

ALTERNATIVE ENERGY IN AMERICAN INDIAN COUNTRY: CATERING TO BOTH SIDES OF THE COIN

*Ryan D. Dreveskracht**

Synopsis: This article looks at both sides of the renewable energy “coin” in relation to American Indian country. On the one side, it appears that tribal governments are opposed to any energy development on their lands. All told, however, this couldn’t be further from the truth – tribes merely seek a seat at the table when decisions are made regarding developments that will adversely affect their lands and/or areas of cultural significance. Indeed, contrary to being opposed to alternative energy development, tribes are very actively seeking to develop their lands in a manner that is consistent with their cultures and traditions. But, large-scale alternative energy projects are virtually absent from Indian country. This article argues that the oft-overlooked other side of the renewable energy “coin” are the federal regulations that hinder these projects from coming to fruition. The final section of the article will discuss what Congress is – and is not – doing regarding the two sides of this “coin.”

I.	Introduction.....	432
	A. Consultation is Not Resistance: The Fallacy of Tribal Opposition to Alternative Energy Development	433
	1. Quechan Tribe v. U.S. Dep’t of Interior.....	433
	2. The Importance of Tribal Consultation.....	436
	3. Lessons Not Learned.....	439
	B. The Other Side of the Coin: Federal Barriers to Alternative Energy Development in American Indian Country	440
	1. Questions and Answers.....	441
	2. A Short History of Federal Regulation.....	443
	3. Recognition of the Federal Failure.....	445
	C. The Future of Alternative Energy Development in American Indian Country	446
II.	Conclusion	448

* Associate at Galanda Broadman, PLLC. The author’s practice focuses on representing businesses and tribal governments in public affairs, energy, gaming, taxation, and general economic development. He holds an LL.M. in Sustainable International Development from the University of Washington and a J.D. from the University of Arizona. He can be reached at 206.909.3842 or ryan@galandabroadman.com. Special thanks to Michael Holland for comments on an early draft of this article. This article is built upon previously published research and materials that can be found in various sources such as the Galanda Broadman, PLLC, blog, the Washington State Bar Association’s Indian Law Newsletter, and other similar publications.

I. INTRODUCTION

A recent study conducted by Small Business America¹ reveals that “[a]cross all industries and at both ends of the political spectrum, entrepreneurs overwhelmingly support government investing in renewable energy and creating clean energy policies that will help guide them into a new economic sector where they can do business.”² The study found that “71 percent believe government investments in clean energy play an important role in creating jobs now.”³

Given the bipartisan Congressional support for tribal energy development in Indian country,⁴ one would assume that tribal governments and their citizens would be playing a large role in making this come to fruition.⁵ But, as noted by Senator Daniel K. Akaka (D-HI), “[o]ur existing laws are falling short of fully enabling tribes to develop their natural resources.”⁶

Has anyone stopped to ask, though, whether tribal governments and their citizens even want to develop alternative energies on their lands? A peripheral reading of recent media accounts would suggest that tribes throughout the Nation are voicing active opposition to alternative energy projects.⁷

This article looks at both sides of the renewable energy “coin” in relation to American Indian country. On the one side, at least according to some recent media depictions, it appears that tribal governments and their citizens are adamantly opposed to any energy development on their lands. All told, however, this couldn’t be further from the truth. Section A of this article will explain that tribes merely seek a seat at the table when decisions are made regarding developments that will adversely affect their lands or areas of cultural significance, and why this is important. Indeed, contrary to being opposed to alternative energy development, Tribes are *very actively seeking* to develop their lands, and to do so in a manner that is consistent with their cultures and traditions. But, large-scale alternative energy projects are virtually absent from Indian country. Thus, Section B of this article will discuss what is hindering

1. SMALL BUSINESS MAJORITY, SMALL BUSINESS OWNERS SUPPORT GOVERNMENT INVESTMENTS IN RENEWABLE ENERGY AND EPA CLEAN AIR STANDARDS (2012), *available at* http://www.smallbusinessmajority.org/small-business-research/downloads/042412_Support_for_Renewable_Energy_Investments_and_EPA_Clean_Air_Standards.pdf.

2. John Arensmeyer, *Small Businesses Want Government to Invest in Clean Energy*, HUFFINGTON POST: SMALL BUSINESS AMERICA (Apr. 30, 2012, 11:15 AM), http://www.huffingtonpost.com/john-arensmeier/small-businesses-clean-energy_b_1464549.html.

3. *Id.*

4. “Indian country” is defined in 18 U.S.C. § 1151 (2012) as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.”

5. Press Release, U.S. Senate Committee on Indian Affairs, Indian Affairs Committee Holds Legislative Hearing on Bipartisan Energy Development Bill (Apr. 19, 2012), *available at* <http://www.indian.senate.gov/news/pressreleases/2012-04-12.cfm>.

6. *Id.*

7. *See generally infra* notes 16-19 and accompanying text.

these projects from coming to fruition. Finally, Section C of the article will discuss what Congress is – and is not – doing regarding the two sides of the coin.

A. Consultation is Not Resistance: The Fallacy of Tribal Opposition to Alternative Energy Development

President Obama’s “goal of generating 80 percent of the Nation’s electricity from clean energy sources by 2035”⁸ has led to numerous projects on millions of acres of public lands, mostly in Western states.⁹ The Administration has put some of the most promising, shovel-ready projects on a “fast track” for Bureau of Land Management (BLM) permitting.¹⁰

When issuing these permits, federal officials adamantly contest that “they have consulted with multiple tribes and have either made sure the massive solar projects will not harm any historic works or have determined that certain sites are not worthy of protecting.”¹¹ But, apparently, this federal agency’s idea of what it means to “consult” when making this determination is something other than what is required by its own clearly defined laws and regulations.¹²

1. Quechan Tribe v. U.S. Dep’t of Interior

In 2010, the BLM allowed a 709-megawatt solar farm planned for more than 6,000 acres of public land in the desert in California’s Imperial Valley to move forward without adequately consulting the tribe whose areas of cultural significance would be directly affected by the project.¹³ The Quechan Tribe of the Fort Yuma Indian Reservation (“Quechan”) opposed the project on the grounds that it was not adequately consulted, and it was able to obtain an order enjoining the project.¹⁴ If built, the project would have been one of the largest solar facilities in the Nation. Instead, because of the BLM’s failure, the “Imperial project” has lost most of its backing and is facing an uphill battle to find investors that can save any hope that it may be constructed in this decade.¹⁵

8. Press Release, The White House, President Obama’s Plan to Win the Future by Producing More Electricity Through Clean Energy (Jan. 25, 2011), available at <http://www.pewclimate.org/docUploads/SOTU%20factsheet%20CES.PDF>.

9. The Western states themselves may also be playing a large part in this development boom. Currently, these states are passing renewable energy portfolio standards with fervor – without the capacity to meet these targets on their own. These laws require utility companies to purchase a mandated amount of their energy from renewable sources. California’s Senate Bill 23, for example, increases the California renewable portfolio standard target to thirty-three percent by 2020. S.B. 23, 2011-2012 Session, 96 (Cal. 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_23_bill_20110909_amended_asm_v96.pdf.

10. See generally Robert L. Glicksman, *Solar Energy Development on the Federal Public Lands: Environmental Trade-Offs on the Road to a Lower Carbon Future*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 107, 129-150 (2012) (discussing the BLM’s “fast track” program in depth).

11. Jason Dearen & Noaki Schwartz, *Native American Groups Sue to Stop Solar Projects*, AOL NEWS (Feb. 27, 2011, 3:04 PM), <http://www.aolnews.com/2011/02/27/native-american-groups-sue-to-stop-solar-projects>.

12. *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1108-11 (S.D. Cal. 2010).

13. *Id.* at 1106-09.

14. *Id.* at 1106-08.

15. The project has only now, in 2012, secured funding. Press Release, Tenaska Closes Commercial Financing for Imperial Solar Energy Center South (Apr. 9, 2012), available at

A storm of media criticism was levied upon the Quechan for not “supporting” the project. After all, as “steward[s] of the Earth,”¹⁶ Indians are supposed to encourage alternative energy production, right? Some commentators have used the fact that the Quechan’s casino uses traditional energy to vilify the Tribe’s environmental record.¹⁷ One article suggested that the Tribe does not actually care about its cultural resources, as the site of their “casino project [was] sacred and . . . scattered with precious cultural artifacts” but the “[b]ulldozers roared into action despite . . . Tribal elders [being] opposed to the project”¹⁸ – an assertion that is both irrelevant and inaccurate. A more evenhanded article in the *San Diego Daily Transcript* characterized the Quechan suit as “clearly epitomiz[ing] how the conflicting priorities of ancient tradition and modern urgent necessity are juxtaposed.”¹⁹ Ultimately, that author concluded that his “sympathies are divided between the legitimate needs of the tribes” to preserve their ancient sites and artifacts “and the imperative to quickly respond to climate change.”²⁰ In sum, the media coverage offered analyses that were over-simplified and created a false dichotomy – a dichotomy that had nothing to do with the issues involved in *Quechan*.

The lands at issue in *Quechan* involved public lands, managed by the BLM, that contain an estimated 459 “cultural resources,” many of which were of significance to the tribe.²¹ All parties agreed that the cultural resources were legitimate, and that the lands had a “history of extensive use by Native American groups.”²² Instead, the thrust of the Tribe’s complaint alleged that the BLM “reached its approval decision without evaluating the significance of the cultural resources . . . within the [project] area” and “refused to formally consult with the Tribe”²³ pursuant to section 106 of the National Historic Preservation Act

<http://www.marketwatch.com/story/tenaska-closes-commercial-financing-for-imperial-solar-energy-center-south-2012-04-09>. The project will also need to go through a new federal approval process before anything can be put to the ground, which can take years and cost millions all over again. Stipulation of Voluntary Dismissal, Quechan Tribe, No. 10-2241, 2011 WL 5016635 (S.D. Cal. Oct. 14, 2011) (“Imperial Valley Solar, LLC, including its parent entities, subsidiaries, agents, and successors-in-interest, shall not proceed with any ground-disturbing activities or other development based on rights-of-way authorized by the October 2010 Record of Decision for the Imperial Valley Solar Project . . .”).

16. *United States v. Jim*, 888 F. Supp. 1058, 1060 (D. Or. 1995).

17. *See generally* Tiffany Hsu, *Native Americans Sue U.S. Over Solar Power Plant in Desert*, L.A. TIMES (Nov. 4, 2010), available at <http://discussions.latimes.com/20/lanews/la-fi-solar-tribe-20101105/10> (online comments to article).

18. Darin Fenger, *As Building Begins, Controversy Continues at Quechan Project*, YUMA SUN (Oct. 22, 2007), available at <http://www.yumasun.com/news/project-37328-tribal-casino.html#ixzz27jhr12ca>. Other coverage appears to be more evenhanded. *See, e.g.*, Barbara Leonard, *Solar Energy Plan Halted to Protect Tribe’s Artifacts*, COURTHOUSE NEWS SERVICE (Dec. 23, 2010), available at <http://www.courthousenews.com/2010/12/23/32864.htm>.

19. Daniel Coffey, *Will the Tribes Support Large-Scale Solar to Reduce Climate-Change?*, THE DAILY TRANSCRIPT (Jan. 13, 2011), available at http://www.sddt.com/commentary/article.cfm?Commentary_ID=176&SourceCode=20110113tzb.

20. *Id.*

21. *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1107 (S.D. Cal. 2010).

22. *Id.*

23. Complaint at 18, *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (No.10-2241, ECF No. 1) [hereinafter *Quechen Tribe Complaint*].

(NHPA),²⁴ the National Environmental Policy Act (NEPA),²⁵ and various other procedural and substantive laws.

The fact that many of the laws invoked by *Quechan*, and those that the decision focused on, were *procedural*, is important because it means that in making its consultation argument the Tribe was not objecting to the implementation of the Imperial project. In other words, the Tribe was not valuing their cultural resources at a higher level than global warming, clean energy, or “modern urgent necessity” – as the media has portrayed.²⁶ Rather, the Tribe was objecting to the *procedure* used by the BLM in granting the developer, Tessera Solar, the permits necessary to implement the project.²⁷ That procedure requires that federal agencies consult “meaningfully” with tribes if there is any possibility that their properties of cultural and religious significance will be affected.²⁸

For consultation to be “meaningful,”²⁹ the federal agency must schedule a meeting with a tribal decision maker, “during which the federal agency notifies the tribe of the proposed action and justifies its reasoning.”³⁰ At that point, the tribe may “issue a motion of support for the decision, or a rejection of the decision, pursuant to tribal law or procedure.”³¹ According to federal regulations, this consultation must “commence early in the planning process” – that is, before any decision is made or implementation plan is initiated – “in order to identify and discuss relevant preservation issues.”³²

Meaningful consultation simply was not done in Imperial Valley, California – and, as an unfortunate result of the federal government’s carelessness, the Imperial project was stopped dead in its tracks.³³

To be clear, pursuant to the procedural laws at issue in *Quechan*, tribal “consultation requires that the federal government respect the desires of Native Americans to be involved in decisions that affect them, but does not bind federal agencies to anything resembling a commitment to the application of tribal input.”³⁴ A tribe can object to a project *ad nauseum*, but, as long as the federal

24. 16 U.S.C. § 470 (2012).

25. 42 U.S.C. §§ 4321-4347 (2012).

26. Coffey, *supra* note 19.

27. Quechan Tribe Complaint, *supra* note 23, at 17-20.

28. *Id.* at 20 (referencing section 106 of NHPA).

29. See generally Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION 3, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with the Fall 2010 issue of the FEDERAL INDIAN LAWYER).

30. *Id.*

31. *Id.* (citing *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995)).

32. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 608 (9th Cir. 2010) (quoting 36 C.F.R. § 800.2 (2012)) (internal quotations omitted).

33. See generally *supra* note 15 and accompanying text.

34. Galanda, *supra* note 29, at 9; See generally *Klamath Tribes v. United States*, No. 96-0381, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996); see also Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 36 (2000).

agencies follow the correct consultation process under the letter of the law, the project will go on without a hitch.³⁵

2. The Importance of Tribal Consultation

So, what's the point? Why does a tribe opt to evoke its consultation right at all? The point, and "the purpose of the federal consultation requirement is largely twofold."³⁶

First, the federal government has a duty to respect tribes' positions in the federalist system as sovereign nations.³⁷ Having the inherent responsibility and opportunity to promote and protect the welfare of tribal people – including the right to protect cultural and religious properties and to be treated with respect by other sovereigns – is a cornerstone of tribal sovereignty. To fulfill this duty, beginning in the 1970s,³⁸ the federal government initiated a slew of laws³⁹ and dynamic government policies requiring that federal agencies interact with tribes on a government-to-government basis⁴⁰ – as opposed to the pre-1970s model that treated tribes as afterthoughts, if they were thought of at all.⁴¹

35. Haskew, *supra* note 34, at 36.

36. For a recent, more in-depth discussion of the consultation right, see Colette Routel & Jeffrey K. Holth, *Tribal Consultation in the 21st Century* (Legal Studies Research Paper Series, William Mitchell College of Law, Working Paper No. 2012-02, 2012), available at <http://dx.doi.org/10.2139/ssrn.2012002>. See also Haskew, *supra* note 34; Galanda, *supra* note 29.

37. See generally Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of the Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 772-73 (2008) ("[I]n a federalist union of states that also incorporates 'domestic dependent' tribes, a state or tribe may be regarded both as a 'domestic' governing sovereign in its own courts and as a quasi-independent entity outside of them.") (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 878-90 (1986)).

38. President Richard Nixon's administration formally inaugurated Indian self-determination in 1970. President's Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970). The President indicated that the new goal of Federal Indian policy must be "to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group . . . [and] without being cut off from Federal concern and Federal support." *Id.* at 566-67. Nixon also emphasized that Indians should lead the development of this policy. *Id.*

39. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450-458ddd-2, underlining a "firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Other statutes enhanced tribal control over on-reservation housing development, 25 U.S.C. § 4101 (2012), and provided funding for tribal education projects. 25 U.S.C. § 1801 (2012).

40. See generally Amanda M. Murphy, Note, *The Tale of Three Sovereigns: The Nebulous Boundaries of the Federal Government, New York State, and the Seneca Nation of Indians Concerning State Taxation of Indian Reservation Cigarette Sales to Non-Indians*, 79 FORDHAM L. REV. 2301, 2322 (2011) ("Today, government-to-government respect is a cornerstone goal of self-determination. The federal government has attempted to give equal weight to concerns about independence and support for Indian tribes. This self-determination policy defines the relationship between the federal government and Indians.").

41. See generally *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7-9 (D.D.C. 1999) (briefly discussing the pre-1970 eras of federal Indian policy); see also Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M.L. REV. 273 (1997).

Although American Indians are still among the poorest minority groups in the Nation, it was much worse before 1970.⁴² Once the Self-Determination Era, as it is now named, came into effect, tribes began to see real improvements in not only their economies but also the welfare of their citizens.⁴³ According to research conducted by Harvard's Stephen Cornell and Joseph Kalt, these improvements demonstrate that exercising sovereignty through government-to-government relationships is a necessary element of sustainable tribal development.⁴⁴ As Regis Pecos, former Governor of Cochiti Pueblo, explains: "[t]hroughout history, the conceptualization of Indian policies has been driven by others and usually not for [tribal] benefit."⁴⁵ When the tribes "were not directly involved, even the most thoughtful and well-intended considerations often had unintended consequences."⁴⁶

What could go wrong usually did.⁴⁷ A recent United Nations Report noted that, as non-Indian investment projects in Indian country come to fruition, "which may take several years depending on their characteristics, the concerns of indigenous peoples, who are seldom consulted on the matter, take a back seat to an overriding 'national interest,' or to market-driven business objectives aimed at developing new economic activities, and maximizing productivity and profits."⁴⁸ But, when tribes are treated as sovereigns – that is, given the ability to object to the actions of federal agencies and outside developers that affect their traditional lands and resources – sustainable tribal development has a chance to thrive.⁴⁹ In this way, tribal governments have not only a right, but also a fiduciary *duty* to tribal citizens to exert the consultation right when federal agencies fail to comply with the law. In his most recent visit to the United States, James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples, confirmed that the right to be informed on decisions affecting land and cultural resources remains of "*central importance* to indigenous peoples' socio-economic development."⁵⁰

42. See generally Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 286-87 (2009).

43. Murphy, *supra* note 40, at 2321-22.

44. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 15 (Miriam Jorgensen, ed., 2007).

45. Rima Krisst, *A Conversation with Regis Pecos, Part I: The Emergence of Federal Self-Determination Policy and its Impact on Defining State-Tribal Relations*, I-NEWS (N.M. Indian Affairs Dep't) Jan. 2009, at 10, available at <http://www.iad.state.nm.us/docs/inews/jan09-inews.pdf>.

46. *Id.*

47. *Id.*

48. Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. Econ. & Soc. Council, Comm'n on Human Rights, 59th Sess., 8, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003).

49. See generally Cornell & Kalt, *supra* note 44, at 13-14.

50. Press Release, Statement of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Upon Conclusion of His Visit to the United States (May 4, 2012), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12114&LangID=E> (emphasis added).

Second, the consultation duty comports with the federal government's general aspiration to foster a government-to-government relationship with tribes. As embodied in President Obama's 2009 Presidential Memorandum on Tribal Consultation:

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.⁵¹

For practical reasons alone, this type of relationship – as opposed to the complex and bifurcated relationship of the past – is mutually beneficial. The fact is that, despite federal hubris since day one, Indian tribes know best how to manage their lands.

The Tulalip Tribes' Snohomish Basin BioGas project⁵² exemplifies this assertion. By the 1970s, salmon stocks in the Tulalip Tribes' traditional fishing waters plummeted to dangerously low levels, mostly due to the untreated cow manure runoff from local dairy farms.⁵³ Local farmers, blaming "tribal-treaty fishing rights for restricting their ability to expand their operations," did not respond to the Tribes' concerns.⁵⁴ Eventually, however, threats of urban development convinced the farmers to consult with the Tribes in order to form a collaborative effort to ward off urban encroachment that would surely sound the death knell for both fish and farms.⁵⁵ The solution: "turn livestock waste into a salmon-friendly and farm-friendly source of renewable energy."⁵⁶ Today, the tribal/farmer partnership, now known as Qualco Energy,⁵⁷ runs a renewable energy plant that pumps livestock manure and associated wastes away from the farms to a nearby facility that uses anaerobic digestion to create methane, which is then used as fuel for electricity-producing generators.⁵⁸

51. Memorandum from President Obama for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009); *see also* Helaman S. Hancock, *America's War on Tribal Economies: Federal Attacks on Native Contracting on the SBA 8(A) Business Development Program*, 49 WASHBURN L.J. 717, 736-37 (2010) (noting that the President's Order on Tribal Consultation "requires agencies to respect tribal sovereignty, to grant Tribal Governments maximum administrative discretion, to encourage Tribes to develop their own policies, to defer to Tribes to establish their own standards, and the order forbids agencies from submitting legislation to Congress that would be inconsistent with such directives").

52. *See generally* DARYL WILLIAMS, *QUIL CEDA POWER BIO-GAS PROJECT* (2008), available at http://apps1.eere.energy.gov/tribalenergy/pdfs/0811review_13williams.pdf.

53. Ian W. Record, *We Are the Stewards: Indigenous-Led Fisheries Innovation in North America*, JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS 35-37 (2008), available at http://nni.arizona.edu/whatsnew/pdfs/JOPNA_2008_01_web.pdf.

54. *Id.* at 37.

55. *Id.* at 39.

56. *Id.*

57. *See generally About Qualco*, QUALCO-ENERGY, <http://qualco-energy.org/about-qualco> (last visited May 10, 2012).

58. Steve Brown, *Digester Generates More Than Electricity*, CAPITAL PRESS (Jan. 5, 2012, 9:00 AM), <http://www.capitalpress.com/content/SB-dairy-coalition-101612-art>; *see also* Debra Smith, *From Cow Poop to*

Litigation in federal courts is drawn out and costly, and, for what it's worth, rarely carries the desired results for either party. As opposed to the adversarial model of yesteryear, many tribes are now building upon their legally enforceable consultation right to forge formal partnerships with federal agencies and corporate interests that advance mutual objectives.⁵⁹

3. Lessons Not Learned

In this way, conflicts alluded to in the media coverage of *Quechan* and elsewhere – conflicts that never actually existed – are almost ironic: the federal consultation obligation seeks to avoid these exact types of valuation conflicts by forcing tribes and outside interests to formulate plans of implementation that are mutually agreeable. In *Quechan*, this would likely have included the Tribe pointing out areas that are very important to its members, and others that could be sacrificed. Or, consultation may have led to the Tribe leasing a portion of its reservation land to Tessler at a reduced rate in lieu of the project going forward on sacred lands. Or, most likely, it could have meant that the Tribe agreed to the exact plan proposed by Tessler and accepted by the BLM. But none of that happened, because the Tribe was not adequately consulted.

Recently, the Colorado River Indian Tribes were not as fortunate as the Quechan. In late April of 2012, a solar project named “Genesis” “uncovered a human tooth and a handful of burned bone fragments the size of quarters on a sand dune in the shadow of new solar power transmission towers.”⁶⁰ As reported by the *LA Times*:

As a federally recognized tribal group with sovereignty over a 264,000-acre reservation, the Colorado tribes were offended that the BLM approved Genesis without holding “nation-to-nation” consultations with them. Before construction began, archaeologists had warned that the site near Ford Dry Lake was rich with Native American history. . . . [D]uring construction last November, workers uncovered a pair of grinding stones and what appeared to be a layer of charcoal. The Colorado tribes say they are evidence of a sacred cremation site. Genesis claims they are insignificant artifacts. . . . NextEra warns that yielding to the tribes’ demands could result in costly delays that jeopardize completion of the 250-megawatt plant, which is being built on BLM land with the help of an \$825-million loan guaranteed by federal taxpayers. . . . Native Americans insist they are not against renewable energy. The problem is that some solar projects were approved for lands that are an essential part of Indian religion, culture and history — without consultation with affected tribes.⁶¹

Similarly, Kumeyaay, Cocopah, and Quechan have recently expressed a desire to be consulted regarding Pattern Energy’s proposed Ocotillo Wind

Power, HERALDNET (Feb. 18, 2009, 12:01AM), <http://www.heraldnet.com/article/20090218/NEWS01/702189799>.

59. See generally ADVISORY COUNCIL ON HISTORIC PRES., CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK (Nov. 2008), available at <http://www.achp.gov/regs-tribes2008.pdf>.

60. Louis Sahagun, *Discovery of Indian Artifacts Complicates Genesis Solar Project*, L.A. TIMES (Apr. 24, 2012), available at <http://articles.latimes.com/2012/apr/24/local/la-me-solar-bones-20120424>; see also Complaint, Confederated Tribes and Bands of the Yakama Nation v. Holder, No. CV-11-3028-RMP (E.D. Wa. Mar. 8, 2011), ECF No. 1 [hereinafter *Yakama Nation Complaint*].

61. Sahagun, *supra* note 60; see also *Yakama Nation Complaint*, *supra* note 60.

Express project: a “project would place up 112 to 155 turbines each 450 feet tall on 12,500 acres of publicly owned [BLM] land” – land abundant with areas of tribal cultural significance.⁶² To clarify, Anthony R. Pico, Chairman of the Viejas Band of Kumeyaay Indians, explained in a letter to President Obama:

[P]lease understand that the Viejas does not oppose renewable energy. We generally support the development of responsible renewable energy projects, so long as they comply with the letter and spirit of applicable laws and policies, so long as they do not threaten wholesale destruction of culturally and religiously significant tribal cultural resources. Neither are we opposed to renewable energy development on tribal lands with the full and informed participation of tribal governments. . . . Viejas and other Tribal Nations have made every attempt to participate in the environmental review process . . . , [but] our meaningful participation [has been] obstructed by both the BLM and the applicant, Pattern Energy.⁶³

B. The Other Side of the Coin: Federal Barriers to Alternative Energy Development in American Indian Country

The other side of the coin is that, as expressed by Chairman Pico, contrary to being against renewable energy, tribal governments are in the best position to utilize their land to develop these projects in a manner that is consistent with their culture and tradition, *and are very actively seeking to do so*.⁶⁴ Using solar and wind alone, Indian country has the capacity to produce “more than four times the amount of electricity generated annually in the United States.”⁶⁵ The economic benefits of tribal energy development are painfully obvious – in Fiscal Year 2010, clean energy investments grew by thirty percent, to \$243 billion.⁶⁶

62. Miriam Raftery, *Wind Storm: Tribes Implore President Obama to Stop Ocotillo Express Wind Project, Save Cultural Resource Sites*, E. COUNTY MAG. (Mar. 23, 2012), available at <http://www.eastcountymagazine.org/node/9104>.

63. Letter from Anthony R. Pico, Chairman, Viejas Band of Kumeyaay Indians to Ken Salazar, U.S. Sec’y of the Interior (Feb. 22, 2012), available at <http://www.eastcountymagazine.org/sites/default/files/OcotilloViejas%20Chairman%20Pico%20Letter%20to%20President%20Obama%2022-12.pdf>; see also *Tribal Coalition Says Feds Not Consulting With Tribes*, MINOT DAILY NEWS (May 10, 2012), available at <http://www.minotdailynews.com/page/content.detail/id/565484/Tribal-coalition-says-feds-not-consulting-with-tribes.html?nav=5010> (reporting that the Mandan, Hidatsa, and Arikara (Three Affiliated Tribes), Blackfeet, Ute, and Crow Nations, and the Arctic Slope Regional Corporation “are not pleased with the overall lack of consultation with tribes by the federal government”).

64. See generally Emily Yehle, *Energy Concerns Up Front as Obama Seeks Closer Relationship with Tribes*, N.Y. TIMES (Aug. 24, 2011), available at <http://www.nytimes.com/gwire/2011/08/24/24greenwire-energy-concerns-up-front-as-obama-seeks-closer-64144.html> (discussing the attempt of the Rosebud Sioux to build a 30-megawatt wind project on tribal lands and noting that:

a slew of obstacles has stalled the shovel-ready project, beginning with the 18 months it took the Bureau of Indian Affairs to approve the leasing agreement back in 2008” and that “delay handicapped the project, forcing the tribe to search for a willing customer during a recession rather than in the brighter economic landscape of 2006).

65. *Native American Tribal Lands Could Produce 17.5 Trillion Kilowatt Hours of Electricity from Wind and Solar Power*, NAT’L INDIAN ENERGY GROUP (Feb. 9, 2011), available at <http://nationalindianenergy.com/news/?paged=2>.

66. Darius Nassiry & David Wheeler, *A Green Venture Fund to Finance Clean Technology for Developing Countries* 3 (Cent. for Global Dev., Working Paper No. 245, 2011), available at <http://www.cgdev.org/content/publications/detail/1424899>. “New financial investment worldwide in [the first quarter of] 2011 totaled \$31.1 [billion], down by a third from the record \$47.1 [billion] recorded in the fourth quarter of last year.” Sarah Feinberg, *Policy Uncertainties in Development Economies Dampen Clean Energy*

An estimated \$1 trillion in revenue is possible were Indian country to fully develop its energy resources.⁶⁷ With tribes already feeling the brunt of global warming,⁶⁸ the environmental benefits of using alternative energies to support the next generation are increasingly being explored.⁶⁹ With unemployment levels that are disproportionately high in Indian country,⁷⁰ perhaps equally important is that alternative energies are job-creating hothouses.⁷¹

Yet, as of May 2012, “only one commercial-scale renewable energy project [is operating] in all of Indian country.”⁷² In short, the federal government has failed to allow tribes to enter the alternative energy market at all.⁷³ Therefore, if a tribe chose to develop its own lands in a similar manner to that of the “Imperial” and “Genesis” projects – save for the disturbance of its areas of cultural and spiritual significance – the project would have been stopped dead in its tracks long before those non-Indian projects.

1. Questions and Answers

On April 1, 2011, the Committee on Natural Resources in the U.S. House of Representatives set out to finally determine (1) just why federal law poses such a hindrance to Native American alternative energy development, and (2) what needs to be done to find a solution.⁷⁴ 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.”⁷⁵ Tribal officials identified the following impediments:

Investment in QI, BLOOMBERG NEW ENERGY FIN. (Apr. 15, 2011), available at <http://bnef.com/Download/pressreleases/150/pdffile>. In a large part, weaker investment was the result of policy uncertainties. *Id.*

67. Jefferson Keel, President, Nat’l Cong. of Am. Indians, State of Indian Nations Address: Sovereign Indian Nations at the Dawn of a New Era (Jan. 27, 2011).

68. See, e.g., Corinne Purtill, *Tribes See Effect of Climate Changes*, ARIZONA REPUBLIC (Dec. 7, 2006), available at <http://www.azcentral.com/arizonarepublic/local/articles/1207tribal-climate1207.html>.

69. See, e.g., Carol Berry, *Future Resources Are Key to Planning for Ute Tribes*, INDIAN COUNTRY TODAY (May 3, 2011), available at <http://indiancountrytodaymedianetwork.com/2011/05/03/future-resources-are-key-to-planning-for-ute-tribes-31679> (noting the instillation of a 230 kilovolt transmission line in order to facilitate the future expansion of solar energy).

70. See, e.g., Clarkson, *supra* note 42, at 287 (“[T]he unemployment rate still hovers around fifty percent for Indians who live on reservations, nearly ten times that for the nation as a whole.”).

71. Robert Glennon & Andrew M. Reeves, *Solar Energy’s Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL’Y 91, 93-94 (2010).

72. Van Jones, Bracken Hendricks, & Jorge Madrid, *Clearing the Way for a Native Opportunity in America’s “Sputnik Moment”*, NATIVE AMERICAN TIMES (Jan. 28, 2011), available at http://www.nativetimes.com/index.php?option=com_content&view=article&id=4853:clearing-the-way-for-a-native-opportunity-in-americas-sputnik-moment&catid=46&Itemid=22.

73. Yehle, *supra* note 64.

74. *Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands: Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affairs*, 112th Cong. (2011) [hereinafter *Energy Hearing*].

75. *Id.* at 2-3 (statement of Rep. Don Young).

- 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.”⁷⁶
- A lack of BIA staffing necessary to review and approve the required instrumentalities within a timely fashion.⁷⁷
- The inability to “enter into long-term, . . . fixed-price contracts that will underpin the commercial framework needed for . . . long-term . . . projects.”⁷⁸
- A lack of standardization and coordination between Department of the Interior (DOI) offices.⁷⁹
- A lack of DOI communication with state and local governments – with tribes bearing the brunt of the cost via legal attacks on their sovereignty.⁸⁰
- General apprehension to issue NEPA compliance decisions at the Environmental Protection Agency, likely due to fear of litigation.⁸¹
- BIA delays in approving Rights-of-Way.⁸²
- 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.⁸³
- “Tribes’, as owners, . . . [inabilities] to take advantage of incentives such as the production/investment tax credits and accelerated depreciation” incentives available to non-Indian project investors.⁸⁴

Stripped down, many of the hindrances referred to in hearing testimony are a direct result of the federal approval process. Pursuant to 25 U.S.C. § 415,

76. *Id.* at 13 (statement of Scott Russell, Secretary, Crow Nation’s Executive Branch).

77. *Id.* at 45-46 (statement of Irene C. Cuch, Ute Tribal Business Comm. Member, Ute Indian Tribe of the Uintah and Ouray Reservation); *see also* Letter from Senator Jon Tester, Mont., to the Hon. Ken Salazar, Sec’y of the Interior (May 3, 2012), *available at* <http://www.testersenate.gov/Legislation/upload/2012-5-3-JT-Letter-to-Sec-Salazar-on-energy-office-staffing-shortages.pdf> (noting that “there is only a single biologist to permit oil and gas projects on all the tribal lands located in Montana and Wyoming”).

78. *Energy Hearing, supra* note 74, at 16 (statement of Scott Russell, Secretary, Crow Nation’s Executive Branch); *see also id.* at 43-47 (statement of Irene C. Cuch, Ute Tribal Business Comm. Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

79. *Id.* at 22 (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation).

80. *Id.* at 23.

81. *Id.* at 24; *see also id.* at 42 (statement of Irene C. Cuch, Ute Tribal Business Comm. Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

82. *Id.* at 45-46 (statement of Irene C. Cuch, Ute Tribal Business Comm. Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

83. *Id.* at 54 (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (creating a double taxation scheme that discriminates against Indian commerce); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 1165-91 (2010) (discussing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)).

84. *Energy Hearing, supra* note 74, at 53-56 (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.).

transactions involving the transfer of an interest in Indian trust land must be approved by the BIA.⁸⁵ But, even if a 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.⁸⁶ Secretarial approval is also necessary for rights-of-way on Indian lands.⁸⁷ In these instances, the BIA approval process constitutes a “federal action” that triggers a slew of federal laws that the BIA must comply with.⁸⁸ This includes NEPA, the National Historic Preservation Act, and the Endangered Species Act, among others. Compliance with NEPA alone can take over twelve years to complete and can generate millions of dollars in additional cost⁸⁹ – not to mention the inevitable litigation that will ensue.⁹⁰ Although there has been some headway toward removing the outdated tribal energy regime, according to previously discussed, recent congressional testimony, there is much work still to be done.

2. A Short History of Federal Regulation

Congress began to address the development of renewables in Indian country in the early nineties. Legislation included the EPAct of 1992, which authorized the Department of Energy (DOE) to provide grants and loans to tribes wishing to develop solar and wind energy;⁹¹ the Indian Energy Resource Development Program, which awarded development grants, federally-backed loans, and purchasing preferences to Indian tribes pursuing energy development projects;⁹² culminating in the Indian Energy Act of 2005 (IEA),⁹³ the most comprehensive Indian-specific energy legislation to date.

Until 2005, much of the federal push for energy development focused on creating incentives for investment, rather than restructuring the antiquated legal structures involved.⁹⁴ Much of the IEA, however, is devoted to the creation of a new framework for the management and oversight of energy development in

85. 25 U.S.C. § 415(a) (2012). Some tribes, however, such as the Tulalip Tribes of Washington, are permitted to lease tribal land for up to seventy-five years without BIA approval. 25 U.S.C. § 415(b) (2012).

86. 25 U.S.C. § 81 (2012).

87. 25 U.S.C. §§ 323, 324 (2012). Secretarial approval is also necessary for minerals agreements related to energy or minerals. 25 U.S.C. § 2102 (2012).

88. *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891, 893 (10th Cir. 1991) (citing *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972)).

89. See generally Katie Kendall, Note, *The Long and Winding “Road”: How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663, 665 (2004).

90. See generally R. Timothy McCrum, *NEPA Litigation Affecting Federal Mineral Leasing and Development*, 2 NAT. RESOURCES & ENV'T 7, 57 (1986) (noting the “inevitable litigation and delay associated with [NEPA’s] wasteful [and] unproductive” approval process); see also Sarah Pizzo, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development With Land and Wildlife Conservation in a Warming Climate*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 123, 144-49 (2011) (describing the numerous ways that a solar project can be shut down due to NEPA litigation); see, e.g., *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

91. 25 U.S.C. § 3503(a) (2012).

92. Pub. L. No. 102-486, tit. XXVI (codified at 25 U.S.C. §§ 3501-3506) (2012).

93. Pub. L. No. 109-58, §§ 501-506, 119 Stat. 594, 763-79 (2005) (EPAct of 2005).

94. Ronald H. Rosenberg, *Diversifying America’s Energy Future: The Future of Renewable Wind Power*, 26 VA. ENVTL. L.J. 505, 532 (2008).

Indian country – the Tribal Energy Resource Agreement (TERA).⁹⁵ 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.⁹⁶

To date, however, “no tribe has yet entered into a TERA.”⁹⁷ For many tribes, the costs simply outweigh the benefits – 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.”⁹⁸ First, in applying for the TERA, the tribe must consult with the director of the DOI before submitting the application.⁹⁹ The director must hold a public comment period on the proposed TERA application and may conduct a NEPA review of the activities proposed.¹⁰⁰ Thereafter, the DOI has 270 days to approve the TERA.¹⁰¹ Second, the TERA requires that tribes create a NEPA-like environmental review process.¹⁰² This “tribal NEPA” must have a procedure for public comment and for “consultation with affected States regarding off-reservation impacts” of the project.¹⁰³ Third, the TERA must include a clause guaranteeing that the tribe and its partner will comply “with all applicable environmental laws.”¹⁰⁴ In so doing, tribes must allow the Secretary to review the tribe’s performance under the TERA – annually for the first three years and

95. 25 U.S.C. § 3504 (2012) (regulations at 25 C.F.R. § 224 (2008)).

96. 25 U.S.C. § 3504 (a)-(b) (2012).

97. *Indian Tribal Energy Development and Self-Determination Act Amendments of 2011: Hearing on S. 1684, Before the S. Comm. on Indian Affairs*, 112th Cong. (April 19, 2012) (testimony of James M. “Mike” Olguim, Vice Chairman, Southern Ute Indian Tribe) [hereinafter Olguim testimony].

98. Kathleen R. Unger, *Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L.A. L. REV. 329, 358 (2009). More recently Congress passed the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act, which gave tribal governments the discretion to lease restricted lands for business, agricultural, public, religious, educational, recreational, or residential purposes without the approval of the Secretary of the Interior. Pub. L. No. 112-151, 126 Stat. 1150 (2012). The HEARTH Act, however, carries the same downfalls as the TERA, in that it (1) requires that the Secretary of the Interior approve the tribal regulations that approve the lease; and (2) requires that the tribe implement an environmental review process – a “tribal,” or “mini” NEPA – that identifies and evaluates any significant effects a proposed lease may have on the environment and allows public comment on those effects. At this point, it is not known whether the HEARTH Act will be more successful than the TERA, but the author suspects that it will hinge on funding – which has been hard to come by in Indian Country. See generally U.S. COMMISSION ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003).

99. 25 C.F.R. § 224.51 (2008).

100. 25 C.F.R. § 224.67 (2008).

101. 25 C.F.R. § 224.74 (2008).

102. 25 C.F.R. § 224.63(c)(1) (2008). Some tribes have already implemented this requirement independent of a TERA. See, e.g., OGLALA SIOUX TRIBAL ENVTL. REVIEW CODE (2002), available at <http://www.narf.org/nill/Codes/oglalacode/oglalaenviro.htm>.

103. L. Poe Leggette & William E. Sparks, *Showing Some Brass: The Justice Department Moves to Dismiss a SUWA Case as Untimely*, FULBRIGHT & JAWORSKI L.L.P. (April 2008), available at http://www.fulbright.com/index.cfm?DETAIL=yes&FUSEACTION=publications.detail&NEWPAGE=0&PUB_ID=3425&SITE_ID=2046&pf=y (citing 25 C.F.R. § 224.63(c)(3), (4), & (d)(10) (2008)).

104. *Id.* (citing 25 C.F.R. § 224.63(d)(6) & (7)).

“once every two years” thereafter.¹⁰⁵ 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.¹⁰⁶ 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.”¹⁰⁷ Finally, agreements for developing alternative energies are subject to a 30-year limit, renewable only once for another 30-year term.¹⁰⁸

In August of 2010, Senator Byron Dorgan (D-ND) introduced S. 3752,¹⁰⁹ a bill “[t]o amend the Energy Policy Act of 1992 to streamline Indian energy development, to enhance programs to support Indian energy development and efficiency, [and] to make technical corrections.”¹¹⁰ In short, the Bill attempted to reduce the federal burdens later identified by the House Subcommittee through “mandated interagency coordination of planning and decision-making; regulatory waiver provisions; relief from land transaction appraisal requirements; and the elimination of fees assessed by the Bureau of Land Management for applications for permits to develop Indian lands.”¹¹¹

Unfortunately, however, S. 3752 died in Committee before consideration by the full Senate.¹¹²

3. Recognition of the Federal Failure

Commentators have noted that the TERA imposes more stringent environmental standards upon tribes than non-Indian developers elsewhere.¹¹³ But, even where a tribe is compelled to go through the burdensome TERA process – which may still be a good idea – many tribes simply do not have the resources necessary to fulfill the TERA requirements.¹¹⁴ 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

105. 25 U.S.C. § 3504(e)(2)(E) (2012).

106. 25 U.S.C. § 3504(e)(2)(D)(ii) (2012).

107. Leggette & Sparks, *supra* note 103 (quoting 25 C.F.R. § 224.63(g)).

108. 25 C.F.R. § 224.86(a)(1) (2008).

109. S. 3752, 111th Cong. (2010).

110. *Id.*

111. Olguim testimony, *supra* note 97, at 2.

112. S. 3752 (111th): *Indian Energy Parity Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s3752> (last visited Sept. 3, 2012).

113. See, e.g., Tribal Energy Res. Agreements Under the Indian Tribal Energy Dev. and Self Determination Act: Final Rule, 73 Fed. Reg. 12,808, 12,814 (Mar. 10, 2008) (codified at 25 C.F.R. pt. 224 (2008)); Unger, *supra* note 98, at 358 (“[T]he TERA framework has changed the federal role in tribal resource development without necessarily reducing it or shifting true control to tribes.”).

114. See generally Judith V. Royster, *Practical Sovereignty, Political Sovereignty and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008).

assume the responsibility of a TERA.¹¹⁵ “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.¹¹⁶

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.¹¹⁷ When 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.¹¹⁸ 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.”¹¹⁹

C. *The Future of Alternative Energy Development in American Indian Country*

The doctrine of self-determination acknowledges that tribal control over development is the best way to strengthen tribal governance and improve economic self-sufficiency.¹²⁰ According to much of the testimony offered at the 2011 House Subcommittee Hearing discussed above, self-determination must also include freedom from the yoke of federal energy oversight and regulation.¹²¹

In May of 2011, the DOE held its first Tribal Summit.¹²² The goal of the Summit, much like that of the House Subcommittee Hearing, was to “provide a forum to survey, analyze and provide viewpoints on real-time obstacles that tribes face in deploying clean energy as well as potential solutions.”¹²³ For many, the Summit presented “a historic opportunity for the [DOE] and tribal leaders to discuss a broad range of critical energy and environmental issues in Indian Country.”¹²⁴

115. *About Tribal Energy Resource Agreements (TERAs)*, TRIBAL ENERGY AND ENVIRONMENTAL INFORMATION CLEARINGHOUSE, <http://teeic.anl.gov/abouttera/index.cfm> (last visited Sept. 3, 2012).

116. Royster, *supra* note 114, at 1083.

117. 149 CONG. REC. S15335-01 (daily ed. Nov. 21, 2003) (statement of Sen. Ben Nighthorse Campbell).

118. *Id.*

119. 149 CONG. REC. S7679-02 (daily ed. Jun. 11, 2003) (statement of Sen. Ben Nighthorse Campbell). See also Elizabeth Bewley, *Tribes Push to Remove Red Tape from Energy Development*, NAT'L WIND WATCH (Apr. 2, 2011), available at <http://www.greatfalltribune.com/article/20110402/BUSINESS/104020305/Tribes-push-remove-red-tape-from-energy-developmentwind-watch.org/news/2011/04/02/tribes-push-to-remove-red-tape-from-energy-development/>.

120. Unger, *supra* note 98, at 337; see also *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) (noting a federal “policy of supporting tribal self-government and self-determination” (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985))).

121. See *supra* notes 71-81 and accompanying text.

122. *DOE Tribal Summit - May 2011*, ENERGY.GOV: OFFICE OF INDIAN ENERGY POLICY AND PROGRAMS, <http://www.energy.gov/indianenergy/services-0> (last visited Sept. 3, 2012).

123. Tracey Lebeau, *Department of Energy Tribal Summit: Winning Our Energy Future*, <http://energy.gov/indianenergy/resources/tribal-summit> (last visited Oct 4, 2012).

124. *Id.*

Having identified “obstacles that tribes face in deploying clean energy” at the Tribal Summit and beyond, Congress is now poised to write the legislation necessary to allow tribes to pursue energy self-determination.¹²⁵ 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.”¹²⁶ Indeed, in order to effectively realize the twin goals of promoting tribal self-determination and encouraging the efficient development of tribal energy resources,¹²⁷ it will be *necessary* to emphasize the former to bring about the latter.

In October of 2011, Senator John Barrasso (R-WY) introduced S. 1684,¹²⁸ a bill “[t]o amend the Indian Tribal Energy Development and Self-Determination Act of 2005.”¹²⁹ Although not as robust as S. 3752, S. 1684 is significant in that it makes the Tribal Energy Resource Agreement (TERA) provision of the IEA somewhat workable.¹³⁰ Section 103 of the Bill extends an approval exemption to leases, business agreements, and rights-of-way granted by a tribe to a tribal energy development organization in which the tribe maintains a controlling interest, thereby expanding the opportunity for access to capital for direct tribal development without federal approval where the tribe continues to control the activity.¹³¹ This Section also

provides for a favorable tribal capacity determination based on a tribe’s performance of 93-638 contracts or self-governance compacts over a three-year period without material audit exceptions . . . allows for TERA funding transfers to be negotiated between the [BIA] and the tribe based on cost savings occasioned by the [Interior Department] as a result of a TERA . . . [and] confirms that TERA provisions are not intended to waive tribal sovereign immunity.¹³²

In April of 2012, the Senate Committee on Indian Affairs held a hearing on S. 1684,¹³³ during which numerous tribal officials indicated their support for the Bill. Although many officials submitted that the “biggest problem is what is not

125. *Energy Hearing*, *supra* note 74, at 2 (statement of Rep. Don Young).

126. *Questions From the Tribal Business Journal for Incoming HCNR Chairman Doc Hastings*, TRIBAL BUS. J. (SPECIAL EDITION) 3 (Winter 2011) (“[A] new federal paradigm ought to be explored to give tribes and individual Indian landowners the option – at their discretion – of enjoying the freedom, risk, responsibility, and reward of managing their lands without obtrusive BIA involvement.”).

127. Andrea S. Miles, Note, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities*, 30 AM. INDIAN L. REV. 461, 462 (2006) (noting “the dual goals of [the IEA]: to encourage the efficient development of energy minerals on tribal land and to promote tribal self-determination, at least in the context of energy development”).

128. Indian Tribal Energy Development and Self-Determination Act Amendments of 2011, S. 1684, 112th Cong. (2011).

129. *Id.*

130. *Indian Tribal Energy Development and Self-Determination Act Amendments of 2011: Hearing on S. 1684, Before the S. Comm. on Indian Affairs*, 112th Cong. (April 19, 2012) (written testimony Irene C. Cuch, Chairwoman, Ute Tribal Business Committee, Ute Indian Tribe of the Uintah and Ouray Reservation).

131. *Id.*

132. Olguim testimony, *supra* note 97, at 6.

133. *Indian Tribal Energy Development and Self-Determination Act Amendments of 2011: Hearing on S. 1684, Before the S. Comm. On Indian Affairs*, 112th Cong. (2012).

in the bill” – as “S. 1684 barely scratches the surface of outdated laws and regulations, bureaucratic regulatory and permitting processes, and insufficient federal staffing or expertise to implement those processes”¹³⁴ – the overall sentiment was that S. 1684 is a much needed step in the right direction. As noted by Tex G. Hall, Chairman of the Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation:

If Indian tribes are going to unlock the potential of their energy resources, we need real changes in the law. Changes that affirm tribal authority, provide tribes access to funding and financing opportunities, and allow tribes¹³⁵ to participate in federal energy programs that have over looked tribes for decades.

The next step will be for the Senate Committee on Indian Affairs to consider mark-ups to the Bill. A fine line will need to be toed. Hopefully, considering the testimony of tribal leaders submitted most recently, mark-ups can make the Bill as hearty as the previously introduced S. 3752. Nevertheless, it is a step in the right direction, which is better than no steps at all; and any changes that will subject the Bill to a fate similar to that suffered by S. 3752 should be avoided.

II. CONCLUSION

Hopefully both sides of the coin – cultural property protection in the face of any callous non-Indian energy development, and streamlined tribal energy development for sake of tribal self-determination – can be realized by the revised S. 1684. Although not as apt as the previously introduced S. 3752, S. 1684 is a step in the right direction – a step that must be taken. The protection of Indian country, both in the long and short term, quite literally depends on it.

134. *Id.* at 3 (testimony of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation).

135. *Id.*