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NOTES

Reservations Please! Could Energy Development on Native American Land Be America's Most Valuable Resource?

Jada Scott Greenhowe*

* Jada Greenhowe is the Senior Development Editor of the *Pittsburgh Journal of Environmental and Public Health Law*. She received her J.D. from the University of Pittsburgh School of Law in May 2013. She also received her B.A. from the University of Pittsburgh. The author acknowledges and expresses gratitude to the *Pittsburgh Journal of Environmental and Public Health Law* editorial staff. Jada would also like to express gratitude to Hazel Greenhowe and Hazel Scott, both of whom were the inspiration for this note.

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I. INTRODUCTION

Over the past few decades, the energy market has expanded not only in profits, but also in discovery, development and necessity. As demands for energy, and subsequently for new sources of energy, continue to increase, the need to support those demands in a manner that is economically feasible increases as well. Recently, the United States has focused a majority of its efforts on decreasing its dependence on foreign sources of energy. This ambition, however, makes it necessary for domestic sources of power to fill the inevitable gaps left by the rejection of foreign sources, which has typically been a challenge for the United States. The United States' energy policy has had the effect of undermining its economy, security, and the world's fragile ecosystem.[1]

While the United States has not historically been a major player in the energy industry, replacing foreign power with domestic energy has not proven to be an insurmountable task. Recent discoveries, such as the Marcellus Shale formation, have given the United States a new outlook on energy development. However, as a resource that requires drilling and extraction, the Marcellus' long-lasting implications remain somewhat nebulous. The United States, however, has had access to a not-so-hidden treasure for at least a century, which has remained largely untouched. If developed properly, this treasure could be a viable source of domestic energy.

Recent studies estimate that Native American lands, which comprise over 55 million acres within the continental United States, hold at least 35% of the country's fossil fuel resources.[2] In addition, according to the

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[1] *See Navajo Nation Discusses "Solar Power for All,"* DREAMING NEW MEXICO, http://dreamingnewmexico.org/news/navajo-nation-discusses-soalr-power-for-all (last visited Oct. 23, 2011) [hereinafter DREAMING NEW MEXICO].

[2] *See* Brian Awehali, *Native Energy Futures*, LIP MAGAZINE, http://www.projectcensored.org/top-stories/articles/25-who-will-profit-from-native-energy/ (last visited Oct. 29, 2011).

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Department of Interior, Native American tribal lands contain at least 5.4 billion barrels of oil, 38 trillion cubic feet of natural gas, and 54 billion tons of coal. Each of these lands holds an estimated value of hundreds of billions of dollars.[3] Tribal lands in the Southwest alone contain enough energy to eliminate the need for all fossil fuel burning plants in the United States.[4] Furthermore, these lands have the ability to produce vast amounts of clean energy such as wind, solar, and geothermal power. Why then, in the wake of this seemingly limitless potential, do these resources remain untapped? If Native American territory truly contains this abundance of energy, why are energy companies not competing to invest?

Simply put, a multitude of domestic energy companies are eagerly awaiting an opportunity to partner with Native American tribes to produce these resources. Challenges such as tribal sovereignty, environmental justice, and the idea that tribal lands experience a disproportionate impact from the effects of global warming, have continually thwarted energy projects.[5] Additionally, politics within the various tribes and the hesitancy of tribal leadership to partner with non-tribal entities, including the Federal Government, have contributed to slowing their development.

The relationship between the United States Government and Native American tribes has been tumultuous, which has contributed to the misconception that neither the Federal Government, nor the tribes on these lands, have an interest in utilizing and developing the resources on Native American soil. Energy legislation in the last few decades, on the other hand, indicates otherwise.

Part II of this Note will discuss the types of energy Native American land can produce, which entities make the decisions regarding the

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[3] *Id.*

[4] *Id.*

[5] *See* Roger F. Tungovia & Steve Torbit, *Tribes Can Provide the Key to Clean Energy*, http://www.azcentral.com/arizonarepublic/viewpoints/articles/20100530energy30.html (May 30, 2010).

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development of that energy, and which entities stand to gain from its production. Furthermore, Part II will describe the complications that accompany energy development on tribal land. Part III of this Note will describe how historic federal-tribal interactions have contributed to the climate of tribal distrust. Finally, Part IV will discuss various solutions that both the Federal Government and Native American tribes can implement to overcome the hurdles associated with that energy development and how tapping into this precious resource could solve many issues concerning domestic energy production.

II. ENERGY SOURCES ON TRIBAL LANDS

Over the past several decades, interest in Native American land has increased. Many companies have taken notice of the big business potential contained on tribal territory. Tribal lands are an opportune and largely undeveloped place to explore possible solutions to the energy crisis. With the capabilities to produce an abundance of wind, geothermal, solar, coal, electric and natural gas energy, the possibilities seem endless. Recently, the government has placed a strong emphasis on clean and renewable sources of energy as concerns with global warming and carbon emissions reach an astounding level.

Several organizations dedicated to the production of clean sources of energy have consistently emphasized the importance of expanding progress in the clean energy sector. The energy policy of the United States has contributed to the effects of global warming and has continued to produce newfound problems. The capacity for Native American lands to improve the energy policies of the United States is so astounding that even if only a fraction of this potential could ever be realized, the contribution would be significant.[6]

[6] *See* Hyatt Townsend et al., *Financing Renewable Energy Development on Native American Lands*, www.orrick.com/Events-and-Publications/Documents/1720.pdf (last visited Oct. 27, 2011).

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A. WIND POWER

Wind is an abundant and clean source of renewable energy, and is readily available in the western plains, specifically in tribal lands. It is not only the most rapidly growing form of energy, comprising over 30% of new energy capacity, but it is also one of the cheapest to produce in bulk.[7] Recent studies estimate that tribal lands have the ability to produce 535 billion kilowatt hours of electricity from wind, an amount at least four times greater than the quantity annually produced in the United States.[8]

Wind power is created by using solar energy to power wind turbines that are connected to generators.[9] When sunrays hit the earth's surface, they "heat the terrain at rates that differ based on variable land surfaces and day/night alternation."[10] This imbalance then creates surface wind, which is captured by the turbines, causing the blades to rotate.[11] The movement of the blades causes the generator to rotate, creating electricity. Turbines are usually grouped together on large parcels of land and developed into wind farms.[12] The downfall of wind power, however, is that to produce enough energy, the

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[7] *See* Peter Meisen, *Renewable Energy on Tribal Lands*, THE GLOBAL ENERGY NETWORK INSTITUTE, http://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf (last visited Nov. 5, 2011).

[8] *See* Alton Parrish, *Native American Tribal Lands Could Produce 17.5 Trillion Kilowatt Hours of Electricity From Wind and Solar Power*, BEFORE IT'S NEWS, http://beforeitsnews.com/native-american-news/2010/06/native-american-tribal-lands-could-produce-17-5-trillion-kilowatt-hours-of-electricity-from-wind-and-solar-power-82333.html (last visited Sept. 22, 2011).

[9] *See* Chrystal D. Masterson, *Wind-Energy Ventures in Indian Country: Fashioning a Functional Paradigm*, 34 AM. INDIAN L. REV. 317, 317 (2009).

[10] *Id*. at 318.

[11] *See id.*

[12] *Id.* at 319.

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wind has to blow uninterrupted within a specific range of speed. The wind speed must be high enough to begin producing energy, which for most turbines is about 10 miles per hour, but slow enough to prevent the destruction of the turbines.[13] Today, most turbines are designed to shut down when wind speeds exceed the range of 55 to 60 miles per hour.[14]

The benefits of wind energy are bountiful, including the fact that wind energy produces no carbon emissions.[15] Additionally, "every megawatt hour of wind energy that replaces traditional energy sources could potentially save up to six hundred gallons of water."[16] This has huge implications for tribal entities, which are disproportionately impacted by the effects of global warming. Unlike migratory populations, or groups of people with the ability to relocate should adverse circumstances render a habitat unlivable, Native American culture fosters a connection with land.[17] Furthermore, tribes generally live off the land. Thus, if climate change has a negative impact on a species that is essential to a tribe's survival, not only would that tribe lose sustainability, the tribe may lack the ability to find an alternative location to reestablish its sustainability. Taking these factors into consideration, it appears that Native American tribes not only have the most to gain from investing in wind and other clean sources of energy, but also have the most to lose from not doing so.

B. UNITED STATES EXPLORATION OF DEVELOPING WIND ENERGY ON TRIBAL LAND

The United States Government has explored the feasibility of developing wind energy on tribal land. The Western Regional Air Partnership (WRAP), comprised of representatives from 13 western states, as well as

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[13] *See id.*

[14] *Id*.

[15] Masterson, *supra* note 9, at 322.

[16] *Id.*

[17] Parrish, *supra* note 8.

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representatives from the Native American tribes therein, was established in the mid-1990s with the mandate of enforcing the recommendations of the Grand Canyon Visibility transport commission (GCVTC).[18] The GCVTC was formed as part of the Clean Air Act to make recommendations on how to improve the visibility and air quality of the Grand Canyon and surrounding areas.[19]

In 1999, the Environmental Protection Agency issued the regional haze rule (RHR) after considering the GCVTC's report and recommendations, and in the attempt to further increase visibility and clean air in the western region of the United States.[20] A necessary part of this rule included the development and implementation of renewable energy. As part of its recommendation report, the GCVTC included an analysis of the wind resources available on Native American land, or "Indian Country."[21] The report concluded that if wind energy in the "Indian Country" was developed, it could actually make the RHR viable and create clean sources of energy generation. Studies showed that at least 60 tribes in the WRAP region contained class-5 wind resources, one of the highest achievable ratings.[22] Furthermore, the report indicated that over 80% of the tribes within that area were not only interested in developing wind energy on their lands, but had a strong desire to be competitive within the energy market.[23]

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[18] Thomas L. Acker et al., *The Implications of the Regional Haze Rule on Renewable and Wind Energy Development on Native American Lands in the West* 1 (College of Business Administration Northern Arizona University, Working Paper Series 02-21, 2002), *available at* http://gondor.bus.cba.nau.edu/Faculty/Intellectual/workingpapers/pdf/Smith_AWEA.pdf.

[19] *See id.* at 2.

[20] *See id.*

[21] *See id.* at 2–3.

[22] *See id.* at 3.

[23] *See id.* at 4.

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Despite the potential held in these lands, it was clear that facilitating a method and policy of developing and fully utilizing the capabilities of each of the tribes' lands would be a different and a unique process for each individual tribe.[24] While many tribes were concerned about cultural issues, others were concerned about sovereignty and the ability to have control over the energy production activities on their territories. These specific types of challenges have hindered, and continue to hinder, to the progress toward Native American land development.[25]

C. TRIBAL EXPLORATION OF DEVELOPING WIND ENERGY

The Government is not the only entity that has unsuccessfully attempted to develop tribal wind resources. Tribes themselves often have difficulty establishing wind farms because they lack access to two of the most important elements: initial capital to get the project started and tax incentives to keep it going.[26]

1. INITIAL CAPITAL

"It is estimated that the installation of one megawatt of turbine capacity requires approximately $2 million of up-front capital."[27] Multiplying this figure by the 100 megawatts that is necessary to create a productive wind project, it becomes apparent that significant funding is essential.[28] Most tribes, however, are not able to produce this type of funding solely within the tribe. Native Americans represent the poorest one percent of America's

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[24] *Id.*

[25] *See* Acker et al., *supra* note 18, at 5.

[26] *See* Mark Shahinian, *The Tax Man Cometh Not: How the Non-Transferability of Tax Credits Harms Indian Tribes*, 32 AM. INDIAN L. REV. 267, 275 (2007).

[27] Masterson, *supra* note 9, at 321.

[28] *Id.*

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population.[29] To embark in the energy industry, tribes would have to partner with non-tribal companies and investors to accumulate the needed start-up funds. Although wind farms need little monetary maintenance, thereby increasing the potential that tribes could pay back investors and eventually acquire sole ownership, for some tribes, relying on non-tribal sources to fund or maintain energy projects is not a readily available trust relationship. Primarily, getting the business started requires not only knowledge about how to best manage the assets, but a functional understanding of how the industry works. Many tribes, due to a lack of education and minimal opportunities to gain experience in this field, do not possess these skills.

The Navajo Nation has emerged as a leader in tribal energy development, participating in a wide range of energy projects including wind, water and solar development. They estimate that their lands contain 5,000 megawatts of wind energy, enough to make them a substantial force in the Southwest United States.[30] The Navajo have traditionally prided themselves as being keenly aware of their environment.[31] Developing energy allows them to pair these concepts with action.[32]

With the primary goal of creating energy related jobs and spurring the Navajo economy, the tribe paired with a non-tribal entity, the Green Economy Coalition, to derive the necessary funds to begin work on the Big Boquillas Wind Project.[33] This project, located near Flagstaff, Arizona, will produce 85 megawatt hours of electricity and will provide a significant

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[29] *See* John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES, Dec. 13, 2011, *available at* http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/.

[30] *See* DREAMING NEW MEXICO, *supra* note 1.

[31] *See id.*

[32] *Id.*

[33] *Id.*

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number of jobs for the Navajo people.[34] Eventually, the Coalition hopes to establish a Navajo Green Economy Coalition specifically for the tribal community.[35]

The price of this venture was not free, however. The Navajo Nation had to contribute $10 million to the fund, all of which was dedicated specifically to the establishment of green jobs.[36] While the tribe will likely see a return profit of an exponentially greater amount, providing this sort of contribution is not possible for many other Native American tribes. Additionally, despite the hefty $10 million the Navajo Nation contributed, it was still not sufficient to get the project underway.[37] The tribe still needed non-tribal capital to finance the exploration, construction, and other factors that went into developing the project.

For many Native American entities, fear of losing sovereignty plays an important role in deciding whether or not to invest in energy development with a non-tribal investor. This is mostly due to the fact that the Federal Government has not always maintained tribal sovereignty as the highest priority in federal-tribal relations. For years, scholars have asserted that control over resources is vital to tribal sovereignty and self-determination.[38] "In broader terms, increased economic self-determination—and specifically the ability of a local population to use and manage its resources—is at the heart of many of the concerns about sovereignty around the world, from the debate over free trade to rapidly developing jurisprudence concerning the efforts of California and northeastern states to impose restrictions on

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[34] *Id.*

[35] *Id.*

[36] *See* DREAMING NEW MEXICO, *supra* note 1, at 2.

[37] *See id.*

[38] Mark Allen, Comment, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination*, 16 B.C. ENVTL. AFF. L. REV. 857, 887 (1989).

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greenhouse gas emissions."[39] Prior incidents with non-tribal corporations, such as the United Nuclear and Kerr-McGee incidents, which resulted in a vast exploitation and significant environmental degradation as a result of uranium mining, have caused tribes to be hesitant about trusting private investors.[40]

Additionally, the Federal Government has not always upheld its duty to protect Native lands, particularly as it relates to resource exploration and management. In the 1970's, the government supported coal mining of Big Mountain in Arizona, which led to the mass displacement of Navajo Indians. Furthermore, because the Secretary of the Interior serves as a pseudo-fiduciary to Native American tribes, tribal entities must seek permission from the acting secretary to pursue energy development.[41] This effectively undermines tribal authority by allowing an outside authority to decide what is in the best interest of the tribes. Corruption in various bureaucracies such as the Bureau of Indian Affairs (BIA) and the Materials Management Service (MMS) branch of the Department of Interior (DOI), have led to the failure to pay, and/or to grossly underpay, tribes royalties from mineral development; such behaviors have not fostered a trusting relationship between the Federal Government and the tribes.[42]

2. TAX LIABILITY

Tax liability is another hurdle for Native American tribes seeking to develop wind or any other type of power, as tribes are not able to utilize energy tax credits.[43] Tribes are not taxable entities.[44] While this appears extremely beneficial to companies that must pay approximately 35% of their

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[39] Shahinian, *supra* note 26, at 288.

[40] Allen, *supra* note 38, at 888.

[41] *Id.* at 872.

[42] *Id.* at 873.

[43] *See* Shahinian, *supra* note 26, at 275.

[44] *See* Masterson, *supra* note 9, at 334.

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income in taxes to the government, this tax exempt status has negative implications including the fact that the tribes are ineligible to receive federal tax benefits.[45] The wind power industry is among those where "federal tax credits play such an important financial role that entities unable to use those tax credits are at a significant financial disadvantage. . . ."[46] Of considerable importance is the production tax credit (PTC). The PTC is an incentive that gives renewable energy developments, particularly the wind industry, a certain amount of money per kilowatt hour produced.[47] Current PTCs give wind energy projects a 1.9 tax credit per kilowatt hour produced.[48] This number supplements earnings making wind projects considerably more profitable than they would be without it.[49] As a matter of fact, studies have indicated that PTC tax credits account for 17% of a wind project's income.[50]

Some tribes, however, have demonstrated that it is possible to overcome the tax hurdle. In 2003, Native Energy, LLC partnered with the Rosebud Sioux and created "the first large-scale native-owned wind turbine in history," a venture that has proven to be markedly successful.[51] Yet, growing this resource into something lucrative has not come without its challenges. To fund the project, Tom Boucher, Native Energy's CEO, sold flexible emission standards, or tax-deductible pollution credits from ecologically responsible companies. These flexible emission standards can be sold to polluting companies that need to offset their carbon dioxide emissions but cannot actually reduce their emissions.[52] Though this was feasible for Native Energy,

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[45] *See* Shahinian, supra *note* 26, at 269.

[46] *Id.*

[47] Masterson, *supra* note 9, at 334.

[48] Shahinian, *supra* note 26, at 273.

[49] *Id.*

[50] *Id*. at 277.

[51] *See* Awehali, *supra* note 2.

[52] *See id.*

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it is not always an option for all tribal communities interested in venturing into the energy arena.

Estimates show that tribal endeavors to produce wind energy without federal tax credits would fare much worse than outside corporations that are able to utilize such tax credits. To be exact, a "side-by-side comparison of a tribally-owned wind farm and a commercially owned wind farm found the tribal wind farm provides a 2% internal rate of return on investment while the same wind farm, commercially owned provides a 12% return—the difference lies almost entirely in the tax credits."[53]

While capturing wind energy poses significant economic benefits for many Native American nations, some individuals on the reservations believe that this sort of development is just an angle for large corporations to capitalize on an untapped supply.[54] These tribes continue to be hesitant to engage in business ventures with non-tribal corporations.

D. OTHER POTENTIAL SOURCES OF ENERGY

Solar energy is another clean and economically viable source of power that has significant earning potential for Native American tribes. It is estimated that tribal lands can produce 17.6 trillion kilowatt hours of electricity through solar energy, a number that exceeds the annual amount produced in the United States by 4.5 times.[55] Solar power is an invaluable resource because it never runs out. Ben Shelley, Vice President of the Navajo Nation, recently noted "[a]s long as the sun shines, there is power, clean power."[56]

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[53] *See* Shahinian, *supra* note 26, at 272.

[54] *See* Awehali, *supra* note 2.

[55] *See* Tungovia & Torbit, *supra* note 5, at 2.

[56] *See* DREAMING NEW MEXICO, *supra* note 1.

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However, this resource, like most sources of clean energy, is not without its limitations. Primarily, solar power is bound by the same variability inherent to wind energy in that it can only be produced during the daylight hours and is subject to weather conditions. Additionally, utility scale solar power, which possesses the capability of providing electricity to large sectors of people, utilizes relatively new technology that has not been tested on Native American land.[57]

These limitations, however, have not dissuaded the Navajo Nation from exploring its options with solar development. As the Navajo Nation continues to surge ahead with their exploration of ways to develop energy on their lands, many other tribes, particularly those that are less financially sound, remain stagnant. Creating a governmental framework that encourages other tribes to pursue energy endeavors would help alleviate the tensions facing many tribes.

III. HISTORICAL RELATIONSHIP BETWEEN U.S. FEDERAL GOVERNMENT AND NATIVE AMERICAN TRIBES AS A BARRIER FOR DEVELOPMENT

Despite the United States' burgeoning need for energy resources and the availability and desire of tribal entities to develop their lands, a lingering question is why a majority of tribes have not capitalized on the opportunity for economic growth and stability. A likely reason is due to the historical relationship between the United States Government and the tribes, which has been characterized by the contradictory notions of self-determination and dependency. Most people have some historic familiarity with the relationship between the Federal Government and Native American tribes. Whether chronicled in a children's film or studied in American history classes, the struggle for possession and control of Native American territory has had lasting effects that still play a pivotal role in the federal-tribal relationship today. As Chief Justice Marshall noted, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in

[57] Meisen, *supra* note 7, at 7.

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existence."[58] Understanding how the Federal Government and Native American Tribes have interacted in the past, and the subsequent trajectory that the relationship has followed, is helpful for understanding how the relationship will function in the future.

A. DISTRUST IN THE SOVEREIGN TRUST PARADIGM

The story began with the discovery and colonization of the America's in the late 1500s. During this early period, many Native American tribes were forced off their land while others perished at the hands of the colonists and the government, or due to an array of diseases brought over from Europe. The situation changed in the 1700s with the acquisition of large sums of tribal land by the Federal Government. Under increased pressure from the rapidly growing immigrant population, various Native American tribes entered into agreements with the United States Government via the Homestead Act.[59] In exchange for services such as education, food, healthcare, and economic development, many tribes agreed to give some of their land to the Federal Government—much of which was rich in natural resources such as coal, gas, and oil.[60]

Under these agreements, the tribes would be able to keep certain parcels of land for their sole usage as long as the tribe was in existence.[61] The government was to serve as trustee, ensuring that no harm came to the specified territory. Essentially, the Federal Government would benefit by supplying its citizens with land through the Homestead Act, while at the same

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[58] Cherokee Nation v. State of Georgia, 30 U.S. 1, 16 (1831).

[59] Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1497 (1994).

[60] Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 208 (2009); Allen, *supra* note 38, at 858.

[61] *Id.*

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time allowing the Native American population to retain a certain amount of separation from the growing nation.[62] This trust obligation required the Federal Government to ensure that the Native American way of life and the lands afforded to the tribal entities were not harmed by the external demands of non-Native American populations.[63]

Implicit in the idea of separation was the notion that the tribes would exercise sovereignty, maintaining control over decisions affecting their territory. "The 'sovereign trusteeship' model was supported by early acts of Congress aimed at upholding treaty promises by restraining local governments and white settlers from intruding upon native territories and sovereignty."[64] To solidify this position the United States enacted various pieces of legislation such as the Trade and Intercourse Act and the Northwest Ordinance, which functioned as mechanisms that prevented settlers from encroaching on Native American territories.[65] The Supreme Court bolstered this position with its decision in *Cherokee Nation v. State of Georgia* and the promulgation of the Worcester Doctrine.

In 1831, the Cherokee Indians petitioned the U.S. Supreme Court to enjoin the state of Georgia from enforcing any of its laws on the tribe's land.[66] Essentially, the tribe was seeking federal recognition as a separate and independent state. Although the Supreme Court acknowledged that the Cherokee Nation had "a distinct political society, separate from others," and was therefore able to manage its own affairs and govern itself, it nevertheless refused to recognize the Cherokee Nation as an independent state.[67] Interestingly, Chief Justice Marshall, serving as the voice of the Court, later

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[62] Wood, *supra* note 59, at 1483.

[63] *Id.* at 1496.

[64] *Id*. at 1498.

[65] *Id.*

[66] *Cherokee*, 30 U.S. at 16 (1831).

[67] Allen, *supra* note 38, at 861.

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in the same opinion proffered a somewhat contradictory conclusion through his own characterization of the relationship as: "that as a ward to his guardian."[68] In retrospect, these words were a foreshadowing of things to come.

Surprisingly, a year later, in *Worcester v. Georgia*, the Supreme Court held that the laws of the state of Georgia did not apply to the Cherokee Nation.[69] The Worcester Doctrine supplanted the idea of the trust by reiterating that the "relation between the Cherokee Nation and the United States was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master."[70] However, as time progressed and the tensions between the Federal Government and Native American tribes increased, particularly in regard to military power, the strength of the federal-tribal trust waned and shifted into a policy of assimilation.[71]

The latter part of the 1800s and the early 1900s brought about a change in the nature of relations between the two entities. The United States became less supportive of Native American self-determination and enacted policies that divested native tribes of the resources necessary to maintain their separatist lifestyle and traditions.[72] Further driving a wedge between the Federal Government and tribal bodies was the case of *United States v. Kagama.* The case ushered in what has been referred to as the "plenary power" doctrine, birthing the notion of a guardian-ward relationship between the Federal Government and tribes instead of solidifying the sovereign-

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[68] *Cherokee*, 30 U.S. at 17 (1831).

[69] Worcester v. Georgia, 31 U.S. 515 (1832).

[70] Wood, *supra* note 59, at 1500.

[71] *Id*. at 1501.

[72] *Id.*

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within-a-sovereign idea that from *Worcester*.[73] *Kagama* eroded tribal sovereignty by extending federal criminal jurisdiction into native territory.[74] Thus, tribal courts had no authority to punish non-tribal entities for crimes committed on their lands. From this point on, the competing ideals of *Worcester* and *Kagama* would constantly be at play.[75] Most significant, this tug-of-war between the two doctrines would continually be reflected through federal policy towards Native Americans.

B. ENERGY AND MODERN TRIBAL LAW

The competition between the *Worcester* and *Kagama* doctrines continued to affect Native American policy as well as impact the environment. Throughout the nineteenth and twentieth centuries, federal policies towards tribal entities produced mixed results. For example, the late 1800s General Allotment Act (GAA), more commonly known as the Dawes Severalty Act, promoted the assimilation of Native Americans into American society.[76] The Dawes Act, managed by the Bureau of Indian Affairs (BIA), severed large tracts of communally held tribal land into smaller parcels of individually owned pieces, with the hope of making it easier for Native Americans to sell and lease their land.[77] Instead, it led to the sale of approximately two-thirds of tribal territory, effectively decentralizing many Native American governments and stifling their self-sufficiency.[78] This specifically impacted the way that the tribes were able to develop their land and led to a modern framework. Under the new framework, with the approval

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[73] *Id*. at 1503.

[74] United States v. Kagama, 118 U.S. 375 (1886).

[75] Wood, *supra* note 59, at 1503.

[76] Koppisch, *supra* note 29.

[77] *The Dawes Severalty Act*, MONTANA HISTORY, http://www.montanahistory.net/state/dawesact.htm (last visited Feb. 19, 2013).

[78] Allen, *supra* note 38, at 862.

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of the Federal Government (specifically the Secretary of the Interior), tribal entities may lease their land provided that certain requirements are met.

Various statutes can affect the way a tribal lease is carried out. Under statutes like the National Environmental Protection Act (NEPA), which stem from the trust relationship between tribes and the United States, the Federal Government must take specific actions to ensure that Native American environments are protected.[79] Requiring that "the federal government use all practicable means to administer federal programs in the most environmentally sound way," NEPA instructs government agencies to perform certain studies before action on tribal terrain may be taken.[80] These studies, known as environmental impact statements (EIS), are assessments of the environmental effects a proposed action will cause on tribal land.[81]

Under NEPA, an EIS must be completed for any "major federal action significantly affecting the quality of the human environment."[82] But courts have gone a step further and have held that the requirements delineated in NEPA are also applicable to any lease or development agreement between Native American tribes and private entities that must garner federal approval.

IV. CURRENT STRUCTURE AND POSSIBLE SOLUTIONS

A. THE ENERGY POLICY ACT AND TERAS

The current structure of Native American energy development policies is not perfect. However, as it stands, it is more supportive of tribal

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[79] Andrea S. Miles, Note, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental Trust Responsibilities?*, 30 AM. INDIAN L. REV. 461, 465 (2006).

[80] National Environmental Policy Act of 1969, 42 U.S.C. § 4331(b) (2012).

[81] *Id.*

[82] Miles, *supra* note 79, at 466.

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sovereignty and economic development than previous policies. Congress has implemented additional measures that make Native American deals with private investors feasible without reworking the centuries old regulatory framework. This is evident through Congress' attempt to update and somewhat overrule existing law.

The Nonintercourse Act, enacted in 1834, "required federal consent for any lease or conveyance of Indian trust land to be valid."[83] In 2005, however, Congress passed the Energy Policy Act.[84] Title V, also known as the Indian Tribal Energy Self-Determination Act, was included as a part of the Energy Policy Act specifically with the goals of promoting tribal entities to develop energy resources on tribal land. Additionally, the policy sought to encourage tribal self-sufficiency and self-determination, primarily in the context of energy development.[85] In the attempt to make the energy permitting process more efficient by allowing tribes and private parties to contract directly, it removes the need for secretarial approval as required by the Nonintercourse Act.[86]

The Energy Policy Act allows "tribes to bypass secretarial approval of certain energy-related arrangements through the use of a tribal energy resource agreement (TERA)."[87] A TERA allows tribes to lease their property for up to 30 years for specific types of development such as the "generation, transmission, and distribution of electric power."[88] Development of wind, solar, and other sorts of clean methods of power fulfill such goals. Furthermore, by not having to receive approval from the secretary, tribal

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[83] Masterson, *supra* note 9, at 342.

[84] Miles, *supra* note 79, at 461.

[85] *Id.* at 462.

[86] Masterson, *supra* note 9, at 342.

[87] *Id.*

[88] *Id.*

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leaders are permitted to use their own discretion when determining whether development will benefit the tribe as a whole.

To make TERA leases effective, a tribe must draft and submit the lease for the approval of the Secretary.[89] It is important to note here that while the Secretary must approve the lease, his approval only indicates that the tribe and the private investor have fulfilled all the steps required by the statute and have included and identified measures that will be taken to ensure the protection of the environment. This should be contrasted to earlier regulations where the Secretary was required to decide whether the proposed action was in the best interest of the tribe. Essentially, the Energy Policy Act lessens the fiduciary duty held by the Federal Government by limiting its role in tribal decision making. This is intended to have the effect of bolstering tribal sovereignty.[90]

Each TERA must include specific provisions, including but not limited to, the term of the lease, provisions regarding amending and renewing the agreement, the process of environmental review, and the economic returns tribes will receive.[91] The Secretary then has 270 days from the time it is submitted to either approve or disapprove the TERA.[92] Under Title V, the Secretary must approve a TERA if all the necessary provisions have been included. After approval, leases and agreements created under the TERAs are no longer subject to federal action.

While the Energy Policy Act's implementation of TERAs has proven to have some benefits, it also has some limitations. Opponents of TERAs assert that it symbolizes a breakdown of the trust relationship between the Federal

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[89] Miles, *supra* note 79, at 469–70.

[90] *Id*. at 470.

[91] Masterson, *supra* note 9, at 342.

[92] 22 C.F.R. § 224.74.

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Government and Native American tribes.[93] Essentially, some believe that TERA agreements absolve the Federal Government of the extremely limited liability it does have under the trust doctrine by removing "the federal guarantees of environmental review from energy development decisions in Indian Country."[94] Environmentalists are concerned that the government will not fulfill its duties under statutes like NEPA, and because TERA leases are not subject to federal oversight, they are fearful that neither the tribes nor private investors will take the necessary precautions to ensure the protection of tribal lands.

Faced with mounting concern that native lands would face substantial harm should tribes and their lessee's ignore federal environmental law, Congress added safeguards.[95] The safeguards implemented incorporate the federal NEPA process into the TERA system. Thus, tribes are not only required to identify and assess any actions under the agreement that could potentially serve as a severe detriment to the land, but they are also required to create mitigation measures for such acts.[96] These mitigation measures must be included in the TERA and implemented once the proposed action gets under way.[97]

TERAs provide a functional framework for striking the balance between tribal sovereignty and tribal economic development, and they should serve as a beacon of hope to non-tribal investors. By allowing Native American governments to make their own decisions regarding resource development and expediting the process for that decision to be implemented, some of the

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[93] Lynn H. Slade, *The Federal Trust Responsibility and Tribal-Private Natural Resources Development*, ROCKY MTN. MIN. L. INST. 13B-1, 13B-31 (2005), *available at* www.modrall.com/files/1421_the_federal_trust_responsibility.pdf.

[94] Masterson, *supra* note 9, at 343.

[95] *Id.*

[96] Miles, *supra* note 78, at 472.

[97] Masterson, *supra* note 9, at 343.

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fears of being taken advantage of by outside investors are alleviated.[98] Additionally, the TERA framework provides a dispute resolution process, thus relaxing the fears of investors concerned that a tribal judicial process may be unfair to them.[99]

B. SUPPLEMENTING ENERGY POLICY ACT GOALS

However, the help of the Energy Policy Act will be limitedly beneficial without Native American tribes having access to the proper tools needed to manage their economic development. Because federal policy has constantly served as a "middle man" between developers and tribes, Native American governments may not be fully capable of running these types of projects without federal assistance due to a lack of knowledge. As critics of the TERA framework have noted, "some tribes have the capacity to do what they need—but there are hundreds that don't and are being set up to fail." Thus the TERA framework needs supplementary legislation to help it achieve its goal of allowing tribes to attain self-determination while mitigating the possibility that they are unable to do so fully.

A possible solution is an Energy Resource Development Managerial Program (ERDMP). This type of program, subsidized by the Federal Government, would serve as an educational tool to help tribal leaders, and eventually members of the tribes, to understand how the clean energy industry functions. By accepting members of the tribal council and a certain amount of the tribal population into the program, the Federal Government would truly be investing in tribal self-determination. While acquiring the understanding of technical intricacies of specific types of energy development can take years, providing Native American tribal members with a working knowledge of how the most successful energy ventures should and actually do operate, could prove invaluable to tribes that distrust outside development corporations.

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[98] Miles, *supra* note 78, at 474.

[99] *Id*. at 475.

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Graduates of the managerial program would benefit tribes in the sense that they would have an intimate understanding of what technology would best serve their community while serving as a liaison. As poverty is a substantial concern among Native American tribes, higher education is not likely possible for many Native American youth. This population also has the highest school dropout rate in the country.[100] Furthermore, because the educational needs of Native American students are often not adequately met in educational institutions outside of reservations these youth may not want to venture outside of their tribal territory.[101] This program would, in essence, bring them the opportunity to develop this skill set.

Though not government sponsored, these types of training programs have proven invaluable to Native American tribes. Henry Red Cloud, founder of Lakota Solar enterprises and the Red Cloud Renewable Energy Center, has made it his mission to make renewable energy training available to tribal members.[102] Red Cloud's Lakota Solar Enterprises is one of the first renewable energy companies in the country that is solely owned and operated by Native Americans. By creating a do-it-yourself solar energy kit, Red Cloud has not only furthered the renewable energy movement, but has brought jobs and skills to his South Dakota reservation.[103] But Red Cloud did not learn his trade on his reservation. As he noted, he "needed to travel great distances to get training, so [he] made a pact with [him]self that he would

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[100] Jon Reyhner, *Plans for Dropout Prevention and Special School Support Services for American Indian and Alaska Native Students*, J. AM. INDIAN EDUC. (1992), *available at* http://www2.nau.edu/~jar/INAR.html.

[101] *Id.*

[102] Brenna Long, *Henry Red Cloud Returns to Native American Reservation, Starts Business and Renewable Energy Training Center*, MOTHER EARTH NEWS (Nov. 5, 2011, 10:23 AM), http://www.motherearthnews.com/energy-matters/henry-red-cloud-renewable-energy.aspx#axzz2KjcD0oWO.

[103] *Id.*

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start to train Native Americans in renewable energy."[104] Red Cloud has since started training sessions on his reservation.[105] As over 82 members were attending the sessions after only a few weeks, it is evident that there is significant interest in learning how to develop renewable energy.[106]

However, Red Cloud is only one man who lives on one reservation. The need for other reservations and Native American tribes to attain this type of training is crucial. Making ERDMPs an essential piece of Native American energy legislation will encourage tribes to invest in energy development, thereby helping to reduce America's dependence on foreign sources.

C. TRADABLE TAX CREDITS

As previously noted, the inability of tribal entities to use tax credits would severely restrict profit margins even if a tribe could establish a clean energy project—a factor that likely dissuades both investors and tribes from pursuing such endeavors. A possible solution is tradable tax credits.[107] Tradable tax credits would allow all parties, including Native American tribes, the outside investor, and the Federal Government, to benefit from their usage. While tribes who provided the land resources would retain most of the income from the project, the outside investor who provided the capital would retain some of the income and all of the tax credits.[108] The Federal Government, in turn would be able to tax the entity.[109]

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[104] *Id.*

[105] *Id*.

[106] *Id.*

[107] *See* Shahinian, *supra* note 26, at 272.

[108] *Id.*

[109] *Id.*

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V. CONCLUSION

Native American lands stand as a source of renewable energy development with significant potential. This not only because these lands are abundant with clean energy, but because they possess a certain quality of longevity that other sources do not. Although it has been known for some time that tribal lands possess these capabilities, the pervasive distrust held by tribal leaders towards governmental and other non-tribal entities has served as a substantial barrier to tribal energy development. Perhaps it is the tribes' own unwillingness to relinquish some control that has compounded the situation.

Regardless of whether the culprit is Native American's distrust or the desire to preserve their own land, current policy, while more progressive than in the past, still possesses a need for further development. There are significant challenges tribal entities face regarding energy development, particularly as it relates to current tax policies and the inability to accrue sufficient capital. Furthermore, while the Energy Policy Act and the TERA framework have assisted in alleviating some of these hurdles, the lack of education regarding energy development continues to dissuade Native American tribes from pursuing energy endeavors without concerns of exploitation and devastation.

While there may not be one perfect answer, the Federal Government and tribal entities appear to be on a path towards a workable solution that will benefit both parties. Supplementing currently enacted energy policy with legislation that fosters tribal education and participation in clean energy development on tribal lands could be the necessary bridge that gaps federal and tribal policies towards exploring resource development. Additionally, developing clean resources on tribal lands may be the key to reducing the United States' reliance on foreign energy and may be essential to tribal survival.

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