reservation. See, e.g., Robert A. Roessel, Jr., Navajo History, 1850-1923, in 10 Handbook of North American Indians 520 (Alfonso Ortiz ed., 1983). For a thorough discussion of the various enactments and a visual map showing each enactment, see id.

[21] See Act of March 1, 1933, ch. 160, *47 Stat. 1418, 1418-19* (as amended by Pub. L. No. 90-306, ***82 Stat. 121 (1968)).***

[22] Id.

State of Utah to use the royalty proceeds to provide "for the health, education, and general **[*559]** welfare of the Navajo Indians residing in San Juan County." [23]

The State of Utah received 61 million dollars in such royalty proceeds between 1960- 1990. [24] However, a recent audit revealed that only 9.5 million dollars remained in the trust fund, thus leaving the State accountable for the other 52 million dollars. [25] The State has subsequently confessed that it recklessly squandered the 52 million dollars. [26] Since this publicized discovery, the State has actively sought to be removed as trustee. [27]

Nevertheless, the Utah Navajos have tried to ensure that the State of Utah, not the Navajo Nation, continues to control and administer a portion of their oil and gas proceeds. [28] Moreover, their Navajo district representative, Mark Maryboy, has continually sought to keep the State of Utah in control of the funds. [29] Maryboy has repeatedly alleged that '"[t]he Navajo Nation is primarily interested in gaining future control of the Utah Navajo Trust and using it for the nation's benefit, to the detriment of the Utah Navajos.'" [30] Consequently, many Utah Navajos, like Maryboy, "fear that if control of the trust is handed to the tribal headquarters, few dollars would return to the Utah Navajos." [31]

Every tribe struggles for more control over their land and its resources. [32] Such control allows tribes to achieve a greater degree of economic self-sufficiency. Yet, the Utah Navajos want to sacrifice their tribe's sovereignty. Ironically, these residents want the State of Utah, which has already squandered millions of their dollars, to **[*560]** continue to control their resources. This continued control seems to defy all logic and, therefore, poses an engaging query. Why do the Utah Navajos distrust the Navajo Nation more than the State of Utah?

Unfortunately, the answer to this inquiry is egregious at best. The Utah Navajos, who have had their own unique cultural and political experiences, [33] are a minority within and have been repetitively shunned by the Navajo Nation. [34] Essentially, the Utah Navajos have been disregarded by all governing entities and own the dubious

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[23] Id.

[24] See Florence Williams, Utah Freezes Navajo Trust Fund as Report Details Scandal; American Indians: An Audit Alleges State, as Trustee, Looked the Other Way as Oil Royalty Trust Account was Plundered, LOS ANGELES TIMES, Jan. 25, 1992, at A18. The Navajos claim that the State of Utah has recklessly squandered as much as 100 million dollars. See id.; see also Christopher Smith, Navajos Want State to Restore Embezzled Millions; Navajos Not Giving Up Fight for Millions, SALT LAKE TRIB., Jan. 19, 1997, at C1.

[25] See *Williams, supra* note 24, at A18.

[26] See Smith, supra note 24, at C1.

[27] See *Williams, supra* note 24, at A18. The Former Utah Governor, Norman H. Bangerter said that "the State has never been effective in managing the trust because of conflicts with the Navajos." Id. Moreover, he maintained that "[t]he State cannot exercise its duties as a trustee without taking away the self- determination of the Navajo people." Id.

[28] See Smith, supra note 24, at C1.

[29] See id.

[30] Id.

[31] *Williams, supra* note 24, at A18.

[32] See generally Kickingbird et al., supra note 2, at 1-13.

[33] For example, the Utah Navajos were not relocated to Bosque Redondo in the 1860s by the United States Army. See Howard W. Gorman, Narrative about the Long Walk to Fort Sumner, in Navajo Stories of the Long Walk Period 41 (Broderick H. Johnson ed., 1973). Since this separation, these two cultures have never felt a close kinship. See Smith, supra note 24, at C1.

[34] For example, the Navajo Nation is entitled to 62.5% of the royalties from the Aneth Extension. See Smith, supra note 24, at C1. Between 1960 and 1990, the Navajo Nation received approximately 85 million dollars. See id. Yet, very little, if any, of this money has ever reached the Utah Navajos. See id.

distinction of being the most impoverished residents in both the State of Utah and among the Navajo Nation. [35] Indeed, the Utah Navajos' plight is so severe thatan inquiry has been launched by the United Nations Human Rights Division. [36]

This is a sorrowful story of a forgotten people-a people that have been abused and degraded by all governing entities. This Article, after analyzing the historical attributes of the Aneth Extension and some of its current legal problems, proposes a prudent solution that would allow these destitute people to govern and control their portion from the natural resources of the Aneth Extension.

Part II outlines the concepts of Native American sovereignty. Part III traces mineral rights development in Indian country. Part IV details the history of and discusses the legal problems associated with the Aneth Extension. The Aneth Extension's historical and legal problems have not been previously documented. Part IV is essential to understanding the uniqueness of the Utah Navajos, and is necessary for determining a prudent solution to the on-going royalty misuse problem. In light of this history, Part V proposes several options for the future governance of the Aneth Extension. Part VI concludes by urging the four interested parties-the United States, the State of Utah, the Navajo Nation, and the Utah Navajos-to adopt a new governmental scheme allowing the Utah Navajos to directly control **[*561]** their portion of the oil and gas royalties received from the Aneth Extension.

II. Tribal Sovereignty

A. Federal Control

1. Federal Control via the Supreme Court

Prior to European discovery, American Indian tribes existed as independent sovereign nations. [37] Each individual tribe had developed extensive political, cultural, and legal institutions. [38] Nevertheless, Supreme Court Chief Justice John Marshall, in Johnson v. M'Intosh, [39] ruled that a tribe's power to sustain absolute sovereignty was extinguished under the Discovery Doctrine. [40] Consequently, the Supreme Court held in Johnson that the tribes, although rightful occupants of the land, were denied the right to sell the land because the doctrine of discovery gave the discovering nation exclusive title to the land. [41]

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[35] See *Williams, supra* note 24, at A18.

[36] See Nancy Lofholm, Despite Prayers, a Navajo-Mormon Culture Clash, N.Y. TIMES, July 24, 1996, at A16.

[37] See Kickingbird et al., supra note 2, at 5-7. What is sovereignty? Ideally, sovereignty is "the absolute or supreme power of a people to govern themselves, completely independent from interference by or involvement with other sovereign nations." Id. at 3. In a historical sense, the notion of sovereignty developed around the time of Christ's birth. See id. at 2. Sovereignty (majestas in Latin) was defined by Roman judges as "'the proper authority by which people make laws.'" Id.

[38] In *Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542-43 (1832),* Chief Justice John Marshall declared that America was "inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws." Id.

[39] *21 U.S. (8 Wheat.) 543 (1823).*

[40] See *id. at 573-74.* The doctrine of discovery gave "title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." Id. See generally Felix S. Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947) (discussing the doctrine of discovery and Indian land titles).

[41] See *Johnson, 21 U.S. (8 Wheat.) at 574.*

Shortly thereafter, the Court, in Cherokee Nation v. Georgia, [42] established that it did not possess original jurisdiction over disputes **[*562]** between a state and a tribe. [43] In Worcester v. Georgia, [44] the last of the Marshall trilogy decisions, the Supreme Court held that the United States Constitution granted the federal government sole control over regulating relations with Indian tribes. [45] This holding was far- reaching because it not only established that the federal government had exclusive control over political and legal status of Indian tribes, [46] but it also defined this exclusive relationship between the tribes and the federal government as one that "resemble[d] that of a ward to guardian." [47]

2. Federal Control via the President and Congress

During the early development of the United States, the executive branch of government controlled tribal-federal relations through the **[*563]** treaty-making process. [48] In the 1871 Appropriations Act, [49] Congress forbade the executive branch from making treaties with the tribes. [50] As a result, any federal policies affecting Indian affairs would have to be authorized either by acts of Congress or by executive orders, thereby eliminating any necessary elements of tribal consent. [51]

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[42] *30 U.S. (5 Pet.) 1 (1831).*

[43] See *id. at 20.* The tribe in Cherokee Nation, claimed that Article III, 2, of the United States Constitution provided the Supreme Court original jurisdiction. See id. Article III, 2, grants federal courts jurisdiction to hear disputes between a "State . . . and foreign States, Citizens or Subjects" and grants the United States Supreme Court the right to hear cases in which a state is a party. *U.S. Const. art. III, 2, cls. 1*, *2*. The Court, however, determined that tribes could not be considered foreign nations under the United States Constitution. See *Cherokee Nation, 30 U.S. (5 Pet.) at 20.*

[44] *31 U.S. (6 Pet.) 515 (1832).*

[45] See *id. at 561.* The United States Constitution only refers to Indian tribes three times. See generally *U.S. Const. First*, in the Commerce Clause, it grants the Federal Government the right to regulate trade with Indian Tribes. See *U.S. Const. art. I, 8, cl. 3*. Second, Article I states that non-taxed Indians would not be counted in congressional representation districts. See *U.S. Const. art. I, 2, cl. 3*. Third, the Fourteenth Amendment excluded Indians from congressional apportionment. See *U.S. Const. amend. XIV*, *2*. This allowed for great judicial latitude in construing federal Indian policy. Chief Justice John Marshall's trilogy serves as the foundation of federal Indian law. For more on Chief Justice John Marshall's decisions, see William E. Nelson, The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich. L. Rev. 893 (1978). See also Philip S. Deloria, The Era of Indian Self-Determination 192-93 (Kenneth R. Philip ed., 1986) ("Marshall established that Indian tribes have a right to a political and social existence and that right is not derived from the Constitution of the United States [rather it can be traced] to natural law and international law.").

[46] See generally Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, *132 U. Pa. L. Rev. 195 (1984).* See, e.g., Charles F. Wilkinson, American Indians, Time, and the Law 24 (1987).

[47] *Cherokee Nation, 30 U.S. (5 Pet.) at 17.*

[48] See generally John R. Wunder, No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands, reprinted in 1 Native Americans And The Law 195 (John R. Wunder ed., 1996). See also Pevar, supra note 18, ch. I, A-C, at 2-4; Washburn, supra note 10, at 59-74.

[49] Act of March 3, 1871, ch. 120, *16 Stat. 566* (codified as amended at *25 U.S.C.A. 71* (West 1983 & Supp. 1997)).

[50] The portion of the Bill relating to Indian tribes states that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Id. The Act was the result of many years of debate between the House of Representatives and the Senate as to who had control over Indian affairs. See, e.g., Cohen, supra note 3, ch. 7 3, at 127-28.

[51] See Cohen, supra note 3, ch. 7, 3, at 127. After Congress assumed power over Indian affairs, it became necessary to determine the intent of any acts passed by Congress. For a thorough discussion on congressional intent and federal Indian law,

Shortly thereafter, Congress, after giving itself substantial power over Indian affairs, began to change federal Indian policy. [52] At first, Congress initiated a period of forced assimilation through the implementation of the General Allotment Act of 1887 (Allotment Act). [53] The allotment policy was contrived to fractionate large communally held tribal estates in favor of individual ownership. [54] This policy's guiding premise was to encourage individual agricultural pursuits while destroying the tribes' communal village existence. [55] Indeed, the Allotment Act even contemplated whether Indians should be brought under state jurisdiction after assimilation had been fully **[*564]** effectuated. [56]

The Assimilation Era, which lasted for over fifty years, destroyed many tribal cultures. [57] Fortunately, Congress reversed its prior policy when it passed the Indian Reorganization Act of 1934 (IRA). [58] Instead of concentrating on integrating individual Indians into society, the IRA sought to integrate the tribal governmental entity into society. [59] Hence, to facilitate this new policy, Congress protected the tribes' fundamental rights of political liberty and local self-government. [60] Congress additionally passed supplementary laws, [61] including the Indian Mineral Leasing Act of 1938, [62] to facilitate economic self-sufficiency for tribal governments. [63] The IRA withstood heavy criticism over the next twenty years. [64] Nevertheless, this policy was reaffirmed and strengthened under the Nixon Administration. [65]

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see Philip P. Frickey, Congressional Intent, Practical Reasoning, and The Dynamic Nature of Federal Indian Law, *78 Cal. L. Rev. 1137 (1990).*

[52] See, e.g., Washburn, supra note 10, at 73-78; James S. Olson & Raymond Wilson, Native Americans In The Twentieth Century 49-78 (1984). See generally Frederick Hoxie, A Final Promise: The Campaign to Assimilate the Indians 1880-1920 (1984).

[53] Act of Feb. 8, 1997, ch. 119, *24 Stat. 388* (codified as amended at *25 U.S.C.A. 331*-358 (West 1983 & Supp. 1997)). For a thorough discussion of the Assimilation Era, see John W. Ragsdale, Jr., The Movement To Assimilate The American Indians: A Jurisprudential Study, 57 UMKC L. Rev. 399 (1989).

[54] See, e.g., Judith V. Royster, The Legacy of Allotment, *27 Ariz. St. L.J. 1105, 1106 (1995).*

[55] See id.

[56] See *25 U.S.C.A. 349* (West 1983 & Supp. 1997). The Assimilation Era went well beyond casting the American Indian in the mold of Thomas Jefferson's quintessential yeoman farmer. See Ragsdale, supra note 53, at 399-400. Indeed, the era tried to penetrate and destroy all vestiges of tribalism and absorb the newly emasculated yeoman Indian farmers into practicing the civilized ways of Anglo- American society. See id. As a result, the Assimilation Era can best be viewed as "an all-out assault on every facet of Indian culture-property, language, appearance, religion, economy, political form and even thought" Id. at 400.

[57] See Royster, supra note 54 (discussing the Allotment Era).

[58] Act of June 18, 1934, ch. 576, *48 Stat. 984* (codified as amended at *25 U.S.C.A. 461*-479 (West 1983 & Supp. 1997)).

[59] See Cohen, supra note 3, ch. 7, 9, at 147; Olson & Wilson, supra note 52, at 107-30; Washburn, supra note 10, at 77-80.

[60] See S. Rep. No. 73-1080, at 3-4 (1934).

[61] See, e.g., Act of Sept. 1, 1937, ch. 897, *50 Stat. 900* (codified as amended at *25 U.S.C.A. 500*-500n (West 1983 & Supp. 1997)) (providing for the federal acquisition, organization, and management of the reindeer industry); Act of Aug. 27, 1935, ch. 748, *49 Stat. 891* (codified as amended at *25 U.S.C.A. 305a*-305c (West 1983 & Supp. 1997) (providing for the federal promotion of the Indian arts and crafts industry)).

[62] See Act of May 11, 1938, ch. 198, ***52 Stat. 347*** (codified as amended at *25 U.S.C.A. 396a*-396g (West 1983 & Supp. 1997)).

[63] See Cohen, supra note 3, ch. 8, 1, at 152.

[64] See generally Charles F. Wilkinson & Eric R. Briggs, The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139 (1977) (discussing the Termination Era and the various statutes enacted by Congress subjecting various tribes to state jurisdiction).

[65] See Washburn, supra note 10, at 97.

Building on the Indian Reorganization Act, President Nixon maintained that the federal government should "encourage real political autonomy for Indian communities, without severing the trust **[*565]** relationship." [66] President Nixon further asserted that federal legislation should not continue to be paternalistic. [67] Instead, Nixon urged Congress to pass legislation that would enable Indians to develop their own potentials. [68] Nixon explained that such programs would "strengthen the Indians' sense of autonomy without threatening this sense of community." [69] Since this pronouncement, Nixon's Indian policy has remained the federal government's guiding principle. [70]

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B. State Control and the Preemption Doctrine

Contrary to the periodic fluctuations that tribal sovereignty has undergone, the federal Preemption Doctrine, granting Congress plenary power over the tribes, remains a predominant axiom of Indian law. [71] Under this doctrine, a state is forbidden from regulating any tribal governmental entity without first obtaining affirmative

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[66] Emma R. Gross, The Origins of Self-Determination Ideology and Constitutional Sovereignty, reprinted in 6 Native Americans And The Law, supra note 1, at 129. President Nixon maintained that the trust relationship is one that is morally and legally binding between the United States and Indian tribes. See id. Moreover, he argued that the trust relationship would force the United States to obey its treaties and formal obligations. See id. However, he asserted that this trust relationship should be guided by principles of sovereignty, rather than paternalism. See id.

[67] See id.

[68] See id. at 169. President Nixon stated that he wanted to strengthen tribal sovereignty, transfer programs from the federal government to the tribal government, and secure land bases. See id. Within several years of President Nixon's proclamation, many acts were passed giving tribal governments much more power. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. 450a (West 1983 & Supp. 1997) (providing for the strengthening of tribal control over local school districts that had been federally funded under educational assistance programs); Indian Child And Welfare Act of 1978, 25 U.S.C.A. 1901-1963 (West 1983 & Supp. 1997) (providing for maximum tribal jurisdiction and the reduction of state jurisdiction in adoption or custody proceedings where the child is a member or could become a member of an Indian tribe).

[69] Gross, supra note 66, at 169.

[70] See id. at 171-72. The latest example of such is President Clinton's 1994 directive commanding federal agencies "to deal with the Indian tribes on a government-to-government basis when tribal governmental or treaty rights are at issue." William J. Clinton, 1 Pub. Papers 800-03 (1994). Shortly thereafter, the Department of Justice issued the following statement: The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments . . . in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems. Janet Reno, A Federal Commitment to Tribal Justice Systems, 79 Judicature 113 n.3 (1995). For previous statements, see Ronald Reagan, 4 Pub. Papers 90-100 (1984); 137 Cong. Rec. S8388-01 (daily ed. June 21, 1991) (Government-to-Government Relationship of the United States with Indian Tribal Governments, statement by President George Bush).

[71] See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the federal government has the sole power to regulate any Indian tribe). Almost a century and a half later, the Supreme Court, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1979), reaffirmed Worcester holding that Congress has the broad power to regulate tribal affairs under the Indian Commerce Clause. See id. at 142-43. Moreover, the Bracker Court stated that state regulatory authority over tribes may be thwarted in one of two ways. See id. First, state law may be preempted by federal law. See id. at 142. Second, state law may not infringe on tribal sovereignty. See id. at 142-43. Additionally, the Court noted that all powers not expressly taken from the tribes still reside in the tribes. See id. at 142.

authorization from Congress. [72] Over the last forty years, the Supreme Court has explained this doctrine in jurisdictional terms. [73]

When employing preemption analysis, the Supreme Court has asserted that the determinative inquiry focuses on whether the state is regulating Indian or non-Indian activities. [74] If the regulated activity concerns non-Indian activities on Indian land, the inquiry focuses on whether state jurisdiction would interfere with the tribes' right of self-government or an express act of Congress. [75] If the state interferes **[*567]** with either, the Supreme Court will revoke that state's attempted jurisdiction. [76] However, if the activity being regulated is solely an Indian activity on Indian land, the state lacks any power over the Indians and power may only be obtained by an express act of Congress. [77] Hence, due to the tribes' unique relationship to the federal government as self-governing bodies and as beneficiaries of the guardian-ward relationship, [78] the states do not have jurisdiction over tribes unless Congress or a specific treaty grants them that right. [79]

III. Mineral Development In Indian Country

A. Mineral Leasing in Indian Country

1. The Mineral Leasing Act of 1891

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[72] See *McClanahan v. State Tax Comm'n, 411 U.S. 164, 169 (1973).* The McClanahan Court stated that "Indian nations were 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries'" *Id. at 168* (quoting *Worcester, 31 U.S. (6 Pet.) at 557).*

[73] See *Williams v. Lee, 358 U.S. 217 (1959).* Williams was the first modern case to discuss the federal Preemption Doctrine within jurisdictional terms. See *id. at 222-23.*

[74] See *McClanahan, 411 U.S. at 173.*

[75] See *Williams, 358 U.S. at 219-20.* In Williams, two Navajo Indians were sued in state court over their failure to pay debts incurred at a store owned by a non-Indian. See *id. at 218.* The Williams Court held that the State of Arizona had no jurisdiction because to assert state jurisdiction would interfere with the tribe's right of self-government. See *id. at 219.* Since Williams, the doctrine of preemption has been used, for example, to oust state tax jurisdiction over the non- Indians doing business within Indian country, if there was a federal statute or treaty giving the tribe exclusive tax jurisdiction over the non-Indian activity or if the state interfered to an impermissible extent with the ability of the tribe to govern itself. See, e.g., *Central Mach. Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1979); Crow Tribe of Indians v. New Mexico, 484 U.S. 997, 1013 (1988); Ramah Navajo Sch. Bd. v. New Mexico, 458 U.S. 832, 848 (1982).* But see *Blaze Construction Co. v. New Mexico Taxation & Revenue Dept., 884 P.2d 803, 805 (N.M. 1994)* (finding the Preemption Doctrine did not apply where contractors did business directly with a federal agency and not a tribe). For a thorough discussion of Ramah Navajo Sch. Bd. and Blaze Construction Co., see Richard J. Ansson, Jr., Note, Protecting Tribal Sovereignty: Why States Should Not Be Able To Tax Contractors Hired By The BIA To Construct Reservation Projects For Tribes: Blaze Construction Co. v. New Mexico Taxation and Revenue Department: A Case Study, 20 Am. Indian L. Rev. 459 (1995-96).

[76] See *McClanahan, 411 U.S. at 170-73.*

[77] See *id. at 170-73.* The State of Arizona could not impose their state income tax on a member of the Navajo Nation who derived his income from reservation sources. See *id. at 173.*

[78] For a very good article detailing the trust relationship between the tribes and the states, see Judith V. Royster, Equivocal Obligations: The Federal- Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources, *71 N.D. L. Rev. 327 (1995).*

[79] See *McClanahan, 411 U.S. at 170-73.*

Congress authorized mineral leasing on Indian lands under an 1891 statute. [80] The Mineral Leasing Act of 1891 (the 1891 Act), enacted several years after the Allotment Act, resembled that era's paternalistic legislation. [81] Indeed, Congress enacted this provision because they believed that non-Indian development of mineral resources was necessary to ensure the efficient use of the land. [82] Three decades later, Congress amended the oil and gas section of the **[*568]** 1891 Act. [83] In 1924, Congress specifically authorized state taxation of oil and gas wells on tribal lands within treaty reservations. [84] In 1927, Congress also authorized, after considerable debate, [85] state taxation of oil and gas wells on tribal lands created by executive order. [86] However, shortly after the passage of the 1927 amendment, Congress significantly altered the purpose of mineral leasing law.

Not surprisingly, Congress's decision to alter mineral law policy coincided with the waning Era of Assimilation and the rising Era of Tribal Self-Government. [87] However, the reformation did not completely revamp mineral leasing policy. Indeed, throughout both eras, several aspects of mineral leasing law have remained constant. First, under mineral leasing law guidelines, tribal governments have generally been restricted to the role of the lessor, leaving tribal governments little control over most leases. [88] Second, tribal mineral land, like tribal land, has been held in trust by the federal government. [89] Finally, tribal mineral land has remained unencumbered. [90]

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2. The Mineral Leasing Act of 1938

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[80] See *25 U.S.C.A. 397* (West 1983 & Supp. 1997).

[81] The 1891 Act allowed exploratory companies to execute ten year mineral leases with Indian tribes. See id. However, before a tribe could execute a lease, it had to obtain the consent and approval of the Secretary of the Interior. See id.

[82] See id.

[83] Other portions of the 1891 Mineral Leasing Act were amended over the years. See *25 U.S.C.A. 399* (West 1983 & Supp. 1997). For example, in 1919 Congress amended the 1891 Act to include mining gold, silver, copper, and other valuable minerals. See id.

[84] See *25 U.S.C.A. 398* (West 1983 & Supp. 1997). The tax rate was 37.5%. See id.

[85] See *25 U.S.C.A. 398a*-*398*e (West 1983 & Supp. 1997). Before the tax was extended to executive order treaties, there was considerable debate on the topic. See Lawrence C. Kelly, The Navajo Indiansand Federal Indian Policy 1900- 1935, at 75-79 (1968). Secretary Hubert Work introduced a bill which provided that all proceeds received on executive order reservations would go to the tribes. See id. at 77. However, this bill was amended in both the United States House of Representatives and Senate to mirror the 1924 Act. See id. at 78. Arizona Representative Carl Hayden introduced a second plan which provided that such monies used "for construction and maintenance of public roads within the respective reservations" or "for the support of public schools attended by Indian children." Id. at 78-79; see also H.R. Rep. No. 69-9133, at 2 (1926). However, Congress ignored the second bill and eventually passed a bill similar to the first-amended bill. See id.

[86] These two amendments taken collectively authorized the Secretary of the Interior to lease oil and gas lands with the consent of the tribes for up to ten years. See *25 U.S.C.A. 398a*-*398*e. Before this express congressional authorization, states were unable to tax non-Indian lessees. See, e.g., *Gillespie v. Oklahoma, 257 U.S. 501 (1922)* (invalidating a tax on a non-Indian oil and gas lessee under the governmental tax immunity doctrine).

[87] For more on the Tribal Self-Government Era, see supra notes 60-73 and accompanying text.

[88] See Royster, supra note 17, at 552.

[89] See id.

[90] See id.

Congress enacted the Indian Mineral Leasing Act of 1938 (the 1938 Act) to facilitate tribal economic and political self-sufficiency. [91] Accordingly, the 1938 Act imposed uniform mineral leasing laws, ensured tribes would receive maximum profits on mineral extraction, and encouraged tribes to use those profits to achieve tribal economic and political self-sufficiency. [92] As a result, the 1938 Act actively promoted tribal involvement in developing their resources and using the profits to achieve self-sufficiency. [93]

One of the purposes of the 1938 Act was to ensure consistency throughout Indian mineral law. [94] To achieve this, the 1938 Act required a single set of procedures to govern Indian mineral law transactions. [95] Another purpose of the 1938 Act was to provide for tribal self- government. [96] As a result, tribes were given more control over certain aspects of the leasing process. For example, under the 1938 Act, tribes were granted the right to consent to mineral leases. [97] Nevertheless, due to the ward-guardian relationship between the tribes and the United States, Congress did not allow the tribes to have sole control over the leasing process. [98] Instead, Congress provided that any mineral leases entered into by the tribe had to be approved by the Secretary of the Interior. [99] Moreover, Congress stated that the Secretary of the Interior still possessed the power to revoke a lease if a lessee violated any term in the agreement. [100] Hence, the 1938 Act granted tribes greater, but not absolute, **[*570]** control over mineral development and extraction. [101]

In connection with the 1934 IRA, [102] the 1938 Act was also designed to facilitate tribal economic survival. [103] As a result, when Congress enacted the 1938 Act, it provided that the tribes would retain "the greatest return from their property." [104] Indeed, the 1938 Act required the Department of Interior, acting in its trusteeship role, to establish a system of rents, bonuses, and royalties to guarantee income. [105] Hence, Congress partly enacted the 1938 Act to

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[91] See S. Rep. No. 75-85, at 2-3 (1937); H.R. Rep. No. 75-1872, at 1-3 (1938).

[92] See *25 U.S.C.A. 396* (West 1983 & Supp. 1997).

[93] See Royster, supra note 17, at 558.

[94] See id.

[95] See id. All leases required approval and consent of the Secretary of the Interior, could not exceed ten years (or as long as royalties were being derived), and would only be granted after competitive bidding. See *25 U.S.C.A. 396a* (West 1983 & Supp. 1997). However, the Act did not disavow all inconsistent mineral law provisions. See Royster, supra note 17, at 558-59.

[96] See Royster, supra note 17, at 560-71.

[97] See *25 U.S.C.A. 396a.*

[98] The ward-guardian distinction was first made in *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).*

[99] See *25 U.S.C.A. 396a.*

[100] See Royster, supra note 17, at 564 (citing *25 C.F.R. 211.27(a) (1993)*).

[101] Many commentators have fiercely criticized numerous provisions in the 1938 Act that vest power in the Secretary of the Interior. See, e.g., Robert A. Williams, Jr., Emergence of a National Indian Policy: Paren Patrie and Indian Tribal Sovereignty, in Mineral Development on Indian Lands Paper No. 1, Page No. 25 (Rocky Mt. Min. L. Fdn. 1989).

[102] See *25 U.S.C.A. 461*-479 (West 1983 & Supp. 1997).

[103] See supra notes 61-66 and accompanying text.

[104] S. Rep. No. 75-985, at 2 (1937); H.R. Rep. No. 75-1872, at 2 (1938).

[105] See Royster, supra note 17, at 565-66 (citing *25 U.S.C.A. 396c* (West 1983 & Supp. 1997)). Royster also noted that these provisions failed due to royalty mismanagement, inadequate accounting practices, and mineral theft. See id. at 567.

ensure that tribal governmental entities would receive the needed funds to facilitate economic strength, thereby facilitating political strength and power.

B. The Trustee Relationship

Indian lands are usually held in trust by the federal government for the benefit of the individual and/or the tribes. [106] This doctrine obligates the federal government to protect tribal lands and resources, [107] and has been recognized by both the executive and legislative branches. [108] As a result, Indian tribes have invoked this doctrine on numerous occasions to protect tribal rights and resources. [109]

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Congressional plenary authority is limited by the Trust Doctrine. [110] The courts generally view the trust obligation as imposing a moral obligation as opposed to a judicially enforceable legal obligation. [111] However, the Trust Doctrine, as applied to the executive branch and its agencies, is much more expansive. Historically, courts have enforced claims against the executive branch based solely on the general trust relationship between the United States and Indian tribes. [112]

Beginning in 1965, when Congress clarified that Indians may sue in federal courts without the government acting as guardian, tribes began to make greater use of the Trust Doctrine. [113] Consequently, tribes began seeking equitable relief for breach of the general trust relationship. [114] Furthermore, the federal district courts and the

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[106] See Hall, supra note 16, at 3. The "trust" concept originally developed in England during the Middle Ages. See id. at 1. This concept was a legal device for the control or ownership of the land. See id. It denoted that "the ownership of land placed in trust was in the hands of one person (the 'trustee') who had the responsibility to manage the land for the benefit of another person (the 'beneficiary')." Id.

[107] See id. at 3.

[108] See President Nixon's Message to Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970). President Nixon argued that the Federal-Indian trust relationship is a special one that is both constitutionally and morally binding. See Gross, supra note 66, at 129.

[109] See, e.g., *Fort Mohave Indian Tribe v. United States, 23 Cl. Ct. 417 (1991)* (stating federal government has a duty to protect reservation water rights); *Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979),* aff'd, *782 F.2d 855 (10th Cir. 1986)* (stating federal government was liable for the mismanagement of oil and gas leases); *United States v. Mitchell, 463 U.S. 206 (1983)* (stating federal government was held liable for mismanagement of timberland). See generally, Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law ch. 3, 2(a-c), at 220-28 (Rennard Strickland et al. eds., Michie Co. 1982) (1942) [hereinafter Cohen, 1982 edition]; Mark Allen, Comment, Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination, *16 B.C. Envtl. Aff. L. Rev. 859 (1989);* Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, *1994 Utah L. Rev. 1471 (1994);* Royster, supra note 78.

[110] See Hall, supra note 16, at 18-29.

[111] See Pevar, supra note 18, ch. IV, at 33.

[112] See Hall, supra note 16, at 29-33; see also *United States v. Creek Nation, 295 U.S. 103 (1935)* (holding the Indian's government liable for mismanagement of tribal land); *Cramer v. United States, 261 U.S. 219 (1923)* (voiding a federal patent because it failed to protect the Indian's right of occupancy).

[113] See Nell Jessup Newton, Indian Claims in the Court of the Conqueror, *41 Am. U. L. Rev. 753, 770 (1992).*

[114] See, e.g., *Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973)* (holding that the Secretary of the Interior violated his trust responsibility by issuing a regulation that did not preserve water for the tribe and ordering the Secretary of the Interior to propose an amended regulation).

Court of Claims also established a breach of trust claim for monetary damages. [115] As a result, tribes could sue the executive branch for **[*572]** a breach of trust claim and receive either equitable or monetary relief. [116]

The breach of trust claim did not go unchallenged. In the Mitchell cases, [117] the Supreme Court was asked to determine the scope of the Trust Doctrine. After Mitchell I and Mitchell II, tribes could bring suit for breach of the general trust relationship. [118] Additionally, the tribes could bring suit under any statutorily created trust relationship. [119] On this point, the Mitchell II Court stated that this relationship required the federal government to have enacted a comprehensive statutory and regulatory scheme. [120] Finally, the tribes could bring suit if a trust relationship was created due to the government's elaborate control over property. [121] The Mitchell II Court implied that this trust relationship arose out of actual control, thus leaving common law to define the duties imposed by the relationship. [122] Hence, after Mitchell I and II, tribes could sue the executive branch for a breach of trust on three separate grounds.

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IV. The Navajo Nation, The Aneth Extension, and The State of Utah

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[115] See Newton, supra note 113, at 786. Such cases were brought under the Tucker Acts, which granted the Court of Claims jurisdiction to hear monetary claims brought by tribes against the federal government. See *28 U.S.C.A. 1505* (West 1994 & Supp. 1997). Claims by individual Indians could also be heard pursuant to the Act. See id. The Act also provides concurrent jurisdiction in district court for claims not exceeding $ 10,000. See id. The Court of Claims, now known as the United States Claims Court, has only limited authority to issue declaratory judgments. See Federal Courts Improvement Act, *28 U.S.C.A. 171* (West 1994 & Supp. 1997).

[116] See generally *United States v. Mitchell, 463 U.S. 206, 224-27 (1983).*

[117] *United States v. Mitchell, 445 U.S. 535 (1980)* [hereinafter Mitchell I]; *United States v. Mitchell, 463 U.S. 206 (1983)* [hereinafter Mitchell II]. The Plaintiffs in the Mitchell cases contended that the government was bound by a trust duty to manage forest resources on allotted lands in compliance with fiduciary standards. See *Mitchell I, 445 U.S. at 537.* The Plaintiffs claimed that the General Allotment Act, which had provided the lands be held in trust, created such a duty. See id. Instead, the Supreme Court held that the Allotment Act merely created a "limited trust relationship" and imposed no obligation on the government to manage forest resources. See *id. at 542-44.* However, the Court remanded the case to the Court of Claims for a determination of whether any other statutes imposed a fiduciary duty on the government to manage tribal resources. See *id. at 546.* On remand, the Court of Claims found that various timber statutes give rise to fiduciary duties. See id. On appeal in Mitchell II, the Supreme Court affirmed the lower court on two grounds. See *Mitchell II, 463 U.S. at 225.* First, the Court held that the executive branch must exercise fiduciary care when a trust relationship is clear from congressional enactments. See id. In Mitchell II, the Court found that specific timber management statutes gave rise to a fiduciary duty. See id. Second, the Court suggested that a fiduciary relationship exists if the executive branch maintains extensive control over Indian property. See id. Here, the Court stated that the Department of the Interior exercised daily control over the harvesting and management of tribal timber, and held the United States accountable in monetary damages for breach of fiduciary duties imposed by the trust relationship. See id.

[118] See *id. at 225-26.* Monetary damages are not available under this claim. See id.

[119] See *id. at 224-25.* Monetary damages are available. See id.

[120] See id. Interestingly, the challenged statute in the Mitchell cases lacked any express trust language. See id. Nevertheless, the Supreme Court envisioned a trust relationship as a result of the executive agencies' detailed management role. See id.

[121] See *id. at 225.* Monetary damages are available under this claim. See id.

[122] See id.

The relationship between the interested parties-the Navajo Nation, the Utah Navajos, the State of Utah, and the United States-entails many intricate and intertwining issues. [123] However, the fundamental inquiry pertains to the concept of sovereignty. Every tribe struggles for sovereignty. Indeed, maintaining sovereignty may well be considered the essence of American Indian law. [124] The remainder of this Article explores the relationship between the Utah Navajos, the State of Utah, and the Navajo Nation and contends that the Utah Navajos, the forgotten people of the Navajo Nation, and the State of Utah deserve to control their portion of the oil and gas proceeds produced on their lands.

A. The Navajo Nation

Before recognition and consolidation of the United States, the Navajo Nation existed in loosely defined nomadic groups. [125] The Navajo peoples' ancestral roots developed from two distinct cultures. [126]

The first ancestral root was comprised of an Apachean band of Indians that migrated into the area approximately 1,000 years ago. [127] The second culture was comprised of an Anasazi-Puebloan band of Indians that had originally inhabited the area. [128] These two **[*574]** cultures fused around 1700. [129] The Apaches de Nabajo culture provided the new cultures' linguistic and political customs while the Puebloan culture provided the new cultures' theological customs. [130]

In early Navajo society, political associations were local. [131] As a result, when the United States began exploring the Southwest in the 1840s, the Navajo culture lacked a centralized government. [132] Instead, the culture was characterized by loosely organized clans of Navajos. [133] Indeed, until the early 1900s, local groups handled both internal and external matters. [134] In most groups, an organization called a residence group would be formed to

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[123] These factors include, but are not limited to, encroachment on tribal sovereignty, encroachment on the Aneth dwellers' sovereignty, state intrusion via taxation, and trust mismanagement.

[124] Tribes possess inherent powers of limited sovereignty. See Cohen, supra note 3, ch. 6, 3(G), at 121.

[125] See Gary Witherspoon, Navajo Social Organization, in 10 Handbook of North American Indians, supra note 20, at 531 (discussing Navajo political, social, and cultural heritage); see also Clyde Kluckhohn & Dorothea Leighton, The Navajo (rev. ed. 1995); Ruth M. Underhill, The Navajos (1956); Raymond Friday Locke, The Book of the Navajo (5th ed. 1992).

[126] See David M. Brugge, Navajo Prehistory and History to 1850, in 10 Handbook of Native American Indians, supra note 20, at 493.

[127] See id. at 498. The Apachean band of Indians did not migrate into this area all at one time. See Underhill, supra note 125, at 12-13. Instead, small nomadic groups gradually infiltrated this area over a number of years. See id. This band of Indians had led a nomadic life of hunting and fishing. See id. at 59- 60.

[128] See Brugge, supra note 126, at 493. For an excellent article on the Anasazi, see John W. Ragsdale, Jr., Anasazi Jurisprudence, 22.2 Am. Indian L. Rev. (forthcoming February 1998).

[129] See Brugge, supra note 126, at 493.

[130] See id.

[131] See Witherspoon, supra note 125, at 531.

[132] See Underhill, supra note 125, at 59-60.

[133] See id.

[134] See Witherspoon, supra note 125, at 531. In the early part of the 20th century, oil was discovered on certain portions of the Navajo Reservation. See Mary Shepardson, Development of Navajo Tribal Government, in 10 Handbook of North American Indians, supra note 20, at 624. This led to the development of the Navajo Tribal Council. See id. Indeed, this event occurred when a meeting was called by Superintendent Evan Estep to discuss oil leasing in the San Juan Jurisdiction. See id. Essentially, this is how local and regional decision makers became the decision makers for the Navajo Nation. See id. Before this time, the lack of tribal government was due to the Navajo Nation's view that a centralized government was "a creature of federal policy,

manage internal matters while a local headman would be engaged to supervise external matters. [135] These external matters included the power to negotiate with other Navajo groups, Indian tribes, and non-Indians. [136] These small political associations developed as a result of the early Navajo's reliance on sheep herding. [137] Thus, the members lived and traveled in small clan-oriented groups. [138]

When the United States Army encountered the various groups of Navajos, the Army sought to move them from their traditional lands. However, the Navajo clans did not want to leave their lands. Hence, the United States Army, in an effort to move the Navajo clans, **[*575]** claimed that the Navajos became unpeaceable. [139] In 1864, the conflicts between the United States and the Navajo people culminated in the decision to relocate them to Bosque Redondo (Fort Sumner), away from their homelands. [140]

By March of 1865, over 9,000 Navajos were relocated to Bosque Redondo, and these Navajo clans began to develop a sense of tribal unity. [141] However, several Navajo clans refused to be relocated [142] and fled north into areas of present-day Utah. One such area was the Aneth Extension. [143] This varied history led to divergent interests **[*576]** between the residents of the Aneth Extension and the Navajo tribe. [144]

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born out of a dizzying conflict of treaties, congressional acts, court decisions, and executive promulgations dealing with Indians." Id.

[135] See Shepardson, supra note 134, at 624.

[136] See id.

[137] See id.

[138] See id.

[139] See Frank Goldtooth, Narration on the Long Walk Period to Fort Sumner, in *Navajo Stories of the Long Walk Period, supra* note 33, at 151. Frank Goldtooth stated: It has been said that the reason why the people were marched to Hweeldi [Fort Sumner] was because, as we were told over and over, they had been stealing. We were no stealers. We were branded as being a bunch of thieves because they couldn't find any other excuse to make us march to Hweeldi [Fort Sumner]. The main reason why we were herded there was because of the rise of enemies, such as the Nooda'i (Utes). Enemies and Navajos started raiding each other back and forth. Many Indian tribes joined together and fought against the Navajo people. Id. (alteration added).

[140] See id. Howard W. Gorman's narrative stated: When we were taken to Hweeldi (Fort Sumner), a harmless people, for four years, the white Men got all of our land-north to Dibe Nitsaa (the La Plata Mountains), toward the northwest to Dzitt Ashdla'ii (La Sal Mountains) to the To Doott'izhi (Green River), and beyond to the mountain with no name (Mount Henry). The Navajos used to have, and live on, that whole area. Later, the white people took most of that territory back. Gorman, supra note 33, at 41-42.

[141] See Roessel, supra note 20, at 513.

[142] See Gorman, supra note 33, at 41. Gorman stated: Navajos living in [T'aabiich'iiddii (Aneth)] . . . weren't taken to Hweeldi [(Fort Sumner)] because they had their own leader. They called him Calgalia or K'aa yettii (Torch). He was the leader in the area around Moab, Utah where the Colorado and San Juan River join. . . . . Also, a large number of Navajos-I think maybe 1,000 or 2,000 or more- moved down below Naatsis'aan (Navajo Mountain). . . . It's very rugged, with Canyons. You could get lost in that place in a short time. Id.

[143] See, e.g., A Bill to Permanently Set Aside Certain Public Lands in Utah as an Addition to the Western Navajo Indian Reservation: Hearings on S.3782 Before the Comm. on Indian Affairs, S.3782, 71st Cong., 2d Sess. 2, at 13 (1930) [hereinafter Hearings on S.3782]. See also Smith, supra note 24, at C1. Smith stated: The rift between Utah Navajos and their Arizona-New Mexico counterparts can be traced back to the 1860s when the U.S. Army forcibly relocated nomadic Navajos to Bosque Redondo in the New Mexico territory. While those Navajos endured a Babylonian captivity, a number of Navajo clans escaped Kit Carson's roundup by fleeing north into present-day south-eastern Utah, settling in Aneth, Monument Valley and Navajo Mountain. Ever since, the two Navajo factions have never felt a close kinship . . . . Id.

[144] See Smith, supra note 24, at C1.

The Navajo Nation was established by executive treaty in 1868. [145] Under the original treaty, the Navajo Nation contained 3,414,528 acres. [146] This acreage, however, only comprised 10% of the land the Navajos had originally inhabited. [147] Problems developed shortly thereafter as non-Navajos moved into the areas traditionally inhabited by Navajos. [148] To quell tensions between the Navajos and non-Navajos, various congressional acts and executive orders provided for the expansion of the Navajo's original land base. [149] As a result of these enactments, the reservation tripled in size over a sixty-year period. [150]

B. The Aneth Extension

One portion of land that was added to the Navajo reservation during this period was the Aneth Extension. [151] The Aneth Extension was a very small strip of land located in southeastern Utah. [152] Congress added the extension to the Navajo reservation in a 1933 Act. [153] Ironically, until the 1933 Act was passed, the majority of **[*577]** the Aneth residents had never lived on the Navajo reservation. [154]

The Aneth residents were primarily Navajos who had purposely separated themselves from other Navajo clans several years prior to those clans' removal to Fort Sumner. [155] In a narration by Howard W. Gorman on the Aneth peoples, Gorman stated:

As for T'aabiich'iidii (Aneth) in Utah, the Montezuma area, land north of the San Juan River and toward the Colorado River, a place now called Blanding, also Monticello, Utah, Navajos living in those areas weren't taken to Hweeldi [Fort Sumner] because they had their own leader. They called him Calgalia or K'aa yettii (Torch). He was the leader in the area around Moab, Utah, where the Colorado River and the San Juan River join. That was where many Navajos lived and had lands, and they never made the journey to Fort Sumner. [156]

Since this time, the two factions have never felt a very close kinship. [157] Indeed, over the years, these groups have had vastly divergent cultural experiences. As a result of these differences, the Aneth residents have been shunned and neglected by the Navajo Nation.

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[145] Treaty of June 1, 1868, U.S.-Navajo Nation, ***15 Stat. 667.***

[146] See Roessel, supra note 20, at 519.

[147] See id. at 520.

[148] See id.

[149] See id. Over a sixty year period various portions of land were both added to and subtracted from the Navajo Reservation. See id. For a thorough discussion of the various enactments and a visual map showing each enactment, see id.

[150] See id.

[151] See id.

[152] See id. Indeed, only 52,000 acres of land comprised the Aneth Extension. See *Texaco, Inc. v. San Juan County, 869 P.2d 942, 944 (Utah 1994).*

[153] See Locke, supra note 125, at 432. It should be noted that all the sources that this author has consulted, except one, have referred to the land granted under the 1933 Act as the Aneth Extension. Locke stated that this addition was called the Aneth Strip. See id. According to Locke, the Aneth Extension was granted to the tribe under a 1905 Act. See id. at 428. This grant of land, encompassing 56,953 acres due south of the Aneth Strip, was added to the reservation under the reign of Indian Commissioner, Francis E. Leupp. See id.

[154] See Hearings on S.3782, supra note 143, at 13.

[155] See, e.g., Gorman, supra note 33, at 41.

[156] Id. (alteration added).

[157] See Smith, supra note 24, at C1.

1. The Aneth Residents and Their Relocation to Southeastern Utah

The Aneth residents likely began residing on the north side of the San Juan River in southeastern Utah as early as 1823. [158] This country was virtually uninhabitable. [159] While white settlers refused to live there, [160] the Aneth dwellers, along with Paiutes and the Weeminuchie Utes, established new domiciles on this land.

Interestingly enough, all three tribal entities developed a unique **[*578]** culture as they began to coexist and interact. [161] The Paiutes helped to ease relations between the Utes and Navajos. [162] David Brugge, a renown historian, suggested that the Paiutes and the Navajos had developed a working relationship as early as 1823. [163] Indeed, the Paiutes had even helped several Navajo bands escape the wrath of mexican general Jose Antonio Vizcarra by allowing them to flee across the San Juan River. [164] "Later, many Paiutes [embraced] the Navajo language, style of dress, and practice of intermarriage." [165] **[*579]** During the 1860s, there was increased

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[158] See Robert S. McPherson, The Northern Navajo Frontier 1860-1900, at 11 (1988). Today, the area is known as the southern portion of San Juan County, Utah. Before the Navajos, Utes, and Paiutes ventured into the San Juan Region, the canyons and the mountains were inhabited by the prehistoric Anasazi Indians. The Anasazi emerged around 200 A.D. See Peg McEntee, San Juan County, Salt Lake Trib., Apr. 23, 1995, at A1. The Anasazis made exquisite baskets and pottery and had elaborate dwellings. See id. Sometime after1250 A.D., the Anasazi vanished. See id.

[159] See Hearings on S.3782, supra note 143, at 13.

[160] See id.

[161] See McPherson, supra note 158, at 11. Due to Navajo-Ute relations, the Navajos in this region have been looked down upon by other Navajo members. See id. Indeed, many of these Navajos married Paiutes. See id. Moreover, this region of the Navajo Nation was considered peripheral to the main Navajo culture, which led McPherson to state: The need for a history of the northern Navajo frontier has existed for a long time. Although writings about the Navajo are extensive, little detailed information has been published about the northern part of the reservation largely because it is considered peripheral to many of the tribe's major events. Id. at vii.

[162] See id. at 11.

[163] See id. Paiute activity may have been present in this area as early as 1300 A.D. See id. at 7. The Navajos entered this region for two reasons. See id. First, there were good grazing areas along the mountainsides. See id. Second, there were agricultural opportunities along the San Juan River. See id.

[164] See id. at 11. The San Juan River was considered the Navajos traditional northern boundary. See id. The Aneth Band of Navajos resided on the north side of the river, and it is quite probable that this band had first gone across the river in 1823. See id. Indeed, in later disputes, the Aneth Band claimed that they had been on the land since "time immemorial." *Young v. Felornia, 244 P.2d 862 (Utah 1952).* Jose Antonio Vizcarra, after Mexico gained independence from Spain, waged several massive assaults on the Navajos. See Brugge, supra note 126, at 495. Brugge stated: The opening of trade with the Anglo-Americans gave the New Mexicans better supplies of firearms, and for the first time since before the Pueblo Revolt the Navajos became a major target of the suppliers of captives for the slave trade. This was set off by the Jose Antonio Vizcarra campaign of 1823 and continued until the end of warfare in the 1860s. Id. During this period the Utes had also captured Navajos and Paiutes, and they would sell these captives into slavery. See McPherson, supra note 158, at 7.

[165] McPherson, supra note 158, at 11. The Paiutes "often established camps near Navajo settlements where trading and mutual support flourished." Id. During this same period, many could not distinguish between Utes and Paiutes in southeastern Utah due to intermarriage. See id. at 13. McPherson stated that this was due to "[s]light variations in language, larger variations in lifestyle, and overlapping subsistence areas, combined with the slave trade and intermarriage, [which] created a blending of the two groups [which] exists to the present day." Id. at 13. The reason that the Utes and Paiutes intermarried was because the predominate Ute in southeastern Utah was the Weeminuchie Ute group to whom the San Juan Band Paiute were related to through marriage. See id. The Weeminuchie Ute were peripheral to the main activity of other Ute bands. See id. The Utes and the Navajos were more hostile toward each other. See id. However, due to the Paiute-Ute intermarriage and the Navajo-Paiute intermarriage, the Navajos began to have family ties with the Utes. See id. Indeed, the Aneth band of Navajos even made peace with the Utes as early as 1858. See id. During this period, Utes were still raiding the Navajos and selling them to the Mexicans for slave labor. See id. After making peace with the Utes, the Aneth residents permanently moved "their whole band into the country north of the San Juan [River]." Id. (quoting Lieutenant Colonel D.S. Miles to Lieutenant John D. Wilkins, Nov. 23, 1858, Navajo Tribal Archives, Window Rock, Arizona).

trading between these tribal entities. [166] Although the Paiutes were gradually being assimilated into both groups, the Utes and Navajos generally remained separate. [167]

These relations existed among the tribal entities for almost twenty years. Thereafter, white landowners began encroaching upon their lands. Nevertheless, these tribal peoples sought to continue living in this area and began negotiating with various white settlers. For example, one white landowner issued illegal grazing passes to the Navajos and Paiutes. [168] According to this landowner, these passes enabled Indians to graze their flocks on the Mormon public domain that was located on the north side of the San Juan River. [169] As a result of white encroachment, competition for good grazing grounds grew fierce. [170] These relations continued to exist throughout the late 19th and early 20th centuries.

[*580]

2. The Aneth Extension is Added to the Navajo Nation

The Aneth Extension was added to the Navajo Nation in a 1933 Act. [171] This Act added both the Paiute Strip and the Aneth Extension to the Navajo reservation. [172] The Paiute Strip, which lies south of the San Juan River, had traditionally been considered peripheral Navajo country. [173] When it was determined in 1929 that there was not any oil on the Paiute strip, Congress held hearings to decide whether it should be added to the Navajo Nation. [174] "Few homesteaders were located within the area because of its . . . forbidding and sterile nature." [175] Hence, after the Navajos indicated that they would like to have this land reincorporated, the strip was temporarily withdrawn from the public domain in 1929. [176]

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[166] See id. at 15.

[167] See id. However, there is evidence that Utes did live among the Navajos and Navajos among the Utes. See id. These relations existed between 1860- 1880. See id. at 18-19. Before the roundup of the Navajos, the Utes and the Navajos were on adversarial terms due to United States Army maneuvering. See id. at 8. For example, in 1860, Colonel T. F. Faunteroy engaged 300 Utes to fight against the Navajos: [T]hey do not require pay as soldiers but only to be supplied a short time with provisions until they can get well into the Indian country . . . . It will at once have the effect to get the cooperation of a most valuable force and at the same time employ these restless people, who otherwise must foray upon our own settlements. Id. at 8. The Utes and their Paiute cousins had better relations. See id. at 15. However, the Utes thought that they were better than the Paiutes. See id. at 7. For example, the Utes had no problem selling Paiutes into slavery during the 1700s and 1800s. See id.

[168] See id. at 45. Henry L. Mitchell owned land on the northern side of the San Juan River in San Juan County, Utah. See id.

[169] See id.

[170] See id. at 51-53.

[171] See Act of March 1, 1933, ch. 160, *47 Stat. 1418, 1418-19,* as amended by Pub. L. No. 90-306, ***82 Stat. 121 (1968).***

[172] See id. This Act added 552,000 acres of land to the Navajo Reservation-500,000 acres in the Paiute Strip and 52,000 acres along the Utah- Colorado border known as the Aneth Extension. See id.

[173] See McPherson, supra note 158, at vii. San Juan Band Paiutes resided on this land as well. This Band has not been formally recognized; however, they are currently petitioning for formal recognition. See Isabel T. Kelly & Catherine S. Fowler, Southern Paiute, in 11 Handbook of North American Indians 392 (Warren L. d'Azevedo ed., 1986).

[174] See Kelly, supra note 85, at 126-27. In 1884, the Paiute Strip was withdrawn from the public domain and given to the Navajo Nation. See id. In 1892, "it was restored to the public domain." Id. at 126. In 1908, this land was withdrawn from the public domain and given to the Navajo Nation. See id. In 1922, when it was thought that oil existed on this land, it was restored to the public domain. See id. In 1929, oil producers determined that there was not any oil on the land. See id. Consequently, Congress began to hold hearings to determine if the land should be returned to the Navajo Nation. See id. at 127 n.45.

[175] Id. at 126.

[176] See id. at 126-27 (citing H.E. Williams, Report on Western Navajo, U.S. House Committee on Indian Affairs, Permanently Set Aside Lands in Utah as an Addition to the Navajo Reservation, H.R. Doc. No. 1883, at 2 (1933)).

The hearing to restore the Paiute Strip to the Navajo Nation was held on March 12, 1930. [177] Several United States senators questioned W.R. Johnson, a missionary who had lived in the area for thirty-three years, about the addition of the Paiute Strip to the Navajo Nation. [178] Mr. Johnson, who was asked by several Navajos to speak on their behalf, testified that these Indians needed the land for **[*581]** grazing and had continually used this land for that purpose. [179] Also, Mr. Johnson testified that to his knowledge there were no Indians crossing onto the north side of the San Juan River. [180]

After the hearings, H.E. Williams was instructed to determine if any Indians were residing on the north side of the river. [181] Therefore, he met with concerned citizens in Blanding, Utah. After their meeting, Mr. Williams met with the Governor of Utah and the Utah congressional delegation. At this meeting, it was determined that the Aneth Extension should be added to the Navajo Reservation with several qualifying provisions. [182]

Due to wrangling over the qualifying provisions, the lands were not automatically transferred to the Navajo Nation. [183] The transaction was finally completed in 1933 when the Governor of Utah approved a provision that allowed the royalties from any oil and gas discovered in the strip to be divided between the State of Utah and the Navajos with the former receiving 37.5% of the total. [184] Under the 1933 Act, Congress provided that if oil and gas were found on the Aneth Extension, 37.5% of all royalties would go to the State of Utah for "payment of the tuition of Indian children in white schools, and/or in the building or maintenance of roads across the lands . . . for the benefit of Indians residing therein." [185]

The Utah congressional delegation was already aware of the oil and gas discoveries that had been made in the Aneth region. [186] **[*582]** Therefore, after some coaxing, the delegation was able to implement legislation allowing the State of Utah to receive 37.5% of oil and gas royalties. [187] Further, the congressional delegation ensured that the State of Utah was granted the right to renounce reservation school tracts which effectively "freed

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[177] See generally Hearings on S. 3782, supra note 143.

[178] See id. at 1-2.

[179] See id. at 2-3. Mr. Johnson acknowledged that 700 Indians lived on the strip. See id. at 4. Moreover, he stated that some of these Indians were Paiute. See id. at 5.

[180] See id. at 10.

[181] See id. Blanding citizens wanted the right to graze their flocks on the south side of the river if the Navajos were going to graze their flocks on the north side. See id.

[182] See Kelly, supra note 85, at 127.

[183] See id.

[184] See id. at 127 n.46 (citing *47 Stat. 1418).* The provision mirrors the Hayden Bill of 1926. See id. This Act even has the requirement that the money received by Utah should be used on schools and roads for the Indians. See id. This Act was passed without any reservations from the Commissioner on Indian Affairs. See id.

[185] Locke, supra note 125, at 432. The 37.5% royalty was not pulled out of thin air. See Shepardson, supra note 134, at 626. Instead, this royalty provision was identical to the taxation rate levied by the 1927 Amendment. See id. For more on the 1927 Amendment, see supra notes 88-89 and accompanying text.

[186] See Locke, supra note 125, at 432. Unfortunately, all the cases discussing the 1933 Act have failed to mention this important factor. See *United States v. Jim, 409 U.S. 80, 81 (1972).* Oil and gas were discovered on the Aneth Extension after the passage of the Act. See id.

[187] See Locke, supra note 125, at 432. This legislative provision has ultimately been the source of much litigation. Certain courts have found that the legislative history of the 1933 Act demonstrated that the Act was passed for the benefit of the residents of the Aneth Extension. See *Pelt v. Utah, 104 F.3d 1534, 1542 (10th Cir. 1996).* Other courts, however, have found that the 1933 Act was passed to compensate the State for the loss of these oil revenues and increased need for governmental services. See Bigman v. Utah Navajo Development Council, Inc., No. C-77-0031, slip op. at 4 (D. Utah, September 25, 1978).

Utah from the responsibility of providing schools for the Indians living [on the Aneth Extension] while still allowing the state" to collect a percentage of Navajo oil and gas royalties for that purpose. [188]

C. The Aneth Extension and the State of Utah

1. The Aneth Extension and the State of Utah: 1933-1972

The first dispute that arose involved the rights of Aneth residents to graze their flocks outside the Aneth Extension. These residents claimed that they had a right to leave the Aneth Extension because they had been grazing on adjoining lands "for a time beyond the memory of man." [189] In United States v. Hosteen Tse-Kesi, [190] the United States brought suit to keep these Indians off the extension. [191] However, the court found that holding in favor of the United States would force many Indians off their grazing lands and out of their homes. [192] As a result, the Hosteen court concluded that it had no authority to restrain these people to the reservation lands because it could not enforce such an order. [193]

This same issue was relitigated two years later. In Young v. **[*583]** Felornia, [194] the court held that the Aneth Navajos were restricted to this land under the Treaty of 1868. [195] The court reasoned that their claimed Navajo membership bound them by treaty language stating that the tribe "will relinquish all right to occupy any territory outside their reservation." [196] The Young decision forced the Aneth dwellers into abject poverty since Aneth Extension lands could only be used to sustain flocks during the winter. [197]

In the early 1950s, substantial amounts of oil and gas started being generated on the Aneth Extension. [198] Furthermore in 1959, the State of Utah implemented a commission to govern royalties produced by the Aneth Extension. [199] Shortly thereafter, in Sakezzie v. Utah Indian Affairs Commission, [200] residents of the Aneth Extension sued the commission for improper use of funds. [201] These residents wanted to use the funds to buy

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[188] Locke, supra note 125, at 432-33.

[189] *93 F. Supp. 745, 746 (D. Utah 1950),* rev'd, *United States v. Hosteen Tse-Kesi, 191 F.2d 518 (10th Cir. 1951);* see also *Hatahley v. United States, 351 U.S. 173, 174 n.2 (1956).* After the court of appeals reinstated the complaint, the district court again dismissed the complaint, this time because it was moot due to the Indians moving to the reservation and off the public lands. See id.

[190] *Hosteen Tse-Kesi, 93 F. Supp. at 745.*

[191] See *id. at 746.*

[192] See id.

[193] See *id. at 746-47.*

[194] *244 P.2d 862 (Utah 1952).*

[195] See *id. at 865.*

[196] Id.

[197] See *Sakezzie v. Utah Indian Affairs Comm'n, 198 F. Supp. 218, 220 (D. Utah 1961).*

[198] See *id. at 219.*

[199] See *id. at 219-20.*

[200] *215 F. Supp. 12 (D. Utah 1963).*

good summer grasslands for year- round support. [202] The State would not use the funds to purchase such land. [203] Instead, the State spent the funds elsewhere. [204]

The court held that the State must use the funds for authorized purposes only. [205] Moreover, the court asserted that because the State occupies a trust relationship, the fund is "not a public fund, and that it may not be used for State, Federal or public purposes or to discharge general governmental duties." [206] Finally, the court noted that the State should not necessarily adhere to the Navajo Nation's interests because these interests have "been in conflict with those of **[*584]** the Indians residing upon the Aneth Extension." [207] However, the State failed to follow the above order. Hence, in 1963, these same Aneth residents petitioned the court for supplemental relief regarding its prior holding. [208] The Sakezzie court once again reiterated the State's trusteeship role. [209] Nevertheless, the State claimed that it was spending the funds as wisely as possible. [210] In 1962, United States Senator Wallace F. Bennet, on behalf of the Utah commission and as a result of the initial Sakezzie holding, introduced a bill that would amend the 1933 Act. [211] Under this amendment, Senator Bennet proposed that Aneth royalties should be disbursed throughout northern portions of the Navajo Nation. [212] The commission argued that this provision would enable it to use the monies more effectively since the Aneth Extension was so sparsely settled. [213] The Navajo Nation fully supported the measure. [214] In 1968, Congress amended the 1933 Act and required the State of Utah to use the royalty proceeds to provide "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." [215] Congress additionally stated that the Aneth Extension Indians did not have a vested property right in the fund because "it is settled law that individual Indians have no vested right in tribal income." [216]

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[201] See id. at 221. These improper uses included: a $ 78,000 expenditure to pipe water to a white man, a $ 27,000 expenditure for an airport, a $ 2,125 payment "to the Utah State Land Board as rent for office space," a $ 7,750 payment to commission employees, a $ 3,990 expenditure to pay employees' travel expenses, and a $ 347 expenditure to pay for employees' telephone calls, printing and incidental expenses. Id. at 220-21.

[202] See id. at 221. The State did not want to do this because they were unsure of the profitability of the operations. See id.

[203] See id.

[204] See id. at 220-21.

[205] See id. at 224.

[206] Id.

[207] Id. at 221.

[208] See *Sakezzie v. Utah State Indian Affairs Comm'n, 215 F. Supp. 12 (D. Utah 1963).*

[209] See *id. at 14.*

[210] See *id. at 14-16.*

[211] See *id. at 19 n.12.*

[212] See *id. at 20.*

[213] See id.

[214] See id.

[215] Navajo Indian Reservation-Use of Funds, Pub. L. No. 90-306, ***82 Stat. 121 (1968).***

[216] H.R. 1324, 90th Cong., 1st Sess., at 3 (1967). Congress correctly stated that Indians do not have a vested right in tribal income. However, this income was not tribal in nature. Instead, this income was designed to benefit the individuals living on the Aneth Extension. Congress can change disbursement patterns, but Congress is also bound by the Fifth Amendment Takings Clause. See, e.g., Newton, supra note 46, at 247. The Aneth Indians' vested property right interest should have been protected by this clause.

The Aneth Extension residents challenged this provision contending that the 1968 Act was an unconstitutional taking of property without just compensation. [217] However, the Supreme Court, in **[*585]** United States v. Jim, held that Congress could alter the royalty disbursement scheme. [218] Justice Douglas dissented arguing:

The occupants of the Extension have been a separate community for many generations. Their claim of right by continuous possession precedes the transfer of title by the United States Government. Congress made provision for the Secretary of the Interior to place other tribes on the land and, if he did, their claim would be based on territory, not membership. Since the rights were vested in those who lived on the Aneth Extension, I do not see how they can be extended to outsiders. [219]

Unfortunately for the residents of the Aneth Extension, Justice Douglas's opinion was not that of the majority. Prior to the passage of the 1968 provision, the State of Utah, Congress, and the Navajo Nation all asserted that funds could be used more wisely if they were disbursed throughout San Juan County. Indeed, these governmental entities reasoned that such a disbursement pattern would allow a larger number of Navajos to benefit from the Aneth Extension's royalty proceeds. [220] Hence, according to these governing entities, the amendment was needed to ensure that the funds were spent more efficiently.

2. The Aneth Extension and the State of Utah: 1973-1997

Nevertheless, as before, the funds collected under the royalty provision never reached the residents of the Aneth Extension or other Utah Navajos. Indeed, the State of Utah misspent 61 million dollars in royalty proceeds between 1960-1990. [221] However, the 1991 audit revealed that the State actually misspent 51.5 million dollars. [222] According to the audit, the Utah Navajo Fund was used by various individuals for personal use. [223] These individuals used the funds to purchase new cars, finance businesses that failed, pay credit card debts, grant cash bonuses, and employ family members. [224] The audit also revealed that the State had spent money on various **[*586]** enterprises that failed shortly after opening. [225] The State revealed that it had operated a tribal boat marina at Lake Powell, a shopping mall in West Jordan, and a government social services office seventy miles off the reservation. [226] Finally, the audit also noted that the State had used certain royalty proceeds to build a garment factory in New Mexico that never opened. [227]

Since these discoveries of abuse, the State of Utah has actively sought to have itself removed as trustee. [228] Utah's prior governor, Norman H. Bangerter, argued that "the state has never been effective in managing the trust because of conflicts with Navajos." [229] Further, he declared that "'[t]he State cannot exercise its duties as a trustee

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[217] See *United States v. Jim, 409 U.S. 80 (1972).*

[218] See *id. at 82.*

[219] *Id. at 86* (Douglas, J., dissenting).

[220] See *id. at 85.*

[221] See *Williams, supra* note 24, at A18.

[222] See Smith, supra note 24, at C1.

[223] See id.

[224] See id.

[225] See id.

[226] See id.

[227] See id.

[228] See *Williams, supra* note 24, at A18.

without taking away the self- determination of the Navajo people.'" [230] Nevertheless, the Aneth residents, as well as other Utah Navajos, have actively tried to ensure that the State of Utah, and not the Navajo Nation, controls and manages their trust fund. [231]

In 1996, the State of Utah reenacted royalty management provisions [232] almost identical to prior royalty provisions that had been repealed a year earlier. [233] These provisions required the trust administrator to follow accountability procedures, [234] required the creation of a state trust fund, [235] and developed built-in oversight responsibilities of the fund. [236] Hence, having not been relieved of their trustee status, the State of Utah reenacted royalty management provisions in an effort to prevent mismanagement of the tribal royalty proceeds. [237]

[*587]

Between 1973 and 1997, beneficiaries of the fund have twice brought suit alleging that the State of Utah has mismanaged their royalty proceeds. In Bigman v. Utah Navajo Development Council, Inc., [238] beneficiaries brought suit for such misuse. This suit was subsequently terminated by consent decree after the State agreed to give an accounting of the funds spent. [239] The Bigman court was unfavorable to the beneficiaries' claim. Indeed, it even incorrectly reasoned that the 1933 Act was passed "[i]n order to compensate the State for the resulting loss of tax revenues and increased need for governmental services." [240]

Unfortunately, just like it did after Sakezzie, [241] the State continued to squander the royalty proceeds of Utah Navajos. In 1992, five beneficiaries, in Pelt & the Navajo Nation v. Utah, [242] brought suit against the State of Utah for the recovery of misused royalty funds. [243] The beneficiaries claimed that the 1933 Act, in its 1968 amended

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[229] Id.

[230] Id.

[231] See Smith, supra note 24, at C1.

[232] See Utah Code Ann. 63-88-101, -102, -105 (Michie Supp. 1997).

[233] Royalty management provisions were initially enacted in 1959. In 1992, the Utah legislature passed a provision that would repeal this section in 1995. These statutes were repealed in 1995. However, the Utah legislature reenacted these provisions the very next year.

[234] See 63-88-105.

[235] See 63-88-102.

[236] See id.

[237] See Utah Code Ann. 9-11-107(5) (Michie Supp. 1997). The State also passed another statute designed to help Utah Navajos. See id. Under this statute, Utah Navajos may receive loans and grants under the Revitalization Fund, if and only if, "the Navajo Nation, the Navajo Trust Fund, San Juan County, the state, the federal government, or other private or public organizations . . . provide[] matching monies or in-kind services." Id.

[238] No. C-77-0031, slip op. at 4 (D. Utah, September 25, 1978).

[239] See id.

[240] Id.

[241] See supra notes 200-16 and accompanying text.

[242] *104 F.3d 1534 (10th Cir. 1996).*

[243] See *id. at 1537.* These beneficiaries were joined by the Navajo Nation. See id. The Navajo Nation asserted that it could stand in place of the United States to enforce the 1933 Act. See *id. at 1537.* The tribe asserted that the State of Utah had breached its common law fiduciary duty and had failed to account for its administration of royalties. See *id. at 1539.* However, the district court held that the tribe, like the beneficiaries, did not possess a valid claim against the State of Utah. See *id. at 1539-40.*

version, implied a cause of action for breach of common-law fiduciary duty. [244] Additionally, the beneficiaries maintained that the State also failed to cooperate with them when disbursing said royalties. [245] The State of Utah subsequently sought summary judgment for failure to state a claim. [246] The district court held that the beneficiaries did not have a cause of action against the State reasoning that neither the 1933 Act nor its 1968 Amendment created a private right of action. [247]

The beneficiaries subsequently appealed the district court's **[*588]** holding. The appellate court reversed the district court's ruling [248] and remanded the case for further proceedings. [249] The appellate court held that the beneficiaries could assert a breach of fiduciary duty claim. [250] The court acknowledged that the 1933 Act did not affirmatively grant the beneficiaries relief, [251] but the court determined that the beneficiaries could seek relief under an implied right of action. [252]

The appellate court acknowledged that the 1933 and 1968 Acts were passed for the benefit of the beneficiaries. [253] The court reasoned that the funds were set aside for the benefit of the Utah Navajos. [254] Indeed, the court noted that "the nature of the Act's intended operation along with subsequent court cases . . . seem to indicate that the fund was to operate with trust-like rights and responsibilities-including the beneficiaries' rights to bring suit to address breaches of fiduciary duty." [255] Furthermore, the court asserted that Congress, by enacting the 1968 amendment, codified the right to bring a breach of trust claim. [256] As a result, the court, in light of United States v. Mitchell, [257] reasoned that "the beneficiaries would have a cause of action against the State in the event of a breach of that trust." [258]

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[244] See *id. at 1540.*

[245] See *id. at 1539.*

[246] See id. The State claimed that "Plaintiffs did not have a private cause of action, did not have standing to bring this action, and that Plaintiffs had failed to join indispensable parties, namely, the United States and the Navajo Tribe." Id.

[247] See *id. at 1540.*

[248] See *id. at 1545.* The tribe did not have any ownership interests in the claimed proceeds. See id.

[249] See id.

[250] See *id. at 1544.*

[251] See *id. at 1541.*

[252] See *id. at 1544.*

[253] See *id. at 1541.*

[254] See *id. at 1542.* The court further stated that "[i]n light of the Act's history, it can hardly be argued that the Aneth Navajos were not one of the primary beneficiaries of the Act." Id.

[255] Id. (citations omitted).

[256] See *id. at 1544.* The appellate court reasoned that the 1968 Amendment established three principles. See id. First, it expanded the class of beneficiaries. See id. Second, it codified a portion of Sakezzie by requiring an annual report of expenditures to the beneficiaries. See id. Finally, by not explicitly restricting the right of beneficiaries to bring a breach of trust suit against the State, Congress "implicitly approved of the cause of action by failing to restrict it in the 1968 Act." Id.

[257] See supra notes 117-22 and accompanying text for more on United States v. Mitchell. The appellate court, rejecting the district court's reasoning, stated that Mitchell held that a claim for a breach of fiduciary duty may lie where the government exercises pervasive control over Native American assets. See *Pelt, 104 F.3d at 1543.*

The appellate court, after determining that the beneficiaries had **[*589]** stated a claim for common-law breach of fiduciary duty, remanded the case for retrial. [259] The beneficiaries are claiming that the State squandered between 52 million dollars and 100 million dollars. [260] As a result of the appellate court's unanimous three-judge decision, the Utah Attorney General's Office has petitioned the entire Court of Appeals for the Tenth Circuit for reconsideration of the issue. [261]

D. The Navajo Nation and the Aneth Extension

Today, the Navajo Nation covers 25,351 square miles in eleven counties in the States of Arizona, New Mexico, and Utah. [262] The Navajo Nation is the largest Indian tribe in the United States. [263] The Navajo Nation is divided into nineteen chapter districts. [264] These political subdivisions span state and county lines. [265] Communities in these districts are extremely rural and isolated. [266] Indeed, the Navajo population is spread throughout the region, with extended family groups living in isolated clusters of a few hogans and mobile homes, occasionally giving way to small communities that have grown around schools or other government facilities. [267]

The Navajo Nation comprises the poorest parts of the poorest counties in Arizona, New Mexico, and Utah. Navajos living in San Juan County, Utah are among the poorest residents living on the reservation, [268] and some would argue that the residents of the Aneth Extension are the poorest within San Juan County. [269] For example, most of the Aneth residents live in either rag-tag governmental tract houses or traditional round earthen hogan dwellings. [270] Moreover, 60% of these inhabitants do not have running water or electricity. [271] Furthermore, almost 95% of these inhabitants have problems reading **[*590]** and writing. [272] Not surprisingly, these findings have led some to conclude that the Aneth residents are the most impoverished people in the entire Navajo Nation. [273]

Over the years, the Navajo Nation has admitted that it has been historically lax in investing scarce tribal funds in the San Juan section of the reservation for such services as roads and power lines. [274] Tribal leaders have even

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[258] *Pelt, 104 F.3d at 1543.*

[259] See *id. at 1545.*

[260] See Smith, supra note 24, at C1.

[261] See id.

[262] See Randolph Barnhouse, Memorandum on the State of the Navajo Nation 1 (Bureau of Indian Affairs, 1994) (on file with author).

[263] See id.

[264] See Shepardson, supra note 134, at 627.

[265] See id.

[266] See Barnhouse, supra note 262, at 1.

[267] See id.

[268] See *Williams, supra* note 24, at A18.

[269] See id.

[270] See Lofholm, supra note 36, at A16.

[271] See id.

[272] See *Williams, supra* note 24, at A18.

[273] See id.

[274] See Smith, supra note 24, at C1.

stated that they were unwilling to "spend scarce tribal funds in San Juan County because the Utah Navajos have their own source of money-the Utah Navajo Trust Fund." [275] Indeed, between 1960-1990, the State of Utah received 61 million dollars in royalty proceeds and squandered at least 52 million dollars. [276] However, during this same period, the Navajo Nation has received approximately 85 million dollars in royalty proceeds. [277]

When the Navajo Nation receives these royalties, it divides them among their nineteen districts. [278] The delegates and the superintendents of each district then decide how these monies should be spent. [279] The Utah Navajos are represented by four different districts. [280] The Aneth Extension is in the Window Rock District (District twelve). [281] The Window Rock District lies primarily in New Mexico along the Arizona-New Mexico border. [282]

The Window Rock District has historically neglected the residents of the Aneth Extension. [283] In January 1997, the Utah Navajos sealed off two entrances to the McElmo production facility for Mobil Exploration and Producing Corporation near the Aneth Extension for 72 hours. [284] Mobil Corporation was forced to shut down 63 of its 500 wells. [285] During the shut down, Aneth chapter officials were **[*591]** able to reach an agreement with Navajo Nation officials. [286] Under this agreement, the Navajo Nation stated that it will ensure that the Aneth residents receive additional royalty proceeds from the Window Rock District. [287] At the present time, the Window Rock Navajos receive two-thirds of the royalties from the Aneth Extension. [288] However, exact figures on the amount of additional royalty proceeds that will flow to the Aneth Residents as a result of this agreement was not disclosed. [289]

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[275] Id.

[276] See *Williams, supra* note 24, at A18.

[277] See id. Overall, between 1960-1990, the Aneth Extension has generated 137 million dollars. See id.

[278] See Shepardson, supra note 134, at 625.

[279] See id.

[280] See id. at 627.

[281] See id.

[282] See id.

[283] See Phil Mueller, Oil's Well That Ends Well As Tepee Talks Pay Off; Tepee Talks Lead To Pact On Production, Salt Lake Trib., Jan. 13, 1997, at A1.

[284] See id.

[285] See id.

[286] See id. Aneth residents also reached an agreement with Mobil Oil. See id. Indeed, Mobil officials agreed that the company would "underwrite a third of the salaries for two Navajo public communication specialists in Aneth and Montezuma Creek." Id. These specialists will inform Utah Navajos of developments in the oil fields. See id. Mobil additionally pledged to continue "following Navajo hiring and employment law but would not agree to rehire nine Navajo workers whose positions the company plans to eliminate." Id. Finally, Mobil agreed to send any disputes to the "Navajo tribe's 'peacemaker' court system," which is equivalent to a "community-level conflict-resolution process but with the force of law." Id. This was not the first time Aneth residents have shut down an oil companies production facilities. See id. In March 1978, protesters shut down 800 wells for two weeks in an effort to "call national attention to pollution, employment discrimination, alleged lax safety standards and failure to invest in the local economy." Id. After the dispute was resolved, an agreement was reached whereby the oil companies agreed to hire more Navajos. See id. In December 1993, the Aneth Navajos successfully shut down exploration testing near Aneth. See id. In return, the Bureau of Land Management agreed to impose an informal moratorium on drilling in the area. See id.

[287] See id.

[288] See id. If the Navajo Nation has received 85 million dollars in royalty proceeds between 1960-1990, the Window Rock district has received approximately 57 million dollars. See id.

[289] See id.

The Window Rock District received approximately 57 million dollars between 1960-1990. Yet, none of these monies ever reached the residents of the Aneth Extension. This has led many residents to conclude that if the Utah Navajo Trust Fund is handed over to the Navajo Nation, those funds would not return to Utah.

V. Who Should Govern the Aneth Extension's Mineral Royalties?

A new scheme of governance needs to be embraced to prevent further grievances from being perpetuated against the Utah Navajos. But who is in the best position to protect their interests-the State of Utah, the Navajo Nation, or the Utah Navajos? Due to the quagmire **[*592]** of competing interests between the aforementioned, this Part will evaluate who should govern the Utah Navajo's portion of resource royalties generated from the Aneth Extension. [290]

The Aneth residents, the original beneficiaries of the 1933 Act, have tried to govern their own peoples. [291] The Aneth residents, who live on the north side of the San Juan River, quite likely entered this area as early as 1823. [292] By 1858, these residents had befriended the Utes, the Navajos' bitter enemy, and permanently established their homes on the north side of the San Juan River. [293] As a result, these residents, under the leadership of Calgalia (Torch), never made the journey to Fort Sumner with the other Navajos. [294]

Once on the north side of the San Juan River, the Aneth residents developed a culture of their own. [295] These residents interacted with the Paiutes and the Utes. [296] Some Aneth residents even married Paiutes. [297] As a result, although the Aneth residents have referred to themselves as Navajos, they are distinct from the Arizona-New Mexico Navajos **[*593]** because they have resided in an area that has been peripheral to the dominant Navajo culture. [298]

While living north of the San Juan River, these people have tried to avoid white encroachment. Indeed, their leader, Calgalia (Torch), initially moved the Aneth people to this region to be free from white encroachment. [299] Since

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[290] This article does not consider whether the Utah Navajos should receive all the royalties obtained from their land. One could argue that the Utah Navajos have incorrectly been deemed part of the Navajo Nation due to the cultural differences between the two. However, to achieve separate tribal status, an unacknowledged tribe must fulfill the seven requirements set out in 25 C.F.R. 83.7(a)-(g) (1996). The process of complying with the seven requirements is extremely difficult. The most forbidding requirement for the Utah Navajos would be "establishing that the group has maintained tribal political influence or other authority over its members as an autonomous entity throughout history." 25 C.F.R. 83.7(c) (1996). Additionally, the Navajos, wanting to keep their portion of the profits obtained from the Aneth Extension, would lobby adamantly against the Utah Navajos receiving separate tribal status. Complying with 25 C.F.R. 83.7 and overcoming fierce lobbying by the Navajo nation would more than likely sink any attempts by the Utah Navajos to achieve their own separate tribal status.

[291] See supra notes 164 & 167 and accompanying text. As previously mentioned, the Aneth residents crossed onto the north side of the San Juan River with the help of the Paiutes. See supra note 163. Land north of the San Juan River has been considered outside Navajo Country. See supra note 167.

[292] See McPherson, supra note 158, at 11; see also supra note 164.

[293] See McPherson, supra note 158, at 13; see also supra note 164.

[294] See Gorman, supra note 33, at 41; see also supra note 142 and accompanying text.

[295] See McPherson, supra note 158, at 11-13; see also supra notes 165 and accompanying text.

[296] See McPherson, supra note 158, at 11-13; see also supra notes 165 and accompanying text.

[297] See McPherson, supra note 158, at 13; see also supra note 165; United States v. Jim, 409 U.S. 80, 83 (1972) (Douglas, J., dissenting). Justice Douglas stated that "[t]he Indians in the Aneth Extension number about 1,500 people who are primitive Navajos with some mixture of P[a]iute blood." Id. at 84.

[298] See McPherson, supra note 158, at vii.

[299] See Goldtooth, supra note 139. See generally Gorman, supra note 33.

white encroachment, these individuals have struggled to survive. [300] Yet, these residents have remained strong over the years and have battled all governing entities for the right to enjoy their land's precious resources and any profits derived therefrom. [301] Unfortunately, the Aneth Indians have had little to no success. [302]

In 1968, Congress amended the 1933 Act and provided that all Navajos living within Utah should be afforded the right to benefit from the royalty proceeds derived from the Aneth Extension. The parties in favor of the amendment claimed that broadening the class of recipients would better enable the State of Utah to use the royalty proceeds to help the Navajos residing within the State. [303] However, the funds never reached the residents of the Aneth extension or the remaining Utah Navajos. [304] Hence, the query remains as to what governing entity is in the best position to ensure that the Utah Navajos receive what rightfully belongs to them?

A. The State of Utah

Between 1960-1990, the State received 61 million dollars in royalty proceeds and squandered at least 52 million dollars. [305] Some residents have claimed that the State squandered at least 100 million dollars in royalty proceeds since the early 1950s. [306] The **[*594]** State recently reenacted the Utah Navajo Trust Fund to protect against royalty mismanagement. [307] But is that enough? After all, fraudulent activity has continually occurred under substantially similar, if not identical, provisions. [308]

Moreover, long-standing complaints of royalty abuse and racism within San Juan County, Utah has "turned the county into a tempest of lawsuits, Federal investigations and even a United Nations inquiry." [309] In commenting on working with county officials, Mark Maryboy, the Navajo Nation District representative and the San Juan County Commissioner, has stated that "'[i]t's obvious we can't work together; there is racism at work here.'" [310] The county has since hired the University of Utah to study the possibility of breaking the county into two. [311] However, this

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[300] See supra notes 158-261 and accompanying text.

[301] See supra notes 158-261 and accompanying text.

[302] See supra notes 286-87 and accompanying text. It is noted that the Aneth residents seem to have won a major battle with the Navajo Nation when the Nation pledged to spend more money in the Aneth region. Furthermore, the Aneth residents, as beneficiaries of the Utah Navajo Trust Fund, seem to have won a major battle in the Courts. But see supra text accompanying notes 289-90. However, these residents have yet to see any money. See supra text accompanying notes 289-90.

[303] See supra notes 213-16 and accompanying text.

[304] See supra notes 221-61 and accompanying text.

[305] See *Williams, supra* note 24, at A18.

[306] See Smith, supra note 24, at C1.

[307] See supra notes 221-61 and accompanying text.

[308] See *Williams, supra* note 24, at A18.

[309] Lofholm, supra note 36, at A16. San Juan County is Utah's largest county. See McEntee, supra note 158, at A1. The county has a population of 13,000 or about 5,500 Anglos and 6,900 Navajos. See id. Racism has existed since the Mormons arrived in southeastern Utah in the 1880s. See Lofholm, supra note 36, at A16. When the Mormons encountered the Indians residing in southeastern Utah, "they believed [them] to be [the] descendants of an ancient evil tribe." Id.

[310] Loftholm, supra note 36, at A16 (quoting Mark Maryboy). Mr. Maryboy was elected as San Juan County Commissioner in 1984 after the Justice Department forced San Juan County officials to create a majority Navajo district. See id.

[311] See id. Such a split has led some to state that it "would let the Navajos deal in their own way with both tribe and state with the help of Commissioner Mark Maryboy . . . [because] '[i]f they were a county they could take their whole budget to Window Rock and get a match, especially if Mark's around.'" McEntee, supra note 158, at A1.

split is unlikely because breaking the county in half "would require a tortuous untangling of oil and gas royalties, Navajo Nation trust funds, water rights and ancestral lands." [312]

As a result of repeated problems between the State, the county, the Navajo Nation, and the Utah Navajos, the State has actively sought to have itself removed as trustee of the Utah Navajo Trust Fund. The State has even advocated that the Navajo Nation should control the fund. [313] Former Utah Governor Norman H. Bangerter stated that "'[t]he state cannot exercise its duties as a trustee without **[*595]** taking away the self-determination of the Navajo people.'" [314] Yet, in opposition to this proposal, the Utah Navajos have tirelessly tried to ensure that the State of Utah continues to manage their royalty proceeds. [315] Indeed, these residents fear that they will never receive any royalty proceeds if the trust fund were to be managed by the Navajo Nation. [316] This fear raises an obvious query-why do the Utah Navajos fear the Navajo Nation?

B. The Navajo Nation

There exists a terrible friction between the Navajo Nation and the residents of the Aneth Extension. This is a feud that has been scarcely recorded [317] but has been predominant between the two cultures. The basis of the feud developed because the Aneth residents, as well as many of the Utah Navajos, did not go to Fort Sumner, remained separate from the Arizona and New Mexico Navajos, intermarried with Paiutes, and developed their own separate culture. [318] As a result of this friction, the Utah Navajos have been severely neglected by the Navajos leaving these residents to be among the poorest, if not the poorest in the Navajo Nation. [319]

Under the 1933 Act, the Navajo Nation is entitled to receive 62.5% of the royalties. Between 1960- 1990, the Navajo Nation received approximately 85 million dollars in royalty proceeds. [320] Correspondingly, the Window Rock District has received 57 million dollars in royalty proceeds. [321] Yet, the residents of the Aneth Extensions have received none of these proceeds. Indeed, it was only recently and under intense circumstances that Navajo Nation President Albert Hale promised that the Window Rock District would begin spending royalty proceeds in this area. [322] However, the Navajo Nation Council recently passed legislation restricting President Hale's powers and such legislation could have an adverse impact on the **[*596]** agreement reached between Hale and the Aneth chapter officials. [323] Since the residents of the Aneth Extension and the remaining Utah Navajos have been

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[312] Lofholm, supra note 36, at A16. Further, such a split is undesirable for the anglo portion of San Juan County. San Juan County's biggest industry is oil and gas. See McEntee, supra note 158, at A1. This industry accounts for 70% of the county's state-assessed valuations and 30% of the 70% comes from the reservation fields. See id.

[313] See *Williams, supra* note 24, at A18.

[314] Id.

[315] See Smith, supra note 24, at C1.

[316] See id.

[317] See McPherson, supra note 158, at vii. Indeed, this lack of recording has been due to the fact that the Aneth area is seen as peripheral to the main Navajo culture. See id.

[318] See supra notes 153-289 and accompanying text.

[319] See *Williams, supra* note 24, at A18.

[320] See supra note 288.

[321] See supra note 289.

[322] See supra notes 287-93 and accompanying text.

[323] See Denise Becenti, Navajo Council Makes Bid For Some of Hale's Authority, Salt Lake Trib., Mar. 17, 1997, at A6. The 88-member Navajo Council passed legislation to take full control of the tribe's Office of Controller. See id. The Council passed such legislation after allegations contended President Hale was abusing his authority in the office. See id. The President's office is charged with administering the budgets of the different departments. See id. Mark Maryboy sponsored the legislation and later

severely neglected by the Navajo Nation, they are justified in fearing that they will never see any proceeds if their Trust Fund is given to the Navajos.

C. The Residents of the Aneth Extension

The initial Act governing the royalty proceeds derived from the Aneth Extension was authored during a very paternalistic era. [324] Shortly thereafter, Congress, reversing its prior thought, passed the Indian Reorganization Act. Under the Act, Congress sought to integrate tribal governing entities into society. [325] To facilitate this, Congress passed legislation designed to protect a tribal government's right to self-government. [326] Congress passed additional laws, such as the Mineral Leasing Act, to provide tribal governmental entities with the needed funds to facilitate economic self-sufficiency, thereby facilitating political strength and power. [327]

The concept of Indian self-government was reaffirmed and strengthened by President Nixon. [328] Nixon argued that federal legislation should no longer treat the Indians in a paternalistic manner. [329] Instead, Nixon urged Congress to pass laws designed to facilitate tribal self-determination. [330] Nixon clarified his concept of self-determination by explaining:

[S]elf-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in **[*597]** fact, that is the only way that self-determination can be effectively fostered. This then, must be the goal of any new national policy toward the Indian people: to strengthen the Indians' sense of self-autonomy without threatening his sense of community. [331]

In the past, we have often assumed that because the government is obligated to provide certain services for Indians it therefore must be administer those services . . . . There is no necessary reason for this assumption. Federal support programs for non-Indian communities-hospitals and schools are two ready examples-are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the federal government.

Nor should they lose federal money because they reject federal control. [332]

In light of these ideals, President Nixon urged Congress to pass measures designed to facilitate real political autonomy for the Indians. [333] Such autonomy, Nixon asserted, would allow Indians to develop their own potentials in their own ways. [334] Shortly thereafter, Congress passed many acts designed to give tribal governments more power over local matters. [335] Since this time, President Nixon's Indian policy has remained the federal

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stated "'[w]e [the Budget and Finance Committee] just want to ensure the Navajo Nation funds are safeguarded.'" Id. However, other councilmen took objection and at least one councilman argued "'[i]f we are going [to change] this, we should come back with a resolution and do away with the three- branch government.'" Id.

[324] See supra notes 52-56 and accompanying text.

[325] See supra notes 58-65 and accompanying text.

[326] See supra notes 58-65 and accompanying text.

[327] See supra notes 58-65 and accompanying text.

[328] See supra notes 66-70 and accompanying text.

[329] See supra notes 66-70 and accompanying text.

[330] See supra notes 66-70 and accompanying text.

[331] Gross, supra note 66, at 129.

[332] Id. at 131.

[333] See id. at 129.

[334] See id.

government's guiding principle. [336] Indeed, as recently as 1995, the Department of Justice stated "[t]he Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance." [337] Furthermore, when tribal governmental issues abound, federal agencies must deal with Indian tribes on a government-to-government basis. [338]

As aforementioned, the 1933 Act governing the royalty proceeds obtained from the Aneth Extension was enacted during the paternalistic Assimilation Era. During this era, mineral leasing was allowed because Congress believed that non-Indian development of natural **[*598]** resources was necessary to ensure the efficient use of the land. [339] Later, Congress authorized state taxation on any mineral resources obtained from Indian land. [340] In 1934, Congress began promoting tribal self-government and passed the Mineral Leasing Act of 1938 to facilitate such. [341] The 1938 Act sought to ensure that Indian tribes received the maximum monetary benefit from the natural resources located on their land and that Indian tribes actively participate in developing their resources. [342] Nevertheless, Congress failed to amend the 1933 Act governing the Aneth Extension-leaving the Aneth residents governed by a paternalistic act and denying them a chance to receive the maximum monetary benefit from the natural resources located on the land and to participate in the development of those resources. The Aneth Indians were left warped in time only to be governed by paternalistic policies-the same policies that had decimated other tribes [343] and the same policy that continues to decimate the Aneth Indians.

Ironically, when the 1933 Act was amended in 1968, it was enacted during the waning days of the Termination Era. [344] The 1968 amendment, which was initially introduced in 1962, did not conform the 1933 Act to the mandates of the 1938 Mineral Leasing Act. Rather, the Act was amended purely to broaden the class of recipients entitled to benefit from the oil and gas resources on the **[*599]** Aneth Extension. The 1933 Act, as amended in 1968, can be viewed as a 64-year-old Act that has kept the Aneth Indians and the remaining Utah Navajos in a long-since repudiated Paternalistic Era.

If Congress wanted to facilitate tribal self-determination on the Aneth Extension, it should amend the 1933 and 1968 Acts by allowing the beneficiaries of the Utah Navajo Trust Fund to govern their own royalty proceeds. Such control would allow these Indians to determine how to use their own royalty proceeds. Moreover, this new autonomy would allow the Utah Navajos to use the royalty proceeds to develop their own potentials in their own ways. Indeed,

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[335] See supra note 68.

[336] See supra note 70 and accompanying text.

[337] Janet Reno, A Federal Commitment to Tribal Justice Systems, 79 Judicature 113 (1995).

[338] See William J. Clinton, 1 Pub. Papers 800-03 (1994).

[339] See supra notes 80-106 and accompanying text.

[340] See supra notes 80-106 and accompanying text.

[341] See supra notes 80-106 and accompanying text.

[342] See supra notes 80-106 and accompanying text.

[343] See Cohen, 1982 edition, supra note 109, ch. 2, D(1), at 144. The Allotment Era devastated Indian communities. See id. In 1924 the Meriam Report was released. See id. This report was a non-governmental two-year study of the Indian Bureau. See id. The Meriam Report detailed the "deplorable living conditions of Indians . . . described the poverty, disease, suffering, and discontent that pervaded the life of the overwhelming majority of Indians . . . [and] criticized the inefficient, paternalistic administration of Indian policy that neither encouraged nor supported Indian self-sufficiency." Id.

[344] See id. After the Indian Reorganization Act was enacted, a series of bills were passed to strengthen the Act. See id. D(2)(e), at 151. However, attacks on this Act were made throughout the 1940s and culminated in the Termination Era during the 1950s. See id. at 152. During the 1950s, Indian land was transferred to non-Indians, and tribal economic development was largely ignored. See id. E, at 153. This policy, where enacted, destroyed tribal culture and led one historian to state that the Termination Era was "the most concerted drive against Indian property and Indian survival since the removals following the acts of 1830 and the liquidation of tribes and reservations following 1887.'" Id. (footnote omitted) (quoting A. Debo, A History of the Indians of the United States 349 (Norman: University of Oklahoma Press 1970)).

former Governor of Utah Norman Bangeter has even stated that "'[t]he state cannot exercise its duties as trustee without taking away the self- determination of the Navajo people.'" [345]

This proposed idea is by no means void of precedent. For example, during the mid-1970s, Congress reinstated tribal status for several Paiute tribes that had been abolished during the Termination Era. [346] Prior to reinstatement, these tribal entities and their people had almost been decimated by poverty and neglect. [347] Yet, once reinstated, Congress allowed these tribes to administer their own monies. [348] Under this new management scheme, these tribes were also able to use their resource royalties in whatever way they so chose. [349] As a result of the new policies, these reinstated Paiute tribes maintained a level of self-sufficiency. [350]

Once a tribe has monies flowing in, they can use those monies to best facilitate their own needs. For example, the Mashantucket Pequot Indians in southeastern Connecticut have generated over 800 million dollars from their Foxwoods Casino. [351] The Pequots have used this money to employ every member of the tribe and pay these members between 50,000 thousand dollars and 60,000 thousand dollars a year. [352] Additionally, the Pequot Tribe has guaranteed that it will pay for all of its members' "education from preschool through **[*600]** a doctorate." [353] Finally, the Pequots have "contributed $ 10 million to the Smithsonian museum for an American Indian building." [354]

The residents of the Aneth Extension and the Utah Navajos deserve the chance to spend their own monies in a way that meets their own needs. For example, such an opportunity may have allowed the Utah Navajos to purchase a fire truck for Montezuma Creek, a small Utah community located on the Navajo Reservation in the middle of vast oil fields. Until the Salt Lake City Fire Department recently donated a 1977 American La France fire engine, this community did not have a fire truck. [355]

The Utah Navajos may have also used their monies to provide their people with better education facilities. For example, the Utah Navajos may elect to use monies to build educational facilities for the children of 1200 Utah Navajos residing in the Navajo Mountain region since the San Juan County School District has refused to provide educational facilities. [356] Likewise, the Utah Navajos may have also used their own monies to provide

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[345] *Williams, supra* note 24, at A18 (quoting Norman H. Bangerter, Utah Governor).

[346] See Kelly & Fowler, supra note 173, at 392. For a map illustrating that various subgroups of Paiute tribes, see id. at 369.

[347] See id. at 390-91.

[348] See id. at 391-92.

[349] See id. at 391.

[350] See id.

[351] See Naomi Mezey, The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming, *48 Stan. L. Rev. 711, 725 (1996).*

[352] See id.

[353] Id.

[354] Id. The Pequot tribe has also employed an archaeologist "to uncover its history and to stock its new museum." Id.

[355] See Cala Byram, S.L. Fire Truck to Have Renaissance as It's Shipped to Montezuma Creek, Desert News, June 11, 1997, at B4.

[356] The parents of these children sued the San juan County School District to compel the district to provide school facilities in the Navajo Mountain area. See *Meyers v. Board of Educ. of San Juan County School Dist., 905 F. Supp. 1544 (1955).* The Meyers court decided not to force the school district to provide facilities in the Navajo Mountain area because local school officials were in the best position to determine how to allocate their own resources. See *id. at 1581.* The Meyers court did not address whether

scholarships to local students. Currently, Utah Navajos must rely solely on Texaco's 10,000 dollar per year scholarship program. [357] Regardless of how the Utah Navajos want to spend their monies, the Utah Navajos deserve the chance to use their own monies for their own needs.

Presently, the Utah Navajo Trust Fund receives input on how to spend incoming revenues from the Utah Dineh Committee. [358] This trust fund was enacted in 1953 and has undergone minor provision changes over the years. [359] The trust fund has been governed by **[*601]** three members-"the State Treasurer, the Director of the Division of Finance, and a state officer or employee appointed by the governor with the advice and the consent of the Senate to a four year term." [360] This Board has been charged with administering royalty proceeds as trustee for the State. Under the statute, the Dineh Committee is allowed to "advise the trust administrator about the expenditure of trust fund monies." [361]

The Dineh Committee is comprised of nine members of which the governor, with the advise and consent of the Senate, must select. [362] The nine members on the committee must be chosen as follows:

(i) two enrolled members of the Aneth Chapter of the Navajo tribe who reside in Utah; (ii) one enrolled member of the Blue Mountain Dine, an off-reservation

chapter, who resides in Utah;

(iii) one enrolled member of the Mexican Water Chapter of the Navajo tribe who resides in Utah;

(iv) one enrolled member of the Navajo Mountain Chapter of the Navajo tribe who resides in Utah; (v) two enrolled members of the Oljato Chapter of the Navajo tribe

who resides in Utah; (vi) one enrolled member of the Red Mesa Chapter of the Navajo tribe who resides in Utah; and (vii) one enrolled member of the Teec Nos Pos Chapter of the Navajo tribe who resides in Utah. [363]

A governing structure such as this should be employed by a congressional amendment tothe 1933 Act. This committee would have direct control over administering the distribution of funds. Such control would allow the Utah Navajos to appropriate the monies for the betterment of their people. Congress may want to tailor the new governing scheme so that the Aneth residents have a weighted vote on the new board. The weighted vote is suggested in light of the uniqueness of this band of Indians. After all, the Aneth residents were the original beneficiaries **[*602]** of the Act due to their uniqueness and separateness from the Navajo Nation. [364] Moreover, the oil and gas wells are located on their lands and those proceeds were initially supposed to be used solely for the benefit of the Aneth Extension residents. Finally, the class of beneficiaries was only expanded under the misnomer that such expansion would allow the State of Utah to better disburse the funds throughout the Navajo Nation.

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the school district would have been compelled to use royalties derived from the Aneth Extension to provide educational facilities under the "health, education, and general welfare" portion of the 1968 Act. Id.

[357] See Business, Tribe Reach Agreement, Salt Lake Trib., Feb. 27, 1997, at D2.

[358] See Utah Code Ann. 63-88-107 (Michie Supp. 1996).

[359] See 63-88-103.

[360] Id.

[361] Id. 63-88-107.

[362] See id.

[363] Id.

[364] In *United States v. Jim, 409 U.S. 80 (1972),* Justice Douglas even stated in his dissent that "[t]he occupants of the [Aneth] Extension have been a separate community for many generations." *Id. at 86.*

Congress should also consider dividing the royalty proceeds between the four chapter districts in Utah with the Aneth district receiving a larger percentage of the funds due to the aforementioned concerns. This funding scheme could resemble the current funding scheme employed by the Navajo Nation whereby the Window Rock District receives two-thirds of the Navajo Nation's portion of the Aneth Extension's royalty proceeds. [365] For example, the district that the Aneth Extension is in could receive two-fifths of the royalty proceeds with the remaining three districts each receiving one- fifth of the royalty proceeds.

Congress may also want to give the Utah Navajos the power to regulate the integrity of their oil wells. [366] This would lessen the problem of dual taxation between the State of Utah and the Navajo Nation over oil and gas produced on these lands. Recently, the Navajo Nation and the State of Utah both asserted the right to tax these resources. The Utah Supreme Court, in Texaco, Inc. v. San Juan County, [367] allowed both the State of Utah and the tribe to continue taxing the oil and gas production on the Aneth Extension. [368] To preempt Utah's state tax, the court established that the **[*603]** oil and gas companies would have to show a clear congressional intent to forbid "powers otherwise available to . . . [the state]." [369] Consequently, since the 1933 Act did not do such, the Supreme Court of Utah allowed both the State of Utah and the Navajo Nation to tax the proceeds derived from the Aneth Extension.

Finally, Congress should give the Utah Navajos the power to execute all types of leases and agreements. This power would lessen the likelihood of conflicts. Recently, in Utah v. Babbitt, [370] the Navajo Nation and Chuska Energy Company tried to evade paying royalties to the State of Utah by entering into an operating agreement. The State of Utah brought suit to collect royalties from Chuska Energy Company. [371] The district court, although

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[365] See supra note 288 and accompanying text.

[366] Currently, local Utah Navajo chapters are involved in the surface approval process. See Phillip Lear & Blake Miller, Exhaustion of Tribal Court Remedies: Rejecting Bright Line Rules And Affirmative Action, *71 N.D. L. Rev. 277, 298 (1995).* Once the Bureau of Indian Affairs and the Bureau of Land Management approve a drilling company's application, the drilling company must receive the permission of the local chapter. See id. For example, the Aneth Chapter granted Boyd & McWilliams Energy Co. the right to drill, and in return, Boyd & McWilliams paid a "requested surface damage cash bond to the Aneth Chapter." *Id. at 298-99.*

[367] *869 P.2d 942 (Utah 1994).*

[368] See *id. at 944.* This issue arose in 1978 when the Navajo Nation began taxing all oil and gas leases, including those on the Aneth Extension. See *id. at 943.* Prior to this, the oil and gas companies, leasing the lands pursuant to the 1938 Mineral Leasing Act, paid the State of Utah the royalties under the 1933 Act and any additional state taxes imposed by the State of Utah. See id. The 1938 Act, however, did not specify whether revenues derived by non-Indian lessees would be taxable by the state government. See id. Consequently, the oil and gas companies, after paying their state taxes under protest, filed suit in state court opposing the imposition of state production taxes on non-Indian lessees on Indian lands. See id. The oil and gas companies alleged that Congress had provided royalties be paid instead of taxation. See id.

[369] *Id. at 945.* For a thorough discussion of this case, see Richard J. Ansson, Jr., Comment, Protecting Profits Derived from Tribal Resources: Why the State Of Utah Should Not Have the Power to Tax Non-Indian Oil and Gas Lessees on the Navajo Nation's Aneth Extension? Texaco, Exxon, and Union Oil v. San Juan County School District, 21 Am. Indian L. Rev. (forthcoming October 1997) (arguing that the Utah Supreme Court, by failing to determine whether the State of Utah had violated any of the tax invalidation factors listed in Cotton Petroleum, incorrectly allowed the State of Utah to tax non-Indian lessees on the Aneth Extension).

[370] *830 F. Supp. 586 (D. Utah 1993).*

[371] See id. The BIA area director stated that the agreement was not a lease within the meaning of the 1933 Act and contended that those proceeds did not have to be paid to the State of Utah under the 1933 Act. See *id. at 589.* The Indian Board of Interior Affairs approved the decision of the area director. See *id. at 590.* The State of Utah appealed this holding to United States' district court. See id.

finding that the 1933 Act was silent with respect to the type of agreements which might be covered under it, held that the agreement was technically a lease. [372]

In the previous two cases, the State of Utah and the Navajo Nation have been battling for greater control over the profits derived from the Aneth Extension. In Texaco, Exxon, and Union Oil v. San Juan County, the State of Utah and the Navajo Nation both exerted their rights to tax non-Indian oil and gas companies. Likewise, in Utah v. Babbit, the Navajo Nation sought to evade paying 37.5% of **[*604]** the royalties to the State's Utah Navajo Trust Fund. The State of Utah, suing on behalf of the Utah Navajos, won the suit but has the State ever used these proceeds to benefit the Utah Navajos? Indeed, has either governing entity provided for the Utah Navajos? Obviously not! These governing entities have only sought to gain control over the precious monies generated on the Aneth Extension for their own respective self-interests. As a result of this greed, these governing entities have severely mistreated and debased the Utah Navajos.

Congress must amend the 1933 and 1968 Acts to give the Utah Navajos the opportunity to govern themselves. Such a scheme would conform with the federal policy of self-determination by allowing the beneficiaries of the trust fund to spend money according to their own needs and wants. More importantly, such a scheme would give the impoverished Utah Navajos a substantial chance to improve their communities and their peoples.

VI. Conclusion

Our treatment of the Utah Navajos, like the treatment of other Indians, in many ways denotes the future treatment of other minority groups in the United States. To quote the reputed father of American Indian law, Felix S. Cohen, "like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, marks the rise and fall of our democratic faith." [373] Such a statement should not be taken lightly. Throughout United States history, however, there have been "schizophrenic" shifts in Indian policy. Professor Robert Clinton has explained: Schizophrenia in federal Indian policy only reflects a fundamental conflict in the American social psyche. We purport to be a freedom loving nation dedicated to diversity, toleration, and liberty. Nevertheless currents of nationalism and insecurity about national unity periodically generate movements favoring forced Indian assimilation. The national choice between cultural domination by the majority or adherence to ideals of toleration and cultural diversity is therefore one we find ourselves addressing again and again. [374] **[*605]**

For the past thirty years, tribal self-determination has been the golden beacon guiding federal Indian policy. Tribal self-determination embodies the concept of Indian self-government and Indian economic development. As a result, Congress has enacted legislation designed to facilitate economic and political autonomy for Indian tribes and Indian communities. The poverty stricken Utah Navajos have attempted time and again to govern their own peoples and their own resources. However, these residents have been repetitively shunned by the United States, the State of Utah, and the Navajo Nation.

In this author's estimation, there is really only one solution to the Aneth Extension's royalty quandary. Since the United States encourages Indian self-government and Indian economic development, Congress must provide the Utah Navajos with the opportunity to govern their own resources. [375] The Utah Navajos should no longer be viewed as pawns of the State of Utah nor should the Utah Navajo Trust Fund be seen as a treasure trove for the

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[372] See *id. at 593.*

[373] Felix Cohen, The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy, 62 Yale L.J. 348, 390 (1953).

[374] Robert Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 Stan. L. Rev. 979, 1063 (1981).

[375] Such an amendment would be very fact specific. Indeed, one commentator has noted that "[n]o single model can be proposed for Indian development. Instead, the development schemes must be related to specific groups. Only in this manner can the concepts of self-government and self-determination envisioned . . . become a reality." Comment, Tribal Self Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955, 982 (1972).

State of Utah to loot. The Utah Navajos must be given the opportunity to govern their own resource royalties. In effect, until Congress acts, the Utah Navajos will remain forever frozen in time as the paternalistic policies of the Assimilation Era continue to govern. By allowing such repudiated policies to control, Congress inadvertently preserves disregarded vestiges of oppression.

This is the sorrowful story of a forgotten people. A people that have been abused and debased by all governing entities. These people deserve the right to govern their own resources. They deserve closure on their days of living in poverty. These people are not mythological. They are real! These people deserve their day in the sun. More importantly, they deserve closure on their days of living in the shadows of the desert canyons. Congress must ensure that the poverty stricken Utah Navajos are no longer the forgotten peoples of San Juan County and the Navajo Nation.
