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## How the Trump Administration Can Inform Its Indian Land Policies in Light of Historical Breakdowns

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## COMMENTS

### HOW THE TRUMP ADMINISTRATION CAN INFORM ITS INDIAN LAND POLICIES IN LIGHT OF HISTORICAL BREAKDOWNS

*Shae Weathersbee*\*

#### *Introduction*

Before President Donald J. Trump had been sworn in, rumors began floating around that Trump's administration planned on privatizing Indian lands.<sup>1</sup> An initial news article indicated that advisors to Trump were pushing this policy to allow for more lucrative oil extraction, an idea that spun internet-users into debates.<sup>2</sup> In the first two years of the Trump administration, it is evident that President Trump is aiming to decrease the bureaucracy that has limited tribes in pursuit of economic development.<sup>3</sup> The extent the administration will go to ease access to tribal resources is unclear. This Comment aims to elaborate the policy of the Trump administration regarding Indian lands in order to analyze its potential ramifications in Indian Country. The policy presented in this Comment has been formulated based on the administration's statements and actions regarding Indian Country. Potential impacts of the policy will be explored through two case studies, providing real-world consequences of changing Indian land policies.

#### *I. Background*

One of the first articles regarding the privatization of Indian land was published on December 5, 2016,<sup>4</sup> and the very next day, Oklahoma Representative Markwayne Mullin issued a response that attempted to settle

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1. Reuters, *Trump Advisors Aim to Privatize Untapped Oil Reserves on Native American Reservations*, FORTUNE (Dec. 5, 2016), <http://fortune.com/2016/12/05/donald-trump-oil-reservations/> [hereinafter *Trump Advisors Aim to Privatize*].

2. *Id.*

3. Remarks at a Tribal, State, and Local Energy Roundtable Discussion and an Exchange with Reporters, 2017 DAILY COMP. PRES. DOC. 1 (June 28, 2017) [hereinafter *Trump Remarks at Energy Roundtable*].

4. *Trump Advisors Aim to Privatize*, *supra* note 1.

the fears such articles induced.<sup>5</sup> Mullin, then recently named the chair of Trump's Native American Coalition, indicated that the actual focus of the administration was to "end the overreaching paternalism that has held American Indians back from being the drivers of their own destiny."<sup>6</sup> Mullin elaborated on this proposal by suggesting that privatization was not the mechanism to effectuate this purpose; rather, it was the removal of restrictions on the utilization of Indian lands.<sup>7</sup> Mullin asserted that seeking the approval of the Bureau of Indian Affairs and the Bureau of Land Management should not be required for tribes to utilize their lands.<sup>8</sup>

The response of the Native American Coalition did not placate the growing concerns of some Americans, who recognized that President Trump's pro-business policies could lead to great changes surrounding Indian trust lands.<sup>9</sup> News sources reported that while reservations only encompass around two percent of land in the United States, they are alleged to entail twenty percent of the country's oil and gas resources.<sup>10</sup> The Trump administration's stance against heavy regulation seemed to substantiate rumors that Indian lands would be privatized to remove regulations and federal bureaucracy surrounding mineral leases and other forms of development.<sup>11</sup> Leaders in Indian Country stood divided on the idea of privatizing lands to make way for more development.<sup>12</sup> Some leaders totally opposed such efforts, as they would lead tribes down a path of commodification that was against spiritual beliefs.<sup>13</sup> There was a further fear that privatization would herald a new Termination Era and be yet another attempt of the United States to remove tribal sovereignty in pursuit

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5. Christine Powell, *Trump Adviser Says He's Not Privatizing Tribal Land*, LAW 360 (Dec. 6, 2016), <https://www.law360.com/articles/869536/trump-adviser-says-he-s-not-privatizing-tribal-land> (internal citation omitted).

6. *Id.*

7. *Id.*

8. *Id.*

9. Hayley Miller, *Trump's Policies Show Profound Disregard for Native Americans, DNC Chair Says*, HUFFINGTON POST (Aug. 7, 2017), [http://www.huffingtonpost.com/entry/trump-native-americans-tom-perez\\_us\\_59889853e4b0ca8b1d49e6df](http://www.huffingtonpost.com/entry/trump-native-americans-tom-perez_us_59889853e4b0ca8b1d49e6df).

10. *Trump Advisors Aim to Privatize*, *supra* note 1.

11. Miller, *supra* note 9.

12. Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016), <https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1>.

13. *Id.*

of economic gains.<sup>14</sup> With \$1.5 trillion worth of resources on the line, it appeared that many parties would want a say in this debate.<sup>15</sup>

In the summer of 2017, more news articles were published in response to the Trump administration's treatment of Native American issues in the first months of the presidency. Politicians such as Democratic National Committee Chair, Tom Perez, spoke out, claiming the administration's continued promotion of the privatization of lands was comparable to the "catastrophic" Eisenhower-era policy.<sup>16</sup> Perez asserted that since President Nixon, the presidents of this country have supported "self-determination without termination," yet this presidency appeared to be parting with this position by not only supporting the privatization of Indian lands but also by questioning the legitimacy of federal housing block grants for Indians, enabling via executive order the expansion of drilling in the Atlantic and Arctic, planning a wall that would run through Indian Country, and proposing a budget that cut approximately \$300 million from the Bureau of Indian Affairs.<sup>17</sup> Other news articles similarly reiterated Trump's plans on the privatization of Indian Country.<sup>18</sup>

As news sources indicated that privatization remained on the table, arguments developed on both sides, with supporters of privatization heralding the freedom such action would bring. Excessive bureaucracy would not burden Indians when trying to seek profit from natural resources.<sup>19</sup> Mortgages could be taken out more easily on lands for capital, removing the paternalistic hand of the federal government.<sup>20</sup> However, voices on the other side worried that this plan seemed far too familiar and recalled the days of termination wherein tribes lost millions of acres of land and even tribal recognition in some cases.<sup>21</sup> Without trust land and federal oversight, some fear the elimination of tribal sovereignty because there will be no physical location for a tribe to assert jurisdiction.<sup>22</sup> Tribal members may be forced to assimilate into society at large.<sup>23</sup>

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14. *Id.*

15. *Id.*

16. Miller, *supra* note 9.

17. *Id.*

18. Tom Perez, Opinion, *Trump Is Breaking the Federal Government's Promises to Native Americans*, L.A. TIMES (Aug. 7, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html>.

19. Volcovici, *supra* note 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

## II. The Trump Administration's Course of Action

To best predict the future actions of the Trump administration and the changes Indian Country is likely to face, it is important to analyze actions taken by both the executive and legislative branches. Considering the actions of both branches will indicate the extent to which Trump policies will be carried out and the shape these policies will assume.

### A. Executive Action

President Donald Trump's policies towards Indian Country encompass the same overarching principles as his plans for the United States at large, with the added complication of federal obligations owed to the tribes. Since taking office, Trump has consistently vocalized the goal of American energy dominance.<sup>24</sup> The President's actions in the first year of his presidency aimed to increase access to the nation's energy resources, attempting to provide room for American ingenuity to flourish.<sup>25</sup> This policy has intended to promote the American economy in order to pay off the national debt and to provide thousands of additional jobs to American citizens.<sup>26</sup>

While news sources report that Trump still aims to privatize lands, presidential documents indicate only that the administration wishes to reduce regulations surrounding land utilization. President Trump, in several proclamations and memoranda, has emphasized a need to cut the bureaucratic thicket to enable tribes to have better access to natural resources.<sup>27</sup> He has asserted a plan to limit the need for approval before development can take place and has hinted at the removal of restraints on alienation of Indian lands.<sup>28</sup> At the same time, the administration has attempted to come to terms with how to balance tribal self-determination with the responsibilities the federal government owes to the tribes.<sup>29</sup>

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24. Trump Remarks at Energy Roundtable, *supra* note 3; Remarks on Signing an Executive Order on Promoting Energy Independence and Economic Growth, 2017 DAILY COMP. PRES. DOC. 1 (Mar. 28, 2017).

25. Remarks on Signing an Executive Order on Promoting Energy Independence and Economic Growth, *supra* note 24, at 1; Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

26. Remarks on Signing an Executive Order on Promoting Energy Independence and Economic Growth, *supra* note 24, at 1.

27. Trump Remarks at Energy Roundtable, *supra* note 3, at 1.

28. *Id.*

29. *Id.*

The administration has voiced its desire to transform the relationship between tribes and the federal government. Trump indicated that the United States is stronger when Indian Country is strong.<sup>30</sup> Reforms in Indian Country are necessary to achieve goals elsewhere.<sup>31</sup> President Trump announced in October of 2017 that his administration is pursuing “aggressive regulatory reform” in Indian affairs and aims to promote a “government-to-government” relationship between tribes and the federal government.<sup>32</sup> Despite the administration’s recognition of the importance of tribal sovereignty to the health of Indian Country, actions by the administration have been mixed, making it difficult to discern the administration’s future actions.

The Trump administration has supported cooperative economic growth in Indian Country, but support began largely as remarks and memoranda. President Trump and Secretary of Energy Rick Perry’s remarks at the Tribal, State, and Local Energy Roundtable indicated a desire for greater cooperation between all levels of government to allow utilization of energy reserves that have previously been left dormant.<sup>33</sup> Trump stated that “unlocking vast treasures of energy reserves” would mean “creat[ing] new prosperity” for Americans.<sup>34</sup> Beyond statements, Trump issued the first Presidential Emergency Declaration on behalf of a tribal nation.<sup>35</sup> This declaration aimed to assure the Seminole Tribe of Florida that the United States would support its rebuilding effort after Hurricane Irma.<sup>36</sup> With Trump taking actions such as ending the moratorium on coal leasing on federal lands and pursuing the repeal of the Obama Administration’s Clean Power Plan and Stream Protection Rule, it appears it may not be long before the administration takes further deregulatory measures in Indian Country.<sup>37</sup>

Recently, the Trump administration has turned words into action via the Tax Cuts and Jobs Act. In December of 2017, President Trump signed into

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30. *Id.* at 2.

31. *Id.*

32. Proclamation 9669-National Native American Heritage Month, 2017 DAILY COMP. PRES. DOC. 1 (Oct. 31, 2017).

33. Trump Remarks at Energy Roundtable, *supra* note 3, at 2.

34. *Id.* at 1.

35. Seminole Tribe of Florida; Major Disaster and Related Determinations, 82 Fed. Reg. 46813 (Oct. 6, 2017).

36. Proclamation 9669-National Native American Heritage Month, *supra* note 32, at 1.

37. *President Donald J. Trump Unleashes America’s Energy Potential*, WHITE HOUSE (June 27, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashes-americas-energy-potential/>.

law the Tax Cuts and Jobs Act of 2017.<sup>38</sup> Of particular relevance is the Opportunity Zones Program, a bipartisan effort included in the Act that comprises part of the President's "comprehensive tax reform plan."<sup>39</sup> The program attempts to address the lack of economic development in underserved parts of the country.<sup>40</sup> In order to effectuate this goal, the enacted program utilizes tax incentives to draw investment to the areas that need it most—including Native communities.<sup>41</sup> Oklahoma Native American Affairs Secretary Chris Bengé was "pleased" that the zones will "provide a range of opportunities for investors to collaborate with many of the tribal nations."<sup>42</sup> As of April 2018, a variety of legislators have voiced support for this attempt to bring together public policy and private investment to create real-world change.<sup>43</sup>

In March of 2018, the Trump administration vocalized support for increased access to treatment in light of the opioid epidemic and pushed for concrete improvements in access to healthcare.<sup>44</sup> Most notably, with regards to Indian affairs, President Trump has supported increased funding for the Department of Health and Human Services.<sup>45</sup> President Trump's proposed Federal Budget requested \$3 billion in additional funding for 2018 and \$10 billion for 2019.<sup>46</sup> Contained in the allocations of this additional funding are provisions for resources to increase access to treatment and recovery in Native communities.<sup>47</sup>

In contrast with the above statements of Indian self-determination, the administration has supported highly controversial energy projects affecting

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38. John Wagner, *Trump Signs Sweeping Tax Bill into Law*, WASH. POST (Dec. 22, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/12/22/trump-signs-sweeping-tax-bill-into-law/?noredirect=on&utm\\_term=.b290fd198b9f](https://www.washingtonpost.com/news/post-politics/wp/2017/12/22/trump-signs-sweeping-tax-bill-into-law/?noredirect=on&utm_term=.b290fd198b9f); Budget Fiscal Year, 2018, Pub. L. 115-97, 131 Stat. 2054 (2017).

39. *President Donald J. Trump Is Expanding Entrepreneurial Opportunity in Underserved Communities*, WHITE HOUSE (Feb. 14, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-expanding-entrepreneurial-opportunity-underserved-communities/>.

40. *Id.*

41. *Id.*

42. *WTAS: Support for the Trump Administration's Approval of Opportunity Zones*, WHITE HOUSE (Apr. 18, 2018), <https://www.whitehouse.gov/briefings-statements/wtas-support-trump-administrations-approval-opportunity-zones/>.

43. *Id.*

44. *How We Will Win the War on Opioids*, WHITE HOUSE (Mar. 1, 2018), <https://www.whitehouse.gov/articles/will-win-war-opioids/>.

45. *Id.*

46. *Id.*

47. *Id.*

Indian Country in pursuit of American energy dominance. After being stalled, the Dakota Access Pipeline was expedited by executive order.<sup>48</sup> The memoranda released accompanying the action indicated the administration's intentions to minimize regulatory hurdles to expedite "high priority energy and infrastructure projects that will create jobs and increase national security."<sup>49</sup> Although the project was predicted to have great economic benefits, highly visible protests presented the project's potential negative impacts, including interfering with Native American sacred sites and contaminating the Standing Rock Reservation's drinking water.<sup>50</sup>

It does not appear that the administration has accounted for tribal religious practice when making decisions regarding the utilization of federal lands. In December of 2017, President Trump modified Bears Ears National Monument to include less land area.<sup>51</sup> After determining the amount of land set aside exceeded what was required under law to protect cultural resources, President Trump ordered a reduction in size of the monument.<sup>52</sup> This decision is indicative of a desire to open federal land for alternative use, despite the protests of tribal groups who believe the decision will adversely impact their cultural or religious practices.

The construction of a wall along the southern border of the United States, an element of the Trump administration's immigration policy, evidences the willingness of the administration to encroach on tribal sovereignty when national security interests are involved.<sup>53</sup> The Tohono O'odham Nation encompasses part of the United States' border with Mexico.<sup>54</sup> The Tribe has made previous agreements with the U.S. Customs and Border Patrol to allow for the construction of a fence and access to guard it.<sup>55</sup> However, the proposed border wall would cut directly through tribal land without the Tribe's consent.<sup>56</sup> In July of 2017, the House of Representatives approved

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48. Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

49. *President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects*, WHITE HOUSE (Jan. 24, 2017), <https://www.whitehouse.gov/briefings-statements/president-trump-takes-action-expedite-priority-energy-infrastructure-projects/>.

50. Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

51. Proclamation No. 9681: Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081, 58085 (Dec. 4, 2017).

52. *Id.*

53. Perez, *supra* note 18.

54. *Id.*

55. *Id.*

56. *Id.*

the allocation of \$1.6 billion to begin construction of the wall.<sup>57</sup> In January of 2018, news sources reported that Trump was planning a visit to examine border wall prototypes.<sup>58</sup> Also in January of 2018, President Trump sought an additional \$18 billion from Congress to build the wall.<sup>59</sup> The Trump administration has reaffirmed its commitment to continue with plans to build a wall as recently as the summer of 2018.<sup>60</sup>

Despite a lack of presidential statements on the matter, tribes have nonetheless begun feeling pressure to privatize tribal lands. In May of 2017, Secretary of the Interior Ryan Zinke proclaimed that there should be an “off-ramp” to get tribal lands out of trust.<sup>61</sup> During further remarks at the National Tribal Energy Summit, Zinke asserted that if tribes had an option between lands staying in trust or becoming incorporated, the tribes would choose incorporation.<sup>62</sup> Commentators have indicated that the administration further wishes to depart with previous administrations’ Indian policies based on verbiage in the signing statement of House Bill 244.<sup>63</sup> The signing statement asserts that the administration will afford benefits that are based on race or ethnicity in “a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution’s Fifth Amendment.”<sup>64</sup> The statement specifically mentions Native American Housing Block Grants, an action commentators have interpreted to indicate that federal provisions based on Indian status may be at risk despite the class being previously determined political and not racial.<sup>65</sup>

Although members of Trump’s Native American Coalition have come forth and said privatization of Indian lands is not the route the Department of the Interior plans to take, statements as recent as the fall of 2017 indicate the President’s intentions to modify the ability of Native Americans to

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57. *Id.*

58. Rebecca Shabad, *Trump to Visit Border Wall Prototypes in San Diego: Report*, CBS NEWS (Jan. 8, 2018), <https://www.cbsnews.com/amp/news/trump-to-visit-border-wall-prototypes-in-san-diego-report/>.

59. *Id.*

60. *Remarks by President Trump at a Lunch with Members of Congress*, WHITE HOUSE (June 26, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-lunch-members-congress/>.

61. Perez, *supra* note 18.

62. *Id.*

63. *Id.*

64. Statement on Signing the Consolidated Appropriations Act, 2017 DAILY COMP. PRES. DOC. 3 (May 5, 2017).

65. Perez, *supra* note 18.

utilize lands.<sup>66</sup> The collection of memoranda and orders released by the Trump administration indicates a focus on stimulating economic growth amongst Indians by deregulating their utilization of trust lands in order to promote the overall economic well-being of the United States. In this process, Indian interests may be outweighed by the administration's policy of pursuing American energy dominance. The administration may favor the privatization or deregulation of Indian lands to remove the disparate treatment of Indians, as viewed by mainstream America, from that of the rest of the population.

### *B. Legislative Action*

In contrast to the Trump administration's statements about equal treatment, *Carcieri v. Salazar* declared that the land-into-trust provision of the Indian Reorganization Act of 1934 (IRA) was only applicable to tribes that were federally recognized at the time of the IRA's enactment.<sup>67</sup> Therefore, only tribes recognized by 1934 have been able to take land into trust and pursue the other programs under the Act.<sup>68</sup> The extent to which the IRA applies to tribes that were later recognized remains uncertain.<sup>69</sup> This means that expensive litigation, costing taxpayers large sums, continues while development is inhibited.<sup>70</sup> Legislative fixes have been considered, including recent House Bills 130 and 131 introduced in January of 2017.<sup>71</sup> House Bill 130 would reassert the ability of the Secretary of the Interior to take land into trust for all federally recognized tribes, without regard to their date of recognition.<sup>72</sup> House Bill 131 holds in place the lands already in trust.<sup>73</sup> As of July of 2018, these bills have not moved past introduction.<sup>74</sup>

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66. Proclamation 9669-National Native American Heritage Month, *supra* note 32, at 1.

67. *Carcieri v. Salazar*, 555 U.S. 379, 390-91 (2009) (discussing Indian Reorganization Act of 1934, ch. 576, § 19, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 5129)).

68. NAT'L CONG. OF AM. INDIANS, POLICY UPDATE 5 (2017), [http://www.ncai.org/attachments/PolicyPaper\\_zZTmwUgiMOBFwXQKgNIDMPzHsGLyRoEArzrzjCwRjTJznxBGJFJ\\_Annual%20Policy%20Update%202017%20-%20Final%2010.13.pdf](http://www.ncai.org/attachments/PolicyPaper_zZTmwUgiMOBFwXQKgNIDMPzHsGLyRoEArzrzjCwRjTJznxBGJFJ_Annual%20Policy%20Update%202017%20-%20Final%2010.13.pdf).

69. *Id.*

70. *Id.* at 6.

71. H.R. 130, 115th Cong. § 1 (2017); H.R. 131, 115th Cong. § 1 (2017).

72. H.R. 130 § 1.

73. H.R. 131 § 1.

74. *H.R. 130 Tracker*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/130> (last visited July 27, 2018); *H.R. 131 Tracker*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/131?q=%7B%22search%22%3A%5B%22H.R.%3E+131%22%5D%7D&r=2> (last visited July 27, 2018).

In accordance with President Trump's emphasis on collective decision-making, the House Natural Resources Subcommittee on Indian, Insular and Alaska Native Affairs undertook an oversight hearing that was meant to address concerns with the modern implementation of the provisions of the IRA.<sup>75</sup> Particularly, the Subcommittee vocalized concerns with the land-into-trust provision, stating "the Secretary has acquired land in trust regardless of the impact on . . . tribes, states and local governments, and landowners, and regardless of the capacity of the government to manage the trust lands."<sup>76</sup> Uncertainty still remains regarding the extent of the Secretary's authority to take lands into trust and what factors must be considered in such decisions.<sup>77</sup> The Department of the Interior has promulgated proposed changes to land acquisition to tribal leaders.<sup>78</sup> The proposals aim to make decisions more predictable but increase the requirements for application of off-reservation land-into-trust applications.<sup>79</sup>

Legislative attempts to limit the amounts of dormant federal land reinforce Trump's plans to utilize American energy resources. House Bill 621, also known as the Disposal of Excess Federal Lands Act of 2017, meant to sell more than 3.3 million acres of federal land.<sup>80</sup> After opposition to the measure by sportsmen groups, statements have been made that the legislation will be withdrawn.<sup>81</sup> Although this specific bill might not be taken any further, its proposal indicates that other similar plans may be taken to utilize previously dormant federal land.<sup>82</sup>

The Indian Trust Asset Reform Act (ITARA), enacted in 2016, provided a first step in modernizing the trust system and is harmonious with the Trump administration's deregulatory policy.<sup>83</sup> The Act lets tribes make choices about how to utilize their land, allowing tribal action without federal approval in some cases.<sup>84</sup> Approvals can delay development for decades.<sup>85</sup> ITARA strikes against part of the bureaucratic thicket by limiting

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75. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 6.

76. *Id.*

77. *Id.* at 9.

78. *Id.* at 6.

79. *Id.* at 6-7.

80. H.R. 621, 115th Cong. (2017); *see* NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 7.

81. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 7.

82. *Id.* at 6.

83. Indian Trust Asset Reform Act § 205, 25 U.S.C.A. § 5614 (West 2016).

84. *Id.* § 205(b), 25 U.S.C.A. § 5614(b).

85. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 10.

the number of steps that need to be taken to develop lands.<sup>86</sup> The legislation particularly impacts the Office of the Special Trustee (OST), which reviews all appraisals of trust transactions.<sup>87</sup> ITARA calls for the Department of the Interior (DOI) to work with tribal governments to create plans that reallocate functions of the OST to other bureaus or offices, minimizing OST oversight.<sup>88</sup> The Act empowers the DOI to create minimum criteria for entities to appraise or value trust lands.<sup>89</sup> The Act authorizes the Secretary of the Interior to appoint an Under Secretary for Indian Affairs, who would be the first official in the DOI with powers in BIA agencies and non-Indian agencies.<sup>90</sup> This “cross-agency advocate” would ensure Indian interests are included in all discussions throughout the DOI.<sup>91</sup>

Recent legislation involving Indian affairs has largely centered around economic development, a key Indian policy priority for the Trump administration. In March of 2018, the Native American Business Incubators Program Act passed the Senate.<sup>92</sup> If enacted, this bill would require the Department of the Interior to establish a grant program to create and operate business incubators tasked with serving Native communities.<sup>93</sup> These incubators would support small Native businesses by helping them acquire the resources they need to be successful.<sup>94</sup> Another bill that has moved past the introductory phase is the Indian Community Economic Enhancement Act of 2018.<sup>95</sup> Passed in the Senate in March of 2018, the bill amends the Native American Business Development, Trade Promotion, and Tourism Act of 2000 and calls upon the Office of Native American Business Development (ONABD) to increase support of tribal economic development.<sup>96</sup> Among other provisions, the bill would require the ONABD

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86. *Id.* at 11.

87. *Id.*

88. Indian Trust Asset Reform Act § 304, 25 U.S.C.A. § 5634.

89. *Id.* § 305, 25 U.S.C.A. § 5635.

90. *Id.* § 303, 25 U.S.C.A. § 5633; *see also* NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 11.

91. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 11.

92. S. 607, 115th Cong. (2017); *S. 607 – Native American Business Incubators Program Act Tracker*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/607> (last visited July 27, 2018).

93. S. 607 § 4(a).

94. *Id.*

95. S. 1116, 115th Cong. (2017); *S.1116 – Indian Community Economic Enhancement Act of 2018 Tracker*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1116> (last visited July 27, 2018).

96. *Id.*

to advise the Department of Commerce on the relationship between Indians and the federal government and require ONABD to act as the point of contact for tribes inquiring about economic development and business on Indian land.<sup>97</sup> The Office of the Assistant Secretary for Indian Affairs and the Community Development Financial Institutions Fund are tasked with collaborating on projects to support tribal economic development.<sup>98</sup>

### C. Additional Considerations

Of interest to the Trump administration and Congress, energy resources on tribal lands serve a dual function of both enabling tribal development and supplying the United States with greater domestic energy sources.<sup>99</sup> However, unlike resources outside of Indian lands, tribal resources face greater difficulties in development.<sup>100</sup> Federal approvals, bureaucracy, and financial limitations, among other factors, mean that it takes longer to develop resources on tribal lands. Indian energy policy has not been significantly changed in ten years.<sup>101</sup> Potential amendments to the Indian Tribal Energy Development and Self-Determination Act, proposed by the Senate in January of 2017, would provide additional resources to enable greater tribal control over development of various energy sources.<sup>102</sup> The bill and proposed amendments seek to streamline approval processes and extend access to programs.<sup>103</sup> The proposed Native American Energy Act of 2017 (House Bill 210) further aims to reduce obstacles to energy development by encouraging standardized procedures and implementing time limitations for secretarial approval.<sup>104</sup> Additionally, the proposed legislation includes the ability for tribes to waive appraisal requirements and dictates that the Secretary of the Interior is to enter into agreements with tribes to implement demonstration projects targeted at developing energy production.<sup>105</sup>

The proposed legislation since President Trump took office largely echoes the executive branch's goals. Both branches appear to support some level of deregulation of Indian land use and portray a desire to promote

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97. S. 1116 § 3(c).

98. *Id.* § 8(a).

99. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 12-13.

100. *Id.* at 13.

101. *Id.*

102. Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, S. 245, 115th Cong. (2017).

103. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 13.

104. H.R. 210, 115th Cong. §§ 2-3 (2017).

105. *Id.* §§ 2, 6.

Indian self-determination and economic development. This could mean that action, beyond mere words, is more likely to be taken under Trump's presidency. However, it is important to note that it has been ten years since major reformations have been made to Indian energy policy.<sup>106</sup> Therefore, it may take time for the promulgation of new legislation to reinforce the shared goals of the legislative and executive branches.

### *III. Case Studies*

In order to fully understand the impacts that changes to policies regarding Indian lands may have, it is essential to look at similar past policies. Analyzing previous policies helps to prevent the repetition of tragic consequences, ensuring that modern policies are refined by historical knowledge. The Termination Era is an informative first case study because it presents the consequences of removing federal oversight from tribal land holdings. Additionally, some of the critics of the Trump administration's Indian policies have likened them to those of the Termination Era.<sup>107</sup> Analysis of the Termination Era will shed light on the fairness of these critiques.

The Alaskan Native Claims Settlement Act (ANCSA) provides additional insight into the results of changes in alienation of land in pursuit of American energy development and will serve as another useful case study. Analyzing the impacts of this policy will be highly relevant to policies endorsed by Trump because the corporations that resulted from ANCSA are possible models for the privatization of Indian lands. This corporate structure serves as an example of how tribes can engage in the energy market. ANCSA further indicates how forced action by the federal government can create indefinite limitations on tribal sovereignty.

Each of the case study sections will first explore the background of the policy and then move on to the statutory framework. After the immediate and long-term impacts of the policy are explored, these insights will be applied to President Trump's policies.

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106. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 13.

107. Miller, *supra* note 9.

## A. Termination Era

### 1. Background and Goals

Before the Termination Era, the Reorganization Era attempted to balance the competing goals of autonomy and assimilation in Indian affairs.<sup>108</sup> The Indian Reorganization Act (IRA) was the centerpiece of the era.<sup>109</sup> The Act attempted to approximate institutions found within American society at large on reservations.<sup>110</sup> This included the promotion of the creation of tribal constitutions and bylaws, which mirrored that of the American government.<sup>111</sup> Tribes were encouraged to retain cultural practices and customs.<sup>112</sup> The Act prevented reservation land from being sold into non-Indian ownership.<sup>113</sup> Despite the attempted compromise, Indians were unsatisfied with the policy's promotion of Western ideals of government and the great federal oversight of tribal actions on reservations.<sup>114</sup> During the mid-1940s, it became evident that the measures Congress and the Bureau of Indian Affairs (BIA) had taken in order to advance the ultimate goal of assimilating Native Americans was largely unsuccessful.<sup>115</sup> The dissatisfaction of Indians, the cost of administering the IRA, and a change of power within the BIA initiated a policy shift.<sup>116</sup> Subcommittees of Congress began to investigate plans to relieve tribes of the control of the BIA.<sup>117</sup>

Termination was partially a product of the United States attempting to distance itself from racial classifications that were invoked by Germany during World War II. In an address to the National Association for the Advancement of Colored People, President Truman asserted that “[t]here is no justifiable reason for discrimination because of ancestry, or religion, or

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108. Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1183 (1983).

109. *Id.*

110. *Id.* at 1183-84.

111. *Id.*; Indian Reorganization Act of 1934 § 16, 25 U.S.C. § 5123(a) (2012).

112. Walch, *supra* note 108, at 1183.

113. Indian Reorganization Act of 1934 § 1, 25 U.S.C. § 5101.

114. Walch, *supra* note 108, at 1184.

115. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 145-46 (1977).

116. *Id.* at 144-46.

117. *Id.* at 146.

race, or color.”<sup>118</sup> Truman’s election ushered in a “liberal assimilationist trend.”<sup>119</sup> Fair Deal policies focused on promoting civil rights and economic progress to ensure the integration of minorities within American society.<sup>120</sup> Overall, the drive for civil rights in this era intended to “free[] the individual from supposedly invidious group identity, especially that of race, so that he or she could compete freely and form associations voluntarily in the great society.”<sup>121</sup> The Truman administration saw the reservation system as segregating Native Americans from the rest of society and called for what would eventually be the goal of the Eisenhower termination policy—ensuring that Indians were placed in the same position in society as other Americans.<sup>122</sup>

## 2. Statutory Framework

Termination became the general policy of the federal government with the passage of House Concurrent Resolution 108 (HCR 108), which was bolstered by additional acts that eliminated the trust relationship between specific tribes and the federal government.<sup>123</sup> Public Law 280 (PL 280) enabled electing states to assume some civil and criminal jurisdiction over tribes, essentially displacing the previous federal and tribal control over such matters.<sup>124</sup> Educational programs promoted assimilation and affected Indian lands were relieved of restraints on alienation.<sup>125</sup> Relocation programs aimed at moving reservation Indians to other areas.<sup>126</sup>

Congress asserted its intentions with regards to Indians in the text of HCR 108, calling for Indians to be “subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.”<sup>127</sup> Although this resolution had no true power of enforceability and was simply a policy statement, this viewpoint retained

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118. Harry S. Truman, *Address Before the National Association for the Advancement of Colored People (June 29, 1947)*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=12686> (last visited May 18, 2017).

119. Clayton R. Koppes, *From New Deal to Termination: Liberalism and Indian Policy, 1933-1953*, 46 PAC. HIST. REV. 543, 558 (1977).

120. *Id.*

121. *Id.*

122. *Id.* at 559.

123. Wilkinson & Biggs, *supra* note 115, at 149.

124. *Id.* at 149; see 28 U.S.C. § 1360 (2012); see also 18 U.S.C. 1162 (2012).

125. Wilkinson & Biggs, *supra* note 115, at 149.

126. *Id.* at 147.

127. H.R. Con. Res. 108, 83rd Cong., 67 Stat. § B122 (1953).

influence in the individual acts of termination that followed.<sup>128</sup> Under the authority of these acts, the Secretary of the Interior developed plans that terminated the historic federal-tribal relationship for the affected tribe.<sup>129</sup> These acts contained some similar provisions.<sup>130</sup> The structure of land ownership changed and often entailed tribal land being sold.<sup>131</sup> The trust relationship that enabled tribes to receive aid in resource management and protected tribal lands from leaving tribal ownership was terminated.<sup>132</sup> States gained legislative jurisdiction over many subject areas of tribal concern.<sup>133</sup> Criminal and civil matters arising amongst Indians of the terminated tribe were directed to state court.<sup>134</sup> Tribes no longer benefitted from exemption from state taxes.<sup>135</sup> Federal programs directed towards tribes were extinguished.<sup>136</sup> Federal programs created specifically for tribal members ended.<sup>137</sup> The loss of tribal lands effectively ended tribal sovereignty, as tribes had no land over which to assert jurisdiction.<sup>138</sup> Although nothing in the termination acts specifically eliminated the inherent sovereignty of tribes, no terminated tribe continued to pass or enforce laws or preserve tribal courts.<sup>139</sup>

In 1953, Congress passed PL 280, which aimed at curbing lawlessness on reservations while assimilating tribes and decreasing federal spending.<sup>140</sup> The Act granted California, Minnesota, Nebraska, Oregon, and Wisconsin criminal and some civil jurisdiction in Indian Country.<sup>141</sup> Congress placed a few limitations on state authority. The Act did not “authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights” of the tribes over which the Act granted jurisdiction.<sup>142</sup> Tribes explicitly maintained hunting, fishing, and some property rights if protected

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128. Wilkinson & Biggs, *supra* note 115, at 150-51.

129. *Id.* at 151-52.

130. *Id.* at 152.

131. *Id.*

132. *Id.*

133. *Id.* at 152-53.

134. *Id.* at 153.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 153-54.

139. *Id.* at 154.

140. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588; Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627, 1657-65 (1998).

141. Act of Aug. 15, 1953, § 2, 67 Stat. at 588.

142. 18 U.S.C. § 1162(b) (2012).

by federal statute, treaty, or agreement.<sup>143</sup> Additional states were provided the option of gaining jurisdiction without the consent of the tribe, and this offer was not revoked until the passage of the Indian Civil Rights Act of 1968, when tribal consent became required before states could adopt PL 280 jurisdiction.<sup>144</sup> The assumption of jurisdiction by states over tribes marked a great change in the federal-tribal relationship that historically characterized Indian affairs.<sup>145</sup>

### 3. Immediate Impacts

In all, 109 tribes and bands suffered termination and no less than 1,362,155 acres of tribal land were impacted by the policy.<sup>146</sup> The erosion of the tribal land base had a large impact on affected Indians in their daily lives. The sale of tribal lands meant that Indians had to migrate to find new residences.<sup>147</sup> Indians lacking the education and skill sets required by mainstream employers struggled to find jobs.<sup>148</sup> There was also a persistent lack of desire to integrate with mainstream American society that served as an obstacle.<sup>149</sup> Attitudes amongst non-Indian Americans further limited employment and socialization prospects.<sup>150</sup> This difficulty in employment was exacerbated by additional financial obligations—taxes—imparted to Indians as a result of termination.<sup>151</sup> All benefits and programs formerly provided by the federal government ended, leaving many Indians unable to live off of previously provided welfare.<sup>152</sup> The freedom promised by the termination acts in actuality cost tribes sovereignty, while their members lost a sense of community.<sup>153</sup>

A series of programs by BIA Commissioner Dillon Myer further aimed at engaging Indians in Western society but ended up having unfortunate consequences. Adding to the lost sense of community was the impact of the Voluntary Relocation Program that led to Indians moving off of

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143. *Id.*

144. Civil Rights Act of 1968, Pub. L. No. 90-284, tit. IV, § 401, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1321).

145. Jimenez & Song, *supra* note 140, at 1656-57.

146. Wilkinson & Biggs, *supra* note 115, at 151.

147. Walch, *supra* note 108, at 1189.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1189-90.

153. *Id.* at 1190.

reservations.<sup>154</sup> This plan, although named “voluntary,” was not always reported as such.<sup>155</sup> Commissioner Myer indicated that the program meant to provide employment services and relocation for forty percent of the Indian population based on a projection that reservation resources could only sustain sixty percent of the population.<sup>156</sup> The program strived to counter the flawed assimilation plans on reservations that tended to focus on farming and left Indians in rural poverty.<sup>157</sup> However, due to monetary limits, only a model program was carried out.<sup>158</sup> In another attempt to address poverty, Commissioner Myer removed some of the restraints on land in 1951.<sup>159</sup> Area directors were enabled to issue fee patents and approve sale of Indian lands.<sup>160</sup> Indians were allowed to mortgage land to secure loans.<sup>161</sup> Inflation after the war prompted some Indians to sell land to take advantage of the higher selling prices, further reducing Indian holdings.<sup>162</sup>

The growing awareness of the detrimental impact that termination had on Indians and tribes meant the policy ended relatively quickly. After the end of termination acts in 1962, President Nixon officially repudiated the policy in 1969, proposing a new focus on self-determination for Indians.<sup>163</sup>

#### 4. Long-Term Impacts

Despite the repudiation of termination policy, Congress has not effectively counteracted the impact of termination on tribes that have not had their termination acts repealed.<sup>164</sup> Many of the terminated tribes remain terminated today.<sup>165</sup> Tribes that have regained their federal recognition may still be deprived of their reservations.<sup>166</sup> The Wyandotte, Ottawa, Modoc, and Peoria tribes did not regain tribal lands in the Act restoring their federal

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154. Wilkinson & Biggs, *supra* note 115, at 147.

155. *Id.* at 147-48.

156. Kenneth R. Philp, *Dillon S. Myer and the Advent of Termination: 1950-1953*, 19 W. HIST. Q. 37, 48 (1988).

157. *Id.*

158. *Id.* at 49.

159. *Id.* at 47.

160. *Id.*

161. *Id.*

162. *Id.* at 47-48.

163. Walch, *supra* note 108, at 1191.

164. *Id.* at 1192.

165. *Id.*

166. *Id.* at 1192-93.

recognition.<sup>167</sup> Land loss impacts a tribe's ability to govern itself because jurisdiction and authority are intimately intertwined with land ownership.<sup>168</sup> In addition to the restoration of federal recognition, the Menominee Tribe regained land that was under a tribal corporation, which Congress restored to reservation status.<sup>169</sup> However, no compensation was given for land that left tribal ownership during termination.<sup>170</sup> An additional restoration act transferred federal land to the Siletz and Paiute Tribe of Utah to establish reservations; however, the amount of land given was dictated in one case by the economic needs of the Tribe and in another by an arbitrary determination.<sup>171</sup>

Terminated tribes are prohibited from being re-recognized through the federal acknowledgment procedure of the BIA.<sup>172</sup> The current regulation detailing federal recognition of unrecognized tribes entails several requirements, including that the tribe is not "the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship."<sup>173</sup> Tribes never before recognized by the federal government can receive federal programs and benefits once approved by the BIA, but terminated tribes may not resort to this pathway for federal recognition.<sup>174</sup>

The impacts of PL 280 have been partially mitigated by provisions of Congress, but in the states that have adopted its jurisdiction, tribes must yield indefinitely to another sovereign having control over some of its affairs. As previously mentioned, the Act prevented state encumbrances on Indian trust land and the regulation of hunting and fishing rights dictated by federal law.<sup>175</sup> Tribal ordinances and customs were later "given full force and effect" in civil actions where they did not conflict with state law.<sup>176</sup> *Bryan v. Itasca County* denied states general civil regulatory jurisdiction in

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167. Act of May 15, 1978, Pub. L. No. 95-281, 92 Stat. 246 (codified at 25 U.S.C. § 861 (Supp. V 1981)) (omitted); Walch, *supra* note 108, at 1193.

168. Walch, *supra* note 108, at 1193.

169. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. § 903 (1976)) (omitted); Walch, *supra* note 108, at 1193.

170. Walch, *supra* note 108, at 1193.

171. Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. §§ 711-771 (Supp. V 1981)) (omitted); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980) (codified at 25 U.S.C. § 761-768 (Supp. V. 1981)) (omitted); Walch, *supra* note 108, at 1193-94.

172. 25 C.F.R. § 83.11(g) (2015).

173. *Id.*

174. Walch, *supra* note 108, at 1194-95.

175. 28 U.S.C. § 1360(b) (2012).

176. *Id.* § 1360(c).

Indian Country.<sup>177</sup> A 1975 report by the United States Department of Justice emphasized that despite only covering six states, 359 of the 500 federally recognized tribes were under the authority of PL 280.<sup>178</sup> This report indicated failures of both state and tribal authorities in assuring applicable laws were respected in Indian Country.<sup>179</sup> Violent crime on Indian reservations subject to PL 280 was fifty percent higher than in other rural areas of the United States.<sup>180</sup> A 1999 report by the Justice Department indicated that crime rates on reservations under PL 280 were higher than that of reservations not under its domain.<sup>181</sup> This trend may be due to tribes under PL 280 no longer receiving support for tribal police forces from the BIA.<sup>182</sup> Coupled with the fact that the federal government does not provide aid to states that assume PL 280 jurisdiction, the refusal of funds to tribal governments means further breakdown of law enforcement.<sup>183</sup>

Individual tribal experiences better demonstrate how termination has a lasting impact on descendants of terminated tribes. In 1951, the Menominee Tribe attained a judgment of \$8,500,000 against the United States for improper administration of the Menominee Tribal Forest.<sup>184</sup> The Tribe requested that part of the trust fund held by the United States for the Tribe be disbursed at a rate of \$1500 per capita.<sup>185</sup> The House passed a bill to disburse these funds, but the Subcommittee on Indian Affairs halted the bill in the Senate, claiming that if tribal members were able to manage this amount of money, then they were not in need of federal supervision.<sup>186</sup> The Tribe was informed of the Senate's position and told that in order to receive the money, the Tribe would have to agree to undergo termination.<sup>187</sup> The General Council of the Menominee Tribe met and decided to undergo termination.<sup>188</sup> This decision was made with the consent of 169 of the 174

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177. 426 U.S. 373, 390 (1976).

178. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1325 n.56 (2000).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1327.

183. *Id.*

184. Robert B. Edgerton, *Menominee Termination: Observations on the End of a Tribe*, 21 HUM. ORG. 10, 10 (1962).

185. *Id.* at 11.

186. *Id.*

187. *Id.*

188. *Id.*

council members, but a referendum was not created to allow the approximately 3000 enrolled members to provide input into arguably one of the Tribe's most important decisions in modern history.<sup>189</sup>

Although the Menominee politicians were proud of the passage of the Menominee Termination Act in the immediate aftermath of termination, tribal members soon realized that the Act carried with it devastating and lasting results.<sup>190</sup> Tribal members feared losing land to new taxes.<sup>191</sup> Tribal members met in opposition to termination, vocalizing their confusion over what termination entailed.<sup>192</sup> The Menominee economy faced crisis.<sup>193</sup> Before termination, the Menominee Tribe maintained economic subsistence because tribal enterprises were exempt from state regulations and were not subject to external taxation.<sup>194</sup> Termination meant that businesses had to expend money to meet state standards.<sup>195</sup> The previous tax exemptions led companies to adopt a business model based on employment maximization, not profits.<sup>196</sup> Individual Menominees became subject to state taxation and this reduction in their income threatened subsistence.<sup>197</sup>

Readily apparent was the depletion of the Tribe's cash reserve.<sup>198</sup> Before the passage of the Menominee Termination Act, the government held \$10,437,000 in trust for the Tribe.<sup>199</sup> Expenditures such as pre-termination studies and improvements to facilities to meet state licensing requirements cost the Tribe \$12,265,424 by 1960.<sup>200</sup> Just four years later, the Tribe's account contained only \$300,000.<sup>201</sup> The depleting account meant that interest payments decreased and the termination of federal programs led to the Tribe having to pay to provide services to tribal members.<sup>202</sup> Without

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189. *Id.*

190. *Id.* at 14.

191. *Id.*

192. *Id.*

193. Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 171 (1978).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 172.

the interest payments, the Tribe had to rely on the “struggling tribal enterprises.”<sup>203</sup>

The well-being of tribal members declined as services could no longer be provided.<sup>204</sup> The Tribe had maintained a hospital, but it was forced to close.<sup>205</sup> Federal funding was no longer available after termination and the medical facilities had to comply with state regulations.<sup>206</sup> After spending \$300,000 attempting to get the facilities in compliance, the system was abandoned.<sup>207</sup> Menominees who did not qualify for welfare or have insurance through employment were deprived of healthcare due to the expense of private doctors.<sup>208</sup> Those who did have insurance were faced with difficulties reaching care as many tribal members did not have transportation.<sup>209</sup> Fears of discrimination and Western medicine devoid of tribal practice meant that many Menominees did not seek treatment.<sup>210</sup> When the hospital closed, more than healthcare was sacrificed.<sup>211</sup> The facility had functioned as a social hub where friends conversed and the homeless sought shelter.<sup>212</sup>

The Menominees numbered amongst the few in America who lived without electricity or water and the previously lucrative tribal mill did not provide assistance. Before termination, tribal members had access to free electricity and water.<sup>213</sup> The Menominee Tribe had actually been selected by the federal government for termination because of its relative wealth in comparison to other tribes.<sup>214</sup> After termination, the tribal power plants were forced to shut down due to licensing requirements.<sup>215</sup> Inspection of the mill before termination revealed that it contained 132 state code violations.<sup>216</sup> After expending \$100,000 to get the plant into compliance,

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203. *Id.*

204. Nancy Oestreich Lurie, *Menominee Termination: From Reservation to Colony*, 31 HUM. ORG. 257, 261 (1972).

205. *Id.*

206. Herzberg, *supra* note 193, at 172.

207. *Id.* at 172-73.

208. *Id.* at 173-74.

209. *Id.* at 174.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 175.

214. Christine K. Lemley & John H. Teller, Reports from the Field, “*Eneq’s Ke:s - Kake:ketikuaq Omae:qnomene:wak*” (“*The Menominee Have Spoken*”): *Mentorship and Collaboration in an Indigenous Community*, 53 J. AM. INDIAN EDUC. no. 1, 2014, at 42, 46.

215. Herzberg, *supra* note 193, at 175.

216. *Id.* at 176.

the Tribe encountered management and personnel difficulties.<sup>217</sup> BIA employees formerly directing the mill had to be replaced by private managers who were unfamiliar with smaller tribal businesses.<sup>218</sup>

Attempts by the managers to adopt Western models for larger businesses on the reservation failed.<sup>219</sup> For example, the replacement of tribal trucks with larger commercial models led to expansion of tribal roads.<sup>220</sup> Despite this undertaking, the trucks were still unable to be used as they sank into the reservation roads.<sup>221</sup> The work environment shifted as cost-limiting practices were employed, focusing the business not on employment but rather on profit.<sup>222</sup> These measures were unable to turn the mill into a highly profitable business.<sup>223</sup> The mill began to lay off workers, leading to a difficult search for jobs in surrounding areas.<sup>224</sup>

Land ownership drastically shifted as termination forced the Tribe to implement individual ownership. The Menominee had long regarded communal ownership of the land as tying the people to their culture and tradition.<sup>225</sup> Although the termination act did not address the topic of land ownership, the tribal government could not resist parceling and selling the land.<sup>226</sup> The land and tribal assets were placed under the authority of Menominee Enterprises, Inc.<sup>227</sup> The board of directors decided to use the land for housing and have it appraised and offered to be sold to its current occupants.<sup>228</sup> Many of the occupants could not afford to buy the land they lived on.<sup>229</sup> The land was offered at fair market value, but the aesthetics of the land increased its value.<sup>230</sup> Land was sold to pay taxes, and where taxes were not paid, Menominee families were forced to relinquish ownership.<sup>231</sup> Menominee people left traditional lands to seek employment in the city.<sup>232</sup>

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 176-77.

221. *Id.* at 177.

222. *Id.*

223. *Id.*

224. *Id.* at 179.

225. *Id.* at 182.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 183.

230. *Id.*

231. Lurie, *supra* note 204, at 261.

232. *Id.*

This action did not always bring prosperity but rather provided merely a switch from rural to urban poverty.<sup>233</sup>

Additional sales of tribal land to outsiders further eroded the tribal land base. After other efforts had proven unsuccessful, the Tribe entered an agreement to sell land.<sup>234</sup> There is some doubt the stockholders understood the economic development plan they were voting on would result in the sale of additional tribal lands to non-members.<sup>235</sup> A developer was hired who created an artificial lake and sold 2600 building sites.<sup>236</sup> The plan took land out of tribal use and required the Tribe to provide additional services, which had to be paid for by the land sales.<sup>237</sup> Though the agreement with the developer was terminated, the land loss is still felt.<sup>238</sup>

Broader consequences of termination affect the identity of tribal members to this day. Termination aimed at assimilation, and in this pursuit, the Menominee lost elements of culture and connection as a people.<sup>239</sup> As the state was enabled to exercise greater power, the Menominee people were denied the level of self-determination the trusteeship of the BIA provided for them.<sup>240</sup> Menominee children born after June 17, 1954, cannot be recognized as tribal citizens.<sup>241</sup> A community once tied together by the land began to fracture as people left the reservation in pursuit of work.<sup>242</sup> The freedom promised by the termination act actually made the Menominee “the wards of many masters.”<sup>243</sup>

##### *5. Application to Trump Administration Policies and Goals*

The current climate in the United States is an echo of post-World War II attitudes that guided termination policies. President Trump appears to be concerned with citizens perceiving disparate treatment based on race.<sup>244</sup> Although Indian status is not a racial classification but rather a political one, it may be perceived by the general public as a racial category.<sup>245</sup> The

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233. *Id.*

234. Herzberg, *supra* note 193, at 183.

235. *Id.* at 183-84.

236. *Id.* at 184.

237. *Id.*

238. *Id.*

239. *Id.* at 185.

240. Lurie, *supra* note 204, at 261.

241. Herzberg, *supra* note 193, at 185.

242. *Id.*

243. *Id.*

244. Perez, *supra* note 18.

245. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

Trump administration has indicated several ways that federally recognized Indians are treated differently than non-member Americans. First, tribes have less access to their land and energy resources because of complex bureaucratic protections.<sup>246</sup> Second, President Trump has voiced concern that Native Americans receive benefits that other minorities do not receive, including access to federal programs.<sup>247</sup> However, although cohesion and equality are valid goals, pursuing them in Indian Country is a complex process due to the federal-tribal relationship that has not existed with other minority groups.

While reducing federal oversight of tribal actions is a stated goal of the Trump administration,<sup>248</sup> the Termination Era warns that drastic actions will have lasting impacts. HCR 108 ushered in the Termination Era and promoted the idea that tribal members should be treated in the same way as other American citizens.<sup>249</sup> The goal of integrating tribes into mainstream society in effect destroyed tribal sovereignty that existed for thousands of years. Termination acts passed in pursuit of the policy led to the sale of the tribal land base, as well as to many tribal members leaving traditional lands.<sup>250</sup> Without a land base, the tribes did not have an area to assert jurisdiction. Although the termination acts did not explicitly eliminate inherent tribal sovereignty, after termination, tribes did not continue to assert this power.<sup>251</sup> Because the tribal-federal relationship was eliminated, lands held by tribes and the incomes of tribal members previously gained on the reservation became subject to state and federal taxes.<sup>252</sup> Additionally, businesses were under the regulatory authority of the state.<sup>253</sup> This meant that tribes had to expend a great amount of money on taxes from which they had previously been shielded. More money was spent on bringing businesses up to state codes.<sup>254</sup> These same effects may be seen today if tribal lands are sufficiently deregulated. Lands may be removed from the tribal land base and no longer subject to tribal jurisdiction. Tribal members

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246. Trump Remarks at Energy Roundtable, *supra* note 3, at 1.

247. *Statement by President Donald J. Trump on Signing H.R. 244 into Law*, WHITE HOUSE (May 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-h-r-244-law/>.

248. Trump Remarks at Energy Roundtable, *supra* note 3, at 1.

249. Wilkinson & Biggs, *supra* note 115, at 149.

250. Herzberg, *supra* note 193, at 183.

251. Wilkinson & Biggs, *supra* note 115, at 154.

252. Walch, *supra* note 108, at 1189.

253. Herzberg, *supra* note 193, at 171.

254. *Id.*

and businesses could be under the domain of state government and may be subject to state taxes.

Trump's policy of reducing regulatory hurdles in the development of tribal land may make access to resources easier, but it is essential that states do not take the role the federal government previously asserted. When federal power is limited in Indian Country, state authority could likely be found permissible. PL 280 enabled states to take over criminal jurisdiction and civil adjudicatory jurisdiction from the federal government.<sup>255</sup> Not only did this lead to the heavy utilization of state courts to adjudicate claims the tribes would traditionally resolve in culturally appropriate manners, but it also led to a gap in enforcement.<sup>256</sup> When the federal government pulls out of programs, funding may go with it. This means that tribes may no longer have the resources to provide services or enforce regulations. States may gain jurisdiction, but the states are then tasked with allocating additional funds to ensure enforcement. This process does not always occur.

While tribal self-determination is an admirable goal, it is one that needs to be undergone in a gradual manner. As evidenced by the Termination Era, the removal of federal programs and oversight can yield breakdowns in Indian Country. Tribes are more likely to be located in remote places, making access to services beyond the reservation costly or impractical once federal support is removed.<sup>257</sup> Additionally, tribal budgets take into account federal funding. Tribes need time to find funds to replace federal support. Therefore, the oversight processes that Trump's administration seeks to curtail need to be evaluated to determine if they need to be replaced by tribal regulations or processes. These processes must be implemented without a lapse period in which lands are leased or alienated without tribal approval informed by the impact of the transaction.

Enabling approval of leases and other land transactions without large bureaucratic hurdles may promote tribal energy resource development, but it may threaten the continued recognition of tribal sovereignty. As lands are alienated, it is more likely that courts will assume tribes no longer have jurisdiction over the lands. Erosion of the tribal land base would threaten the continuance of the tribe, perhaps without the approval of tribal governments and a majority of tribal members. Although this would not be termination in name, it could evolve into de facto termination. Sale of lands or leasing of lands that were previously utilized as family residences may

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255. Jimenez & Song, *supra* note 140, at 1657-65.

256. Twetten, *supra* note 178, at 1325.

257. Herzberg, *supra* note 193, at 174.

yield in the movement of tribal members off the reservation. This would allow for more energy development of the land, but it could yield a loss of cohesion amongst tribal members that threatens the endurance of tribal constituencies. Tribal members who move off the reservation will be subject to state and federal taxes. In order to meet the requirements of monetary obligations off the reservation, members may be forced to abandon elements of culture in order to secure profitable jobs.

A further complicating factor is that with reduced federal oversight of tribal lands, the utilization of tribal resources may be up to tribal governments who are not always representative of member interests at large. After tribes were encouraged to create governments under the IRA, some tribes have been governed by systems that are incompatible with tribal beliefs and values.<sup>258</sup> Federal oversight has delayed development of tribal resources, but it has also served as additional protection of tribal members from tribal government action that is against the best interest of its members. The elimination of this barrier could put members at the will of governments that are not representative of tribal culture or desires. Therefore, reformation of tribal governments and regulations is important before removal of existing regulations.

In any discussion of tribal development, it is important to remember that the type of development tribes wish to undergo does not always mirror the type of development occurring in the United States at large. Despite the belief that energy development on tribal lands may be in the best interest of the country, the needs of individual tribes must be considered. It is easy to assume that tribes want to develop and turn resources into profit, but that is not necessarily the case. Even if that is the case, tribes may be interested in different development than what the current administration believes is the best plan of action. In the pursuit of self-determination and the observation of inherent tribal sovereignty, it is important to include tribes in the decision-making process and to allow tribes to pursue their own courses of development if regulations and restraints are removed.

#### *B. Alaska Native Claims Settlement Act (ANCSA)*

##### *1. Background and Goals*

Occupying a remote part of the country, which became sparsely populated by Westerners only later in American history, the treatment of Alaskan Natives vastly differed from that of tribes in the lower forty-eight.

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258. Robert L. Bee, *Structure, Ideology, and Tribal Governments*, 58 HUM. ORG. 285, 286 (1999).

When the United States entered into a Treaty of Cession with Russia in 1867, it was announced that the indigenous people living there would be “subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.”<sup>259</sup> The Alaskan Statehood Act of 1958 indicated that land and property of Indians, Eskimos, and Aleuts was to be held in trust by the United States until further congressional action dictated otherwise.<sup>260</sup> The Statehood Act granted Alaska the ability to select 102.5 million acres from public lands.<sup>261</sup> However, as the state began to select lands, Native villages objected to certain land claims, and the Secretary of the Interior halted patenting until the claims could be settled.<sup>262</sup> The discovery of oil in Alaska prompted the resolution of land claims so that development of resources could proceed.<sup>263</sup> The land claims were extinguished through the passage in 1971 of the Alaska Native Claims Settlement Act (ANCSA).<sup>264</sup> While Native Alaskans initially supported ANCSA because they believed the Act would recognize their land holdings and enable them to maintain their traditional ways of life, viewpoints have since evolved.<sup>265</sup>

## 2. Statutory Framework

Beyond freeing up land for oil development, ANCSA has been claimed to have the goal of supporting economic and political independence of tribes.<sup>266</sup> Overall, the Act initially provided for the granting of title to forty million acres of land, the provision of \$962.5 million to various Native groups, and the creation of twelve regional Native corporations and 220 village corporations to manage benefits awarded by the federal

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259. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., art. 3, Mar. 30, 1867, 15 Stat. 539.

260. Pub. L. No. 85-508, § 4, 72 Stat. 339, 339.

261. *Id.* § 6(b), 72 Stat. at 340.

262. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07(3)(b)(i), at 329 (Nell Jessup Newton et al. eds., 2012).

263. *Id.*

264. Pub. L. No. 92-203, 85 Stat. 688 (1971); see Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1331 (1992).

265. Hirschfield, *supra* note 264, at 1331.

266. Gordon Scott Harrison, *The Alaska Native Claims Settlement Act, 1971*, 25 ARCTIC 232, 232 (1972).

government.<sup>267</sup> In return for these benefits, Alaska was divided into twelve regions that were purportedly based on commonalities in culture amongst Alaskan Native groups.<sup>268</sup> The regions incorporated as businesses for profit under state laws.<sup>269</sup> One hundred shares of stock in the corporation were given to enrolled members of that region.<sup>270</sup> The village divisions were also meant to incorporate.<sup>271</sup> Stocks were made inalienable for twenty years to provide tribes with time to acclimate to the new organization.<sup>272</sup> Both levels of corporations were empowered to hold land, but the title varied based on the level of the corporation holding the land.<sup>273</sup>

The regional and village corporations hold different roles in disbursing and managing the settlement. The village corporations were tasked with selecting twenty-two million acres of land, with each village receiving land proportionately according to the Native population it entailed.<sup>274</sup> These holdings only included the surface estate.<sup>275</sup> Regional corporations selected a total of sixteen million acres of land.<sup>276</sup> The Secretary of the Interior could convey two million additional acres so that the corporations could manage significant sites such as cemeteries or historical markers.<sup>277</sup> These landholdings comprise a total of forty million acres of land.<sup>278</sup> Regional corporations hold the subsurface estates of these allocated lands.<sup>279</sup> An elaborate scheme dictates how each region is to distribute a portion of its profits to the other regions.<sup>280</sup> The region is responsible for the monetary settlement held in the Alaska Native Fund.<sup>281</sup> This fund's contents comprised general appropriations in the amount of \$462.5 million.<sup>282</sup> An amount of \$500 million in mineral revenues is also under regional

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267. 43 U.S.C. § 1613 (2012); *id.* § 1605(a); *id.* § 1606(a); *id.* § 1607; Harrison, *supra* note 266, at 232.

268. 43 U.S.C. § 1606(a).

269. *Id.* § 1606(d).

270. *Id.* § 1606(g)(1)(A).

271. *Id.* § 1607(a).

272. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 7(h)(1), 85 Stat. 688, 692 (1971).

273. 43 U.S.C. § 1613(f).

274. Hirschfield, *supra* note 264, at 1336; 43 U.S.C. § 1613(a).

275. 43 U.S.C. § 1613(f).

276. Hirschfield, *supra* note 264, at 1336.

277. 43 U.S.C. § 1613(h).

278. Hirschfield, *supra* note 264, at 1336.

279. 43 U.S.C. § 1613(f).

280. Hirschfield, *supra* note 264, at 1336.

281. *Id.*

282. *Id.*

domain.<sup>283</sup> Regions receive payment from this fund based on the number of shareholders.<sup>284</sup>

ANCSA's framework requires the village and regional corporations to work together in various ways despite the village corporations not being a stockholder or subsidiary of the regional corporations to which they report.<sup>285</sup> During the first five years after the passage of ANCSA, the regional corporations oversaw payments from the Alaska Native Fund and natural resource revenue to the villages.<sup>286</sup> The regional corporations had the ability to deny funds until village usage plans were approved and had the authority to approve the villages' budgets and articles of incorporation.<sup>287</sup> Regions could compel joint ventures amongst the villages to best support the region as a whole.<sup>288</sup> Even though villages were afforded the decision of when subsurface development would occur within their domain, accountability became an issue as the surface and subsurface rights to a piece of land could be held by different corporations.<sup>289</sup>

Although the Act purported to address the real and pressing needs of Natives in Alaska, it failed to fully address them. Commentators are split amongst whether ANCSA posed de facto termination or whether tribes were simply transformed into corporations.<sup>290</sup> Those who argue transformation recognize it came with diminished self-determination.<sup>291</sup> Native corporations had to make initial expenditures of the settlement funds to address essential needs such as housing and drinking water.<sup>292</sup> Education and training were seen as pressing needs as well.<sup>293</sup> While the resources provided by the Act were meant to improve the well-being of villages, the corporate model became a hindrance.<sup>294</sup> Studies conducted after the implementation of the Act found that the corporations garnered limited

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283. *Id.*

284. Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132, 136 (1976).

285. Hirschfield, *supra* note 264, at 1337.

286. *Id.*

287. Lazarus & West, *supra* note 284, at 135.

288. Hirschfield, *supra* note 264, at 1337.

289. *Id.*

290. Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 326 (2012).

291. *Id.*

292. Hirschfield, *supra* note 264, at 1338.

293. *Id.*

294. *Id.*

success in promoting the economic well-being of villages.<sup>295</sup> The corporate structure's success was limited to the small number of jobs the entities created.<sup>296</sup>

The corporations had the goals of not only succeeding financially but also providing great changes in the lives of Native Alaskans.<sup>297</sup> Unfortunately, both goals were initially undermined by a variety of factors that limited the independence of the corporations.<sup>298</sup> The corporations suffered from inexperience and lack of education regarding business.<sup>299</sup> In the twenty years following the enactment of ANCSA, Native corporations had differing levels of economic success.<sup>300</sup> One faced bankruptcy in 1988, while another was making more money than the combined income of the other Native corporations.<sup>301</sup> The Act required corporate compliance, which funneled out money from company profitability and individual payouts.<sup>302</sup> Resources were limited based on inflation in the 1970s, as well as litigation over the meaning of ambiguous provisions of ANCSA.<sup>303</sup> Delays were experienced in receiving title to the land.<sup>304</sup> To counteract these influences, some corporations chose to merge.<sup>305</sup> Others contemplated selling land.<sup>306</sup>

In 1988, before the twenty-year implementation period was set to expire, the ANCSA amendments became law.<sup>307</sup> Native groups wanted to ensure that once the implementation period ended, Natives would retain control over corporate membership and the assets of the corporations would be protected.<sup>308</sup> The restraint on alienability of stock in the corporations for the twenty-year period had insulated the corporations from external pressures.<sup>309</sup> Were the restraint to be removed, it was feared that outsiders could threaten tribal ownership.<sup>310</sup> The amendments allow the corporations

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295. *Id.*

296. *Id.*

297. *Id.*

298. Catherine Lynn Allison, Note, *Alaska Native Corporations: Reclaiming the Namesake; Effectuating the Purpose*, 42 PUB. CONT. L.J. 869, 874 (2013).

299. *Id.*

300. *Id.* at 875.

301. *Id.* at 875.

302. Hirschfield, *supra* note 264, at 1339.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 1340.

308. *Id.*

309. *Id.*

310. *Id.*

to decide if they would like to extend the restraints on alienability and also allow corporations to create different kinds of stock with different voting rights.<sup>311</sup>

Even in areas where the village and the region retain Native ownership, conflicts between the two could mean that villages are forced to undergo development they do not wish to occur.<sup>312</sup> The amendments do allow for Native Alaskans born after the cutoff date to become stockholders but at the discretion of the existing stockholders.<sup>313</sup> There is a different interest in stockholding than that in business at large.<sup>314</sup> Traditionally, a stockholder buys stock with the understanding that it will be alienable.<sup>315</sup> However, stockholding in these corporations depends on Native status and thus serves as a symbol of Native cooperation and cultural recognition.<sup>316</sup> Congress has granted quasi-tribal status to these corporations.<sup>317</sup> Treating them as traditional business or private entities is at odds with notions of self-governance and sovereignty involved in federal Indian law.<sup>318</sup>

Fearing the development of Indian Country in Alaska, legislators involved in the amendments created a settlement trust option that would allow for a certain level of protection for some corporate property.<sup>319</sup> Trusts chartered under state law may hold and manage corporate land to promote various interests of the tribe.<sup>320</sup> The trust cannot hold any subsurface estates, and regional corporations can prevent villages from placing land in trust.<sup>321</sup> The trust is not allowed to convey land it holds to Natives without ANCSA stock.<sup>322</sup>

### 3. Impacts

Although the amendments do allow for the continuation of restraints on alienation, these protections can be eliminated by a majority vote.<sup>323</sup> The

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311. *Id.* at 1341.

312. *Id.*

313. *Id.*

314. *Id.* at 1341.

315. *Id.* at 1341-42.

316. *Id.* at 1342.

317. *Id.* at 1342-43.

318. *Id.*

319. *Id.* at 1343.

320. *Id.* at 1344.

321. *Id.*

322. *Id.*

323. Julia A. Bowen, Note, *The Option of Preserving a Heritage: The 1987 Amendments to the Alaska Native Claims Settlement Act*, 15 AM. INDIAN L. REV. 391, 405-06 (1991).

protections of ANCSA provide that the stock is to remain in Native hands until the twenty-year period expires.<sup>324</sup> That meant that after December 18, 1991, stock would become freely alienable.<sup>325</sup> The amendments allow a corporation to continue restraints on alienability or to discontinue it.<sup>326</sup> The fate of corporate stock may be at the whim of a majority vote.<sup>327</sup> Recapitalization of stock is enabled through the amendments in which a corporation could create different levels of stock corresponding to different rights.<sup>328</sup> If this were to occur, stock held by Native Alaskans could be reduced in power such that voting could be skewed in the direction of non-Indian stockholders.<sup>329</sup> The requirements surrounding the trust are problematic because subsurface rights cannot be placed in trust.<sup>330</sup> To get benefits from them, the corporation must continue to exist.<sup>331</sup> If the profits dwindle, Native people may have to end the corporation and lose the subsurface rights.<sup>332</sup>

Although corporations have potential to become highly profitable and to encourage self-determination, placing intricate business decisions in the hands of people without experience or training in the area places them at a strong disadvantage.<sup>333</sup> Many of the Native shareholders are not familiar with business.<sup>334</sup> The economic struggles of the corporations often put the stockholders in a position where they must sell or lose land rights in order to avoid debt.<sup>335</sup> Natives are forced to make decisions not according to independent action, but according to survival.<sup>336</sup>

While ANCSA has increased Native visibility in Alaskan politics, it has not been as successful at increasing the general welfare of Alaskan Natives.<sup>337</sup> Natives still rely greatly on welfare. Even with welfare benefits figured in, an estimated twenty-five percent of Native Alaskans lived below

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324. *Id.*

325. *Id.* at 406.

326. *Id.* at 405-06.

327. *Id.* at 406.

328. *Id.*

329. *Id.*

330. *Id.* at 406-07.

331. *Id.* at 407.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 407-08.

336. *Id.* at 408.

337. Gary C. Anders, *Social and Economic Consequences of Federal Indian Policy: A Case Study of the Alaska Natives*, 37 *ECON. DEV. & CULTURAL CHANGE* 285, 294 (1989).

the poverty level in 1989.<sup>338</sup> Over half of Native Alaskans over sixteen-years-old were unemployed in 1985.<sup>339</sup> There is a disparity of outcomes between rural and urban Alaskan Natives.<sup>340</sup> In rural areas, some culture and language are preserved, but assistance is needed to provide tools with which to carry out traditional practices.<sup>341</sup> These rural communities require financial aid to afford hunting tools and utilities, as well as service support.<sup>342</sup> In villages not engaged in commercial fishing, around eighty percent of jobs resulted from state expenditures in 1989.<sup>343</sup>

Having endured assimilative and other destructive pressures before the passage of ANCSA, the failures of the Act to provide needed benefits has led to a variety of social problems.<sup>344</sup> For example, mental illness and suicide especially impact young adult males.<sup>345</sup>

ANCSA attacks tribal sovereignty traditionally afforded to tribes because sovereignty that is typically viewed as inherent within the tribe is partially granted to Alaskan Natives based on land grants to private entities that allow for limited tribal autonomy. ANCSA reduces recognized tribal sovereignty because it recognizes land holdings as grants from the federal government.<sup>346</sup> While a tribe may be able to retain sovereignty without landholdings, a separation of land and governance weakens a tribe's autonomy.<sup>347</sup> Market influences can dictate how corporations are managed apart from tribal wishes.<sup>348</sup> When Natives are limited to operating within the constraints of a corporation, it becomes difficult to provide for communities.<sup>349</sup> Corporations do not have the full functionality of a government.<sup>350</sup> Their sovereign action is limited.<sup>351</sup>

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338. *Id.*

339. *Id.* at 294-95.

340. *Id.*

341. *Id.* at 294-96.

342. *Id.* at 295-96.

343. *Id.* at 296.

344. *Id.* at 296-97.

345. *Id.*

346. Hirschfield, *supra* note 264, at 1347.

347. *Id.* at 1348.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

#### 4. Application to Trump Administration Policies and Goals

ANCSA provides a warning for downplaying Indian interests in pursuit of energy development. ANCSA was a result of a similar climate of American energy dominance.<sup>352</sup> The Trump administration has not made direct statements indicating a desire to privatize Indian land or transform tribal holdings into corporate holdings, but the aftermath of ANCSA provides key takeaways to remember when addressing tribal energy development and harmonizing this with American energy interests.

While utilizing previously dormant lands may yield initial profits, forcing development on tribes erodes tribal sovereignty, even when tribes have a role in subsequent development. Under ANCSA, tribal governments were transformed into corporations.<sup>353</sup> While these corporations have control in business decisions, the tribes were denied the large decision regarding transformation into a corporate entity under state law. Tribes are no longer able to assert full sovereignty because businesses do not perform all of the same functions as a government. Additionally, tribes are required to adhere to state corporate laws.<sup>354</sup> This means that tribal sovereigns have to yield to the power of the state. Market pressures can turn choices into forced action in order to preserve some tribal power. If corporations go bankrupt, tribes lose access to subsurface resources.<sup>355</sup> The framework of the corporate structure means that not only the state has power over a tribe's actions but so do other tribes.<sup>356</sup> Regional corporations can dictate some actions of the village corporations.<sup>357</sup> These regional corporations are made up of several Native groups that may have divergent goals and cultural considerations.<sup>358</sup>

Decisions made by the Trump administration could potentially erode tribal sovereignty in a similar way that ANCSA has, by forcing tribes to adhere to new regulations. While tribes have been subject to federal oversight as part of the federal-tribal trust relationship for many years, removing long-standing limitations on Indian actions with regards to land could erode the tribal land base without the tribe's consent. This is why it is essential that tribes have their own regulations and processes in place in anticipation of changes in federal oversight. Without tribal processes, tribes

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352. Harrison, *supra* note 266, at 232.

353. Hirschfield, *supra* note 264, at 1331-32.

354. *Id.* at 1332.

355. Bowen, *supra* note 323, at 407.

356. Hirschfield, *supra* note 264, at 1337.

357. *Id.*

358. *Id.* at 1335.

may lose land holdings and therefore power. Additionally, while the Trump administration is wise in including tribal leaders and states in discussions on regulatory reform, it is important to learn from ANCSA that allowing other tribes and states to assert authority over a particular tribe's landholdings further erodes sovereignty and undermines tribal interests.<sup>359</sup> Discussions amongst diverse groups may provide insights into reforms, but if success is to occur, it is important that individual tribes have authority over the development of their own land. This ensures that tribes have the fullest sovereign authority possible to cater development to local needs and beliefs.

ANCSA made lands inalienable for a portion of years, which may pose a possible option for tribal development if many restraints on alienation are removed.<sup>360</sup> If the Trump administration does push for privatization of lands or the removal of restraints on land, it may be in tribes' best interest to keep lands unalienable for a period to ensure that tribal mechanisms are in place to retain tribal land holdings. In the first years after the enactment of ANCSA, tribes allocated money to the most pressing issues, including healthcare and schooling.<sup>361</sup> If restraints on alienation had not been put in place, tribal members could have sought immediate money to address these needs by selling shares, meaning that holdings could have quickly fallen out of tribal control. A similar process could take place if restraints on alienation were removed under the Trump administration. In tribal areas where necessities are not met, tribal members may be encouraged to address immediate concerns despite these actions risking the continuance of tribal authority.

When individuals make decisions that will personally impact them, responsible regulations and policies are more likely to be created. Under the ANCSA framework, regional corporations could make decisions without the approval of village corporations.<sup>362</sup> This framework meant that the regional corporation could pursue its overall best interest without regard to individual village welfare. In order to maintain the corporation, profit may be prioritized over the welfare of Native Alaskans. Therefore, individualized plans of action with regard to energy development on tribal lands should be created at the tribal level and should be undertaken by traditional governments rather than tribal corporations. Not only would this enable tribes to consider their individual needs, it would also mean that

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359. Trump Remarks at Energy Roundtable, *supra* note 3, at 1.

360. Hirschfield, *supra* note 264, at 1332.

361. *Id.* at 1338.

362. *Id.* at 1337.

more thought could be given to tribal endurance and environmental sustainability.

The status of Native Alaskans after ANCSA creates confusion that inhibits tribal action. Native Alaskan villages are considered quasi-tribal.<sup>363</sup> They do not have the same rights and recognition as tribes in the lower forty-eight states, but they retain a level of federal recognition.<sup>364</sup> The removal of restraints on Indian lands in the continental United States, accompanied by reductions in regulations, could yield discussions relating to the extent of the tribal-federal relationship. It is important that these questions are resolved with tribal input and made sufficiently clear so that tribes can pursue development without needing to litigate questions of authority. Leaving unanswered questions regarding federal authority in tribal development would mean expensive litigation or stalls in tribal plans.

#### *IV. Conclusion*

Both the Termination Era and ANCSA warn against changes in federal Indian policy without consultation with tribal governments and deep conversations into the possible impacts of policy. While reductions in federal oversight may be vital steps in allowing for the development of tribal resources, the federal government must recognize the importance of preserving tribal sovereignty. Tribes must be given time and authority to implement individualized regulations that come into effect before federal protections are removed. Without the allowance of sufficient time to implement protective measures, tribes are at risk of de facto termination. However, if the federal government works closely with tribal governments, removal of federal oversight could enhance a tribe's ability to utilize fuller sovereignty.

The Termination Era warns that policy must be informed by the understanding that Indian status is a political, and not a racial, classification. Although racial equality is an important goal, inequalities in the treatment of tribes raise different questions than disparate treatment amongst people of different races. Federally recognized tribes have a special relationship with the federal government. This relationship comes with responsibilities that are not necessarily owed to other groups. Tribes as sovereigns have different interests than other minority groups.

In order to maintain their rights as sovereigns, tribes usually need access to land, a body of constituents, and resources. Deregulation of the

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363. *Id.* at 1342.

364. *Id.* at 1343.

bureaucracy created to oversee tribal actions may have a great impact on tribes' access to these essential elements. When restraints on alienation of lands are removed without tribal regulations or laws on the disposition of land, individual members may decide single-handedly to decrease the tribe's landholdings. This would be similar to a United States citizen selling his land to another nation, removing the land from the United States' control. Such actions could greatly undermine the functioning of a government that needs land to assert jurisdiction. If the tribal-federal relationship were sufficiently transformed so that greater state control was present in Indian Country, Indians and their land could be subject to state taxes. These taxes would not only limit the amount of income individual Indians receive, regardless of where the income came from, but would also decrease the amount of money tribes held. Reduction in land and income limits sovereignty in that tribes have more limited courses of action.

When PL 280 was passed, federal authority was replaced with state authority, and federal funding was removed. This same process could happen if the federal government were to remove oversight of tribal land holdings and allow for greater state participation. If tribes do not have sufficient revenue apart from federal aid, even if tribal regulations are passed, there may be insufficient funds to carry them out. States could attempt to assert their own regulations, which could yield confusion over sovereign authority. Confusion may inhibit tribal action and energy development. The best course of action if the federal government wished to reduce federal oversight would be to give tribes support and time to implement their own regulations to take the place of similar federal rules. Any intrusion of tribal authority by state authority needs to be fully discussed with the potentially impacted tribes. Robust conversations between tribes and the federal government would include the structure of the tribal government and its ability to carry out the functions the federal government has previously provided. Reducing federal oversight diminishes federal protection of tribal members from unwise decisions of the tribal government. This reality further indicates the importance of tribal regulations to replace this function, as well as a capable government to implement the regulations.

Although it is time-consuming, the most effective manner to alter federal control over land in Indian Country is to address each tribe individually. Some tribes will have larger governments that are capable of enforcing their own regulations and adjudicating disputes. Other tribes may lack judicial systems or well-staffed governments and require more time to develop these. ANCSA indicates that one possible way to allow for a transition of

power is to place a terminable restraint on the alienation of lands. Once tribes are satisfied with their abilities to direct land sales themselves, they may remove federal restrictions. Tribes will likely have different opinions on energy development and the relationship they wish to have with the federal government. Respecting tribal sovereignty should entail respecting a tribe's individual plans for energy development.

ANCSA warns against unilateral choices by the federal government in Indian Country. While freeing lands for energy development may allow for lucrative resource extraction, it leaves a lasting mark on those whose voices were silenced in the process. This is not to say that resource development should not take place but rather that it should be the result of collaborations between all parties involved. The structure of ANCSA enabled different Native groups to control the actions of others. This inhibits Native Alaskan groups from practicing self-determination. In the lower forty-eight states, it is important that individual tribes control actions regarding lands under their domain. It should be remembered that tribes are individual sovereigns and not a collective whole. Additionally, local action at the tribal level is more likely to take into account the impacts development will have on individual tribal members and the environment. When groups who will face the consequences of the action make the decision to take the action, more thought will hopefully be given to environmental sustainability and human welfare.

While it may appear that the federal government can consider Indian interests adequately without always receiving tribal input, a recent action of the executive branch warns against hasty action without local cooperation and insight. The Trump administration recently vocalized that it will “cease all implementation” of the Paris Climate Accord.<sup>365</sup> The National Congress of American Indians reports that climate change has a disproportionate impact on tribes, and therefore, President Trump's intent to withdraw from the Paris Climate Accord may have larger impacts on tribal development than elsewhere in the country.<sup>366</sup> The locale of reservations and the continuance of subsistence practices by some tribes mean that impacts on climate can affect health, food supply, and culture.<sup>367</sup> These are realities that may not enter the discussion at the federal level but nonetheless are vital considerations for well-rounded decision-making.

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365. Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 1 (Jun. 1, 2017).

366. NAT'L CONG. OF AM. INDIANS, *supra* note 68, at 9.

367. *Id.*