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Change is in the Wind: Self-Determination and Wind Power through Tribal Energy Resource Agreements

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CHANGE IS IN THE WIND: SELF-DETERMINATION AND WIND POWER THROUGH TRIBAL ENERGY RESOURCE AGREEMENTS

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The United States currently faces an energy supply crisis, problems of climate change and environmental degradation, and national security concerns attributable to the reliance on fossil fuels. Wind power can play a significant role in addressing these issues. Wind resources on Native American lands have great potential as part of a national solution. At the same time, harnessing tribal wind power can address the need for sustainable and environmentally sound economic development on tribal lands. To successfully meet these needs, tribal wind resource development must enhance tribal control under the principle of self-determination. The Energy Policy Act of 2005 included a provision designed to allow self-determined development of tribal natural resources through tribal energy resource agreements (TERAs), which will allow tribes to enter into leases and other business agreements for resource development without the otherwise-required federal approval process. However, the TERA framework falls short, in various ways, of its promise of putting control of resource development into tribal hands. Wind resource development is free of many concerns raised by the development of traditional energy resources, such as environmental harms and erosion of the federal trust responsibility toward tribes. The use of TERAs for wind power projects may, along with statutory changes, allow for self-determined tribal resource development.

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I. INTRODUCTION

On Earth Day 2009, President Barack Obama exhorted the public, "[I]t is time for us to lay a new foundation for economic growth by beginning a new era of energy exploration in America."[1] He called for a new energy economy based on renewable sources and technologies, with the aim of creating jobs, enhancing energy security, and protecting the planet from climate change.[2] Wind power is now the fastest-growing energy source worldwide and will be central in developing the new energy economy to achieve these ends.[3] One major source of wind power is the wind that blows across Native American tribal lands, which could provide an abundant source of energy to help meet national needs.[4]

Developing these resources can not only help in the new American energy economy but can also meet needs of the tribes that own the resources by providing a means of sustainable economic development.[5] To fulfill this goal, however, wind power

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1. President Barack Obama, Remarks on Clean Energy in Newton, Iowa (Apr. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Newton-IA/.

2. *Id.*

3. William Moomaw, *Renewable Energy and Climate Change*, 2008 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE SCOPING MEETING ON RENEWABLE ENERGY SOURCES 3, 4 (Olav Hohmeyer & Tom Trittin eds.), *available at* http://www.ipcc.ch/pdf/special-reports/srren.pdf.

4. Kevin L. Shaw & Richard D. Deutsch, *Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development on Indian Lands*, NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY (Rocky Mtn. Min. L. Found., Westminster, Colo.), Nov. 10–11, 2005, at 9-3.

This Note refers to American Indians and tribes by a variety of terms, recognizing the lack of a clear consensus regarding preferred terminology. *See* Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 291 n.2 (2005). The term "tribe" predominates here because it is the statutorily accepted term for an Indian community or governmental entity as used in federal law. *See* 25 U.S.C. § 450b(e) (2006). The discussion generally uses the term "tribal lands" to refer to lands defined as "Indian lands" in Title 25, Chapter 37, of the U.S. Code. *Id.* § 3501(2). However, land title is a complex issue in Indian law, and this Note does not address the complexities of ownership that may affect development on lands controlled by tribes or individual Indians. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 544–52 (1993) [hereinafter Royster, *Mineral Development*] (discussing how land tenure patterns affect tribal mineral ownership). Finally, this Note does not consider issues specific to Alaska Native groups, which are governed in part under a distinct legal framework. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 905–11 (4th ed. 1998).

5. DEAN B. SUAGEE, RENEWABLE ENERGY POLICY PROJECT, ISSUE BRIEF 10, RENEWABLE ENERGY IN INDIAN COUNTRY: OPTIONS FOR TRIBAL GOVERNMENTS (1998), http://www.repp.org/repp_pubs/pdf/issuebr10.pdf [hereinafter SUAGEE, RENEWABLE ENERGY].

development on tribal lands must take an approach that enhances tribal control, rather than federal control, over the management of tribal resources.[6] This approach must be compatible with the principle of tribal self-determination, which posits that tribes should control their own social, governmental, and economic development.[7] Congress recently enacted a federal legal framework that provides tribes an option for increasing their control over resource development projects, through tribal-federal agreements called "tribal energy resource agreements" (TERAs).[8] Though the TERA framework falls short of allowing full tribal control over natural resource development, wind power offers the best opportunity for TERAs to advance tribal self-determination in this arena.

This Note examines issues related to self-determination and tribal control of resource development under the TERA structure, as played out in the context of tribal wind power. Part II summarizes the importance of developing tribal wind power to meet national energy and environmental needs as well as tribal economic and environmental needs. Part III discusses the principle of tribal self-determination and obstacles to its realization. Part IV provides an overview of the legal structure governing tribal wind power, including the TERA legislation and regulations. Part V presents a critique of the TERA framework, arguing that it does not foster tribal self-determination to the extent that it should. Part VI proposes that wind power offers an opportunity for self-determined resource development and suggests various changes to the TERA structure to help achieve this goal. Part VII offers concluding thoughts regarding the potential of TERAs to promote wind power development on tribal lands in accord with the principle of self-determination.

II. TRIBAL WIND POWER AS A SOLUTION TO NATIONAL AND TRIBAL NEEDS

Wind power is a major component in developing a new energy system nationwide. Turning from conventional energy sources to wind and other renewable resources will mitigate environmental and health effects related to fossil fuels. Wind power offers great

6. *See infra* notes 43–49 and accompanying text.

7. *See infra* Part III.

8. 25 U.S.C. § 3504(e); *see infra* Part IV.B.

potential for replacing conventional fuels for electricity, and tribal wind resources can play a significant role in this endeavor. Not only can tribal wind power projects contribute to the national energy solution, but they can also meet tribal needs for environmentally sustainable economic development.

A. The Imminent Need for Alternative Energy Sources and the Promise of Wind Power

Developing wind power will address a variety of crucial national and global concerns.[9] The foremost of these are global warming and other environmental effects of burning fossil fuels.[10] Most electricity in the United States is produced from coal and natural gas, leading to greenhouse gas emissions.[11] The Intergovernmental Panel on Climate Change, an international scientific body affiliated with the United Nations, has reported that the buildup of greenhouse gases is the major cause of global warming.[12] Global warming leads to environmental effects including drought, flooding, rising sea levels, coastal erosion, ecosystem collapse, and an increased likelihood of mass extinctions, as well as harms to humans such as population dislocations and malnutrition.[13]

Halting global warming will require forceful action. Experts suggest that dramatic changes must be made within the next ten years to avoid passing the point of no return.[14] One estimate suggests the need to reduce global greenhouse gas emissions to more than 50 percent below 1990 levels by the year 2050.[15] Additionally, fossil fuel extraction and energy production cause environmental

9. AM. WIND ENERGY ASS'N, WIND POWER OUTLOOK 2008 1 (2008), http://www.awea.org/pubs/documents/Outlook_2008.pdf.

10. *See id.* at 6.

11. Robert Gough, *Tribal Wind Power Development in the Northern Great Plains*, NAT. RESOURCES & ENV'T, Fall 2004, at 57, 59.

12. Moomaw, *supra* note 3.

13. Intergovernmental Panel on Climate Change, 2007: Summary for Policymakers, *in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 7, 11–12 (Martin Parry et al. eds., Cambridge Univ. Press 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf.

14. Al Gore, Speech on Renewable Energy (July 17, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=92638501 [hereinafter Gore Speech].

15. Climate Change Research Centre, 2007 Bali Climate Declaration by Scientists, http://www.ccrc.unsw.edu.au/news/2007/Bali.html (last updated May 5, 2009).

contamination and public health consequences such as respiratory disease.[16] Added to these concerns are the economic and national security costs of importing fossil fuels from other nations at unstable prices.[17]

Low- and no-carbon alternatives will play a key role in addressing the critical issues related to fossil fuel energy.[18] The use of wind power has been growing dramatically, and wind can take a leading position in the new energy system.[19] In 2008, the U.S. wind power industry experienced 50 percent growth, making the United States the global leader in wind energy generation.[20]

Replacing fossil fuels with wind energy makes sense because wind is an inexhaustible resource; also, because wind is free, the price of wind power does not depend on fuel costs that can lead to price spikes.[21] The Western Governors' Association projects that if its policy recommendations are implemented, wind power could be the lowest-cost energy resource in the western United States.[22] Wind is also an abundant resource: estimates indicate that wind resources in the Midwest alone could meet the United States' total electricity needs.[23]

Wind power raises some concerns about its negative environmental effects, which primarily involve visual impacts, noise, and harm to birds and bats.[24] However, it is possible to minimize these effects through careful siting of wind turbines and other

16. Dave Newman, Feature Article, *Empowering the Wind: Overcoming Obstacles to Wind Energy Development in the United States*, SUSTAINABLE DEV. L. & POL'Y, Summer/Fall 2003, at 5, 5.

17. Gore Speech, *supra* note 14. President Obama recently remarked that oil imports represent 20 percent of total U.S. imports. Obama, *supra* note 1.

18. Moomaw, *supra* note 3.

19. *Id.*

20. AM. WIND ENERGY ASS'N, ANNUAL WIND INDUSTRY REPORT 2 (2009), *available at* http://www.awea.org/publications/reports/AWEA-Annual-Wind-Report-2009.pdf.

21. Gough, *supra* note 11, at 59.

22. WESTERN GOVERNORS' ASS'N, CLEAN ENERGY, A STRONG ECONOMY AND A HEALTHY ENVIRONMENT 16 (2006), *available at* http://www.westgov.org/wga/publicat/CDEAC06.pdf.

23. Ronald H. Rosenberg, *Diversifying America's Energy Future: The Future of Renewable Wind Power*, 26 VA. ENVTL. L.J. 505, 519 (2008).

24. U.S. Dep't of Energy, Guide to Tribal Energy Development: Environmental Benefits and Impacts, http://www1.eere.energy.gov/tribalenergy/guide/benefits_impacts.html (last updated Mar. 13, 2009).

mitigation measures.[25] Moreover, wind power poses far fewer negative effects than fossil fuels do, and the advantages of wind power far outweigh those concerns.[26]

B. The Role of Tribal Wind Resources and Their Potential to Meet Tribal Needs

Tribal lands have substantial wind resources. The Energy Information Administration has identified almost one hundred reservations with winds great enough for energy development projects.[27] Reservations on the Great Plains offer approximately 200 gigawatts of wind power potential—roughly one-third of the electrical capacity of the entire nation.[28] These tribal lands offer the additional advantage of having single landowners over large land areas, allowing development without the need to enter into agreements with many different owners.[29]

Tribes can address several issues through the development of wind power on their lands. One concern raised by advocates of tribal wind power is the need for sustainable economic development.[30] Despite federal assistance for tribal economic development over the past several decades,[31] the people living on many U.S. tribal

25. Newman, *supra* note 16, at 9; NAT'L WIND COORDINATING COLLABORATIVE, MITIGATION TOOLBOX (2007), *available at* http://www.nationalwind.org/assets/publications/Mitigation_Toolbox.pdf. Selective siting can also address religious and other cultural impacts. U.S. Dep't of Energy, Guide to Tribal Energy Development: The Impacts of an Energy Project, http://www1.eere.energy.gov/tribalenergy/guide/energy_project_impacts.html (last updated Mar. 16, 2009).

26. Rosenberg, *supra* note 23, at 509.

27. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ENERGY CONSUMPTION AND RENEWABLE ENERGY DEVELOPMENT POTENTIAL ON INDIAN LANDS 28 (2000), *available at* http://www.eia.doe.gov/cneaf/solar.renewables/ilands/ilands.pdf. Issues regarding access to the transmission grid and distance from load centers play into how appropriate development is at a particular location. *Indian Energy Development: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 47 (2008) (prepared statement of Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Dep't of the Interior); Rosenberg, *supra* note 23, at 527. However, these issues are beyond the scope of this Note.

28. Gough, *supra* note 11, at 57.

29. Mark Shahinian, Special Feature, *The Tax Man Cometh Not: How the Non-Transferability of Tax Credits Harms Indian Tribes*, 32 AM. INDIAN L. REV. 267, 271 (2007–2008).

30. Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, NAT. RESOURCES & ENV'T, Summer 2008, at 25, 28; Gough, *supra* note 11, at 62.

31. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.04 (Nell Jessup Newton ed., 2005).

reservations suffer from extreme poverty.[32] Unemployment rates, at approximately 50 percent, are about ten times higher than the national average, while per capita income is significantly lower.[33] Moreover, basic infrastructure—such as plumbing and sewer systems, electricity, and paved roadways—is often lacking.[34]

However, reservation populations have the benefit of the tribal lands they live on, which are a crucial economic resource for most tribes.[35] Land and other natural resources can provide opportunities for economic development.[36] Among the natural resources the tribal land base offers is wind.[37] A productive and sustainable economy based on wind can help address the poverty and related social issues currently confronting tribes.[38]

Developing tribal wind power can also address tribes' environmental concerns. Much past resource development on tribal lands has involved the extraction of coal, oil, gas, and uranium.[39] Energy mineral exploration and production activities on tribal lands have caused environmental effects including air, water, and soil contamination, as well as erosion and flooding.[40] Wind power offers

32. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, *in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 2, 3 (Stephen Cornell & Joseph P. Kalt eds., UCLA Am. Indian Studies Ctr. 1992).

33. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943, 952–53 (2008) [hereinafter Clarkson, *Wall Street Indians*].

34. *Id.*

35. Richmond L. Clow & Imre Sutton, *Prologue: Tribes, Trusteeship, and Resource Management*, *in* TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT, at xxix, xxxvi (Richmond L. Clow & Imre Sutton eds., 2001) (referring to "[t]ribes' dependence on a resource base and territorial locus"); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003) ("[T]he land base is the linchpin for tribal survival.").

36. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 15.01.

37. *See supra* notes 27–29 and accompanying text.

38. *See* David H. Getches, *Foreword* to TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT, at xiii, xiii (Richmond L. Clow & Imre Sutton eds., 2001) [hereinafter Getches, *Foreword*].

39. SUAGEE, RENEWABLE ENERGY, *supra* note 5.

40. Royster, *Mineral Development*, *supra* note 4, at 614–15. One particularly intractable example is uranium mining on the Navajo Reservation: radioactive soil and mine tailings, and water in abandoned pit mines, have led to diseases including lung, stomach, ovarian, and breast cancer, respiratory disease, and Navajo neuropathy. Judy Pasternak, *A Peril That Dwelt Among the Navajos*, L.A. TIMES, Nov. 19, 2006, at A1; Judy Pasternak, *Oases in Navajo Desert Contained "a Witch's Brew,"* L.A. TIMES, Nov. 20, 2006, at A1. See Mary Christina Wood,

an alternative form of development without air pollution or solid and hazardous wastes.[41] Thus, wind provides an opportunity for economic development that is nonpolluting and sustainable over the long term.[42]

To meet these goals, however, tribal resource development must also promote self-determination through tribal control over development projects. Economic development on tribal lands succeeds best where control over the development activity is in tribal hands rather than in the hands of the federal government or another outsider.[43] Past federal policies tended to place control in the hands of the federal government or non-Indian developers.[44] For example, in the past, the federal government was entirely in charge of deciding the course of natural resource development on tribal lands.[45] The government often accomplished this development through lease agreements with outsiders, initially for grazing and mining, and later for other mineral development processes as well.[46] The royalty payments to tribes under these leases were low, and tribes were unable to negotiate for better lease terms, leaving them at a disadvantage.[47] More generally, the federal government retained the ability to direct the course of development under these policies.[48]

Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1481–96, for additional examples of environmental contamination resulting from energy development and hazardous waste storage on and near tribal lands.

41. Rosenberg, *supra* note 23, at 523–24.

42. Gough, *supra* note 11, at 58.

43. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 619 (2004). Stephen Cornell and Joseph P. Kalt have done extended research on tribal economic development as part of the Harvard Project on American Indian Economic Development. They note, "After fifteen years of research and work in Indian Country, we cannot find a single case of sustained economic development in which an entity other than the Indian nation is making the major decisions about development strategy, resource use, or internal organization." STEPHEN CORNELL & JOSEPH P. KALT, JOINT OCCASIONAL PAPERS ON NATIVE AFF. NO. 2005-02, TWO APPROACHES TO ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS: ONE WORKS, THE OTHER DOESN'T 14 (2006), *available at* http://www.jopna.net/pubs/jopna_2005-02_Approaches.pdf.

44. *See* Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1071–75 (2008) [hereinafter Royster, *Practical Sovereignty*].

45. *Id.* at 1072.

46. *Id.* at 1072–73.

47. *Id.* at 1074.

48. *Id.*

More recently, a shift in federal policy has lessened the extreme federal control over tribal resource development. The doctrine of self-determination, which has guided much of federal policy toward American Indians over the past decades, acknowledges that giving tribes control over how their resources are developed is the best way to improve economic self-sufficiency and to strengthen tribal governmental and economic structures.[49] Thus, promoting self-determination should be a central consideration in the development of tribal energy resources.

III. THE PRINCIPLE OF TRIBAL SELF-DETERMINATION AND OBSTACLES TO ITS REALIZATION

The doctrine of self-determination has its roots in tribal sovereignty long recognized in U.S. Supreme Court jurisprudence.[50] The notion of tribal sovereignty acknowledges the power and right of tribes to self-governance.[51] Juxtaposed with this notion is a federal assertion that the U.S. government has power over tribes, which extends to the power to destroy tribal sovereignty.[52] The tension

49. *See* Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY (Rocky Mtn. Min. L. Found., Westminster, Colo.), Nov. 10–11, 2005, at 13A-1; *infra* Part III.

Even today under the policy of self-determination, tribes suffer from many disadvantages in developing their resources and economies. Lack of access to capital markets occurs through limitations on tribal tax-exempt bonding authority, Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1014–17 (2007), and other statutory, regulatory, and informational barriers, Clarkson, *Wall Street Indians*, *supra* note 33, at 954–55, 957–59. Also, federal jurisprudence allows state taxation of activities by non-Indians on tribal lands. Angelique A. EagleWoman, *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations Within the United States*, 43 TULSA L. REV. 43, 55–61 (2007). This creates a burden on economic activity on tribal lands, thus hindering economic development. *Id.* at 50, 58. For example, the state of Wyoming taxes oil and gas production on the Eastern Shoshone Tribe's land at 14 percent. *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Comm. on Indian Affairs*, 108th Cong. 82 (2003) (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council). When the state tax is combined with the tribe's 8 percent tax, the total tax burden creates a disincentive for resource development. *Id.* Similarly, the wind power project on the Campo Kumeyaay lands in San Diego County is subject to county taxes. Connolly, *supra* note 30, at 28. The result is "a draw of tax dollars from the tribal economy to an adjacent jurisdiction." *Id.*

50. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (recognizing the Cherokee Nation as a sovereign state).

51. Rosser, *supra* note 4, at 343.

52. Robert Laurence, *American Indians and the Environment: A Legal Primer for Newcomers to the Field*, 7 NAT. RESOURCES & ENV'T, Spring 1993, at 3, 4.

between these principles informs considerations of tribal self-determination and federal control, both with respect to tribal economic development in general and with respect to the development of tribal natural resources, including wind power.[53]

The history of federal policy toward Native American tribes reflects an ebb and flow between tribal sovereignty and federal control.[54] The policy of self-determination has held sway since the 1960s, based on a renewed recognition of tribal sovereignty and a desire for reforms to address the needs of ethnic and racial minorities.[55] The central idea of the policy promoting self-determination is that tribes can serve as governmental units that provide services to their members.[56]

In 1970, President Richard Nixon issued a message to Congress formally articulating the self-determination policy:

> The time has come to break decisively with the past and to create the conditions for a new era in which the Indian

53. *See infra* Parts V, VI. Another closely related tension is that between the political branches' assertions of support for tribal sovereignty through the policy of self-determination, discussed immediately below, and the Supreme Court's recent contrary tendency to limit tribal sovereignty. Striking examples include limits on tribes' jurisdiction over non-Indians in both criminal and civil contexts and limits on tribes' ability to hold the federal government liable in damages for breaches of trust. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians); Nevada v. Hicks, 533 U.S. 353 (2001) (limiting civil jurisdiction over non-Indians to narrow circumstances); Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (further limiting civil jurisdiction over non-Indians); United States v. Navajo Nation (*Navajo Nation I*), 537 U.S. 488 (2003) (limiting the circumstances under which damages suits against the federal government can prevail); United States v. Navajo Nation (*Navajo Nation II*), 129 S. Ct. 1547 (2009) (same). For more information about the Supreme Court's Indian law jurisprudence, see ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

54. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, §§ 1.01, 1.06. Cohen identifies four periods in the history of federal policy between the adoption of the U.S. Constitution and the present-day policy of self-determination. From 1789 to 1871, federal Indian policy involved treaty making with the aim of obtaining tribal lands but generally allowing tribes autonomy in internal matters. *Id.* § 1.03. In 1871, Congress halted treaty making with tribes, and until 1928, federal policy attempted to assimilate American Indians into "civilized" society; the primary means was to break up tribally owned landholdings into individual allotments, sometimes accompanied by terminating tribal status. *Id.* § 1.04. From 1928 to 1942, policy shifted away from assimilation and back toward sovereignty, as epitomized by the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006), which restored sovereignty and encouraged self-governance and economic development. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.05. From 1943 to 1961, policy returned to assimilation, through termination of federal recognition of tribal status. *Id.* § 1.06.

55. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.07.

56. *Id.*

> future is determined by Indian acts and Indian decisions. . . .
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> . . . [T]he Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems.[57]

Two major legislative enactments implemented the self-determination policy: the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA)[58] and the Tribal Self-Governance Act of 1994.[59] These two acts aimed to put control over the course of social, governmental, and economic development into tribal hands by providing federal funding for tribes to deliver health and education services and to administer programs to promote economic development.[60] One illustrative success story involves forest resources.[61] During the 1980s, forty-nine tribes increased their roles in the management of their forestry resources under the ISDEAA.[62] Under tribal control, forestry productivity and profits increased significantly.[63] This example shows the power of tribal control over economic development.

However, a variety of obstacles to the ideal of self-determination hinder tribal control. These include a tension with the trust doctrine, as well as conflicts of interest with the federal government and bureaucratic resistance to tribes' taking over control of federal programs and activities. The trust doctrine recognizes a federal responsibility toward tribes and individual Indians and toward the land and resource assets that the federal government holds in trust for

57. Special Message to the Congress on Indian Affairs, PUB. PAPERS 564, 565, 576 (July 8, 1970).

58. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–458).

59. Pub. L. No. 103-413, tit. II, 108 Stat. 4270 (1994) (codified at 25 U.S.C. §§ 450a-1, 458aa–458hh).

60. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.07.

61. Royster, *Practical Sovereignty*, *supra* note 44, at 1070.

62. *Id.*

63. *Id.* Output increased by up to 40 percent, and the prices tribes received increased by up to 6 percent. *Id.*

them.[64] This doctrine goes hand in hand with the federal recognition of tribal sovereignty but acknowledges that federal power over tribes creates a federal responsibility to protect tribal rights.[65]

The trust relationship originated in treaties between tribes and the federal government.[66] These treaties created a "sacred trust" relationship, including a promise that the federal government would protect tribes in exchange for the tribes relinquishing lands to the United States.[67] As a doctrine of federal Native American law, the trust doctrine lies on the foundation of three cases from the era of Chief Justice John Marshall.[68] These cases together establish the principles that the federal government holds legal title to tribal lands, while tribes have possessory rights;[69] that tribes are dependent nations rather than fully independent sovereignties;[70] and that though tribes retain sovereignty over their own governance, they rely on the federal government for protection from harm by states and individuals.[71]

The relationship between the doctrines of trust and self-determination is complex and in some instances oppositional. The federal trust responsibility can interfere with the exercise of tribal self-determination.[72] The extent to which this is true depends partly on how one conceptualizes the trust doctrine. It can be seen as a

64. Chambers, *supra* note 49, at 13A-9.

65. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 5.04[4].

66. Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 272 (2003) [hereinafter Tsosie, *Conflict*].

67. *Id.* at 273; Wood, *supra* note 35, at 356–58. This promise of protection took various forms, including a guarantee to the lands designated for tribal groups, assurances that non-Indians committing crimes on tribal lands would be subject to punishment, and assistance in the form of agricultural equipment and domestic animals. *See, e.g.*, Treaty with the Creeks, 1790, *in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 25, 25–28 (Charles J. Kappler ed., 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/cre0025.htm.

68. Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 593 (2008). The three cases—the "Marshall Trilogy"—are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See WILLIAMS, *supra* note 53, at 47–70, for a critique of the Marshall Trilogy as perpetuating white superiority and discrimination based on stereotypes of American Indians as "savages."

69. *Johnson*, 21 U.S. at 585.

70. *Cherokee Nation*, 30 U.S. at 13.

71. *Worcester*, 31 U.S. at 552, 555, 561–62; Tsosie, *Conflict*, *supra* note 66, at 273.

72. Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 902–03 (1998).

federal duty to protect tribes' right of self-governance and autonomy,[73] or as a way to justify federal power and control over tribal affairs.[74] The latter conception relates more closely to the federal trust responsibility to manage Indian property than to the responsibility to protect Indian rights to sovereignty and autonomy.[75] A leading example is the case of *Lone Wolf v. Hitchcock*,[76] in which the Supreme Court held that Congress could divest a tribe of its lands without tribal members' consent despite a treaty to the contrary. The Court based its holding on the rationale that Congress's trust responsibility over the lands gave it "a paramount power over the property of the Indians."[77] Under this interpretation, the trust doctrine directly interfered with tribal self-determination.

By contrast, since the mid-twentieth century, the trust doctrine has been used as a source of tribal rights.[78] Tribes and individual American Indians use the trust doctrine as the ground for bringing suit against the federal government based on breach of trust.[79]

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73. Tsosie, *Conflict*, *supra* note 66, at 274.

74. *Id.* at 275.

75. Chambers, *supra* note 49, at 13A-11.

76. 187 U.S. 553 (1902).

77. *Id.* at 565–67.

78. Tsosie, *Conflict*, *supra* note 66, at 275–76.

79. *See* Wood, *supra* note 35, at 364. Professor Wood distinguishes between suits for injunctive relief, usually based on the Administrative Procedure Act (APA), and suits for damages, based on the Tucker Act or on the Indian Tucker Act. *Id.* at 361, 364. The latter acts require a claim to be grounded in an "express source of law," including the U.S. Constitution, statutes, treaties, and regulations, that creates a right to federal compensation for damages. *Id.* at 364–65.

The recent Supreme Court decisions regarding the Navajo Nation's breach of trust claims illustrate the difficulty of prevailing on a claim for damages. United States v. Navajo Nation (*Navajo Nation I*), 537 U.S. 488 (2003); United States v. Navajo Nation (*Navajo Nation II*), 129 S. Ct. 1547 (2009). This case involved the federal role in coal lease amendments between the Navajo Nation and a private company. *Navajo Nation I*, 537 U.S. at 493. During negotiations to amend the royalty rate paid to the Navajo Nation, representatives from the coal company met privately with the Secretary of the Interior, and the Department of the Interior did not inform the Navajo Nation that it had determined a royalty rate of 20 percent was appropriate, instead allowing the parties to renegotiate at a rate of 12.5 percent. *Id.* at 496–98. Nevertheless, in *Navajo Nation I*, the Court held that no provision of the controlling statute or regulations imposed federal liability for the breach of trust. *Id.* at 493. Subsequently, in *Navajo Nation II*, the Court held that neither any of three other statutes pointed to by the Navajo Nation, nor the federal government's "comprehensive control" over coal mining on American Indian lands, supported monetary damages for breach of trust. *Navajo Nation II*, 129 S. Ct. at 1555–58.

Professor Wood observes, "Trust enforcement under the APA is much broader than under the Tucker Acts, because there is no requirement of premising a claim on a statute or some other source of express law." Wood, *supra* note 35, at 365. Instead, suits seeking injunctions can be grounded in "broad common law assertions of the trust responsibility." *Id.* However, she notes

Indeed, the ability to hold the federal government liable for breach is at the heart of its trust obligation toward tribes.[80] However, in recent years, while expanding tribes' ability to take control of business activities previously managed by the federal government, Congress has placed limits on federal liability for losses related to those activities.[81] The TERA framework for resource development includes such a limitation on liability.[82] This and other enactments offer specific instances in which an increase in self-determination comes with a reduction in tribes' ability to hold the federal government responsible under its trust obligation.[83]

Further problems in the exercise of tribal self-determination derive from federal conflicts of interest and resistance to giving up control over economic activities on tribal lands. First, the Department of the Interior (DOI) must conform to both the trust responsibility toward tribes and a responsibility to protect federal interests.[84] When tribal and public interests collide, a conflict of interest arises.[85] Such conflicts can emerge in the management of tribal natural resources.[86] For example, much resource development requires the DOI to undertake an environmental review process.[87] The government is simultaneously obligated to act in the tribe's best interests and in the public interest in protecting the environment, which "introduces non-Indian considerations" into the review of a resource development project.[88] This conflict can interfere with the federal trust responsibility toward tribes.[89]

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that "recent decisions have ignored the different contexts in which trust claims are brought, applying Tucker Act restrictions to claims brought under the APA." *Id.* Given the difficulty of prevailing on damages claims, this confusion creates an "ill-founded barrier" to "claims for injunctive relief" based on the trust doctrine. *Id.* at 367.

80. Rosser, *supra* note 4, at 301.

81. Chambers, *supra* note 49, at 13A-28 to -32.

82. *See infra* note 148 and accompanying text.

83. Rosser, *supra* note 4, at 336.

84. Porter, *supra* note 72, at 942.

85. *Id.*

86. Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 342 (1995) [hereinafter Royster, *Equivocal Obligations*].

87. *See infra* notes 109–18 and accompanying text.

88. Royster, *Equivocal Obligations*, *supra* note 86, at 334–42.

89. *See id.* at 364 ("In determining whether to approve development of tribal mineral resources, the [Interior] Secretary's obligation is to the tribal mineral owners and not to a balancing of tribal and public interests.").

Second, as regulatory activities are transferred from the federal government to tribes, the Bureau of Indian Affairs (BIA) bureaucracy may resist relinquishing control because of self-interested concerns over losing jobs and power.[90] This tendency is illustrated in the congressional attempt to shift control of programs to tribes under the ISDEAA.[91] This Act allowed tribes to contract with the BIA to manage programs previously managed by the BIA.[92] But the BIA often denied contracting requests,[93] and even when the BIA issued a contract, it dictated the form of program administration and required the tribe to obtain BIA concurrence in decision making.[94] In this way, the BIA retained significant control over tribal programs, and the federal bureaucracy thus greatly limited tribal self-determination.[95] Similarly, when these conflicts arise in federal laws and regulations governing tribal resource development, they hamper the ability of tribes to truly take control of development in a self-determined way.[96]

The principle of self-determination informs federal American Indian policy in general and policy for tribal resource development in particular. However, the contrary impulse for the government to assert its power over tribes can be an obstacle to tribal self-determination even when the government affirms its commitment to that principle and to increasing tribes' control over the course of development on their lands.

IV. THE LEGAL FRAMEWORK FOR WIND POWER DEVELOPMENT ON TRIBAL LANDS

The development of tribal renewable energy resources, including wind power, is governed primarily by tribal and federal law. In addition to generally applicable federal law, tribal

90. *See* Porter, *supra* note 72, at 942, 966. The BIA is the DOI division most directly responsible for carrying out federal Native American policies and programs. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 5.03.

91. *See supra* notes 58–60 and accompanying text.

92. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1262–63 (1995).

93. *Id.* at 1265 n.61.

94. *Id.* at 1265.

95. *See id.* at 1264 ("It is important . . . not to overstate the freedom the tribes enjoyed from the dead hand of federal bureaucracy.").

96. *See infra* Part V.

development projects often implicate federal approval and involvement. Concerns about self-determination and obstacles to development led Congress to enact a new framework for tribal energy resource development that minimizes the federal role.[97] This new framework allows tribes to enter into agreements for development projects once the Secretary of the Interior ("Secretary") approves a TERA for the tribe.

A. The Preexisting Legal Framework for Renewable Resource Development on Tribal Lands

The legal framework under which tribal renewable energy development can take place is shaped more by general provisions for economic development on tribal lands than by enactments aimed specifically at energy resource development. This is because past laws related to developing tribal natural resources focused on mineral resources.[98] By contrast, federal attention to renewable energy resources has come only much more recently and generally takes the form of incentives rather than legal requirements.[99]

Much of the legal framework for tribal economic development is based on tribal law and corporate documents and varies from tribe to tribe.[100] These bodies of law serve the same functions as local and state laws do for development outside tribal lands.[101] For example,

97. 25 U.S.C. § 3504 (2006).

98. Laws for mineral resource development include the 1891 Act, *id.* § 397 (allowing ten-year leases for mining on tribal land), the 1909 Act, *id.* § 396 (allowing leases for mining on allotted lands), the 1924 and 1927 amendments to the 1891 Act, *id.* § 398 (allowing leases for oil and gas mining on reservation land) and *id.* §§ 398a–398e (allowing leases for oil and gas mining on reservations created by executive order), the Indian Mineral Leasing Act of 1938, *id.* §§ 396a–396g (providing for consistent mineral leasing procedures for tribal lands), and the Indian Mineral Development Act of 1982, *id.* §§ 2101–2108 (allowing tribes to develop mineral resources through various business structures including joint ventures, operating and production-sharing agreements, and lease agreements). *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 17.03[2].

99. Rosenberg, *supra* note 23, at 532. The electricity generation industry is largely a matter of private finance and operation and is not federally controlled, and though federal policy encourages wind power development, no comprehensive national strategy exists. *Id.*; *see also infra* note 125 (summarizing the foremost federal renewable energy incentives).

100. Graham, *supra* note 43, at 630 & n.219. For more information about tribal corporate forms—and some difficulties tribes encounter with them—see Angelique EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 397–404 (2008) [hereinafter EagleWoman, *Tribal Nation Economics*].

101. *See* JOHN BUSCH ET AL., NATIVE POWER: A HANDBOOK ON RENEWABLE ENERGY AND ENERGY EFFICIENCY FOR NATIVE AMERICAN COMMUNITIES 58 (1998), http://www1.eere.

the Sisseton-Wahpeton Sioux Tribe of South Dakota has an extensive tribal code composed of approximately seventy chapters. [102] Among its provisions, the code governs corporations and commerce, business licensing, zoning, taxation, employment rights, and environmental protection. [103] With respect to wind power projects, tribal law can govern zoning and project siting requirements, building codes, worker safety, and project permitting. [104] Because wind power projects are a new type of development on tribal lands, many tribes have not yet developed ordinances to govern them specifically. [105] Tribes moving into wind power development may therefore need to develop applicable codes. [106] In addition to these local legal concerns, utility-scale wind power projects must comply with generally applicable federal provisions for interconnection to the electrical grid [107] and with various federal provisions related to environmental impacts and the protection of cultural resources. [108]

Depending on the form of the project, wind power projects may also trigger federal approval requirements. Federal approval derives from the federal-tribal trust relationship: [109] the trust obligation's

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energy.gov/tribalenergy/guide/pdfs/nativepower.pdf. Tribal lands are generally not subject to regulations of the states in which they are located. U.S. Dep't of Energy, Guide to Tribal Energy Development: State Legal Issues, http://www1.eere.energy.gov/tribalenergy/guide/state_legal_issues.html (last updated June 7, 2007).

102. National Tribal Justice Resource Center, Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation Codes of Law (1998), http://www.ntjrc.org/ccfolder/sisseton_wahpeton_codeoflawmenu.htm.

103. *Id.*

104. BUSCH ET AL., *supra* note 101, at 60; U.S. Dep't of Energy, Guide to Tribal Energy Development: Tribal Legal Issues, http://www1.eere.energy.gov/tribalenergy/guide/tribal_legal_issues.html (last updated June 7, 2007) [hereinafter U.S. Dep't of Energy, Tribal Legal Issues]; U.S. Dep't of Energy, Guide to Tribal Energy Development: Developer Risk Factors, http://www1.eere.energy.gov/tribalenergy/guide/developer_risk_factors.html (last updated June 7, 2007).

105. *See* Gough, *supra* note 11, at 61 (discussing the Rosebud Sioux Tribe's experience with a demonstration wind power project).

106. U.S. Dep't of Energy, Tribal Legal Issues, *supra* note 104.

107. U.S. Dep't of Energy, Guide to Tribal Energy Development: Grid Interconnection Issues, http://www1.eere.energy.gov/tribalenergy/guide/interconnection_issues.html (last updated Nov. 11, 2008).

108. BUSCH ET AL., *supra* note 101, at 60 (discussing the Endangered Species Act and the Migratory Bird Treaty Act); U.S. Dep't of Energy, Guide to Tribal Energy Development: Federal Legal Issues, http://www1.eere.energy.gov/tribalenergy/guide/federal_legal_issues.html (last updated June 7, 2007) (discussing federal laws for cultural resource protection).

109. Royster, *Equivocal Obligations*, *supra* note 86, at 332–33; *see supra* notes 64–71 and accompanying text.

promise of protection calls for federal approval of development agreements between tribes and non-Indians.[110] Some statutes related to tribal programs also explicitly include a requirement of federal approval.[111] For example, one method for tribes to develop renewable resources is leasing land to non-Indians for renewable energy projects. The general statutory provision for leases of tribal land dictates approval by the Secretary.[112] Alternatively, tribes can engage in development projects through their governmental entities or through corporations,[113] either alone or in partnership with private entities.[114] Even in the absence of a lease, such projects often require Secretarial approval because they involve contracts related to the use of tribal lands or convey an interest in tribal lands.[115]

Secretarial approval, in turn, implicates the National Environmental Policy Act (NEPA)[116] because approval constitutes "major Federal action," the trigger for NEPA.[117] The federal government's role thus entails an environmental review under NEPA, which typically requires that the government prepare an environmental impact statement addressing the impacts, unavoidable adverse environmental effects, alternatives, and other related considerations of the proposed development.[118]

The requirement for Secretarial approval often impedes development by adding delays and complexity to project planning.[119]

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110. Chambers, *supra* note 49, at 13A-20.

111. See Royster, *Practical Sovereignty*, *supra* note 44, at 1077–78, for a succinct history of such statutory requirements.

112. 25 U.S.C. § 415 (2006).

113. SUAGEE, RENEWABLE ENERGY, *supra* note 5.

114. *See* U.S. Dep't of Energy, Guide to Tribal Energy Development: Organizational Development, http://www1.eere.energy.gov/tribalenergy/guide/organizational_development.html (last updated June 11, 2007) (describing organizations for tribal energy development, including tribal utilities and other business entities, as well as joint ventures with nontribal entities).

115. Gough, *supra* note 11, at 62. The requirement of federal approval is tied to contracts for activities that "encumber" tribal land for seven years or more. 25 U.S.C. § 81(b).

116. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

117. 42 U.S.C. § 4332(C); *see also* Dean B. Suagee, *The Application of the Natural Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377, 395 (1991).

118. 42 U.S.C. § 4332(C). Some federal actions may not require an environmental impact statement. Some actions are categorically excluded, and some others require the completion of an environmental assessment to determine whether an environmental impact statement is needed. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 10.08.

119. William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 172

For example, when the Campo Kumeyaay Nation negotiated a lease arrangement for a wind power project on its lands, the BIA's lack of familiarity with wind projects led to several months of delay.[120] Some have argued that the approval process also puts tribal projects at a competitive disadvantage compared with projects on private or public lands and imposes unnecessary obstacles to resource development.[121] More significantly, the approval requirement signifies a paternalistic attitude toward tribes and interferes with tribal autonomy and self-determination.[122] These concerns contributed to the passage in 2005 of the new framework for tribal resource development,[123] which was meant to streamline development by eliminating the federal approval requirement for resource development projects.[124]

B. The Energy Policy Act of 2005 and Its New TERA Framework for Tribal Resource Development

The Energy Policy Act of 2005 (the "2005 Act") is omnibus legislation with eighteen titles related to various aspects of federal energy policy, including incentives for renewable energy development.[125] Title V of the 2005 Act (the "Indian Energy Act") is

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(1994); *see also Indian Energy Development: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 8 (2008) (statement of Marcus D. Wells, Jr., Chairman, Three Affiliated Tribes of the Fort Berthold Indian Reservation) (noting the harm caused to the tribe by delays and "other bureaucratic hurdles" in a lease approval).

120. Connolly, *supra* note 30, at 26 ("Since no commercial lease for wind energy production had been done in Indian country, the realty personnel at the BIA had nothing to use as a benchmark to determine if the tribe was getting a fair value in the deal. It took several months of discussion with the BIA before an approval was finally granted.").

121. Tim Vollman, *Indian Energy Title Offers Provocative Schemes for Tribal Development*, NATIVE AM. RESOURCES COMMITTEE NEWSL. (ABA Section of Env't, Energy, and Res., Chi., Ill.), Feb. 2004, at 3, 3, http://www.abanet.org/environ/committees/nativeamerican/newsletter/feb04/nativeamerres204.pdf; *see also* Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, 22 NAT. RESOURCES & ENV'T, Summer 2007, at 55, 56 (David S. May ed.) [hereinafter Shipps, *Step*].

122. Vollman, *supra* note 121.

123. *See infra* note 133 and accompanying text.

124. Vollman, *supra* note 121.

125. Pub. L. No. 109-58, 119 Stat. 594 (2005); *see, e.g.*, tit. II, 119 Stat. 650–83 (Renewable Energy). Significant renewable energy incentives created or extended in the 2005 Act include the production tax credit, 26 U.S.C. § 45 (2006), which provides a credit per unit of renewable energy produced; the renewable energy production incentive, 42 U.S.C. § 13317 (2006), which provides a comparable direct incentive for nontaxable entities; and clean renewable energy bonds, 26 U.S.C. § 54, which allow a bond issuer to receive tax-free financing by allowing bond holders a federal tax credit in lieu of interest paid by the issue. The American Recovery and Reinvestment Act of 2009 extended and expanded the production tax credit and new clean renewable energy

dedicated to tribal energy development.[126] The Indian Energy Act aims to meet the goals of energy development and self-determination through various provisions to encourage resource development by tribes.[127]

Among its provisions, the Indian Energy Act establishes a new office within the Department of Energy, the Office of Indian Energy Policy and Programs,[128] to promote tribal energy development, to control energy costs, and to build energy-related infrastructure and promote electrification on tribal lands.[129] Additionally, the Act mandates federal assistance for tribal energy development projects through grant, loan, and loan guarantee programs,[130] to aid in carrying out projects and in building tribal capacity in the areas of managerial and technical skills and environmental review processes and policies.[131] The Act also allows for grants from the DOI to support tribal regulation of energy resources.[132]

The largest section of the Indian Energy Act is devoted to the new legal framework for leases, business agreements, and rights of way for energy development or transmission on tribal lands.[133] This new framework aims to address the complexity and delay involved in the federal approval process for tribal development projects.[134] The Indian Energy Act does not require tribes to adopt this new framework but rather allows them to continue using the existing legal framework if they choose to do so.[135] However, if a tribe pursues the new option for energy resource development, the Act allows a tribe

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bonds, a modified version of the original clean renewable energy bonds. Pub. L. No. 111-5, §§ 1101–1102, 123 Stat. 319–20; § 1111, 123 Stat. 322 (2009).

126. Pub. L. No. 109-58, §§ 501–506, 119 Stat. at 763–79.

127. This Note presents a brief outline of the provisions; for a more detailed summary, see Dean Suagee, *"Indian Energy" Title of the 2005 Energy Policy Act—An Overview*, NATIVE AM. RESOURCES COMMITTEE NEWSL. (ABA Section of Env't, Energy, and Res., Chi., Ill.), May 2007, at 5, *available at* http://www.abanet.org/environ/committees/nativeamerican/newsletter/may2007/NativeAmerResMay07.pdf.

128. Pub. L. No. 109-58, § 502, 119 Stat. 763, 763 (codified at 42 U.S.C. § 7144e).

129. *Id.*

130. *Id.* § 503, 119 Stat. 764, 765–67 (codified at 25 U.S.C. § 3502).

131. *Id.* at 765–66.

132. *Id.* at 768 (codified at 25 U.S.C. § 3503).

133. *Id.* at 769–76 (codified at 25 U.S.C. § 3504).

134. *See supra* text accompanying notes 119–124.

135. Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act; Final Rule, 73 Fed. Reg. 12,808, 12,820 (Mar. 10, 2008) [hereinafter Final Rule].

that gains approval for a master agreement with the Secretary—the tribal energy resource agreement, or TERA—to enter into leases and other business arrangements and to grant rights of way across tribal lands.[136] Once a tribe has obtained a TERA, Secretarial approval is not needed for these subsequent development agreements.[137]

The TERA must include several prescribed provisions.[138] Some of these provisions address basic elements of a business agreement, such as its term, methods for amending or renewing it, economic return, and remedies for breach.[139] Other TERA provisions address the tribe's ability to regulate its agreements and communicate with interested third parties, such as provisions to ensure that parties to agreements comply with environmental laws, to allow for public notification and consultation with states, and to provide information related to governing tribal law and judicial remedies.[140] The TERA must also establish an environmental review process for energy development agreements that addresses environmental effects, mitigation measures, public notification and comment, and tribal oversight of development activities.[141] Finally, the TERA must allow for periodic Secretarial review and evaluation of activities carried out under the tribe's energy agreements and must authorize the Secretary to act when needed to resolve a violation of an agreement or of controlling environmental laws.[142]

The Indian Energy Act also sets out provisions governing the Secretary's consideration, approval, and disapproval of TERAs.[143] In addition, it allows a party that sustains adverse environmental impacts to petition for Secretarial review of a tribe's compliance with a TERA, after the party has exhausted available tribal remedies.[144]

One subsection refers specifically to the federal trust responsibility, affirming that the trust responsibility remains in effect.[145] This provision mandates that the Secretary "act in

136. 25 U.S.C. § 3504(a)–(b).
137. *Id.* § 3504(a)(2).
138. *Id.* § 3504(e)(2)(B).
139. *Id.* § 3504(e)(2)(B)(iii).
140. *Id.*
141. *Id.* § 3504(e)(2)(C).
142. *Id.* § 3504(e)(2)(D).
143. *Id.* § 3504(e)(2)(A), (2)(B), (4).
144. *Id.* § 3504(e)(7).
145. *Id.* § 3504(e)(6).

accordance with the trust responsibility of the United States relating to mineral and other trust resources" and "in good faith and in the best interests of the Indian tribes."[146] It also notes that with the exception of the waiver of Secretarial approval allowed through the TERA framework, the Indian Energy Act does not "absolve the United States from any responsibility to Indians or Indian tribes, including . . . those which derive from the trust relationship."[147] However, this subsection also limits federal liability for losses related to agreements tribes enter into pursuant to a TERA.[148]

The Act instructs the Secretary to promulgate regulations implementing the subsection regarding TERAs.[149] The Secretary released the final TERA regulations in March 2008.[150] The regulations are divided into nine subparts covering general provisions, application procedures, the approval process, the implementation of TERAs, interested party petitions regarding potential environmental damage, Secretarial review, Secretarial reassumption of responsibilities taken on by a tribe under a TERA, rescission, and appeal.[151] Some of the sections essentially track the provisions of the Indian Energy Act.[152] Others provide significant detail regarding the categories of regulation specified in the Act: criteria for determining a tribe's regulatory capacity, processes and requirements for rescission of agreements and return of responsibilities to the Secretary, Secretarial review, and DOI actions after appeals from a Secretarial determination in response to an interested party petition have been exhausted.[153]

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146. *Id.* § 3504(e)(6)(A).

147. *Id.* § 3504(e)(6)(B).

148. *Id.* § 3504(e)(6)(D)(ii) ("[T]he United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right of way executed pursuant to . . . a tribal energy resource agreement . . . ."); *see also supra* text accompanying notes 78–83.

149. *Id.* § 3504(e)(8).

150. Press Release, U.S. Dep't of the Interior, DOI Publishes Final Regulations on Tribal Energy Resource Agreements (Mar. 10, 2008), http://www.doi.gov/news/08_News_Releases/080311.html.

151. 25 C.F.R. pt. 224 (2008).

152. *See, e.g., id.* § 224.63 (detailing provisions that a TERA must contain; the provisions given under § 224.63(c) use language almost identical to that of 25 U.S.C. § 3504(e)(2)(C)).

153. The Indian Energy Act's specific directive regarding regulations to be promulgated appears at 25 U.S.C. § 3504(e)(8). The corresponding regulations appear at 25 C.F.R. §§ 224.72–224.73 (criteria for determining capacity), 25 C.F.R. §§ 224.170–224.175 (rescission),

In the application and approval process, a tribe must consult with the director of the Office of Indian Energy and Economic Development, an office within the DOI, both before and after submitting an application.[154] The DOI must accept public comments regarding the proposed TERA and may conduct a NEPA review related to the activities proposed.[155] The DOI must approve or disapprove a proposed TERA within 270 days of receiving an application.[156] Thus, the total time for the application and approval process is likely to exceed one year.[157]

Thomas H. Shipps, an Indian law practitioner, provided commentary on the proposed regulations after their publication in 2006.[158] Shipps noted that the regulations generally advance the Indian Energy Act's goal of tribal self-determination, but he identified some exceptions.[159] The most important of these exceptions is a provision that restricts the scope of TERAs by excepting "inherently Federal functions" from the activities that a tribe can assume under a TERA.[160] Shipps's commentary suggests that this and other provisions of the regulations interfere with tribal self-determination and discourage tribes from entering into TERAs.[161] This Note next takes up these concerns as part of an evaluation of the TERA framework's ability to promote self-determined wind power development by tribes.

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25 C.F.R. §§ 224.130–224.141 (periodic reviews), and 25 C.F.R. §§ 224.100–224.121 (interested party petitions).

154. 25 C.F.R. §§ 224.51, 224.58.

155. *Id.* § 224.67; *see supra* notes 116–18 and accompanying text.

156. *Id.* § 224.74.

157. Royster, *Practical Sovereignty*, *supra* note 44, at 1082.

158. Thomas H. Shipps, *Tribal Energy Resource Agreements: Commentary on the Proposed Regulations*, NATIVE AM. RESOURCES COMMITTEE NEWSL. (ABA Section of Env't, Energy, and Res., Chi., Ill.), May 2007, at 2, *available at* http://www.abanet.org/environ/committees/nativeamerican/newsletter/may2007/NativeAmerResMay07.pdf [hereinafter Shipps, *Commentary*].

159. *Id.* at 3.

160. 25 C.F.R. § 224.52(c). The DOI has indicated that it would treat this concept as consistent with the Office of Management and Budget's Circular A-76. Memorandum from Bureau of Indian Affairs to Sen. Byron L. Dorgan, Chairman, Committee on Indian Affairs (Aug. 22, 2008) (on file with author). The circular provides that "inherently governmental activities" involve "the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements." OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 (REVISED) A-2 (2003).

161. Shipps, *Commentary*, *supra* note 158, at 3–4.

V. CRITIQUE OF THE TERA FRAMEWORK AS A VEHICLE FOR SELF-DETERMINED RESOURCE DEVELOPMENT

Congress and the DOI have stated that one goal of the TERA legislation and regulations is to make energy resource development easier and more efficient.[162] Enhancing tribal self-determination is another often-mentioned goal.[163] To the extent that TERAs eliminate the middleman role of the federal government,[164] they accomplish these goals. However, the Indian Energy Act and its implementing regulations show a tension between a desire for tribes to manage resource development independently and a desire for the federal government to retain control of tribal resource development. The TERA framework allows the federal government to retain control over resource development by imposing stringent environmental review requirements, by using the trust responsibility to justify federal power, by withholding authority for "inherently Federal functions," and by dictating the terms of tribal energy development projects pursuant to TERAs. The ultimate effect is to undermine the federal commitment to tribal self-determination.

A. Retaining Federal Control over Resource Development Through Stringent Environmental Review Requirements

A tribe developing resources under a TERA must undertake an environmental review as provided for in the TERA.[165] This means that the business arrangement is subject to a tribally established review process rather than review under NEPA.[166] Some comments in response to the proposed TERA regulations observed that the TERA framework requires a more stringent environmental review than called for under NEPA.[167] After the Indian Energy Act was

162. Final Rule, *supra* note 135, at 12,808; *see also supra* text accompanying notes 119–121 (discussing how the preexisting development framework impedes development).

163. Final Rule, *supra* note 135, at 12,808.

164. 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, 468 (2006).

165. *See supra* note 141 and accompanying text.

166. Miles, *supra* note 164, at 470. In some circumstances, NEPA review may still apply, such as if a tribe obtains federal funding for resource development. Telephone Interview with Robert Gough, Sec'y, Intertribal Council On Util. Policy (Oct. 2–3, 2008) [hereinafter Gough Interview I]; *see also* Chambers, *supra* note 49, at 13A-30 (referring to federal approval of business agreements as "one ground" requiring NEPA review).

167. Final Rule, *supra* note 135, at 12,814.

passed, one commentator noted that state and local governments are not subject to NEPA review requirements and argued that the TERA environmental review requirement is "more intrusive on the government prerogatives of Indian tribes than justified." [168] At the very least, the environmental review provisions pose a strong potential for delaying tribal resource development. [169]

Congress included the environmental review provisions in the Indian Energy Act in response to expressions of concern that the TERA framework would eliminate NEPA review. [170] The extent of environmental review that should be required was a theme of the congressional debate when the energy policy legislation was first considered in 2003. [171] The final version of the legislation includes provisions requiring the incorporation of mitigation measures into development agreements and tribal environmental oversight of activities by other parties to an agreement. [172] By contrast, NEPA is considered a procedural statute that does not impose actual constraints on decisions related to environmental impacts. [173] For example, though NEPA requires a discussion of mitigation measures, [174] it includes no requirement that those measures must be carried out. [175] Additionally, the TERA framework requires tribes to consult with states regarding any off-reservation environmental impacts. [176] NEPA imposes no corresponding requirement on federal agencies. [177] In these ways, the TERA requirements go beyond NEPA requirements.

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168. Scot W. Anderson, *The Indian Tribal Energy Development and Self-Determination Act of 2005: Opportunities for Cooperative Ventures*, NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY (Rocky Mtn. Min. L. Found., Westminster, Colo.), Nov. 10–11, 2005, at 8-7.

169. Royster, *Practical Sovereignty*, *supra* note 44, at 1091.

170. Anderson, *supra* note 168, at 8-5 to -6.

171. *Id.* at 8-6.

172. 25 U.S.C. § 3504(e)(2)(C)(ii), (v) (2006).

173. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 237–38 (1996) [hereinafter Tsosie, *Tribal Environmental Policy*].

174. 42 U.S.C. § 4332(2)(C) (2006); 40 C.F.R. § 1502.14(f) (2008).

175. *See* Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 376 (2008) (noting that NEPA aims to ensure that information about mitigation measures be considered but reiterating that "NEPA imposes only procedural requirements").

176. 25 U.S.C. § 3504(e)(2)(B)(iii)(X).

177. *See* 42 U.S.C. § 4332(2)(C). A somewhat related concern involves the fact that federal law does not require states to consult with tribes when state development activities create on-reservation environmental impacts. Royster, *Practical Sovereignty*, *supra* note 44, at 1094.

The Secretary has acknowledged that the TERA environmental review provisions go beyond what NEPA requires of the federal government. [178] In the *Federal Register* preamble (the "Preamble") to the final TERA regulations, the DOI tied the TERA environmental review regulations to the mandate articulated in the 2005 Act and claimed that the Secretary bore responsibility for ensuring that tribal environmental review processes were sufficient to identify and address foreseeable environmental impacts. [179] Thus, Congress and the DOI appear, in the instance of environmental review, to have bound tribes to a stringent process rather than allowing tribes to determine for themselves what environmental review process would be appropriate for development projects they regulate and manage on their lands.

B. Retaining Federal Control over Resource Development Through the Trust Responsibility

Another area of concern regarding TERAs is their effect on the federal trust obligation toward tribes. Of particular concern is the provision absolving the federal government of liability related to the negotiated terms of agreements tribes enter into pursuant to a TERA. [180] Some tribal leaders see this limitation of liability as the government abdicating its trust responsibilities. [181] The possibility provokes fears that private entities such as energy companies will exploit tribal resources and take unfair advantage of tribes. [182] On the other side, some tribes and tribal organizations welcome the opportunity to use TERAs as a way to develop tribal resources. [183] They stress the fact that entering into a TERA is voluntary and that the law creating TERAs is, at its essence, about self-determination. [184]

Professor Royster notes that "the asymmetry of requiring consultation only one way is troublesome." *Id.* at 1095.

178. Final Rule, *supra* note 135, at 12,814.

179. *Id.*

180. *See supra* notes 78–83, 148 and accompanying text.

181. Robert Gehrke, *Some Tribes Say Energy Development Measure Goes Too Far*, BISMARCK TRIB. (N.D.), July 31, 2003, at 2C.

182. April Reese, *New Federal Law Encourages Tapping of Indian Resources*, LAND LETTER, Dec. 1, 2005.

183. Brenda Norrell, *Title V Could Jeopardize Trust Status Protections*, INDIAN COUNTRY TODAY (Canastota, N.Y.), Aug. 31, 2005.

184. Gehrke, *supra* note 181; Reese, *supra* note 182.

These two viewpoints capture the complexity of the relationship between the doctrines of trust and self-determination.[185] The former viewpoint seeks federal protection at the expense of increased control over the course of tribal resource development.[186] For some tribes, such as those with weaker governmental structures, this may be the best choice.[187] However, the idea of choice is key, as tribes should be in charge of whether and when to assume control of their development.[188] The TERA structure is meant to allow this choice because entering into a TERA is voluntary.[189] Tribes that wish to remain under federal protection may continue to use the preexisting system of federal approval for development projects.[190] Thus, the TERA framework does not weaken the trust responsibility.[191]

On the contrary, the federal government uses the trust responsibility to retain control unnecessarily through the TERA regulations. The Preamble included a discussion of proposed section 224.115 of the regulations highlighting this tendency.[192] In the subpart of the regulations that addresses petitions by interested parties regarding noncompliance with a TERA,[193] the DOI's regulations, as originally proposed, allowed for dismissing such a petition if the tribe and the petitioner concur in the tribe's proposed resolution of the petitioner's claim.[194] The following section allowed

185. *See supra* notes 72–75 and accompanying text.

186. *See* Rosser, *supra* note 4, at 342.

187. *Id.* at 344, 350.

188. *Id.* at 350.

189. *See supra* note 135 and accompanying text.

190. *See supra* Part IV.A.

191. Miles, *supra* note 164, at 473.

192. Final Rule, *supra* note 135, at 12,816.

193. 25 C.F.R. subpt. E, §§ 224.100–224.121 (2008).

194. Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 71 Fed. Reg. 48,626, 48,640 (Aug. 21, 2006) [hereinafter Proposed Rule] (proposed § 224.114). See Royster, *Practical Sovereignty*, *supra* note 44, at 1095–98, for further discussion of interested party petitions. Professor Royster observes that the petition procedures may cause delay and added expense in resource development by tribes. *Id.* at 1096. She also raises a concern related to the portion of the process prior to a petition to the Secretary, in which a petitioner pursues tribal remedies. 25 C.F.R. §§ 224.100, 224.106, 224.107. Her discussion suggests that the form of the final regulations may lead to an interpretation in which "a petitioner must consent in writing to any resolution offered through the tribal administrative or judicial process," which would "make[] a mockery of the tribal remedies." Royster, *Practical Sovereignty*, *supra* note 44, at 1097. Professor Royster proposes that instead the regulations should be interpreted to apply to the portion of the procedure *after* a petition has been submitted to the Secretary, providing "an additional opportunity [for the parties] to resolve the matter." *Id.*

the DOI—through the director of the Office of Indian Energy and Economic Development—to reject a resolution that the tribe and the petitioner mutually agreed to.[195] In the Preamble, the DOI declined to remove that provision, characterizing it as an expression of the DOI's "residual trust responsibility."[196] The DOI thus used the trust obligation as a basis for preserving its control over a tribe's TERA compliance. This is contrary to the goals of the Indian Energy Act and undercuts tribal self-determination.

C. Retaining Federal Control over Resource Development Through the "Inherently Federal Functions" Requirement

Another instance in which the DOI unnecessarily retains control over the TERA process is its excepting "inherently Federal functions" from activities that tribes can take on under a TERA.[197] However, this exception is neither included in nor required by the Indian Energy Act.[198] Thus, the reservation of federal functions indicates reluctance on the part of the DOI to turn over administrative activities to tribes.[199] The "inherently Federal functions" exception manifests the federal bureaucracy's resistance to relinquishing its power over the course of tribal resource development.[200]

The Preamble acknowledged that this exception was a major issue during the public comment period and discusses why the DOI included the exception.[201] According to the Preamble, the inclusion was attributable partly to the trust responsibility toward tribes and trust assets and partly to the DOI's responsibilities, as spelled out in

195. Final Rule, *supra* note 135, at 12,816; Proposed Rule, *supra* note 194 (proposed § 224.115). In Professor Royster's discussion, *see supra* note 194, the preferred interpretation allows resolution only if the director concurs in the resolution. Royster, *Practical Sovereignty*, *supra* note 44, at 1097 & n.188.

196. Final Rule, *supra* note 135, at 12,816. The DOI revised this section but did not remove this authority granted to the director. *Compare* Proposed Rule, *supra* note 194 (providing the proposed wording of section 224.115, which allowed for the director to act after rejecting a tribe's proposed resolution), *with* 25 C.F.R. § 224.115 (showing the final wording, which still allows the director to determine whether the tribe successfully resolved a claim and to act after determining that the tribe did not do so).

197. *See supra* note 160 and accompanying text.

198. Shipps, *Commentary*, *supra* note 158, at 3.

199. *Id.*

200. *See supra* notes 90–96 and accompanying text.

201. Final Rule, *supra* note 135, 12,809–12,810.

the Indian Energy Act, to determine a tribe's capacity to carry out TERA activities and to undertake periodic reviews of a tribe's TERA activities.[202] The Preamble went on to note that "Congress did not expressly prohibit the use of the term 'Inherently Federal Functions'" and that this same exception appears in other Indian Affairs regulations, most notably under the Indian Self-Determination and Education Assistance Act (ISDEAA).[203] However, the text of the ISDEAA explicitly includes the limitation that prevents tribes from taking on "inherently Federal functions,"[204] while the Indian Energy Act does not.[205] Congress's failure to mention this limitation should be interpreted as a signal that the limitation should not apply. The DOI instead used Congress's silence to justify applying the limitation.

Moreover, in the context of the ISDEAA, a past DOI solicitor advised the DOI that "there is no clear constitutional limitation or an independent Secretarial responsibility to withhold delegation of inherently federal functions from tribes."[206] The requirement thus gives the DOI more control than the Indian Energy Act envisioned and makes the TERA structure less likely to meet its intended goal of enabling tribes to independently develop their resources pursuant to the principle of self-determination.[207]

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202. *Id.* at 12,810. The issue of this language came up during a hearing before the Senate Indian Affairs Committee after the final regulations were published. Senator Byron Dorgan, the chair of the committee, expressed concern that the requirement in the regulations was undefined. In response, the director of the Office of Indian Energy and Economic Development reiterated that the requirement was related to the federal trust responsibility. In answer to Senator Dorgan's concern about the lack of clarity about this provision, the director said, "We have been in long-term discussions with tribes . . . to try and delineate what these inherently Federal functions would be. To be honest, we haven't quite come to completion on our internal thought processes on that yet." *Indian Energy Development: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 71–72 (2008). Subsequently, the DOI provided a written response to Senator Dorgan's questions, indicating that it would treat "inherently Federal functions" as consistent with the definition of "inherently governmental activities" contained in a circular from the Office of Management and Budget. *See supra* note 160.

203. Final Rule, *supra* note 135, at 12,810. For information on the ISDEAA, see *supra* notes 58–60 and accompanying text.

204. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 501 (2007). The Tribal Self-Governance Act amended the ISDEAA. *Id.* at 476; *see supra* notes 58–59 and accompanying text.

205. *See* 25 U.S.C. § 3504(e) (2006).

206. Shipps, *Commentary*, *supra* note 158, at 3.

207. *Id.*

D. Retaining Federal Control over Resource Development by Dictating the Terms of TERA Development

In addition to the specific weaknesses discussed above, the TERA framework is flawed more generally as an attempt to promote tribal self-interest. The framework allows tribes to enter into resource development agreements without Secretarial approval, but only on terms dictated by the federal government rather than on the tribes' own terms.[208]

The federal government sets the terms of resource development agreements through its extensive legislative and regulatory requirements for TERAs and for agreements forged pursuant to TERAs. First, the Indian Energy Act dictates the required terms of TERAs in great detail.[209] Among the requirements, tribes must allow the Secretary to review their performance under a TERA.[210] These reviews must occur annually for the first three years and thereafter at least biannually.[211] Thus, the legislation both specifies the form of a TERA and requires constant federal oversight after the DOI approves a tribe's TERA.

Second, federal control over TERA approval and review is substantial.[212] The approval process involves extensive consultation and a lengthy time for application review.[213] There is also a broad set of regulations for Secretarial review of a tribe's compliance with its TERA.[214] Thus, the TERA framework has changed the federal role in tribal resource development without necessarily reducing it or shifting true control to tribes.[215]

208. *See* Porter, *supra* note 72, at 967 (noting that under the self-determination policy, the federal government makes decisions about policies and programs).

209. *See supra* notes 138–42 and accompanying text.

210. 25 U.S.C. § 3504(e)(2)(D).

211. *Id.* § 3504(e)(2)(E).

212. *See supra* notes 143, 151–57 and accompanying text.

213. *See supra* notes 154–57 and accompanying text.

214. 25 C.F.R. §§ 224.100–224.141 (2008).

215. *See* Porter, *supra* note 72, at 964–69 (discussing a similar pattern with the BIA retaining power and micromanaging tribal activities under the ISDEAA); Royster, *Practical Sovereignty*, *supra* note 44, at 1070 (noting that the ISDEAA framework does not allow tribes to choose the programs and development opportunities they would like to pursue).

VI. PROPOSED CHANGES TO FEDERAL TRIBAL RESOURCE DEVELOPMENT POLICY

In its present form, the TERA structure does not fully meet its asserted goal of promoting self-determination.[216] However, possibilities exist for using TERAs to get closer to achieving this goal. The first of these involves finding an opportunity for resource development that can take advantage of the TERA structure. Wind can provide that opportunity. The second involves making changes to the TERA framework to enhance tribal control over resource development.

A. Wind Power TERA as an Opportunity to Put the TERA Framework into Practice

The foregoing discussion casts into relief the difficulty involved in enabling tribes to take control of the development of their natural resources. The solution involves not only creating a successful legal framework for resource development but also finding a way to put that framework into practice. Therefore, whether TERAs can facilitate self-determined resource development may center on how successfully tribes can use them. Wind power presents advantages over conventional resource development and offers prospects for putting TERAs into practice.

Because the TERA regulations were promulgated only recently,[217] it is too soon to know how broadly TERAs will be used.[218] Some experts suggest that the process of securing a TERA may be so burdensome that many tribes will choose not to seek a TERA.[219] Indeed, the long, multistep application process can be a hurdle for tribes that want to move forward quickly with development plans.[220]

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216. *See supra* Part V.

217. The final regulations appeared in the Federal Register on March 10, 2008, and went into effect on April 9, 2008. Final Rule, *supra* note 135, at 12,808.

218. The Indian Energy Act provided that tribes could apply for a TERA when regulations were promulgated. 25 U.S.C. § 3504(e)(1) (2006). More than a year after the regulations were released, no applications had yet been submitted. Telephone Interview with Darryl François, Chief, Div. of Indian Energy Policy Dev., Office of Indian Energy & Econ. Dev., Bureau of Indian Affairs (Aug. 13, 2009).

219. Vollman, *supra* note 121, at 4.

220. *See supra* notes 154–57 and accompanying text.

Additionally, only a few tribes may presently be in a position to successfully apply for a TERA, based on their level of expertise in regulating and carrying out resource development projects.[221] The Indian Energy Act includes provisions to build tribes' regulatory and management capacity,[222] but the capacity-building process will take time, and generally, congressional appropriations have not provided the necessary financial resources for wide use of these provisions.[223]

However, the underlying assumption of much discussion regarding TERAs is that energy resource development takes the form of mineral development.[224] A TERA related to mineral energy development will require a level of knowledge that most likely entails significant experience with such development projects.[225] The number of tribes in this position, as noted previously, appears quite small. For one thing, fossil fuel development creates significant environmental impacts, requiring a robust environmental review process.[226] Also, carrying out large energy development projects requires management, technical, and regulatory capacity,[227] as well

221. Royster, *Practical Sovereignty*, *supra* note 44, at 1083 ("Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts . . . to provide the tribe with accurate and reliable information about its energy resources and the environmental and financial impacts of resource decisions."); Gough Interview I, *supra* note 166 (suggesting that TERAs may be useful for a few tribes for large projects); Telephone Interview with Thomas H. Shipps, Partner, Maynes, Bradford, Shipps & Sheftel (Gen. Counsel to Southern Ute Indian Tribe) (Sept. 24, 2008) (identifying three tribes with probable capacity to enter into TERAs for energy development).

222. *See supra* notes 129–32 and accompanying text.

223. Royster, *Practical Sovereignty*, *supra* note 44, at 1084–85. Royster notes that the lack of federal resources may lead to a "haves-and-have-nots situation" in which some tribes are able to take advantage of the TERA framework, while others must use the preexisting framework involving Secretarial approval of resource development agreements. *Id.* at 1085 n.115. For further information on federal appropriations related to American Indian programs and services, see National Congress of American Indians, Appropriations, http://www.ncai.org/Federal_Appropriations.87.0.html (last visited Sept. 18, 2009).

224. *See* Anderson, *supra* note 168, at 8-14 (noting that the Indian Energy Act "is intended to attract mineral development to Indian Country").

225. *Id.* at 8-16.

226. 149 CONG. REC. S7684 (2003) (statement of Sen. Jeff Bingaman) (quoting a letter from state attorneys general urging that "significant energy development activity on tribal lands continue[] to be subject to meaningful environmental review"); *id.* at S7689 (statement of Sen. Jim Jeffords) (asserting the need for a strong environmental review in the face of possible "massive energy development on tribal lands" with "potentially massive environmental impacts").

227. *See* H.R. REP. NO. 102-474, pt. 8, at 93–95 (1992).

as access to significant capital.[228] These limitations partly explain a continuing trend under policies meant to encourage tribal self-determination: most large-scale mineral development projects are carried out by non-Indian companies pursuant to leases.[229] The concern about the weakening of the trust relationship may also be implicated in mineral development, because the danger of permanent harm to tribal natural resources and the potential long-term nature of some mineral development agreements make tribes wary of the consequences of entering into such projects.[230]

Wind power, however, can provide an opportunity for TERAs to fulfill their potential despite these limitations. For renewable energy projects tapping wind power, the concerns about business capacity, regulatory structures, environmental review, capital, and the trust relationship are reduced.[231]

Environmental impacts for wind power projects are greatly lessened in comparison with those associated with mineral development.[232] Thus, tribes are much more likely to have the capacity to undertake the environmental review required for a wind project than the review required for a conventional power plant.[233] Additionally, wind projects lend themselves to a modular approach that is impractical for fossil fuel development. For example, construction of a coal plant must take place as a single—typically 500- to 1,000-megawatt—project, whereas it is possible to build a wind power project in stages.[234] This modular approach provides an

228. Coal plant construction typically requires more than $1 billion in capital. *See, e.g.*, Tim Craig & Sandhya Somaskehkar, *Dominion Gets Initial Approval for Coal Plant*, WASH. POST, Apr. 1, 2008, at B02 (discussing construction of a $1.8 billion plant); Tom Fowler, *Company Is Stepping Back from Coal Gasification Plant*, HOUSTON CHRON., June 14, 2007, Business sec., at 3 (discussing a 600-megawatt coal plant's projected $1.5 billion cost).

229. Royster, *Practical Sovereignty*, *supra* note 44, at 1071.

230. Chambers, *supra* note 49, at 13A-39 (noting that mineral development depletes irreplaceable resources and can permanently change the land on a reservation). The TERA legislation allows a tribe to enter into a lease or a business agreement related to oil or gas resources for "10 years and as long thereafter as oil or gas is produced in paying quantities." 25 U.S.C. § 3504(a)(2)(B)(ii) (2006).

231. Gough Interview I, *supra* note 166.

232. *See supra* notes 24–26 and accompanying text.

233. Gough Interview I, *supra* note 166.

234. BUSCH ET AL., *supra* note 101, at 56; Gough Interview I, *supra* note 166 (suggesting that a wind power project can be developed in 10- to 50-megawatt "modules").

opportunity to observe and mitigate impacts as the project progresses, creating a streamlined process.[235]

A wind power TERA also is largely free from concerns about erosion of the trust responsibility, both because the environmental impacts are less and because the duration of a business agreement pursuant to a TERA is limited to thirty years.[236] Moreover, a wind power TERA may reduce the government's concern with relinquishing control to tribes and may ease the transition of regulatory activity to tribes: because of the lesser impacts and reduced need for regulatory capacity, the risks are lower, and the DOI can have greater confidence in leaving control in tribes' hands.[237]

Thus, wind power projects appear to be particularly well suited for the TERA structure. Wind power should be at the center of attempts to promote the use of TERAs by tribes seeking to undertake self-determined development.[238]

However, the use of TERAs for wind power development raises a question regarding the proper entity to enter into a TERA. Though a single tribe may not be the best entity to develop a wind power project, the TERA framework directs that "an Indian tribe" can apply for and enter into a TERA with the Secretary—that is, a single tribe is the TERA entity.[239] For many resource development purposes, this is the most suitable arrangement, because the TERA structure envisions that the tribe will be the regulatory body for development on its lands.

Wind, however, has the disadvantage of intermittency.[240] Wind's intermittent nature raises concerns about the need for power

235. Gough Interview I, *supra* note 166.

236. 25 U.S.C. § 3504(a)(2)(B)(i) (2006). Renewals are allowed, however. *Id.* § 3504(c).

237. *See* Shaw & Deutsch, *supra* note 4, at 9-15.

238. However, Robert Gough, a leading advocate for tribal wind energy, suggests that though the TERA structure can reduce some obstacles to wind development, projects that link to the federal transmission grid still implicate significant federal participation. Telephone Interview with Robert Gough, Sec'y, Intertribal Council On Util. Policy (Aug. 12, 2009) [hereinafter Gough Interview II]. This means that though wind power may be especially suitable for a TERA, a TERA may not advance wind power development as much as it might be able to with additional reforms to streamline tribal wind projects connecting to the federal grid. Such reforms are outside the scope of this Note.

239. 25 U.S.C. § 3504(e).

240. Rosenberg, *supra* note 23, at 526.

from other sources to supplement wind power.[241] This drawback reduces wind's market value.[242] Additionally, existing grid-connection and pricing policies disadvantage intermittent power producers.[243] Interconnecting geographically dispersed turbines compensates for the wind's variability and can make the power source more reliable.[244] For these reasons, wind power projects can benefit from a design in which wind farms are spread over a broad geographic area.[245]

To allow for the necessary dispersal, a tribal wind power project would gain from locating turbines on several reservations.[246] However, with a project involving several reservations, the current TERA framework would require each tribe involved to enter into a separate TERA with the Secretary.[247] This would create a significant administrative impediment to a wind power project involving several tribes, as each tribe's TERA would require a lengthy application process.[248]

Other sections of the Indian Energy Act allow a tribal energy resource development organization—an organization including at least one tribe—to receive grants, loans, and other federal assistance.[249] Such an organization can be an important entity in wind power development because of the advantages of dispersal. Therefore, the TERA framework should be revised to allow a tribal energy resource development organization, rather than a single tribe, to enter into a TERA. Appropriate limits can be placed on the kind of organization that may enter into a TERA, such as requiring that it include only tribes, and on the kinds of projects that the organization

241. *Id.* The required supplemental power is known as "reserve" power. *See id.*

242. Christina L. Archer & Mark Z. Jacobson, *Supplying Baseload Power and Reducing Transmission Requirements by Interconnecting Wind Farms*, 46 J. APPLIED METEOROLOGY & CLIMATOLOGY 1701, 1701 (2007).

243. Newman, *supra* note 16, at 7; *see also* Matthew L. Wald, *Wind Power Is Becoming a Better Bargain*, N.Y. TIMES, Feb. 13, 2005, § 1, at 27.

244. Archer & Jacobson, *supra* note 242, at 1702. Interconnection allows wind power projects to provide what is known as "baseload," or guaranteed, power. *Id.* at 1716. It also allows lower installed long-distance transmission capacity, which reduces the cost of delivering power to distant end users, reducing the overall cost of wind energy. *Id.* at 1710, 1716.

245. Wald, *supra* note 243.

246. Gough Interview I, *supra* note 166.

247. *See* 25 U.S.C. § 3504(e) (2006).

248. *See supra* notes 154–57 and accompanying text.

249. 25 U.S.C. § 3501(11).

can develop under a TERA, such as limiting it to developing a single energy resource. Allowing a tribal energy resource development organization to be the TERA entity would streamline the approval process and facilitate development of wind power on tribal lands. One example of a potential organization that could take advantage of the TERA structure is one composed of tribal members of the Intertribal Council On Utility Policy (COUP).[250] COUP represents member tribes located in the Northern Great Plains, a region with great wind power potential.[251] This organization has been investigating the possibility of a distributed wind power project with turbines on several reservations.[252] Allowing the participating tribes to enter into a single TERA through a tribal energy resource development organization might streamline the development of this project.

B. Changes to Increase Tribal Control over Development

Encouraging wind power development through TERAs and allowing tribal energy resource development organizations to enter into TERAs will go far in increasing the use of wind energy and in fostering self-determination in tribal resource development. But additional changes to the TERA framework will also help in meeting these goals. The key changes that are needed include revisions to remove the "inherently Federal functions" requirement, to grant tribes greater discretion in environmental review, to align the assertions of the federal trust responsibility with the goal of self-determination, and to encourage direct tribal participation in development projects.

First, the exception for "inherently Federal functions" should be removed from the TERA regulations.[253] This exception was not mandated by the legislation and is not necessary to the TERA

250. COUP "provide[s] policy analysis and recommendations, as well as workshops . . . with a heavy emphasis on wind energy development." Intertribal Council On Utility Policy Mission Statement, http://www.intertribalcoup.org/mission/index.html (last visited Aug. 15, 2009).

251. Gough, *supra* note 11, at 57; *see also supra* text accompanying note 28.

252. Gough, *supra* note 11, at 62. The article discusses a project involving up to eight reservations. *Id.* More recently, COUP has been considering expanding the project to additional reservations, and it is exploring the potential for wind power on more than twenty reservations in the Upper Great Plains region. Gough Interview I, *supra* note 166; Gough Interview II, *supra* note 238.

253. *See supra* Part V.C.

framework.[254] TERA approval already calls for an extensive consultation process between a tribe and the DOI, during which the parties can identify which aspects of development regulation the tribe can reasonably undertake.[255] In arguing for the "inherently Federal functions" provision, the DOI itself recognized that the consultation process would allow the tribe and the DOI to agree about the scope of a TERA.[256]

The decision not to transfer responsibility to the tribe can be made during the consultation process if an activity is truly the province of the federal government (for example, an activity that binds the federal government to take a particular action).[257] Protecting the federal government's sphere of action is a legitimate concern, but the government's default posture should be to grant control to tribes to better fulfill the self-determination principle.[258] Removing the "inherently Federal functions" provision will help shift the presumption from the federal government retaining control over resource development to tribes taking over that control.

Second, the environmental review requirements in the Indian Energy Act should be revised to allow tribes more discretion in how they approach environmental issues. Where the TERA framework requires more stringent review than would apply under NEPA,[259] it should be altered to allow tribes greater flexibility. Congress created the TERA environmental review requirements because of concern that tribes would not protect the environment as well as the federal government would under NEPA.[260] However, scholars of tribal attitudes toward the environment suggest that tribes generally place value on environmental protection and that tribal environmental review would likely not be weaker than NEPA review.[261] Some

254. *See supra* note 198 and accompanying text.

255. 26 C.F.R. § 224.51 (2008) (describing the consultation to take place before a tribe submits an application); *id.* § 224.58 (describing the consultation to take place after a tribe submits an application).

256. Final Rule, *supra* note 135, at 12,813.

257. OFFICE OF MGMT. & BUDGET, *supra* note 160.

258. *See* Porter, *supra* note 72, at 966–67.

259. *See supra* notes 116–18, 172–79 and accompanying text.

260. Anderson, *supra* note 168, at 8-6; *see also* text accompanying note 170.

261. *See* William H. Rodgers Jr., *Tribal Government Roles in Environmental Federalism*, NAT. RESOURCES & ENV'T, Winter 2007, at 3, 5; Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 233–34 (1998); Tsosie, *Tribal Environmental Policy*, *supra* note 173, at 330–31; *see also*

tribes have already voluntarily adopted environmental policy acts comparable to NEPA.[262] Their reasons for doing so include a desire to meaningfully consider concerns about "environmental, cultural, historical, and ecological factors" and a desire to preserve the reservation land base for future generations.[263]

Indeed, environmental review is best viewed as a decision-making tool rather than as a compliance hurdle.[264] For example, preparation of an environmental assessment during planning is advisable even when not required for NEPA compliance, because an assessment can help in identifying and mitigating environmental impacts.[265] Because tribes rely on their land base and resources,[266] they have strong incentives to approach environmental review in this light.

For this reason, the shift from federal environmental review under NEPA to tribal environmental review under the TERA structure would be a positive step that would improve the environmental review process and avoid the conflicts of interest inherent in federal environmental review.[267] Additionally, the principle of self-determination suggests that tribes should be able to control the procedures of environmental protection, based on their own values, while engaging in resource development on their lands.[268] But to accomplish this, the TERA framework should increase flexibility for environmental review rather than specifying the form of that review, as it presently does.[269]

Getches, *Foreword*, *supra* note 38, at xv ("For many tribal peoples, a sense of mutuality and interdependence between humans and the rest of nature ensures that resources will be treated with stewardship. Used . . . thoughtfully, gratefully, and in ways that preserve their availability so future generations can endure on the land.").

262. Royster, *Practical Sovereignty*, *supra* note 44, at 1093.

263. *Id.* (internal quotation marks omitted).

264. *Id.* at 1091; Dean B. Suagee, *Tribal Environmental Policy Acts and the TEPA Template Policy*, A.L.I.-A.B.A. COURSE OF STUDY Dec. 13–14, 2001; *see also* WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1:14(B) (2008).

265. Gough, *supra* note 11, at 62. See Rosenberg, *supra* note 23, at 530–31, for a discussion of environmental impacts of wind power projects.

266. Clow & Sutton, *supra* note 35, at xxxvi.

267. *See supra* notes 84–89 and accompanying text.

268. *See* Tsosie, *Tribal Environmental Policy*, *supra* note 173, at 232, 330.

269. "The shift to a tribal environmental review process ensures that comments will be reviewed in light of tribal values, priorities, and decisions, rather than filtered through a federal lens." Royster, *Practical Sovereignty*, *supra* note 44, at 1092. It is certainly true that the shift

Third, the sections of the legislation and regulations relating to the trust responsibility should be modified to better accord with the principle of self-determination.[270] The foremost concern is that the government uses the trust responsibility to retain control of tribal resource development, contrary to the principle of self-determination.[271] The regulations regarding interested party petitions are a case in point: when an interested party brings a claim that a tribe did not comply with a TERA, the regulations allow the Secretary to reject a tribe's resolution of the claim.[272] This amounts to the government second-guessing tribes, even though the TERA framework and the Indian Energy Act in general purport to foster tribes' ability to control their natural resource development activities under the self-determination principle. The portions of the legislation and regulations that enable such Secretarial second-guessing should be revised to guide the Secretary instead to view the trust responsibility as a duty to protect tribes' right to self-determination.[273]

In addition, changes to the legislation's trust provisions can allow the provisions to better foster self-determination. The provision related to the trust obligation with respect to physical assets allows federal assertion of control at the expense of tribal self-determination.[274] This provision should be removed or revised in order to clarify that the Indian Energy Act does not authorize such control. The provision related to the trust obligation toward individual Indians and tribes should also be revised, to direct that it should be interpreted to require federal protection and encouragement of self-determination.[275]

As the foregoing discussion indicates, the concerns expressed about the government abdicating its trust obligation[276] are unwarranted—the government has more of a tendency to use the

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from review carried out by federal agencies to review carried out by tribes will entail a shift in perspective. However, the strictures of the TERA framework impede that shift in perspective.

270. *See supra* Part V.B.

271. *See* Tsosie, *Conflict*, *supra* note 66, at 275 (discussing the federal government's historical use of the trust doctrine to justify federal power over tribes).

272. 25 C.F.R. § 224.115(b) (2008); *see also supra* text accompanying notes 193–196.

273. *See* Tsosie, *Conflict*, *supra* note 66, at 274.

274. 25 U.S.C. § 3504(e)(6)(A)(i) (2006); *see also supra* notes 64–77 and accompanying text.

275. *Id.* § 3504(e)(6)(B); *see also* Chambers, *supra* note 49, at 13A-32.

276. *See supra* notes 181–82 and accompanying text.

trust doctrine to retain control over tribal resource development. TERA advocates who emphasize that TERAs are voluntary recognize the importance of focusing more on the opportunity for self-determined resource development than on the security afforded by the federal trust obligation.[277] Thus, the provision limiting federal liability does not require revision,[278] for two main reasons.

One reason revision is not needed is that the Indian Energy Act's explicit recognition of the trust responsibility offers assurance that this responsibility remains intact.[279] The Act can be compared with the Indian Mineral Development Act of 1982.[280] Professor Judith V. Royster asserts that in that Act, Congress intended to sustain the trust responsibility despite the inclusion of a similar limitation on federal liability.[281] Though Professor Royster expresses some reservations based on differences between the Indian Mineral Development Act and the Indian Energy Act, she ultimately concludes that the concerns about the trust responsibility are unfounded.[282]

Another reason the limitation on federal liability does not need to be changed is that tribes must be willing to take responsibility when assuming control over resource development. The TERA framework envisions a process in which the Secretary no longer approves specific development agreements.[283] It is sensible not to require that the federal government be liable for damages related to such agreements.[284] More importantly, it is in tribes' own interests to accept the risks attendant to developing their resources.[285] Freedom

277. *See supra* notes 183–84 and accompanying text.

278. 25 U.S.C. § 3504(e)(6)(D)(ii); *see supra* text accompanying note 148.

279. *See supra* notes 145–47 and accompanying text.

280. Pub. L. No. 97-382, 96 Stat. 1938 (1982) (codified at 25 U.S.C. §§ 2101–2108).

281. Royster, *Equivocal Obligations*, *supra* note 86, at 337–38; Royster, *Practical Sovereignty*, *supra* note 44, at 1099.

282. Royster, *Practical Sovereignty*, *supra* note 44, at 1099–100. The issue arises because the Indian Mineral Development Act prescribes factors that the Secretary must consider in approving development agreements, while the Indian Energy Act sidesteps the approval process and thus does not create a standard for Secretarial action to which the government might be held in an action for breach of trust. *Id.*

283. *See supra* notes 136–37 and accompanying text.

284. *See* Chambers, *supra* note 49, at 13A-24 (noting that where the federal government does not have legal authority over tribal programs and policies, the government should not be held liable for damages).

285. Cornell & Kalt, *supra* note 32, at 45.

from government control necessarily entails forgoing some federal protection.[286] The Indian Energy Act includes several provisions to build tribal capacity to take on development projects.[287] Tribes must evaluate when their capacity enables them to use a TERA to take control over resource development. They have the ability to opt in or remain under the preexisting framework for development, with federal approval and greater federal oversight and responsibility.[288] When they do take control, they should embrace the attendant risks, because "sovereignty without such risks is a contradiction in terms."[289]

A fourth change that should be made to the TERA structure is that it should be reworked to encourage direct tribal participation in development projects. Though the Indian Energy Act's asserted aim is to allow tribes to take control of development on their lands, in reality the TERA legislation is geared more toward having tribes take over the regulatory role of the federal government, while private development is still the most likely medium through which resource development will take place.[290] Because research has suggested that economic development is more successful when tribes are actively involved,[291] this model should be rethought. In part, rethinking the tribe-as-regulator model will involve considering whether the TERA framework works to enable truly self-determined resource development by tribes. The framework has been called a "guarded effort" to allow tribes to determine the course of resource development on their lands.[292] But a guarded effort may not be enough to foster real self-determination.

In fact, the TERA legislation and regulations specify in great detail the provisions that a tribe's TERA and its subsequent

286. Rosser, *supra* note 4, at 352.

287. *See supra* notes 128–32 and accompanying text.

288. Royster, *Practical Sovereignty*, *supra* note 44, at 1101; *see supra* text accompanying notes 189–190.

289. Cornell & Kalt, *supra* note 32, at 45.

290. Gough Interview I, *supra* note 166.

291. *See supra* note 43 and accompanying text; *see also* Getches, *Foreword*, *supra* note 38, at xiv ("[S]uccessful resource management on reservations is linked to Indian control."); Cornell & Kalt, *supra* note 32, at 44 ("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 . . . .").

292. Shipps, *Step*, *supra* note 121, at 57.

development agreements must contain.[293] This high level of federal regulation appears logically inconsistent with real tribal control over economic and resource development.[294] The issue at the heart of self-determination is tribes' right to make their own laws and govern themselves.[295] When the federal government dictates the terms under which tribes can take control over resource development, this right remains unfulfilled.

As noted previously, much of the concern over TERAs for natural resource development arose in the context of mineral resources, because of the high potential for adverse impacts resulting from their development.[296] But because wind power does not share this potential,[297] it can provide an opening for a less rigid structure than the present TERA framework allows. Given the imperative to develop wind power, now may be the perfect time to consider this possibility.

VII. CONCLUSION

Indian tribes and the DOI should view the TERA framework as providing an opportunity for tribes to take charge of resource development when their capacity is sufficiently advanced. Because of its lesser environmental impacts, wind power provides a significant opportunity for tribes to use TERAs to step into an active development role.

Not only do the characteristics of wind power make it particularly well suited for use of the TERA structure, but wind power is also particularly appropriate for development by a tribal energy resource development organization made up of several tribes. Allowing a tribal energy resource development organization to enter into a wind power TERA would enable the development of this renewable resource through large-scale projects that can help meet the nation's energy needs in a sustainable way and also help meet tribes' needs for sustainable economic development.

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293. 25 U.S.C. § 3504(e)(2)(B)(iii) (2006); 25 C.F.R. pt. 224 (2008); *see supra* Part V.D.

294. Rosser, *supra* note 4, at 323 n.208. For a discussion of some possible legislative "fixes" and "overhauls" that could encourage tribal economic development in general, see EagleWoman, *Tribal Nation Economics*, *supra* note 100, at 424–26.

295. Laurence, *supra* note 52, at 50.

296. *See supra* notes 170–71, 230 and accompanying text.

297. *See supra* notes 231–33 and accompanying text.

In addition, a wind power TERA provides an opportunity for tribes to have an ownership interest in the development of their resources rather than remaining only regulators of development undertaken by others.[298] This ownership enables tribes to take greater control over development projects, thereby furthering the goal of self-determination.

Finally, TERAs enhance self-determination by giving tribes the power of choice over development decisions.[299] Because the TERA structure is a voluntary framework for development, tribes can choose to use this tool or to forgo it in favor of the preexisting, more protective framework. Moreover, TERAs allow tribes to choose tribal control, and thus self-determination, in place of federal protection under the trust doctrine.[300] There may be less need for a robust trust doctrine after the past several decades, in which the self-determination principle has influenced federal Indian policy and has led to greater tribal autonomy—and through the choice TERAs offer, they can be seen as harmonizing the trust obligation with that present reality.[301]

However, it is worth considering whether the TERA framework goes far enough in fostering self-determination. Making some changes to the TERA structure, as this Note suggests, can help tribes achieve the goal of developing wind power in a self-determined way. But now may be the time to make broader changes to the federal legal framework that governs tribal resource development, to truly unleash the power of tribal wind.

298. Gough Interview I, *supra* note 166 ("With renewables, tribes can do it themselves.").

299. Rosser, supra note 4, at 351–52.

300. *Id.*; Royster, *Practical Sovereignty*, *supra* note 44, at 1101.

301. Chambers, *supra* note 49, at 13A-37.