11

An Unfit Guardian

Ongoing Federal Paternalism

Even after adopting a policy of tribal self-determination, the United States continues its paternalistic treatment of tribes. The Moapa Band of Paiute Indians discovered this firsthand in 1984. The Moapa Band is located in Clark County, Nevada, home of Las Vegas. Proximity to the Vegas Strip means few people are going to drive to the Moapa Band of Paiute Reservation to gamble. Thus, the Moapa Band had to look for nongaming revenue sources. It selected prostitution.

Prostitution is legal in Nevada but illegal in Clark County because Nevada law prohibits brothels in counties with populations greater than 250,000 people. The Moapa Band saw this as an opportunity for economic development and passed an ordinance legalizing brothels on the Moapa Reservation. But like many Indian Reorganization Act tribes, the Moapa Band's Constitution required federal approval of tribal ordinances.[1]

The Secretary of the Interior had the authority to deny tribal ordinances for "any cause" and exercised this authority to block the Moapa ordinance. The Secretary noted the Moapa Reservation's location within Clark County meant prostitution violated state law. In the spirit of unabashed paternalism, the area's BIA director admitted tribal economic development was an important federal policy goal but determined brothels were "not the kind of economic development envisioned by federal policy."[2] The Secretary of the Interior also did not believe the Moapa Band would derive significant revenue from the bordello. Furthermore,

[1] Moapa Band of Paiute Indians v. United States Dep't of Interior, 747 F.2d 563, 564 (9th Cir. 1984).
[2] *Id.*

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the Secretary believed the brothel would attract substantial media attention and precipitate a "political reaction detrimental to the sovereignty, not only of the Moapa Band, but all of Indian tribes."[3]

The Moapa Band challenged the Secretary's decision as an abuse of discretion. A federal magistrate and the federal district court affirmed the Secretary's decision based on Nevada law – but disregarded the Secretary's public policy concerns. On appeal, the Ninth Circuit noted it could "uphold the Secretary's ruling if any reason given for it is valid."[4] The Ninth Circuit believed the Secretary had legitimate reasons to invalidate the tribal ordinance although the court admitted that "the activity is legal in Nevada and apparently is a profitable economic enterprise for non-Indians. The Secretary's decision denies Moapa an economic opportunity which the Moapa Business Council has determined will benefit the tribe, and which is available to non-Indians nearby albeit not in Clark County."[5] In a footnote, the court conceded the Secretary's denial of the ordinance was largely driven by an impulse to protect the Moapa.[6] Hence, the reasons provided by the Secretary were little more than patina used to validate federal paternalism.

Federal paternalism remains alive in federal Indian policy. Regardless of the federal government's intentions, the ongoing paternalism undermines tribes' ability to act as governments and determine their own destiny. After all, Nevada counties do not need federal permission to establish a brothel. Nevertheless, tribes – who have much longer histories of self-governing than any state – need federal approval before they can determine what activities are permissible on *their* land. Making federal paternalism all the worse, the federal government has proven itself to be an exceedingly unfit guardian.

11.1 THE FEDERAL GOVERNMENT AND *PEABODY COAL* V. *NAVAJO NATION*

The Navajo Nation has a larger landmass than West Virginia and contains significant natural resources endowments. Notwithstanding, many on the Navajo Nation live in abject poverty. Navajo homes frequently lack access to running water, electricity, and the internet. Plus, houses are often significantly overcrowded due to federal land controls. These factors

[3] *Id.* at 567 n.3.
[4] *Id.* at 565.
[5] *Id.* at 566.
[6] *Id.* at 567 n.3.

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made the Navajo Nation, as well as numerous other tribes, particularly susceptible to COVID-19.

Over the years, the federal government has enabled oil, uranium, and coal companies to exploit the Navajo Nation's resources. To be sure, some Navajos benefited from employment created by reservation resource extraction. Nonetheless, Peabody Coal Company's relationship with the Navajo Nation shows how the federal government's mismanagement of tribal resources rises from ineptitude to outright corruption.

In 1964, Sentry Royalty Company entered a twenty-year lease for coal on the Navajo Nation at a rate of 37.5 cents per ton – "not enough to buy a can of Coke," as former Navajo Nation Chairman Peter MacDonald put it. The Secretary of the Interior approved the lease although the United States Court of Appeals for the Federal Circuit later noted, "It is not disputed that this was well below then-prevailing royalty rates."[7] Peabody Coal Company eventually succeeded Sentry as the leaseholder. By 1983, Peabody Coal had generated more than $140 million from the lease while the Navajo Nation itself received only $2.7 million in royalties.[8]

The Navajo Nation sought to increase the lease rate, but Peabody was unwilling to agree to an increase. Therefore, the Navajo Nation invoked a federal law permitting the BIA to establish the lease at the fair market rate.[9] Based upon what private owners were receiving for coal leases, the BIA Division of Energy and Mineral Resources recommended the Navajo Nation royalty rate be set at no less than 25 percent. Nevertheless, the BIA only sought to increase the lease rate to 20 percent.[10] The BIA never informed the Navajo Nation of the pending increase.

When Peabody received notice of the pending increase from the Navajo area BIA director, Peabody immediately appealed the decision. Peabody hired sitting Secretary of the Interior Donald Hodel's close friend, Stanley Hulett, to engage in private communications with Hodel. Hulett's purpose was to prevent Hodel and Deputy Assistant Interior Secretary John Fritz from increasing the royalty rate.[11] Then Interior Solicitor Frank K. Richardson advised Hodel that his private communications

[7] Navajo Nation v. United States, 263 F.3d 1325, 1327 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

[8] Marley Shebala, *Lawsuits Shed Light on Peabody's Clout, Part 2*, Navajo Times (Aug. 26, 2011), https://navajotimes.com/news/2011/0811/082911peabody2.php [https://perma.cc/6PAY-V88K].

[9] *Navajo Nation*, 263 F.3d at 1327.

[10] Shebala, *supra* note 8.

[11] *Id.*

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with Hulett would constitute improper ex parte contact.[12] Fritz independently reached the same conclusion.[13] Notwithstanding, Fritz and Hodel both engaged in private communications with Hulett.[14]

Exactly what happened during the ex parte meetings is unknown; however, following the private interactions with Hulett, Hodel suppressed the BIA's decision recommending the royalty rate increase.[15] Hodel also proceeded to personally oversee negotiations between the Navajo Nation and Peabody – a break from standard Department of the Interior protocol. Hodel told Peabody and the Navajo Nation that a failure to reach an agreement would likely lead to time-consuming and expensive appeals.[16] As a result, negotiations amounted to the Secretary of the Interior and Peabody Coal teaming up against the Navajo Nation. Then Navajo Chairman Peterson Zah advocated for the 25 percent rate that private coal owners were getting.[17] Zah never learned how close the Navajo Nation was to getting 20 percent. With the deck stacked against him, Zah ended up falling far short of his goal. Instead of the 20% the BIA had recently determined was a reasonable rate, the Navajo were forced to accept 12.5% as well as several other terms favorable to Peabody, including waiving claims to $88 million dollars in back taxes and royalties from Peabody.[18]

During the lease review ten years later, the Navajo Nation obtained federal documents disclosing Hodel's illicit communications. The Navajo Nation filed suit in 1999 and lost at the federal district court despite the court admitting, "[T]he United States violated the most fundamental fiduciary duties of care, loyalty and candor."[19] The United States Court of Appeals for the Federal Circuit reversed the lower court and held that the federal government violated its trust duty because the Indian Mineral Leasing Act and its accompanying regulations grant "pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect

[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] United States v. Navajo Nation, 537 US 488, 497 (2003).
[17] Bill Donovan, *U.S. Supreme Court Kills Bid to Hold Interior Accountable for Coal Royalty Deceit*, Navajo Times (Apr. 9, 2009), www.navajotimes.com/news/2009/0409/040909coal.php [https://perma.cc/44A2-98UL].
[18] *Navajo Nation*, 537 U.S. at 498 n.6.
[19] Navajo Nation v. United States, 46 Fed. Cl. 217, 227 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

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the interests of the Indian tribes."[20] Contrarily, the Supreme Court resolved the matter in 2003 by stating, "However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act."[21] In other words, no statute explicitly forbade the Secretary of the Interior from intervening on behalf of Peabody and undermining the Navajo Nation's bargaining position, so the Secretary did not breach the United States' trust obligation to the Navajo Nation.

Justice Souter wrote a dissent, joined by Justices O'Connor and Stevens. He explained:

> What is more, the Tribe has made a powerful showing that the Secretary knew perfectly well how his own intervention on behalf of Peabody had derailed the lease adjustment proceeding that would in all probability have yielded the 20 percent rate. After his *ex parte* meeting with Peabody's representatives, the Secretary put his name on the memorandum, drafted by Peabody, directing Deputy Assistant Secretary Fritz to withhold his decision affirming the 20 percent rate; directing him to mislead the Tribe by telling it that no decision on the merits of the adjustment was imminent, when in fact the affirmance had been prepared for Fritz's signature; and directing him to encourage the Tribe to shift its attention from the Area Director's appealed award of 20 percent and return to the negotiating table, where 20 percent was never even a possibility. The purpose and predictable effect of these actions was to induce the Tribe to take a deep discount in the royalty rate in the face of what the Tribe feared would otherwise be prolonged revenue loss and uncertainty. The point of this evidence is not that the Secretary violated some rule of procedure for administrative appeals, or some statutory duty regarding royalty adjustments under the terms of the earlier lease. What these facts support is the Tribe's claim that the Secretary defaulted on his fiduciary responsibility to withhold approval of an inadequate lease accepted by the Tribe while *under a disadvantage the Secretary himself had intentionally imposed*.[22]

The Navajo Nation attempted to relitigate the case but was ultimately denied again by the Supreme Court in 2009. The Navajo Nation lost more than $600 million due to the Secretary of the Interior's unscrupulous interaction with the Peabody Coal Company – money the Navajo Nation could have used to better life on the reservation. Indeed, allowing the United States to avoid financial liability appears to have factored into

[20] Navajo Nation v. United States, 263 F.3d 1325, 1331 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).
[21] United States v. Navajo Nation, 537 U.S. 488, 514 (2003).
[22] *Id.* at 520 (Souter, J., dissenting) (internal citations omitted) (emphasis added).

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the Court's decision as the Solicitor General argued a Navajo Nation victory would result in other suits for duplicitous federal behavior.[23]

11.2 THE LARGEST CLASS ACTION IN UNITED STATES' HISTORY

A few years before the Navajo suit commenced in federal court, Elouise Cobell filed a class action lawsuit against the United States alleging it had breached its trust relationship with Indian allotment holders. Cobell was a citizen of the Blackfeet Nation and heir to an allotment interest. Growing up, she frequently heard tales of missing money from the family allotment.[24] Cobell was far from the only Indian with stories of lost or suspiciously managed money by the United States. At eighteen years old, Cobell started asking the BIA to explain where the money from her allotment was going. The BIA told her she was not "capable" of comprehending accounting.[25] Cobell proceeded to become an accountant and a banker; she even founded the Native American Bank, the first ever Indian-owned bank.[26] While serving as treasurer for the Blackfeet Nation, she questioned the BIA about its trust account management but was again dismissively told she did not know how to read the financial statements. Undeterred, she contacted other tribal financial officers. The group banded together and succeeded in having Congress enact the Indian Trust Reform Act of 1994.[27]

Coincidentally, Cobell encountered Attorney General Janet Reno at a conference after the Indian Trust Reform Act passed, and the two discussed the federal government's failure to properly account for Indian trust money. Reno told Cobell to request a meeting. After months of trying, Cobell finally scheduled a meeting. Representatives from many federal agencies were present, but Reno was absent.[28] Cobell stated her extensive research revealed the United States was stealing Indian trust money by placing it in the Treasury's general fund to be used for the

[23] Shebala, *supra* note 8.

[24] Melinda Janko, *Elouise Cobell: A Small Measure of Justice*, Nat'l Museum of the Am. Indian Mag., Summer 2013, www.americanindianmagazine.org/story/elouise-cobell-small-measure-justice [https://perma.cc/E4NG-Q4K5].

[25] Julia Whitty, *Elouise Cobell's Accounting Coup*, Mother Jones, Sept./Oct. 2005, www.motherjones.com/politics/2005/09/accounting-coup-o/ [https://perma.cc/9Y5E-TEYP].

[26] Emma Rothberg, *Elouise Cobell ["Yellow Bird Woman"]*, Nat'l Women's Hist. Museum, www.womenshistory.org/education-resources/biographies/elouise-cobell-yellow-bird-woman [https://perma.cc/C6S9-A9XW].

[27] Janko, *supra* note 24.

[28] *Id.*

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United States' latest pet projects. Cobell also claimed much of the money owed to individual Indians disappeared into the pockets of BIA employees.[29] For years, the United States had dared the Indians who questioned its management of their money to sue it. Fed up, Cobell decided to call the bluff and filed suit in 1996.[30]

The suit was one of the largest class actions in United States' history. The class comprised more than 300,000 Indian plaintiffs, though it is possible that more than 500,000 Indians were wronged. According to Cobell's accountants, the United States failed to pay Indian beneficiaries $176 billion for agricultural and mineral leases over the past century. The Clinton and W. Bush administrations responded by mustering the full force of the federal government to prevent resolution of the case in favor of Cobell. Both administrations spent hundreds of millions of dollars and intentionally caused bureaucratic delays.[31] In fact, federal employees intentionally destroyed relevant documents during the course of litigation and engaged in other improprieties.[32]

The presiding judge in the case was Royce Lamberth. Judge Lamberth, appointed to the federal judiciary by President Ronald Reagan, was not amused by the federal government's antics. In Judge Lamberth's opinion, the United States' management of Indian assets was "a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy – the end of which is nowhere in sight."[33] Judge Lamberth asked, "If Interior is willing to deceive this Court, why would anyone think that Interior would hesitate to lie to the Indians?"[34] Due to the federal government's unscrupulous behavior during the course of litigation, Judge Lamberth held two cabinet-level federal officials in contempt of a court – a first in the history of the United States.[35] The United States, nonetheless, persisted with dubious tactics, such as withholding royalty payments from Indians then telling the angry royalty holders to contact Cobell with complaints. Cobell personally responded to every call she received.[36]

[29] Whitty, *supra* note 25.
[30] Janko, *supra* note 24.
[31] Whitty, *supra* note 25.
[32] *Id.*
[33] Cobell v. Kempthorne, 455 F.3d 317, 327 (D.C. Cir. 2006).
[34] *Id.* at 328.
[35] Mathew L.M. Fletcher, Federal Indian Law 204 (2016).
[36] Whitty, *supra* note 25.

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Outraged by the Department of Interior's continued improprieties, Judge Lamberth authored an opinion of rare candor in 2005:

> But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal ….
>
> … But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our "modern" Interior department has time and again demonstrated that it is a dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.[37]

Prior to penning this passage, Judge Lamberth had consistently ruled in favor of the *Cobell*-plaintiffs. Hence, the United States had repeatedly attempted to have Judge Lamberth removed from the case.[38] The United States Court of Appeals for the District of Columbia finally removed Judge Lamberth after his 2005 opinion. The Court of Appeals determined Judge Lamberth was justified in describing the Department of Interior's handling of Indian assets as "ignominious" and "incompetent."[39] The Court of Appeals even concluded Judge Lamberth *may* have been justified in describing the Department of Interior as racist. However, the Court of Appeals believed allegations of racism were irrelevant because the case was about accounting.[40]

Judge Lamberth was replaced by Judge James Robertson. Judge Robertson was appointed by President Clinton and prior to taking the bench, was actively involved in civil rights and racial justice initiatives.[41]

[37] Cobell v. Norton, 229 F.R.D. 5 (D.D.C. 2005), *vacated*, Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006).

[38] Whitty, *supra* note 25.

[39] Cobell v. Kempthorne, 455 F.3d 317, 333 (D.C. Cir. 2006).

[40] *Id.*

[41] John Murph, *Judge James Robertson, Former D.C. Bar President, Passes Away*, DC BAR (Sept. 10, 2019), www.dcbar.org/news-events/news/judge-james-robertson,-former-d-c-bar-president,-p [https://perma.cc/UE72-DME]; Transcript, On the Occasion of the Portrait Presentation Ceremony for the Honorable James Robertson, at 19–20, 26–31 (Dec. 8, 2009), https://dcchs.org/wp-content/uploads/2019/08/james-robertson-portrait.pdf [https://perma.cc/J6Z7-K95Y].

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Soon after taking over the case, Judge Robertson held a ten-day bench trial in the name of bringing the case to a close.[42] Judge Robertson's appointment changed the dynamics of the case. While he recognized the federal government's failures, Judge Robertson wrote, "[T]he time has come to bring this suit to a close."[43] Thus, the *Cobell*-plaintiffs moved to settle. President Obama signed the *Cobell* settlement in December of 2010.

Rather than the more than $100 billion sought by the class, the settlement was $3.4 billion. Only $1.5 billion went to individual Indians – meaning individual Indians who had their assets mismanaged for more than a century received $500 each.[44] Sardonically, the remaining $1.9 billion went to the Department of Interior – the very agency that misappropriated from Indians for a century – to improve its land management capacity.[45]

To be sure, the deck was stacked against the *Cobell*-plaintiffs. The class was facing the world's largest law office – the United States Department of Justice[46] – and its virtually unlimited resources. Exacerbating the disadvantage, the *Cobell* class was litigating against the United States in the federal court system, which the Supreme Court itself has described as the "courts of the conqueror."[47] Indians have a losing record in federal court. Given this reality, the settlement may be the best Indians could have hoped for. Still, $500 per Indian after a century of robbery was an unsatisfactory settlement for many claimants.[48]

11.3 THE SUPREME COURT SHIELDS THE FEDERAL GOVERNMENT AGAIN

Although the federal government has been undeniably deplorable at managing Indian assets, in 2011 the Supreme Court ruled the United States does not have the standard disclosure duties of an ordinary trustee. The Jicarilla Apache Nation filed a breach of trust suit against the United

[42] Fletcher, *supra* note 35, at 207.
[43] Cobell v. Kempthorne, 532 F. Supp. 2d 37, 103 (D.D.C. 2008).
[44] *Id.* at 207–08.
[45] *Consultations on Cobell Trust Land Consolidation*, U.S. Dep't of the Interior, www.doi.gov/cobell [https://perma.cc/23Y3-5TVH].
[46] *Office of Attorney Recruitment & Management*, U.S. Dep't of Just., www.justice.gov/oarm#:~:text=The%20Department%20of%20Justice%20is,more%20than%2010%2C000%20attorneys%20nationwide [https://perma.cc/ZC7R-SCHC].
[47] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).
[48] Richard A. Monette, *Unconscionable Cobell*, Hill (Aug. 5, 2010, 2:47 PM ET), https://thehill.com/blogs/congress-blog/judicial/168277-unconscionable-cobell/ [https://perma.cc/KL8F-A5DW].

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States for mismanagement of the tribe's trust assets. To effectively pursue the action, the tribe sought disclosure of several documents relevant to the case. The United States eventually agreed to turn over some of the documents; however, the United States continued to claim 155 documents were privileged from discovery. The federal district court and the federal appellate court ruled in favor of the tribe, analogizing the trust relationship between tribes and the United States to that of a standard trust. However, the Supreme Court disagreed and held the United States' trust relationship was sufficiently different from ordinary trust relationships to avoid common law disclosure duties. Justice Alito, writing for the majority, bluntly summarized the trust relationship between tribes and the United States, explaining, "[T]he Government has often structured the trust relationship to pursue its own policy goals."[49]

Justice Sotomayor was alone in her dissent. She noted the trust relationship's long history, the intricate web of federal statutes detailing the United States' trust obligations to tribes, and the United States' exercise of "elaborate control over [trust assets] belonging to Indians."[50] Justice Sotomayor believed this meant – on top of the Court's historic reliance on common law trust principles – the United States should be bound by standard common law duties of disclosure to beneficiaries. Furthermore, Justice Sotomayor asserted that the United States' undisputed ineptitude at managing Indian trust assets screamed for higher disclosure duties than ordinary trustees are bound to. Justice Sotomayor declared, "[H]ad this type of mismanagement taken place in other trust arrangements such as Social Security, there would be war."[51] Justice Sotomayor explicitly stated the Supreme Court's decision had severe adverse effects on the Jicarilla Apache Nation's chances of success in litigation and harmed tribes in more than ninety other pending cases.

11.4 DOUBLE STANDARD FOR TRIBAL GOVERNMENTS

The United States' treatment of tribes as lesser governments continues beyond the trust relationship. For example, the purpose of the National Labor Relations Act (NLRA)[52] is to preserve workers' right to union-

[49] United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011).
[50] *Id.* at 194 (Sotomayor, J., dissenting).
[51] *Id.* at 208.
[52] An Act of July 5, 1935, Pub. L. No. 74–198, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2024)).

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ize and engage in collective bargaining. The NLRA covers most private sector employees;[53] however, the NLRA specifically excludes the federal, state, and municipal governments from the Act's coverage.[54] Even labor organizations are exempt from the NLRA. Though not specifically mentioned in the NLRA's text, Indian tribes are governments. Following this logic, the National Labor Relations Board (NLRB) determined Indian tribes and their wholly owned enterprises were exempt from the NLRA in 1976.[55]

Although the federal government's policy of tribal self-determination has not changed since the NLRB took this position, the NLRB decided tribes had changed in 2004. That year, the NLRB decided tribes were subject to the NLRA because, "As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses."[56] Thus, the economic development brought on by tribal self-determination, most notably Indian gaming, meant Indian tribes were now *too successful* in business although the NLRA still excluded governments from its coverage.

As a result, tribes are the only governments in the United States subject to the NRLA. While it is true that the NLRA's application is specifically limited to tribal commercial enterprises – like casinos – it is equally true that the NLRA does not apply to state and local government-owned commercial enterprises such as lotteries, liquor stores, hotels, and banks.[57] Furthermore, the NLRB's ruling ignores the reality that virtually all tribal government revenue is derived from tribal commercial enterprises due to other federal policies that hinder tribal private sector development. Tribes have pursued federal legislation that would amend the NLRA to ensure tribes are treated the same as every other United States government but to no avail. States and municipalities prefer tribes to be at a competitive disadvantage, and unions want to organize on tribal lands.

[53] *Frequently Asked Questions*, Nat'l Labor Relations Bd., www.nlrb.gov/resources/faq/nlrb#:~:text=To%20start%20the%20election%20process,at%20least%2030%25%20of%20employees [https://perma.cc/UX28-9AY2].

[54] 29 U.S.C. § 152(2) (2024).

[55] Cong. Research Serv., R44270, The NLRB's Enforcement of the NLRA Against Tribal Employers and the Tribal Labor Sovereignty Act of 2015, H.R. 511 and S. 248, at 1 (2015).

[56] San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1056 (2004).

[57] *Editorial: Support Tribal sovereignty and Pass the Tribal Labor Sovereignty Act*, Nat'l Cong. of Am. Indians (Apr. 16, 2018), www.ncai.org/news/articles/2018/04/16/editorial-support-tribal-sovereignty-and-pass-the-tribal-labor-sovereignty-act [https://perma.cc/K8E9-SHTL].

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Tribes have less clout in Congress than those constituencies. Accordingly, tribes are treated as lesser sovereigns.

Tribes face a similar issue when it comes to issuing tax-exempt bonds. Tribes have always been governments, and in 1982, Congress enacted the Indian Tribal Governmental Tax Status Act.[58] The Act solidified tribes' treatment as states for federal tax purposes, including issuing tax-exempt bonds.[59] However, tribes face a major hurdle when seeking to issue tax-exempt bonds: the bond financing must further an "essential governmental function."[60] These three words have enabled the Internal Revenue Service (IRS) to prevent tribes from using bonds to finance golf courses and countless other economic development projects.[61] Notably, when blocking the Las Vegas Paiute Tribe from using tax-exempt bonds to finance a golf course on its reservation in 2002, the IRS admitted, "[I]t is likely that construction and operation of golf courses are customary governmental functions."[62]

The IRS put it mildly. The Government Accountability Office (GAO) conducted a study in 2006 to examine how state and local governments use tax-exempt bonds.[63] The GAO performed this research due to the difficulties tribal governments faced when complying with the essential governmental function requirement. According to the GAO, "[a]t least 120 golf courses in twenty-nine states have been identified as financed, at least in part, with tax-exempt bonds."[64] The GAO discovered thirty-nine hotels that had been financed with tax-exempt bonds. The GAO even identified state and local governments' use of tax-exempt bonds to finance gaming – including to support privately owned casinos. Tribes are still treated as lesser governments when it comes to finance. Without access to the same financial tools as other United States governments, tribes face unparalleled difficulties funding basic government services.

In addition to tax and financing issues, tribes receive less in federal funds than other United States governments. Tribes sold their land in treaties in exchange for the United States' pledge to provide numerous

[58] Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97–473, Title II, 96 Stat. 2607 (codified as amended in scattered sections of 26 U.S.C. (2024)).

[59] *Id.* § 202; *TEB Phase II – Lesson 12: Tribal Bonds*, IRS, www.irs.gov/pub/irs-tege/teb2_lesson12.pdf [https://perma.cc/5FR4-KADQ].

[60] 26 U.S.C. §§ 7871(b) & (c)(1) (2024).

[61] Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C.L. Rev. 1009, 1050 (2007).

[62] *Id.*

[63] U.S. Gov't Accountability Off., GAO-06-1082, Federal Tax Policy: Information on Selected Capital Facilities Related to the Essential Governmental Function Test (2006).

[64] *Id.* at 5.

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goods and services. Nonetheless, the United States persistently fails to honor its treaty-funding obligations to tribes. For example, tribes received $0.75 cents per every $100 needed from the Drinking Water State Revolving Fund in 2012. Louisiana was funded at the lowest level of any state, yet it collected triple the amount of money Indian country received.[65] The United States has consistently spent more money providing foreign countries with safe drinking water than it spends providing the original Americans with access to safe drinking water.[66] Lack of funding for safe water exacerbated tribes' susceptibility to COVID-19.

Insufficient federal spending on Indian healthcare also made Indians particularly vulnerable to COVID-19. Although treaties explicitly secured tribes' right to healthcare, the United States has long underfunded Indian healthcare. In 2017, Indian Health Services expenditures were $3,332 per person versus $9,207 federal healthcare dollars per person in the country.[67] The United States even spends twice as much money on healthcare per prisoner than it does per Indian.[68] The litany of funding disparities goes on and on. A 2018 report by the United States Commission on Civil Rights made the following recommendation in response to the federal government's ongoing failure to fund tribal governments: "The United States expects all nations to live up to their treaty obligations; it should live up to its own."[69]

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Despite an avowed policy of tribal self-determination, the United States continues to exercise paternalism over tribes. But it is unclear what the United States is protecting tribes from. Indeed, the federal government's history of ineptitude and corruption suggests federal paternalism causes more problems for tribes than it cures. A symptom of paternalism is bureaucracy, and Indian country is rife with it.

[65] Democratic Staff of H. Comm. on Nat. Res., Water Delayed Is Water Denied: How Congress Has Blocked Access to Water for Native Families 2–3 (2016), https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf [https://perma.cc/S3U3-5L6N].

[66] Adam Crepelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 Tul. Envtl. L. J. 157, 174 (2019).

[67] U.S. Comm'n on Civil Rights, Broken Promises: Continuing Federal Funding Shortfall for Native Americans 67 (2018), www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/ZZ74-AR9Z].

[68] Mary Smith, *Native Americans: A Crisis in Health Equity*, Am. Bar Ass'n, www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/ [https://perma.cc/2LK9-EVQ3].

[69] Broken Promises, *supra* note 67, at 214.

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