Tribal Consent and the Lease of Indian Lands for Federal Power Projects

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Note: Tribal Consent and the Lease of Indian Lands for Federal Power Projects

There are approximately 452,000 American Indians living on or adjacent to the 536 Indian reservations in this country. These Indians are the beneficial owners of more than 50 million acres of reservation land. Yet the Indian people rank lowest "on virtually every scale of measurement" of all racial and ethnic groups in terms of employment, income, education, and health. Federal efforts to ameliorate the plight of the Indians have increasingly focused on the economic potential of developing reservation resources. The leasing of reservation lands for resource development purposes plays an instrumental role in tapping the economic potential of Indian reservations. By combining Indian manpower and land resources with non-Indian capital and technology these leases have benefited both the Indian tribes and their lessees. But the leasing of Indian reservation land has also created a complicated legal web among the many parties affected by the lease. The state government, the local government, the Department of the Interior, and other federal agencies—in addition to the lessee and the Indian tribe lessor—often have significant interests in the lease of reservation lands. Questions frequently arise concerning the extent of each party's authority and the standards governing the exercise of that authority. The lease of Indian reservation lands for the construction and operation of hydroelectric power plants presents a typical example of the overlapping authority and undefined roles characteristic of this uncertain area of the law.

2. According to the Bureau of Indian Affairs (BIA), the total is 50,475,906 acres. Chambers & Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan. L. Rev. 1061, 1062 n.5 (1974) [hereinafter cited as Chambers & Price].
4. In addition to programs administered by the BIA, federal agencies have expended over 150 million dollars on grants and loans during the past six years to further economic development on Indian reservations. See Chambers & Price, supra note 2, at 1064 n.17.
The Federal Water Power Act of 1920\(^6\) gave the Federal Power Commission (FPC) the authority to issue 50-year licenses for the construction and operation of hydroelectric power plants on “any part of the public lands and reservations of the United States,”\(^7\) including “tribal lands embraced within Indian reservations.”\(^8\) A substantial number of the projects licensed pursuant to this authority are located on the tribal lands of Indian reservations.\(^9\)

In 1934 the Indian Reorganization Act (IRA) vested the power to “prevent the sale, disposition, lease or encumbrance of tribal lands” in all Indian tribes organized under its provisions.\(^10\) Whether this power to prevent alienation limits the authority of the FPC to grant licenses to power companies for the use of Indian tribal lands remains unresolved. This question involves more than an exercise in statutory construction. The issue of an Indian tribe’s control over its lands inevitably raises broad questions of national Indian policy and the proper role of federal agencies in implementing that policy. Moreover, the conflict between the FPC and the Indian tribes has become increasingly important as the public has developed a greater concern for both Indian rights and sources of energy. The issue is especially significant in view of the fact that a number of the original 50-year licenses are now approaching expiration.\(^11\)

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8. Id. § 796(2).
9. Chairman John N. Nassikas of the FPC states that hydroelectric structures and facilities of federally licensed power projects occupy tribal lands on the Lac Courte Oreilles (Wis.), Flathead (Mont.), LaJolla (Cal.), Rincon (Cal.), San Pasqual (Cal.), Uintah (Utah), Ouray (Utah), Warm Springs (Ore.), and Gila River (Ariz.) Indian Reservations. Hydroelectric project transmission or control lines cross the tribal lands of numerous other Indian reservations. Hearings on Federal Protection of Indian Resources Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 7, at 1677, 1679-84 (1972) [hereinafter cited as Hearings].
11. The Washington Star reports that by the end of 1976 nearly 40 hydroelectric project licenses will have expired. The Star suggests that “important conditions could be attached to the renewals calling for new recreational uses, environmentally cleaner operations or higher payments to those who own the land—in a number of cases Indian tribes.” The Star cites two examples:

In Wisconsin, the Lac Court Oreilles Indian Band of the Lake Superior Chippewa Tribe has asked the Federal Power
The FPC has recently rejected the proposition that tribal consent is required before a license may be issued for a power project on tribal lands.\(^\text{12}\) In its opinion the FPC expressed concern about the potential disruption of the efficient functioning of the integrated network of nationally regulated hydroelectric power plants that could result from the conditioning of power projects on tribal approval. The Commission observed that any such disruption would threaten the "comprehensive development of the water resources of the Nation."\(^\text{13}\) Refusing to believe that Congress ever intended that result, the Commission concluded that the overriding policy of the Federal Power Act precluded a requirement for tribal consent.

In reaching this conclusion the FPC did not consider the symbolic and economic interests of an Indian tribe in the licensing of federal power projects on tribal lands. The Indian tribes have a significant symbolic interest in protecting tribal sovereignty against an administratively imposed alienation of tribal lands.\(^\text{14}\) They also have an economic interest in increasing their participation in the development of reservation resources. Unlike many other leases, a lease for a hydroelectric power plant does not generally produce economic benefit for the lessor tribe. If power companies were no longer unilaterally able to secure the use of tribal lands, they would presumably be compelled to offer sufficient economic incentives to induce a tribe to give its consent.

\(^\text{12}\) Northern States Power Co., 50 F.P.C. 753 (1973). The case involved an extensive legal battle for control of the Chippewa Flowage in northwest Wisconsin. The Chippewa Flowage, the largest inland waterway in Wisconsin, consists of about 30,000 acres with a development value of more than 50 million dollars. Northern States Power Company operated a reservoir which is located in part on the flowage and in part on tribal lands of the Lac Courte Oreilles Band of Chippewas. The power company's license to operate this reservoir expired in August, 1971, and the Lac Courte Oreilles Indians argued that the FPC could not legally issue a new license for the use of this land without the Indians' consent. Intervening on behalf of the Lac Courte Oreilles Indians in Northern States Power Co. were the BIA and several environmental and Indian interest organizations.

\(^\text{13}\) Id. at 774.

\(^\text{14}\) See text accompanying note 47 infra.
This Note will examine the nature and extent of federal and tribal authority over Indian tribal lands. Specific attention will be directed to the question whether this concurrent authority is being exercised properly when federal power projects are licensed on Indian tribal lands. It will be proposed that tribal sovereignty can be promoted while the efficient utilization of the nation's water resources is still protected by requiring tribal consent before licensing a power project on Indian tribal lands, but subjecting the withholding of that consent to judicial review. This Note will then explore two alternative proposals for accommodating responsible tribal participation within the statutory framework of the present licensing procedure.

I. FEDERAL AUTHORITY OVER TRIBAL LANDS

Federal authority over tribal lands finds its basis in article IV of the Constitution, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the

15. At the present time, if an Indian tribe disapproves of the renewal of a license for the use of its lands, there are two procedures by which the tribal lands involved in the project might be transferred back to the tribe. First, 16 U.S.C. § 808(b) (1970) authorizes the FPC, upon the expiration and nonrenewal of a license, to license the project for temporary nonpower use by a new licensee who will reimburse the old licensee for its "net investment." The statute then directs the FPC to terminate its supervision over the project whenever "a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands . . . ." Under this procedure, the Indian tribe itself could reimburse the old licensee for its net investment and the FPC would then, by the issuance of a temporary nonpower license, transfer supervision of the project to the Department of the Interior for the ultimate benefit of the tribe. Second, 16 U.S.C. § 807 (1970) provides that the United States, upon recommendation by "any Federal department or agency," may "take over" a particular project by reimbursing the licensee for its "net investment" in the project. Under this procedure, the Department of the Interior could recommend that Congress exercise its right to "recapture" a particular project and then hold in trust the federally owned lands for the benefit of the Indian tribe.

The Secretary of the Interior has already requested the recapture of two federal power projects. He has advised the FPC that the Department desires to recapture the Escondido Canal Project No. 176, in order to protect the water and land interests of the Indians living there, and he has also requested that the FPC institute proceedings to recapture the lands and waters involved in the Chippewa Flowage Project No. 108, so that the lands are returned to the United States to be held in trust for the use and benefit of the Lac Courte Oreilles Chippewa Indians. Hearings, supra note 9, at 1716-17.
The Constitution vests responsibility for Indian affairs primarily in Congress and to a more limited extent in the President. As Chief Justice Marshall concluded in *Worcester v. Georgia*, "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians."

The courts have characterized the relationship between the United States Government and the Indian tribes as that of trustee-beneficiary and guardian-ward. Chief Justice Marshall introduced both concepts, and the courts quickly accepted them because of a need for some principles to explain the dependent, yet semi-autonomous relationship of the Indian tribes to the federal government. The trusteeship and guardianship rationales became the principal justifications for upholding the claim of plenary congressional authority over the Indians and their tribal property. Consequently Congress may dictate the condi-

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16. U.S. Const. art. IV, § 3. Indian tribal lands are included under "[p]roperty belonging to the United States" and thus are directly subject to the power of Congress.

17. Id. See also id. art. I, § 8: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

18. "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ." Id. art. II, § 2.


20. The trustee-beneficiary concept is derived from the doctrine of "title by discovery." Chief Justice Marshall introduced the doctrine to American law in *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823):

> [The Indians'] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Thus, the United States Government holds legal title to all Indian lands with the Indians reserving the right as beneficiary to use and occupy the lands.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), Chief Justice Marshall stated: "[The Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

21. The plenary character of congressional power over various aspects of Indian affairs has been recognized on many occasions. See *Board of Comm'rs v. Seber*, 318 U.S. 705, 716 (1943) (extension of tax immunity to Indian trust lands); *United States v. McGowan*, 302 U.S. 535, 538-39 (1938) (prohibition of intoxicants in Indian country); *United States v. Ramsey*, 271 U.S. 467, 469-71 (1926) (regulation of crimes committed by or against Indians on a restricted allotment); *Sunderland v. United States*, 266 U.S. 226, 233-34 (1924) (restraints upon sale of land by Indian allottees); *Brader v. James*, 246 U.S. 88, 96 (1918) (reimposition of restraints upon the sale of land by an heir of an Indian allottee); *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913) (prohi-
tions under which tribal land may be used, may convey tribal land to third parties, and may restrict alienation of the land by the Indians. Moreover, it has been held that congressional discretion over tribal lands is political in nature and not subject to traditional judicial scrutiny. Thus the only constraint upon congressional power to dispose of tribal lands is apparently the fifth amendment guarantee that private property will not be taken for public use without just compensation.

As trustee of Indian tribal lands, Congress has assumed a fiduciary duty to act in the best interest of the tribes. As guardian, Congress has accepted general responsibility for protecting the Indians and providing for their general welfare. Despite the extensive power of Congress over tribal lands, however, its specific obligations remain difficult to define and enforce, because they are entirely self-imposed. As a result, the concepts of federal trusteeship and guardianship have proven to

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25. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not for the courts.


27. [T]his court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with [Indians] . . . . In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.


be fertile sources of federal authority over tribal lands while providing ineffective checks on that authority.

Congress has delegated its trusteeship and guardianship responsibilities for the Indians to the Secretary of the Interior. The Secretary, in turn, has departmentally assigned initial responsibility for the Indians to the Commissioner on Indian Affairs. Prior to 1934, the power of the Secretary of the Interior to dispose of tribal lands was comparable to his authority over public lands in general. The Secretary could issue mineral leases of tribal land, sell the timber on the land, and even allocate tribal property to individual members of the tribe.

The Indian Reorganization Act of 1934 and subsequent legislation significantly narrowed the scope of the Secretary's authority. Essentially, his role was changed from that of manager to that of protector. In this new capacity the Secretary can no longer unilaterally direct the disposition of tribal resources, although he can still prevent any dissipation of Indian land by the improvident actions of the Indians themselves. Thus, the approval of the Secretary is required for all leases of Indian

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In addition to the direct authority over Indian lands delegated to the Department of the Interior, Congress has conferred incidental jurisdiction over Indian reservations to other Federal agencies. One example is the licensing of hydroelectric power plants, discussed in text accompanying notes 6-9 supra. Such licensing triggers the Commission's attendant supervisory jurisdiction over that part of the reservation encompassed within the project.

31. The BIA was created as part of the War Department in 1824 and transferred to the Department of the Interior when the latter was established in 1849. The Snyder Act of Nov. 2, 1921, ch. 115, 42 Stat. 208 (codified at 25 U.S.C. § 13 (1970)), specifically provided for appropriations for the activities of the BIA. The scope and character of the authorizations contained in this Act were broadened by the Indian Reorganization Act of June 18, 1934, ch. 576, §§ 1-18, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79 (1970)).


lands\textsuperscript{37} and all other contracts relating to tribal property.\textsuperscript{38} Furthermore, in the event of a lease or other encumbrance of Indian land, he may insist on any conditions he deems necessary for the protection of the affected tribe.\textsuperscript{39}

The Secretary of the Interior is also responsible for protecting Indian lands and resources from encroachment by third parties.\textsuperscript{40} However, the Department of the Interior is plagued with conflicting interests that hinder vigorous enforcement of Indian rights. It is composed of several specialized bureaus, including Mines, Land Management, Sport Fisheries and Wildlife, and Reclamation, as well as Indian Affairs.\textsuperscript{41} The underlying purpose of all these bureaus and the general purpose of the Department is to manage public lands in the public interest.\textsuperscript{42} Conflicts between the pursuit of this goal and the promotion of Indian property interests are inevitable.\textsuperscript{43} Moreover, the Bureau of Indian Affairs (BIA) does not have its own legal counsel; legal matters for the Bureau are handled through the office of the Solicitor of the Interior.\textsuperscript{44} Consequently, when a conflict arises affecting the private interests of Indian tribes in the use of their land, there is no independent legal advocate to argue the Indians' case and to ensure that Indian interests are not routinely sacrificed to competing demands.\textsuperscript{45} In short, the bureaucratic structure responsible for implementing the Government's fiduciary duty to the Indians has proved inadequate to protect the Indians, their land, and their resources.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{37} 25 U.S.C. §§ 396a, 397-98, 415a (1970).
\item \textsuperscript{38} Id. §§ 81, 85.
\item \textsuperscript{39} Id. § 415a; 16 U.S.C. § 797 (e) (1970).
\item \textsuperscript{40} This fiduciary duty to represent Indian property interests is shared with the Department of Justice. See 25 U.S.C. § 175 (1970); 28 U.S.C. § 516 (1970).
\item \textsuperscript{41} \textit{UNITED STATES GOVERNMENT ORGANIZATION MANUAL} 261 (1973).
\item \textsuperscript{42} Id. at 260.
\item \textsuperscript{43} \textit{See generally} Comment, Interagency Conflicts of Interests: The Peril to Indian Water Rights, 1972 LAW & SOC. ORDER 313.
\item \textsuperscript{44} \textit{See generally} Hearings, supra note 9, at 233-49, 1702.
\item \textsuperscript{45} In this context President Nixon said: "There is considerable evidence that the Indians are the losers when such situations arise." \textit{Presidential Message, supra note 3,} at 23,135 (1970). There are, however, promises of reform. A new position of Deputy Assistant Secretary for Indian Affairs has been created, and an Indian Water Rights Office has been established. An agreement has also been reached whereby the Department of Justice will file briefs with the Department of the Interior whenever it has a different view as to the federal trust duty in cases involving a reservation's natural resources. See \textit{Hearings, supra note 9,} at 1702.
\item \textsuperscript{46} In particular, federal water projects, whether initiated by the FPC, the Bureau of Reclamation, or the Army Corps of Engineers,
II. TRIBAL AUTHORITY OVER TRIBAL LANDS

A. THE CONCEPT OF TRIBAL SOVEREIGNTY

Tribal sovereignty can be defined as the right of Indian tribes to govern their own land and affairs according to laws and policies developed by the tribes themselves. The authority of tribal councils to manage and regulate the use of reservation lands and the jurisdiction of tribal courts to adjudicate disputes arising on the reservation are the two major incidents of tribal sovereignty and are frequently governed by the same general principles. Although tribal sovereignty is in essence a political concept, the term has also developed legal import as a doctrine influencing judicial opinions.47

Each Indian tribe began its relationship with the United States Government as a sovereign power, capable of declaring war and conducting international relations with other sovereign powers. The initial treaties between the United States and the various Indian nations clearly acknowledged this sovereignty as well as the validity of the Indians' aboriginal title to their

illustrate the Department's ineffectiveness in protecting Indian interests. For example, the Garrison Dam on the Fort Berthold Reservation flooded one-fourth of the entire reservation, inundating the tribe's most fertile lands and partitioning the reservation into five sectors. The project economically and emotionally shattered the Indians living on the reservation. See Citizens' Advocate Center, Our Brother's Keeper: The Indian in White America 69-72 (E. Cahn ed. 1969).

Other examples of federal water projects antagonistic to Indian interests in their lands and waters include the Yakima Reclamation Project, which diverted thousands of acre-feet of irrigation water from the Yakima Reservation; the Central Arizona Project, which is expected to flood 12,000 to 15,000 acres of the Fort McDowall Reservation, including all buildings on the reservation and virtually all the irrigable land; and a river diversion project on the Winnebago Reservation which is expected to flood 200 to 800 acres of Winnebago lands and prevent the Indians from developing their own recreational facilities. See Testimony Before the Water Resources Council, San Francisco, March 13-14, 1972, Concerning Proposed Principles and Standards for Planning Water and Related Land Resources, in Hearings, supra note 9, at 1730-32. In response, the Water Resources Council, composed of the Chairman of the FPC and the Secretaries of the Army, Interior, Agriculture, Transportation, and Health, Education and Welfare, has proposed standards recognizing the authority of the tribal council to veto planned federal projects affecting Indian lands and waters. Proposed Amendments to Water Resources Council's Principles and Standards for Planning Water and Related Land Resources Projects Affecting Indians, in Hearings, supra note 9, at 1728-29. The Council was established pursuant to 42 U.S.C. § 1862a (1970) (originally enacted as Act of July 22, 1965, Pub. L. 89-80, tit. 1, § 101, 79 Stat. 245).

47. See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) and text accompanying note 60 infra.
lands. As the country expanded westward and the idea of a separate sovereignty within the geographical boundaries of the United States grew unacceptable, it became necessary for the United States to limit and subordinate, militarily and politically, the exercise of Indian sovereignty. Consequently, the Indian people were reduced to the status of a conquered nation subject to the plenary authority of Congress. What dominion the Indian tribes continued to exercise over their lands they exercised by congressional grace and not by legally indefeasible right. Tribal sovereignty came to be viewed as merely those powers which Congress had not yet extinguished.

As conquered nations, the Indian tribes have seen their property rights fluctuate with the Government's shifting Indian policies. Oscillation between policies of assimilation and

48. See, e.g., Treaty with the Creek Nation, August 7, 1790, 7 Stat. 35; Fort Harmar Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations, January 9, 1789, 7 Stat. 28.

49. See text accompanying notes 20-24 supra.


51. Until 1871, treaties were the principal instruments used to define the fundamental legal relationship between the United States Government and the Indian tribes. At the time the majority of these treaties were negotiated, the Indians were generally considered impediments to progress. The intense and often violent competition for land control made the Indian a natural enemy. The Government's solution was to confine the Indians to specific reservations. Dictated by the exigencies of the times, this solution produced two immediate results. First, it minimized the violent confrontations with the Indians which could only have ended in complete annihilation of the Indian race. Second, since geographic confinement was inconsistent with a hunting and gathering lifestyle, it tended to induce the Indians to adopt a more "civilized" agricultural economy.

The Allotment Act of 1887, ch. 119, 24 Stat. 388, authorized the President to divide the Indian reservations into parcels which would then be allotted in severalty to the individual members of the particular tribe. The allotted land would be held in trust by the Government for a minimum of 25 years, after which the parcels would be patented in fee simple to the individual Indians. The effect of the Act on the general welfare of the Indians was disastrous. From its inception in 1887 until its repeal in 1934, the Indians lost over 90 million acres of reservation land. The reservation land not allotted was deemed "surplus" and made available for sale to the white settlers and railroads. 25 U.S.C. § 331 (1970). Moreover, the idea of individual ownership was foreign to Indian culture, and the inexperience and resulting confusion of the individual Indian rendered him particularly susceptible to the high pressure tactics of land dealers. See generally Kelly, Indian Adjustment and the History of Indian Affairs, 10 Ariz. L. Rev. 559 (1968).

segregation,\textsuperscript{52} coupled with a propensity to dispose of problems on an ad hoc basis,\textsuperscript{53} has prevented any stable definition of tribal property rights and has contributed significantly to the social, economic, and cultural disintegration of American Indians.\textsuperscript{64} It now appears, however, that the emerging policy is to preserve and promote Indian tribal sovereignty and self-determination. In an address to Congress in 1970 President Nixon stated that self-determination among the Indian people can and must be encouraged without the threat of eventual termination: "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community."\textsuperscript{55}

There is evidence that protection of tribal sovereignty is indeed becoming a significant feature of the fiduciary duty that Congress has assumed toward the Indian people. Thus the promotion of tribal sovereignty has played a major role in the

\textsuperscript{53}For example, Congress has frequently enacted legislation specifically dealing with only a single Indian tribe. See, e.g., 25 U.S.C. §§ 495-1300(e) (1970).
\textsuperscript{54}See Comment, supra note 52.
\textsuperscript{55}Presidential Message, supra note 3, at 23,132.
enactment of recent Indian legislation. At the present time Congress is considering a bill that would provide for Indian administration of BIA and Public Health Service Indian programs. This proposed legislation is indicative of the renewed concern in Congress for tribal sovereignty as it is specifically designed "to promote maximum Indian participation in the government of Indian people" and "to achieve . . . government by consent in the Indian country."

The Supreme Court has also indicated an increasing awareness of and sensitivity to the policy of tribal sovereignty. The Court recently focused on the nature of tribal sovereignty in the companion cases of McClanahan v. Arizona State Tax Commission and Mescalero Apache Tribe v. Jones. In McClanahan the Court struck down a state income tax on revenue generated by reservation Indians from reservation resources. In Mescalero the Court upheld a state gross receipts tax on a ski resort operated by an Indian tribe on nonreservation land. The McClanahan Court recognized the relevance of the "Indian sovereignty doctrine," although it used the doctrine only as a "backdrop" for interpretation of treaties and statutes which it considered dispositive. Using this same approach in Mescalero, the Court refused to extend the tribe's tax immunity to activities conducted off the reservation.

The Supreme Court again considered the policy of Indian
self-determination in *Morton v. Mancari*.\(^6\) Upholding the employment preference for Indians required of the BIA by section 12 of the IRA,\(^6\) the Court observed:

The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.\(^6\)

In deference to this policy and in recognition of the Indians' unique historical relationship to the federal government, the Court unanimously refused to apply a racial discrimination analysis and upheld the statute as "rationally designed to further Indian self-government."\(^6\)

These recent cases establish a revitalized, yet conservative, role for tribal sovereignty. Although the Court appears very willing to use the concept of tribal sovereignty as a legal doctrine to justify decisions favorable to the Indians, it remains reluctant to extend the influence of the doctrine beyond the boundaries of the reservations. At the same time, the Court seems to be adopting a narrow and technical approach to questions involving Indian rights, stressing a "more individualized treatment of particular treaties and specific federal statutes."\(^6\)

Consequently, the doctrine of tribal sovereignty does not appear to be of sufficient weight to determine independently the Court's conclusion in any particular case. The doctrine's major contribution is its influence on the interpretation of applicable treaties and statutes.

Thus viewed, the doctrine of tribal sovereignty is not in competition with the plenary authority of Congress, but rather is an expression of congressional intent to use that authority to preserve the Indian tribe as a political, social, and economic entity. Consequently, the courts' proper function is to implement and promote tribal sovereignty except in those instances where Congress has clearly manifested a contrary intent.

B. FACTORS INFLUENCING TRIBAL SOVEREIGNTY

Because of the uneven historical development of the legal status of Indians\(^6\) and the disparate treatment of particular Indian tribes,\(^6\) the extent of tribal sovereignty over tribal lands

\(^{63}\) 94 S. Ct. at 2478-79.
\(^{64}\) Id. at 2485.
\(^{66}\) See note 51 *supra*.
\(^{67}\) See note 53 *supra*. 
cannot be categorically determined. Deference to the concept of tribal sovereignty varies according to the circumstances of each case. The character of the adverse party, the status of the reservation, and the nature of the right invoked are all factors which influence the extent of that deference.

1. The Character of the Adverse Party

One of the major variables affecting the recognition given tribal sovereignty is the status or character of the party asserting an interest adverse to the Indian tribe. As with most principles of Indian law, the significance of the adverse party's character derives from the Indian tribe's unique historical status.

The Supreme Court initially confronted the issue of Indian political-legal status in 1831 when the Cherokee Indian Nation attempted to invoke the original jurisdiction of the Supreme Court. Since article III of the Constitution clearly gives the Supreme Court original jurisdiction over suits involving "foreign states," the problem facing the Court was to define the status of the Cherokee Nation—and thereby the status of all Indian tribes—under the Constitution. The result was the creation of a new legal category for Indian tribes:

[The Indian tribes] may . . . perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Two distinct and potentially conflicting concepts are contained in this description: first, the concept of internal sovereignty suggested by the term "domestic dependent nation"; second, the concept of subservience inherent in the relationship of guardian and ward. The Court's decision as to which characterization to favor depends upon the relationship of the parties before it. Where the issue involves the assertion of state or local power over the Indian tribe, the Court has emphasized the domestic dependent nation status. Thus, the Court has re-

70. 30 U.S. (5 Pet.) at 17.
fused to allow state or local governments to tax\textsuperscript{72} or condemn\textsuperscript{73} Indian lands, and has denied state courts civil and criminal jurisdiction over the internal affairs of Indian tribes.\textsuperscript{74} Where the issue involves the assertion of congressional power over the affairs of a tribe, the Court has emphasized the guardian relationship and has allowed Congress free reign in the exercise of its authority.\textsuperscript{75} As a consequence, Indian rights vis-a-vis the federal government are much different than Indian rights vis-a-vis state or local governments. The character of the adverse party is thus a threshold consideration in determining the extent of recognition given to tribal sovereignty.

2. The Status of the Reservation

The extent of tribal control over Indian lands also depends upon the source of a tribe’s interest in the land. While almost all Indian property rights ultimately derive from the Indians’ aboriginal possession of the land, aboriginal title by itself creates a very limited property interest. As the Supreme Court concluded in \textit{Tee-Hit-Ton Indians v. United States},\textsuperscript{76} “Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.”\textsuperscript{77}

Thus, recognition that the land in which the Indians assert an interest is designated a reservation is only the initial step in the analysis. Not all Indian reservations are of equal status.\textsuperscript{78} There are different considerations for reservations created by executive order and for those created by treaty or act of Congress.\textsuperscript{79} While it is within the power of the President or the

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\textsuperscript{73} Minnesota v. United States, 305 U.S. 382 (1939). Indian lands are also exempt from state or local zoning regulations. See 25 C.F.R. § 1.4 (1974).
\textsuperscript{75} \textit{See note 21 supra and accompanying text.}
\textsuperscript{76} 348 U.S. 272 (1955).
\textsuperscript{78} \textit{See F. COHEN, supra} note 50, at 291.
\textsuperscript{79} In 1871 Congress dispensed with treaties as a means of dealing with Indian affairs and established legislation as the official channel for all future expressions of Indian law. 25 U.S.C. § 71 (1970) (originally enacted as Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566).
Secretary of the Interior without congressional authorization to order lands withdrawn from the public domain for the use of Indians, the property rights created in a tribe by such an executive order are subject to termination without compensation at the will of the President or Congress. Moreover, the Supreme Court has held that even when the executive withdrawal is congressionally sanctioned, a tribe still does not have the power to prevent the sale or other compensated disposition of an executive order reservation. In contrast, a treaty or act of Congress vests in an Indian tribe a compensable property interest in the reservation land. The extent of an Indian tribe's property interest above this minimum interest depends upon the particular definition of tribal property rights employed in the creating instrument. The language used to define the character of the estate guaranteed to an Indian tribe varies considerably, ranging from fee simple ownership to various limited rights of use and occupancy.

Regardless of the language employed in any particular treaty, tribal property rights based solely on a treaty are not inviolable. Even though treaties are identified in the Constitution as part of the supreme law of the land, the doctrine of treaty abrogation seriously dilutes the effective force of Indian treaties. The rationale for the doctrine is that since Indian treaties and federal statutes are of the same constitutional rank, then, as in the case of all laws emanating from an equal authority, the later in time prevails over any inconsistent provisions of the earlier. In upholding the power of Congress to contravene the provisions of an Indian treaty by subsequent legislation, the Supreme Court has said:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.

84. See generally F. COHEN, supra note 50.
85. U.S. CONST. art. VI.
Abrogation of an Indian treaty is ultimately a question of judicial interpretation. A court not only must construe the later legislation, but also must consider the impact of the earlier treaty. The courts have adhered to numerous rules of construction that are aimed at preventing the abusive application of the doctrine. As Chief Justice Marshall stated, "the language used in treaties with the Indians should never be construed to their prejudice."

Indeed, in determining the meaning of treaties, any ambiguous or technical language is to be interpreted "in the sense in which [it] would naturally be understood by the Indians." Moreover, in analyzing the effect of subsequent legislation on treaty guarantees, the courts have consistently held that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." When this rule is applied in conjunction with the rule that ambiguous legislation is generally "to be construed in the interest of the Indian," a presumption against abrogation results.

The degree of legislative specificity required to rebut this presumption is unclear. In Menominee Tribe v. United States the Supreme Court held that a statutory provision that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within its jurisdiction" was not sufficiently specific to abrogate the hunting and fishing privileges guaranteed to the tribe by treaty. On the other hand, in The Cherokee Tobacco the Court held that the language of the Internal Revenue Act of 1868, which stated that the "laws imposing taxes on . . . tobacco . . . shall be held and construed to extend to such articles produced anywhere within the exterior boundaries of the United States," was "as clear and explicit as could be employed" and therefore abrogated the tobacco taxation immunity granted to the Cherokee Indians by treaty. Thus, it appears that the degree of specificity which is required to rebut the presumption against abrogation results.

93. 78 U.S. (11 Wall.) 616 (1870).
94. Id. at 618, 620.
tion is a matter of fine judicial discretion. Although the presumption against abrogation and the similar presumption against implied repeal help to protect an Indian tribe whose reservation is created by treaty or statute from inadvertent intrusions into its sovereignty, these presumptions do not limit the plenary authority of Congress over tribal lands. Consequently, the extent of an individual tribe's sovereign control over its tribal lands depends not only on whether the reservation is protected by treaty or statute, but also on whether the provisions of that treaty or statute have been abrogated or repealed by a later statute.

3. The Nature of the Right Invoked

The extent of a tribe's control over its land appears to vary according to the nature of the rights invoked by the Indians. An example of a power which is strictly limited is the tribe's power to alienate tribal property. That power is subordinate to the general power of the Secretary of the Interior to restrain any type of alienation he deems improvident. Thus the tribal council's exercise of affirmative sovereignty over tribal lands is generally limited to suggesting land leases to the Secretary of the Interior and internally regulating the use of the land by tribal members.

In contrast to the subordination of this power of alienation is the special recognition given to Indian water rights. In Winters v. United States, the Supreme Court established the doctrine that Indian tribes reserved under their treaties the continuing right to use the water flowing through their reservation. The idea of confining the Indians to semi-arid reservation lands and then depriving them of the water which made those lands habitable affronted the Court's sense of fairness. The effect of the

95. See notes 37-40 supra and accompanying text.
96. There are exceptions to the general requirement of secretarial approval. For example, in 1970 Congress authorized the Tulalip Tribe to conclude leases of tribal lands for terms of up to 30 years without secretarial approval. Act of June 2, 1970, Pub. L. No. 91-274, § 3(b), 84 Stat. 302 (codified at 25 U.S.C. § 415b (1970)).
97. In addition to the authority over the use of land, tribal sovereignty allows an Indian tribe to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, and to administer justice. See generally Cohen, Indian Rights and the Federal Courts, 24 MINN. L. REV. 145 (1940).
98. 207 U.S. 564 (1908).
99. See generally Bloom, Indian "Paramount" Rights to Water Use, 16 ROCKY Mt. MINERAL L. INST. 669 (1971); Veeder, Indian Prior and Paramount Rights to the Use of Water, id. at 631.
Winters doctrine is to give to an Indian tribe a prior right to the water on or flowing through its reservation. Moreover, this right does not depend on the particular status of the reservation. In United States v. Walker River Irrigation District, the Winters doctrine was extended to statutory and executive order reservations. In addition, the amount of water to which the Indians are entitled is measured by the amount required "to irrigate all the practicably irrigable acreage on the reservations." Thus the Winters doctrine gives an Indian tribe the right to prevent any diversion of water that would impair the agricultural productivity of its reservation lands.

III. THE FEDERAL POWER PROJECT LICENSE

A. THE ROLE OF TRIBAL SOVEREIGNTY

Congress first authorized the leasing of Indian reservation lands in 1891 and continued to enact piecemeal legislation on the subject until 1955. In 1955 Congress significantly broadened the permissible purposes and extended the permissible duration of such leases but did not repeal any of the previous piecemeal legislation. All of the leasing statutes require

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100. 104 F.2d 334 (9th Cir. 1939).
101. We see no reason to believe that the intention to reserve [water rights] need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent.
Id. at 336.
105. Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases .... All leases so granted shall be for a term of not to exceed twenty-five years .... [Such] leases with the consent of both parties may include provisions authorizing their renewal for one additional term ....
Id. § 415.
106. Nothing contained in sections 396 and 415-415d of this title shall be construed to repeal any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.
Id. § 415d.
tribal consent as a condition for any leases. Specifically, tribal consent is required when Indian tribal land is leased for purposes of mining,\textsuperscript{107} oil and gas extraction,\textsuperscript{108} or farming.\textsuperscript{109} However, Congress has not clearly defined the extent of tribal authority over tribal lands leased for a federal power project. The Federal Power Act (FPA) and the IRA are too imprecise to compel a conclusion. This ambiguity leaves substantial latitude for consideration of the problem within the framework of general principles and policies of Indian law.

1. The Character of the Adverse Party

If a state were to attempt to impose a power project on an Indian tribe, the tribe's quasi-sovereign status would presumably operate to prevent the intrusion.\textsuperscript{110} A power project, however, arises in a context in which the party asserting an interest adverse to the Indian tribe is a federal administrative agency. An Indian tribe's sovereignty vis-a-vis a federal agency is not clear. If the federal agency's action is specifically mandated by Congress, the plenary nature of federal authority preempts tribal sovereignty.\textsuperscript{111} If the federal agency's action is not clearly mandated by statute, then the validity of the action must be evaluated in terms of the relevant statutes and treaties. The doctrine of tribal sovereignty provides the proper "backdrop" for the interpretation of those statutes and treaties.\textsuperscript{112}

2. The Status of the Reservation

The second variable which is considered in defining the respective roles of the Indians and the FPC is the status of the reservation. The significance of this variable is illustrated by the Supreme Court's decision in \textit{FPC v. Tuscarora Indian Nation.}\textsuperscript{113} \textit{Tuscarora} involved an Indian tribe's attempt to enjoin the condemnation of its lands by a licensee of the FPC. The tribe argued that its lands could not be condemned under section 21 of the FPA\textsuperscript{114} because a reservation could be leased only upon an FPC finding that the power project would be con-

\textsuperscript{107} Id. § 396a.
\textsuperscript{108} Id. § 398.
\textsuperscript{109} Id. § 402a.
\textsuperscript{110} Minnesota v. United States, 305 U.S. 382 (1939). See text accompanying note 71 \textit{supra}.
\textsuperscript{111} See note 21 \textit{supra} and accompanying text.
\textsuperscript{112} See text accompanying note 60 \textit{supra}.
\textsuperscript{113} 362 U.S. 99 (1960).
sistent with the purpose of the reservation.\textsuperscript{115} The Court rejected this argument on the ground that the Tuscarora lands were not reservation lands created by treaty and protected by the trust relationship thereunder,\textsuperscript{116} but had been purchased in fee by the Indians and were therefore subject to condemnation.\textsuperscript{117} The Court concluded:

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others—but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the United States, or any treaty or other contractual agreement with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.\textsuperscript{118}

Although the Court discussed the distinction between treaty and nontreaty Indian lands, it based its holding on the more fundamental distinction between reservation and nonreservation lands. Reservation status is the threshold requirement for the invocation of federal trust responsibility for Indian land. The legal validity of a tribe's sovereignty vis-a-vis the United States depends at the very minimum on some formal recognition of that sovereignty by the United States Government. This recognition is formalized by the reservation of land for the Indian tribe. The Court's finding that the Tuscarora lands were not a reservation foreclosed further consideration of the tribe's sovereignty to control the use of the land.

The Tuscarora Court did not address the issue of whether the FPC could license a power project on reservation lands without the consent of the tribe. The traditionally limited nature of the rights accorded tribes living on executive order reserva-

\textsuperscript{115} Id. § 797(e). See text accompanying note 163 infra.
\textsuperscript{116} 362 U.S. at 121 n.18.
\textsuperscript{117} Id. at 123. In addition, the Tuscarora Indians argued that the eminent domain powers exercisable under the FPA did not apply to Indians or Indian lands because under the rule of Elk v. Wilkins, 112 U.S. 94 (1884), general acts of Congress do not apply to Indians unless such application is expressly mandated. However, the Court found that later cases had seriously undermined the Elk v. Wilkins rule, and that the direct reference to Indian reservations in other provisions of the FPA would have rendered the rule inapplicable in any event. 362 U.S. at 123. The Indians also relied on a federal statute which provided that Indian lands could not be taken without the express and specific consent of Congress. See 25 U.S.C. § 177 (1970). The Court held the statutory prohibition inapplicable to the United States Government and its agencies. 362 U.S. at 123-24.
\textsuperscript{118} Id. at 124.
tions suggests that this type of reservation could be taken for a power project without the consent of the tribe. In contrast, Congress has given special recognition and promises to tribes living on treaty and statute reservations. In addition, with the enactment of the IRA Congress vested in these tribes the power to control the disposition of tribal lands and resources. Although Congress clearly has the power to take lands from the Indians, it has exercised this power “only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian lands.” While it is clear that the FPA “neither overlooks nor excludes Indians or lands owned or occupied by them,” the provisions of the Act must be interpreted in light of the presumption against abrogation or implied repeal of a tribe’s treaty and statutory rights.

3. The Nature of the Right Invoked

The nature of the right invoked is the third variable that frequently influences the recognition given tribal sovereignty over tribal lands. In the context of federal power project negotiations, an Indian tribe might assert the right to prevent an unwanted incursion into tribal lands by a licensee of the FPC. The tribe’s exercise of this right would be in the nature of preserving, as opposed to dissipating, the reservation land, and therefore would not be restricted by any of the disabilities traditionally associated with Indian status. Moreover, the notion of an impoverished Indian tribe struggling to protect its shrinking tribal resources from further dissipation could prove to be an influential equitable factor in an area of law characterized by broad judicial discretion.

The special recognition accorded a tribe’s right to protect its water rights is a significant factor in the consideration of a power project. The operation of a hydroelectric power facility causes

119. See note 135 infra and text accompanying notes 76-82 supra.
123. Id. at 118.
124. See text accompanying notes 85-94 supra.
125. See text accompanying notes 95-97 supra.
abnormal fluctuations in water level both above and below the
dam. This fluctuation could impair the agricultural productivity
of an Indian reservation and thereby violate the tribe's rights
under the Winters doctrine.126 Moreover, the Office of Indian
Water Rights, recently created in the Department of the Interior,
has demonstrated its intention to vigorously review and litigate
any infringement of Indian water rights.127 Thus there is a
strong possibility that an Indian tribe could successfully enjoin
or limit the operation of the power plant.128

Under the existing licensing procedure a utility company
operating a power project on an Indian reservation incurs the
risk of seeing the efficiency of its project crippled if the Indian
tribe successfully asserts its water rights. However, the risk is
avoided when tribal consent is obtained prior to the commence-
ment of a hydroelectric project. The tribe's consent to a project
would operate to estop it from later asserting its water rights
against a project operated in accordance with the terms of that
consent.

B. APPLICATION OF FEDERAL STATUTES

Tribal sovereignty derives much of its content from statutory
sources. The most significant legislation in the area of tribal
land control is the IRA.129 The overall purpose of the Act is
"to give the Indians an opportunity to take over the control of
their own resources"; it seeks "to give the Indians the control
of their own affairs and of their own property; to put it in the
hands either of an Indian council or in the hands of the corpora-
tion to be organized by the Indians."130 Section 16 of the IRA
contains the most relevant congressional statement of tribal
rights and powers:

In addition to all powers vested in any Indian tribe or tribal
council by existing law, the constitution adopted by said tribe
shall also vest in such tribe or its tribal council the following
rights and powers: . . . to prevent the sale, disposition, lease,
or encumbrance of tribal lands, interests in lands, or other tribal

panying notes 98-102 supra.
127. See Hearings, supra note 9, at 1716-17.
128. See, e.g., id., where it is reported that the Office of Indian Water
Rights has requested the FPC to require the Escondido Mutual Water
Company and the Vista Irrigation District to change their operations
and cease those practices which deprive the Indians of their water sup-
ply.
130. 78 Cong. Rec. 11,124-25 (1934).
assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.\textsuperscript{131}

It is primarily on this statutory foundation that an Indian tribe can base the argument that tribal approval is required before tribal lands can be leased for power projects.\textsuperscript{132}

Section 16 of the IRA does not apply to every Indian tribe or to every reservation. In order for an Indian tribe to enjoy the powers and benefits conferred by section 16 it must organize and operate under a constitution that is "ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation . . . at a special election authorized and called by the Secretary of the Interior."\textsuperscript{133} The constitution must then be approved by the Secretary of the Interior.\textsuperscript{134} In addition to the eligibility limitations, the Supreme Court has held that IRA powers do not extend to Indian tribes living on executive order reservations.\textsuperscript{135}

Another potential constraint on the application of the IRA is the sovereign exclusion doctrine. In Tuscarora the Supreme Court held that a statutory prohibition against alienation of Indian land did not apply to the FPC because the statute contained an implied sovereign exclusion which exempted federal agencies from its coverage.\textsuperscript{136} Conceivably this sovereign exclusion doctrine could also be invoked in interpreting the scope of the IRA. But since private individuals and states have never

\begin{itemize}
  \item \textsuperscript{132} See Northern States Power Co., 50 F.P.C. 753, 764 (1973).
  \item \textsuperscript{133} 25 U.S.C. § 476 (1970).
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Hynes v. Grimes Packing Co., 337 U.S. 86 (1949). Hynes is the only case in which the Supreme Court has specifically addressed the scope of section 16. The dispute centered on the designation of a tract of land by the Secretary of the Interior as a reservation for the Karluk Indians of Alaska. The tract of land selected included coastal waters where Alaskan fisheries had operated for many years. The imposition of this reservation in 1936 and the attendant restriction of fishing privileges seriously threatened the economic survival of the fisheries. The Court held that the Secretary could not legally deprive the companies of their source of fish by granting exclusive fishing rights to the Indians. The Court stressed the limited nature of property rights created by executive order reservations, and in rejecting the argument that section 16 of the IRA applied to executive order reservations, stated: We think, however, in view of the breadth of the coverage of the Wheeler-Howard Act [IRA] that this language [section 16] would be effective only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands.
  \item \textsuperscript{136} See note 117 supra.
\end{itemize}
had the power to sell tribal land or to dispose of tribal assets.\textsuperscript{137} Exemption of federal agencies from the application of the IRA would leave it meaningless. Moreover, the IRA expressly confers upon the Indian tribes the power "to negotiate with the Federal, State and local Governments."\textsuperscript{138} A power to negotiate implies a power to refuse proposals advanced during negotiation; accordingly, it would be reasonable to conclude that when Congress granted Indian tribes the power to negotiate with the federal government for the use of tribal lands, it also intended to include in that grant the right to reject a proposal by a federal agency for the use of tribal lands.\textsuperscript{139} The terms and conditions governing the issuance of power licenses, however, are contained in section 4(e) of the Federal Power Act of 1935.\textsuperscript{140} Even though the FPA was enacted only one year after the IRA, tribal consent is not mentioned in section 4(e) as one of the conditions for the licensing of a power project on Indian lands. Consequently the FPC has not considered tribal consent as a necessary condition when it licenses power projects on tribal lands.

\section*{IV. EVALUATION OF EXISTING LICENSING PROCEDURE}

With increasing frequency, Congress has endorsed the promotion of tribal sovereignty and self-determination as the guiding national policy behind the economic development of Indian reservations.\textsuperscript{141} At the same time Congress has recognized the need for comprehensive national regulation of water resources.\textsuperscript{142} Thus, when a hydroelectric project is licensed on

\begin{footnote}
\textsuperscript{138} Id. § 476 (emphasis added).
\textsuperscript{139} Senator Wheeler's comments on the purpose of the IRA suggest that Congress did intend to confer on the Indian tribes a veto power over the use of their lands. See text accompanying note 130 supra.
\textsuperscript{140} [L]icenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations . . . .
\textsuperscript{141} See text accompanying notes 55-57 supra.
\textsuperscript{142} Federal Power Act of 1935, 16 U.S.C. § 791a et seq. (1970). In First Iowa Hydroelec. Coop. v. FPC, 328 U.S. 152 (1946), the Court held that even though the FPC's jurisdiction was not by nature totally exclusive, it was nevertheless sufficient to enable the Commission to operate free of restricting or duplicating state regulations. See also United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
\end{footnote}
tribal lands, the interest in protecting tribal sovereignty is opposed by the public interest in developing and maintaining uniform and uninterrupted hydroelectric power production. The present procedure for licensing power projects on Indian reservations does not provide a proper balance between these competing interests. For example, when the FPC licensed a power project on the Lac Courte Oreilles Reservation in 1920, the Commission, and the Secretary of the Interior by implication, sanctioned the flooding of Indian villages and sacred burial grounds, the complete destruction of the tribe's wild rice economy, and the grossly inequitable rental payment of 100 dollars per month for more than 525 acres of tribal land. The Lac Courte Oreilles tribe objected to the action but was unable to prevent the licensing of the project or even modify its drastic effect on the reservation. In short, the licensing procedure proved to be totally inadequate protection for the interests of the Indian tribe.

The inadequacy of the existing licensing scheme does not necessarily warrant placement of the final decision concerning continued operation of a power project wholly within the discretion of the Indian tribe. Regions of the country are dependent on the electricity generated by power plants located on Indian tribal lands. Allowing the unreviewable, and thus potentially improvident, termination or even disruption of the electrical service provided by these power projects would be as unsatisfactory as the existing decision process. Some form of compromise is required. In formulating this compromise it must be remembered that there are two distinct licensing situations—the original licensing of the construction and operation of a power project, and the renewal licensing of a power project already in operation. The balance between the interests of tribal sovereignty and hydroelectric power production in each of these situations is different. Prior to the original licensing of a hydroelectric project there is no substantial financial investment by the

143. The FPC must obtain the approval of the Secretary of the Interior before it can license a power project on an Indian reservation. 16 U.S.C. § 797(e) (1970). The Secretary approved the license for the construction of the power plant on the Lac Courte Oreilles Reservation despite the strenuous objections of the tribe. Lac Court Oreilles Indian Reservation FPC Project No. 109 (mimeograph copy from Chippewa Flowage Investigations by Inland Lakes Demonstration Project, U. of Wis. & Wis. Dep't Nat. Resources).

144. See generally Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band's Struggle to Regain its Land and to Achieve Compensation for Past Abuses (Position Paper relative to the Chippewa Reservoir Federal Power Project No. 108).

145. See, e.g., notes 11-12 supra.
utility company, no reliance on electrical service by surrounding communities, and no unusual hardship involved in locating an alternative site. The policy of promoting economic self-determination and sovereignty over tribal lands would thus favor the requirement of tribal consent at the original licensing stage.

At the renewal licensing stage the factors of financial investment, community reliance, and relocation hardship may outweigh the need to protect tribal sovereignty. Nevertheless, the failure of the existing licensing procedure to respond to Indian interests suggests the need for a different allocation of responsibility for the renewal decision. This new framework should accommodate the presumption that an Indian tribe will exercise its sovereignty in a responsible and constructive manner. The procedure should provide that a tribal council's determination of the best use of its tribal land will be upheld during the renewal licensing of a power project, unless the FPC can prove on appeal that the withholding of tribal consent for a particular project is arbitrary and unreasonable or will result in irreparable injury to the public. Shifting the burden of proof to the FPC maximizes recognition of tribal sovereignty but retains the flexibility needed to protect against serious disruption in the development and utilization of national water resources.

V. REFORMATION OF THE LICENSING PROCEDURE
A. FOUNDATION FOR A TRIBAL CONSENT REQUIREMENT

Congressional legislation would be the most appropriate means of balancing the policies which are brought into focus when power projects are licensed on Indian lands. Until such legislation is forthcoming, it is the responsibility of the courts to effectuate a reasonable compromise of the competing interests through a clarification of the ambiguous statutory language. The courts could sustain a tribal consent requirement within the existing statutory framework under two distinct theories. The courts could interpret the FPA in pari materia with the IRA: general rules of construction and a specific reference to the IRA in the FPA\textsuperscript{146} may suggest that Congress intended tribal consent to be a condition for the licensing of power projects on tribal lands. Alternatively, the courts could view the purpose of an Indian reservation as that of providing an arena for the exercise of tribal sovereignty. From this perspective the leasing of res-

reservation land without the consent of the tribal government could be perceived as "inconsistent with the purpose for which such reservation was created" and thereby prohibited by section 4(e) of the FPA.

1. An In Pari Materia Approach

Section 15(a) of the FPA authorizes the Commission to issue a license only after satisfying the terms and conditions required by the "then existing law." The IRA is currently a part of the existing law. Therefore it can be argued that the FPC cannot issue a new license without the tribal consent required by the IRA. To escape this conclusion the Commission has argued that the grant of authority contained in the Federal Power Act of 1935 to issue licenses on Indian reservations impliedly repeals any provisions of the Indian Reorganization Act of 1934 that would seem to limit that authority. However, this argument ignores basic principles of statutory construction. Courts do not favor repeal by implication and will avoid finding an implied repeal if there is another reasonable construction. Moreover, the general rule of liberally construing ambiguous statutes in favor of the Indians militates against any implied repeal of an Indian tribe's IRA rights. Recognition of tribal consent as merely another condition on the exercise of the Commission's licensing authority would be a reasonable construction of the two statutes to avoid an implied repeal.

Harmonization of the two statutes, however, is complicated by a specific reference to the IRA in section 10(e) of the FPA. That section, entitled "Annual charges payable by licensees," provides in part:

148. Id. § 808a.
149. The legislative history of the 1935 Federal Power Act does not illuminate the intention of Congress concerning the interaction of the Act with the 1934 Indian Reorganization Act. Senator Wheeler, a co-sponsor of both the IRA and the FPA, stated:

Mr. President, I do not think I shall go into a discussion of title II of the bill [FPA]. In the committee there was very little if any discussion with reference to it . . . . All the way through title II it is specifically provided that the FPC shall have the power to do this or do that with respect to the matters over which the Commission or Congress has jurisdiction at the present time.

79 CONG. REC. 9444 (1935).
When licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in Section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter.\textsuperscript{153}

The appearance of this reference to the IRA in the "annual charges" section of the FPA could be interpreted as limiting the tribe's role to participation only in the determination of rent. It could thus be inferred that the tribes are excluded from the actual licensing decision. But the reference is not restrictive in tone. This suggests that the intent of Congress was not to limit tribal powers but to extend to a tribe a new right to participate in the readjustment of rent, in harmony with the purpose of the IRA to give Indians control of their own resources.\textsuperscript{154}

The only case\textsuperscript{155} to interpret section 10(e) in reference to the issue of tribal consent for federally licensed power projects is FPC v. Montana Power Co.\textsuperscript{156} In that case the court of ap-

\textsuperscript{153} Id. (emphasis added).

\textsuperscript{154} Arguably section 10(e) could be construed to give a tribe the option of refusing to approve any annual charge fixed by the Commission, thereby empowering the tribe to effectively block the licensing of a project. \textit{But see} text accompanying note 160 \textit{infra}.

\textsuperscript{155} Case law touching on the specific issue of tribal consent for power projects on Indian reservations is sparse. The Supreme Court first encountered the subject in 1955 when the State of Oregon asserted that its jurisdiction over public lands, granted to it by a prior federal statute, precluded issuance of an FPC license without the state's consent. FPC v. Oregon, 349 U.S. 435 (1955). The Supreme Court avoided a direct confrontation between the two federal laws by finding that the land was reservation land, as distinguished from public land, and thus not included under the statute upon which the state premised its claim. In explaining its decision, the Court observed that "[t]he Indians [had] given their consent to the project." Id. at 444. The Court was not required to clarify whether that consent would have been an essential condition to the issuance of the license.

The only other Supreme Court decision on the jurisdictional relationship between the FPC and an Indian tribe is FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960). Although the Tuscarora case involved an Indian challenge to the authority of the FPC to license power projects on Indian lands, the power project licensed was not on reservation lands. Therefore the Court again was not required to determine the influence of the IRA on an Indian tribe's control over the licensing of power projects on reservation land. \textit{See} text accompanying notes 113-18 \textit{supra}.

\textsuperscript{156} 445 F.2d 739 (D.C. Cir. 1970), cert. denied, 400 U.S. 1013 (1971).
peals addressed the question whether rental readjustments for a particular power project would be determined by the Commission pursuant to section 10(e) or by arbitration, as provided in the original license for the project. The court held that the procedure outlined in the 1935 power act controlled.\textsuperscript{157} The power company had asserted that the court did not have jurisdiction to review the readjustment since section 10(e) vests the Secretary of the Interior with the power to disapprove determinations of annual charges by either the Commission or the court. The court rejected this argument because the Secretary had in fact accepted the Commission's readjustment and had disclaimed any power to overrule the decision of the court. The court then stated:

The Secretary's approval under the 1928 law, like the approval of the Secretary and of the Indian Tribes referred to in Section 10(e) of the Act, is manifested initially by the concurrence with the licensee which must exist in order for the application for the original license (either as filed, or as modified to take account of objections found in the original filing) to be approved by the Commission. It is manifested as to readjustment of rentals by the filing with the Commission, or acquiescing in presentation to the Commission, of an application requesting readjustment. The readjustment decision is made by the independent regulatory agency assigned this function by Congress, subject to review by the court of appeals. After approval of the presentation of the application for readjustment the only further recourse of the Secretary or the Tribes is the right of appeal provided by law for the correction of errors made by the commission.\textsuperscript{158}

The Montana Power court outlined two separate and distinct situations in which the approval of the Indian tribe and the Secretary of the Interior would be relevant. The first situation is the initial licensing; the court stated that concurrence among the Indian tribe, the Secretary, and the licensee "must exist in order for the application for the original license . . . to be approved by the Commission."\textsuperscript{159} The second situation is the periodic readjustment of rent; the court made it clear that the Indian tribe or the Secretary might request a rental readjustment, but

\textsuperscript{157} Id. at 749.
\textsuperscript{158} Id. at 756. The 1928 law that the court referred to was the Interior Department Appropriation Bill, ch. 137, 45 Stat. 212-13, which contained a proviso "[t]hat the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a . . . license . . . for the use, for the development of power, of power sites on the Flathead Reservation . . . ." The legislative history of the Act does not explain why specific enabling legislation was passed for this project when it would appear that the 1920 Act was sufficient.
\textsuperscript{159} 445 F.2d at 756.
that the primary responsibility for the decision lies with the FPC, subject only to judicial review.\textsuperscript{160}

Limiting the Indian tribe and the Secretary of the Interior to the remedy of judicial review comports with a practical understanding of licensing. Federally licensed power projects typically involve investments by the licensee of several million dollars. Twenty years after the license is issued and every ten years thereafter the rent is periodically adjusted to properly reflect the appreciated value of the lease.\textsuperscript{161} If the \textit{Montana Power} court had accepted the power company's assertion that the Secretary of the Interior, and presumably the Indian tribe, had unreviewable discretion in determining the rental readjustment, then it would have in effect allowed the Secretary or the Indian tribe the option of demanding unreasonable increases in rent at the readjustment intervals. The licensee would be forced to either meet an exorbitant rent demand or abandon the entire project. The \textit{Montana Power} court effectively avoided such a result by recognizing that responsibility for the rental readjustment decision is in the FPC, subject to review by the courts.

What is not clear is whether this same decision and review procedure is applicable to the initial determination of the rental charge. At the original licensing stage the applicant does not have a substantial financial investment at stake. Thus there is not the same compelling reason for the FPC to exercise exclusive responsibility for the decision. In fact, at this initial negotiation stage there is no apparent substantive difference between a power company's request for a power project license and an effort by any other private party to lease Indian tribal lands.\textsuperscript{162} Therefore, even though section 10(e) speaks of a "like approval" at the two stages, the \textit{Montana Power} court's carefully drawn

\textsuperscript{160} This point was again stressed in Montana Power Co. v. FPC, 459 F.2d 863, 874 (1972), when the court elaborated upon the roles of the Indian tribe and the Secretary of the Interior in the rental readjustment procedure:

The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.


\textsuperscript{162} See text accompanying notes 107-09 \textit{supra},
distinction between the approval manifested during the original licensing and the approval manifested during rental readjustment supports the conclusion that section 10(e) does not eliminate tribal consent as a requirement for leases of Indian reservation lands.

2. A Reservation Purpose Approach

Before a license may be issued for the use of reservation land the Commission is required by statute to find "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired . . . ."163 Traditionally the FPC has analyzed the question of interference or inconsistency with the purpose of an Indian reservation in strictly utilitarian terms.164 For example, the purpose of an Indian reservation is to provide living space for the Indian tribe residing there; if the construction of a power project would inundate too much of the reservation acreage, then the granting of a power license would "interfere or be inconsistent with the purpose of the reservation."165

If the validity of the utilitarian analysis of reservation purpose is conceded, the only debatable issue is whether a power project inundates so much land as to interfere with the tribe's use of the reservation. This question of fact is decided by the FPC. In the case where the Commission's judgment as to what interferes with the purpose of the reservation differs substantially from the judgment of the Indian tribe, the only recourse the tribe has is judicial review of the Commission's finding. Since administrative determinations of fact are not overturned if supported by substantial evidence,166 it is unlikely that the Commission's finding of fact can be reversed on appeal. Consequently, under a utilitarian definition of reservation purpose an Indian tribe is entirely dependent on the Commission's opinion of what interferes with the reservation.

165. The acreage of reservation land that would be used by the power project is perhaps the single most influential factor. Id. See also Lazarus, Indian Rights Under the Federal Power Act, 20 Fed. B.J. 217, 219-20 (1960).
166. Mobil Oil Corp. v. FPC, 94 S. Ct. 2328 (1974). In Iowa v. FPC, 178 F.2d 421, 427 (8th Cir. 1949), the court stated that on judicial review the court may "not retry the controversy, [or] substitute its judgment for that of the [FPC] as to any doubtful or debatable question of fact."
On the other hand, if the utilitarian definition of purpose is not conceded, a quite different argument can be made. The purpose of an Indian reservation is to provide a confined but real arena for the exercise of tribal sovereignty; if the tribal government rejects a proposed power project on the reservation, then licensing of such a project would interfere and be inconsistent with the purpose of the reservation as an arena for tribal sovereignty.

The question of which definition of reservation purpose is the proper premise from which to make the required finding is ultimately a question of policy rather than law. The traditional utilitarian analysis of reservation purpose conveys the notion of the Indian as an incompetent ward—the idea that the Indian tribes are incapable of deciding for themselves how best to utilize and manage the resources of their reservations. Under the utilitarian approach the FPC decides how to develop those water resources and it fulfills its federal trust obligation so long as it gives some consideration to the physical and economic needs of the Indians.

In contrast, the tribal sovereignty conception of reservations assumes a more significant federal trust responsibility. It assumes that the purpose of the trust relationship is to preserve and promote the Indian tribe's status as a distinct, self-governing society. If, as the Supreme Court has indicated, the doctrine

167. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall suggested that the purpose of the federal-Indian trust relationship, and thus the purpose of the Indian reservations, was to preserve the status of the Indian tribe as a distinct, self-governing society.

The sovereignty and economic functions of an Indian reservation are not, of course, mutually exclusive. In commenting on the function of an Indian reservation, Justice Douglas has said:

[C]ongress has attempted to give this tribe an economic base which offers job opportunities, a higher standard of living, community stability, preservation of Indian culture, and the orientation of the tribe to commercial maturity.


It is my conclusion that we cannot, as a matter of law make the essential finding required by 4(e). By treaty and by statute, the Lac Courte Oreille Band has been given sovereignty over tribal lands; this was, and continues to be, the "purpose for which such reservation was created." With the Band's unequivocal rejection of use of tribal lands by Northern States or any Commission licensee for power purposes, we have no lawful basis for the issuance of a license.

169. See text accompanying notes 163-65 supra.
of Indian sovereignty is the proper "backdrop" for interpreting particular treaties and statutes affecting Indian interests, then the tribal sovereignty definition of reservation purpose emerges as the appropriate premise from which to determine whether a power project interferes or is inconsistent with the purpose of the reservation.

B. IMPLEMENTATION OF A TRIBAL CONSENT REQUIREMENT

Although a reservation purpose approach and an in pari materia approach both support a tribal consent requirement, the two approaches differ in scope. Since the reservation purpose analysis does not directly rely on the IRA, it would not incorporate the distinction between executive order reservations and treaty or statute reservations nor would it require a tribe to ratify a constitution. Instead it would recognize the sovereignty of all Indian tribes on all reservations and their corresponding power to prevent the licensing of power projects on their tribal lands. The rights of an Indian tribe under a reservation purpose analysis would be similar to Indian water rights and thus not dependent on reservation status. Moreover, under a reservation purpose analysis the principle of tribal sovereignty would be elevated to doctrinal status and conceptually merged into the Government's trust relationship with the Indians. In this respect, a reservation purpose approach would be consistent with recent congressional indications that the promotion of tribal sovereignty is a significant feature of the Government's trust responsibilities. Nevertheless, the definition of the Government's trust responsibilities is legislative in nature, and the potentially expansive implications of a reservation purpose analysis would not be congruent with the Supreme Court's traditionally conservative role in the area of Indian law.

Thus the realistic approach to a tribal consent requirement would be to interpret the licensing conditions of the FPA in pari materia with the tribal powers under the IRA. This approach would be more limited in scope since the consent requirement would not extend to tribes on executive order reservations or to tribes without ratified constitutions. The tribal sovereignty principle would operate as a "backdrop" for an in pari materia interpretation and would provide additional force to the presumptions against abrogation and implied repeal. Moreover, an

in pari materia analysis would be consistent with the Supreme Court's emphasis on "individualized treatment of particular treaties and specific federal statutes."

A strict holding that tribal consent is required when power projects are licensed on tribal lands does not provide the flexibility needed for those occasions when the withholding of tribal consent might be arbitrary or improvident. Judicial review of the tribe's decision would best respond to this need. Section 4(e) of the FPA states that each license "shall be subject to and contain such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservations." If the Secretary of the Interior were to subject a license involving reservation lands to the condition that tribal consent must be obtained prior to licensing, the courts could indirectly review a tribe's decision. If the FPC should appeal the withholding of consent for a project it would have the burden of proving that the Secretary's adherence to the tribe's decision was an abuse of administrative discretion. Thus, an Indian tribe would be able to negotiate with a power company from a position of strength, knowing that its decision to reject a proposal would be upheld unless it were clearly arbitrary or would result in irreparable injury to the public. Although the Department of the Interior has not been an effective protector of Indian interests, it is beginning to demonstrate a renewed sensitivity to the protection of Indian land and water rights. If the Department adheres to its stated policy of increasing "involvement and self determination in the management by the Indians of their resources," the contribution of its expertise and influence to the licensing procedure could promote the type of mutually beneficial contract between an Indian tribe and a power company that has characterized leases of Indian lands for nonpower purposes.

173. The Secretary implemented a tribal consent requirement during the recent licensing of the Montezuma Power Project in the Gila River Indian Reservation in Arizona. See Hearings, supra note 9, at 1692.