ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Native American Resources Committee Newsletter

Vol. 9, No. 2 **July 2013**

MESSAGE FROM THE COMMITTEE CHAIR
Robert F. Gruenig

We hope that you enjoy this latest issue of the Native American Resources Committee Newsletter, which includes timely articles on several issues relating to environmental, energy, and resource issues in Indian country. Since the 1980s, the Native American Resources Committee has been recognized as a national forum for lawyers representing federally recognized tribes, tribal entities, indigenous peoples, and businesses engaged in development or other commercial activities within or near Indian country, Alaska Native villages, and other lands of indigenous peoples (collectively, Tribal Lands). The committee focuses on broad-ranging current and emerging environmental, energy, and resource issues affecting Tribal Lands, including but not limited to regulation of reservation activities, resources, and the environment; traditional, renewable, and alternative energy development; land use, land rights, leasing, and permitting; climate change impacts and legislative initiatives and policies; financing and economic considerations; collaborative efforts between tribes and states or developers; treaty and subsistence rights; Indian water rights; environmental justice; cultural and sacred site protection; and cross boundary and international initiatives, agreements, and processes affecting the rights of tribes and indigenous peoples.

Although our committee focus is broad and ambitious, we look forward to addressing these issues with you and the rest of our membership through the committee's written materials and programs. You are invited to participate by contributing to the committee's newsletter, the *Year in Review*, and the various programs that the committee sponsors throughout the year. If you are interested in contributing in any of these areas, please let the appropriate vice chairs know of your interest.

We are pleased to introduce the vice chairs who have volunteered to spearhead the committee's activities during this 2012–2013 ABA year. They are:

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Native American Resources Committee Newsletter
Vol. 9, No. 2, July 2013
Ronnie Hawks and Jane W. Gardner, Editors

In this issue:

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

August 1-2, 2013
25th Annual Texas Environmental Superconference
Austin, TX
Primary Sponsor: State Bar of Texas, Environmental and Natural Resources Law Section

August 8-13, 2013
ABA Annual Meeting
St. Regis
San Francisco, CA

October 9-12, 2013
21st Fall Conference
Hilton Baltimore
Baltimore, MD

March 20-22, 2014
43rd Spring Conference
The Grand America Hotel
Salt Lake City, UT

June 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas, NV

October 8-11, 2014
22nd Fall Conference
The Trump Doral Golf Resort & Spa
Miami, FL

For full details, please visit www.ambar.org/EnvironCalendar

A MESSAGE FROM THE EDITORS

Ronnie Hawks and Jane W. Gardner

Please enjoy the latest issue of the Native American Resources Committee Newsletter. It has been our privilege to work with our committee on developing the newsletter, and I'm sure you will find it topical and interesting. We urge you to think about the important issues that are raised here, and provide us with your thoughts and comments on the articles. The Native American Resources Committee requests that you provide us with your thoughts not just on this topic, but on future topics you would like to see in upcoming newsletters.

Our deepest gratitude to the members of the committee and, in particular, Robert Gruenig and Don Clary, for their assistance in this effort.

Leadership Development Program

Applications Now Accepted

Deadline August 12, 2013

The LDP is designed to support Section members interested in expanding a current leadership role or growing their knowledge of the Section so that they can assume a leadership role in the future. The Section is seeking to identify and enroll up to twelve Section members who exhibit an interest in increased Section involvement or leadership responsibility and who can commit to the Leadership Development Program over one year (September 2013- August 2014). We anticipate that these individuals will reflect diversity and help the Section support ABA Goal III.

http://www.americanbar.org/groups/environment_energy_resources/membership/ldp.html

RENEWABLE ENERGY ON TRIBAL LANDS: KEY AGREEMENTS AND TERMS FOR SUCCESSFUL PROJECT DEVELOPMENT

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This paper was originally submitted for the 19th Section Fall Meeting in Indianapolis, Indiana, October 12–15, 2011.

Abstract

Indian tribes and Alaska Natives in the United States (hereafter, "tribes") are well positioned to take advantage of renewable energy development opportunities as a result of the vast amount of land and energy resources controlled by tribes. Tribes are actively exploring new business models to own and invest in energy assets, and to develop and produce power, either for consumption by their own people or for economic development purposes as a commodity for sale to utilities and industry in the wholesale power market. There are a number of reasons why a tribe might decide to partner with a nontribal business entity for development of an energy project, including energy project development expertise; access to project financing; and the benefit of federal incentives (e.g., tax credits). This paper explores some of the key energy-related agreements needed for utility-scale and community-scale projects for successful renewable energy development.

Developing the Project—Key Energy Project Agreements

Any party involved in the development of a renewable energy project will at some point find itself entering into a variety of legal agreements, ranging from relatively simple agreements for the purchase of technical services to complex long-term financing or ownership agreements.

It is beyond the scope of this paper to provide detailed information about every contract that might be required

in the course of developing a renewable energy project. The following discussion provides an overview of four types of agreements that are central and universal to almost every energy project, as well as insights and tips for tribal managers involved in contract negotiations.

Joint Venture/Joint Development Agreements

Joint development in the context of a renewable energy project on tribal lands describes a contractual, collaborative enterprise between a tribal sponsor and often a nontribal entity—usually a developer or investor—to form a project entity and carry out development together.[1] This type of project entity is often referred to as a "joint venture." There are a number of reasons why a tribe might decide to partner with a nontribal business entity for development of an energy project. In the energy context, tribes are motivated to partner for three primary reasons: (1) to acquire energy project development expertise that the tribal project would otherwise lack; (2) to secure project financing; and (3) to get the benefit of federal incentives (e.g., tax credits).

Once a tribe has identified a potential partner/investor for an energy project, the parties will need to create a safe process for negotiations. The first step in negotiations is often a nonbinding letter of intent coupled with a confidentiality and nondisclosure agreement. Together, these agreements set the basic tone for discussions between the tribal sponsor and the developer or potential partner and allow both parties to share information without fear of disclosure to competitors. At this early stage most nontribal parties will accept dispute resolution pursuant to tribal law. This creates an opportunity for the tribe to demonstrate its capacity to support the project.

One of the first topics to be discussed is what type of entity the parties should form to undertake joint development of the project. The tribal sponsor must also consider what type of tribal entity will be the party to the joint development agreement. As discussions between the parties proceed, the next key step is drafting a joint development agreement that clarifies and memorializes the intent of the parties. The agreement should be comprehensive in scope, detailing virtually all aspects of the joint development. A joint development agreement is a detailed agreement between the joint venture partners that establishes the basic framework of the relationship by detailing the preconstruction project development process and allocating rights, duties, and obligations between the two entities. The joint development agreement also sets the tone and "template" for all future agreements between the tribal sponsor and the nontribal business partner. The following discussion omits very necessary but basic terms, focusing instead on some of the key terms and considerations for a joint development agreement for an energy project between a tribe or tribal enterprise and a nontribal entity:

Development Responsibilities of the Limited Liability Company (LLC): On the assumption that the LLC is an experienced developer of projects similar to the Project, it is likely that the LLC will have the primary responsibility for the overall development of the Project. Accordingly, the LLC will be designated as the Party to perform or cause to be performed all activities with respect to development of the Project not specifically assigned to the Tribe.

Development Responsibilities of the Tribe: The development activities of the Tribe are usually focused on the relationship with the Tribe and the surrounding community. If there are resource agreements to be entered into with the Tribe, such as lease or easement agreements for the land, water or fuel supply agreements, tax arrangements, and/or agreements to give priority to tribal members or businesses for the labor or other business needs of the Project, it is likely that the Tribe would be instrumental in making such arrangements.

Coordination of Development Activities: Each Party should agree to coordinate and cooperate with the other on all Project matters in good faith in order to facilitate the development of the Project in an effective and cost-efficient manner. In furtherance of this obligation, each Party should be required to assign personnel that have the time and skills to devote to the Party's assigned responsibilities and to assign a representative who will be the principal interface with

the other Party with respect to the Project. The Parties will report to the other, in a form and on timing to be agreed by the Parties on the activities undertaken by each Party in the development of the Project.

Development Costs: The agreement of the Parties with respect to development costs ("Development Costs") will need to be addressed. If the Tribe expended funds in development of the Project prior to the execution of the Joint Development Agreement, it might seek reimbursement of these funds from the LLC upon execution of the Joint Development Agreement or the right to be reimbursed at the closing of the financing for the construction of the Project ("Financial Closing"). The responsibility of each Party for funding new Development Costs will need to be addressed, including the internal costs for personnel and overhead of each Party during development, as well as for payments to third parties, such as to consultants and advisors and for filing fees for permits, etc. It is important for the Parties to agree in advance on a budget for the Development Costs ("Development Budget"), on a mechanism for revisions to the Development Budget, and for milestones or other circumstances that must be met for continued funding, in order to avoid surprises and disagreements between the Parties. The Parties also may agree upon fees to be earned by a Party during Project development to defray its internal costs, and/or success fees to which one or the other or both will be entitled at Financial Closing in order to reward a Party for the financial risk that it has undertaken during the development of the Project.

Ownership of Project Assets and Work Product: Ownership of data, information, studies, analyses, and reports developed by either Party in the performance of the Project development ("Work Product") and of any Project permits obtained during development will need to be addressed. If the Work Product and permits are obtained by one Party, it should be stated that such Work Product or permit will be the property of the Project Company upon its formation or at a specified time and, until then, will be held by an individual Party in trust for the Project Company. The Parties should agree to share Work Product but should also determine whether there is Work Product for which disclosure to third parties (other than Project consultants) should be restricted. If the Tribe has the equivalent of a "freedom of information act" or other regulations that would treat any information held by a tribal entity as public information, the Parties will need to determine mechanisms under which they will seek protection for the confidentiality of nonpublic or proprietary information.

Affiliate Contracts: The arrangements for contracts between either of the Parties or their affiliates, on the one hand, and the Project Company, on the other hand, should be described, e.g., by including a requirement that the terms and conditions be negotiated on an arm's-length basis and be reflective of market conditions and/or by having the affiliated Party step out of the negotiations. Such affiliate contracts, employing tribal members or tribal business enterprises, are often a key objective of tribal sponsors in the deal.

Compliance with Law: The Parties should agree to adhere to all laws, including tribal laws, applicable to the Parties or the Project during the development of the Project.

Governing Law: Governing law is likely to be a controversial issue for the Parties to resolve. The Tribe will likely desire that the Joint Development Agreement be governed by its tribal laws, while a private entity such as an LLC will prefer the laws of a jurisdiction with which it has familiarity and for which there can be predictability through the LLC's understanding of the jurisdiction's laws and precedents. If the laws of the Tribe are highly developed and the determinations of its courts are readily accessible by nontribal members, the Tribe will have greater success at arguing for the tribal laws to govern the contract. However, it would not be surprising for an LLC to desire that the agreement be governed by the laws of a state with a well-developed body of commercial law, such as the laws of the State of New York, which is often specified for complex and costly commercial ventures. (*See* section 5-1401 of the New York General Obligations Law, which provides for such choice of law.) Bear in mind that although the Joint Development Agreement may set a precedent for the Parties' negotiation of other arrangements, it is

feasible for the Joint Development Agreement and joint ownership agreement to have a different governing law than the arrangements that involve the use of tribal resources such as land, fuel, or water.

Dispute Resolution: A mechanism for resolving disputes and claims under the Joint Development Agreement should be specified. While the efficacy of arbitration is a heavily debated topic, it might be a useful middle ground for the Parties as opposed to trying to reach agreement on whether the tribal courts or state or federal courts will be used for dispute resolution.

Waiver of Sovereign Immunity: The LLC is likely to request that the Tribe waive its sovereign immunity in light of the commercial nature of the Joint Development Agreement and related joint ownership agreement, at least insofar as such waiver is necessary to preserve a Party's rights to pursue the agreed-upon dispute resolution mechanism. Many tribes grant limited waivers that protect certain tribal assets and impose other conditions on the scope of the waiver in order to secure contracts. Legal counsel should be consulted on the precise text, and tribal law may require specific procedures or approval by tribal council for the waiver or limited waiver to be valid.

Power Sales Agreements

Once an energy developer has identified one or more potential customers and is ready to secure a long-term commitment from a power purchaser, it will begin to negotiate a power sales agreement or PSA. As the name implies, a PSA sets the terms and conditions for the sale of power from the project.[2] A well-crafted PSA is a pivotal element of a successful energy project. With some exceptions, the basic terms and conditions are the same no matter whether the PSA deals with the output of a renewable energy project, be it solar PV, thermal, hydro, biomass, wind, or other type of fuel resource and technology.

In order to understand and negotiate a PSA, it is necessary to understand certain basics about how electrical energy is purchased and sold. Electrical power is sold by two components: capacity and energy. Capacity is expressed in MW (megawatts). Capacity is of two types. The manufacturer's rating of the generating equipment's capability is the "nameplate capacity" of the equipment. In a project with more than one generator, such as a wind project, the project's nameplate capacity is the sum of all the units in the project. The other type of capacity is the MWs that the project is most likely to make available in day-to-day operation. It is the net amount of the nameplate capacity reduced by the project's capacity factor and availability factor. This latter is the capacity level that will be used for the energy production commitments that will be made in the PSA. The capacity price generally is designed to recover the fixed and capital costs of the project over a 20- to 30-year period much like a mortgage payment. Energy is the power, measured in MWh (megawatt hours) or kWh (kilowatt hours), actually delivered from the project. Another way to look at the price of the energy component is that it is set to recover the variable costs of producing the power delivered during a month.

The project's customers may have the choice of purchasing firm or interruptible energy and capacity. Firm energy is priced higher and is often associated with rights to project capacity. Interruptible energy can be relatively inexpensive and usually is not associated with any rights to capacity. Customers with firm capacity rights have the first call on project output. Firm capacity and energy are often subject to a "take or pay" provision in the pricing section of the PSA, which requires the customer to pay whether or not they actually take any power. Obviously the project has to be up and running and making power available according to the requirements of the PSA in order for the take-or-pay provision to be enforceable.

The following are most of the key provisions in a PSA:

Buyer promises to purchase. The core of the PSA is the purchaser's commitment to purchase power produced at a certain price.

Developer promises to deliver power. The project or seller's core commitment is to deliver a certain amount of power (MWh delivery expectations) to specified delivery points—these generally will be the connection points with the transmission provider or at a meter or transformer in the project substation or switchyard.

The Commercial Operation Date (COD). This is the date on which the project will be put into regular service and fully subject to all of its delivery obligations in the PSA.

Terms of payment. The parties must agree how and when the purchaser will make payments and whether "green attributes" are included in the purchase price or priced and sold separately. Parties to a PSA will often include a mechanism for changing the price over the term of the agreement. This may be indexed to an agreed inflation measure, such as one published by the U.S. Department of Commerce, or the cost of key inputs such as fuel or a set amount at agreed intervals over the life of the PSA.

Term of agreement. The parties must agree to a specific term for the initial length of the agreement (usually at least 20 years, but at least as long as the project financing loans). The PSA should also provide for a certain number of renewals for shorter periods (usually no more than five years).

Conditions precedent to the parties' responsibilities. In many cases project developers will secure a PSA for the power output from a project long before the project is completed. It is not unusual for parties to enter into a PSA before project construction has commenced because a project developer may need to have a signed PSA before it can secure financing. Many lenders and investors want to see proof that a project will have a fixed revenue stream upon completion before investing in it. Because of this "cart before the horse" situation, both parties need detailed provisions that protect them in the event that the project fails, falls behind its construction schedule, or does not perform according to expectations. These provisions set "conditions precedent to the parties' responsibilities." In other words, the buyer will only be required to satisfy its obligation to buy power if the developer successfully performs its required tasks to produce and deliver it. Those tasks also include deadlines that must be met to trigger an obligation or right under the PSA. Among them are closing project financing; applying for and obtaining necessary permits and approvals; meeting construction milestones; successful equipment testing; and commissioning and completion of ancillary agreements.

Construction and project in-service deadlines. If the project gets significantly behind schedule, it can have serious consequences beyond any inconvenience that results. In the case of a wind project, the right to receive production tax credits (PTC) will usually depend on the project's being in commercial service by a date set in the federal legislation authorizing the PTCs.

Government approvals required and which party is responsible for securing them (such as land use, construction, environmental). Government approvals are usually the responsibility of the project developer, with project owners and operators having responsibility for continuing compliance and reporting once the project achieves its COD.

Utility regulatory approvals and filings. These may be required for the life of the project and may include state and federal regulatory proceedings. Frequently the project will be regulated at the state level, but could be subject to both federal and state regulation. Interstate transmission service is regulated at the federal level. State and federal jurisdiction will vary with land ownership and tribal jurisdiction.

Supporting agreements required. The PSA may require successful completion of other key agreements, such as transmission and interconnection agreements or plant operation and maintenance agreements.

Responsibility for reserve power and "shaping." The PSA should set which party arranges and pays for reserves or backup capacity for unexpected loss of power production from the project or reduced transmission transfer capability. A certain level of reserves is required in order for the product to be interconnected with the transmission

grid. "Shaping" adjusts project output over a given time period—for instance, to ensure that the output level is steady even if the wind is variable or stops, which usually requires a separate agreement with another generation project that operates in a base load manner on fossil fuel or possibly a hydroelectric project.

Project equipment. A PSA usually includes several provisions relating to the project equipment and how its maintenance or failure might affect the project's ability to meet power delivery expectations. These provisions outline any indemnity or compensation available to the power customer.

Defaults and remedies. This sets the hierarchy of things that could go wrong and what events are serious enough to give one of the parties the right to terminate the agreement or be entitled to damages. There will be considerable negotiation on these terms.

Transmission and Interconnection Agreements

Transmission is key to development of a successful energy project. All energy projects will require transmission of the project's power output to the power purchaser(s). From a practical standpoint, agreements for transmission service are the culmination of significant efforts and analysis by the receiving customer or the project developer to identify a cost-effective interconnection to an existing transmission system. Agreements for interconnection often include construction requirements and, like in the PSA, both parties might require certain protections in order to limit their exposure to risks. For example, the project developer generally needs a contractual commitment from the transmission provider before it begins construction of the necessary interconnection equipment. The terms and conditions for transmission service will often consist of two separate agreements:

Interconnection: Project and transmission provider enter into an agreement for connection of the project to the provider's system.

Transmission: Project or power purchaser and transmission provider enter into an agreement for the transport of power to the purchaser's delivery point.

There is likely to be much less negotiation over the terms and conditions of the transmission agreement than with the PSA since the service will almost certainly be provided pursuant to state or federal tariffs or regulations that require all customers be served on roughly equal terms. The rates probably will be determined by the transmission provider's tariff, which may provide for "market based" negotiated rates. The Federal Energy Regulatory Commission's regulations require that all parties are treated in a similar fashion and have open access to the transmission system. Reservations of capacity and information about the transmission system are made on the provider's OASIS (Open Access Same Time Information System) Web site. The primary issues will be whether there is enough available capacity to provide service, which party will fund and construct the interconnection facilities, and what level of credit support will be required from the party receiving the transmission service. There may be a queue for service since transmission capacity is only added in block increments. The provider may require that a system study be performed, at the project's expense, to determine if capacity is available and the conditions under which the project may be connected to the system.

The transmission agreements must be pursued early in the development process to allow time for studies to be performed, equipment specified, and capacity verified. It is important to note that a project might not be able to obtain transmission service within its preferred time constraints and that the project might have to construct a connecting transmission line at its own expense in order to obtain transmission service even if service is available at the connection point to the grid.

Many of the terms of a transmission services agreement will be subject to regulatory requirements or the provider's tariff. Some of these terms may go in the transmission services agreement and the

interconnection provisions could be merged with it or be an exhibit to it. For purposes of this discussion, we assume that the transmission services agreement and the transmission interconnection agreement are merged into one. The purpose of an interconnection agreement is to establish the requirements, terms, and conditions for the interconnection of the generator's facility with the transmission system of the transmission provider.

Key Provisions of Transmission Services/ Interconnection Agreements

Transmission service. Transmission provider promises to provide transmission service over its transmission system.

Purchase obligation. Project developer/generator promises to purchase transmission services from provider.

Service rates. Rates for transmission service are generally set by provider's tariff.

Term of agreement. The parties must agree to a specific term for the initial length of the agreement and renewal terms. The term usually corresponds to the term of the PSA, though the rates will vary over time.

Conditions precedent to the parties' responsibilities. Completion of interconnection facilities is often a condition precedent to the transmission services agreement. In an interconnection/transmission agreement, the transmission provider often commits to the engineering study and design work necessary for interconnection. The project developer often agrees to pay for design and construction of all equipment and facilities and may, in some cases, be responsible for construction. Interconnection and transmission may also be contingent on the project's closing of certain financing or funding.

Construction and project in-service deadlines. The agreement should specify construction deadlines and in-service deadlines.

Ownership of interconnection facilities. Even if the project funds the construction of the facilities, the provider may require title to the facilities. Depending upon circumstances, the project may be indifferent to whether it has title or not, especially if some liability or maintenance obligation comes with ownership.

Government approvals. The agreement should note which government approvals are required (such as land use, construction, environmental) and which party is responsible for securing them. Government approvals are usually the responsibility of the project developer, with project owners and operators having responsibility for continuing compliance and reporting once the project achieves its COD.

Utility regulatory approvals and filings. These may be required for the life of the project and may include state and federal regulatory proceedings. Usually the project will be regulated at the state level and the transmission provider at the federal level.

Supporting agreements required. A transmission services agreement will often make references to other related agreements, such as a power sale agreement or a funding agreement.

Project equipment. The transmission provider usually specifies all interconnection equipment.

Agreements Relating to Development of an Energy Project on Tribal Lands

Energy project development is inextricably intertwined with land. The cost-effectiveness of an energy project depends on the land available for a particular generating resource as well as the land available for transmission. For that reason, a tribe's assessment of its energy resources must include a review of land ownership of particular parcels to determine what types of leases, easements, rights-of-way, or licenses may be necessary for development of a particular project.

Tribes own and control land in a variety of forms. Except for Alaska Natives, the most common form is trust title, where fee title is vested in the United States on behalf of and for the benefit of the tribe. Tribes may also own land in fee title, restricted fee title, and other forms. Trust lands, hereinafter referred to as "tribal lands," are the most common. As explained below, tribal authority to "alienate" tribal land is restricted by federal law. Because the applicable law for "leasing" differs from that governing "rights-of-way," each topic is addressed separately.

Leasing Tribal Land for Development of an Energy Project

Surface leases (as opposed to mineral leases) are popular vehicles for establishing the necessary land rights for energy projects, largely because of the long term that can be authorized (25 to 99 years), and because security interests may be taken in the leasehold and in other assets that do not include the Indian land such as the wind towers or PV arrays. Tribes may use their lands for any purpose consistent with tribal and federal law, including granting tribal members rights to occupy and use tribal land.[3] Yet even when the tribe leases to tribal entities or members,[4] such a lease requires Bureau of Indian Affairs (BIA) approval if it "encumbers Indian lands for a period of 7 or more years, with limited exceptions.[5] Section 81 is discussed more fully later in this chapter. Tribes may *not* sell, transfer, or alienate lands held in trust for them by the federal government. Even tribal authority to lease land to non-tribal members was historically restricted. Federal policy in favor of tribal self-determination, including tribal responsibility for the management of tribal resources," has resulted in the passage of a number of laws granting tribes specific authority to lease tribal lands:

Section 17 Corporations. The Indian Reorganization Act of 1934 (IRA) specifically addresses leasing authority. Tribes that receive a "charter of incorporation" under 25 U.S.C. § 477 (as amended in 1990) of the IRA may seek authority to lease any trust or restricted lands included in the limits of the reservation for a period not to exceed 25 years *without BIA approval*.[6] Leases authorized by section 477 cannot include an option extending the 25-year initial term.

Section 415. Most non-agricultural surface leasing of tribal lands is conducted under the Indian Long-Term Leasing Act of 1955, also known as "section 415."[7] Under section 415, an Indian tribe may lease tribal land for an initial term of up to 25 years, with an option to renew for one additional 25-year term. Certain specific tribes have legislative authority to lease land for up 99 years. Almost all leases pursuant to section 415 are subject to the approval of the Secretary of the Interior, though two tribes have authority to lease land for up to 75 years without Interior/BIA approval (Tulalip and Navajo).

Tribal Energy Resource Agreements (TERAs). Title V of the Energy Policy Act of 2005 relates to "Indian Tribal Energy Development and Self-Determination." Pursuant to regulations issued on March 10, 2005, tribes can enter into an agreement with the Department of the Interior called a "TERA." The TERA authorizes the tribe to enter into leases, business agreements, and rights-of-way for energy projects on tribal land for 30 years, renewable for another 30 years by the tribe, all without BIA review and approval.

Despite the TERA option, many leases of tribal land for energy development will likely be subject to BIA approval under section 415. Because of the unique circumstances of each energy project, tribes should always work with an experienced attorney to understand the leasing issues specific to each parcel. The following is a list of some of the issues that tribal managers should be aware of:

Even a tribal entity may be subject to limitations as a lessee. Any person or legal entity other than the tribe itself, "including an independent legal entity owned and operated by the tribe, must obtain a lease under these regulations before taking possession" of tribal land. 25 C.F.R. § 162.104(d).

BIA must comply with NEPA, NHPA, and ESA. BIA must also comply with several key environmental and cultural preservation laws before approving a lease of tribal land, including the National Environmental Policy

Act (NEPA), the National Historic Preservation Act (NHPA), and the Endangered Species Act (ESA). BIA compliance with any one of these laws can involve a lengthy process with substantial public involvement and may require mitigation of environmental or other impacts from the proposed project.

In some situations, a tribal resolution can trump federal regulations. The federal regulations implementing section 415 can be superseded or modified by tribal laws in certain circumstances. Specifically, BIA will streamline and modify certain approval processes when specifically authorized by an appropriate tribal resolution establishing a general policy for the leasing of tribal land. The tribal resolution must comport with 25 C.F.R. §162.109(b) (requiring that the tribe give BIA notice of the resolution and that the resolution be consistent with federal law).

BIA must approve subleases and assignments. Subject to certain exceptions, a sublease, assignment, amendment, or encumbrance of any lease or permit issued under section 415 requires BIA approval.

Section 415 regulations address remedies for breach, dispute resolution, and when BIA has the authority to cancel leases. BIA involvement in a lease of tribal land does not end with BIA approval. Among other things, section 415 regulations give BIA the authority to collect payments on behalf of the tribe as well as cancel the lease under certain circumstances. *See* 25 C.F.R. §162.612 et seq.

Rights-of-Way and Easements

BIA grants rights-of-way across tribal land subject to tribal consent and compensation. Federal law governs the granting of rights-of-way on tribal lands for transmission lines, hydroelectric facilities, and reservoirs.[8] BIA must comply with NEPA, NHPA, ESA, and its own regulations before granting the right-of-way. Additionally, tribes might need to enter into easements for use of private land in order to secure interconnection and transmission off tribal lands.

BIA Approval of Contracts with Tribes

In March 2000, President Clinton signed the Indian Tribal Economic Development and Contract Encouragement Act of 2000[9] into law to encourage outside investment in Indian Country. In the 2000 Act, Congress revised 25 U.S.C. §81, more commonly known as "section 81" and amended the long-standing rule that required BIA approval for all transactions between non-Indians and Indian tribes or individuals relating to Indian lands.

Today, section 81 requires the Secretary of the Interior or the Secretary of the Interior's designee to approve any contract that encumbers Indian lands for a period of seven years or more. Pursuant to 25 C.F.R § 84.002, leasehold mortgages, easements, and any other contract that gives a third party exclusive or nearly exclusive proprietary control over tribal land are governed by section 81. Approvals are normally made by the regional or area BIA office responsible for the particular tribal lands.

Special Considerations for Leases on Tribal Lands

The considerations for contracts discussed in this paper are also critical for leases of tribal lands. Reaching agreement on lease issues is a critical early-stage development issue due to the importance of site control in permitting, negotiations for PPAs, transmission interconnection, and financing. While the lease does not need to be negotiated too early in the process, the joint venture or development agreement should guide the tribe and nontribal parties through general goals of a project site lease to avoid surprises during the development process.

Know your agency: Talk with the local BIA officials *early* about the approval process, timelines, federal appraisal requirements, etc.;

Permitted uses: Ancillary uses and projects enabled by the primary project may be very valuable to the tribe; the tribe should carefully draft the permitted uses in the lease to preserve valuable uses that are not essential to the success of the project;

Compensation, alternative tax structure: There are many ways to structure compensation,

royalties, and tax payments within the requirements of federal law;

Term (primary and renewal): If a nontribal entity requires ownership for debt or tax purposes, once these purposes are satisfied the tribe should be able to come into significant or majority ownership, even if this requires phasing over a period of years;

Assignment and transfer: Some type of pre-approved authorization is common for those entities that may take a security interest (e.g., approved encumbrances);

Removal of improvements; reserve account: Consider requiring the developer to fund a reserve account, which can be accomplished without tying up liquid assets by using a letter of credit, personal guarantees, or other devices; and

Dispute resolution: Issues of sovereign immunity, choice of law, choice of forum for resolving disputes, and exhaustion of tribal remedies must be addressed; the ultimate goal is to try and solve the problem while keeping the project operating or moving forward. Tribes and nontribal parties generally work out a limited waiver of immunity, coupled with acceptable dispute resolution which may include binding arbitration with enforcement in tribal courts (and other courts of competent jurisdiction).

Conclusion

Energy projects are long-term complicated projects that involve raising money, managing construction, and managing long-term operations. An energy project needs a dedicated team with expertise and authority to make decisions. In determining the best business structure for a given energy project, a tribe must determine which structure will best achieve its multiple goals of securing investors and financing, maintaining control and sovereign independence, and protecting the tribe from liability.

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Endnotes

[1] Parties may also enter into joint venture agreements for construction and/or operation of an energy project, but this paper focuses on agreements for joint preconstruction development.

[2] Power purchasers sometimes refer to this agreement as a Power Purchase Agreement or PPA, but the PSA and PPA are one and the same.

[3] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at §16.01[3]

[4] 25 U.S.C. § 81, as amended in 2000.

[5] 25 U.S.C. § 177 (The Nonintercourse Act of 1834).

[6] *See also* 25 C.F.R. § 84.004(b).

[7] 25 U.S.C. § 415; COHEN'S HANDBOOK at § 17.02[3].

[8] 25 U.S.C. §§ 323–28; 25 C.F.R. Pt. 169.

[9] Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46–47.

GOVERNANCE AND JURISDICTIONAL CONSIDERATIONS FOR RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY

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Abstract

Indian tribes are eager, and poised, to take advantage of their abundant energy resources—renewable as well as fossil energy. As tribal leaders and officials assess their energy development opportunities, fundamental governance and jurisdictional issues pose threshold questions in the evaluation of these opportunities. Tribal governments have the inherent sovereign authority to govern—through positive law, regulations, and taxation, among other sovereign rights—where and how this development will occur on tribal lands. Many—although, unfortunately not most—tribes have exercised this sovereign authority by adopting comprehensive environmental review, land use and planning, and tax codes. Non-Indian commercial project developers and owners that build and operate energy projects on Indian lands are subject to triple sovereign authorities, but to very different degrees. This paper outlines some of the key principles and concepts behind governance and jurisdiction over energy projects in Indian Country, and proposes some thoughts on reducing some of the major conflicts in the exercise of jurisdiction by the three sovereigns.

Status of Indian Tribes

In the beginning, there were Indian Tribes.[1] Pre-contact, Indian Tribes were self-governing sovereigns over the Tribes' people, lands, territories, and resources. As preexisting sovereigns, Indian Tribes' inherent sovereign authorities are not dependent on, nor delegated from, the U.S. federal government.[2]

Based on long-standing, and still current, U.S. Supreme Court precedent, Indian Tribes are treated under federal law as "distinct, independent, political communities" and "domestic dependent nations."[3] Indian Tribes are within the United States, subject to federal power, but retain all inherent sovereign authorities not revoked or diminished by treaty, statute, or because of their status as dependent nations.[4]

The U.S. Constitution establishes the status of Indian Tribes within the United States. The federal government has the (sole) authority "to regulate Commerce . . . with the Indian Tribes."[5] Furthermore, the United States, through the president's treaty making authority,[6] engaged in government-to-government relations with the Indian Tribes during the early years of the United States.[7] Indian Tribes' inherent, preexisting sovereignty is also "extra-constitutional." That is, Indian Tribes are not subject to the U.S. constitution.[8] This status removes Indian Tribes from the constitutional governance scheme of the federal and state governments. Indian Tribes are not political subdivisions of either the federal government or any state government.

Over the course of U.S. history, Indian Tribes were woven into, and under, the federal power of the United States through congressional and presidential action.[9] This incorporation has solidified over the years through Supreme Court decisions—from the infamous Marshall Trilogy to *Kagama* and *Lara*.[10] While Indian Tribes are subject to federal power, Indian Tribes are not subject to state power on Indian lands;[11] state legislative, regulatory, taxation and judicial authorities, among others, do not extend to Indian Tribes or tribal members on Indian lands.[12]

Inherent sovereign authority is the foundation for Indian Tribes' right to self-governance and self-determination. As acknowledged under federal law, Indian Tribes have the right to make their own laws and be governed by them.[13] These sovereign rights to govern extend to Indian Tribes' rights to control their land and resources, and to regulate the behavior of Indian and non-Indians alike on tribal lands and territory.[14] Despite recent Supreme Court decisions that have diminished Indian Tribes' authorities over non-Indians, both the legislative and executive branches of the federal government have

encouraged and promoted tribal self-determination, self-governance, and the exercise of jurisdiction over Indian land and resources.[15]

Tribal Governance and Jurisdiction

As self-governing sovereigns, Indian Tribes are free to determine for themselves how they will organize their governments and affairs. Today, tribal governance structures vary considerably, with some Indian Tribes still organized and governed in their traditional and customary ways, and others organized much like the U.S. government. Most tribes have organized themselves under either the Indian Reorganization Act of 1934 (IRA) or the Oklahoma Indian Welfare Act of 1936 (OIWA).[16] Under these two acts, tribes have the ability to adopt constitutions and charter corporations to organize and govern themselves and manage their affairs. While over 200 tribes organized under these acts, over 75 tribes voted not to adopt the IRA officially (although many have subsequently structured their governments using this model).[17] Some notable tribes that have not organized under the IRA or the OIWA include the Navajo Nation and the Cherokee Nation.

Tribal constitutions define the tribal government structure and enumerate the governments' powers. Tribal corporations, whether federally charted under section 17 of the IRA, section 3 of the OIWA, or tribally chartered under inherent tribal authorities, are generally created to manage and operate a tribe's economic endeavors. Many constitutions and corporations were adopted in the years after the IRA was implemented, based on models provided by the Bureau of Indian Affairs. Some of these original constitutions are still in place, while many others have been amended. To this day, Indian Tribes continue to apply for section 17 charters to incorporate tribally owned businesses. In any event, a tribe organized under the IRA or OIWA will have organic documents that typically include a constitution, bylaws, and possibly a federally charted corporation.[18] Other tribes may have organized outside the IRA or OIWA, by statute (such as the Navajo Nation), or by constitution (such as the Cherokee Nation), or other organizing document. Lastly, some Indian Tribes, like some of the pueblos of New Mexico, may not have written documents, but function based on tradition, culture, and religion.

Regardless of how an Indian Tribe chooses to organize itself, an Indian Tribe has inherent authority to determine how it will govern its people, lands, resources, and territories. Indian Tribes exercise these authorities in familiar ways—through acts of their legislative bodies, executive or administrative departments, and judiciaries. Indian Tribes have adopted ordinances, statutes, and codes to regulate development of tribal lands. Many Indian Tribes have established regulatory and taxation authorities to control and tax economic activity on Indian lands and to regulate environmental issues. And, Indian Tribes have established tribal court systems to adjudicate disputes that arise over the use of or activities on Indian lands. The degree of formality in action varies by Indian Tribe, but regardless, federal law generally recognizes the validity and supremacy of an Indian Tribe's sovereign acts as applied to an Indian Tribe's members or related to an Indian Tribe's lands and resources.[19]

Although an Indian Tribe's authority, like any government, is co-extensive with its jurisdiction, Indian Tribes do not possess plenary authority or power. Instead, tribal government authority and jurisdiction may be limited based on a number of factors, including location, land ownership, tribal membership or Indian status, action to be taken, and government entity to take such action.

When non-Indians engage in activities on Indian lands, or non-Indian fee land within an Indian reservation, Indian Tribes' authority over that non-Indian activity has been delineated by the Supreme Court under *Montana*.[20] Under this rule, Indian Tribes do not have jurisdiction (and thus authority) over non-Indian activities on fee land within the exterior boundaries of the reservation, unless one of two exceptions apply: (1) the non-Indian activity may have a detrimental effect on a tribe's public safety, welfare, economic integrity or ability to govern itself; or (2) the non-Indian has entered into a consensual commercial relationship. Despite the limitations of tribal jurisdiction over non-

Indians on non-Indian fee land, federal courts acknowledge Indian Tribes' sovereign rights to impose taxes and regulations and authorize the use of tribal lands and resources.[21]

In addition to Indian Tribes' inherent authorities to regulate activity on tribal lands, several federal statutes specifically allow federal agencies to delegate certain agency authorities and jurisdictions directly to tribes. For example, the Clean Air Act (CAA) and the Clean Water Act (CWA) allow tribes to be "treated as states" (TAS) for setting standards, permitting, and enforcement jurisdiction under those acts.[22] Indian Tribes with TAS status can establish their own CAA implementation plans or CWA water quality standards, and permit activities under those acts.[23] Most recently, the Energy Policy Act of 2005 created the ability for tribes to enter into tribal energy resource agreements (TERAs) with the Secretary of the Interior.[24] Tribes with approved TERAs do not have to get the approval of the secretary for leases and rights-of-ways for energy development projects on tribal lands. Tribes also avoid NEPA requirements, although they must have a substitute environmental review process compliant with the statute's requirements.

Potential Jurisdictional Conflicts

Because the federal government has plenary power over, and a trust relationship with, Indian Tribes, the federal government exercises jurisdiction over Indian Tribes in two critical ways: (1) it must approve any non-Indian use of Indian lands (agreements, mortgages, leases, and rights-of-ways); and (2) federal environmental laws generally apply on Indian lands. As related to energy development, the Secretary of the Interior is required to approve oil, gas, and geothermal leases under the Indian Mineral Leasing Act[25] or the Indian Mineral Development Act.[26] Leases for renewable energy projects, such as wind, solar, or biomass, are typically approved under the Long-Term Leasing Act.[27] And, to the extent that transmission lines or pipelines are developed with the project, then the secretary is required to approve rights-of-ways for those facilities.[28]

Federal environmental laws that are likely to be implicated in energy development on Indian lands include, but are not limited to, the Clean Air Act, Clean Water Act, and the Endangered Species Act.[29] If there is federal action involved—such as providing financial assistance or approving lease agreements or rights-of-ways—then the National Environmental Policy Act and the National Historic Preservation Act, among others, will also likely apply.[30]

Since 1834, when the Supreme Court held that state law does not apply within Indian reservations,[31] state and local governments have been trying to assert jurisdiction over Indian Country.[32] States have sometimes sought to regulate various activities, such as hunting or fishing.[33] But, more often, and especially in the modern era, states have been most concerned with taxing non-Indian economic activity in Indian Country.[34] The Court has established a very bright line rule that states cannot tax tribal members or Indian Tribes for economic activities or income generated on Indian lands.[35] However, the Court has established a balancing test—referred to as the *Bracker* balancing test—to determine whether states have the authority to tax non-Indian activities on Indian land.[36] Under *Bracker*, state and federal courts have found state authority to tax non-Indian energy projects in Indian Country, including oil and gas development and power plants.[37] This state taxation has resulted in lost economic opportunities for tribes to impose taxes themselves, as double taxation can have a sufficient economic detriment so as to render a project economically unviable.

Removing Jurisdictional Conflicts

Indian Tribes have specific tools available to them to counteract, or displace the conflicting jurisdictional impositions of both the federal government and state governments. For example, Indian Tribes can petition the Environmental Protection Agency for TAS status. Once gained, this status would give Indian Tribes the authority to permit energy development projects on lands within their jurisdiction. Indian Tribes can also apply to the Secretary of the Interior for a TERA. Under a TERA, an Indian tribe does not need secretarial approval for leases or rights-of-ways for

renewable energy development on a tribe's lands.[38] If Indian Tribes were to avail themselves of the jurisdictional control these federal statutes allow for, a considerable amount of federal control over energy development in Indian Country would recede.

Indian Tribes should also consider exercising their inherent authorities to regulate and tax economic activities on Indian lands *before* considering and developing non-Indian owned projects. Doing so would generally require that Indian Tribes adopt regulatory laws—including permitting, zoning, and environmental—as well as tax laws. Over that last few years efforts have been made to develop model tribal codes for utility and environmental regulation.[39] Of course, because each Indian Tribe is different, model codes should be adapted to meet the Indian Tribe's needs. The existence of these laws will position Indian Tribes to be able to assert an argument that conflicting state laws should be preempted.[40] Non-Indian developers will also have notice of the tax and regulatory environment on tribal lands. Model codes also contribute to certainty and clarity for non-Indian developers and project owners.

In considering the types of regulatory and tax schemes, tribes should bear in mind the political implications of exercising these inherent authorities. Much political consternation has been raised about the low tax environment, relative to the surrounding state. Indian Tribes can mute these objections by implementing regulatory and tax schemes consistent with state law. While this removes some of the competitive advantage an Indian Tribe may have through a lower tax and regulatory burden, this should be weighed against the goal of minimizing state and local attempts to tax and regulate on-reservation non-Indian development.

Lastly, another way to avoid federal oversight and control and state taxation is for Indian Tribes to structure project ownership and legal contracts in such a way as to make the project a tribally owned project—structuring the ownership so that the Indian Tribe is at least a 51 percent owner. Majority tribal ownership positions an Indian Tribe to assert that the state lacks authority to tax or regulate the project. While it may be difficult for large-scale commercial projects to be structured as majority tribal owned, given the current project financing tools, Indian Tribes should work through and exhaust all their options for trying to structure a project in this manner.

Conclusion

While Indian Tribes have inherent sovereign authority and jurisdiction over energy development on Indian lands, the federal government exercises a great degree of control and jurisdiction as well; and states have the authority to tax non-Indian energy projects. Non-Indian developers could thus be subject to the jurisdiction of at least two, and likely three, sovereigns over energy development projects. Indian Tribes can take certain steps to minimize, mitigate, or even remove the authorities of the federal and state governments, and they should seriously consider doing so. Reducing the number of governmental authorities exercising jurisdiction over energy development in Indian Country could only enhance the likelihood of increasing renewable energy and economic development efforts in Indian Country.

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Endnotes

[1] I use the term "Indian Tribe" to mean Indian tribes, nations, bands, pueblos, communities, and Alaska Native villages and tribes.

[2] Talton v. Mayes, 163 U.S. 376 (1896); United States v. Lara, 541 U.S. 193 (2004).

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

[4] *Lara*, 541 U.S. 193.

[5] U.S. CONST. art. I, § 8.

[6] U.S. CONST. art. II, § 2.

[7] Treaty-making authority was "revoked" by Congress in 1871. 16 Stat. 566 (1877) (codified at 25 U.S.C. § 71).

[8] *Talton*, 163 U.S. 376 (1896). While Indian Tribes may not be subject to the U.S. Constitution, Congress, in another exercise of its plenary power over Indian Tribes, enacted the Indian Civil Rights Act of 1968. 82 Stat. 77 (1968) (codified at 25 U.S.C. § 1301 et seq.). The act requires Indian tribal governments to provide certain rights in the exercise of their functions. 25 U.S.C. § 1302.

[9] E.g., Trade and Intercourse Act, Act of June 30, 1834, 4 Stat. 729 (codified as amended at 25 U.S.C. § 177); Executive Order of Oct. 3, 1861 (establishing Uintah Reserve for the Uintah Ura Indians); General Allotment Act, 24 Stat. 388 (1877); Executive Order of July 1, 1874 (establishing San Xavier Reservation for Papago Indians); Indian Reorganization Act, 48 Stat. 984 (1934); Indian Gaming Regulatory Act, 102 Stat. 2467 (1988).

[10] Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (discussing tribes as "domestic dependent nations" and establishing the trust relationship); United States v. Kagama, 118 U.S. 375 (1886) (tribes are subject to the plenary power and authority of the federal government); *Lara*, 541 U.S. 193 (tribes were not delegated criminal jurisdiction from Congress over non-member Indians, but retained inherent sovereign jurisdiction).

[11] I use the term "Indian lands" to mean reservation lands, trust lands, allotments, and dependent Indian communities. This closely tracks the definition of "Indian Country" found in 18 U.S.C. § 1151. However, Congress has defined Indian lands in many different ways, so I do not rely on any one definition.

[12] Worcester v. Georgia, 31 U.S. 515 (1832); Williams v. Lee, 358 U.S. 217 (1959); Bryan v. Itasca County, 426 U.S. 373 (1976); *cf.* Mescalero Apache v. Jones, 411 U.S. 145 (1973).

[13] Williams v. Lee, 358 U.S. 217 (1959).

[14] Montana v. United States, 450 U.S. 544 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); *but see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[15] *See, e.g.*, Indian Reorganization Act, 25 U.S.C. § 461 et seq.; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq.; Indian Mineral Development Act, 25 U.S.C. § 2101 et seq.; Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.; Indian Tribal Energy Development and Self-Determination Act (tit. V, Energy Policy Act of 2005), 25 U.S.C. § 3501 et seq.

[16] Oklahoma Indian Welfare Act, 49 Stat. 1967 (1936) (codified at 25 U.S.C. § 501 et seq.).

[17] *See* Theodore Haas, Ten Years of Tribal Government Under IRA (1947) (listing 195 tribes that organized under the IRA, and 18 Oklahoma tribes that organized under the OIWA).

[18] The Native American Rights Fund has an online resource that collects tribal constitutions and codes, http://www.narf.org/nill/triballaw/index.htm (last visited 9/21/11). Other resources include Westlaw, the Tribal Law and Policy Institute, and the University of Oklahoma Native American Constitution and Law Digitization Project, http://thorpe.ou.edu (last visited 9/21/11).

[19] *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Mescalero v. New Mexico, 462 U.S. 324 (1983); *Merrion*, 455 U.S. 130 (1982).

[20] *Montana*, 450 U.S. 544 (1981) (holding that the Crow Nation did not have regulatory jurisdiction to enforce hunting and fishing regulations over non-Indians on non-Indian fee land within the Crow Reservation).

[21] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Big Horn Electric v. Adams, 219 F.3d 944 (9th Cir. 2000).

[22] 42 U.S.C. § 7601(d)(1)(B); 33 U.S.C. § 1377(e).

[23] Arizona Public Service Co. v. Environmental Protection Agency, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding Pueblo of Isleta clean water standards under the CWA).

[24] 25 U.S.C. § 3504(e).

[25] 25 U.S.C. § 398.

[26] 25 U.S.C. §§ 2101–08.

[27] 25 U.S.C. § 415.

[28] 25 U.S.C. §§ 311–28.

[29] 16 U.S.C. § 1531 et seq.

[30] 42 U.S.C. § 4321; 16 U.S.C. § 470.

[31] *Worcester v. Georgia*, 31 U.S. 515.

[32] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

[33] *Mescalero Apache*, 462 U.S. 324

[34] Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir.), *cert. denied*, 460 U.S. 959 (1981); Gila River Indian Community v. Waddell, 967 F.2d 1401 (9th Cir. 1992).

[35]McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1976); Montana, et al. v. Blackfeet Tribe, 471 U.S. 759 (1985); *cf.* Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) (allowing taxation of tribal members who live off the reservation).

[36] *Bracker*, 448 U.S. 144–45.

[37] Cotton Petroleum, Calpine Const. Finance Co. v. Arizona Dept. of Revenue, 211 P.3d 1228, 221 Ariz. 244 (Ariz. App. 2009) (upholding property tax assessed against power plant located on Ft. Mojave Tribe reservation); *but see* Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981) (invalidating a state excise tax on coal mined from the Crow Reservation).

[38] Pending legislation would give tribes the ability to bypass secretarial approval under the Long-Term Leasing Act as well.

[39] The Tribal Law and Policy Institute collects information from various sources on tribal codes and tribal courts. *See* http://www.tribal-institute.org/codes/overview.htm (visited 9/21/11).

[40] *See Crow Tribe v. Montana*, 650 F.2d 1104.

CALIFORNIA DISTRICT COURT UPHOLDS THE BLM'S OCOTILLO WIND FARM APPROVAL AMIDST ENVIRONMENTAL CHALLENGES

Janis Bladine

In *Quechan Tribe of Ft. Yuma v. U.S.*, __ F. Supp. 2d __ (Feb. 27, 2013), the U.S. District Court in California ruled on a challenge filed by the Quechan Tribe of the Fort Yuma Indian Reservation (Tribe) to the Bureau of Land Management's (BLM or the Agency) approval of a 10,151 acre right-of-way permit allowing Ocotillo Express LLC to construct a 112 turbine generator wind farm on federal land just outside the small desert town of Ocotillo. The Tribe, which traces its ancestry to land within the wind project area, challenged the Agency's approval under numerous statutes including the National Historic Preservation Act (NHPA), Federal Land Policy Management Act (FLPMA), National Environmental Policy Act (NEPA), and Archaeological Resources Protection Act (ARPA). Applying a "highly deferential" standard of review, District Judge Gonzalo P. Curiel held that the BLM's approval withstood judicial scrutiny under all of the aforementioned environmental laws, giving Ocotillo Express the green light to move forward with the Ocotillo Wind Energy Facility.

NHPA

As described by the court, the NHPA's section 106 functions as a legal "stop, look, and listen" mandate, requiring federal agencies to consider the effects of its proposed project. Essentially arguing that the BLM failed to look and listen, the Tribe claimed that, prior to approval, the BLM did not identify all historic properties and did not consult with the Tribe as required by the NHPA. An examination of the administrative record led the court to conclude that, contrary to the Tribe's claims, the BLM adequately delineated its project site and correctly analyzed the wind turbines' impacts as direct impacts. And although the Tribe claimed that its monitors were not allowed access to direct impact survey areas, the administrative record indicated that tribal representatives were both present and provided input during the survey.

With respect to the BLM's NHPA obligation to consult with the Tribe, the two sides recounted vastly divergent versions of the facts, with the tribe contending that consultation did not begin until three months before project approval and the government claiming that consultation began early in the process. Again, the administrative record supported the defendants' version of the facts, reflecting repeated agency attempts to initiate tribal consultation beginning early in the process. Those attempts continued until the Tribe finally acquiesced, engaging in consultation just months before completion of the project's evaluation. Under these facts, the court readily agreed with the defendants, upholding their NHPA consultation efforts.

FLPMA

The Tribe alleged that the BLM failed to comply with the FLPMA in three different ways, and in all three ways the court upheld the BLM's actions. First, the Tribe contended that the BLM's approval significantly diminished and degraded sensitive resources contrary to the applicable land use classification under the California Desert Conservation Area (CDCA) Plan, a plan created pursuant to the FLPMA. After reviewing the record, the court concluded that the Tribe failed to demonstrate that the wind farm, as modified during the evaluation process with numerous mitigation measures, was contrary to the applicable land use classification requirements of the CDCA Plan.

Second, the Tribe contended that the BLM's decision was arbitrary because the agency downgraded the project's visual resource management category just prior to the Final Environmental Impact Statement (FEIS). In rejecting the Tribe's contention that such an action was arbitrary, the court relied upon a similar change in *Southern Utah Wilderness Alliance*, 144 IBLA 70 (1998), an action that was upheld. Finally, the court examined whether the BLM decision was an unnecessary and undue degradation of public lands. Commenting that the agency was entitled to "a great deal of discretion," the court examined the Record of Decision (ROD) discussion and numerous mandated mitigation measures and concluded that the BLM's determination of no unnecessary and undue degradation of public lands was reasonable.

NEPA

The court upheld the BLM's NEPA analysis contained within its FEIS against the Tribe's challenges that (1) a single EIS should have been used to analyze the agency's "priority" renewable energy projects; and (2) a "hard look" was not taken at the project's cumulative effects with past, present, and future actions, with its indirect growth-inducing effects, and with local law conformance.

Connected, cumulative, or similar actions must be analyzed in a single EIS. The Tribe alleged that the BLM planned more than a dozen "priority" renewable energy projects for about 25 million acres of land within the CDCA, all of which should have been analyzed in a single EIS. But it failed to convince the court that the projects were connected, cumulative, or similar actions.

With respect to whether the BLM took the requisite "hard look" at the project's environmental impacts, the Tribe argued that the agency failed to analyze the project's cumulative effects with past, present, and future actions, its indirect growth-inducing effects, and the project's compliance with local law. While examining the analyses completed for the project's cumulative impacts, the court explained that the agency must not simply list out related projects but must also enumerate their environmental effects and the impacts as they interact with one another. With respect to both the wildlife and cultural resources impacts analyses, the BLM analyzed each resource separately, specifically addressed the cumulative impacts, listed the current and reasonably foreseeable future projects, and included a quantitative or otherwise detailed analysis of cumulative impacts.

Finally, the Tribe claimed that the BLM failed to consider the project's indirect growth-inducing effects, specifically arguing that the project would act as a catalyst for additional adjacent wind and energy developments. According to the court, however, the Tribe failed to provide any evidence disputing the agency's analysis contained within the BLM's growth-inducing impacts discussion. Similarly, with respect to the BLM's conformity with local law discussion, the

court concluded that the Tribe failed to offer any evidence contradicting the agency's conclusion that there was no local law conflict.

ARPA

Although the tribe contended that the BLM failed to issue an ARPA-compliant permit for artifact excavation and removal, the Tribe failed to respond to the recitation in the record that indeed a permit was issued to the contractor prior to excavation and removal. For this reason, the court upheld the BLM's actions under ARPA.

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FREE PRIOR INFORMED CONSENT: LIMITATIONS AND SUCCESSES IN ENABLING NATIVE DIRECTION OF NATIVE LAND DEVELOPMENT

Samantha Arens

Free prior informed consent (FPIC) is a concept that has recently generated significant attention among indigenous, international, academic, and corporate groups. It has been used frequently in the international context as a protective mechanism for the rights of native people. Implementation of FPIC to the end of increasing the ability of native peoples to self-direct development of their lands has met with varying degrees of success worldwide. This article examines ways in which FPIC can be leveraged in domestic contracting contexts (such as energy development in the American Southwest) to give maximum power to native people.

A. Legal Background

1. Origins of FPIC

FPIC originated as a way to address the oft-occurring problem of indigenous peoples being cut out of planning and decision making in projects involving natural resources, such as mineral extraction, dam construction, and logging. Issues, such as who represents and may speak or sign for a group of people, and what happens when a project exceeds the understood scope, have frequently been resolved in ways that harm native people.

Recognizing these problems, international organizations developed FPIC as a way to increase transparency, solicit community input prior to project implementation, and require ongoing community consent as a project unfolds. *See* Brant M. McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 576–80 (2009) (describing origins of FPIC).

2. Lack of Substantive Federal Support for FPIC

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) codifies key concepts

of FPIC. G.A. Res. 295, U.N. GAOR, 61st Sess. (Sept. 7, 2007). In 2010, President Obama announced U.S. support for UNDRIP. *See* United States Endorses International Declaration on Indigenous Rights, http://www.aclu.org/human-rights/united-states-endorses-international-declaration-indigenous-rights (last visited May 27, 2013). Unfortunately, the Department of State's policy statement on UNDRIP picks and chooses which of UNDRIP's terms are incorporated into U.S. law. For instance, the Department of State interprets FPIC as requiring "consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken." Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, http://www.state.gov/documents/organization/184099.pdf (last visited May 27, 2013). Agreement, in the form of consent that can be withdrawn, is requisite to FPIC as described by UNDRIP. G.A. Res. 295, *supra*.

Executive Order 13175 of November 6, 2000, provides some measure of input by native groups in developing federal policy, and mandates that federal agencies consult with tribes in developing policy that could impact native people. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). Like the 2010 federal policy, this order indicates a federal move toward recognizing FPIC, but falls short of giving FPIC the full force intended by UNDRIP.

B. Elements of FPIC

1. Incorporate FPIC into Contract Language at or Before Explorative Stages

Because there is not strong federal policy in support of the core concepts of FPIC, native communities must negotiate for its core principles, outlined below, to be included in contract language.

The essence of the "prior" element of FPIC is to seek local consent at an early stage, before work on a project has begun. Since there are mandatory consultation requirements under federal law prior to project implementation, such consultation could be an opportunity to explain the benefits of FPIC to project developers and negotiate incorporation of other aspects of FPIC into contract terms.

In international contexts, FPIC has been sought as early as the explorative stages of project development. For example, Shell sought community approval at the exploration stage of a project on the Camisea oil and gas fields in Peru. The Camisea Gas Project: A Multi-Stakeholder Perspective on Conflicts & Negotiation, http://crgp.stanford.edu/publications/working_papers/vences.pdf (last visited May 27, 2013). One trigger for Shell's willingness to seek community approval may have been public opposition at an early stage of the project; the project affects remote tribes in the Amazon. Although organizing efforts can take time, early and well-publicized protests can serve as leverage in negotiation. The end result of discussions between Shell and the Peruvian community was a compromise to use helicopters and rivers for ingress and egress to the project, rather than building access roads through village land. Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges, http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy, at 31 (last visited May 27, 2013). While the Camisea project is far from a success story, the point illustrated is that major corporations have shown willingness to engage in community consultation early on in project development. At the point discussions begin, so must negotiation for key terms.

In contrast to the Camisea example, Manhattan Mining obtained government approval but not community consent to go forward with the Tambogrande mine project in Peru. Because of failure to obtain community consent, work had to be halted completely when community opposition arose. This demonstrates that, in certain instances, corporations can be incentivized to obtain consent early to ensure smooth operations going forward. Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges, *supra*, at 30.

Finally, one method of gaining early approval (or veto) of a project is by holding public referendum. In Peru, Argentina, Mexico, and Guatemala, local communities have held elections to ask voters whether a project should go forward. McGee, *supra*, at 573. This strategy has been used by the Navajo Nation in the context of water rights. Statement by the Navajo Nation Human Rights Commission Executive Director, http://www.navajo-nsn.gov/News%20Releases/NNHRC/2012/Apr12/41712_StatementByTheNavajoNationHumanRightsCommissionExecutiveDirector.pdf (last visited May 27, 2013).

2. Local People Have Absolute Veto Power over a Project

The "consent" aspect of FPIC connotes more than simple acquiescence. It describes the idea that, at any stage of a project, consent can be revoked such that the project must be redesigned or work must stop. Where law does not support FPIC, as in the United States, this is likely the most difficult, and important, term to be included in a contract between a developer and a tribe. However, looking again to international contexts, inclusion of such a term in a contract is not unprecedented.

For example, in Canada, a model agreement between Voisey Bay Nickel Company and the Innu Nation/Labrador Inuit Association gave veto power to native people, in addition to involving them in project design, environmental protection, and all project phases. FREE, PRIOR, AND INFORMED CONSENT IN REDD+, http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual_127.pdf (last visited May 27, 2013).

3. Consent Must Be Broad Based

Ideally, FPIC addresses the issue of who represents local people. As an example, to return to the Camisea mine example in Peru, Shell engaged with local leaders, but other members of the community voiced opposition to the project when the alleged leaders did not share information with them. Shell responded by seeking land access through multiple large-scale community assemblies. *See* IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES, *supra*, at 42.

C. Mechanisms for Adoption of FPIC

1. Inclusion as a Prior Condition for Financing and Regulatory Decisions

Major financers are aware of and have, to a limited extent, adopted some of the principles of FPIC in their guidelines. For example, the World Bank has adopted FPIC as a requirement for financing private sector projects such as dams and extraction. Aid Group Lauds New World Bank Policies on Indigenous Rights and Oil and Mining Transparency, http://www.oxfamamerica.org/press/pressreleases/aid-group-lauds-new-world-bank-policies-on-indigenous-rights-and-oil-and-mining-transparency (last visited May 17, 2013).

2. Shareholder Pressure

In 2010, Canadian oil giant Talisman Energy's board of directors approved FPIC principles as part of a new community-relations policy. The policy explicitly defines standards for engagement with indigenous and tribal communities in Talisman's project areas. SAFE PROFITABLE GROWTH: 2010 CORPORATE RESPONSIBILITY REPORT, http://cr.talisman-energy.com/2010/communities/ (last visited May 27, 2013); *see also* 2009 CORPORATE RESPONSIBILITY REPORT: SAFE, PROFITABLE GROWTH, http://cr.talisman-energy.com/2009/community-relations.html (last visited May 27, 2013) (discussing shareholder involvement in decision to investigate FPIC as a corporate policy). A major factor in bringing about the board decision was pressure from large shareholders and, possibly, a desire to revamp Talisman's image after involvement in conflict in the Sudan.

3. Minimize Potential for Future Legal Action and Maximize Potential for Smooth Operations

Inclusion of affected peoples in planning and development will lower long-term legal risk by reducing the likelihood of future opposition. In many instances, reengineering problematic projects with mutually satisfactory, innovative solutions can avoid future negative publicity and delayed operations.

Some major mining entities see cost advantages in following Talisman's example. Most recently, in May

2013 the International Council on Mining and Metals (ICMM) released a position statement adopting certain elements of FPIC as binding on its member companies (including such major players in the extractive industries as Rio Tinto and, pertinent to U.S. operations, Newmont; Barrick Gold Corporation; BHP Billiton; and Freeport-McMoran Copper & Gold, among others). INTERNATIONAL COUNCIL ON MINING AND METALS: POSITION STATEMENTS, http://www.icmm.com/our-work/sustainable-development-framework/position-statements (last visited May 28, 2013). Although the ICMM position statement contains some clauses that are unsupportive of FPIC, such as a prohibition on veto power, the general tone and substance support implementation of meaningful FPIC.

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THE SUPREME COURT DENIES REVIEW OF KIVALINA GLOBAL WARMING DAMAGES CLAIM

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In *American Elec. Power Co. v. Conn.*, the Supreme Court held that federal common law nuisance claims seeking abatement of greenhouse gas emissions had been displaced by the comprehensive legislative scheme of the Clean Air Act. __ U.S. __, 131 S. Ct. 2527 (2011). *American Elec.* did not, however, address the issue of whether the CAA also displaced federal common law claims for damages arising from air pollution. That issue now appears to have been addressed in a suit brought by a Native Alaskan tribe for damages allegedly arising from global warming.

The Native Village of Kivalina, a federally recognized tribe of Inupiat Native Alaskans, and the City of Kivalina are located on a coastal barrier reef in northwest Alaska. Residents depend upon sea ice to shield them from fierce winter storms, but in recent decades the ice has been thinner and shorter-lived. As a result, waves and storm surges have seriously damaged the reef to the point that the village's buildings and infrastructure are now threatened. Unless the village relocates to more sheltered grounds, it may soon cease to exist. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (2012).

The Army Corps of Engineers has named Kivalina as a "Priority Action Community" in a 2009 study of Alaskan communities facing severe erosion. Among other things, additional shoreline protections, a new evacuation and access road, and relocation of the school have been proposed, at total costs in the millions of dollars. Eventually, the village hopes to relocate to the mainland. A 2006 report cited by the Corps estimated that relocation would cost between $95 million and $125 million. More recent estimates have been as high as $400 million. *See* U.S. Army Corps of Engineers, STUDY FINDINGS AND TECHNICAL REPORT, ALASKA BASELINE EROSION ASSESSMENT (Mar. 2009), *available at* https://docs.google.com/viewer?url=http%3A%2F%2 Fwww.climatechange.alaska.gov%2Fdocs%2Fiaw_USACE_erosion_rpt.pdf (last visited May 23, 2013); Carey Restino, ALASKA DISPATCH, *Threatened Alaska Village of Kivalina May Get Needed Evacuation Route* (Apr. 6, 2013), *available at* http://www.alaskadispatch.com/article/20130406/threatened-alaska-village-kivalina-may-get-needed-evacuation-route (last visited May 23, 2013).

Ironically, the village originally was located on the mainland. The barrier island where the village currently lies was a traditional hunting ground and seasonal residence, but the tribe moved inland during the fall and winter. In 1905, the Bureau of Indian Affairs mistook a summer camp on the barrier reef as the tribe's year-round village. It built a school on the reef and ordered that all children be enrolled in the school under threat of imprisonment. This compelled tribal members to move to the reef. During the resulting migration, 70 percent of the original Kivalina's residents fell victim to disease and starvation. NANA Regional Corp., Inc., *Kivalina Village Profile*, *available at* http://nana.com/regional/about-us/overview-of-region/kivalina/ (last visited May 23, 2013).

In 2008, the tribe and city sued numerous energy, oil, and utility companies, primarily under the federal, state, and common law theories of public nuisance. The plaintiffs argued that global warming was hindering production of protective sea ice and generating rising sea levels. Among other things, the plaintiffs argued that, as substantial contributors to global warming, the defendant companies were creating a public nuisance and were interfering with public rights, including public and private property rights. The plaintiffs requested monetary damages, including a declaratory judgment for future monetary damages and expenses. *Native Vill. of Kivalina v. ExxonMobil Corp.*, Complaint for Damages, at 67 (N.D. Cal. Feb. 26, 2008), *available at* http://www.adn.com/static/adn/pdfs/Kivalina%20Complaint%20-%20Final.pdf (last visited May 23, 2013).

The district court dismissed the federal public nuisance claim as barred by the political question doctrine. The court also held that the plaintiffs lacked standing because they could not demonstrate the causation element of nuisance. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

On appeal, the Ninth Circuit did not address the political question doctrine or standing. Instead, the Ninth Circuit started with the question of whether plaintiffs could bring a nuisance claim under federal common law. The court recognized that a public nuisance suit based on ambient or transboundary air pollution could be brought under federal common law. But the right to assert a federal common law public nuisance claim is barred where a statute directly addresses the question at issue. Relying on *American Elec. Power Co. v. Conn.*, __ U.S. __, 131 S. Ct. 2527 (2011), the Ninth Circuit held that Congress already had addressed the issue of greenhouse gas emissions in the Clean Air Act, thereby displacing federal common law on the issue. Although the plaintiff in *Kivalina* sought damages—instead of abatement of emissions as in *American Elec.*—the court held that all remedies are barred where a common law cause of action is displaced by statute. *Kivalina*, 696 F.3d at 855–58.

In a concurring opinion, Judge Pro agreed with the district court that the plaintiffs had not established standing. Noting that plaintiffs had admitted that global warming had been occurring for centuries and was the result of worldwide emissions from a multitude of sources, Judge Pro concluded that the plaintiffs had failed to identify when their injuries occurred in relation to the defendants' activities and had not tied their injuries to those activities. *Id.* at 867–69. Judge Pro believed that it would be unfair "to hold that a private party has standing to pick and choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages." *Id.* at 869.

The Supreme Court recently rejected the *Kivalina* plaintiffs' petition for certiorari. *Native Village of Kivalina v. ExxonMobil Corp.*, No. 12-1072 (petition denied May 20, 2013). This appears to lie to rest the issue of whether damage claims under federal common law are available for injuries arising from air pollution. As the Ninth Circuit lamented, this outcome "obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."

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