### Case

#### Cognitive science says Try or Die is irrational/generally dumb

Sunstein 2 (Cass, Karl N. Llewellyn Distinguished Service Professor, University of Chicago, Law School and Department of Political Science, Probability Neglect: Emotions, Worst Cases, and Law, http://www.yalelawjournal.org/pdf/112-1/SunsteinFINAL.pdf)

If someone is predisposed to be worried, degrees of unlikeliness seem to provide no comfort, unless one can prove that harm is absolutely impossible, which itself is not possible.1 [A]ffect-rich outcomes yield pronounced overweighting of small probabilities . . . .2

On Sept. 11, Americans entered a new and frightening geography, where the continents of safety and danger seemed forever shifted. Is it safe to fly? Will terrorists wage germ warfare? Where is the line between reasonable precaution and panic? Jittery, uncertain and assuming the worst, many people have answered these questions by forswearing air travel, purchasing gas masks and radiation detectors, placing frantic calls to pediatricians demanding vaccinations against exotic diseases or rushing out to fill prescriptions for Cipro, an antibiotic most experts consider an unnecessary defense against anthrax.3

I. RISKS, NUMBERS, AND REGULATION Consider the following problems: • People live in a community near an abandoned hazardous waste site. The community appears to suffer from an unusually high number of deaths and illnesses. Many members of the community fear that the hazardous waste site is responsible for the problem. Administrative officials attempt to offer reassurance that the likelihood of adverse health effects, as a result of the site, is extremely low.4 The reassurance is met with skepticism and distrust. • An airplane, carrying people from New York to California, has recently crashed. Although the source of the problem is unknown, many people suspect terrorism. In the following weeks, many people who would otherwise fly are taking trains or staying home. Some of those same people acknowledge that the statistical risk is exceedingly small. Nonetheless, they refuse to fly, in part because they do not want to experience the anxiety that would come from flying.

• An administrative agency is deciding whether to require labels on genetically modified food. According to experts within the agency, genetically modified food, as such, poses insignificant risks to the environment and to human health. But many consumers disagree. Knowledge of genetic modification triggers strong emotions, and the labeling requirement is thought likely to have large effects on consumer choice, notwithstanding expert claims that the danger is trivial. How should we understand human behavior in cases of this sort? My principal answer, the thesis of this Essay, is that when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood.

That is, they are not closely attuned to the probability that harm will occur. At the individual level, this phenomenon, which I shall call “probability neglect,” produces serious difficulties of various sorts, including excessive worry and unjustified behavioral changes. When people neglect probability, they may also treat some risks as if they were nonexistent, even though the likelihood of harm, over a lifetime, is far from trivial. Probability neglect can produce significant problems for law and regulation. As we shall see, regulatory agencies, no less than individuals, may neglect the issue of probability, in a way that can lead to either indifference to real risks or costly expenditures for little or no gain. If agencies are falling victim to probability neglect, they might well be violating relevant law.5

Indeed, we shall see that the idea of probability neglect helps illuminate a number of judicial decisions, which seem implicitly attuned to that idea, and which reveal an implicit behavioral rationality in important pockets of federal administrative law. As we shall also see, an understanding of probability neglect helps show how government can heighten, or dampen, public concern about hazards. Public-spirited political actors, no less than self-interested ones, can exploit probability neglect so as to promote attention to problems that may or may not deserve public concern. It will be helpful to begin, however, with some general background on individual and social judgments about risks.

A. Cognition On the conventional view of rationality, probabilities matter a great deal to reactions to risks. But emotions, as such, are not assessed independently; they are not taken to play a distinctive role.6 Of course, people might be risk-averse or risk-inclined. For example, it is possible that people will be willing to pay $100 to eliminate a 1/1000 risk of losing $900. But analysts usually believe that variations in probability should matter, so that there would be a serious problem if people were willing to pay both $100 to eliminate a 1/1000 risk of losing $900 and $100 to eliminate a 1/100,000 risk of losing $900. Analysts do not generally ask, or care, whether risk-related dispositions are a product of emotions or something

else.

Of course, it is now generally agreed that in thinking about risks, people rely on certain heuristics and show identifiable biases.7 Those who emphasize heuristics and biases are often seen as attacking the conventional view of rationality.8 In a way they are doing just that, but the heuristicsand- biases literature has a highly cognitive focus, designed to establish how people proceed under conditions of uncertainty. The central question is this: When people do not know about the probability associated with some risk, how do they think? It is clear that when people lack statistical information, they rely on certain heuristics, or rules of thumb, which serve to simplify their inquiry.9 Of these rules of thumb, the “availability heuristic” is probably the most important for purposes of understanding risk-related law.10 Thus, for example, “a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable.”11 The point very much bears on private and public responses to risks, suggesting, for example, that people will be especially responsive to the dangers of AIDS, crime, earthquakes, and nuclear power plant accidents if examples of these risks are easy to recall.12

This is a point about how familiarity can affect the availability of instances. But salience is important as well. “The impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.”13 So, too, recent events will have a greater impact than earlier ones. The point helps explain much risk-related behavior. For example, whether people will buy insurance for natural disasters is greatly affected by recent experiences.14 If floods have not occurred in the immediate past, people who live on flood plains are far less likely to purchase insurance.15 In the aftermath of an earthquake, the proportion of people carrying earthquake insurance rises sharply—but it declines steadily from that point, as vivid memories recede.16 For purposes of law and regulation, the problem is that the availability heuristic can lead to serious errors of fact, in terms of both excessive controls on small risks that are cognitively available and insufficient controls on large risks that are not.17 The cognitive emphasis of the heuristics-and-biases literature can be found as well in prospect theory, a departure from expected utility theory that explains decision under risk.18 For present purposes, what is most important is that prospect theory offers an explanation for simultaneous gambling and insurance.19 When given the choice, most people will reject a certain gain of X in favor of a gamble with an expected value below X, if the gamble involves a small probability of riches. At the same time, most people prefer a certain loss of X to a gamble with an expected value less than X, if the gamble involves a small probability of catastrophe.20 If expected utility theory is taken as normative, then people depart from the normative theory of rationality in giving excessive weight to lowprobability outcomes when the stakes are high. Indeed, we might easily see prospect theory as emphasizing a form of probability neglect. But in making these descriptive claims, prospect theory does not specify a special role for emotions. This is not a puzzling oversight, if it counts as an oversight at all. For many purposes, what matters is what people choose, and it is unimportant to know whether their choices depend on cognition or emotion, whatever may be the difference between these two terms.

B. Emotion

No one doubts, however, that in many domains, people do not think much about variations in probability and that emotions have a large effect on judgment and decisionmaking.21 Would a group of randomly selected people pay more to reduce a 1/100,000 risk of getting a gruesome form of cancer than a similar group would pay to reduce a 1/200,000 risk of getting that form of cancer? Would the former group pay twice as much? With some low-probability events, anticipated and actual emotions, triggered by the best-case or worst-case outcome, help to determine choice. Those who buy lottery tickets, for example, often fantasize about the goods associated with a lucky outcome.22 With respect to risks of harm, many of our ordinary ways of speaking suggest strong emotions: panic, hysteria, terror. People might refuse to fly, for example, not because they are currently frightened, but because they anticipate their own anxiety, and they want to avoid it. It has been suggested that people often decide as they do because they anticipate their own regret.23 The same is true for fear. Knowing that they will be afraid, people may refuse to travel to Israel or South Africa, even if they would much enjoy seeing those nations and even if they believe, on reflection, that their fear is not entirely rational. Recent evidence is quite specific.24 It suggests that people greatly neglect significant differences in probability when the outcome is “affect rich”—when it involves not simply a serious loss, but one that produces strong emotions, including fear.25

To be sure, the distinction between cognition and emotion is complex and contested.26 In the domain of risks, and most other places, emotional reactions are usually based on thinking; they are hardly cognition-free. When a negative emotion is associated with a certain risk—pesticides or nuclear power, for example—cognition plays a central role.27 For purposes of the analysis here, it is not necessary to say anything especially controversial about the nature of the emotion of fear. The only suggestion is that when emotions are intense, calculation is less likely to occur, or at least that form of calculation that involves assessment of risks in terms of not only the magnitude but also the probability of the outcome.

Drawing on and expanding the relevant evidence, I will emphasize a general phenomenon here: In political and market domains, people often focus on the desirability of the outcome in question and pay (too) little attention to the probability that a good or bad outcome will, in fact, occur. It is in such cases that people fall prey to probability neglect, which is properly treated as a form of quasi-rationality.28 Probability neglect is especially large when people focus on the worst possible case or otherwise are subject to strong emotions. When such emotions are at work, people do not give sufficient consideration to the likelihood that the worst case will actually occur. This is quasi-rational because, from the normative point of view, it is not fully rational to treat a 1% chance of X as equivalent, or nearly equivalent, to a 99% chance of X, or even a 10% chance of X. Because people suffer from probability neglect, and because neglecting probability is not fully rational, the phenomenon I identify raises new questions about the widespread idea that ordinary people have a kind of rival rationality superior to that of experts.29 Most of the time, experts are concerned principally with the number of lives at stake,30 and for that reason they will be closely attuned, as ordinary people are not, to the issue of probability.

By drawing attention to probability neglect, I do not mean to suggest that most people, most of the time, are indifferent to large variations in the probability that a risk will come to fruition. Large variations can, and often do, make a difference—but when emotions are engaged, the difference is far less than the standard theory predicts. Nor do I suggest that probability neglect is impervious to circumstances. If the costs of neglecting probability are placed “on screen,” then people will be more likely to attend to the question of probability.31 In this light it is both mildly counterintuitive and reasonable, for example, to predict that people would be willing to pay less, in terms of dollars and waiting time, to reduce lowprobability risks of an airplane disaster if they are frequent travelers. An intriguing study finds exactly that effect.32 For similar reasons, market pressures are likely to dampen the impact of probability neglect, ensuring that, say, risks of 1/10,000 are treated differently from risks of 1/1,000,000, even if individuals, in surveys, show relative insensitivity to such differences.

Acknowledging all this, I emphasize three central points. First, differences in probability will often affect behavior far less than they should or than conventional theory would predict. Second, private behavior, even when real dollars are involved,33 can display insensitivity to the issue of probability, especially when emotions are intensely engaged. Third, and most important, the demand for legal intervention can be greatly affected by probability neglect, so that government may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that the relevant dangers will ever come to fruition.

C. Law It is not at all clear how the law should respond to probability neglect. But at a minimum, the phenomenon raises serious legal issues in administrative law, at least under statutes banning agencies from acting unless they can show a “significant risk”34 or can establish that the benefits of regulation outweigh the costs.35 If agencies are neglecting the issue of probability (perhaps because the public is doing so as well), they may well be acting unlawfully. Indeed, the law of judicial review shows an inchoate understanding of probability neglect, treating it as a problem for which judicial invalidation is a solution.36 The only qualification is that the relevant law remains in an embryonic state. There is much to be done, especially at the agency level, to ensure that government is alert to the probability that harm will actually occur.

Outside of the context of administrative law, an understanding of probability neglect will help us to make better predictions about the public “demand” for law. When a bad outcome is highly salient and triggers strong emotions, government will be asked to do something about it, even if the probability that the bad outcome will occur is low. Political participants of various stripes, focusing on the worst case, are entirely willing to exploit probability neglect. Those who encourage people to purchase lottery tickets, focusing on the best case, do the same. An understanding of probability neglect simultaneously helps show why jurors, and ordinary officials, are not likely to be moved much by a showing that before the fact, the harm was not likely to occur. For many people, what matters is that the harm did occur, not that it was unlikely to do so before the fact. For law, many of the most difficult questions are normative in character: Should government take account of variations in the probability that harms will occur? Should government respond to intense fears that involve statistically remote risks? When people suffer from probability neglect, should law and policy do the same thing? At first glance, we might think that even if people are neglecting probability, government and law at least should not—that the tort system and administrators should pay a great deal of attention to probability in designing institutions. If government wants to insulate itself from probability neglect, it will create institutions designed to ensure that genuine risks, rather than tiny ones, receive the most concern. Such institutions will not necessarily require agencies to discuss the worst-case scenario.37 And if government is attempting to increase public concern about a genuine danger, it should not emphasize statistics and probabilities, but should instead draw attention to the worst-case scenario.

If government is attempting to decrease public concern with a risk that has a tiny probability of coming to fruition, it may be ineffective if it emphasizes the issue of probability; indeed, it may do better if it changes the subject or stresses instead the affirmative social values associated with running the risk.38 On the other hand, public fear, however unwarranted, may be intractable, in the sense that it may be impervious to efforts at reassurance. And if public fear is intractable, it will cause serious problems, partly because fear is itself extremely unpleasant and partly because fear is likely to influence conduct, possibly producing wasteful and excessive private precautions. If so, a governmental response, via regulatory safeguards, would appear to be justified if the benefits, in terms of fear reduction, justify the costs.

II. PROBABILITY NEGLECT: THE BASIC PHENOMENON When it comes to risk, a key question is whether people can imagine or visualize the worst-case outcome.39 When the worst case produces intense fear, surprisingly little role is played by the stated probability that that outcome will occur.40 An important function of strong emotions is thus to drive out quantitative judgments, including judgments about probability, by making the best case or the worst case seem highly salient.41 But it is important to note that probability neglect can occur even when emotions are not involved. A great deal of evidence shows that whether or not emotions are involved, people are relatively insensitive to differences in probabilities, at least when the relevant probabilities are low.

A. Insensitivity to Variations Among Low Probabilities Do people care about probability at all? Of course they do; a risk of 1/100,000 is significantly less troublesome than a risk of 1/1000. But many people, much of the time, show a remarkable unwillingness to attend to the question of probability. Several studies show that when people are seeking relevant information, they often do not try to learn about probability at all. One study, for example, finds that in deciding whether to purchase warranties for consumer products, people do not spontaneously point to the probability of needing repair as a reason for the purchase.42 Another study finds that those making hypothetical, risky managerial decisions rarely ask for data on probabilities.43 Or consider a study involving children and adolescents,44 in which the following question was asked: Susan and Jennifer are arguing about whether they should wear seat belts when they ride in a car. Susan says that you should. Jennifer says you shouldn’t . . . . Jennifer says that she heard of an accident where a car fell into a lake and a woman was kept from getting out in time because of wearing her seat belt . . . . What do you think about this?45 In answering that question, many subjects did not think about probability at all.46 One exchange took the following form: A: Well, in that case I don’t think you should wear a seat belt. Q (interviewer): How do you know when that’s gonna happen? A: Like, just hope it doesn’t! Q: So, should you or shouldn’t you wear seat belts? A: Well, tell-you-the-truth we should wear seat belts. Q: How come? A: Just in case of an accident. You won’t get hurt as much as you will if you didn’t wear a seat belt. Q: Ok, well what about these kinds of things, when people get trapped? A: I don’t think you should, in that case.47 These answers might seem odd and idiosyncratic, but we might reasonably suppose that some of the time, both children and adults focus primarily on bad scenarios, without thinking a great deal about the question of probability.

Many studies find that significant differences in low probabilities have little impact on decisions. This finding is in sharp conflict with the standard view of rationality, which suggests that people’s willingness to pay for small risk reductions ought to be nearly proportional to the size of the reduction.48 Perhaps these findings reflect people’s implicit understanding that in these settings, the relevant probability is “low, but not zero,” and that finer distinctions are unhelpful. (What does a risk of 1/100,000 really mean? How different is it, for an individual, from a risk of 1/20,000 or 1/600,000?) In an especially striking study, Kunreuther and his coauthors found that mean willingness to pay insurance premiums did not vary among risks of 1/100,000, 1/1,000,000, and 1/10,000,000.49 They also found basically the same willingness to pay for insurance premiums for risks ranging from 1/650, to 1/6300, to 1/68,000.50

The study just described involved a “between subjects” design; subjects considered only one risk, and the same people were not asked to consider the various risks at the same time. Low probabilities are not likely to be terribly meaningful to most people, but most educated people would know that a 1/100,000 risk is worse than 1/1,000,000 risk. When low-probability risks are seen in isolation and are not assessed together, we have an example of the problem of “evaluability.”51 For most people, most of the time, it is very difficult to evaluate a low probability, and hence isolated decisions will pick up small or no variations between people’s assessments of very different risks.

But several studies have a “within subjects” design, exposing people simultaneously to risks of different probabilities, and even here, the differences in probabilities have little effect on decisions. An early study examined people’s willingness to pay (WTP) to reduce various fatality risks. The central finding was that the mean WTP to reduce such risks was, for over 40% of the respondents, unaffected by a large variation in the probability of harm, even though expected utility theory would predict significant effects from such variations.52 A later study found that for serious injuries, WTP to reduce the risk by 12/100,000 was only 20% higher than WTP to reduce the same risk by 4/100,000, even though standard theory would predict a WTP three times as high.53 These results are not unusual. Lin and Milon attempted to elicit people’s willingness to pay to reduce the risk of illness from eating oysters.54 There was little sensitivity to variations in probability of illness.55 Another study found little change in WTP across probability variations involving exposure to pesticide residues on fresh produce.56 A similar anomaly was found in a study involving hazardous wastes, where WTP actually decreased as the stated fatality risk reduction increased.57

There is much to say about the general insensitivity to significant variations within the category of low-probability events. It would be difficult to produce a rational explanation for this insensitivity; recall the standard suggestion that WTP for small risk reductions should be roughly proportional to the size of the reduction.58 Why don’t people think in this way? An imaginable explanation is that in the abstract, most people simply do not know how to evaluate low probabilities. A risk of 7/100,000 seems “small”; a risk of 4/100,000 also seems “small.”59 Most people would prefer a risk of 4/100,000 to a risk of 7/100,000, and I have noted that joint evaluation improves evaluability, which would otherwise be extremely difficult.60 But even when the preference is clear, both risks seem “small,” and hence it is not at all clear that a proportional increase in WTP will follow. As suggested by the findings of Kunreuther and his coauthors, it is likely that in a between-subjects design, WTP to eliminate a risk of 4/100,000 would be about the same as WTP to eliminate a risk of 7/100,000, simply because the small difference would not matter when each risk is taken in isolation.

#### Flip structure solves

Meisen 8—President Global Energy Network Institute (Peter, Renewable Energy on Tribal Lands, [www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf](http://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf))

The Flip Structure combines the best of both contracting out and tribal ownership. The need for the flip structure comes from the fact that Tribes are not taxable entities and, therefore, the production tax credits (PTC) which make wind power affordable do not easily apply to Tribes developing wind. While complex, a flip arrangement manages to both preserve tribal ownership and allow the Tribe to take advantage of whatever tax credits are available. ¶ To start the process, a Tribe, combined with other investors, loans a company money to build a large wind or solar farm. The Tribe also leases the land required for the project to the company. For the next ten years, the company builds and operates the project, during which they hold 90% of the ownership of the project with the Tribe retaining 10%. This allows the project to take advantage of the ten year long PTCs, because the company which has ownership of the project is a taxable entity. During the first ten years, the Tribe receives payments of interest on the loan and on the land-lease. After the first ten years, the company makes a balloon payment for the value of the original lease. At the same time, the Tribe buys the wind or solar farm from the company for the value of the original lease. This creates a “flip” in ownership so the Tribe then holds 90% of the ownership and the company holds 10% of the ownership of the facility. 29 This creates a debt free facility that has all of the advantages of a tribally owned project while taking advantage of any tax incentives.

#### There are ways around state tax

Slade 11—partner at Modrall Sperling where he specializes in Federal Indian law and Native American law, energy, natural resources, environmental law, project development, complex litigation and transactions (Lynn, INDIAN TRIBES—BUSINESS PARTNERS AND MARKET PARTICIPANTS: STRATEGIES FOR EFFECTIVE TRIBAL / INDUSTRY PARTNERSHIP, http://www.modrall.com/files/1411\_tribal\_industry\_partners.pdf)

Faced with the prospect of dual, state and tribal, taxation, development participants ¶ should consider alternatives to minimize overall tax burdens. First, existing law may afford tax ¶ credits or other incentives for energy and mineral development on tribal lands.¶ 154¶ Second, the ¶ Indian Mineral Development Act and Business Site Leasing Act allow flexibility for structures ¶ that facilitate tax planning. For example, if a tribe retains a working interest in minerals, state oil ¶ and gas severance taxation likely will not apply to the tribe’s equity interest in production. A ¶ non-Indian entity may have an argument that a state tax is preempted if the tax materially and ¶ adversely affects the tribe’s ability to provide government services and the state affords few or no services to the producer.¶ 155¶ A transaction can be structured to motivate a developer to ¶ prosecute a tax challenge by providing for a division of tax revenues saved between the tribal ¶ and non-tribal parties. Similarly, a tribe’s purchase of materials or equipment, or contracting to ¶ construct facilities, may defeat state gross receipts or sales tax. In a joint venture format, ¶ allocating depreciable assets to a taxable joint venturer, rather than a non-taxable tribe or tribal ¶ entity, may also reduce overall federal and state income taxation.

### 2AC: T Restrictions

#### A) “Restriction” are limitations on the use of property

Texas Supreme Court ’10

CAUSE NO. 08-01-18,007-CV-A, Final Judgment, http://www.supreme.courts.state.tx.us/ebriefs/12/12046401.pdf

"Restriction" is defined and commonly used to mean "[a] limitation (esp. in a deed) placed on the use or enjoyment of property." BLACK'S LAW DICTIONARY 1054 (7th ed. 2000).

#### b) Restrictions are the equivalent of conditions on action

Plummer 29 J., Court Justice, MAX ZLOZOWER, Respondent, v. SAM LINDENBAUM et al., Appellants Civ. No. 3724COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT100 Cal. App. 766; 281 P. 102; 1929 Cal. App. LEXIS 404September 26, 1929, Decided, lexis

The word "restriction," when used in connection with the grant of interest in real property, is construed as being the legal equivalent of "condition." Either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The words "terms" and "conditions" are often used synonymously when relating to legal rights. "Conditions and restrictions" are that which limits or modifies the existence or character of something; a restriction or qualification. It is a restriction or limitation modifying or destroying the original act with which it is connected, or defeating, terminating or enlarging an estate granted; something which defeats or qualifies an estate; a modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate may be either defeated, enlarged, or created upon an uncertain event; a quality annexed to land whereby an estate may be defeated; a qualification or restriction annexed to a deed or device, by virtue of which an estate is made to vest, to be enlarged or defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act.

#### Best Interpretation:

#### A) Captures the benefits of outright prohibition by including statutory restrictions that make production more difficult but that are limited to those that include the possibility of complete prohibition

U.S. Code ‘5

25 U.S.C. § 3504 : US Code - Section 3504: Leases, business agreements, and rights-of-way involving energy development or transmission, 2005,

An Indian tribe may grant a right-of-way over tribal land for a¶ pipeline or an electric transmission or distribution line without¶ review or approval by the Secretary if -¶ (1) the right-of-way is executed in accordance with a tribal¶ energy resource agreement approved by the Secretary under¶ subsection (e);¶ (2) the term of the right-of-way does not exceed 30 years;¶ (3) the pipeline or electric transmission or distribution line¶ serves -¶ (A) an electric generation, transmission, or distribution¶ facility located on tribal land; or¶ (B) a facility located on tribal land that processes or¶ refines energy resources developed on tribal land; and¶ (4) the Indian tribe has entered into a tribal energy resource¶ agreement with the Secretary, as described in subsection (e),¶ relating to the development of energy resources on tribal land¶ (including the periodic review and evaluation of the activities¶ of the Indian tribe under an agreement described in subparagraphs¶ (D) and (E) of subsection (e)(2)).¶ (c) Renewals¶ A lease or business agreement entered into, or a right-of-way¶ granted, by an Indian tribe under this section may be renewed at¶ the discretion of the Indian tribe in accordance with this section.¶ (d) Validity¶ No lease, business agreement, or right-of-way relating to the¶ development of tribal energy resources under this section shall be¶ valid unless the lease, business agreement, or right-of-way is¶ authorized by a tribal energy resource agreement approved by the¶ Secretary under subsection (e)(2).¶ (e) Tribal energy resource agreements¶ (1) On the date on which regulations are promulgated under¶ paragraph (8), an Indian tribe may submit to the Secretary for¶ approval a tribal energy resource agreement governing leases,¶ business agreements, and rights-of-way under this section.¶ (2)(A) Not later than 270 days after the date on which the¶ Secretary receives a tribal energy resource agreement from an¶ Indian tribe under paragraph (1), or not later than 60 days after¶ the Secretary receives a revised tribal energy resource agreement¶ from an Indian tribe under paragraph (4)(C) (or a later date, as¶ agreed to by the Secretary and the Indian tribe), the Secretary¶ shall approve or disapprove the tribal energy resource agreement.¶ (B) The Secretary shall approve a tribal energy resource¶ agreement submitted under paragraph (1) if -¶ (i) the Secretary determines that the Indian tribe has¶ demonstrated that the Indian tribe has sufficient capacity to¶ regulate the development of energy resources of the Indian tribe;¶ (ii) the tribal energy resource agreement includes provisions¶ required under subparagraph (D); and¶ (iii) the tribal energy resource agreement includes provisions¶ that, with respect to a lease, business agreement, or right-of-¶ way under this section -¶ (I) ensure the acquisition of necessary information from the¶ applicant for the lease, business agreement, or right-of-way;¶ (II) address the term of the lease or business agreement or¶ the term of conveyance of the right-of-way;¶ (III) address amendments and renewals;¶ (IV) address the economic return to the Indian tribe under¶ leases, business agreements, and rights-of-way;¶ (V) address technical or other relevant requirements;¶ (VI) establish requirements for environmental review in¶ accordance with subparagraph (C);¶ (VII) ensure compliance with all applicable environmental¶ laws, including a requirement that each lease, business¶ agreement, and right-of-way state that the lessee, operator, or¶ right-of-way grantee shall comply with all such laws;¶ (VIII) identify final approval authority;¶ (IX) provide for public notification of final approvals;¶ (X) establish a process for consultation with any affected¶ States regarding off-reservation impacts, if any, identified¶ under subparagraph (C)(i);¶ (XI) describe the remedies for breach of the lease, business¶ agreement, or right-of-way;¶ (XII) require each lease, business agreement, and right-of-¶ way to include a statement that, if any of its provisions¶ violates an express term or requirement of the tribal energy¶ resource agreement pursuant to which the lease, business¶ agreement, or right-of-way was executed -¶ (aa) the provision shall be null and void; and¶ (bb) if the Secretary determines the provision to be¶ material, the Secretary may suspend or rescind the lease,¶ business agreement, or right-of-way or take other appropriate¶ action that the Secretary determines to be in the best¶ interest of the Indian tribe;¶

#### B) No limits distinction – no way to distinguish the number of outright ban affs and affs that restrict property AND include chance of total prohibition

#### C) We effectively lift a total ban – Kronk proves there have been ZERO energy production agreements in the 7 years since enacting ITEDSDA.

#### They kill topic meaning – there are no direct federal prohibitions on wind and solar; only we can give meaning to every topic word; resolutional language is the only non-arbitrary way to set predictable limits

### Solar

#### Double bind---either Natives want solar so they’ll do it anyway, or they’ll just choose wind b/c it’s cheaper

Hurtado 12—Sci Dev writer (Maria, Wind power 'can be cheaper' than photovoltaics, study says, www.scidev.net/en/climate-change-and-energy/energy-policy/news/wind-power-can-be-cheaper-than-photovoltaics-study-says.html)

Generating wind energy is more than twice as cheap as solar photovoltaic (PV) energy production, a study of alternative energy in six developing countries has found.¶ The findings, published in Nature Climate Change last week (15 April), could help inform global debates on financing initiatives aimed at reducing greenhouse gas emissions in developing countries.¶ The authors note that differentiating technologies or countries is one of the reforms under discussion in the Clean Development Mechanism following its experience with nearly 3,500 projects in 70-plus countries.¶ They commented that there is little available data on the costs of different renewable energy technologies in developing countries, and that such information is needed to allocate funding through such mechanisms as the Green Climate Fund — which is expected to raise US$100 billion per year by 2020. ¶ The researchers, from the Swiss Federal Institute of Technology in Zurich, studied the baseline costs of current energy sources in Brazil, Egypt, India, Kenya, Nicaragua and Thailand — including the cost of national fuel subsidies — and then investigated the relative costs of switching to wind or solar electricity.¶ These countries were chosen due to their variety in size, state of economic development and current variation in energy use.¶ Broadly speaking, the authors said that in 2010, PV electricity costs were 2.2 to 4.5 times higher than wind power in these countries, and that the cost gap between the two technologies could be expected to continue until at least 2020.

#### Must combine solar and wind --- they’re insufficient independently

Dr. J.B.V. SUBRAHMANYAM 12, P.K SAHOO, and Madhukar REDDY -- Electrical &Electronics Engineering Dept - Bharat Institute of Engineering &Technology, “Local PV-Wind Hybrid System Development for Supplying Electricity to Industry,” Vol. 53, No. 1, 2012, http://ie.utcluj.ro/Contents\_Acta\_ET/2012/Number1/Paper02\_Subrahmanyam.pdf

PV modules and wind turbines(3)are now widely used in developed countries to produce electrical power in locations where it might be inconvenient or expensive to use conventional grid supplies, while other homeowners who choose the renewable energy sources prefer to connect their energy system to the grid as a huge ‘battery’ for some convenient grid-tied situation.¶ In contrast. in many developing countries, especially in rural areas electricity grids are often non- existent or rudimentary, and all forms of energy are usually very expensive. Here the PV modules and wind turbine can be highly competitive with other forms of energy supply. However, the fact that natural energy resources are intermittent and storage batteries are expensive, has led to the utilization of so-called hybrid renewable energy systems. Any power system that incorporates two or more of the following is referred to as a hybrid power system: PV panels, wind t4bines. or diesel, propane. gasoline generators. For small loads, the most common combinations (4) are PV-wind hybrid system. PV and wind is good match, because inland wind speeds tend to be lower in summer, when **solar energy can compensate,** and higher in winter, when sunshine falls to very low levels.¶ In this paper. a PV-wind hybrid system is presented that can supply electricity to a private house. farm house or a small company or an apartment house with electrical power depending on the need at the site where used. The aim of this study is to introduce the local PV-wind hybrid system’s working principle by reviewing one case where the system is connected to the grid.¶ 2. SPECIAL ISSUES OF WIND TURBINES AND PV CELLS¶ As the wind does not blow all the time nor does the sun shine all the time, solar and wind power alone are poor power sources. Hybridizing solar and wind power sources together with storage batteries to cover the periods of time without sun or wind provides a realistic form of power generation. This variable feature of wind turbine power generation is different from conventional fossil fuel, nuclear or hydro-based power generation. Wind energy has become the least expensive renewable energy technology in existence and has peaked the interest of scientists and educators the world over.

#### SOLAR INEV

Leone 11—Associate Editor, RenewableEnergyWorld.com (Steve, 10 Reasons Renewable Energy May Beat the Projections, http://www.renewableenergyworld.com/rea/news/article/2011/09/10-reasons-renewables-may-beat-the-projections)

We won’t have to wait until 2035 to find grid parity, considering it’s already here in some select areas. Pricing will truly be the transformative force that redefines the world’s energy mix. Once we’re at true grid parity, it will become a matter of retiring existing fossil fuel plants. Consider two companies that are making huge strides toward grid parity. First Solar announced it is developing a thin-film cell with a 15 percent efficiency in mass production. GE, meanwhile, is working to create a 10- to 15-MW turbine. Advancements like these will combine with the inevitable manufacturing gains that come with greater scale to make grid parity a reality perhaps sooner than later.

### CP

#### CP can’t bypass the approval process which crushes solvency

Dreveskracht 11—Associate at Galanda Broadman PLLC, of Seattle, an American Indian majority-owned law firm. His practice focuses on representing businesses and tribal governments in public affairs, energy, gaming, taxation, and general economic development (Ryan, The Road to Alternative Energy in Indian Country: Is It a Dead End?, http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section/~/media/Files/Legal%20Community/Sections/Indian%20Law/Indian%20Newsletters/Summer%202011%20Vol%2019%20No%202.ashx)

Yet, as of February 2011, only one commercial scale renewable energy project is operating in Indian country. 9 What gives?¶ On April 1, 2011, the U.S. House of Representatives, Committee on Natural Resources, set out to find the answer. 10 In his opening statement, Committee Chairman Don Young set the tone for testimony to follow: “[B]ecause of outdated or duplicative federal regulations and laws, tribes often feel that the federal government is treating them unfairly…. These rules and policies often slow energy development and discourage businesses to invest on tribal lands.” 11 Tribal officials identified the following impediments:¶ • Erroneous Bureau of Indian Affairs (BIA) records, which cause significant delay in the preparation of environmental documents and overall land records necessary for the approval of business transactions. 12¶ • A lack of BIA staffing necessary to review and approve the required instrumentalities within a timely fashion. 13¶ • The inability to enter into long-term fixed price contracts necessary to underpin the commercial framework needed for long-term projects. 14¶ • A lack of standardization and coordination between Department of the Interior (DOI) offices. 15¶ • A lack of DOI communication with state and local governments – with tribes bearing the brunt of the cost via legal attacks on their sovereignty. 16¶ • General apprehension to issue National Environmental Protection Act (NEPA) compliance decisions at the Environmental Protection Agency, likely due to fear of litigation. 17¶ • BIA delays in approving Rights-of-Way. 18¶ • The practical inability to tax non-Indian energy developments on leased lands due to state and local governments in many instances already taxing the project. 19¶ • Tribes’, as owners, inability to take advantage of the production/investment tax credits and accelerated depreciation incentives available to non-Indian project investors. 20¶ Stripped down, many the hindrances referred to in Hearing testimony are a direct result of the federal approval process. Pursuant to 25 U.S.C. § 415, transactions involving the transfer of an interest in Indian trust land must be approved by the BIA. 21 But even where the tribe structures the project without leasing its land, 25 U.S.C. § 81 requires that the BIA approve contracts that could “encumber” Indian lands for a period of seven or more years. 22 Secretarial approval is also necessary for rights of-way on Indian lands. 23 In these instances the BIA approval process constitutes a “federal action,” which triggers a slew of federal laws that the BIA must comply with. 24 This includes NEPA, the National Historic Preservation Act, and the Endangered Species Act, among others. Compliance with NEPA alone can take over 12 years to complete and can generate millions of dollars in additional cost 25 – not to mention the inevitable litigation that will ensue. 26 Although there has been some headway in removal of the outdated tribal energy regime, according to recent congressional testimony there is much work to be done.¶ The Road to Nowhere¶ Congress began to address the development of renewables in Indian country in the early nineties. Such legislation included the EPAct of 1992, 27 which authorized the Department of Energy (DOE) to provide grants and loans to tribes wishing to develop solar and wind energy; the Indian Energy Resource Development Program, 28 which awarded development grants, federally-backed loans, and purchasing preferences to Indian tribes pursuing energy development projects 29 ; culminating in the Indian Energy Act of 2005 (IEA), 30 the most comprehensive Indian-specific energy legislation to date.¶ Until 2005, much of the federal push for energy development had focused on creating incentives for investment rather than a restructuring of the antiquated legal structures involved. 31 Much of the IEA, however, was devoted to the creation of a new framework for the management and oversight of energy development in Indian country – the Tribal Energy Resource Agreement (TERA). 32 This section of the IEA allowed a tribe to enter into a master agreement (the TERA) with the Secretary of the Interior, granting the tribe the ability to enter into leases and other business agreements and to grant rights of way across tribal lands without Secretarial approval. 33¶ To date, however, no tribe has entered into a TERA. For many tribes, the cost simply outweighs the benefits 34 – TERAs allow tribes the leeway to skip secretarial approval for specific projects, “but only on terms dictated by the federal government rather than on the tribes’ own terms.” 35 First, in applying for the TERA, the tribe must consult with the director of the DOI before submitting the application. 36 The director must hold a public comment period on the proposed TERA application and may conduct a NEPA review of the activities proposed. 37 Thereafter, the DOI has 270 days to approve the TERA. 38 Second, the TERA requires that tribes create a NEPA-like environmental review process. 39 This “tribal NEPA” must have a procedure for public comment and for “consultation with affected States regarding off-reservation impacts” of the project. 40 Third, the TERA must include a clause guaranteeing that the tribe and its partner will comply “with all applicable environmental laws.” 41 In so doing, tribes must allow the Secretary to review the tribe’s performance under the TERA – annually for the first three years and biannually thereafter. 42 If in the course of such a review the Secretary finds “imminent jeopardy to a physical trust asset,” the Secretary is allowed to take any action necessary to protect the asset, including assuming responsibility over the project. 43 Fourth, the TERA must address public availability of information and record keeping by designating “a person … authorized by the tribe to maintain and disseminate to requesting members of the public current copies of tribal laws, regulations or procedures that establish or describe tribal remedies that petitioning parties must exhaust before instituting appeals ….” 44 Finally, agreements for developing alternative energies are subject to a 30-year limit, renewable only once for another 30-year term. 45¶ Roadblocks¶ Commentators have noted that the TERA imposes more stringent environmental standards upon tribes than non-Indian developers elsewhere. 46 But even where a tribe is compelled to go through the burdensome TERA process – which may still be a good idea 47 – many tribes simply do not have the resources necessary to fulfill the TERA requirements. The regulations impose an extremely heavy burden on tribal governments to demonstrate that they have the requisite expertise, experience, laws, and administrative structures in place to assume the responsibility of a TERA. “Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts, or the financial wherewithal to hire or train them,” in order to provide the tribe with the capacity necessary to obtain secretarial approval under the TERA regulations. 48¶ The irony is that those tribes with TERA capacity are likely in a position to skip the approval process altogether by implementing alternative energy projects on their own, which do not require secretarial approval. 49 Where no lease, contract, or right-of-way is involved, the approval process – and the insurmountable burdens of federal law that come along with it – is not necessary. 50 The majority of tribes, however – tribes that are most in need of economic development and would most benefit from the implementation of an alternative energy project – have to seek an outside partner, which puts them “at a terrific disadvantage for developing their own resources.” 51¶ The Road Ahead¶ The doctrine of self-determination acknowledges that tribal control over development is the best way to strengthen tribal governance and improve economic selfsufficiency. 52 According to much of the testimony offered at the recent Hearing before the Subcommittee on Indian and Alaska Native Affairs, self-determination must also include freedom from the yoke of federal energy oversight and regulation.¶ On May, 4-5, 2011, the U.S. Department of Energy (DOE) held its first Tribal Summit. 53 The goal of the Summit, much like that of the most recent Hearing, is to identify and “break down bureaucratic barriers that have prevented tribal nations from developing clean energy with the ultimate goal of prosperity and energy security for both Indian country and the nation as a whole.” 54 For many, the Summit reflects the nation’s “continued commitment to partnering with Native Americans to support the development of clean energy projects on tribal lands ….” 55 But will it be enough?¶ Having identified “unnecessary laws and regulations” hindering alternative energy development in Indian country, it is now time for Congress to write necessary legislation to allow tribes to pursue energy self-determination. 56 If the words of Doc Hastings, Chairman of the House Committee on Natural Resources, hold any bearing, the current regulation of energy resources in Indian country may soon be upset: “Tribes know best how to meet their own land management objectives.” 57 This axiom should not be lost. Indeed, in order to effectively realize the twin goals of promoting tribal self-determination and encouraging the efficient development of tribal energy resources, 58 it will be necessary to emphasize the former to bring about the latter.

#### No s

Kronk 12—Assistant Professor, Texas Tech University School of Law (Elizabeth, Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform, 29 Pace Envtl. L. Rev. 811)

¶ ¶ [\*834] Potentially in response to these concerns, on June 11, 2003, Senator Bingaman introduced an amendment to add the mandatory environmental review provisions to the then-pending TERA provisions. n87¶ Senator Campbell opposed Senator Bingaman's proposed amendment, explaining that "in my view, the Bingaman amendment would literally strip tribes of 30 years of that direction of self-determination and would circumvent the trust responsibilities this Government has to tribes because it would force the statutory equivalent of NEPA on all decisions they make with their own land." n88 Senator Domenici shared Senator Campbell's concerns regarding the mandatory provisions in Senator Bingaman's proposed amendment, adding that "the amendment before us takes the unprecedented step of applying the NEPA process to the Indian tribes just as if they were the Federal Government. This amendment goes well beyond current environmental regulations and adds unnecessary regulations and costs to the tribal energy project." n89¶ Accordingly, the legislative history demonstrates commentators' concern about potential encroachments into tribal sovereignty and costs associated with the imposition of mandatory environmental review through the TERA provisions. These issues may explain in part tribes' ongoing reluctance to enter into TERAs. ¶ E. Waiver of Federal Government's Liability¶ ¶ As identified above, another concern of several commentators on the then-pending TERA provisions related to the waiver of federal government liability to third parties or tribes related to matters arising after approval of a TERA. On June 5, 2003, Senator Campbell explained the purpose of the liability waiver in the then-pending TERA provisions:¶ [\*835] ¶ ¶ Section 2604 provides that the United States will not be liable to any party, including a tribe, for losses resulting in the terms of any lease agreements or right-of-way executed by the tribe pursuant to the approved TERA, which makes sense; Liability follows responsibility. If a tribe makes the leasing decisions, it should certainly be held responsible. If the United States continues to make the leasing decisions, it will continue to be held responsible. If Indian self-determination means anything, it means the right of tribes to make their own decisions and their responsibility to the tribes to live with those decisions. n90¶ ¶ Despite Senator Campbell's sentiments, concerns regarding this provision pervade the legislative history. Senator Bingaman acknowledged that the TERA provision waiving the federal government's liability was controversial, in stating that "there are concerns with language in the bill that limits the liability of the Federal Government with respect to leases and rights-of-way approved by tribes under the citing provisions of the bill." n91 Chairman Vernon Hill shared this concern, explaining that given the government's pervasive role in energy development in Indian country, tribes would be unlikely to release the federal government from liability until the implications of the streamlined process were clear. n92 President Joe Shirley, Jr., shared and expounded upon the concerns raised by Chairman Hill, explaining that:¶ ¶ Both bills [submitted by Senator Bingaman and Senator Campbell] stipulate a waiver of federal liability, regardless of the degree of managerial control exercised by the federal government in Indian energy development... .¶ ¶ ¶ While these bills purport to put tribes in the driver seat of decision making, they continue to empower the federal government to act as the traffic cop who is authorized to put its hand out to stop a tribe's car from moving. Both bills ultimately [\*836] preserve the federal government's final authority over energy leases. Such final authority constitutes the lead role. This scheme, wherein a cabinet Secretary has prescriptive control over decisions regarding Indian energy development, but no subsequent liability, is an abdication of the federal trust responsibility that is patently unfair to tribes. n93

#### Tribes won’t get screwed by companies

Royster 12—Professor of Law and Co-Director, Native American Law Center, University of Tulsa College of Law (Judith, Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures, 31 Stan. Envtl. L.J. 91)

The proposed amendment to the definition of "mineral resources" in the IMDA would eliminate one of the serious disadvantages of the statutes presently available for renewable energy development by allowing tribes to take as active a role in the development process as they choose. But it does not address the other major drawback, that of secretarial approval. Under the IMDA, the Secretary is responsible for individually approving every negotiated lease and minerals agreement.¶ Discarding any approval role for the Secretary of the Interior is, at least in the short term, unrealistic. In only one limited situation relevant to renewable energy has Congress eliminated secretarial approval entirely: the 2000 amendment to § 81 to authorize contracts or agreements that encumber Indian lands for less than seven years without any federal approval. As noted earlier, § 81 applies only if other statutory authority does not.¶ More commonly, Congress has been willing to ease up on the Secretary's approval power, allowing tribes to bypass federal approval of specific instruments if a more global approval has already been granted. Thus, the original ten-year authority of section 17 corporations to lease without secretarial approval was expanded in 1990 to twenty-five years. Nonetheless, the section 17 corporate charter itself is issued by the Secretary, and the powers granted in the charter are thus subject to secretarial approval. The surface leasing statute was amended several times to authorize specific tribes to lease without secretarial approval of the individual lease, as long as the tribe first has in place tribal regulations approved by the Secretary. Legislation introduced in the 111th and 112th Congresses would have extended this authority to all tribes. Similarly, the TERA process enacted in 2005 authorizes any tribe to use the same approach for energy leases and agreements.¶ While these statutes and amendments clearly indicate a trend toward a somewhat less intrusive role for the Secretary, it is equally clear that Congress wants some level of federal oversight for long-term encumbrances of Indian lands. It is willing to have that oversight one step removed from specific development instruments, but not removed altogether. Any realistic solution at this point, therefore, must retain some sort of secretarial approval.¶ Nonetheless, there are steps that can be taken to tighten up the approval process and make it friendlier to renewable energy development. The two amendments to the IMDA proposed here [\*133] would provide that the Secretary's failure to act within the time allotted constitutes approval, and that in determining whether a minerals agreement is in the tribe's best interest, the Secretary will defer to the tribe's decision.¶ Under the IMDA, the Secretary has 180 days to approve or disapprove a minerals agreement, or 60 days after compliance with the National Environmental Policy Act (NEPA), whichever is later. n189 The statute specifically provides that the Secretary's failure to meet the deadline is enforceable by a mandamus action in federal court. n190 Making the Secretary's deadline mandatory is useful, but authorizing enforcement by court action is not. Civil suits proceed slowly through the federal courts, and it is unlikely that a writ of mandamus would be issued before the Secretary reached a decision on the minerals agreement. Waiting two years for the court's decision is no better than waiting two years for the Secretary's.¶ A better approach would borrow from the proposed statutory amendments to the TERA process. The proposed TERA amendments would replace a provision giving the Secretary 270 days to approve a TERA, with a provision that 271 days after the tribe submits its TERA application, the TERA "shall" become effective if the Secretary has not disapproved it. n191 A similar amendment to the IMDA could provide that 181 days after the tribe submits a proposed minerals agreement, or 61 days after compliance with NEPA, whichever is later, the agreement "shall" take effect if the Secretary has not disapproved it or has not provided the tribe with written findings of the intent to approve or disapprove the agreement. n192 As with the proposed TERA [\*134] amendment, this would put substantial additional pressure on the Department of the Interior to act quickly. But the benefit to tribes of knowing whether their minerals agreements have been approved, and being able to implement their agreements within a reasonable time, outweigh those concerns.¶ The second way to streamline the approval process for renewable energy resources is to address the substance of the Secretary's review of mineral agreements. The IMDA provides that the Secretary must determine whether a proposed agreement "is in the best interest of the Indian tribe." n193 In so doing, the Secretary "shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement." n194 The statute expressly provides, however, that the Secretary is not responsible for preparing any studies regarding "environmental, socioeconomic, or cultural effects" other than the environmental studies required by NEPA. n195¶ The regulations, on the other hand, require that the Secretary determine both that the minerals agreement is in the tribe's best interest and that any adverse cultural, social, or environmental impacts do not outweigh the benefits of the agreement. n196 The "best interest" standard is further defined as requiring "the Secretary [to] consider any relevant factor, including, but not limited to: economic considerations, such as date of lease or minerals agreement expiration; probable financial effects on the Indian mineral owner; need for change in the terms of the existing minerals agreement; marketability of mineral products; and potential environmental, social and cultural effects." n197 The regulations further specify that the "best interest" standard is based on information supplied by the parties "and any other [\*135] information considered relevant by the Secretary." n198 That information may include comparisons to other contracts or offers for similar resources, "insofar as that information is readily available." n199¶ These standards, derived from judicial determinations that the Secretary must consider all relevant factors in reviewing mineral leases under the IMLA, n200 place considerable decision-making power with the Secretary. During the rulemaking process, in fact, the Department of the Interior rejected a commenter's suggestion that minerals agreements should be approved if the agreements were in compliance with law. The Department noted that the law itself "allows the Secretary the discretion to weigh relevant factors and requires the Secretary to make, on the basis of the Secretary's judgement, a best interest determination." n201¶ At the time the IMDA was enacted in 1982, federal Indian policy had only recently focused on tribal self-determination, n202 and Indian tribes were still emerging from the uncertainties and destruction of the termination era. n203 The Department of the Interior had experience with considering all relevant factors in the approval of IMLA leases, and carried that standard into the new world of minerals agreements. It took twelve years for the Department to issue IMDA regulations, but the regulations again reflected the central role of the Secretary and the importance of the Secretary's judgment call. In the 1980s and even early 1990s, the Secretary's stringent oversight may have been justified by the imbalance of knowledge and bargaining power between tribes and energy companies.¶ But nearly twenty years have passed since the regulations were [\*136] promulgated in 1994. Indian tribes have thirty years of experience with IMDA minerals agreements, and many of the energy tribes have become sophisticated negotiators of development deals. Certainly tribes are the best determiners of cultural and social impacts, and often of the economic impacts as well. In light of those factors, the standards for approval of IMDA agreements are due for amendment.¶ Amending the statute itself to revisit the appropriate factors may be the best choice, but a simpler and perhaps quicker fix is also available. The Department could amend the regulations to reflect modern realities. Similar to the best interests determination in the regulations for agricultural and other surface leases, the IMDA regulations could provide that in reviewing an IMDA minerals agreement, the Secretary will defer to the tribe's determination that the agreement is in its best interest, to the maximum extent possible. n204 Although the conditional "maximum extent possible" language preserves the Secretary's ultimate authority under the statute, the regulation would ensure that the Secretary will undertake the minerals agreement review process with due respect for the tribe's decision. Even if a deferential review is current practice, embedding it in the regulations strengthens the tribe's role in the decision making process.

### 2ac Fiscal Cliff

#### Won’t pass

Swanson 10/24 Ian, The Hill, "Fiscal cliff approaches and concerns mount", 2012, thehill.com/blogs/on-the-money/economy/263699-cliff-approaches-and-concerns-mount

Yet two weeks before a presidential election that is razor-close, there is new skepticism that any deal will be reached in lame-duck Washington. ¶ “The odds are high that we’ll have to go into next year to get a deal,” Mark Zandi, the chief economist at Moody’s Analytics, said in an interview Tuesday. ¶ “We’re increasingly concerned,” said Steve Bell, senior director of economic policy for the Bipartisan Policy Center. ¶ Lawmakers digging in their heels during a campaign, pressure on committee chairmen — who could face challenges in the lame-duck session — and a belief on both sides that the other will take more of the blame are adding to the sense that a deal won’t be found. ¶ The Congressional Budget Office estimates falling over the cliff would cause a recession. Unemployment would jump back over 9 percent while the economy would contract in the first half of the year by 2.9 percent. Goldman Sachs argues the cliff would take 4 points off the nation’s GDP. ¶ But it could take time for that to happen. ¶ Zandi argues the immediate effects on the economy of going over the cliff are “not cataclysmic.” ¶ “The economy won’t collapse,” he says, though the damage will build up over time.

\*\*\*in elections\*\*\*

#### Plan bipart + tribes like it

Brown 10 -- AP (Matthew, Indian tribes to Congress – Streamline energy development, www.buffalopost.net/?p=8525#more-8525)

American Indian leaders on Thursday asked Congress to streamline the development of energy projects on tribal lands by curbing some federal oversight and providing incentives for companies to strike deals with reservations.¶ Reservations from Oklahoma to Montana and Alaska sit atop large amounts of oil, natural gas and coal. Others in wind-swept regions of the Northern Plains and on the West Coast have huge renewable energy potential.¶ But existing government rules make it easier for energy companies to pursue projects on non-tribal land, some members of Congress and tribal leaders say. As a result, tribes often miss out on the chance to develop their natural resources.¶ “Tribes in some of the poorest counties in America have vast renewable energy resources that can help them overcome poverty,” said Joe Garcia, Chairman of the All Indian Pueblo Council of New Mexico.¶ Garcia and other tribal representatives want the Senate Indian Affairs Committee to intervene through legislation proposed by Sen. Byron Dorgan, the North Dakota Democrat who chairs the committee.¶ The tribes want to eliminate federal drilling fees, pare down the Interior Department’s bureaucracy, and shield tribes from state and local taxes on energy projects.¶ Dorgan’s bill has yet to be introduced.¶ The tribal leaders’ requests were welcomed Thursday by both Democrats and Republicans.¶ “Energy development means jobs,” said Sen. John Barrasso, a Wyoming Republican. “It means income for families. It means paying the heating bill.”¶ Nationwide, energy royalties paid to tribes through the federal government totaled more than $334 million in 2008, the most recent year with figures available. That was down sharply from 2007, driven largely by a drop in oil and gas prices.¶ More than 2 million acres of tribal land have been developed for oil, gas and coal, according to the government. Estimates show 15 million acres more have the same potential, with additional land suited for wind, solar and other renewable energy projects.¶ In 2005, Congress tried to promote development by making it easier for tribes to enter agreements with private companies.¶ Witnesses at Thursday’s hearings said those changes weren’t enough. They also criticized changes instituted since 2005, such as a $4,000 fee for drilling on public lands – including reservations, which are held in federal trust.

#### k/t agenda

Young 9 [Kerry Young, CQ-Roll Call, “American Indians Exercise Political Clout,” 12/2, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003256367&cpage=2>]

**Yet, American Indians have been steadily and quietly building new clout on Capitol Hill. Aided in part by those same casino profits, as well as the shifting electoral landscape, American Indians have wielded growing influence in the past three election cycles — both by making significant donations to candidates and, perhaps even more important, by turning out in much greater numbers to vote.¶ Indeed, the votes of American Indians were credited with helping at least two Democrats defeat incumbent Republican senators. In 2006, Jon Tester ousted Abramoff-tainted Conrad Burns in part by campaigning in Indian country. Increased tribal voter registration may have aided Al Franken ’s 312-vote victory in Minnesota over Norm Coleman last year, which helped give the Senate Democratic Caucus its much-coveted 60-vote majority.¶ As a result, American Indians are now in position, for the first time in decades, to make demands on Congress and the administration to address long-neglected problems in tribal communities where, as recently as nine years ago, 12 percent of reservation homes lacked adequate plumbing.¶ President Obama signed a law last month that contained the biggest spending increase for the Indian Health Service in 20 years, and he installed at its helm the first American Indian woman to hold that position. Obama also followed through on a campaign pledge to appoint a White House policy adviser for Native American affairs, and he has pushed congressional leaders to make time in the legislative calendar for a bill that would beef up law enforcement on reservations.¶ “This has probably been the best year for Native Americans” in a long time, said Tom Cole , an Oklahoma Republican who is part Chickasaw and the only enrolled member of a tribe now in Congress. “Certainly, in my experience, I have never seen anything like it.”¶ Not Only About Casinos¶ The newfound political strength of American Indians grows out of a long history of political disenfranchisement. It was only in 1924 that Congress passed a law making clear that American Indians are U.S. citizens with full voting rights — about a half-century after passage of a constitutional amendment for blacks and four years after one granting voting rights to women. That one federal law alone didn’t prevent states and communities from creating barriers to voting by American Indians, and they — like blacks — were given additional protections in the 1965 Voting Rights Act.¶ There are more than 560 registered Indian tribes. While money from casinos has undoubtedly helped leverage their influence, fewer than half of the tribes are involved in gambling, so their clout appears to result mostly from a new focus on grass-roots organizing.¶ Analysts say the earliest sign of the voting power of American Indians may have been the defeat in 2000 of Sen. Slade Gorton, a Washington Republican who was regarded by many American Indians as having tried to weaken their sovereignty with a 1998 bill that would have permitted lawsuits against tribes in federal court. Analysts say votes from the Pine Ridge Sioux Reservation probably helped South Dakota Democrat Tim Johnson keep his Senate seat in 2002.¶ These races “made more of a case for candidates to seek the vote of native people,” said Manley A. Begay Jr., a senior lecturer in the American Indian studies program at the University of Arizona. “Candidates are beginning to say, ‘I’ve got to court that vote.’”¶ Beyond providing margins in critical races, American Indians have sharply increased their contributions to political campaigns. Tribal campaign donations increased nearly sevenfold to $11.4 million in the 2008 election cycle from $1.7 million in 2000.¶ At the same time, Indians are more politically savvy, analysts say, because of improved education. The number of college and university degrees awarded to American Indians, including Alaska Natives, almost tripled from the mid-1970s to the mid-2000s, said Diane-Michele Prindeville, an associate professor at New Mexico State University. Many graduates have returned to reservations, she said, helping to provide a bridge between Indian communities and the wider political world.**

#### Reducing regulations on Native energy is popular

Jones 11—Senior Fellow on the Energy Policy Team, Center for American Progres—AND—Bracken Hendricks, Senior Fellow, and Jorge Madrid, Research Associate (Van, Clearing the Way for a Native Opportunity in America’s “Sputnik Moment”, http://www.nativetimes.com/index.php?option=com\_content&view=article&id=4853:clearing-the-way-for-a-native-opportunity-in-americas-sputnikmoment&catid=46&Itemid=22)

In recent weeks President Obama has boldly called for a 21st-century regulatory system that removes outdated government regulations that would otherwise stifle private-sector innovation and slow job growth, making our economy less competitive. Part of this commitment is a government-wide audit of all the rules on the books, and an order to cut where reasonable and necessary. This sentiment is strongly echoed in both chambers of the newly elected 112th Congress, and in both political parties.¶ The general consensus is that government needs to be more efficient and more effective, keeping our public safety and welfare a priority while removing unnecessary or outdated regulatory overlap and barriers that slows investment, job creation, and economic growth.¶ Now is the time to apply this logic to Indian country. The administration and policymakers on both sides of the aisle should join forces to remove the bureaucratic barriers to rapid renewable energy deployment, and draw a game plan for reaching multiple goals. Fixing our current policies and offering appropriate incentives can streamline government processes, stimulate a new wave of investment in clean energy, and activate the economic potential of tribal lands, while stimulating the American entrepreneurial and innovation spirit. Moreover, these projects have sizable benefits for both Indian country and the rest of the nation. Here are a few ideas to start with:¶ Promote interagency and federal tribal coordination. Immediate efficiency can be achieved by designating one lead agency to oversee renewable energy projects on tribal lands so that existing processes would be streamlined and duplicative ones eliminated, mitigating a slow and costly process for development. Overlapping responsibilities and potential conflicts between the Department of Interior and the Department of Energy, in particular, need to be resolved. In addition, agencies should establish a tribal advisory body to ensure meaningful tribal participation in this work.¶ Ensure tribal access to the national electricity grid. Tribes must be included in the planning and expansion of our national electricity grid so their projects can “plug in” without unfair added expenses. Tribes should be explicitly represented in national, regional, and state planning processes.¶ Enable tribes to develop their energy resources. Tribes must have access to production and investment tax credits already on the books and available to all other states. Agencies should also eliminate fees that apply only to projects undertaken on tribal lands. These two relatively easy fixes would go a long way toward jumpstarting a renewable energy renaissance in the Native American community.¶ Empower tribes to conduct preliminary clean energy feasibility studies on their lands either internally or through a third party. Presently all preliminary clean energy work, such as land appraisals needs to be done through the Department of the Interior, which creates substantial backlog. Allowing tribes to conduct their own studies either internally or through a third party would expedite this process substantially.¶ Provide smart financing incentives for tribal projects. Energy Secretary Steven Chu has already begun championing a process to promote tribal energy development with financing to support the evaluation, development, and deployment of energy efficiency and renewable energy projects on tribal lands through the Tribal Energy Program. These programs should be enhanced to provide valuable start-up funds for projects that will have multiple co-benefits and pay dividends many times over.¶ Today, the tribes are ready and willing to be key contributors to this nation’s “Sputnik moment.” Part of this effort will include our government removing barriers that slow industry and innovation, and introducing smart policies that unleash the creative and entrepreneurial spirit that has made American the world power it is today. Another equally important part of our economic recovery will depend on how well we utilize our domestic resources and activate the full potential of our human capital–especially those communities that have been hit hardest by the recession. A bipartisan effort to cut through the red tape will clear the way for them to thrive and strengthen their people, and thus make America as a whole stronger.

#### Winners win

Marshall and Prins 11 (BRYAN W, Miami University and BRANDON C, University of Tennessee & Howard H. Baker, Jr. Center for Public Policy, “Power or Posturing? Policy Availability and Congressional Influence on U.S. Presidential Decisions to Use Force”, Sept, Presidential Studies Quarterly 41, no. 3)

Presidents rely heavily on Congress in converting their political capital into real policy success. Policy success not only shapes the reelection prospects of presidents, but it also builds the president’s reputation for political effectiveness and fuels the prospect for subsequent gains in political capital (Light 1982). Moreover, the president’s legislative success in foreign policy is correlated with success on the domestic front. On this point, some have largely disavowed the two-presidencies distinction while others have even argued that foreign policy has become a mere extension of domestic policy (Fleisher et al. 2000; Oldfield and Wildavsky 1989) Presidents implicitly understand that there exists a linkage between their actions in one policy area and their ability to affect another. The use of force is no exception; in promoting and protecting U.S. interests abroad, presidential decisions are made with an eye toward managing political capital at home (Fordham 2002).

### 2AC Elections

#### Plan happens in lame duck – no link

#### Romney win---national polls best---state polls suck

Horowitz 10/26—writes for the Madison Project (Daniel, A Wide Electoral/Popular Vote Split Won’t Happen, [www.redstate.com/2012/10/26/a-wide-electoralpopular-vote-split-wont-happen/](http://www.redstate.com/2012/10/26/a-wide-electoralpopular-vote-split-wont-happen/))

There is an emerging narrative percolating throughout the political world; the prospect that Romney could win the popular vote but lose the Electoral College. The theory is predicated on the seemingly contradictory data between state and national polls. National polls seem to show Romney with a consistent 2-4% lead, while state polls show the candidates tied or Obama slightly ahead in Ohio, Iowa, and Wisconsin.¶ Some analysts are attempting to harmonize the state and national polls by theorizing that Romney’s national lead is driven by historic gains among whites in red states and a strong showing in Pennsylvania and Michigan. They suggest that ultimately the Electoral College boils down to Ohio (or Wisconsin, if Romney loses Ohio), a state where Obama’s much-vaunted ground game and oversaturation of ads could flip the state and the entire election to Obama.¶ This analysis is dead wrong. Either the state polls are correct, and this is a dog fight, or the national polls are correct, and this is a Romney win. The both cannot reflect reality.¶ It’s not just that the national polls show Romney ahead by 3%; it’s that 3 respected, yet diverse, national polls converged yesterday on the exact same number in one day – Romney 50% Obama 47% (today Gallup is Romney +5 and ABC/WaPost is Romney +1). So Romney is at 50% and the incumbent is at 47% (how ironic!) with undecided voters likely to break against him in an election defined by the stagnating economy. But it’s more than that. The Washington Post poll has Romney leading by 19-20 among Independents; Rasmussen shows him with a 17-point lead. Romney is now crushing Obama on the economy and even leading in favorability. It is almost impossible to lose the Electoral College under normal circumstances when leading by more than 1%

nationally. It’s certainly impossible to lose when polling this well in all the internals.¶ In order for Romney to win by such margins in the popular vote, yet lose the Electoral College, he would have to outperform Bush in a number of non-swing-states, though he is unlikely to do so.¶ The math doesn’t add up.¶ Bush won the popular vote by 2.46% in 2004. In order to assume that Romney wins by roughly the same margin as Bush (or probably more, based on the internal numbers of the national polls), yet loses the Electoral College, one has to find a number of places where Romney outperforms Bush. But look around the map. Bush did really well in red states and probably won a number of them by more than Romney will. Bush won Montana by 21 points – something Romney will not do. The latest Rasmussen poll had him up just 8.¶ What about the blue states? People forget that Bush did pretty well in many Democrat states. He came within 7.6 in Delaware; 6.7 in NJ, 4 in Oregon, 3.5 in MN, and 9 in Maine. Heck, he only lost California by 10 points – a somewhat unlikely outcome for Romney.¶ What about the swing states? He won CO by 4.5; VA by 8; FL by 5; and NC by a whopping 13. He even won New Mexico – a state that Romney will not come close to winning (unless the Gallup national poll is correct).¶ What about Romney dramatically overperforming in Wis, MI, and PA, yet still losing? Well, that’s already baked into Bush’s 2.46% national margin. He lost Wis. by the slimmest of margins, PA by 2.5, and MI by 3.5.¶ Across the board, this is a much better showing in many states than Romney is expected to win, even in the best case scenario. Yet, he still only won the popular vote by 2.46% overall. So the idea that Romney could match this margin or even more nationally, yet lose the Electoral College, but make up the difference by overperfroming Bush in a number of areas, is crazy talk. Where would those votes come from?¶ Bottom line: if Romney wins the popular vote by 2-3%, he will clearly run the table on all the swing states, and possibly come very close in MI or PA, if not win them outright. Oh, and what’s all that talk of ads running in Minnesota?¶ So what about the state polls? If you look at most of the samples, they are more Democratic than the 2008 turnout model. It’s becoming clear that the early voting, which is disproportionately comprised of Democrats, is distorting the likely voter screens of most state polls. That’s why they are all showing a high D turnout, despite the ubiquitous enthusiasm gap.¶ Additionally, notice how Romney’s surge has stalled out in the state polls even as it continues in the national polls. He has even stalled in some Colorado and Virginia polls, states where Obama is clearly losing. The stagnation in all the state polls began right around the time when early voting picked up in earnest. If we are to believe the national polls, which are hard to disregard due to the convergence, the only plausible theory about the divergence of state polling is that they are inflating Democrat strength by 2-4% due to early voting.¶ If you reconstruct a turnout model that is only slightly more favorable for Republicans than 2008, Romney is ahead in most of the important states. Take this Gravis Marketing poll of Iowa, for example. They show Obama up 4 points, but the party ID is D +6 (D 41, R 35, I 24). In 2008, it was D +1 (D 34, R 33, I 33), and in 2004 it was R +2 (D 34, R 36, I 30). Here’s the kicker: the poll shows Romney leading by 12 among independents. Remember that of all swing states, Republicans improved their voter registration edge the most in Iowa. Additionally, there is a tremendous enthusiasm gap. Yet, if we merely reconstruct the 2008 turnout, which was evenly split among all three affiliations, a 12-point Indy win would clearly tip the state to Romney.¶ We’re seeing the same thing with the latest ARG poll in Ohio. They have Obama up 49-47, yet Romney is winning Independents by a gargantuan 21 points. The sample is D+9, even though it was D+5 in 2008.¶ It’s becoming clear that the national polls could easily work with the state polling data if we adjust for the likely turnout distortions from early voting. To a certain extent, we are seeing a reflection of the national polling in the Rasmussen state polls that factor in respondents who are certain to vote. However, whether this theory is correct or not, one thing is certain: Romney will not win Independents nationally by 15-19 points and lose the Electoral College.

#### The Native American vote is hugely impactful in key swing states --- courting their vote can impact outcome

Terrance H. Booth 9-27, Sr. -- Tsimshian Tribe, 2012 Presidential Race Decided Upon Swing Vote States, OpEdNews, 9-27-12, <http://www.opednews.com/articles/2012-Presidential-Race-Dec-by-Terrance-H-BoothSr-120926-619.html> (\*\*\*ITALICS IN ORIGINAL\*\*\*)

"The 2012 Presidential election is very close can be decided upon 10 swing vote states; including: Politico identifies 10 swing states that will most likely decide the 2012 election. Obama leads in nine of them: Colorado, Florida, Iowa, Michigan, Nevada, New Hampshire, Ohio, Virginia, and Wisconsin. Romney leads Obama by one percent in the swing state of North Carolina." [1] ¶ The following states being targeted by Native Vote, National Congress of American Indian, a non-partisan and non-profit to educate and register new voters. Alaska Native and Native American population on voter education and registration for following states: Alaska, ***Florida, Michigan, Nevada***, North Dakota, South Dakota, Arizona, ***Iowa***, Minnesota, New Mexico, Oklahoma, Washington, ***Colorado***, Massachusetts, Montana, and ***North Carolina***, Oregon and ***Wisconsin*** where the voting numbers are increasing with efforts having the largest Alaska Native and Native American voter turnout in 2012 elections. The States in bold and in italics are the swing state **Native Vote is working upon which is six of the ten states both presidential candidates are targeting** with a close vote by both candidates the Alaska Native and **Native American voters are in a position to elect the** Office of the **President**. [2] ¶ "If these swing vote states hold up in an election that requires 270 out of 538 electoral votes to win a majority, Obama would gain 111 electoral votes to Romney's 15. States that appear solid or leaning for Obama give him an additional 221 electoral votes. Romney's solid or leaning state electoral votes total 191. These figures add up to 332 for Obama and 206 for Romney, more than enough to give Obama the winning total." [3] ¶ **Bloc voting is not new to Native American voters:** "Ridge to Johnson; the result was unsurprising. In the year, 2000 election in Washington State the Native American vote made a difference in the outcome of a new US Senator. Comment on the Native American participation after the election. The result in Washington State in 2000 **was not lost on Capitol Hill**. Whether it was Party strategists, Members of Congress, lobbyists, the media or the political commentaries, the message is that the Alaska Native and **Native Americans are** now important political players**.** Native Vote should be feared and/or courted, especially in states with a substantial Native population where a race could be close. [4] Alaska Native and Native American Voters let us make a resounding voice and let us be heard this election year.

#### Don’t be blackmailed by threats of elections apocalypse---causes political apathy

Taibbi 12 (Matt, journalist at Rolling Stone, How the Hype Became Bigger Than the Presidential Election, readersupportednews.org/opinion2/277-75/13893-focus-how-the-hype-became-bigger-than-the-presidential-election

What we Americans go through to pick a president is not only crazy and unnecessary but genuinely abusive. Hundreds of millions of dollars are spent in a craven, cynical effort to stir up hatred and anger on both sides. A decision that in reality takes one or two days of careful research to make is somehow stretched out into a process that involves two years of relentless, suffocating mind-warfare, an onslaught of toxic media messaging directed at liberals, conservatives and everyone in between that by Election Day makes every dinner conversation dangerous and literally divides families.

Politicians are much to blame for this, but we in the media have to take responsibility for the damage we do to the American psyche in the name of election coverage. At this very moment, there are people all over the country who are stocking up on canned goods and ammo for the apocalypse they believe will come if Obama is re-elected. For the broadcast business to be successful, viewers need to be not merely interested in our political melodramas, they have to be in an absolute state about them - emotionally invested in the outcome and frightened not to watch what happens next. And any person who's been subjected to 720 consecutive days of propaganda is not likely to take the news well if he gets the wrong result, whether it's a victory for Obama or for Romney. By that point, the networks have spent two years finding new ways each day to convince him that the world is going to disintegrate into some commie or Hitlerian version of Mad Max, to keep him coming back and watching ads.

The campaign should start and finish in six weeks, and there should be free TV access to both candidates. And it should be illegal to publish poll numbers. This isn't as crazy as it sounds - they actually had such a law in Russia while I lived there, and people were much happier. (Well, they were still miserable, because they were Russian, but at least they weren't stressing about poll numbers.) Think about it: Banning poll numbers would force the media to actually cover the issues. As it stands now, the horse race is the entire story - I can think of a couple of cable networks that would have to go completely dark tomorrow, as in Dan-Rather-Dead-Fucking-Air dark, if they had to come up with even 10 seconds of news content that wasn't centered on who was winning. That's the dirtiest secret we in the media have kept from you over the years: Most of us suck so badly at our jobs, and are so uninterested in delving into any polysyllabic subject, that we would literally have to put down our shovels and go home if we didn't have poll numbers we can use to terrify our audiences. Can you imagine if your favorite news network had to do stories like, "What is the Overseas Private Investment Corporation up to, and what do each of the candidates think about it?" That would be like asking Nineties-era baseball players to take the field without popping greenies - what, you mean play the game sober? Half the on-air talent would have to resign, or do ad work hawking reverse mortgages.

It obviously matters who gets to be president. And it's perfectly valid for us media types to advocate for the candidate we think is more qualified, based on our reporting. But the hype has gotten so out of control, it's become bigger than the presidency itself. In every race there are now not two but three dominating figures - the Democrat, the Republican and The Process, and we're raising whole generations who hate The Process far more than they like either of the candidates. Mainly for grim commercial reasons, we in the media manipulate people to stay wired on hate and panic-focused on the race for every waking moment, indifferent to how much this depresses the hell out of everyone. In doing so, we rob people of their patriotism and their desire to vote. If The Process is so clearly wrong, how right can the candidates be?

If we did this right, people would come out of presidential elections exhilarated, maybe even stoked to get involved in their local races for county sheriff or D.A. (Such races would likely have more of an impact on their day-to-day lives: For the most part, when it comes to our daily routines, the president might as well be on Mars.) Instead, most of us come out of the election exhausted, in desperate need of a couple of Ambiens and determined to spend the next two years buried in Hulu reruns, afraid to even pass a news channel while couch-surfing our way to Storage Wars or a Lifetime movie.

What makes us feel pessimistic about the world, ultimately, is the way the media encourage us to believe that our fate hangs on the every move of the promise-breaking, terminally disappointing Teflon liars in Washington. And that's a shame, because feeling optimistic shouldn't require turning off the TV or tuning out The Process. What we are witnessing, after all, is the world's greatest contest for power, an amazing fairy tale full of iconic moments that we'll watch no matter how much Sean Hannity or Chris Matthews screams at us. But it would be awesome, next time, if we could find a way to turn down the volume.

#### Energy won’t switch votes even if they campaign on it

Farnam 12 T.W. is a writer at WashPost politics. “Energy ads flood TV in swing states,” 6/27, http://www.washingtonpost.com/politics/energy-ads/2012/06/27/gJQAD5MR7V\_story.html

**Energy issues don’t spark much excitement among voters**, ranking below health care, education and the federal budget deficit — not to mention jobs and the economy.¶ And yet those same voters are being flooded this year with campaign ads on energy policy. Particularly in presidential swing states, the airwaves are laden with messages boosting oil drilling and natural gas and hammering President Obama for his support of green energy. The Cleveland area alone has heard $2.7 million in energy-related ads.¶ The disconnect between what voters say they care about and what they’re seeing on TV lies in the money behind the ads, much of it coming from oil and gas interests. Those funders get the double benefit of attacking Obama at the same time they are promoting their industry.¶ Democrats also have spent millions on the subject, defending the president’s record and tying Republican candidate Mitt Romney to “Big Oil.”¶ Overall, more than $41 million, about one in four of the dollars spent on broadcast advertising in the presidential campaign, has gone to ads mentioning energy, more than a host of other subjects and just as much as health care, according to ad-tracking firm Kantar Media/Cmag.¶ In an election focused heavily on jobs and the economy, all of this attention to energy seems a bit off topic. But the stakes are high for energy producers and environmentalists, who are squared off over how much the government should regulate the industry. And attention has been heightened by a recent boom in production using new technologies such as fracking and horizontal drilling, as well as a spike in gas prices this spring just as the general election got underway.¶ When asked whether energy is important, more than half of voters say yes, according to recent polls. But asked to rank their top issues, **fewer than 1 percent mention energy.**

### FoPo Impact

#### Romney’s the same as Obama, won’t implement outlandish pledges, and Congress checks

Clara Marina O'Donnell 12, Research fellow, CER and non-resident fellow The Brookings Institution, "What Romney would mean for Europe," October-November, CER Bulletin, Issue 86, www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/bulletin86\_cod\_article2-6179.pdf

As the US elections approach, Mitt Romney’s sometimes bellicose rhetoric on national security is raising European eyebrows. But many in Washington believe that if the Republican contender were to become president, US policies might not differ much from the last four years. Despite Romney’s strong criticism of Barack Obama, some of the challenger’s views on foreign policy issues are similar to the president’s. And the points on which they disagree may matter little: US presidents rarely implement their more outlandish campaign pledges. In any case, Congress will continue to set limits on US policy on issues such as the Arab-Israeli conflict and nuclear arms control, whoever the president. But, if Mitt Romney genuinely believes much of his foreign policy rhetoric, a Republican victory in November could mean difficult times for transatlantic relations.¶ The former governor has, for example, identified Russia as America’s “number one geopolitical foe”. He considers Obama’s ‘reset’ with Moscow to have been a failure. He opposed ratification of the New START treaty on strategic weapons reductions because it supposedly allows Russia to expand its nuclear arsenal – Romney has notably warned that the treaty, unprecedentedly, allows Russia to mount intercontinental ballistic missiles on bombers. The Republican candidate has also strongly criticised Obama’s missile defence plan as less technologically reliable and ambitious than that of George W Bush, and for downgrading the involvement of US allies Poland and the Czech Republic.¶ Europeans, however, welcomed the US-Russia reset. Many of them worry about Vladimir Putin’s authoritarianism and non-co-operation on Syria. But most Europeans think the reset has made Russia more helpful on Afghanistan and Iran. They like New START, and many EU governments will have been confused by Romney’s concerns about bombers equipped with intercontinental ballistic missiles. Indeed it would be impossible for a bomber to take off with such a heavy load. Even EU countries that are more hawkish on Russia are likely to see Romney’s views as unnecessarily antagonistic. Initial concerns in Poland and the Czech Republic about the Obama administration’s commitment to their security have been largely addressed, after the US placed fighter jets in central Europe and started holding regular military exercises there. And Poland has been working on its own reset with Russia in recent years.¶ Romney promises to declare China a currency manipulator in order to encourage Beijing to revalue the renminbi (believing that its level hurts US industry). Europeans find many of China’s trade practices frustrating, but try to avoid a confrontational approach with Beijing. EU governments would be particularly keen to avoid a US-China trade war in the midst of the eurozone crisis.¶ While most European countries have long wanted to end military operations in Afghanistan, Romney has criticised the Obama administration for leaving too soon and trying to talk to the Taliban. Romney wants to keep the detention camp at Guantanamo Bay and ‘enhanced interrogation techniques’, while Europeans have welcomed Obama’s efforts to eliminate both.¶ On Iran, Romney has made clear his willingness to use force to stop Tehran from developing a nuclear weapon – while most Europeans would not go that far. Romney’s rhetoric on the Middle East peace process is also at odds with European views. The Republican contender has opposed President Obama’s attempts to stop Israel building illegal settlements – efforts which have been applauded by most EU states. Romney has also pledged to reduce financial assistance to the Palestinians if they form a unity government that includes Hamas. The EU on the other hand, despite its dislike of the militant group, is willing to work with a Hamas that is reconciled to Fatah and renounces using force against Israel.¶ But on several foreign policy issues (including those above), Romney’s views appear changeable and somewhat contradictory – perhaps because his team includes both neoconservatives who backed George W Bush’s wars and realists with a more pragmatic perspective. So some of Romney’s policy recommendations are in fact quite similar to those of the current US government. Like Romney, Obama says that he would – if necessary – use force to stop Iran obtaining a nuclear weapon. Like Obama, Romney would withdraw US troops from Afghanistan in 2014. Like the current administration, Romney is against US military intervention in Syria unless Bashar al-Assad’s regime resorts to chemical and biological weapons. Romney is even willing to co-operate with Russia on missile defence as long as Russia is not given a ‘veto’ on US security – a position shared by Obama.¶ In any case, how many of his controversial policies would Romney implement if he won the election? Many presidential contenders, after all, have walked away from campaign pledges: Obama also promised to label China a currency manipulator, while George W Bush was against using US troops for nation-building.¶ Mitt Romney already has a track-record of about-turns on policy. Although he now questions whether humans are responsible for climate change, he previously strove to reduce greenhouse gas emissions. And although Romney now lists Obama’s raid against Bin Laden among the president’s few foreign policy successes, the challenger opposed covert operations in Pakistan when Obama first voiced the idea in 2007.¶ Romney’s endorsement of increasingly hawkish objectives abroad (and conservative policies at home) seems designed to win over sections of the Republican party which were uncomfortable with his initially moderate positions. The former governor’s policies and views could change again, once today’s rhetoric has served its purpose. Given the candidate’s malleability, and his pledge to strengthen ties with America’s allies, the Europeans may have an opportunity to shape a President Romney’s foreign policy views, on issues such as Russia and Iran.¶ But even then, Mitt Romney’s room for manoeuvre would probably be constrained by US domestic politics. Over the last four years, an uncompromising Congress has hampered President Obama’s efforts on numerous domestic and foreign fronts – including further cuts in nuclear weapons and shifting US policy towards the Middle East peace process. Republicans within Congress might be more conciliatory towards a Republican President. But US politics – which two leading US scholars, Thomas Mann and Norman Ornstein, have characterised as “utterly dysfunctional” – are set to remain ideologically polarised, notwithstanding who wins the presidential elections.

### K

#### Don’t let the perfect be the enemy of the good

Royster 12—Professor of Law and Co-Director, Native American Law Center, University of Tulsa College of Law (Judith, Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures, 31 Stan. Envtl. L.J. 91)

There is no perfect solution to streamlining renewable energy [\*128] development. The "best" approach, certainly, would be for tribes to develop the capacity and capability to engage in energy development directly, without the need to invoke any federal statutory authority. While several tribes are moving in that direction, it is an unrealistic short-term expectation for most tribes. For the near future, at least, the vast majority of Indian tribes seeking to develop their renewable energy resources will need to partner with non-Indian companies in one form or another. Renewable energy development on tribal lands will thus be dependent on statutory authority and, most likely, on secretarial approval at some point in the development process. The proposals that follow address these two concerns. First, I propose a fairly simple amendment to the Indian Mineral Development Act that would allow tribes to take active roles in the development of their renewable energy resources. And second, I propose a few suggestions for streamlining the secretarial approval process under the IMDA. These suggestions are necessarily imperfect. Like many of the recent statutes and proposed pieces of legislation, they represent a step in the right direction. But they are equally subject to the criticism that they don't go far enough. However, these proposals are offered in the spirit of what perhaps can be done, not what should be done. And offered as well with the belief that continued progress toward tribal self-determination in energy development is preferable to immobility pending a perfect solution.

#### Perm = anti-colonial wind development

Bosworth 10—Honors Projects Environmental Studies Department, Macalester College (Kai, Straws in the Wind: Race, Nature and Technoscience in Postcolonial South Dakotan Wind Power Development, http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1007&context=envi\_honors&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fstart%3D10%26q%3D%2522Technologies%2Bof%2BExistence%2522%26hl%3Den%26as\_sdt%3D0%2C14#search=%22Technologies%20Existence%22)

Importantly, the DOE’s Tribal Energy Guide is not the only guide, and nor do users have to follow its prescriptions. In February 2010, the Native-led nonprofit Honor the Earth released Sustainable Tribal Economies: A Guide to Restoring Energy and Food Sovereignty in Native America (http://www.honorearth.org). The booklet outlines a different vision for wind power and other renewable energy development in Native American communities. First, the booklet frames the challenges of climate change, dirty energy, and fuel poverty on Native communities. Each of these systems is part of a wider colonial political economy. But through a “re-localization” of tribal economies, tribes can build energy sovereignty and self-sufficiency. Responsibility for development is directed towards individuals and institutions, but importantly, many of the policies that govern and limit Native American wind power ownership and financing are discussed. The booklet is realistic and pragmatic about possibilities and pitfalls. The Sustainable Tribal Economies booklet also develops its own set of norms of energy development and indigenous identity. The booklet at times relies upon similar romantic articulations of Ecological Indians. But in its comparison with the DOE Tribal Energy Guide, the contingencies of the DOE’s conditions of possibility are exposed to critique. Through the Sustainable Tribal Economies guide, a wider field of possibilities for anti-colonial wind power development is created.

#### No link---the plan subverts contemporary capitalist development by rendering it submissible to Native culture---the K inscribes a false distinction b/w modern and traditional that effaces Natives

O’Neill 4—Associate Professor, Utah State (Collen, Rethinking Modernity and the Discourse of Development in American Indian History, an Introduction, http://www.upcolorado.com/excerpts/9780870818592.pdf)

Modernity is a culturally specific, historical construct, yet the concept remains stubbornly reified as some sort of natural historical phenomenon. As Joseph Gusfield described in 1967, “We cannot easily separate modernity and tradition from some specific tradition and some specific modernity, some version which functions ideologically as a directive. The modern comes to the traditional society as a particular culture with its own traditions.” 39 The use of universal categories of capitalist development defines a particular kind of historical narrative. Theoretical paradigms that posit subsistence ways of life against proletarian experiences and the traditional versus the modern render historically invisible economic systems that do not fit within those dualistic parameters. Recognizing the coexistence of modernity and tradition within the same historical time and space and refusing to think of culture as purely a terrain of resistance reveals a much more complicated and compelling story. As historian Kathy Walker suggests from her study of Chinese peasants, “Alternative pasts indicate a counter-appropriation of history that simply cannot be reduced to a logic of capitalist development or universalized modernity. They must be explained on their own terms.” 40 Reaching for historical specificity does not mean ignoring the bigger picture or abandoning the work of capitalist theory. On the contrary, moving beyond the “discourse of development,” to use Arturo Escobar’s term, means creating new theoretical models to help make sense out of the multiple histories that are bound to emerge once we remove the paradigmatic blinders.¶ American historians can learn a great deal from scholars studying the ways rural peoples in the Third World have shaped and been shaped by capitalist development. Peasant and subaltern studies scholars have chipped away at assumptions that had previously characterized peasant societies as undifferentiated, or “traditional,” and peasant uprisings as reactive and conservative. In effect, they opened Marx’s “sack of potatoes” to look inside. What they found were complex societies divided along wealth, gender, and age hierarchies and united by kinship and other socially constructed identities. Third World social scientists found that peasants, a social category once defined as “precapitalist,” existed within capitalist structures as well as on the periphery of the world system. These scholars wondered how the internal dynamics of peasant cultures mediated their interactions with the world economy, how they resisted absorption into the capitalist market, as well as how they accommodated to it. This type of scholarship produced a nuanced view that expanded definitions of resistance beyond collective uprising and revolution to oppositional popular culture, nationalism, gender antagonism, and subtle subversion encoded in “hidden transcripts.” 41 Still, revealing the agency of historical actors does not necessarily shed light on the power structures within which they operate. However, these types of studies revealed how complex the dance between power structures and historical agents can be. 42 ¶ NATIVE PATHWAYS: COMMERCIAL INCORPORATION¶ The capitalist market has taken its toll on American Indian communities, particularly since incorporation has usually meant a devastating loss of land and other natural resources—elements of central economic and cultural significance. Yet the way indigenous communities recovered in the twentieth century shows a creative engagement with the market. By contesting the terms of incorporation, either as laborers or as tribal capitalists, American Indians are challenging the cultural assumptions of modernity itself.¶ Native Pathways reflects much of the exciting scholarship done by Third World scholars since the mid-1980s. This volume helps to flesh out what historian Florencia Mallon has described as “that skeleton historians call the development of capitalism.” She examines how Andean peasants used “traditional relationships” to shape their villages’ transition to a capitalist economy, and in the process those “weapons of the weak” transformed the villagers and their communities. 43 Paul Rosier’s chapter on Blackfeet oil leasing demonstrates the importance of understanding the “culture of political economy” implicit in the incorporation of indigenous societies into the capitalist market economy. Even though American Indians do not dictate the terms of their incorporation, they may in fact shape its impact. For example, Rosier shows that the revenue earned from oil leasing did not necessarily subvert Blackfeet culture. Instead, tribal members incorporated it into their established cultural practices, such as giveaways, which helped to “mitigate against incipient class conflict” through a redistribution of tribal income. Cultural practices changed, but they remained no less Blackfeet in their reincarnation.¶ Whereas cultural practices might temper the effects of incorporation, Tressa Berman describes ways informal women’s networks served as a buffer against the surrounding capitalist market, helping to “spread the risks of survival across households.” American Indian women on the Fort Berthold Reservation intermixed their production for the market with ceremonial use so that those realms have become interdependent. Mandan, Hidatsa, and Arikara women pooled resources such as commodity food issued by the federal government, wages, or star quilts and redistributed them for ceremonial purposes or to aid kin who were in need. As a result, Berman states, “[in] both their structural adaptation and their community-based resistance the core cultural life remains intact, such that new strategies emerge from the maintenance of traditional practices.”¶ David Arnold’s chapter on Tlingit fishermen describes a similar cultural dynamic. Although development of a commercial salmon industry in southeastern Alaska drew Tlingits into the market economy, it did not necessarily undermine their subsistence practices. Indeed, customary fishing traditions and seasonal cannery work allowed Tlingits to retain some autonomy from the market. And like the Blackfeet, the revenue they earned in the commercial market and from wages in the canneries could be redistributed through ceremonial activities and community feasts.¶ David La Vere’s analysis of the Kiowa-Comanche-Apache Business Committee in the early twentieth century shows a similar use of “tradition” to build, protect, and enhance tribal resources. In this example, kinship obligations remained central to the goals of the Business Committee “as a way of navigating the white man’s road.” In this vein, the council developed a process of adopting people into the tribes—a well-worn tradition among the Comanche and the Kiowa—as a way to build tribal membership and resources. Jeffrey Shepherd’s history of the Hualapai describes a similar dynamic. Like the wealthier peasants Mallon describes in Yanamarca Valley, who drew on their influence at the village level to fashion a system of wage-based, commercial agricultural from a kinship-based system, participation in the market economy as labor contractors provided Hualapai elites with a new avenue of power and prestige. According to Shepherd, incorporation into the market economy actu-ally encouraged tribal cohesion and strengthened Hualapai identity instead of eroding it. 44¶ The history of American Indians’ relationship to the developing capitalist market involves multiple strands of analysis. Although it is important to think about how Indians responded to the cultural and economic demands of incorporation and how they fashioned strategies that rejected the incipient cultural logic of twentieth-century capitalism, the more compelling story involves the new institutions they created out of the conflict. Duane Champagne’s chapter raises these issues in important ways. As he suggests, although American Indians formed tribal governments under pressure from the federal government, those tribal councils did not always behave in the ways the federal government had hoped. He argues that in fact, many “[t]ribal governments continue to operate within the holistic orientations of native community life. Unlike U.S. society, institutional relations among economy, community, kinship, and politics are not separated.” For example, whereas the federal government created many of the modern tribal councils in an effort to extract valuable natural resources such as oil, timber, or other resources Western capitalists coveted, the tribal councils became something else indeed. Champagne’s examples show that American Indians embraced capitalism yet developed a system that embodies native values. As American Indians have been drawn into the capitalist economy, they have also been able to transform the institutions originally intended to control and exploit them.¶ Jessica Cattelino’s and Nicolas Rosenthal’s chapters on gaming offer interesting examples of what tribal capitalism looks like. Although American Indian sovereignty and the morality of gaming dominate the public debate, how and why those operations are “different” from the gaming establishments in Las Vegas or Atlantic City are often overlooked. Yet as Cattelino and Rosenthal demonstrate, American Indians have crafted a new pathway of development. For the most part, American Indians have crafted capitalist endeavors that redistribute and redirect profits for community benefit. The success of gaming is unparalleled. However, these chapters show that gaming did not emerge in a vacuum. The Seminoles and the southern California tribes developed gaming enterprises as one in a long line of development initiatives.

#### The alternative is complicit with the ongoing domination of Native peoples and reentrenches colonialism---the aff is necessary to reorient class relations

Churchill 8—former prof @ UC Boulder (Ward, I Am Indigenist, www.zcommunications.org/i-am-indigenist-by-ward-churchill)

Leaving aside questions concerning the validity of various treaties, the beginning point for any indigenist endeavor in the United States centers, logically enough, in efforts to restore direct Indian control over the huge portion of the continental United States that was plainly never ceded by native nations. Upon the bedrock of this foundation, a number of other problems integral to the present configuration of power and privilege in North American society can be resolved, not just for Indians, but for everyone else as well. It is probably impossible to solve, or even to begin meaningfully addressing, certain of these problems in any other way. But still, it is, as they say, "no easy sell" to convince anyone outside the more conscious sectors of the American Indian population itself of the truth of this very simple fact.¶ ¶ In part, uncomfortable as it may be to admit, this is because even the most progressive elements of the North American immigrant population share a perceived commonality of interest with the more reactionary segments. This takes the form of a mutual insistence upon an imagined "right" to possess native property, merely because they are here, and because they desire it. The Great Fear is, within any settler-state, that if indigenous land rights are ever openly acknowledged, and native people therefore begin to recover some significant portion of their land, the immigrants will correspondingly be dispossessed of that which they have come to consider "theirs" (most notably, individual homes, small farms, ranches and the like).¶ ¶ Tellingly, every major Indian land recovery initiative in the United States during the second half of the twentieth century—the Western Shoshone, those in Maine, the Black Hills, the Oneida claims in New York State are prime examples—has been met by a propaganda barrage from right-wing organizations ranging from the Ku Klux Klan to the John Birch Society to the Republican Party warning individual non-Indian property holders of exactly this "peril."36¶ ¶ I will debunk some of this nonsense in a moment, but first I want to take up the posture of self-proclaimed leftist radicals in the same connection. And I will do so on the basis of principle, because justice is supposed to matter more to progressives than to rightist hacks. Let me say that the pervasive and near-total silence of the left in this connection has been quite illuminating. Non-Indian activists, with only a handful of exceptions, persistently plead that they cannot really take a coherent position on the matter of Indian land rights because, "unfortunately," they are "not really conversant with the issues" (as if these are tremendously complex).¶ ¶ Meanwhile, they do virtually nothing, generation after generation, to inform themselves on the topic of who actually owns the ground they are standing on. The record can be played only so many times before it wears out and becomes just another variation of "hear no evil, see no evil."

At this point, it does not take Einstein to figure out that the left does not know much about such things because it has never wanted to know, or that this is so because it has always had its own plans for utilizing land it has no more right to than does the status quo it claims to oppose.¶ The usual technique for explaining this away has always been a sort of pro forma acknowledgment that Indian land rights are of course "really important stuff" (yawn), but that one "really does not have a lot of time" to get into it (I'll buy your book, though, and keep it on my shelf even if I never read it). Reason? Well, one is just "overwhelmingly preoccupied" with working on "other important issues" (meaning, what they consider to be more important things). Typically enumerated are sexism, racism, homophobia, class inequities, militarism, the environment, or some combination. It is a pretty good evasion, all in all. Certainly, there is no denying any of these issues their due; they are all important, obviously so. But more important than the question of land rights? There are some serious problems of primacy and priority imbedded in the orthodox script.¶ To frame things clearly in this regard, let us hypothesize for a moment that all of the various non-Indian movements concentrating on each of these issues were suddenly successful in accomplishing their objectives. Let us imagine that the United States as a whole were somehow transformed into an entity defined by the parity of its race, class and gender relations, its embrace of unrestricted sexual preference, its rejection of militarism in all forms and its abiding concern with environmental protection (I know, I know, this is a sheer impossibility, but that is my point).¶ When all is said and done, the society resulting from this scenario is still, first and foremost, a colonialist society, an imperialist society in the most fundamental sense and with all that this implies. This is true because the scenario does nothing at all to address the fact that whatever happens is on someone else's land, not only without their consent, but with an adamant disregard for their rights to the land. Hence, all it means is that the immigrant or invading population has rearranged its affairs in such a way as to make itself more comfortable at the continuing expense of indigenous people. The colonial equation remains intact and may even be reinforced by a greater degree of participation and vested interest in maintenance of the colonial order among the settler population at large.37¶ ¶ The dynamic here is not very different from that evident in the American Revolution of the late eighteenth century, is it? And we all know very well where that led. Should we therefore begin to refer to socialist imperialism, feminist imperialism, gay and lesbian imperialism, environmentalist imperialism, Afroamerican and la Raza imperialism? I would hope not.38 I would hope this is all just a matter of confusion, of muddled priorities among people who really do mean well and who would like to do better. If so, then all that is necessary to correct the situation is a basic rethinking of what it is that must be done, and in what order. Here, I would advance the straightforward premise that the land rights of "First Americans" should be a priority for anyone seriously committed to accomplishing positive change in North America.¶ ¶ But before I suggest everyone jump up and adopt this priority, I suppose it is only fair that I investigate the converse of the proposition: If making things like class inequity and sexism the preeminent focus of progressive action in North America inevitably perpetuates the internal colonial structure of the United States, does the reverse hold true? I will state unequivocally that it does not.¶ ¶ There is no indication whatsoever that a restoration of indigenous sovereignty in Indian Country would foster class stratification anywhere, least of all in Indian Country. In fact, all indications are that when left to their own devices, indigenous peoples have consistently organized their societies in the most class-free manner. Look to the Haudenosaunee (Six Nations Iroquois Confederacy) for an example. Look to the Muscogee (Creek) Confederacy. ¶ Look to the confederations of the Yaqui and the Lakota, and those pursued and nearly perfected by Pontiac and Tecumseh. They represent the very essence of enlightened egalitarianism and democracy. Every imagined example to the contrary brought forth by even the most arcane anthropologist can be readily offset by a couple of dozen other illustrations along the lines of those I just mentioned.39¶ ¶ Would sexism be perpetuated? Ask the Haudenosaunee clan mothers, who continue to assert political leadership in their societies through the present day. Ask Wilma Mankiller, recent head of the Cherokee Nation, a people who were traditionally led by what were called "Beloved Women." Ask a Lakota woman—or man, for that matter—about who owned all real property in traditional society, and what that meant in terms of parity in gender relations. Ask a traditional Navajo grandmother about her social and political role among her people. Women in most traditional native societies not only enjoyed political, social, and economic parity with men, but they also often held a preponderance of power in one or more of these spheres.¶ ¶ Homophobia? Homosexuals of both genders were, and in many settings still are, deeply revered as special or extraordinary, and therefore spiritually significant, within most indigenous North American cultures. The extent to which these realities do not now pertain in native societies is exactly the extent to which Indians have been subordinated to the morés of the invading, dominating culture. Insofar as restoration of Indian land rights is tied directly to the reconstitution of traditional indigenous social, political, and economic modes, one can see where this leads; the Indian arrangements of sex and sexuality accord rather well with the aspirations of feminism and gay rights activism.40¶ ¶ How about a restoration of native land rights precipitating some sort of "environmental holocaust?" Let us get at least a little bit realistic here. If one is not addicted to the fabrications of Smithsonian anthropologists about how Indians lived,41 or George Weurthner's eurosupremicist Earth First! fantasies about how we beat all the woolly mammoths and mastodons and sabertoothed cats to death with sticks,42 then this question is not even on the board. I know it has become fashionable among Washington Post editorialists to make snide references to native people "strewing refuse in their wake" as they "wandered nomadically" about the "prehistoric" North American landscape.43 What is this supposed to imply? That we, who were mostly "sedentary agriculturalists" in any event, were dropping plastic and aluminum cans as we went?¶ ¶ As I said, let us get real. Read the accounts of early European invaders about what they encountered: North America was invariably described as being a "pristine wilderness" at the point of European arrival, despite the fact that it had been occupied by fifteen or twenty million people enjoying a remarkably high standard of living for nobody knows how long. 40,000 years? 50,000 years?44 Longer? Now contrast that reality to what has been done to this continent over the past couple of hundred years by the culture Weurthner, the Smithsonian and the Post represent, and you tell me about environmental devastation.45¶ ¶ That leaves militarism and racism. Taking the last first, there really is no indication of racism in traditional indigenous societies. To the contrary, the record reveals that Indians habitually intermarried between groups and frequently adopted both children and adults from other groups. This occurred in precontact times between Indians, and the practice was broadened to include those of both African and European origin, and ultimately Asian origin as well, once contact occurred. Those who were naturalized by marriage or adoption were considered members of the group, pure and simple. This was always the native view.46¶ The Europeans and subsequent Euroamerican settlers viewed things rather differently, however, and foisted off the notion that Indian identity should be determined primarily by "blood quantum," an outright eugenics code similar to those developed in places like nazi Germany and apartheid South Africa. Now, that is a racist construction if there ever was one. Unfortunately, a lot of Indians have been conned into buying into this anti-Indian absurdity, and that is something to be overcome. But there is also solid indication that quite a number of native people continue to strongly resist such things as the quantum system.47¶ ¶ As to militarism, no one will deny that Indians fought wars among themselves both before and after the European invasion began. Probably half of all indigenous peoples in North America maintained permanent warrior societies. This could perhaps be reasonably construed as "militarism." But not, I think, with the sense the term conveys within the European/Euroamerican tradition. There were never, so far as anyone can demonstrate, wars of annihilation fought in this hemisphere prior to the Columbian arrival. None. In fact, it seems that it was a more-or-less firm principle of indigenous warfare not to kill, the object being to demonstrate personal bravery, something that could be done only against a live opponent. There is no honor to be had in killing another person, because a dead person cannot hurt you. There is no risk.¶ ¶ This is not to say that nobody ever died or was seriously injured in the fighting. They were, just as they are in full-contact contemporary sports like football and boxing. Actually, these kinds of Euroamerican games are what I would take to be the closest modern parallels to traditional Indian warfare. For us, it was a way of burning excess testosterone out of young males and not much more. So, militarism in the way the term is used today is as alien to native tradition as smallpox and atomic bombs.48¶ ¶ Not only is it perfectly reasonable to assert that a restoration of native control over unceded lands within the United States would do nothing to perpetuate such problems as sexism and classism, but the reconstitution of indigenous social standards that this would entail stands to free the affected portions of North America from such maladies altogether. Moreover, it can be said that the process should have a tangible impact in terms of diminishing such things elsewhere. The principle is this: Sexism, racism, and all the rest arose here as a concomitant to the emergence and consolidation of the eurocentric nation-state form of sociopolitical and economic organization. Everything the state does, everything it can do, is entirely contingent upon its maintaining internal cohesion, a cohesion signified above all by its pretended territorial integrity, its ongoing domination of Indian Country.¶ Given this, it seems obvious that the literal dismemberment of the nation-state necessary for Indian land recovery correspondingly reduces the ability of the state to sustain the imposition of objectionable policies within itself. It follows that realization of indigenous land rights serves to undermine or destroy the ability of the status quo to continue imposing a racist, sexist, classist, homophobic, militaristic order upon non-Indians.¶ A brief aside: Anyone with doubts as to whether it is possible to bring about the dismemberment from within of a superpower state in this day and age, ought to sit down and have a long talk with a guy named Mikhail Gorbechev. It would be better yet if one could chew the fat with Leonid Breznev, a man who we can be sure would have replied in all sincerity, only twenty years ago, that this was the most outlandish idea he'd ever heard. Well, look on a map today, and see if you can find the Union of Soviet Socialist Republics. It ain't there, folks. Instead, you are seeing—and you will see it more and more—the reemergence of the very nations Léon Trotsky and his colleagues consigned to the "dustbin of history" clear back at the beginning of the century. These megastates are not immutable. They can be taken apart. They can be destroyed. But first we have to decide that we can do it and that we will do it.¶ ¶ So, all things considered, when indigenist movements like AIM advance slogans like "U.S. Out of North America," non-Indian radicals should not react defensively. They should cheer. They should see what they might do to help. When they respond defensively to sentiments like those expressed by AIM, what they are ultimately defending is the very government, the very order they claim to oppose so resolutely. And if they manifest this contradiction often enough, consistently enough, pathologically enough, then we have no alternative but to take them at their word: that they really are at some deep level or another aligned, all protestations to the contrary notwithstanding, with the mentality that endorses our permanent dispossession and disenfranchisement, our continuing oppression, our ultimate genocidal obliteration as self-defining and self-determining peoples. In other words, they make themselves part of the problem rather than becoming part of the solution.

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Kronk 12—Assistant Professor, Texas Tech University School of Law (Elizabeth, Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform, 29 Pace Envtl. L. Rev. 811)

¶ ¶ [\*834] Potentially in response to these concerns, on June 11, 2003, Senator Bingaman introduced an amendment to add the mandatory environmental review provisions to the then-pending TERA provisions. n87¶ Senator Campbell opposed Senator Bingaman's proposed amendment, explaining that "in my view, the Bingaman amendment would literally strip tribes of 30 years of that direction of self-determination and would circumvent the trust responsibilities this Government has to tribes because it would force the statutory equivalent of NEPA on all decisions they make with their own land." n88 Senator Domenici shared Senator Campbell's concerns regarding the mandatory provisions in Senator Bingaman's proposed amendment, adding that "the amendment before us takes the unprecedented step of applying the NEPA process to the Indian tribes just as if they were the Federal Government. This amendment goes well beyond current environmental regulations and adds unnecessary regulations and costs to the tribal energy project." n89¶ Accordingly, the legislative history demonstrates commentators' concern about potential encroachments into tribal sovereignty and costs associated with the imposition of mandatory environmental review through the TERA provisions. These issues may explain in part tribes' ongoing reluctance to enter into TERAs. ¶ E. Waiver of Federal Government's Liability¶ ¶ As identified above, another concern of several commentators on the then-pending TERA provisions related to the waiver of federal government liability to third parties or tribes related to matters arising after approval of a TERA. On June 5, 2003, Senator Campbell explained the purpose of the liability waiver in the then-pending TERA provisions:¶ [\*835] ¶ ¶ Section 2604 provides that the United States will not be liable to any party, including a tribe, for losses resulting in the terms of any lease agreements or right-of-way executed by the tribe pursuant to the approved TERA, which makes sense; Liability follows responsibility. If a tribe makes the leasing decisions, it should certainly be held responsible. If the United States continues to make the leasing decisions, it will continue to be held responsible. If Indian self-determination means anything, it means the right of tribes to make their own decisions and their responsibility to the tribes to live with those decisions. n90¶ ¶ Despite Senator Campbell's sentiments, concerns regarding this provision pervade the legislative history. Senator Bingaman acknowledged that the TERA provision waiving the federal government's liability was controversial, in stating that "there are concerns with language in the bill that limits the liability of the Federal Government with respect to leases and rights-of-way approved by tribes under the citing provisions of the bill." n91 Chairman Vernon Hill shared this concern, explaining that given the government's pervasive role in energy development in Indian country, tribes would be unlikely to release the federal government from liability until the implications of the streamlined process were clear. n92 President Joe Shirley, Jr., shared and expounded upon the concerns raised by Chairman Hill, explaining that:¶ ¶ Both bills [submitted by Senator Bingaman and Senator Campbell] stipulate a waiver of federal liability, regardless of the degree of managerial control exercised by the federal government in Indian energy development... .¶ ¶ ¶ While these bills purport to put tribes in the driver seat of decision making, they continue to empower the federal government to act as the traffic cop who is authorized to put its hand out to stop a tribe's car from moving. Both bills ultimately [\*836] preserve the federal government's final authority over energy leases. Such final authority constitutes the lead role. This scheme, wherein a cabinet Secretary has prescriptive control over decisions regarding Indian energy development, but no subsequent liability, is an abdication of the federal trust responsibility that is patently unfair to tribes. n93

#### The counterplan trades off with sovereignty

Kronk 12—Assistant Professor, Texas Tech University School of Law (Elizabeth, Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform, 29 Pace Envtl. L. Rev. 811)

[\*849] The discussion below offers two suggestions for reform. These options, though somewhat contradictory, would both improve upon the existing TERA regulations. Whether one proposal is found more persuasive than the other may turn "partly on how one conceptualizes the trust doctrine. It can be seen as a federal duty to protect tribes' right of self-governance and autonomy, or as a way to justify federal power and control over tribal affairs." n138 Senators Bingaman's and Campbell's comments on the then-pending TERA provisions exemplify this difference of viewpoint on the federal government's trust responsibility to federally-recognized tribes.¶ The first proposal approaches the federal trust responsibility from the perspective of promoting tribal sovereignty and self-determination: the TERA regulations maintain federal decision-making authority over energy development in Indian country, which is unnecessary and perhaps even detrimental to the overarching goal of tribal self-determination and energy development. Alternatively, the second proposal for reform adopts a "federal" or "paternalistic" perspective of the federal trust responsibility: the federal government maintains a significant role in energy development in Indian country and therefore should be liable for decisions made under TERA (presumably to protect the economic stability of tribal governments). In considering these proposals, one must be mindful of the fact that the role of the federal government in tribal decision-making is a hotly contested issued. n139 Moreover, these two options for reform are presented in recognition of the existing trade-offs between the tribal trust responsibility and full tribal sovereignty. As Professor Ezra Rosser explained, "the challenge for Indian scholars and leaders alike is recognizing that the future of tribal progress will involve a trade-off between self- [\*850] determination and the trust duties of the federal government." n140 Interestingly, the Navajo Nation made similar recommendations to the Senate Committee on Indian Affairs in comments submitted in 2003. n141

#### Internal dissent is not a reason to support the CP

Rosser 12—Associate Professor, American University Washington College of Law; Research Affiliate, National Poverty Center, University of Michigan; M.Phil. in Land Economics, Cambridge; J.D. magna cum laude, Harvard Law School (Ezra, Ahistorical Indians and Reservation Resources, elawreview.org/2012/02/ahistorical-indians-and-reservation-resources/)

The Navajo Nation provides avenues for project objections to be raised and it is important that internal dissent not be misused or misrepresented by environmentalists. Nearly every tribal government proposal—just like any U.S. government proposal—will have detractors. But the consequences are particularly acute for tribes, as “the age-old problem of internal disagreement . . . weakens tribal governments and has historically worked against Indian people.”[702] Non-Indian governments have undercut tribes by supporting dissenting factions and either signing agreements with them that purport to bind the entire tribe or using trumped-up tribal disagreement as a pretext for ignoring the will of the tribe.[703] Environmental organizations should not do the same. To be concrete, while the few Diné directly affected by Desert Rock are legitimately upset with the leadership of the Navajo Nation, their complaints should not be bootstrapped by environmental organizations or presented as the views of the Navajo people. The fact that “native peoples have not been of one mind on resource issues” should not provide a pretext for attempting to undercut tribal governments.[704] Exploiting dissent in the Navajo Nation fails to respect the will of the people—as expressed in the same way that it is in the United States, through democracy—and denies the majority the right to establish the balance between development and the environment through the political processes and internal tribal mechanisms.

#### No s and no link to exploitation

Cornell and Kalt 93—Ph.D. Director Professor of Sociology and of Public Administration and Policy Faculty Associate, Native Nations Institute—AND—Ford Foundation Professor of International Political Economy, Emeritus, Co-Director Harvard Proj. on American Indian Econ. Development (Stephen and Joseph, WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT, http://www.tribalreentry.org/sites/tribalreentry.org/files/Strategies%20and%20Institutions%20in%20AI%20Economic%20Development.pdf)

We believe the available evidence clearly demonstrates that tribal sovereignty is a necessary prerequisite of reservation economic development. Each present instance of substantial and sustained economic development in Indian Country is accompanied by a transfer of primary decision-making control to tribal hands and away from federal and state authorities. Sovereignty brings accountability and allows "success" to be properly defined to include Indians' goals of political and social well-being along with economic well-being. Decades of control over reservation economic resources and affairs by federal and state authorities did not work to put reservation economies on their feet. ¶ This conclusion does not imply that tribal-federal/state relations are or should be hostile or uncooperative. In fact, the federal government in particular has made a number of encouraging efforts to enhance tribal control over economic affairs. Public Law 638, which enables tribal contracting of otherwise federal services; the Indian Gaming Act, which codifies tribal authority over certain activities; and BIA efforts such as the "SelfGovernance Project" are examples of steps in the right direction. The objective of federal and state policy should be to enhance tribal sovereignty over economic matters, with federal and state efforts aimed at support and technical assistance. In the role of consultant, federal and state governments need not always devolve back to the role of decision-maker.¶ The vast bulk of federal and state assistance to Indian tribes comes in the form of program-specific expenditures: health, education, infrastructure investment, loan and grant programs, direct general income assistance, and so forth. Capable tribal governments should be granted "Super 638" powers to elect to receive most of that assistance in the form of no-strings block grants, much in the way that the states now relate to the federal government. Criteria for eligibility should shift the burden of proof away from the tribe by presuming eligibility upon the tribe's request, unless it can be shown that the tribe is incapable of self-management of its block grant.¶ Sovereignty has many dimensions, from taxation and resource control to civil rights and child welfare. 35 Our research is confined to the economic sphere. Within that sphere, we believe the evidence on development success and failure supports the conclusion that tribal sovereignty over economic affairs should be founded upon a government-to-government relationship between Indian nations and the United States. This means tribal preeminence in taxation and business regulatory policy, as well as in land, water and resource use, and environmental policy. Split or shared jurisdiction, as under the Indian Gaming Act, does not go far enough.¶ One of the consequences of enhanced tribal sovereignty in the economic arena is likely to be greater variation in the economic conditions prevailing across reservations. There will be successes—and there will be failures. American Indian tribes are no more guaranteed than other developing countries that self-government will quickly and unfailingly produce dramatic improvements in economic, political, and social well-being.¶ The prospect of failure raises difficult policy and jurisdictional issues: Under the federal trust doctrine (under which Indian reservations are managed by the federal government in the role of trustee), does the federal government have the responsibility to bail out tribes that stumble as sovereigns? We believe that an appropriate long-range objective of federal policy should be to empower tribes with the information and decision-making apparatus by which they might knowingly and voluntarily elect to waive explicitly the federal trust responsibility upon the assertion of sovereignty powers (e.g., over the use of current trust funds, natural resource development, or environmental regulations). This would undoubtedly expose tribes to risks. But sovereignty without such risks is a contradiction in terms.

### Elections

#### Romney will back down on Russia and Putin will cooperate

Butler 10/20 Desmond is a reporter for the Associated Press. “ROMNEY RIPS RUSSIA, AT LEAST ON CAMPAIGN TRAIL,” 2012, http://bigstory.ap.org/article/romney-tough-russia-least-campaign-trail

WASHINGTON (AP) — Republican presidential candidate Mitt Romney calls Russia the No. 1 foe of the United States and promises to stand up to Russian President Vladimir Putin. But if he's elected president, he might find that he'll need Moscow's help.¶ Russia plays a critical role in facilitating the withdrawal of U.S. troops from Afghanistan. The United States also needs Moscow's cooperation on keeping nuclear materials away from terrorists and American adversaries, and preventing gridlock at the U.N. Security Council, where both countries have vetoes.¶ While Romney has criticized President Barack Obama's "reset" — his administration's policy for improving relations with Russia — he has not said what exactly he would do differently beyond taking a tougher approach. Given U.S. interests in a cooperative relationship with Russia, some analysts think Romney may have to tone down his rhetoric if wins the White House.¶ "**He may discover the value of Russia as a partner** on some issues," says Andrew Kuchins, the head of the Russia program at the Center for Strategic and International Studies.¶ U.S.-Russian relations, like international affairs in general, have not been major issues in a presidential campaign dominated by the economy. But they are an area of sharp disagreement between the candidates and could be an issue in Monday's presidential debate, which will focus on foreign policy.¶ Obama administration officials see improved relations with Russia as a foreign policy success after years of tension during George W. Bush's presidency. They cite the opening of a supply corridor to Afghanistan, the signing of a major arms control treaty, known as New Start, and progress on trade issues, including Russia's entry into the World Trade Organization.¶ While Russia has often blocked Western initiatives in the U.N. Security Council, it has gone along in key instances. Last year, Moscow abstained in a vote allowing military intervention in Syria, though Russian officials later accused the U.S. and allies of abusing the council's mandate. In 2010, Russia also backed new sanctions against Iran after a compromise. However, it has opposed further sanctions aimed at curbing Iranian nuclear ambitions.¶ Recent heated disputes over Syria and Iran and missile defense show that the relationship remains testy and may be getting tense. In a sign of faltering ties, Russian officials said recently that they would not extend a 20-year-old program for U.S. help securing Russia's nuclear stockpile unless it was substantially overhauled. The Nunn-Lugar program is considered one of the hallmarks of post-Cold War cooperation.¶ Also, last month, Russia ordered U.S. foreign aid workers out of the country, charging that they were inciting unrest by supporting government opponents.¶ Romney advisers say Obama has conceded much to Russia and received little in return. They accuse Obama of being weak with Putin, whom they see as bent on undermining democracy at home and abroad and harming U.S. interests wherever he can. They cite Russian opposition to U.S. and European efforts to reign in Iran's nuclear ambitions and to bring down the Syrian government.¶ "On every major issue, we have received nothing but intransigence, obstruction, counterproductive behavior," says Romney foreign policy adviser Alex Wong.¶ Romney has criticized Obama's decision to scrap a Bush administration plan for a European missile defense system and replace it with one that was less threatening to Russia. He says this offended important allies like Poland and the Czech Republic, which were to host the original system, and won nothing from Moscow. Indeed, Moscow continues to oppose Obama's missile defense plans.¶ Romney also says the New Start treaty accomplished little because Russia's arsenal was already below treaty limits. The Obama administration says the agreement allowed a resumption of U.S. inspections of Russian weapons facilities that had ceased when a previous treaty expired.¶ If elected, Romney "will reset the reset," his campaign website says.¶ Obama's backers say Romney's comments are overblown and reflect his lack of foreign policy experience. For instance, they say, in naming Russia as the worst U.S. foe, Romney skipped over al-Qaida and Iran.¶ "The goal of the reset was to not let our disagreements with Russia prevent us from working together on our shared interests," says Spencer Boyer, a national security adviser to the Obama campaign. "That has been a success."¶ For all his tough talk, it's not clear what Romney would change, especially considering the potential consequences. A rupture in relations with Russia could prevent a smooth exit from Afghanistan. A supply corridor that runs through Russia and Central Asia is one of only two possible routes for the millions of tons of military equipment that the U.S. needs to bring home. The other one runs through Pakistan, which once closed it after a NATO airstrike killed Pakistani soldiers.¶ Advisers say Romney would proceed with the Obama administration's missile defense plans if they are effective, while retaining the option to revert to the Bush administration plan. In a foreign policy speech this month, Romney said he wouldn't allow Putin any flexibility on missile defense, a jibe at Obama, who was caught on a microphone telling then-President Dmitry Medvedev last March that the U.S. would have more flexibility to work on missile defense issues after the election.¶ Romney's campaign website says he would review the New Start treaty. When asked what that means, Wong said that Romney will review everything when he gets into office.¶It's not unusual for presidential candidates to talk tough about an adversary during a campaign **only to become more pragmatic in office**. In fact, Putin stoked anti-American sentiments in his presidential campaign. Yet one of his first moves was to approve a transit facility for NATO at a Russian airbase.¶ Still, Romney's blunt talk has been noticed in Moscow. **Putin said** in a TV interview last month that it justified his opposition to U.S. missile defense plans, which he says could undermine Russia's nuclear deterrent.¶ But he also said he could work with Romney.¶ "We'll work with whichever president is elected by the American people," Putin said. "But our effort will be only as efficient as our partners will want it to be."

#### Obama hasn’t abandoned European BMD and won’t

Adomanis 9/7 Mark, Forbes, "Mitt Romney's Still Not Telling the Truth About European Missile Defense", 2012, www.forbes.com/sites/markadomanis/2012/09/07/mitt-romneys-still-not-telling-the-truth-about-european-missile-defense/

Mitt Romney’s campaign recently put out an…interesting indictment of Barack Obama’s foreign policy record. To the layman it would appear that Obama has been in broad continuity with the foreign policies of his predecessor and has, in a few spheres, pursued notably more aggressive and bellicose stances. Certainly one would not expect a weak-willed coward to surge tens of thousands of combat troops into Afghanistan, nor would you expect such a milquetoast to dispatch a large number of flying death robots to regularly dispense extra legal justice-via-missile across a broad swath of the Middle East and Pakistan. Indeed one might even be forgiven for thinking a truly radical thought: that Barack Obama, a president who, recall, fought a non-war-war in Libya without Congressional authorization, is vulnerable to criticism because his foreign policies have been too aggressive. ¶ But no! Barack Obama is not, as he appears, a president with a record of modest foreign policy success, he has actually been a bumbling incompetent, and has failed in a truly bewildering array of spheres. Did you know that Barack Obama could have ensured a “clean” election in Afghanistan but failed to do so? Me neither! Did you know that Obama has ignored the “threat” posed by Hugo Chavez? I didn’t even know Chavez was a “threat,” I thought he was dying of cancer and was in serious danger of losing the next election (I also thought that Venezuela’s economy was an inflation-strangled basket case that was in danger of collapse, but I guess I need to pay more attention).¶ But while most of the accusations in the foreign policy memorandum are simply tendentious, one of them appears to be an outright falsehood. Here is what the article says about Obama’s decision to “abandon” missile defense:¶ Abandoning A European Missile Defense System. The unilateral abandonment of a missile defense system to be based in Poland and the Czech Republic and completed by 2013 was a sop to Russia, which had sought to intimidate our allies and discourage them from agreeing to the system in the first place. They agreed to it despite the pressure. To add insult to injury, he announced his decision on September 17, 2009—the 70th anniversary of Russia’s invasion of Poland.¶ I don’t think I’m being uncharitable, but if you read this paragraph and didn’t have any background knowledge about US missile defense in Eastern Europe you would come away with at least two very clear conclusions¶ 1) Obama canceled a missile defense system planned for Poland and the Czech Republic¶ 2) Obama did not replace this planned missile defense system with anything else¶ Conclusion 1) is accurate, Obama really did kibosh the Czech/Polish system that had been planned by George W. Bush. Conclusion 2), however, is absolutely, categorically false. Obama, you see, replaced the system planned for Poland and the Czech Republic with a system in Romania. The United States is, right this second, continuing with a play to deploy land-based interceptors in Romania by 2015. Even the Heritage Foundation, hardly an Obama fan club, has recognized this.¶ You can criticize Obama for pulling the system out of Poland and the Czech Republic, you can criticize him for needling the always sensitive Poles, you can criticize him for not moving quickly enough with the system in Romania, you can criticize him for being overly accommodative of the Russians, you can, truthfully if not compellingly, criticize him for an awful lot of things regarding foreign policy in general and missile defense in particular. But what you absolutely cannot criticize Obama for is “canceling” or “abandoning” ballistic missile defense in Europe. By any minimally honest reckoning, Obama has not done that.¶ For the life of me I don’t understand why the Romney campaign can’t simply say: “President Obama unnecessarily delayed missile defense in Eastern Europe and this reflects a worrying lack of judgement on his part.” That gets across the exact same point (Obama is weak-kneed and incompetent) and it has the virtue of not being completely false.¶ Personally speaking, I find the US’ continued pursuit of ballsitic missile defense in Eastern Europe to be an unconscionable waste of resources: virtually any activity short of lighting a large pile of money on fire would bring a greater benefit to the US and to its allies. Romania, the country hosting the new missile system, is not only a poor, underdeveloped country it is also currently in the midst of a horrific economic downturn; its security, and the security of its citizens, would almost certainly be better served by having Ben Bernake helicopter over downtown Bucharest dispensing hundred dollar bills than by building missile interceptors designed to shoot down non-existent Iranian nukes. But the US government doesn’t appear overly troubled by my views on the matter, and is continuing to build a comprehensive system of ballistic missile defense, a system which Obama has at no point “abandoned.”¶ I understand that presidential campaigns are ugly, sordid affairs, which is why I’ve done my very best to ignore the conventions and why I don’t intend to vote for either Obama or Romney (just like I didn’t vote for either Obama or McCain). But the accusation that Obama has “abandoned” missile defense is so far out in left field, so far past any minimal bounds of honesty, that it has to be rebutted. In a country with 8% unemployment and pervasive economic misery you would think the Romney campaign wouldn’t have to strain itself to find Obama’s soft spots: the fact that they are inventing foreign policy failures ought to tell you something.

#### Romney win---Silver wrong

Jordan 10/22 Josh is a small-business market-research consultant. “Nate Silver’s Flawed Model,” 2012, National Review Online, http://www.nationalreview.com/articles/331192/nate-silver-s-flawed-model-josh-jordan?pg=2

Silver gained fame by correctly predicting 49 of 50 states in the 2008 election using a statistical model that assigns weight to the various polls based on a number of factors. After the 2008 election, Silver partnered with the New York Times, and he has been quoted by many media outlets as the gold standard for predicting what will happen in November.¶ ¶ Some note that 2008 was a wave election, where the enthusiasm and underlying fundamentals were so favorable to Obama that **the outcome was easy to foresee,** with the exception of a few of the GOP-turned-Democratic states such as Indiana and North Carolina where Obama won a razor-thin victory. Others argue that Silver’s access to the Obama administration’s internal polling gave him information that most other analysts never saw, which allowed him to make more adjustments to his model and increase his accuracy.¶ Whatever the explanation, Silver’s strong showing in the 2008 election, coupled with his consistent predictions that Obama will win in November, has given Democrats a reason for optimism. While there is nothing wrong with trying to make sense of the polls, it should be noted that Nate Silver is openly rooting for Obama, and it shows in the way he forecasts the election.¶ ¶ On September 30, leading into the debates, Silver gave Obama an 85 percent chance and predicted an Electoral College count of 320–218. Today, the margins have narrowed — but Silver still gives Obama a 67 percent chance and an Electoral College lead of 288–250, which has led many to wonder if he has observed the same movement to Romney over the past three weeks as everyone else has. Given the fact that an incumbent president is stuck at 47 percent nationwide, **the odds might not be in Obama’s favor**, and they certainly aren’t in his favor by a 67–33 margin.¶ ¶ The main reason that Silver feels Obama is still an overwhelming favorite is that while Romney has surged in the polls to tie (or lead) Obama nationally, the challenger is still, in Silver’s opinion, a long shot to pull together enough battleground states to get to 270 electoral votes. This is the real problem with Silver’s model in the eyes of many Romney backers — the “weighting” he puts into state polls gives an edge to Obama, and the distribution of that weighting is highly subjective. For example, Silver currently gives Obama a 70 percent chance of winning Ohio. A component of this is a weighted “polling average” of Obama’s support at 48.2 percent to Romney’s at 45.2. The current Real Clear Politics average is nearly a full point more favorable to Romney: It has Obama at 48.1 and Romney at 46.0. The difference comes from the fact that Real Clear Politics gives equal weight to all of the polls it includes and uses only the most recent polls from each polling organization in a given timeframe.¶ While many in the media (and Silver himself) openly mock the idea of Republicans’ “unskewing polls” (and I am not a fan of unskewedpolls.com by any means), Silver’s weighting method is just a more subtle way of doing just that. I outlined yesterday why Ohio is closer than the polls seem to indicate by looking at the full results of the polls as opposed to only the topline head-to-head numbers. Romney is up by well over eight points among independents in an average of current Ohio polls, the overall sample of those same polls is more Democratic than the 2008 electorate was, and Obama’s two best recent polls are among the oldest.¶ ¶ But look at some of the weights applied to the individual polls in Silver’s model. The most current Public Policy Polling survey, released Saturday, has Obama up only one point, 49–48. That poll is given a weighting under Silver’s model of .95201. The PPP poll taken last weekend had Obama up five, 51–46. This poll is a week **older but has a weighting of 1.15**569.¶ ¶ The NBC/Marist Ohio poll conducted twelve days ago has a higher weighting attached to it (1.31395) than eight of the nine polls taken since. The poll from twelve days ago also, coincidentally enough, **is Obama’s best** recent poll in Ohio, because of a Democratic party-identification advantage of eleven points. By contrast, the Rasmussen poll from eight days later, which has a larger sample size, more recent field dates, but has an even party-identification split between Democrats and Republicans, has a weighting of .88826, lower than any other poll taken in the last nine days.¶ ¶ Furthermore, Silver explained on Saturday that a tie in the Gravis Marketing Ohio poll is actually a negative for Romney in his forecast because Gravis shows a Republican-leaning bias in polling. But the Gravis poll released Saturday has a nine point advantage in party identification for Democrats — almost double the Democrats’ advantage in the 2008 election. Then, regarding the PPP Ohio poll mentioned above (where Romney cut Obama’s five-point lead to one in a week), Silver notes that “Public Policy Polling has lost most of the strong Democratic lean that it had earlier in the cycle.” He means that PPP’s polling results have tended to favor Obama less than they used to, and thus that the “house effect” of their Democratic tilt has lessened. But **this subjective measure fails to take into account the possibility that Romney is doing better among the same samples**. The PPP poll of Ohio actually leaned more Democratic this week; Democrats had an eight-point party-ID advantage this week but only a four-point advantage last week. So while the poll swung more to Obama’s advantage in the sample, Silver declares that it has actually lost its “Democratic lean.”¶ ¶ In that same post, Silver touts a “SurveyUSA poll showing Mr. Obama with a one-point lead in Florida is really the slightly better result for him.” That SurveyUSA poll indeed had Obama up by one point, but had a Democratic party-ID advantage of nine points. In 2008 Democrats had a three-point advantage, and in 2010 the parties were even. So the SurveyUSA poll is good news only if you believe Democrats will not only improve on their 2008 turnout, but triple their turnout advantage over Republicans.¶ ¶ This is the type of analysis that walks a very thin line between forecasting and cheerleading. When you weight a poll based on what you think of the pollster and the results and not based on what is actually inside the poll (party sampling, changes in favorability, job approval, etc), it can make for forecasts that mirror **what you hope will happen rather than what’s most likely** to happen. This is also true of Silver’s dismissal of Romney’s lead in Gallup this week. While Romney is likely not up by seven points nationally, as the poll predicted, **you can’t dismiss it while at the same time giving a twelve-day-old** Marist/**NBC** Ohio **poll a higher weighting** than eight newer polls when Marist has leaned Obama this entire cycle.¶ ¶ All of this also completely ignores the fact that it is more important for Obama to cross the 50 percent threshold in national polls before Election Day than it is for Romney. While it’s impossible to know how the late deciders will break, the historical trend has been for them to break for the challenger. If the Real Clear Politics average is tied at 47 percent, **the overwhelming odds are that the last 6 percent will break heavily to Romney**. While that would not guarantee an Electoral College victory, it is very difficult to imagine a scenario where Romney wins the national vote by more than a percentage point and loses the Electoral College.¶ ¶ On November 7, after the dust settles from Election Day and we (hopefully) have a winner, it might very well turn out that Nate Silver once again successfully predicted the battleground states and thus the election. But midway through October, 2012 is shaping up to be a far different election than the one in which Silver made his name. One must wonder if Silver’s forecast model includes a little bit too much hope of an Obama victory against what appears to be a surge of Romney momentum. Obama’s aura of inevitability is quickly losing steam, and once that runs out, even Homer Simpson will have a hard time proving otherwise.