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THE BUREAU OF LAND MANAGEMENT'S FINALIZED HYDRAULIC FRACTURING RULE ON TRIBAL LANDS: A RESPONSIBILITY OR INTRUSION?

Kerstie Moran*

“Our entire tribal culture and existence is based on the principle that the land equals the people, us; destroy one and you destroy the other,” [Corey] Sanders wrote to his tribal representative. “Yes, it’s true our tribe needs money, and it’s nice to get a royalty check every month, but what are we giving up to get it?”¹

I. Introduction

On May 11, 2012, the Bureau of Land Management (BLM) proposed a regulation dealing with hydraulic fracturing of oil and gas on federal and Indian lands.² The initially published rule spurred a vast number of opinionated reviews criticizing the BLM for imposing unnecessary regulations on an already heavily encumbered energy industry.³ In response to these outcries, and the approximately 177,000 comments received on the initially proposed regulation, the BLM published a supplemental version of this regulation on May 16, 2013.⁴ The proposed regulation’s revisions integrate a number of interests held by tribes, environmentalists, and operators. Although the rule was projected to be finalized in the fall of

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1. Curt Brown, *Taking a Stand on Their Sacred Land: “Keepers of the Earth” Struggle to Come to Terms with North Dakota’s Oil Boom*, STAR TRIB. (Minneapolis, Minn.), Feb. 25, 2014, <http://www.startribune.com/local/233854981.html>. Sanders is a Native of the Fort Berthold Indian Reservation in North Dakota. *Id.*

2. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27691 (proposed May 11, 2012) (to be codified at 43 C.F.R. pt. 3160).

3. Szonja Ludvig, *The Tribes Must Regulate: Jurisdictional, Environmental, and Religious Considerations of Hydraulic Fracturing on Tribal Lands*, 2013 BYU L. REV. 727 (2014), available at <http://digitalcommons.law.byu.edu/lawreview/vol2013/iss3/13>; David Blackmon, *BLM’s Fracking Rule – A Solution Vainly Searching for a Problem*, FORBES (Aug. 26, 2013, 1:42 PM), <http://www.forbes.com/sites/davidblackmon/2013/08/26/blms-fracking-rule-a-solution-vainly-searching-for-a-problem/>.

4. See Press Release, Bureau of Land Mgmt., U.S. Dep’t of the Interior, Interior Releases Updated Draft Rule for Hydraulic Fracturing on Public and Indian Lands for Public Comment (May 16, 2013), available at http://www.blm.gov/wo/st/en/info/newsroom/2013/may/nr_05_16_2013.html.

2014,⁵ the completed rule was not published until March 20, 2015.⁶ A press release by the Department of Interior (DOI) briefly describes the final rule and its standards that are to take effect 90 days from the release date.⁷ Prior to the final publication, over 1.5 million public comments were submitted to the DOI for consideration.⁸ Among several other rule components detailed in the following sections, the rule broadly seeks to improve safety and enhance groundwater protection by updating requirements for well-bore integrity, wastewater disposal management, and public disclosure of chemicals.⁹

Of the more than 100,000 oil and gas wells situated on federally managed lands, over 90 percent use hydraulic fracturing to extract valuable oil and gas hydrocarbons trapped within impermeable layers of rock deep below the earth's surface.¹⁰ Therefore, the vast majority of oil and gas operations on federally managed lands will be affected by these regulations. As a result, the rule has conjured up a great deal of concern amongst industry leaders and affected parties. Those opposed to the new BLM regulation argue existing state and tribal regulations provide adequate oversight of hydraulic fracturing.¹¹ Many have gone so far as to support the notion that the proposed regulation "will undoubtedly insert an unnecessary layer of rigidity into the permitting and development process [of hydraulic fracturing]."¹² Commentators challenge the BLM's most recent rule to regulate oil and gas production on tribal lands, believing it infringes on tribal sovereignty.¹³ For many tribes hoping to find economic stability

5. Abigail Faulkner Jones, *Draft Final BLM Rules Under White House Review*, SHALE ENERGY LAW BLOG (Sept. 3, 2014), <http://www.shaleenergylawblog.com/oil-gas/draft-final-blm-rules-under-white-house-review/>.

6. Press Release, Office of the Sec'y, U.S. Dep't of the Interior, Interior Department Releases Final Rule to Support Safe, Responsible Hydraulic Fracturing Activities on Public and Tribal Lands, DOI (Mar. 20, 2015) [hereinafter Press Release, Interior Department Releases Final Rule], available at <http://www.doi.gov/news/pressreleases/interior-department-releases-final-rule-to-support-safe-responsible-hydraulic-fracturing-activities-on-public-and-tribal-lands.cfm>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Ludvig, *supra* note 3.

12. John M. Broder, *New Proposal on Fracking Gives Ground to Industry*, N.Y. TIMES, May 4, 2012, http://www.nytimes.com/2012/05/05/us/new-fracking-rule-is-issued-by-obama-administration.html?_r=0.

13. Ludvig, *supra* note 3, at 740.

through increased drilling efforts, federal regulation is seen as adding “more bureaucratic hurdles for prospective lessees on tribal lands.”¹⁴

Even still, other tribes, such as the Turtle Mountain Band of Chippewa Indians, feel the hazards associated with hydraulic fracturing are far too severe, and as a result have completely banned such drilling techniques.¹⁵ Because tribes similar to the Turtle Mountain Band would elect to have stronger environmental protections in lieu of economic development, they are unlikely to oppose federal efforts to add environmental protections against such hazards as water contamination, improper wastewater disposal, and air pollution. Contrary to popular belief, the BLM insists that the new rule will streamline hydraulic fracturing on tribal lands held in trust by the DOI, and that it will not hinder tribes’ ability to govern drilling efforts.¹⁶ Faced with balancing a number of differing interests, the BLM’s attempt to create a comprehensive rule that satisfies everyone seems next to impossible. The BLM is essentially left with two losing options: (1) sit idle and allow local, state, and tribal regulations to control the industry, which may result in destruction of tribal lands and environmental damage; or (2) place federal regulations on hydraulic fracturing operations and potentially risk impeding economic growth for tribes that desperately need to decrease unemployment and alleviate poverty.

Unconventional drilling practices, including hydraulic fracturing and horizontal drilling, have allowed increased access to shale oil and gas development.¹⁷ Although these technological advances have indisputably led to the extraction of once unattainable resources, the rapid expansion of this practice has caused widespread public concern about whether fracturing can contaminate underground water sources.¹⁸ Other concerns include whether the chemicals used in fracturing should be disclosed to the public and whether there is adequate management of well integrity and the “flowback” fluids that return to the surface during and after fracturing operations.¹⁹

14. Eloise Ogden, *Tex Hall: Proposed Fracking Regs Will Hurt Energy Development on Reservations*, MHA NATION: NEWS (Mar. 30, 2012), http://www.mhanation.com/main2/Home_News/Home_News_2012/News_2012_03_March/news_2012_march30.html.

15. See Turtle Mountain Tribal Council Res. TMBC627-11-11 (Nov. 29, 2011), available at <http://www.legis.nd.gov/assembly/62-2011/docs/pdf/ts032612appendixd.pdf>.

16. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636, 31636 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160).

17. *Id.*

18. *Id.*

19. *Id.*

The BLM, together with the Bureau of Indian Affairs (BIA), has the task of overseeing approximately fifty-six million subsurface acres of land held in trust by the federal government on behalf of tribes and individual Indian owners under the Indian Mineral Leasing Act of 1938 (IMLA).²⁰ Rising concerns of environmental impacts of hydraulic fracturing on these tribal lands has compelled the BLM to provide Indian lands with the same level of protection it provides to public lands. The initially proposed rule, supplemental proposed rule and finalized rule seek to

modernize BLM's management of hydraulic fracturing operations by ensuring that hydraulic fracturing operations conducted on the public mineral estate [and Indian lands] . . . follow certain best practices, including: (1) The public disclosure of chemicals used in hydraulic fracturing operations on Federal and Indian lands; (2) Confirmation that wells used in fracturing operations meet appropriate construction standards; and (3) A requirement that operators put appropriate plans in place for managing flowback waters from fracturing operations.²¹

The question thus remains, is this regulation simply a means by which the federal government seeks to constrain tribal sovereignty and exercise its authority, or is it a necessary legislative action to more adequately and efficiently govern oil and gas production in the best interest of the tribes?

This comment will focus on the BLM's hydraulic fracturing regulation and the potential effects it will have on Native American tribal lands. This comment can be distinguished from other comments that have been published on the BLM regulation and its impacts on tribes by looking more broadly at both sides of the issue and offering alternative solutions for tribes seeking safe and effective energy development. Part II discusses the general areas to be addressed by (A) looking at the financial impacts of increased oil and gas development on tribal lands, (B) analyzing the steps Congress has taken thus far to regulate oil and gas development on tribal lands, and (C) examining the BLM's obligation to regulate tribal lands held in trust by the federal government. Part III discusses the particular issues surrounding the BLM regulation by analyzing (A) whether hydraulic fracturing on tribal lands should be regulated through local or federal efforts, and (B) whether hydraulic fracturing causes environmental damage. Next, Part III (C) reviews the major elements of the recently published BLM regulation. Part

20. *Id.*

21. *Id.*

IV suggests options for tribes that seek to resolve the divide between tribal self-governance over energy development and protecting tribal lands from unnecessary destruction. Although the BLM's regulation will affect Indian and federal lands alike, the effects on federal lands are not within the scope of this comment.

II. Contextual Background Synopsis

A. The Possibility of Financial Independence for Tribes

Increasing political instability around the globe continues to place pressure on the United States to become more energy independent. Achieving greater energy independence has become a reality through advances in unconventional drilling techniques such as horizontal drilling and hydraulic fracturing. Despite its more recent uptick in public exposure, hydraulic fracturing is not a new technique.²² Since the early fifties, the basic concept was used to stimulate production in old oil and gas wells. Hydraulic fracturing has made the production of oil and gas from impermeable rock formations in the earth's subsurface, known as "shale" formations, profitable and has produced additional resources from reservoirs that were once thought to be completely drained.²³ Hydraulically fracturing a well is done by forcing water, usually mixed with proppants (sand or beads to hold the fractures open) and chemicals (to reduce friction and kill bacteria) down a wellbore (the actual hole that forms the well) at extremely high pressure in order to create or expand fractures in the shale rock formation. The proppants act as wedges and allow the oil and/or gas to flow freely from the rock formation in which it is trapped.²⁴

The U.S. Environmental Protection Agency (EPA) briefly describes hydraulic fracturing as a "well stimulation process used to maximize the extraction of underground resources; including oil, natural gas, geothermal energy, and even water."²⁵ The BLM estimates that about 90% of wells drilled on federal and Indian lands are stimulated using hydraulic fracturing

22. Zachary Lees, Note, *Anticipated Harm, Precautionary Regulation and Hydraulic Fracturing*, 13 VT. J. ENVTL. L. 575, 578 (2012).

23. *Natural Gas Extraction – Hydraulic Fracturing*, EPA, <http://www2.epa.gov/hydraulicfracturing> (last visited Oct. 2, 2014).

24. *Id.*

25. *Hydraulic Fracturing Background Information*, EPA, http://water.epa.gov/type/gro/undwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last visited May 2, 2012).

techniques (approximately 3400 wells per year).²⁶ Several Indian reservations are located in known “shale play areas” and contain large amounts of undeveloped or underdeveloped oil-rich areas. Industry demand for mineral leases conveying shale formations has drastically increased, resulting in equally drastic monetary success for tribes.²⁷ According to the BIA, in 2012 alone “energy and mineral resources generated over \$701 million in royalty revenue paid to Indian mineral owners.”²⁸ In the last three years, the BIA and other government energy departments have collectively assisted tribes in the negotiation of forty-eight leases for oil and gas under the Indian Mineral Development Act of 1982 (IMDA), covering approximately 2.75 million acres and amounting to about \$45 million in bonuses—upfront per-acre payments made to mineral owners as consideration for oil and gas leases.²⁹ Through royalties and working interests, these leases are projected to produce an additional \$20 billion in revenue to Indian mineral owners over the life of the leases.³⁰

Because of the enormous success with shale gas, natural gas has become abundant and cheap for consumers in America.³¹ The lower price of natural gas benefits consumers and the electric power generating industry alike by lowering the cost of home heating and electricity.³² Eventually, this higher demand will create higher prices, and new exploration for natural gas is likely to ensue.³³ “One unanticipated scenario is that natural gas may become so abundant that it be possible to export as liquefied natural gas, creating new markets for natural gas produced from Indian lands.”³⁴

The U.S. Energy Information Administration (EIA) offers additional insightful data pertaining to mineral development on Indian lands. Crude oil and natural gas were found to represent 29% and 22%, respectively, of fossil fuel sales from production on Indian lands in fiscal year (FY) 2013.³⁵

26. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636, 31638 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160)

27. *Oil and Gas Outlook in Indian Country*, BUREAU OF INDIAN AFFAIRS, 1, <http://www.bia.gov/cs/groups/xieed/documents/document/idc1-024535.pdf> (last visited Apr. 29, 2015).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. U.S. ENERGY INFO. ADMIN., SALES OF FOSSIL FUELS PRODUCED FROM FEDERAL AND INDIAN LANDS, FY 2003 THROUGH FY 2013, at 4 (June 2014), available at <http://www.eia.doe.gov>

“Sales of crude oil produced on Indian lands increased a fourth consecutive year, by 48% to forty-six million barrels in FY 2013 (Table 3), the highest level between FY 2003 and FY 2013.”³⁶ According to a recent EIA study, Indian lands account for 1% of total natural gas production, less than 1% of total natural gas plant liquids production, a little more than 1% of sales of total crude oil production, and about 2% of total coal production in the United States.³⁷ Despite the fact that Indian lands only constitute 5% of total land area in America,³⁸ experts have estimated that up to 10% of the nation’s available energy resources can be found under these lands.³⁹ Attributed in large part to unconventional drilling techniques, the EIA estimates that sales from production on Indian lands, which account for less than 7% of total federal and Indian land production, increased by 9% in FY 2013.⁴⁰ Crude oil production from Indian lands increased 360% from ten million barrels in FY 2003 to forty-six million barrels in FY 2013.⁴¹ Nearly all of this increase took place in FY 2010 due to a greater incidence of hydraulic fracturing, with the majority of the increase occurring in the Fort Berthold Indian Reservation in the western part of North Dakota.⁴²

One example of tribes experiencing economic profits from increased oil and gas production through hydraulic fracturing is the Three Affiliated Tribes of Mandan, Hidatsa and Arikara (MHA) Nation located atop the oil-rich Bakken Formation in North Dakota.⁴³ In the latest oil and gas assessment for the Bakken Formation, the U.S. Geological Survey of the DOI found that “these world-class formations contain even more energy resource potential than previously understood,” with an estimated mean oil resource of 3.65 billion barrels (BBO) of undiscovered, technically

eia.gov/analysis/requests/federallands/pdf/eia-federallandsales.pdf. EIA’s estimates are based on data provided by the Department of the Interior’s (DOI) Office of Natural Resources Revenue (ONRR) and include sales of production from federal onshore and offshore lands, and from Indian lands. *Id.* at 1.

36. *Id.* at 4.

37. *Id.* at 3.

38. Elizabeth Ann Kronk, Comment, *Tribal Energy Resource Agreements: The Unintended “Great Mischief for Indian Energy Development” and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811, 813 n.11 (2012).

39. Ludvig, *supra* note 3, at 728.

40. U.S. ENERGY INFO. ADMIN., *supra* note 29, at 1.

41. *Id.*

42. *Id.* at 6.

43. Eric Killelea, *Resurrecting the Reservation*, TALKIN’ THE BAKKEN, Nov. 2014, at 26.

recoverable oil in the Bakken.⁴⁴ For Councilman Lewis Ken Hall of MHA's Knife Clan, oil and gas resources beneath their reservation offer an extraordinary opportunity to achieve "sovereignty by the barrel," a message that echoes throughout tribal communities in the region.⁴⁵ Oil revenue payments on the reservation have reached more than \$100 million over the past five years, drastically reducing an unemployment rate that was once over 70%.⁴⁶ The reservation currently produces more than 330,000 barrels of oil every day, approximately a third of North Dakota's total million-barrel-per-day output.⁴⁷ Since 2008, tribal members in the Bakken region have received more than \$1 billion in oil tax revenue.⁴⁸ Striving to rely wholly on themselves, as opposed to state or federal agencies, the MHA Nation tribal leaders believe oil is their "bargaining chip" to protecting sovereignty.⁴⁹

B. Steps Taken by Congress to Regulate Mineral Development on Tribal Lands

In order to gain a greater understanding of the complexity involved in oil and gas development on tribal lands, it is important to become familiar with the land's governing authorities. Generally, state laws and regulations do not apply within Indian reservation boundaries, leaving the reservations subject only to tribal and federal law.⁵⁰ Unless an exemption exists, matters relating to Indian country are subject only to tribal and federal jurisdiction.⁵¹ If state interference would hinder tribal or federal law, the property or activities of nonmember Indians or non-Indians within Indian country also fall outside state regulation.⁵² Although a tribe's ability to impose regulations on Indian land or federal trust land is generally

44. Alex Demas, *USGS Releases New Oil and Gas Assessment for Bakken and Three Forks Formations*, USGS (May 2, 2013, 3:01 PM), http://www.usgs.gov/blogs/features/usgs_top_story/usgs-releases-new-oil-and-gas-assessment-for-bakken-and-three-forks-formations/.

45. Killelea, *supra* note 43.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Mitchell Davis, Comment, *Fractured Focus: Tribal Energy Development and the Regulatory Contest Over Hydraulic Fracturing in Indian Country*, 4 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 305, 324 (2013) (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[1] (Nell Jessup Newton et al. eds., LexisNexis 2012)).

51. *Id.*

52. *Id.*

unchallenged, the tribe's ability to regulate may be limited if the regulation affects activities of nonmembers on non-Indian fee lands.⁵³ In *Montana v. United States*, the U.S. Supreme Court held that tribal regulations apply to nonmember Indians and non-Indians if they have entered a consensual relationship with the tribe, or if their activity has "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁵⁴ Further, "nonmember conduct or property does not necessarily fall under state jurisdiction simply because it falls outside tribal jurisdiction."⁵⁵ States may not assert their authority over tribes or tribal lands when doing so would conflict with federal law or would interfere with tribal lawmaking rights.⁵⁶

Oil and gas development on tribal lands becomes even more complex when determining land ownership. Tribes and tribal members may own mineral estates within reservation boundaries, while tribes may also have rights in mineral estates that extend outside reservation boundaries where land was ceded for homesteading or federal use.⁵⁷ Where lands are held in trust for a tribe or tribal member by the federal government—which acts as a trustee—the tribe or tribal member is the beneficial owner of the mineral estate and may have enforceable rights in cases of federal mismanagement.⁵⁸ This introductory information shall act a precursor for the legislative history of government oversight on tribal lands that follows.

The Leasing and Grazing Act of 1891 was the first law passed concerning mineral leasing on tribal lands.⁵⁹ This act affirmed congressional consent of non-Indian mineral leasing on tribal lands and permitted ten-year leases with consent of the tribe.⁶⁰ Over the next thirty years, additional acts stipulated longer lease terms and ultimately eliminated the requirement for tribal consent of leases in 1919.⁶¹ States were further permitted to tax production activities on tribal lands and the Secretary of the Interior was authorized to handle royalty and tax

53. *Id.*

54. *Id.* (quoting *Montana v. United States*, 405 U.S. 544, 565-66 (1981)).

55. *Id.* at 325.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Indian Law*, GETCHES-WILKINSON CENTER FOR NAT. RESOURCES, ENERGY, AND THE ENV'T: INTERMOUNTAIN OIL & GAS BMP PROJECT, <http://www.oilandgasbmps.org/laws/tribal/> (last visited Mar. 26, 2015) [hereinafter *Getches-Wilkinson BMP Project Indian Law Page*].

60. *Id.*

61. *Id.*

transactions with the lessees and states on behalf of the tribe.⁶² Considered “haphazard, piecemeal legislation . . . [that] left the law governing mineral leases on tribal lands in a state of confusion,” early legislation was in need of clarification.⁶³ Consequently, Congress enacted the IMLA to replace inconsistent earlier laws and clarify leasing regulations on Indian land.⁶⁴ By ensuring a fair return on tribal minerals, the IMLA encouraged tribal self-governance. It created a single set of leasing procedures for mineral development on tribal lands; further, all IMLA leases required tribal consent and approval from the Secretary of the Interior, which were to be granted on a competitive bidding basis.⁶⁵ Under the IMLA, all leases were to be for a term of ten years and could only be extended if the minerals on the lease were being produced in paying quantities.⁶⁶

However, the IMLA contained some gaps and exceptions that have resulted in problems over the years. The IMLA did not incorporate all tribes and tribal lands, although it did preserve the right of tribes to lease lands for mining under the Indian Reorganization Act (IRA).⁶⁷ The IRA allowed tribes to supersede DOI regulations for mining.⁶⁸ Leases of allotted lands or of the allotment era leasing acts were not generally included in the IRA however. Moreover, a tribe did not have the authority to unilaterally cancel a lease for breach of the lease terms; this power continued to rest with the Secretary of the Interior or the courts.⁶⁹ As an added layer of control, the IMLA excluded tribes from being involved in the mining process after the lease was authorized.⁷⁰ This inevitably stripped tribes of the opportunity to regulate energy development on their land.

Regulatory authority under the IMLA continued to waffle, and in 1977 the DOI Solicitor determined that the IMLA did not authorize states to tax Indian mineral leases.⁷¹ In 1985, the U.S. Supreme Court found that states could not tax Indian interests inside Indian country because Congress had not clearly consented to the transaction.⁷² The Supreme Court ruling in *Cotton Petroleum v. New Mexico* further complicated this rule by holding

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985).

that the IMLA did not bar state taxation of non-Indian lessees on Indian land.⁷³

The IMLA has also been held to establish a fiduciary duty between the federal government and tribes when leasing minerals, as reflected in *United States v. Navajo Nation*.⁷⁴ Under *Navajo Nation*, the Secretary may only approve lease sales when they are “in the [best] interest of the Indians.” Furthermore, as long as the parties are involved in the mineral lease arrangement, the IMLA established federal jurisdiction over all claims involving mineral leasing operations.⁷⁵ As sovereign, independent nations, tribes are immune from many state and federal taxes.⁷⁶ Under the IMLA, tribes today have the right to tax oil and gas production from tribal lands and are exempt from paying state taxes on royalty payments procured from an oil and gas lease.⁷⁷

Signed into legislation on December 22, 1982, the IMDA expanded tribal authority by authorizing tribes to enter into agreements for oil and gas development.⁷⁸ It allows an individual tribal member who possesses a mineral interest to include such resources in a tribal mineral agreement, if the parties to the agreement concur and the Secretary determines that such participation is in the individual’s best interest.⁷⁹

In 2005, Congress amended the Energy Policy Act of 1992⁸⁰ to establish the Indian Energy Resource Development Program.⁸¹ The purposes of the program are to “assist Indian tribes in the development of energy resources and further the goal of Indian self-determination.”⁸² The Secretary of the Interior accomplishes these tasks by providing grants for use in

developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land,⁸³
carrying out projects to promote the integration of energy

73. *Getches-Wilkinson BMP Project Indian Law Page*, *supra* note 53; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989).

74. *Getches-Wilkinson BMP Project Indian Law Page*, *supra* note 53; *United States v. Navajo Nation*, 537 U.S. 488 (2003).

75. *Getches-Wilkinson BMP Project Indian Law Page*, *supra* note 53.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 42 U.S.C. §§ 13201-13574 (2012).

81. 25 U.S.C. §§ 3501-3506 (2012).

82. *Id.* § 3502(a)(1).

83. *Id.* § 3502(a)(2)(A).

resources,⁸⁴ [and] . . . [establish[ing] a national resource center to develop tribal capacity to establish and carry out tribal environmental programs in support of energy-related programs and activities.⁸⁵

The Secretary also provides low-interest loans “for use in the promotion of energy resource development on Indian land.”⁸⁶ Most notably, these amendments established the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) of 2005, which eliminates the need for Secretarial approval of certain qualifying leases.⁸⁷ The ITEDSA gives tribes an opportunity to exercise greater control over their mineral resources.⁸⁸ It represents a valiant step towards tribal self-determination by allowing tribes to negotiate their own energy resource agreements and manage any responsibilities associated with those agreements.⁸⁹ No tribe has taken advantage of ITEDSA thus far, although it may be a viable alternative to government regulation for tribes seeking to administer their own regulations on hydraulic fracturing without complete BLM oversight.

In September of 2012, the Senate’s Indian Affairs Committee presented the ITEDSA Amendments of 2012⁹⁰ to the 112th Congress (2011-2013), but the bill ultimately failed to be enacted.⁹¹ More recently, on May 21, 2014, proposed amendments to the ITEDSA were again introduced to Congress but were also not enacted into legislation.⁹² Among other modifications, the 2014 amendments sought to direct the Secretary of the Interior to “provide technical assistance to interested Indian tribes to develop energy plans.”⁹³

84. *Id.* § 3502(a)(2)(B).

85. *Id.* § 3502(a)(2)(D).

86. *Id.* § 3502(a)(2)(C).

87. *Id.* § 3504.

88. Benjamin J. Fosland, *A Case of Not-So-Fatal Flaws: Re-Evaluating the Indian Tribal Energy and Self-Determination Act*, 48 IDAHO L. REV. 447, 448 (2012).

89. *Id.*

90. Ludvig, *supra* note 3, at 739 (citing Adam Voge, *Indian Energy Bill, Introduced by Wyoming Senator, Heads to Senate*, CASPER STAR TRIB., Sept. 19, 2012, http://trib.com/business/energy/inidian-energy-bill-introduced-by-wyoming-senator-heads-to-senate/article_143ded55-e0c9-5296-bfed-f38ca6a26e6c.html).

91. S. 1684, 112th Cong. (2011-2012).

92. S. 2132, 113th Cong. (2013-2015).

93. *Id.*

C. The BLM's Obligation to Regulate

The relationship between the federal government and Indian tribes is complex to say the least.⁹⁴ Ownership of the subsurface mineral estate and the affected surface estate plays a critical role in determining who has the authority to regulate oil and gas development on tribal lands.⁹⁵ In *United States v. Shoshone Tribe of Indians Of Wind River Reservation in Wyoming*, the U.S. Supreme Court held “that when lands are reserved or otherwise set aside for the tribes in executive order, treaties or agreements approved by Congress, the tribes held the beneficial rights to the soil and the mineral interests under the lands.”⁹⁶

On Indian trust lands, tribes retain ownership of the mineral resources, including oil and gas found therein.⁹⁷ However, in many cases, tribes have been divested of title to the subsurface minerals. Particularly, lands falling under the General Allotment Act of 1887 call for greater consideration in determining who holds the mineral title to those lands.⁹⁸ This act essentially isolated mineral rights of tribes by “allotting tribal lands to individual members of the tribe and then allowing those tribal members to sell off the lands in fee simple after a period of time.”⁹⁹ Since the lands were sold in fee simple, the mineral estate and production rights were included in the transactions, which were generally made with non-Indians.¹⁰⁰ Consequently, as individual tribal members sold their parcels of land, the alienation of mineral rights from tribal member ownership rose. “In 1934 Congress ended the General Allotment Act of 1887, and since then has been working with the tribes to reconsolidate former tribal trust lands.”¹⁰¹

Today, the majority of reservation lands are held in trust for tribes by the United States.¹⁰² The origins of the trust relationship between the federal government and Native American Tribes can be found in two nineteenth century cases: *Cherokee Nation v. Georgia*¹⁰³ and *Worcester v. Georgia*.¹⁰⁴ In *Cherokee Nation*, the Court held that instead of being classified as

94. *Getches-Wilkinson BMP Project Indian Law Page*, *supra* note 53.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Ludvig, *supra* note 3, at 734.

103. *Id.* at 734-35; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

104. Ludvig, *supra* note 3, at 735; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

“foreign states” within the meaning of the constitution,¹⁰⁵ Indian tribes were to be considered “domestic dependent nations” that have an “unquestionable . . . right to the lands they occupy.”¹⁰⁶ The Court equated the tribe’s relationship with the U.S. government as one resembling a “ward to his guardian.”¹⁰⁷ Soon thereafter, in *Worcester v. Georgia*, the Court held that state law does not apply to tribal lands, and that “[t]he whole intercourse between the United States and this [Indian] nation, is by our constitution and laws, vested in the government of the United States.”¹⁰⁸

Considered a trustee, the federal government has extensive control over minerals, including oil and gas, on tribal lands.¹⁰⁹ With this control comes fiduciary obligations that have appeared ambiguous at times. The extent of these fiduciary duties were examined in a series of 1980s Supreme Court cases, generally referred to as the “*Mitchell*” series. Essentially, the cases revealed that depending on breadth or specificity of the act or statute involved, the federal government’s fiduciary obligation may be one of “bare trust”¹¹⁰ where the act forming the basis of the obligation is general, or, under a more narrowly tailored statute, this obligation may be heightened, such as when the federal government has “elaborate control over [natural resources] and property belonging to Indians.”¹¹¹

The DOI regulates oil and gas development on tribal lands held in trust through the BIA and the BLM, which regulate surface and subsurface mineral rights, respectively.¹¹² The BLM supervises and approves most oil and gas operations on tribal lands, although the BIA is responsible for issuing lease permits.¹¹³ The Federal Land Policy and Management Act (FLPMA) “directs the BLM to manage the public lands so as to prevent unnecessary or undue degradation, and to manage those lands using the

105. Ludvig, *supra* note 3, at 735; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 8.

106. Ludvig, *supra* note 3, at 735; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

107. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

108. Ludvig, *supra* note 3, at 735; *Worcester*, 31 U.S. (6 Pet.) at 520.

109. Ludvig, *supra* note 3, at 735-36 (citing Brett J. Stavin, Comment, *Responsible Remedies: Suggestion for Indian Tribes in Trust Relationship Cases*, 44 ARIZ. ST. L.J. 1743, 1743 (2012)).

110. *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (citing *United States v. Mitchell*, 445 U.S. 535 (1980)).

111. *Id.* at 225.

112. Ludvig, *supra* note 3, at 736-37 (citing Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands? The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 ENERGY L.J. 119, 121 (2012)).

113. *Getches-Wilkinson BMP Project Indian Law Page*, *supra* note 53.

principles of multiple use and sustained yield.”¹¹⁴ Under the FLPMA, public and tribal lands must be “managed in a manner that will protect the quality of their resources, including ecological, environmental, and water resources.”¹¹⁵ Both the IMLA and the IMDA assign regulatory authority over Indian oil and gas leases for trust lands to the Secretary of the Interior.¹¹⁶ In turn, the Secretary has delegated his or her authority to oversee operations on Indian mineral leases to the BLM under the Indian Allotted Lands Leasing Act and the Tribal Lands Leasing Act.¹¹⁷

III. Fuel for the Fire: The Heated Debate

The initial proposal of the BLM’s rule in May of 2012 sparked a great deal of interest that remained throughout the lengthy editing process. The final BLM rule brought with it an array of reactions ranging from praise and support to fierce criticism and scorn backed by lawsuits.¹¹⁸ A popular debate is whether or not the federal government is the best entity to be regulating oil and gas development on tribal lands. Supporters of state and local tribal regulation stress federal agencies are ill-equipped to handle environmental regulation on tribal lands.¹¹⁹ Local regulation advocates also emphasize the tribe’s superior understanding of certain religious and environmental concerns on their lands.¹²⁰ In contrast, environmentalists concerned about the future of tribal lands push for greater federal government participation in this area and hope to see stricter regulations that protect the land for generations to come.

In addition to debates over local and federal regulation, disputes concerning the truths and fabrications of environmental impacts of hydraulic fracturing have further complicated the discussion. Research regarding hydraulic fracturing and its possible negative effects on the

114. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636, 31640 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160).

115. *Id.*

116. *Id.* at 31641.

117. *Id.*

118. Press Release, Env’tl. Def. Fund, New BLM Fracking Rule Brings Crucial Oversight to Oil & Gas Development (Mar. 20, 2015) [hereinafter Press Release, New BLM Fracking Rule], available at <http://www.edf.org/media/new-blm-fracking-rule-brings-crucial-oversight-oil-gas-development>; Jim Polson, Mark Drajem & Andrew Harris, *Oil Industry Meets First Federal Fracking Rules with a Lawsuit*, BLOOMBERG BUS. (Mar. 20, 2015, 10:36 AM), <http://www.bloomberg.com/news/articles/2015-03-20/u-s-sets-first-fracking-rules-since-process-fueled-energy-boom>.

119. See Ludvig, *supra* note 3.

120. *Id.*

environment is relatively new and, as a result, a number of theories have developed about the practice, but for the time being they remain just that—*theories*. The slurry of theories appearing in newspaper headlines across the nation have yet to be scientifically proven, although many attempt to equate *correlation* of hydraulic fracturing and environmental occurrences, such as water contamination, with absolute *causation*.

A. Local vs. Federal Debate: Is the BLM the Proper Entity to Regulate?

The BLM's former regulation governing fracking on tribal lands is more than thirty years old and was not designed to address modern fracking technology.¹²¹ Section A of the existing regulation calls for a:

[P]roposal for further well operations shall be submitted by the operator . . . for approval by the authorized officer prior to commencing operations to redrill, deepen, perform casing repairs, plug-back, alter casing, perform nonroutine fracturing jobs, recomplete in a different interval, perform water shut off, commingling production between intervals and/or conversion to injection.¹²²

This regulation is far less encompassing than the BLM's recently published regulation. Secretary of the Interior Sally Jewell stated the regulation provides "common-sense updates that increase safety while also providing flexibility and facilitating coordination with states and tribes."¹²³ She continued by saying, "[a]s we continue to offer millions of acres of America's public [and tribal] lands for oil and gas development, it is important that the public has full confidence that the right safety and environmental protections are in place."¹²⁴

The outdated prior rule leaves the majority of regulation up to state and tribal governments, although often times neither states nor tribes seek to implement a rule that would adequately regulate the highly technical and complex drilling method of hydraulic fracturing. Nonetheless, several tribal and industry leaders feel that fracking is best regulated at the local level because a "one-size-fits-all rule" on fracking operations is illogical.¹²⁵

121. 43 C.F.R. § 3162.3-2 (2014).

122. *Id.* § 3162.3-2(a).

123. Alysa Landry, *New Rules to Address Fracking on Indian Lands*, NAVAJO TIMES (May 23, 2013), <http://navajotimes.com/politics/2013/0513/052313fra.php#.VRWkK1ymAf4>.

124. *Id.*

125. Broder, *supra* note 12.

Advocates of local regulation argue geographic characteristics of oil and gas reserves vary significantly from state to state, and state officials are more knowledgeable about local and regional production techniques than federal agencies.¹²⁶ Commentators believe that “on-the-ground knowledge leads to more effective regulation—regulation that is more specifically tailored to the characteristics of reserves in the location.”¹²⁷ Additionally, since state officials are politically accountable to local residents, they will likely be more receptive to local concerns.¹²⁸ Similarly, tribal regulation is also considered more effective because tribal leaders have more information about site locations, environmental impacts observed over time, and the economic needs of their tribe.¹²⁹ The rule’s critics argue that environmental and social costs of fracking on tribal lands differ from tribe to tribe and even within each tribe.¹³⁰ While many tribal leaders support increased drilling through hydraulic fracturing, others are strongly opposed to its religious and environmental consequences.¹³¹ The question thus remains, is it paternalistic to believe that tribes will not be able to resolve these conflicts without the helping hand of the federal government?

In stark contrast to these beliefs, environmental groups and some tribal members continue to urge the federal government to take an increased role in regulating fracking operations.¹³² One initiative that environmentalists have lobbied for is the passage of the Fracturing Responsibility and Awareness of Chemicals Act of 2011 (the Frac Act), which would repeal the Safe Drinking Water Act (SDWA) and require operators to disclose fracking chemicals.¹³³ Environmentalists seeking a more hands-on approach from the federal government fear that the states’ relaxed attitude towards the environmental impacts of hydraulic fracturing will result in damning repercussions for tribes and their lands.¹³⁴ Supporters such as the

126. Ludvig, *supra* note 3, at 744.

127. Matt Willie, Comment, *Hydraulic Fracturing and “Spotty” Regulation: Why the Federal Government Should Let States Control Unconventional Onshore Drilling*, 2011 BYU L. REV. 1743, 1773.

128. *See id.*

129. Ludvig, *supra* note 3, at 744.

130. *Id.* at 745.

131. *Id.*

132. Rebecca Jo Reser, *State and Federal Statutory and Regulatory Treatment of Hydraulic Fracturing*, 80 DEF. COUNS. J. 90, 100 (2013).

133. *Id.*

134. Heather Ash, Note, *EPA Launches Hydraulic Fracturing Study to Investigate Health and Environmental Concerns While North Dakota Resists Regulation: Should Citizens Be Concerned?*, 87 N.D. L. REV. 717, 733 (2011).

Environmental Defense Fund (EDF) welcomed the BLM's final rule, believing the rule takes, "an important step toward addressing several critical issues associated with oil and gas development."¹³⁵ The EDF's Associate Vice President, Mark Brownstein, continued by saying, "[b]ut states also play an important role here, and we strongly encourage [the] BLM to work constructively with them, as they have expertise, talent, and resources that must be engaged for effective oversight of these new rules."¹³⁶

B. Fact or Fiction: Environmental Impacts of Fracking Are Devastating to Indian Country

There is much uncertainty as to whether or not the injection of hydraulic frack fluid into the subsurface geology causes damage to the environment.¹³⁷ The fluid injected into a well to fracture the surrounding rock is approximately 99% water and sand, with the remaining 1% comprised of some combination of over 200 chemicals.¹³⁸ The oil and gas industry tends to emphasize the chemicals used in fracking fluid make up only a small percentage of the injected mixture, whereas those opposed to the practice believe that even though these chemicals constitute only a small percentage of the millions of gallons of fluid used in a single fracturing operation, this equates to hundreds of thousands of pounds of chemical additives likely to cause harm to the environment.¹³⁹ Fracturing, or "frack" fluid disposal efforts are another area of serious concern for many. The Union of Concerned Scientists states that "the geological formations targeted for fracking are typically thousands of feet deeper than freshwater aquifers," meaning it is essentially impossible for the upward migration of fluids to contaminate groundwater.¹⁴⁰ Yet, adversaries of hydraulic fracturing argue that fracturing stimulation is not a precise science, making fracking a specifically targeted location thousands of feet underground very difficult.¹⁴¹ Despite the vast amount of research

135. Press Release, New BLM Fracking Rule, *supra* note 118.

136. *Id.*

137. Lees, *supra* note 22, at 583.

138. *Id.* at 579.

139. *Id.* at 580.

140. Lees, *supra* note 22, at 580 (citing *How Natural Gas Works*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/our-energy-choices/coal-and-other-fossil-fuels/how-natural-gas-works.html (last visited Apr. 30, 2015)).

141. *Id.* at 581.

conducted, at this point there is no scientific evidence that can verify any of these theories with 100% accuracy.

In response to public concern, Congress requested that the EPA conduct a scientific study to examine the relationship between hydraulic fracturing and drinking water resources.¹⁴² In the recently released assessment, the EPA was unable to find evidence that certain hydraulic fracturing mechanisms, such as water withdrawals in times of low water availability, spills of hydraulic fracturing fluids and produced water, or fracturing directly into underground drinking water resources “have led to widespread, systemic impacts on drinking water resources in the United States.”¹⁴³ The study found instances where one or more of these mechanisms impacted drinking water, but compared to the number of wells hydraulically fracked, the number was small.¹⁴⁴ Although this report is the most comprehensive study conducted thus far, it does not take every potential groundwater contamination instance into consideration nor does it claim to do so.¹⁴⁵

The report has conjured up varying responses. Environmentalists argue the report proves fracking contaminates groundwater but leaves health concerns related to the contamination unanswered, whereas the report has left the oil and gas industry feeling confident in the safety measures already in place on fracking.¹⁴⁶ Unfortunately, this report was unable to successfully put the issue to rest for good, and instead continues to fuel opposing parties with ammunition to fire at one another.

C. Major Elements & Reactions of the Finalized BLM Regulation

According to the BLM Press Release published March 20, 2015, the BLM’s rule provides a framework of safeguards and disclosure requirements that aim to protect public and American Indian lands from irresponsible development of oil and gas resources that could lead to an environmental disaster.¹⁴⁷ Overall the rule seeks to improve safety and help protect groundwater through updated requirements on well-bore integrity,

142. *EPA’s Study of Hydraulic Fracturing for Oil and Gas and Its Potential Impact on Drinking Water Resources*, EPA, <http://www2.epa.gov/hfstudy> (last visited June 16, 2015).

143. *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources (External Review Draft)*, EPA, <http://cfpub.epa.gov/ncea/hfstudy> (last visited June 16, 2015).

144. *Id.*

145. *Id.*

146. Kate Sheppard, *EPA Finds Some Cases of Water Contamination Related to Fracking, But Says It’s Not Widespread*, HUFFINGTON POST (June 4, 2015, 12:07 PM EDT), http://www.huffingtonpost.com/2015/06/04/epa-fracking-study_n_7511836.html.

147. Press Release, Interior Department Releases Final Rule, *supra* note 6.

wastewater disposal and public disclosure of chemicals.¹⁴⁸ According to the BLM's News Release on the final rule, the key components of the rule include: provisions for ensuring the protection of groundwater supplies by requiring a validation of well integrity and strong cement barriers between the wellbore and water zones through which the wellbore passes; increased transparency by requiring companies to publicly disclose chemicals used in hydraulic fracturing to the BLM within thirty days of completing fracturing operations through the website FracFocus; raised standards for interim storage of recovered waste fluids from hydraulic fracturing to mitigate environmental risks; and added measures to lower the risk of cross-well contamination with chemicals and fluids used in the fracturing operation, by requiring companies to submit more detailed information on the geology, depth, and location of preexisting wells to afford the BLM an opportunity to better evaluate and manage unique site characteristics.¹⁴⁹

A number of changes from previous drafts can be found throughout the rule. For example, companies will no longer be able to test a single well's structural integrity to demonstrate the same for an entire group of similar wells.¹⁵⁰ Instead, companies must submit an analysis of each well's integrity before it can be hydraulically fractured.¹⁵¹ Additionally, except under limited exceptions determined on a case-by-case basis, operators are prohibited from using waste pits, even if they are lined, on drilling pads.¹⁵² This will force companies to inject waste water and other recovered frack fluid into above ground, rigid enclosed, covered, or netted tanks.¹⁵³ Although companies do have to disclose any fracking chemicals used during operation to the public through the industry-backed website FracFocus, companies are still able to invoke trade secret exemptions on specific ingredients used in their frack fluid.¹⁵⁴

Like the initial and revised proposed rules, the final rule will apply to Indian lands, "to ensure that these lands and communities all receive the same level of protection as provided on public lands."¹⁵⁵ It is noted that a number of states such as Alaska, Arkansas, Colorado, Illinois, Michigan, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, Utah, and Wyoming

148. *Id.*

149. *Id.*

150. 43 C.F.R. 3160, 16130.

151. *Id.*

152. *Id.* at 16129.

153. *Id.*

154. *Id.* at 16130.

155. 43 C.F.R. Part 3160, 16129.

already have regulations in place that address hydraulic fracturing operations.¹⁵⁶ In an effort to prevent duplicative efforts, the final rule states that were state or tribal regulations to meet or exceed the BLM's requirements, the state or tribe may obtain a "variance."¹⁵⁷ The variance will allow for the more protective state or tribal rule to be enforced in the alternative.¹⁵⁸

The rule also includes an express statement as to the importance of consulting with tribal leaders regarding the rule's components.¹⁵⁹ During the proposed rule stage and after the proposed and supplemental rules were published, the BLM held regional meetings with tribes in a number of cities across the nation.¹⁶⁰ At each stage along the way, the BLM offered follow-up one-on-one consultations and several such meetings were held with tribal leaders.¹⁶¹ One of the outcomes of these meetings formed the requirement that operators on Indian lands comply with applicable tribal laws.¹⁶² Whether or not these sessions adequately addressed the tribes concerns throughout the drafting process is disputed. For example, the Three Affiliated Tribes Chairman, Tex "Red Tipped Arrow" Hall, strongly expressed his distress about the lack of involvement on the rule's creation in a letter to the Secretary of the U.S. DOI in May of 2012.¹⁶³ Throughout the letter, Tex demonstrates circumstances where the BLM lacked tribal consultation regarding the hydraulic fracturing regulation.¹⁶⁴ He states that "[p]roper tribal consultation is an expression of the unique legal relationship between Indian tribes and the federal government, the federal trust responsibility and our right to self-government."¹⁶⁵

Despite opposing parties contrasting reactions to the final rule, it appears as though everyone can agree on one thing: the rule is all wrong. Environmental organizations argue that the rule is inadequate for

156. *Id.* at 16130.

157. *Id.*

158. *Id.*

159. *Id.* at 16131.

160. *Id.* at 16132

161. *Id.*

162. *Id.*

163. Letter from Tex "Red Tipped Arrow" Hall to Ken Salazar, Secretary of the U.S. DOI (May 14, 2012), available at http://www.eenews.net/assets/2012/05/15/document_ew_02.pdf.

164. *Id.*

165. *Id.*

preventing potential risk of fracking,¹⁶⁶ whereas industry groups such as the Independent Petroleum Association of America and the Western Energy Alliance showed their dissatisfaction by filing a lawsuit the same day the regulation was published.¹⁶⁷ These industry groups argue that the rule's duplicative nature is lacking scientific evidence to back its necessity.¹⁶⁸ Likewise, Wyoming quickly filed a lawsuit challenging the BLM's final rule in the case of *Wyoming v. U.S. Dep't of Interior*, Case No. 15-CV-43-5 (March 26, 2015), claiming the BLM's final rule conflicts with the Safe Drinking Water Act and interferes with the state's hydraulic fracturing regulations.¹⁶⁹ North Dakota later joined Wyoming in this lawsuit against the BLM.¹⁷⁰ Indian tribes were not silent either, expressing their concern that the rule too closely relates Indian land with federal lands.¹⁷¹

IV. Suggested Options for Tribes

It is without question that the BLM's regulation is strongly disliked by many industry leaders, tribes, and commentators. Arguments made in favor of the BLM regulation are scarce, but still exist and should not be completely dismissed as being without merit.¹⁷² For tribal members like Theodora Bird Bear and Corey Sanders, fighting for their beloved land is a constant battle that they refuse to give up on.¹⁷³ "You feel like you're one person against a whole oil company system—what can you do?" expresses Sanders. "It's like a spell and the money is too strong."¹⁷⁴ North Dakota oil extraction continues to rise, nearing one million barrels a day.¹⁷⁵ "One oil tycoon calls North Dakota the next Saudi Arabia."¹⁷⁶ National environmentalists remain silent in the midst of all the production, and other environmentalists fear that locals in the region have become too lax about

166. *Merits and Ramifications of BLM Fracking Rule*, ENVTL. L. INST. (May 28, 2015), <https://www.eli.org/events/merits-and-ramifications-blm-fracking-rule>.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Brown, *supra* note 1.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

the situation, having taken a “wait-and-see” attitude and assuming all is well as long as there is not a big disaster.¹⁷⁷

Unfortunately, major oil spills in North Dakota have occurred all too often, and have been exacerbated by regulators’ and operators’ failure to timely notify the public.¹⁷⁸ In one instance, a farmer discovered a spill from a busted pipeline that oozed more than twenty thousand barrels of oil on his wheat fields.¹⁷⁹ Documented as one of the largest spills in North Dakota’s history, the public was unaware of this disaster for eleven days.¹⁸⁰ On a different occasion, a leak in an underground line sent 150 barrels of disposed salt water percolating into U.S. Forest Service land in North Dakota.¹⁸¹ Weeks later, an explosion ignited thirteen tanks and spilled 2,700 barrels of salt water and oil.¹⁸² In the past two years, North Dakota has recorded 300 pipeline spills without alerting the public at all, although many have been minor.¹⁸³ For tribal members like Bird Bear, the recent spills call for serious talk about how much environmental havoc this oil boom is causing the local ecosystem. “I expect to live here all my life, and I have a commitment to this land that was my folks’ land,” explains Bird Bear. “I just feel like I have an obligation to protect it, not only for me, but for the families that come after.”¹⁸⁴

Bird Bear, Sanders, and others with similar sentiments have lobbied for a bill to increase setbacks for wells drilled near homes.¹⁸⁵ Bird Bear has “urged the state’s powerful Industrial Commission to slow down approving oil wells in the Killdeer Mountains, a spiritual place for tribal members,” albeit unsuccessfully.¹⁸⁶ To complicate the situation, many tribal members who fear fracking operations are harming the environment also benefit from the oil boom by receiving large royalty checks for their mineral inheritance.¹⁸⁷ In spite of the potential consequences to their land, revenues from oil and gas production are hard to turn down, for historically poverty-stricken tribal members. Tribes are essentially torn between the urgent need to stimulate their economies and alleviate high poverty rates and protecting

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

their environment and respecting their lands.¹⁸⁸ These often conflicting interests are at the root of the turmoil on tribal lands and are not much different than the conflicting interests seen in public lands across the nation. Some believe that they have found the solution to this complicated matter, but finding one solution that fulfills all interests involved seems to be a far cry from reality.

Although the majority of commentators cannot see past the rule's potentially negative consequences, subsection A below seeks to expose the rule's highpoints, even if there are few. Also, since the rule is soon to be in effect, it might save operators the headache of a lawsuit or penalties to just embrace the rule's requirements. Subsection B looks at an alternative approach tribes can take advantage of to maintain control over oil and gas development on their lands.

A. Give It a Chance?: The BLM Rule in a More Positive Light

This section is intended to be read with an open mind towards a rule that, for the time being, must be adhered to. The overwhelming amount of negative feedback the rule has received surely outweighs the positive aspects, but perhaps considering them will bring optimism in the future. In the words of the BLM's Deputy Director, Mike Pool, the BLM regulation possesses several positive aspects that seek to "strengthen the requirements for hydraulic fracturing performed on . . . Indian trust lands in order to build public confidence and protect the health of American communities, while ensuring continued access to important resources to America's energy economy."¹⁸⁹ To many adversaries of the regulation, the Deputy's statement is likely nothing more than an eloquent attempt to bolster the BLM's interests in the matter while at the same time placing unnecessary regulation on an already heavily burdened industry. However, for Natives like Bird Bear and Sanders, this regulation may be the answer to their prayers and a way for tribes to continue gaining economic prosperity while at the same time gaining protections that could help preserve their cherished lands.

Regulatory power varies depending on numerous factors, such as whether the land is owned in trust or in fee simple and the status of the tribe

188. Ludvig, *supra* note 3, at 754.

189. *Rhetoric vs. Reality, Part II: Assessing the Impact of New Federal Red Tape on Hydraulic Fracturing and American Energy Independence: Hearing Before the H. Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform*, 112th Cong. 79 (May 31, 2012) (statement of Mike Pool, Deputy Director, Bureau of Land Management, U.S. Department of the Interior) [hereinafter Pool Statement].

involved. As a result, several overlapping and conflicting regulatory schemes have evolved over the years.¹⁹⁰ Some suggest the federal government should empower tribes to take on a role in administering environmental programs on tribal lands through acts such as the SDWA and the Clean Water Act (CWA).¹⁹¹ Yet simply enforcing these regulatory schemes may be inadequate to address the breadth of issues that accompany hydraulic fracturing. Current environmental programs do not govern a number of issues, from inspection to cleanup, which leaves gaping holes in current hydraulic fracturing regulation.¹⁹² Both the SDWA and the CWA allow the regulation of hydraulic fracturing but to a limited extent.¹⁹³ The SDWA applies only to fracking operations where diesel fuels are used, a relatively small amount of overall fracking operations conducted.¹⁹⁴ Similarly, the CWA applies mostly to the disposal of hydraulic fracturing wastewater into treatment works that flow into navigable waters, making it equally limited.¹⁹⁵

The BLM's proposed regulation, however, provides more straightforward measures that are consistent with the American Petroleum Institute's (API) guidelines for well construction and well integrity.¹⁹⁶ A major motivation for a separate BLM rule is that states do not have the same trust responsibilities for Indian lands as the federal government.¹⁹⁷ Therefore, the rule expands and sets different standards from those states that currently regulate hydraulic fracturing operations but "do not need to adhere to the same resource management and public involvement standards appropriate on Federal lands [i.e. tribal lands] under Federal law."¹⁹⁸

Even where current environmental regulatory programs allow for protection of Indian lands from improper fracking techniques, enforcement is likely lacking. Weak enforcement allows oil and gas operators to pollute tribal lands since there are no motivations to do otherwise.¹⁹⁹ Whether or not the BLM regulation will deliver adequate government oversight and enforcement that ensures operators fulfill safety requirements is yet to be

190. Ludvig, *supra* note 3, at 747.

191. *Id.* at 748.

192. *Id.* at 749.

193. *Id.* at 741.

194. *Id.*

195. *Id.*

196. Pool Statement, *supra* note 189, at 79.

197. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636, 31640 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160).

198. *Id.*

199. *Id.*

determined. Commentators speculate that the BLM is likely to fail at effectively enforcing the new regulation on tribal lands due to a lack of adequate staffing, budget, and expertise needed to implement the rule.²⁰⁰ Unfortunately, if the BLM is understaffed or unable to enforce its policies, and if there is no corresponding regulation by the tribes, there will essentially be no comprehensive, sufficient hydraulic fracking regulation on tribal lands, which is likely to result in continued destruction and unsafe development.²⁰¹ The BLM admits that greater use of state or tribal standards or procedures could reduce compliance costs for operators and increase consistency but at the risk of inadequate enforcement.²⁰² On Indian lands, the BLM reiterates it is responsible for enforcing all federal regulations and the terms of the leases, whereas tribes themselves must enforce tribal laws.²⁰³ Although an assurance alone may not be completely convincing to skeptics, the BLM has continually reiterated that it “will seek new and improved agreements to reduce regulatory burdens and to increase efficiency, while fulfilling the Secretary’s responsibilities mandated by statutes as . . . [the] trustee for Indian lands.”²⁰⁴

Aside from filling a void in safety regulations that could cause widespread devastation to Indian lands and, arguably, offer better enforcement and more timely completion of fracking operations, the BLM’s proposed regulation also seeks to create a consistent oversight and disclosure model that will apply across all public and Indian lands that are available for oil and gas development.²⁰⁵ “State regulations [on Federal lands] pertaining to hydraulic fracturing operations are [currently] not uniform.”²⁰⁶

One final consideration in favor of implementing the BLM’s regulation on tribal lands is that the rule allows tribes to forego the rule’s requirement through a variance.²⁰⁷ To be granted a variance, a tribe’s rule must “meet or exceed the effectiveness of the revised proposed rule,” which is to be determined by the BLM.²⁰⁸ “[T]ribes would be invited to work with the

200. Ludvig, *supra* note 3, at 750.

201. *Id.*

202. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. at 31640.

203. *Id.*

204. *Id.*

205. *Id.* at 31637.

206. *Id.*

207. *Id.*

208. *Id.*

BLM to craft variances that would allow technologies, processes or standards required or allowed by the State or tribe to be accepted as compliance with the rule.”²⁰⁹ The state of Colorado has taken advantage of the variance option by enacting a Memorandum of Agreement with the BLM (and the U.S. Forest Service) for Permitting and Oil and Gas Operations on BLM and National Forest Service Lands in Colorado.²¹⁰ Tribes are encouraged to pursue the same type of agreement on their lands, and although the contents of such agreements may differ from tribe to tribe, the agreements allow tribal agencies and the BLM to share standards, information, and processes that should yield more consistency for operators.²¹¹ The variance would be applied to all lands within the boundaries of the tribe that are proportionate to the tribal regulatory scheme.²¹² Regulatory consistency and predictability are attractive for operators seeking to explore hydraulic fracturing operations and, as a result, are likely to increase interest and exploration of oil and gas resources on tribal lands.

After looking at the revisions to the regulation and considering harsh criticisms, it is hard to agree that the regulation possesses absolutely no positive attributes. Regulating mineral exploration on tribal lands is unlikely to please every skeptic or work with 100% efficiency. The rule’s primary goal of ensuring that hydraulic fracturing does not cause negative impacts to Indian resources is one that seems to be often forgotten amid all the criticism.

Since the late 1980s state and local tribal regulation has primarily managed mineral extraction on tribal lands. Although a number of tribes have found economic prosperity through increased exploration and development, it has not come without costs. Allowing state and tribal regulation of fracking operations to continue without change may leave Native peoples, like Bird Bear and Sanders, with only memories of what they used to call home. Hydraulic fracturing has changed oil and gas extraction drastically and has enabled America to seek greater energy independence; for these reasons, it should not be hindered or restricted. The BLM and supporters similarly believe the rule will not slow production on tribal lands, and that implementing a comprehensive and modernized process will be ideal for tribes looking to protect their resources while at the

209. *Id.*

210. *Id.* at 31645.

211. *Id.*

212. *Id.* at 31637.

same time safely and effectively increasing oil and gas production through hydraulic fracturing.

B. Tribes Seeking Self-Determination to Take Advantage of the Indian Tribal Energy Development and Self-Determination Act

Aside from seeking a variance, there exists another option for tribes who wish to govern their own energy leases without hardly any interference from the federal government. Passed by Congress in 2005 as part of the larger Energy Policy Act of 1992, the ITEDSA allows tribes to achieve this goal.²¹³ Under ITEDSA, a tribe can enter into a Tribal Energy Resource Agreement (TERA) with the DOI, and if approved, the agreement will govern the interactions between the Secretary of the Interior and the tribe involved.²¹⁴ Thus, tribes no longer need Secretarial approval for leases involving mineral development once a TERA is in place.²¹⁵ In order for the Secretary to place his or her stamp of approval on a tribal TERA, a few prerequisites must be met:

First, the Secretary must find that the tribe has “sufficient capacity to regulate the development of energy resources of the Indian tribe.” Second, the agreement itself must provide for periodic review of the tribe’s compliance with the agreement’s terms by the Secretary. Third, the proposed resource agreement must contain provisions authorizing the Secretary to take necessary action to protect trust assets that are in “imminent jeopardy” as a result of violation of the resource agreement or other applicable federal law. And finally, the agreement must contain certain provisions with respect to the leases, business agreements, or rights-of-way that will be entered into under the resource agreement.²¹⁶

Although the ITEDSA’s purpose was to free tribes from a multitude of burdens and complex regulatory schemes that have evolved in energy development on Indian land, criticisms of the act have masked these attributes. Among others, some of the most prevalent criticisms include: (1) Secretarial approval of prerequisites are “rather cumbersome,” especially when tribes are without sufficient money and expertise to enter into a

213. Fosland, *supra* note 88, at 452.

214. *Id.* at 453.

215. *Id.*

216. *Id.* at 453 (citing and quoting 25 U.S.C. § 3504(e)(2)(B)(i)-(iii), (e)(2)(D)(ii) (2012) (footnotes omitted)).

TERA,²¹⁷ (2) “[t]raditional notions of tribal sovereignty [that] protect tribes from incursion of . . . non-members in the decisionmaking process” are violated,²¹⁸ and (3) uncertainty regarding the federal government’s fiduciary responsibility regarding tribes that enter into a TERA.²¹⁹ A closer look at the act and the criticisms associated with it reveal that tribes are in no way barred from taking advantage of this act. As one commentator expresses, “TERAs should be seen for what they are: the best option for tribes who want to maximize their control over the development of tribal energy resources.”²²⁰

Lacking money and expertise to take advantage of the ITEDSA is a common concern. However, under the ITEDSA, the Secretary has been directed to “provide development grants to Indian tribes . . . for use in developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land.”²²¹ Section 3503(c) of the statute expands on the obligations of the United States by

ensur[ing], to the maximum extent practicable and to the extent of available resources, that on the request of an Indian tribe, the Indian tribe shall have available scientific and technical information and expertise, for use in the regulation, development, and management of energy resources of the Indian tribe on Indian land.²²²

Therefore, the statute itself provides for financial and technical assistance on behalf of the federal government for tribes pursuing a TERA.

Tribes irrefutably have resources available to them if they wish to take advantage of the statute’s assistance. Unfortunately, concerns regarding whether or not the federal government will follow through on these promises are not unwarranted.²²³ Congress’ past performance on similar financial obligations leaves many skeptics weary of why this act would be any different than others in the past.²²⁴ Although financial inability will be a bar for some tribes, others are likely to already possess the financial and

217. Ludvig, *supra* note 3, at 738.

218. *Id.* at 739 (quoting Kronk, *supra* note 38, at 831).

219. Fosland, *supra* note 88, at 454.

220. *Id.*

221. 25 U.S.C. § 3502(a)(2)(A) (2012).

222. *Id.* § 3503(c)(1).

223. Fosland, *supra* note 88, at 454.

224. *Id.*

technical resources to enter into a TERA with the government.²²⁵ Tribes with less financial security still have the ability to meet TERA standards by working with the federal government. Smaller-scale renewable energy projects can be used to build up to the standards necessary for tribes to enter into a resource agreement with the Secretary.²²⁶ Gradually building upon their expertise, tribes seeking to develop their own energy resources can enhance their understanding of the industry and gain greater control over energy regulations on their land.

Another cause for concern is the act's "notice-and-comment" language that commentators argue "conflict[s] sharply with tribal self-governance."²²⁷ Under the notice-and-comment requirement, "tribes must incorporate processes to allow for public comment before final tribal approval of the leases, right-of-ways, and any other development instruments."²²⁸ Non-Indian commentators, however, are unlikely to alter the Secretary's decision-making process in approving TERAs since the purpose of the public input is not to determine whether or not a tribe will be granted a resource agreement, but instead is used as an information-gathering tool to track compliance with the tribes' resource agreement.²²⁹ Therefore, as long as a tribe complies with the terms of their resource agreement, public commentary will have little to no effect on any substantive decisions administered by the Secretary.²³⁰

Still, others would rather see the ITEDSA completely amended. In September, 2012, the Senate's Indian Affairs Committee passed the ITEDSA Amendments of 2012 in hopes of encouraging more tribes to pursue this option.²³¹ This would allow certain actions to be excluded from environmental reviews and no longer require tribes to have sufficient capacity to develop resources to qualify for a TERA.²³² However, this amendment died in committee and a new amendment was introduced on March 13, 2014. Perhaps one reason why the 2012 amendments were not enacted is that regulating certain modern drilling techniques, such as

225. *Id.* at 455.

226. *Id.*

227. *Id.* at 459 (quoting Judith V. Royster, Comment, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1086 (2008)).

228. *Id.* (citing 25 U.S.C. § 3504(e)(2)(B)(iii)(IX) (2012)).

229. *Id.* at 461.

230. *Id.*

231. Voge, *supra* note 90.

232. Ludvig, *supra* note 3, at 739-40.

hydraulic fracturing, requires extensive regulatory oversight. Oil spills have left some tribal lands in poor condition and displaced tribal members from their beloved homes. Striking a balance between efficient regulation of energy extraction techniques like hydraulic fracturing, ensuring safety, and preventing unnecessary destruction of tribal lands is a difficult task. Tribes that are not equipped with the necessary comprehensive environmental regulatory scheme will almost assuredly run into the same issues that currently exist on tribal lands. By requiring prerequisite capacity to qualify for a TERA, the federal government can assure that tribal lands held in trust are still protected while at the same time presenting tribes with the opportunity to regulate their own energy development.

V. Conclusion

Through the implementation of this rule, the BLM has placed sweeping regulations on a portion of lands that unquestionably contributes to America's overall oil and gas production. Although the rule may come with a limited number of beneficial components, it does attempt to respond to growing concerns. Most consider the rule to be "a-swing-and-a-miss," despite the fact that the rule has yet to be in effect for a single day. Perhaps with time the rule will prove to be a surprisingly valuable directive. Just perhaps.

The BLM's regulation has stirred a flurry of concerns regarding tribal sovereignty, government oversight, and environmental impacts of hydraulic fracturing. The vast number of arguments made in favor and in contradiction of the regulation placed great pressure on the DOI to produce a regulation that incorporates these opinions while at the same time keeping the best interest of tribes in mind. Commentators who sought complete abandonment of the rule's regulation and who view state and tribal regulation as the most efficient and appropriate solution to increasing energy development of state and tribal resources continue to make convincing arguments. Nonetheless, the BLM has created a rule that—with tribal and industry cooperation—has the potential to greatly expand energy development through hydraulic fracturing in a safe and effective manner.

Increased political instability abroad makes now (more than ever) the time to increase domestic production. Hydraulic fracturing has completely altered the energy industry by generating resource recovery from formations previously considered economically unprofitable. Reservations across the nation situated atop millions of barrels of untapped natural resources have—through hydraulic fracturing—been given a prominent seat

at America's energy market table. Decades of legislation have complicated mineral development on tribal lands and, as a result, have placed barriers upon tribes seeking to develop their resources. The BLM regulation specifically regulates the most prominent method of oil and gas extraction on tribal lands—hydraulic fracturing. Enacting a comprehensive rule that incorporates fracking regulations, previously adopted by several states, will ensure tribal lands are protected from unnecessary destruction while at the same time implementing a procedure to streamline the process and reduce delays.

Tribes have worked extremely hard to protect their sovereignty. Reflected through more recent legislation, the federal government has become a strong supporter of increasing tribal self-determination by removing archaic and overly oppressive government regulations. According to the BLM, this rule does not seek to infringe on tribal sovereignty but rather purports to modernize hydraulic fracturing regulation in hopes of boosting oil and gas extraction by establishing necessary requirements to protect tribal lands for generations to come. Viewed as a controversial time in America's energy industry, advanced studies, regulations, and lawsuits will undoubtedly be interesting and spur more debate in this arena. Often taking on more responsibility than is necessary, the government clearly believes the regulation of hydraulic fracturing on tribal lands is a *responsibility* that has gone unattended for far too long. Tribes and industry leaders see the opposite side of the coin, such that the BLM has burdened tribes and operators with an *intrusive* regulation that will be counterproductive.