“Those Who Cannot Remember the Past are Condemned to Repeat It”: The Tribal Role in Recurring Federal Regulatory Climates

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• As above: Learn from history.

• Eternal vigilance is the price of tribal sovereignty.

• “We need protection from our protectors.”
  – Peterson Zah (2012)
"Those who don’t study history are doomed to repeat it. Yet those who *do* study history are doomed to stand by helplessly while everyone else repeats it."
Current Congressional/Regulatory Climate

• DAPL, mineral royalties, flaring, etc.

• Tax Reform, Native American Energy (H.R. 210)

• Indian Trade and Commerce Regulations

• Fee-to-Trust Regulations

- § 2(e) - “TRUST RESPONSIBILITY NOT DIMINISHED. — Nothing in this section shall be construed to diminish the Federal trust responsibility to any Indian tribe.”

- Oct. 25, 2017 Hearing memo – “the federal ‘trust responsibility’ has ill-served Native people . . . .”

- DOI testimony - “If a tribe is going to take on complete decision-making control of land and resources, we believe liability on behalf of the federal government should be nonexistent.”

- Navajo testimony – “While we support one of the aims to minimize federal micromanagement of Navajo land, minimizing micromanagement should not replace the trust responsibility.”
The Nature of the Trust Responsibility

- Contracts – land/resources = consideration
- Property Law – places matter; Armory v. Delamirie
- Trust Law – general v. fiduciary; guardian-ward
- Foreign Relations – suzerainty, Vattel to UNDRIP
- (Pre)Constitutional Law – Northwest Ordinance
The Issues

• Executive Liability Evasion

  “Because the dollars at stake appear to be so large the
government has raised legal and factual arguments that
have little or no basis in law, fact or logic.” *California

  “Although defendant continues to argue otherwise,
  . . . ‘the duty of care owned by the United States “is
  not mere reasonableness, but the highest fiduciary
  standards.” *Jicarilla Apache Nation v. United States*,
  Fed. Cl. (2013)
Neocolonial Judicial Activism

DOI v. Klamath Water Users Protective Ass’n, 532 U.S. 1 (2001) - oral argument trans. at 28:

[Scalia]: I guess . . . . the moral is you should never pick a trustee who enacts a Freedom of Information Act.

(Laughter)

[Breyer]: But I’m not sure the Indians had a choice.
Neocolonial Judicial Activism (contd.)

United States v. Navajo Nation, 537 U.S. 488 (2003) - oral argument transcript at 5:

Breyer: “Ex parte communications take place all the time in those [informal adjudication] situations. So what’s unfortunate about it? Maybe it was unfortunate politically, but I mean, legally —”
Episodic Federal Action and the Future of the Trust Responsibility

• Prior efforts
  – Congressional - 1994 Trust Reform Act, Cobell-related, ITARA
  – Executive - Secretarial Orders 3215, 3335, 303 DM 2.7

• Pending efforts
  – Native American Energy Act (H.R. 210)
  – American Indian Empowerment Act (H.R. 215)
  – Indian Trader Regulations (maybe)
  – Fee-to-Trust Regulations (not)

• Issues/Ideas
  – Reaffirmation (not likely)
  – Self-determination (above?)
  – Integration and Elevation (ITARA)
  – Oversight (White House Council; NCIO)
  – Funding (TBD)
Conclusion