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Energy Sovereignty for Native American Nations: The Model Tribal Energy Code

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**ENERGY SOVEREIGNTY FOR NATIVE AMERICAN NATIONS:
THE MODEL TRIBAL ENERGY CODE**

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I.	INTRODUCTION.....	68
II.	HISTORICAL OVERVIEW OF FEDERAL ENERGY MANAGEMENT ON TRIBAL LANDS	68
	A. The Legal Relationship Between Federal Agencies and Tribal Governments.....	68
	B. Historical Performance Issues with Federal Management of Tribal Resources.....	70
	C. Inspector General’s Findings on Federal Energy Management on Tribal Lands	71
	D. A Clear and Urgent Need Exists for Tribal Self-governance Over Their Own Resources	72
III.	ENERGY POTENTIAL WITHIN NATIVE AMERICAN NATIONS	74
IV.	OPERATIONALIZING NATIVE AMERICAN SOVEREIGNTY FOR ENERGY DEVELOPMENT	78
V.	THE MODEL TRIBAL ENERGY CODE.....	80
VI.	PARTNERING FOR TRIBAL CAPACITY BUILDING AND ENERGY GOVERNANCE	104
VII.	CONCLUSION.....	107

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I. INTRODUCTION

This article describes a unique initiative undertaken by the Tribal Energy Consortium, a Native American-led nonprofit organization, to create the first Model Tribal Energy Code³ for the self-governance of energy resources by Native American nations.⁴ The authors are supporting the Tribal Energy Consortium and Tribal governments throughout the United States in the design and implementation of an innovative, 100 percent Tribally-governed legal regime for energy management within Tribal jurisdictions.⁵ The goal of the Model Tribal Energy Code is to provide a starting point for Tribal governments to create a comprehensive, “best-of-all-worlds” set of energy laws that will provide:

1. A full legal code for Tribal self-regulation of traditional and renewable energy development activities;
2. Legal terms that are recognized and accepted by the energy industry and by the federal government, enabling Tribes to assume direct control of energy resources and policies within their jurisdictions;
3. Provisions that enhance and operationalize Native American sovereignty and replace state and federal control over Tribal resources; and
4. Streamlined procedures and partnering opportunities that create competitive advantages for Tribal economic development.

The Model Tribal Energy Code presents a pathway for the advancement of Native American energy development from being under federal regulatory authority to sovereign Tribal governance.⁶ Utilizing efficient legal procedures and the strategic application of sovereignty to create commercial advantages, the Model Tribal Energy Code offers a new approach for the management of Native American energy resources and creates new sustainable energy opportunities for the long-term benefit of Tribal communities.⁷

II. HISTORICAL OVERVIEW OF FEDERAL ENERGY MANAGEMENT ON TRIBAL LANDS

A. The Legal Relationship Between Federal Agencies and Tribal Governments

The Commerce Clause of the United States Constitution provides Congress with the authority “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁸ This constitutional authority forms the legal foundation for the political and economic relationships between the federal government and the governments of federally recognized Tribes.⁹ From this originating authority, Nineteenth Century U.S. Supreme Court decisions enunciated the concept of the federal government serving

3. MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023).

4. The Tribal Energy Consortium is a 501(c)(3) non-profit organization formed and governed by Native Americans, with a focus on market development and public policy to advance Tribal Energy. TRIBAL ENERGY CONSORTIUM, <https://www.ndnenergy.org/> (last visited Nov. 17, 2023). Details on the mission and work of the Tribal Energy Consortium are available online at <https://www.ndnenergy.org/>.

5. *Id.*

6. MODEL TRIBAL ENERGY CODE § 100.10 (Tribal Energy Consortium 2023).

7. MODEL TRIBAL ENERGY CODE introductory cmt., §100.80 (Tribal Energy Consortium 2023).

8. U.S. CONST. art. 1, § 8, cl. 2.

9. *Id.*

as a trustee for Indian Tribes, applying paternalistic descriptions of the relationship being akin to that of a "ward to its guardian."¹⁰ In its capacity as trustee, the United States government holds the legal title to significant tracts of Tribal land owned by Native American nations and land allotted to individual Native Americans.¹¹ The United States government currently holds over fifty-six million acres of land in trust for Tribes and individual allotment owners.¹² The United States has fiduciary responsibilities to manage funds and assets derived from these lands for the benefit of Tribal citizens.¹³ When revenue is generated from economic activity on these lands, the federal government is responsible for collecting appropriate royalties and for disbursement of the funds to the Tribal or individual property owners.¹⁴

Following World War I, the United States government began taking significant interest in the development of energy resources, particularly coal for heating and industrial uses and oil to fuel the burgeoning automobile and military sectors.¹⁵ With significant energy deposits having been identified within Tribal territories, the United States Congress undertook the enactment of legislation designed to develop these resources under federal supervision.¹⁶ The Indian Mineral Leasing Act of 1938 created a formal process for energy extraction leases on Tribal lands, with the Department of Interior holding sole authority to negotiate and approve leases with oil and mining companies operating on Tribal lands.¹⁷ The Indian Mineral Development Act of 1982 subsequently expanded the role of Tribal governments and owners of allotment parcels to participate in the negotiation process for oil and mineral leases on their lands—but final approval of such agreements still remained with the Department of Interior, which would decide whether the proposed agreements were “in the best interest of the Indian tribe.”¹⁸

10. See, e.g. *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

11. General Allotment Act, Pub. L. 49–105, 24 Stat. 388 (1887). The General Allotment Act (commonly known as “The Dawes Act”) authorized the United States government to seize land within Indian reservations, divide it into parcels, and distribute ownership of the parcels to individual Native Americans living in the area. *Id.* Some of the allotted parcels were transferred to fee title in the names of the individual owners, while others were retained in trust status by federal agencies. See *id.*; *Native American Ownership and Governance of Natural Resources*, U.S. DEP’T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Nov. 17, 2023). The allotment of Tribal lands by federal agencies ended with the enactment of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461).

12. Lizana Pierce, *DOE Indian Energy Program Overview*, DOE OFFICE OF INDIAN ENERGY, 6 (2018), <https://www.energy.gov/sites/prod/files/2018/12/f58/1-indian-energy-overview.pdf>.

13. *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)).

14. *Why Tribes Exist Today in the United States: What is the Federal Indian Trust Responsibility?*, U.S. DEPT. OF INTERIOR, INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Nov. 17, 2023) (stating that “[t]he federal Indian trust responsibility is a legal obligation under which the United States ‘has charged itself with moral obligations of the highest responsibility and trust’ toward Indian tribes” (*Seminole Nation v. United States*, 1942)).

15. Brian C. Black, *How World War I Ushered in the Century of Oil*, Observer (Apr. 4, 2017, 2:59 PM), <https://observer.com/2017/04/world-war-i-ushered-in-the-century-of-oil-global-economy-geopolitics-national-security/>; Jessie Kratz, “*You Can’t Dig Coal With Bayonets*”, NATIONAL ARCHIVES (July 11, 2018), <https://prologue.blogs.archives.gov/2018/07/11/you-cant-dig-coal-with-bayonets/> (discussing the various uses of coal during World War II).

16. See *Indian Law*, Intermountain Oil and Gas BMP Project, <https://www.oilandgasbmps.org/laws/tribal/> (last visited Nov. 17, 2023).

17. Indian Mineral Leasing Act of 1938, 25 USC §§ 396(a)–396(g). See also the implementing regulations at 25 C.F.R. § 211 (2022).

18. Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108. See also the implementing regulations at 25 C.F.R. § 225 (2022).

The current era of energy management within Tribal lands was initiated with the enactment of the Indian Tribal Energy Development and Self-Determination Act of 2005.¹⁹ Although the federal government still retains authority to negotiate and execute leases on Tribal lands, Tribal governments can now enter into Tribal Energy Resource Agreements with the Bureau of Indian Affairs that enable Tribes to negotiate energy leases and related agreements without federal approval.²⁰ However, very few Tribes have actually entered in Tribal Energy Resource Agreements with the Bureau of Indian Affairs, and most energy resources within Native American Nations remain under federal management.²¹

B. Historical Performance Issues with Federal Management of Tribal Resources

While the fiduciary responsibility of the United States government in its trust relationship with Native American Nations is clear,²² the actual performance of federal agencies such as the Department of Interior has broadly failed to deliver appropriate results for Tribal communities.²³ Generations of Native Americans have lamented the lack of engagement, basic financial aptitude, or cultural competence on the part of the federal agencies that hold responsibility for Tribal affairs.²⁴ More recently, the full extent of the unfulfilled obligations was brought to light through the federal *Cobell* Indian Trust Fund class action litigation.²⁵ The *Cobell* litigation began in 1996, and its docket included over 3,600 pleadings and more than twenty federal District Court and Court of Appeals opinions over the course of the next fifteen years.²⁶ The plaintiffs were Native Americans to whom the federal government had a specific trust responsibility to manage monies and other assets in special financial accounts set up for Native American trust assets.²⁷ The Native American plaintiffs sued to compel performance of the United States government's trust obligations, alleging that the Secretaries of the Interior and the Treasury—as the primary agents of the federal government's trust responsibilities to Tribes—had breached the fiduciary duties owed to the plaintiffs by mismanaging their accounts.²⁸

19. Indian Tribal Energy and Self-Determination Act of 2005, 25 U.S.C. §§ 3501–3506. This Act was intended to provide an explicit basis for Tribal governments to take over leasing and business agreement authority from the Bureau of Indian Affairs for energy projects within the Tribes' jurisdictions. The Act was subsequently amended in 2017 under Pub. L. 115–325, with provisions intended to streamline the process for Tribal assertion of governing authority.

20. The requirements and procedures for Tribes to obtain leasing authority under Tribal Energy Resource Agreements are codified in 25 C.F.R. § 224 (2019).

21. It has been widely recognized that the federal requirements to obtain approval of a Tribal Energy Resource Agreement are unduly onerous and burdensome for Tribes, resulting in the lack of use of this legal vehicle for operationalizing Tribal authority. See Ben Reiter, *A New TERA: Why It's Time to Revisit Tribal Energy Resource Agreements*, 10 LSU J. ENERGY L. & RESOURCES 335, 344, 348 (2022).

22. Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 407 (2017).

23. See Reiter, *supra* note 21, at 340.

24. See Rey-Bear, *supra* note 22, at 407.

25. *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009). The *Cobell v. Salazar* case was the last in a series of related cases that began in 1996 under the caption *Cobell v. Babbitt*. *Id.* at 809–10. The name of the primary defendant in each *Cobell* case is the name of the then-serving Secretary of the Interior, and the case captions were changed each time a new Secretary was appointed by the President of the United States over the next fifteen years. *Id.*

26. *The Indian Trust Fund Litigation: An Overview of Cobell v. Salazar*, EVERYCRSREPORT.COM (Nov. 20, 2012), <https://www.everycrsreport.com/reports/RL34628.html>; *Cobell v. Salazar*, 573 F.3d 808 (2009).

27. *Cobell*, 573 F.3d at 809.

28. *Id.* at 809–10.

The extensive discovery process of the *Cobell* litigation revealed that not only had the federal government failed to provide the basic financial stewardship required under its trust obligations to Tribal communities, it could not even "achieve an accounting that passes muster as a trust accounting[.]"²⁹ Although Federal Agencies had collected billions of dollars owed to Native Americans from the sale of oil, gas, and other resources extracted from Native-owned lands, the federal government did not produce a single accounting of these assets for over one hundred years.³⁰ Recognizing (and likely chagrined by) the extent of the federal agency failures to uphold their trust responsibilities, the United States Congress ultimately intervened and funded a \$3.4 billion settlement to compensate Native Americans for their financial losses and problems related to federal land management.³¹ Subsequent revelations of federal agency mismanagement resulted in further congressional claims payments to Native Americans, such as the \$680 million *Keepseagle* Settlement in 2011.³² The troubling revelations and financial damages arising from trust-related litigation have spurred numerous calls for federal agency reform, along with an increasing awareness of the need for self-management of assets and resources by Tribes.³³

C. Inspector General's Findings on Federal Energy Management on Tribal Lands

In addition to the general trust mismanagement issues highlighted by the *Cobell* litigation, specific and extensive problems have been identified with federal management of energy resources located within Tribal lands.³⁴ A specific example pertains to the energy resources of the Osage Nation, which possesses one of the largest Tribal mineral estates in the country, including ownership of all oil and gas rights in Osage County, Oklahoma.³⁵ To date, more than one billion barrels of oil have been produced from the Osage mineral estate, and current estimates range "between 1.5 to 13 billion barrels of oil still remaining in the ground."³⁶ For over a century since the discovery of oil in the region, primary control of the Osage Nation's energy resources has been in the hands of the Bureau of Indian Affairs. Once the magnitude of the oil and gas deposits within the Osage Nation's territory was understood, a special department was established within the Bureau called the Osage Agency, which today is responsible for oil and gas development within the 1.45-million-acre Osage Nation mineral estate.³⁷

For a period of years leading up to 2013, the Osage Nation raised concerns with the Department of the Interior regarding the federal agency management of the Tribe's

29. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 102 n.19 (D.D.C. 2008).

30. *Individual Indian Money Accounts (Cobell v. Salazar)*, NATIVE AM. RTS. FUND, <https://narf.org/cases/cobell/> (last visited Nov. 17, 2023).

31. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010).

32. See *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98 (D.D.C. 2015).

33. See Rey-Bear, *supra* note 22, at 452.

34. U.S. Gov't Accountability Off., *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502 1, 18 (June 8, 2015), <https://www.gao.gov/products/gao-15-502>.

35. *Minerals Council*, THE OSAGE NATION (last visited Nov. 17, 2023), <https://www.osagenation-nsn.gov/who-we-are/minerals-council>. Details on the history and current management of the energy resources of the Osage Nation may be reviewed on the website for the Nation's Minerals Council. *Id.*

36. Bureau of Indian Affs., *Oil and Gas Leasing Potential of Osage Nation*, OSAGE NATION 1, 3 (2020), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/demd/pdf/202008-osage-NAPE-brochure.pdf>.

37. *Osage Agency*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., <https://www.bia.gov/regional-offices/eastern-oklahoma/osage-agency> (last visited Nov. 17, 2023).

mineral estate.³⁸ Problems with operational and administrative transparency, financial accountability, and environmental protection were noted, as was the lack of responsiveness by the Osage Agency in addressing the problems.³⁹ Reflecting the extent and seriousness of the concerns, the Department of the Interior took the unusual action of initiating an internal investigation by the Inspector General in 2013.⁴⁰ After a year-long investigation, the Inspector General issued its findings in a formal report entitled: “*BIA Needs Sweeping Changes to Manage the Osage Nation’s Energy Resources*[.]”⁴¹ The Inspector General issued a withering summary of the detailed assessments within its seventy-four-page report:

We found systemic flaws at the Osage Agency, a unit of the [BIA], that have created an ineffective program for managing the Osage Nation’s mineral estate (oil, gas, and other reservation sub-surface minerals) . . . [Overall], we found the program fundamentally flawed. More specifically, the Agency does not have or has vague policies and procedures for managing the Osage Nation’s mineral estate, does not comply with environmental law, does not have sufficient planning and mineral resource management, and does not have effective data management.⁴²

It is notable that the characterization of the Bureau of Indian Affairs’ management of Tribal energy resources as “ineffective” and “fundamentally flawed” is not a statement of the Tribal point of view—it is the federal government’s officially published determination of its own performance.⁴³ The Inspector General’s report reflects the failings of the Bureau’s unique special-purpose department specifically created and tasked with the single responsibility of managing the energy resources of a single Tribe.⁴⁴ The drastically inadequate performance of the Osage Agency serves as a troubling barometer for how the Bureau of Indian Affairs at large is managing energy resources for the hundreds of federally recognized Tribes throughout the United States.

D. A Clear and Urgent Need Exists for Tribal Self-governance Over Their Own Resources

In addition to the publicly reported problems described above, the authors have personally witnessed recent examples of continuing federal agency failures in the management of and accountability for energy resources in Tribal territories.⁴⁵ A Tribe located in western Oklahoma owns land with known oil and gas reserves, located primarily in

38. See *BIA Needs Sweeping Changes to Manage the Osage Nation’s Energy Res.*, OFF. OF INSPECTOR GEN. – U.S. DEP’T OF THE INTERIOR 4 (2014), <https://www.doi.gov/sites/default/files/2021-migration/CR-EV-BIA-0002-2013Public1.pdf>.

39. *Id.* at 32.

40. *Id.* at 3, 44.

41. See generally *id.*

42. *Id.* at 1.

43. *BIA Needs Sweeping Changes to Manage the Osage Nation’s Energy Res.*, OFF. OF INSPECTOR GEN. – U.S. DEP’T OF THE INTERIOR 1 (2014), <https://www.doi.gov/sites/default/files/2021-migration/CR-EV-BIA-0002-2013Public1.pdf>.

44. *Id.* at 5.

45. Interview with Greg Guedel, 5:15-5:40 (Aug. 17, 2023) (on file with author).

sparsely populated rural areas of its territory.⁴⁶ In 2019, a citizen of the Tribe contacted the governmental headquarters to ask if the Tribe was aware of a new oil drilling operation being installed near the citizen's home.⁴⁷ The citizen was concerned that the new oil well was being drilled close to the location of an underground aquifer that was a primary source of the local drinking water supply.⁴⁸ The Tribal government was in fact not aware of the drilling operation—having received no advance notice or information from any party—and immediately made urgent calls to the Bureau of Indian Affairs.⁴⁹

The next week, a meeting was convened at a federal agency office located on the campus of the University of Oklahoma, attended by officials of the Tribe, the Bureau of Indian Affairs, the Bureau of Land Management, and executives of two large oil companies who held the federally-granted drilling concessions on the Tribe's land.⁵⁰ The Tribe's Lieutenant Governor opened the meeting with a succinct statement of purpose: "We just found out you're drilling an oil well next to our drinking water supply—we'd like to know exactly what you're doing, and why you haven't told us about it."⁵¹

The oil company executives appeared genuinely surprised and explained that they had fully complied with all of the mineral leasing and drilling permit requirements issued by the Bureaus.⁵² They asserted that at no time did either federal agency instruct the companies to provide any information directly to the Tribe, and that the companies were under the impression that the agencies were doing so themselves.⁵³ The Bureau representatives then apologized for the "miscommunication" that had occurred and pledged that, in the future, there would be more engagement with the Tribe.⁵⁴ The Bureau representatives did not acknowledge that their failures to inform the Tribe of the oil lease and drilling on the Tribe's land were direct and substantial violations of federal law under the Federal Land Policy and Management Act,⁵⁵ the National Environmental Policy Act,⁵⁶ and the environmental protection requirements of Executive Order 12898.⁵⁷ Nor did the Bureaus offer to suspend or withdraw the drilling permit that had been unlawfully issued to extract energy resources from the Tribe's land—where today the oil well now stands and operates next to the Tribe's drinking water aquifer.⁵⁸

Continuing incidents of federal negligence such as this are indicative of the need for a fundamental paradigm shift in the governance structure of Native American energy resources. The federal policies issued from Washington D.C., and the centralized management by the Bureau of Indian Affairs, cannot adequately address the diverse conditions,

46. *Id.*

47. *Id.* at 5:50-6:03.

48. *Id.*

49. Interview with Greg Guedel, *supra* note 45, at 5:50-6:03.

50. *Id.* at 6:05-6:45.

51. *Id.* at 6:46-6:53.

52. *Id.* at 7:06-8:25.

53. *Id.*

54. Interview with Greg Guedel, *supra* note 45, at 8:25-9:11.

55. 43 U.S.C. § 1712; Interview with Greg Guedel, *supra* note 45, at 8:25-9:11.

56. 42 U.S.C. § 4321; Interview with Greg Guedel, *supra* note 45, at 8:25-9:11.

57. Exec. Order No. 12,898, 59 Fed. Reg. § 7629 (Feb. 16, 1994); Interview with Greg Guedel, *supra* note 45, at 8:25-9:11.

58. Interview with Greg Guedel, *supra* note 45, at 9:11-9:20; *see generally* Bureau of Land Mgmt., *Tribal Consultations for Oil and Gas Leasing Handbook* (2020), https://www.blm.gov/sites/default/files/documents/files/BLM_CO_Tribal_Consultations_O%26G_Leasing_Handbook_508.pdf (showing a general overview of the federal agency obligations and procedural requirements for coordinating with Tribal governments on energy projects within their lands).

needs, and opportunities of the 574 federally recognized Tribes.⁵⁹ Instead, the most viable approach is for Native American Nations to assert their inherent sovereignty over the natural resources within their lands, managing the development and distribution of energy in accordance with Tribal laws designed specifically to serve the needs and promote the interests of their citizens.

III. ENERGY POTENTIAL WITHIN NATIVE AMERICAN NATIONS

Native American lands are extraordinarily rich with mineral energy resources like coal, oil, gas, and radioactive elements.⁶⁰ Tribal lands contain thirty percent of America's coal reserves west of the Mississippi River, fifty percent of America's uranium reserves, and twenty percent of America's known oil and gas deposits.⁶¹ The revolution in carbon-based fuel development from advancements in shale extraction technologies, as indicated in the following map produced by the Bureau of Indian Affairs, has placed Tribal reservations in the forefront of American energy production because of major Tribal-centric oil and gas deposits and shale energy basins on tribal land:⁶²

The highlighted areas on the map below illustrate the number and locations of Tribal communities that are located within geological areas with confirmed major deposits of oil and gas.⁶³ Most of the development activity in these Tribal areas is presently under the management of federal agencies, which have not updated the leasing or royalty rates charged to energy companies drilling on Tribal lands since the 1920s.⁶⁴

59. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021) (stating that there are currently 574 Native American Tribes that have obtained formal recognition from the United States government); U.S. Gov't Accountability Off., *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, U.S. Government Accountability Office 3–4, 35–36 (June 8, 2015), <https://www.gao.gov/assets/680/671095.pdf>.

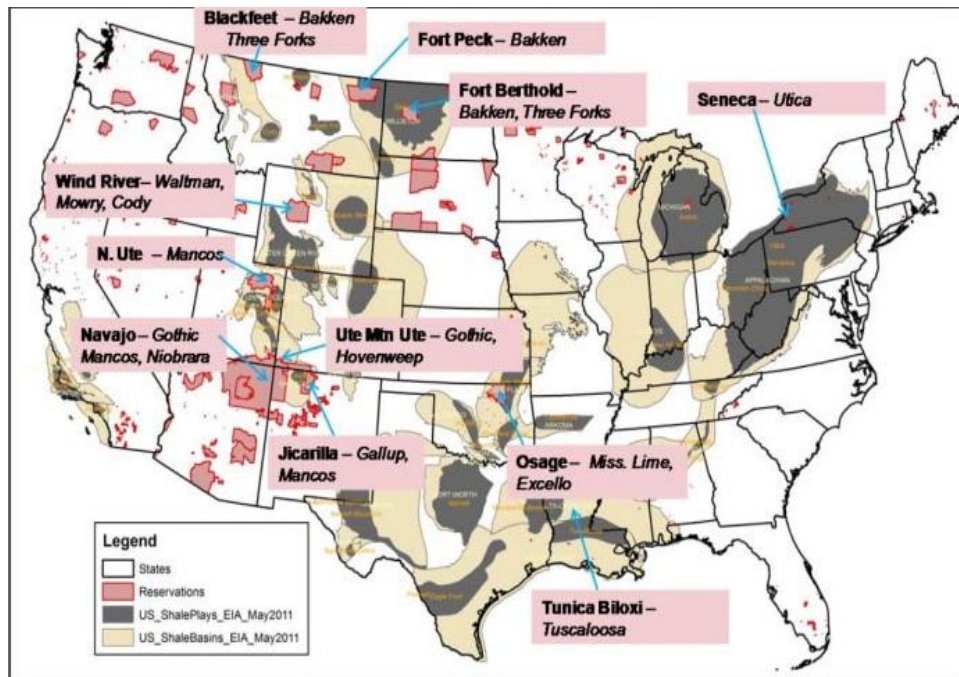
60. Reiter, *supra* note 21, at 341; Pierce, *supra* note 12, at 6.

61. Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LSU J. OF ENERGY L. & RES. 195, 196 (2014).

62. Bureau of Indian Affs., *Oil and Gas Outlook in Indian Country* 5, (Aug. 10, 2013), https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/ieed/pdf/DEMD_OG_Oil_Gas_Outlook_508.pdf.

63. *Id.*

64. Coral Davenport, *Biden Administration Moves to Raise the Cost of Drilling on Federal Lands*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/climate/biden-drilling-federal-lands.html>.

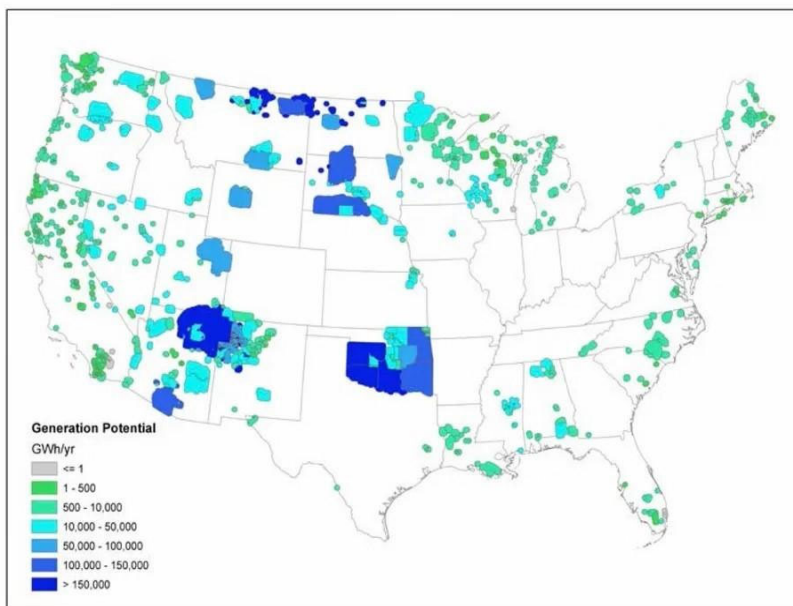


Emerging Oil & Gas Shale Plays (Dark Grey), Shale Basins (Tan)

As the world turns to renewable sources for sustainable energy production, and to mitigate adverse climate change, Native American Nations have been identified as possessing exceptional conditions for the generation of clean energy.⁶⁵ Tremendous wind-generated energy potential exists in Tribal communities, as shown in the following map produced by the National Renewable Energy Laboratory.⁶⁶

65. Anelia Milbrandt et al., *Techno-Economic Renewable Energy Potential on Tribal Lands*, 6, 10 (Nat'l Renewable Energy Lab'y) (July 2018).

66. *Id.* at 6.



Wind generation potential by reservation (including extended areas of 10 miles adjacent to the tribal land boundaries)

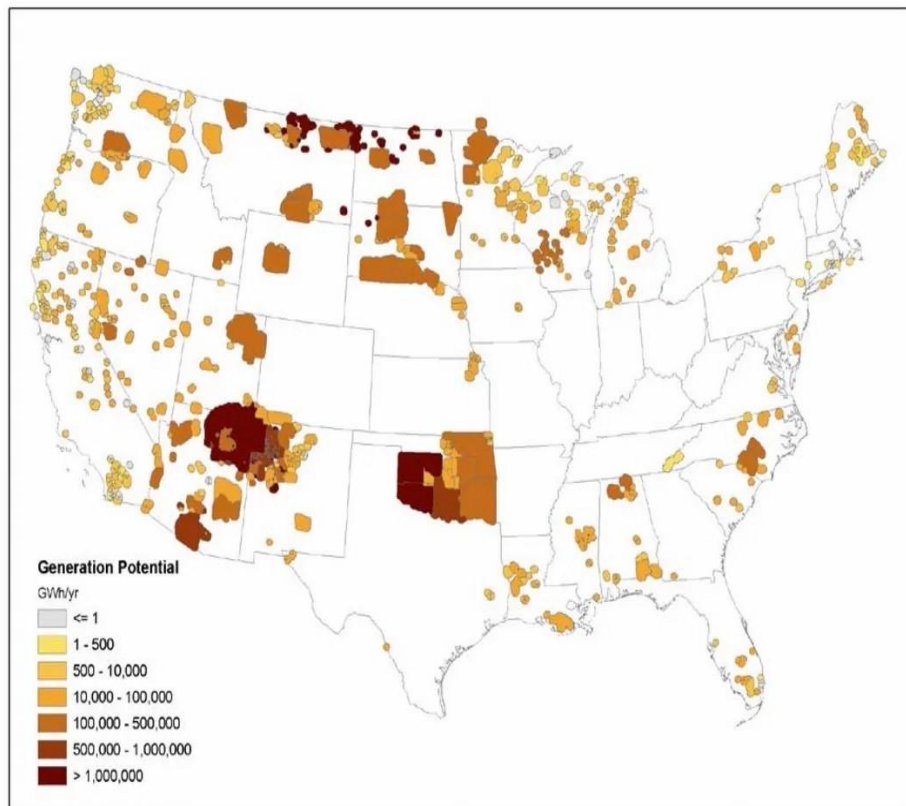
This map illustrates that the majority of Native American Reservations, in the forty-eight contiguous United States, have the potential to generate a minimum of one Gigawatt of wind energy each year, with most areas having sufficient annual wind to generate far higher amounts of energy.⁶⁷ One Gigawatt of energy is sufficient to provide electricity to 750,000 homes, offering the potential for certain Tribes to become more self-sufficient in electrical energy if their wind potential is properly developed.⁶⁸

The National Renewable Energy Laboratory has further confirmed the essentially limitless availability solar energy generation across Tribal communities, as detailed in the following map of photovoltaic potential:⁶⁹

67. *Id.*

68. AJ Dellinger, *Gigawatt: The Solar Energy Term You Should Know About*, COMPUT. NETWORK (Nov. 16, 2021, 5:00 AM), <https://www.cnet.com/home/energy-and-utilities/gigawatt-the-solar-energy-term-you-should-know-about/>.

69. Milbrandt, et al., *supra* note 65, at 10.



Photovoltaic generation potential by reservation (including extended areas of 10 miles adjacent to the tribal land boundaries)

As with the potential wind power illustrated above, the Gigawatt potential of solar power in some Tribal communities, provides a basis for more self-sufficiency in electricity; the interest of Tribal governments in harnessing solar energy is increasing nationwide.⁷⁰

The threat of energy supply disruptions from global events such as pandemics, war, and economic contractions makes securing consistent and sustainable domestic energy a matter of crucial importance for the United States.⁷¹ As indicated in the maps above, Native American Nations not only possess ample energy reserves to serve their own communities, but they are also positioned to play a leading role in America's national energy security.⁷² However, of the fifty-six plus million acres of Tribal land held in federal trust, eighty-six percent of Tribal land with energy resources remains undeveloped.⁷³ The inertia in bringing these resources into positive use makes it clear that Native American nations require new solutions for overcoming energy development constraints originating from

70. Ted McDermott, *Renewable Energy Projects Power Up in Tribal Nations*, GREENBIZ (June 9, 2022), <https://www.greenbiz.com/article/renewable-energy-projects-power-tribal-nations>.

71. Int'l Energy Agency, *Global Energy Crisis*, INT'L ENERGY AGENCY (2021), <https://www.iea.org/topics/global-energy-crisis>.

72. Milbrandt, et al., *supra* note 65, at 6, 10.

73. Pierce, *supra* note 12, at 6.

federal agency management.⁷⁴ Equally clear is that the solutions need to be generated by and managed within Tribal communities themselves, rather than sought from outside agencies that lack the requisite perspective and will to produce positive change.⁷⁵

IV. OPERATIONALIZING NATIVE AMERICAN SOVEREIGNTY FOR ENERGY DEVELOPMENT

When the British colonial government and subsequently the United States government initially engaged politically with the Indigenous communities of North America, they recognized the latter as having the status of nations, and interactions were conducted pursuant to a treaty-based, government-to-government relationship.⁷⁶ A fundamental element of nationhood is sovereignty, and Native American Nations were recognized by the United States as possessing inherent sovereignty to the extent not explicitly constrained by the United States Congress.⁷⁷ Following a series of anti-Tribal retrenchments beginning after the Civil War, in the 1970s, the United States government shifted its policy orientation to affirm Native American self-determination, supporting initiatives by Tribal governments to take over responsibility for socio-economic programs historically managed by federal agencies.⁷⁸ Recent federal administrations have confirmed that the United States government “is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States.”⁷⁹

In discussions of Native American political economy, the concept of sovereignty is one of the most often mentioned subjects. Such conversations typically reflect a general understanding of sovereignty as a political power that offers a pathway for the improvement of socio-economic conditions for Tribal communities. Less often discussed is the specific method through which Tribal governments must apply their inherent political power to create positive outcomes—*operationalizing* Tribal sovereignty.⁸⁰ The concept of operationalizing Tribal sovereignty is simple: Governments govern through laws, so Tribal governments must enact laws in order to assert their governing authority.⁸¹ Without laws that specifically address activities occurring within their jurisdictions, Tribes only possess the *potential* for self-governance. Enacting laws that place the Tribal government in the position of authority to regulate activities is how Tribes operationalize their sovereignty, converting the potential of sovereignty into actualized control over the course of

74. U.S. Gov't Accountability Off. *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, U.S. Government Accountability Office 18 (June 8, 2015), <https://www.gao.gov/assets/680/671095.pdf>.

75. *Id.* at 3–4, 36.

76. CHARLES WILKINSON, *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS: A SOURCEBOOK ON FEDERAL-TRIBAL HISTORY, LAW, AND POLICY* 4, 6 (2d ed. 1991).

77. *See* *Worcester v. Georgia*, 31 U.S. 515, 530–31 (1832); STEVEN ANDREW LIGHT, & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 19 (3d prtg. 2005).

78. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 189 (2005).

79. Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040923-4.html>.

80. W. Gregory Guedel, *Model Tribal Energy Code*, INTERTRIBAL COUNCIL COMMERCE COMM. QUARTERLY MEETING (July 13, 2023); *see also* MODEL TRIBAL ENERGY CODE § 100.10.5 (Tribal Energy Consortium 2023).

81. Guedel, *supra* note 80.

events within their territories.⁸² When Tribes contemplate the nature of their inherent sovereignty, a basic truth must be recognized: Only operationalized sovereignty can initiate positive changes and confer benefits upon Tribal citizens.⁸³

The United States of America is regularly characterized as “a [n]ation of laws[.]”⁸⁴ One of the practical manifestations of this notion is that a regulatory vacuum almost never exists in American law—whatever someone is doing and wherever they are doing it, some form and level of law applies.⁸⁵ If a town does not have a law governing a subject, the county law will apply; if the county does not have a law, the state law will apply; and if a state does not have a law, federal law will apply.⁸⁶ Tribal governments operate within this same dynamic. It is a long-settled principle that if a Tribe does not have a law governing an activity that occurs within the Tribe’s jurisdiction, it does not mean that no law applies, but rather, the gap in the Tribe’s laws will be filled by federal and/or state laws.⁸⁷ Since federal and state laws are drafted by separate sovereigns, they often reflect philosophies and priorities that differ from those of Tribal communities.⁸⁸ This reality reinforces the need for Tribal governments to operationalize their own sovereignty and enact laws that can replace federal and state systems with self-governance specifically designed to serve the Tribal community.⁸⁹

For the regulation of energy, there is presently a gigantic gap in Tribal laws.⁹⁰ For over a century, the federal and state governments have made a concerted and continual effort to enact and enforce energy-related laws within their jurisdictions.⁹¹ In states with abundant energy resources, institutionalizing the authority of the state government over energy development is a clear priority. For example, the Oklahoma Statutes governing oil and gas development within the state run to 262 pages and comprehensively regulate all industry activities from resource ownership down to detailed operational matters such as the hours when lights can be utilized on drilling sites.⁹² In contrast, only a handful of Tribes have enacted even a fraction of the laws codified by the major energy-producing states—and most Tribes have no energy governance laws at all.⁹³ For those Tribes, the laws governing energy development within their lands are not their own but are typically federal laws administered by the Bureau of Indian Affairs.⁹⁴ The severe performance deficiencies

82. *Id.*

83. *Id.*

84. Proclamation on Law Day, U.S.A., 2023 DAILY COMP. PRES. DOC. (Apr. 28, 2023).

85. James H. Shott, *The United States of America: ‘A Nation of Laws,’ Not a Nation of Men*, BLUEFIELD DAILY TELEGRAPH (June 24, 2014), https://www.bdtonline.com/opinion/columns/the-united-states-of-america-a-nation-of-laws-not-a-nation-of-men/article_a70db247-110c-5e09-8760-2cbaaec7bc98.html.

86. U.S. CONST. art. VI, cl. 2.

87. In 1834, the U.S. Commissioner of Indian Affairs described the lack of codified Tribal legal codes that prompted the assertion of federal laws within their territories: “With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.” H.R. Rep. No. 23–474, at 91 (1834).

88. MODEL TRIBAL ENERGY CODE § 100.30.1(1) (Tribal Energy Consortium 2023).

89. Guedel, *supra* note 80.

90. MODEL TRIBAL ENERGY CODE § 100.10.3(9) (Tribal Energy Consortium 2023).

91. The first modern federal law specifically regulating the energy sector was the Federal Power Act of 1920, 16 U.S.C. §§ 791–828; see OFF. OF THE GEN. COUNS., *Laws Dept. of Edu. Administers*, <https://www.energy.gov/gc/laws-doe-administers> (last visited Nov. 17, 2023); 2022 *Legis. Energy Trends*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/energy/2022-legislative-energy-trends> (last visited Nov. 17, 2023).

92. See generally OKLA. STAT. tit. 52.

93. MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023).

94. *Id.*

of federal energy management detailed above provide an *urgent* call to action for Tribal governments to operationalize their sovereignty over the energy sector by enacting laws for the self-governance of their resources.⁹⁵

In addition to regulatory self-governance, the sovereignty of Native American nations provides the basis for creating laws specifically designed to promote economic opportunities for the Tribal community.⁹⁶ Tribal laws can be structured to be more efficient and provide a more positive business environment than state or federal jurisdictions.⁹⁷ Tribal governance that is more nimble and less inhibited by political partisanship than their state and federal counterparts can produce substantial competitive advantages for the Tribal economy, making it a favored destination for energy-related business development.⁹⁸ Tribes should view their sovereignty as a dynamic national resource and adopt a strategic and comprehensive approach to creating Tribal laws with sovereign advantages that support energy security and facilitate sustainable economic growth.⁹⁹

V. THE MODEL TRIBAL ENERGY CODE

A necessary and fundamental institution for the governance of energy within Native American Nations is the Tribe's legal code. To provide the basis for Tribal governments to regulate energy-related activities within their jurisdictions, the authors have developed the first **Model Tribal Energy Code ("MTEC")** in the United States.¹⁰⁰ The goal of the MTEC is to create a "best-of-all-worlds" set of laws that will provide Tribal nations with: 1) a complete legal code for the regulation of traditional and emerging renewable energy development; 2) legal terms that are already recognized and accepted by the federal government and key industry enterprises; and 3) provisions that operationalize Tribal sovereignty and create competitive advantages for the Nation's economic development.¹⁰¹

To achieve these objectives, the foundation of the MTEC synthesizes terms from existing energy codes and related regulations adopted by the federal government of the United States, the governments of the primary energy-producing states, and the governments of Native American Tribes with established energy development programs. These codes were selected as a starting point based on their industry-recognized terms for regulating energy development activity.¹⁰² By starting from these codes, the MTEC is adapting a structure and terminology familiar to and accepted by the federal government agencies and industry entities that Tribes may partner with to develop and distribute energy within their communities.¹⁰³

The base terms from the selected existing codes have been revised and supplemented in the MTEC to a) recognize the sovereign authority of Tribal governments, and b) to enhance the efficiency and attractiveness of conducting energy development activity

95. Guedel, *supra* note 80; MODEL TRIBAL ENERGY CODE § 100.10.3 (Tribal Energy Consortium 2023).

96. MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023).

97. MODEL TRIBAL ENERGY CODE § 100.10.2(3) (Tribal Energy Consortium 2023).

98. MODEL TRIBAL ENERGY CODE § 100.10.5 (Tribal Energy Consortium 2023).

99. Guedel, *supra* note 80.

100. *See* MODEL TRIBAL ENERGY CODE § 100.10–100.100 (Tribal Energy Consortium 2023). Drafting of the Model Tribal Energy Code was completed by the Tribal Energy Consortium in July 2023.

101. Guedel, *supra* note 80; *see also* MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023).

102. MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023).

103. MODEL TRIBAL ENERGY CODE introductory cmt., § 100.20.6 (Tribal Energy Consortium 2023).

within the Nation's jurisdiction, consistent with the Nation's laws and oversight requirements.¹⁰⁴ For example, many existing state energy codes contain unnecessary bureaucratic provisions that were likely included as compromise legislation between political parties or as the result of lobbying by special interest groups. In such cases, the requirements for responsible, transparent, and documented actions by parties involved in energy development have been retained in the MTEC, but unnecessary intrusions into operations have been removed and those procedural matters left to the discretion of the Tribe.¹⁰⁵ The Tribal government is also empowered to apply its sovereign discretion to facilitate projects of particular urgency or benefit to its citizens, and to require beneficial community engagement and information sharing.¹⁰⁶

The structure and content of each Chapter of the MTEC is summarized below.¹⁰⁷

MODEL TRIBAL ENERGY CODE CHAPTERS

100.10. PURPOSE AND APPLICABILITY.

Chapter 100.10 provides a definitive statement of the Tribal government's assertion of sovereignty over energy activity within its jurisdiction, the assumption by the Tribe of all regulatory powers authorized by the federal government, and the intention of the Tribe to supplant any state law authority within the Tribe's territory.¹⁰⁸ This opening chapter of the Model Tribal Energy Code provides the foundation for operationalizing of the Tribe's sovereignty over energy-related activities, based on a set of findings listed in section 100.10.3 that explain the Tribe's prevailing conditions and forward-looking goals for energy development.

100.10.3. Findings. The Tribal Council hereby finds:

1. A strong national energy program is needed to meet the present and future energy needs of the Nation consistent with its overall economic, environmental, and social goals.
2. Clear responsibility for energy policy, regulation, and research, development and demonstration is crucial to enable the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs.
3. Formulation and implementation of a national energy program require the integration of major energy functions into a dedicated department in the Nation's government.

104. MODEL TRIBAL ENERGY CODE introductory cmt., § 100.20.2(4) (Tribal Energy Consortium 2023).

105. MODEL TRIBAL ENERGY CODE § 100.20.3 (Tribal Energy Consortium 2023).

106. MODEL TRIBAL ENERGY CODE § 100.100.3(1)–(3) (Tribal Energy Consortium 2023).

107. MODEL TRIBAL ENERGY CODE § 100.10–100.100 (Tribal Energy Consortium 2023). The MTEC is designed as a recommended set of legal regulations for Tribal governments to customize and adopt in conformance with their own specific laws and national priorities. MODEL TRIBAL ENERGY CODE introductory cmt. (Tribal Energy Consortium 2023). More detailed information on the MTEC legal structure and terms is available by contacting the authors or the Tribal Energy Consortium, <https://www.ndnenergy.org/>.

108. MODEL TRIBAL ENERGY CODE § 100.10 (Tribal Energy Consortium 2023).

4. The power to regulate energy and public utilities is an inherent and essential part of the authority of any Tribal government. This power is an aspect of the sovereignty of the Nation, limited only to the extent that such power is explicitly circumscribed by federal law.

5. As the population within the boundaries of the Nation grows, and as additional residential, commercial, governmental, and agricultural activities multiply, the need for adequate regulations to govern the development, supply, and use of energy is a matter of national priority.

6. The Nation has a clear and continual obligation to ensure that the development and distribution of energy within its jurisdiction is done in a manner that is safe, promotes the Nation's economy, and protects the Nation's environment and cultural heritage.

7. It is in the best interest of all members of the Nation to assure the fair and equitable delivery of public utility services to every person and consumer within the Nation's jurisdiction. As both trust land and non-trust land are crossed by electric lines, telephone lines, pipelines, roads, rail lines, and rights of way, the protection of the Nation and its people require the Nation to regulate all utilities and rights of way within the Nation's jurisdiction.

8. The adjacent state government lacks jurisdiction to regulate energy and utilities within the Nation, as state regulation would directly interfere with the right of the Nation and its people to make their own laws and be governed by them. State regulatory interest is also preempted by the Nation and the federal government with respect to all homes and businesses of Tribal members financed in whole or in part by the Nation or the federal government, all Tribal buildings and businesses of the Nation financed in whole or in part by the Nation or the federal government, and all federally owned or operated buildings and facilities.

9. The absence of Tribal regulation of the development and service of energy and public utilities will inevitably result in wasteful misallocation of investment in facilities and services, while at the same time failing to provide the facilities necessary to support existing and future development.

10. The Nation is the proper taxing authority for activities related to energy and utilities within its jurisdiction, and appropriate tax regulations are required to ensure appropriate accountability and financial responsibility within the energy and utility sectors.¹⁰⁹

These findings establish the position of the Tribal sovereign relative to state governments, and specifically identify the Tribal government as the sole regulatory authority over energy development, distribution, and revenue for activities within the Tribe's jurisdiction. To help avoid disputes regarding jurisdiction, section 100.10.4 further clarifies the

109. MODEL TRIBAL ENERGY CODE § 100.10.3 (Tribal Energy Consortium 2023).

delineation of the geographical zones of authority between the Tribal and state governments:

100.10.4. Territory, Persons, and Property Affected. This Title shall apply to the following:

1. All lands, water, and airspace within the Nation's jurisdiction, including but not limited to the Nation's Reservation and trust lands added thereto, including all lands, islands, waters, roads, and bridges or any interests therein, whether in trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, within the boundaries of the Nation's lands as established in Treaty; and such other lands, islands, waters, or any interests thereafter added to the Nation's lands or jurisdiction at any time.
2. All persons, entities, and property within any geographical area referred to above that is subject to the jurisdiction and governmental power of the Nation, to the extent not prohibited by federal law.
3. Any adjudication by a court of competent jurisdiction that this Title or any part thereof does not apply to land, persons, or property in specific circumstances shall not affect its application to land, persons, or property in any other circumstances, nor the general applicability of the other provisions of this Title.¹¹⁰

Despite the long-established sovereignty of Tribal governments, there are numerous ongoing instances where state governments attempt to impose state laws and authority over activities that occur within Tribal jurisdictions.¹¹¹ The Supreme Court of the United States has held that "a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."¹¹² To meet this standard, section 100.10.5 explicitly codifies the Tribal government's preemption of state laws for the purpose of self-governance over energy:

100.10.5. Intent to Preempt State Law. The Nation, and not any adjacent state or its political subdivisions, nor the management or boards of directors of any corporation, has exclusive legal and governance authority over energy and utilities within the Nation's jurisdiction. The Nation, subject solely to applicable provisions of federal law, exercises civil regulatory jurisdiction over Indians and non-Indians within its jurisdiction. To provide for the equitable regulation of industries and the protection of persons, entities, and the environment within its jurisdiction, it is the

110. MODEL TRIBAL ENERGY CODE § 100.10.4 (Tribal Energy Consortium 2023).

111. See, e.g., *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). Following the decision of the Supreme Court of the United States in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) that confirmed the territorial boundaries and political jurisdictions of certain Tribes located within Oklahoma, the State of Oklahoma subsequently sought to overlay its own jurisdiction upon Tribal territories, resulting in a separate Supreme Court decision that imposed a concurrent jurisdiction scenario pertaining to criminal law.

112. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494 (2022).

express intent of the Nation that this Title shall preempt any law, regulation, or related authority enacted by any state or local jurisdictions purporting to regulate activities covered by this Title.¹¹³

Once a sovereign's law and governing authority over an activity is established, it opens a question regarding the immunity status of the sovereign related to claims arising from the activity.¹¹⁴ For example, while some state governments have expressly and permanently waived their sovereign immunity, the United States government has reserved its sovereign immunity unless explicitly waived in regard to a specific activity.¹¹⁵ To eliminate potential confusion on this issue, section 100.10.6 codifies an explicit reservation of Tribal sovereign immunity with regard to its governance and general involvement in the energy sector.

100.10.6. Sovereign Immunity. The Nation and all its constituent parts, including but not limited to the departments and authorities established pursuant to this Title, are immune from suit in any jurisdiction except to the extent that such immunity has been expressly and unequivocally waived by the Nation in this Title or elsewhere. Nothing in this Title shall be construed as waiving the sovereign immunity of the Nation or any of its constituent parts. Nothing in this Title, nor any petition to any court, nor any enforcement action taken pursuant to this Title, including the filing of suit by the Nation's agencies for the collection of damages, penalties, interest, and for recovery of reasonable attorney's fees and expenses incurred in bringing such action, shall constitute a waiver of such sovereign immunity as to any claim of any kind or any damages, attorney's fees or costs, regardless of whether any such claim arises out of the same transaction or occurrence, or in any other respect.¹¹⁶

The overall impact of Chapter 100.10 is to assert the Tribe's sovereignty over the energy sector in the broadest possible terms, while maintaining the Tribal government's sovereign protections to avoid unnecessary legal entanglements.¹¹⁷

100.20. TRIBAL ENERGY DEPARTMENT

Chapter 100.20 authorizes the creation of a dedicated department within the Tribe's government specifically focused on energy matters, establishing a national energy authority on par with the United States Department of Energy.¹¹⁸ The Tribal Energy Department is empowered to implement a cohesive program of planning, development, and

113. MODEL TRIBAL ENERGY CODE § 100.10.5 (Tribal Energy Consortium 2023).

114. *See generally* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

115. WASH. REV. CODE § 4.96.010. Washington state relinquished its sovereign immunity in 1961 and made governmental entities liable for legal claims to the same extent as a private person or corporation. *Id.* For the federal government, the Supreme Court of the United States has stated: "It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Price v. United States*, 174 U.S. 373, 375–76 (1899). *See also* *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

116. MODEL TRIBAL ENERGY CODE § 100.10.6 (Tribal Energy Consortium 2023).

117. MODEL TRIBAL ENERGY CODE § 100.10 (Tribal Energy Consortium 2023).

118. MODEL TRIBAL ENERGY CODE § 100.20 (Tribal Energy Consortium 2023).

accountability for the Nation's energy resources, as detailed in the statement of purpose codified in section 100.20.2.¹¹⁹

100.20.2. Purpose. The Nation declares that the establishment of an Energy Department is in the public interest and will promote the general welfare by assuring coordinated and effective administration of the Nation's energy policy and programs. It is the purpose of this chapter:

- (1) To establish an Energy Department within the Nation's government.
- (2) To achieve, through the Department, effective management of energy within the Nation with a coordinated energy policy, and to operationalize and promote energy sovereignty for the Nation.
- (3) To provide a coordinated national energy policy to deal with the near and long-term energy issues of the Nation, and to develop plans and programs for dealing with energy production and preventing shortages.
- (4) To create and implement a comprehensive energy conservation strategy that will promote efficiency in the Nation's energy program.
- (5) To carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including—
 - (a) assessing the requirements for energy research and development;
 - (b) developing priorities necessary to meet those requirements;
 - (c) undertaking programs for the optimal development of the various forms of energy production and conservation; and
 - (d) disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies.
- (6) To promote the development and commercial use of solar, wind, geothermal, recycling, and other technologies utilizing renewable energy resources.
- (7) To create a central energy data collection and analysis program for the Nation.
- (8) To create an effective strategy for distributing and allocating fuels in periods of short supply and to provide for an energy supply reserve for the Nation.

119. *Id.* § 100.20.2.

(9) To promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost.

(10) To provide for the cooperation of Tribal, federal, state, and local governments in the development and implementation of beneficial energy policies and programs.

(11) To secure affordable and reliable sources of supply of energy and fuels.

(12) To assure incorporation of environmental and cultural protection in the formulation and implementation of energy programs, and to advance the goals of restoring, protecting, and enhancing environmental quality and assuring public health and safety.

(13) To coordinate with the Nation's Tribal Employment Rights Office to create and promote employment opportunities for the Nation's citizens within the energy sector.

(14) To create an awareness of and responsibility for the fuel and energy needs of rural and urban residents as such needs pertain to home heating and cooling, transportation, agricultural production, electrical generation, conservation, and research and development.

(15) To support the Nation's small business firms, public utility districts, municipal utilities, and private cooperatives involved in energy production, transportation, research, development, demonstration, marketing, and merchandising.

(16) To provide for the administration of the functions of federal agencies which are transferred to the Nation by this Title.

(17) To support science and engineering education and job programs for the benefit of the Nation's people.¹²⁰

As discussed earlier, the federal government plays a prominent role in energy activities throughout the United States. Numerous federal programs exist that are directed toward and beneficial for Tribes, including direct financial support for Tribal energy management via the Tribal Energy Development Capacity Grant program.¹²¹ To maximize the benefits available from Tribal-federal partnering, the following three sections of the Code specifically authorize and encourage the Tribal Department of Energy to pursue programmatic and funding opportunities:

100.20.5 Administration of Federal Programs. In coordination with the Tribal Council, the Department may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C.

120. *Id.*

121. U.S. Dept. of the Interior – Indian Affs., *Tribal Energy Development Capacity (TEDC) Grant*, <https://www.bia.gov/service/grants/tedc> (last visited Nov. 17, 2023).

450(f) et seq.) or other appropriate authority to assume administration of any eligible activities that are currently administered by agencies of the federal government of the United States of America.¹²²

100.20.6 Federal Partnering Agreements. The Department is designated as an administrative agent of the Nation to apply for any funds or other support, cooperate, and enter into contracts and agreements with the federal government relating to the planning and development of energy and natural resources, or for any other purpose which the United States has authorized within the functions of the Department. The Secretary is authorized in the name of the Nation to make applications and do necessary tasks to obtain such funding and support from federal agencies.¹²³

100.20.7. Tribal Energy Development Organization. The Department is authorized to apply for and obtain certification as a federal Tribal Energy Development Organization and may undertake related development activities in accordance with applicable laws and procedures.¹²⁴

During the initial period of establishing their energy sovereignty, many Tribes may not possess the logistical or financial resources necessary to form and implement a comprehensive Tribal Department of Energy. In addition to their administrative functions, the sections within Chapter 100.20 are designed to serve as the basis for federal grant applications to obtain funding to assist Tribes with the formation and operation of the new Department.

100.30. TRIBAL ENERGY RESOURCE AGREEMENTS.

Governmental development of energy resources is a contract-oriented activity, which enables the government to establish objectives and exercise controls to assure security, safety, and the prudent use of resources, while allowing private sector organizations selected for their technical ability and managerial expertise to carry out the day-to-day operations.¹²⁵ As noted above, most Tribal energy development contracting has traditionally been handled by the Bureau of Indian Affairs, but Tribal governments can supplant the Bureau by entering into Tribal Energy Resource Agreements as authorized under federal regulations.¹²⁶ Chapter 100.30 incorporates the requirements of 25 C.F.R. 224.63 for Tribal governments to take over authority from the Bureau of Indian Affairs for entering into energy leases and business agreements pursuant to the Indian Tribal Energy Development and Self Determination Act and 25 U.S.C. 3503.¹²⁷

By replacing federal agency management, the Tribe brings all of the logistical, environmental, and economic aspects of energy development within its territory under its

122. MODEL TRIBAL ENERGY CODE § 100.20.5 (Tribal Energy Consortium 2023).

123. *Id.* § 100.20.6.

124. *Id.* § 100.20.7.

125. *Management & Operating (M&O) Contracts*, U.S. DEPT. OF ENERGY, <https://science.osti.gov/lp/Management-and-Operating-Contracts> (last visited Nov. 17, 2023).

126. *See* 25 C.F.R. § 224 (2019).

127. MODEL TRIBAL ENERGY CODE § 100.30 (Tribal Energy Consortium 2023); *see* 25 C.F.R. § 224.63 (2019); Indian Tribal Energy and Self-Determination Act of 2005, 25 U.S.C. §§ 3501–3506.

own sovereign control.¹²⁸ The purpose and benefits of doing so are set forth in section 100.30.1:

100.30.1. Purpose.

(1) It is a fundamental aspect of the Nation's sovereignty for the allowable uses of the lands within its jurisdiction to be determined and controlled by the Nation itself, and not by agencies of other governments.

(2) This chapter establishes procedures by which, at its discretion, the Nation may enter into and manage leases, business agreements, and rights-of-way for purposes of energy resource development within its jurisdiction.

(3) This chapter also describes the process, in conjunction with federal agency procedures, for obtaining, implementing, and enforcing a Tribal Energy Resource Agreement (TERA) confirming the authority of the Nation to enter into individual leases, business agreements, and rights-of-way without the requirement of separate federal approval.

Federal laws and regulations applicable to Tribal matters are created and revised on a continuing basis, ideally (but not always) in consultation with Tribal governments.¹²⁹ To avoid the need to constantly update the Tribe's energy laws to incorporate new federal authorities, section 100.30.2 provides a self-updating mechanism for the Tribe to automatically apply all current and future Tribal governance powers authorized by the United States:

100.30.2. Federal Authority Integration. Without limitation to any of the Nation's sovereign rights, powers, and procedures in this chapter, the Nation fully asserts and incorporates all Tribal authority provided under the laws and regulations of the United States of America, including but not limited to 25 U.S.C. 2 and 9; 25 U.S.C. 3501–3504; Pub. L. 109–58; Pub. L. 115–325; 25 CFR 224; and any future pertinent federal authority.¹³⁰

The primary sources of governmental revenue from the energy sector are lease and royalty fees charged to producers, but federal lease and royalty fees have not kept pace with the national market—indeed, federal oil and gas royalty rates have not been updated for over 100 years.¹³¹ To obtain the appropriate market-rate financial benefits from their energy resources, Tribal government control over the leasing process within their territories is clearly crucial, and section 100.30.6 provides the authority for entering into the foundational agreements for energy production and distribution:

128. MODEL TRIBAL ENERGY CODE § 100.30.1(1) (Tribal Energy Consortium 2023).

129. Memorandum on Uniform Standards for Tribal Consultation, 2022 DAILY COMP. PRES DOC. 1083 (Nov. 30, 2022).

130. MODEL TRIBAL ENERGY CODE § 100.30.2 (Tribal Energy Consortium 2023).

131. *Interior Department Takes Steps to Modernize Oil and Gas Leasing on Public Lands, Ensure Fair Return to Taxpayers*, U.S. DEP'T. OF THE INTERIOR (July 20, 2023), <https://www.doi.gov/pressreleases/interior-department-takes-steps-modernize-oil-and-gas-leasing-public-lands-ensure-fair>.

100.30.6. Lease and Business Agreements. The Nation may enter into a lease or business agreement for the purpose of energy resource development for:

- (a) Exploration for, extraction of, or other development of the Nation's energy mineral resources on Tribal land including, but not limited to, marketing or distribution;
- (b) Construction or operation of an electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on Tribal land;
- (c) Construction or operation of a facility to process or refine energy resources, at least a portion of which have been developed on Tribal land; and
- (d) Pooling, unitization, or communitization of the energy mineral resources of the Nation located on Tribal land with any other energy mineral resource (including energy mineral resources owned by the Nation or an individual in fee, trust, or restricted status or by any other persons or entities) if the owner, or, if appropriate, lessee, of the resources has consented or consents to the pooling, unitization, or communitization of the other resources under any lease or agreement.

By asserting control over the negotiation and approval of business agreements that result in energy production, Tribes strengthen their sovereignty and improve the efficiency of energy development by removing the barrier of Department of the Interior approval for individual leases, business agreements, and rights-of-way for energy projects on Tribal lands.¹³²

100.40. ENVIRONMENTAL AND CULTURAL PROTECTION

Chapter 100.40 codifies the fundamental importance of protecting the Tribe's environmental and cultural resources that may be affected by energy development activities and provides the Tribe with the legal basis to impose oversight, accountability, and remedial actions to preserve environmental and cultural sites.¹³³ This Chapter establishes the authority for the Tribe to receive direct and immediate information from energy companies regarding all activities that may adversely impact Tribal lands and heritage and control the permit approval process and compliance requirements.¹³⁴

Section 100.40.1 provides the foundational statements for prioritizing environmental and cultural protection within the sphere of energy development activities:

132. Tribal Energy Resource Agreements and Tribal Energy Development Organizations, U.S. DEP'T OF THE INTERIOR, <https://www.bia.gov/service/tribal-energy-resource-agreements-development-organizations> (last visited Nov. 17, 2023).

133. MODEL TRIBAL ENERGY CODE § 100.40 (Tribal Energy Consortium 2023).

134. *Id.*

100.40.1. Policy.

(1) The Tribal Council finds that the growing population and expanding economy of the Nation have a profound impact on the natural environment. The air, water, land, and other natural resources are recognized as fragile and precious, and human activity must be guided by and in harmony with the system of relationships of nature. Therefore, the policy of the Nation is to conserve, improve, and protect its natural resources and environment and to control air, land, and water pollution to enhance the health, safety, and well-being of all people. It is the policy of the Nation to improve and coordinate its environmental plans, functions, powers, and programs, in cooperation with the federal government, state and local governments, other public and private organizations and concerned individuals, and to manage the resources of air, land and water to fulfill the responsibility of a steward of the environment for the present and future generations.

(2) It is the continuing responsibility of the Nation to: (i) fulfill the responsibility of each generation as trustee of the environment for succeeding generations; (ii) assure for all residents of the Nation safe, healthful, productive, and culturally protective surroundings; (iii) attain the beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (iv) preserve important historic, cultural, and natural aspects of the Nation's heritage; (v) achieve an ecological balance between population and resource use which will permit sustainable enhancement of standards of living; (vi) enhance the quality and availability of renewable resources and approach the maximum attainable recycling of depletable resources; and (vii) practice conservation in the use of energy, maximize the use of energy efficient systems, and minimize the environmental impact of energy production and use.¹³⁵

As illustrated by the previously-discussed case of the Tribe in Oklahoma whose water supply was jeopardized by oil drilling activity that occurred without their knowledge,¹³⁶ it is critical for Tribal governments to have detailed, accurate information on environmental conditions related to energy development within their lands.¹³⁷ Section 100.40.3 codifies a broad scope of information to be provided to and reviewed by the Tribal government in connection with the permitting of energy-related activities:

100.40.3. Actions Which May Significantly Affect the Environment. As used in this chapter, "actions that may significantly affect the

135. MODEL TRIBAL ENERGY CODE § 100.40.1 (Tribal Energy Consortium 2023).

136. *See supra* Part II.

137. EXECUTIVE OFFICE OF THE PRESIDENT – OFFICE OF SCIENCE AND TECHNOLOGY POLICY, GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON INDIGENOUS KNOWLEDGE (2022) (stating that "[a]gencies should recognize that Tribes and Indigenous Peoples hold relevant information and perspectives regarding the environment, and Indigenous Knowledge can inform Agencies' environmental analysis. Tribes and Indigenous communities may have special expertise with respect to environmental and community impacts, informed by Indigenous Knowledge. Tribes can play a key role in the NEPA process as a cooperating or participating agency.").

environment” means individual activities or a sequence of planned activities proposed to be undertaken that could have a major impact on the Nation’s land, water, air, archeological and cultural sites, housing, or other environmental resources, or could undermine the Nation’s environmental goals. Such actions shall include but not be limited to new projects and programs but shall not include (1) emergency measures undertaken in response to an immediate threat to public health or safety; or (2) activities specifically directed by the Tribal Council.

An unfortunate legacy of federal energy management is the presence of thousands of orphaned oil and gas wells on Tribal lands, which jeopardize public health and safety by “contaminating groundwater, seeping toxic chemicals, emitting harmful pollutants including methane and harming wildlife.”¹³⁸ To provide the reference basis for initiating appropriate safety and remediation actions, section 100.40.13 mandates the creation of a database to compile information on hazardous sites within the Tribe’s lands:

100.40.13. Inventory of Hazardous Materials Sites. The Department shall compile and keep current an inventory of any sites in the Nation’s jurisdiction that have been used for toxic or hazardous waste disposal, or other hazardous materials related to the production and use of energy, and the types and amounts of such materials disposed of at any such sites.¹³⁹

For Tribes with a large and/or predominantly rural land base, information from Tribal citizen observations is a powerful source of key data regarding environmental conditions, and section 100.40.14 enables the use of citizen input for analyzing environmental impacts:

100.40.14. Citizen Complaints. The Department is empowered to receive and investigate citizen complaints alleging violation of any statute or regulation in respect to environmental quality. When deemed appropriate, the Secretary may hold a hearing concerning such complaint, having given written notice and opportunity to be heard to all interested parties.¹⁴⁰

The combined provisions of Chapter 100.40 confirm the priority of sound environmental and cultural protection practices in all aspects of energy development within Tribal lands and place the Tribal government in first position as permitting and enforcement authority.¹⁴¹

138. *Biden-Harris Administration Releases Draft Guidance on New Tribal Orphaned Well Program*, U.S. DEP’T OF THE INTERIOR (Aug. 31, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-releases-draft-guidance-new-tribal-orphaned-well-program>.

139. MODEL TRIBAL ENERGY CODE § 100.40.13 (Tribal Energy Consortium 2023).

140. MODEL TRIBAL ENERGY CODE § 100.40.14 (Tribal Energy Consortium 2023).

141. MODEL TRIBAL ENERGY CODE § 100.40 (Tribal Energy Consortium 2023).

100.50. RIGHTS OF WAY.

In order for outside parties such as producers and utility companies to engage in energy-related activities on Tribal lands, they must first obtain a government-issued right of way permitting their entry and activities within the Tribe's jurisdiction.¹⁴² As with many activities, rights of way over Tribal land have typically been negotiated, issued, and managed by the Bureau of Indian Affairs, but 25 C.F.R. Section 169 provides the authority and procedures for Tribal governments to assume control of the process.¹⁴³ Chapter 100.50 incorporates the requirements of 25 C.F.R. Section 169 for Tribal governments to take over authority from the Bureau of Indian Affairs for the negotiation and granting of easements and other rights of way within the Nation's jurisdiction.¹⁴⁴ For energy-related activities, this gives the Tribal government the sole right to determine a) who is allowed to enter the Nation's lands, b) what activities are allowed, c) the specific locations where activities are allowed, d) the authorized time period for activities, and e) the amount and terms of compensation to be provided to the Tribe in return for right-of-way privileges.¹⁴⁵

Chapter 100.50 begins with a statement of purpose that codifies the Tribal government's intent to assume direct control over access to its lands for energy-related activities:

100.50.1. Purpose. This chapter provides procedures and conditions under which the Nation will consider a request to issue rights-of-way over and across Tribal lands and any other areas over which the Nation exercises jurisdiction. This chapter promotes Tribal self-determination and self-governance by incorporating Tribal law and policies in processing a request for a right-of-way across Tribal lands and codifies the full sovereign authority of the Nation to exclusively determine the allowable uses of the lands within its jurisdiction.¹⁴⁶

Federal regulations require that parties receiving a right of way across Tribal land pay compensation "that is fair and reasonable under the circumstances of the agreement."¹⁴⁷ However, rights of way negotiated by the Bureau of Indian Affairs have often provided inadequate compensation to Tribal landowners, either from the standpoint of fair market rates or overall utility to the Tribal community.¹⁴⁸ Section 100.50.11 moves the negotiation of compensation for Tribal rights of way under the authority of the Tribal government, and provides the Tribe with flexibility to establish appropriate compensation utilizing market conditions and other pertinent factors:

142. See 25 C.F.R. § 169.4 (2019).

143. 25 C.F.R. § 169.1 (2019) ("This part is also intended to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land.").

144. MODEL TRIBAL ENERGY CODE § 100.50 (Tribal Energy Consortium 2023).

145. *Id.*

146. MODEL TRIBAL ENERGY CODE § 100.50.1 (Tribal Energy Consortium 2023).

147. See 25 C.F.R. § 169.2 (2019).

148. See Brian L. Pierson, *Right of Way Sovereignty*, 2 WIS. L. REV. 225, 227 (2022).

100.50.11. Compensation for Right-Of-Way.

(1) A right-of-way over or across Tribal land may allow for any payment amount negotiated by the Nation, and the Nation need not require a valuation if the Nation expressly states that it:

(a) Has agreed upon compensation satisfactory to the Nation;

(b) Waives valuation; and

(c) Has determined that accepting such agreed-upon compensation and waiving valuation is in the Nation's best interest.

(2) The Nation may coordinate with third parties to determine fair market value to assist in the Nation's assessment of appropriate compensation.

(3) If the conditions in paragraph (1) or (2) of this section are not met, the Nation will require that the grantee pay fair market value, in addition to any other conditions of the grant the Nation determines appropriate.

Consistent with applicable federal regulations, Chapter 100.50 establishes the requirement for Tribal authorization and a written agreement with the Tribe for outside parties to obtain a grant of right-of-way across Tribal land, and the imposition of any restrictions or conditions deemed necessary by the Tribal government.¹⁴⁹

100.60. DRILLING, EXCAVATION, AND SUBSURFACE ACTIVITIES.

The installation and operation of energy systems involves a good deal of activity and equipment located under the ground, including wells, pipelines, cables, and supporting structures.¹⁵⁰ To ensure Tribal governments are properly informed regarding the location and status of current and proposed installations on Tribal land, Chapter 100.60 provides requirements for coordination, safety, permitting, maintenance, and documentation of activities occurring below ground level, including the construction of energy-related systems such as wells, mines, and pipelines.¹⁵¹ Key requirements include receiving advance permission from the Tribe for any subsurface activities, compliance with established safety regulations, appropriate public notices, and compliance with environmental and cultural protection regulations.¹⁵²

With public safety being the foremost priority, the statement of purpose codified in section 100.60.1 also establishes that the specific requirements of Chapter 100.60 are in addition to existing safety laws pertaining to underground activities:

149. See 25 C.F.R. § 169.107 (2019); MODEL TRIBAL ENERGY CODE § 100.50 (Tribal Energy Consortium 2023).

150. *Where Are the Pipelines?*, AM. PETROL. INST., <https://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/where-are-the-pipelines> (last visited Nov. 18, 2023). For example, there are approximately 2.4 million miles of underground oil and gas pipelines traversing the United States, maps of which are made available by the American Petroleum Institute. *Id.*

151. MODEL TRIBAL ENERGY CODE § 100.60 (Tribal Energy Consortium 2023).

152. *Id.*

100.60.1. Purpose. The provisions of this chapter are intended to prevent injury or damages caused by excavation resulting from damage to pipelines, underground utility lines, cable television lines, and similar underground facilities by requiring location and marking of such facilities prior to any excavation. Nothing contained in this chapter shall be deemed to alter or waive the requirements of any other law that establishes conditions for conducting an excavation as defined herein.¹⁵³

To help clarify legal responsibilities for the safety and maintenance of underground facilities, Chapter 100.60.3 establishes affirmative duties on the part of excavators to ensure proper safety protocols are incorporated in the design, planning, and execution of all subsurface activities:

100.60.3. Duties of Excavators.

- (1) Every person who engages in excavation or prepares engineering plans for excavation shall:
 - (a) Request all possible owners or operators of underground facilities at the proposed excavation site to locate and mark the underground facility as set forth in this chapter. The request shall also be given by telephone to the local Utility Notification Center and by any other means reasonably calculated to give actual notice of the request to the owners or operators.
 - (b) Plan the excavation to avoid or minimize interference with or damage to underground facilities.
 - (c) Include information in the engineering plans identifying all underground facilities in the excavation area.
- (2) The excavator shall request reaffirmation of the line location from the owners or operators of the underground facility not less than every 30 working days after the initial location request or on a more frequent basis as needed to maintain clearly visible markings of underground facilities.
- (3) Prior to initial exposure of the underground facility, the excavator shall maintain an estimated clearance of at least 18 inches between existing underground facilities previously identified and marked by the owners or operators of the underground facilities and the cutting surface of any mechanical excavating equipment. An excavator shall not use any mechanical excavating equipment within 18 inches of the exterior sides of markings for an underground facility before the excavator has determined the exact location of the underground facilities by excavating with hand tools.
- (4) The excavator shall provide such support, including but not limited to, subsurface, lateral, and subjacent support, for underground facilities in the excavation area as is necessary to prevent damage.
- (5) The excavator shall backfill all excavations in a manner and with materials necessary to prevent damage to underground facilities.

153. MODEL TRIBAL ENERGY CODE § 100.60.1 (Tribal Energy Consortium 2023).

(6) The excavator shall immediately notify the owner or operator of any underground facilities that have been, or may have been, damaged or dislocated during the excavation work. Notice may be given by telephone, in person or in writing so long as the means used is reasonably calculated to give immediate notice.

(7) The excavator shall not move or obliterate markings made to show the location of any underground facility or fabricate markings in an unmarked location for the purpose of concealing or avoiding liability for a violation of or noncompliance with this chapter.

(8) The requirements of this section shall not apply to the following:

(a) Emergency excavations;

(b) Gardening; and

(c) Tilling private ground for agricultural purposes.¹⁵⁴

Liability and penalties for violation of the Tribe's safety requirements for subsurface activities include indemnification, monetary damages, fines, and civil penalties.¹⁵⁵

100.70. OIL, GAS, AND MINERAL ENERGY.

The oil and gas industry is highly regulated at multiple levels of government, including state, federal, and international.¹⁵⁶ Chapter 100.70 adapts established codes from primary oil-and-gas states and provides the structure and procedures for the Tribe to regulate the activities of companies in this specific energy sector.¹⁵⁷ Detailed requirements and procedures for permitting, site operations, metering, spacing unit and pooling orders, and administrative compliance are included.¹⁵⁸

As depicted in the feature film *Killers of the Flower Moon*, the historical misappropriation of Native American petroleum resources created devastating consequences for numerous Tribal communities.¹⁵⁹ Cognizant of this background, Section 100.70.1 establishes a Tribal-centric philosophy and purpose for the management of these resources:

100.70.1. Purpose. It is hereby declared that it is in the public interest to foster, encourage, and promote the development, production, and utilization of natural resources of oil, gas, and minerals in the Nation's territory in such a manner as will prevent waste; to authorize and provide for the operation and development of properties in such a manner that a greater

154. MODEL TRIBAL ENERGY CODE § 100.60.3 (Tribal Energy Consortium 2023).

155. MODEL TRIBAL ENERGY CODE § 100.60.7 (Tribal Energy Consortium 2023).

156. See Library of Congress, *Oil and Gas Industry: A Research Guide*, <https://guides.loc.gov/oil-and-gas-industry/laws>, (last visited Nov. 19, 2023).

157. MODEL TRIBAL ENERGY CODE § 100.70 (Tribal Energy Consortium 2023).

158. *Id.*

159. *KILLERS OF THE FLOWER MOON* (Paramount Pictures 2021); see also DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (1st ed. 2017).

ultimate recovery of oil, gas, and minerals be obtained and that the correlative rights of all owners be fully protected; and to encourage, authorize, and provide for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil, gas, and mineral resources accrues to the Nation and its people realize and enjoy the greatest possible good from these vital natural resources.

To prevent hazardous scenarios like drilling for oil next to the Tribe's water supply as described earlier, per section 100.70.4 the Tribal government reserves all permitting authority within its territory:

100.70.4. Application for Permit to Drill or Mine. The Department shall require that an operator seeking to drill a well for oil or gas or mine for minerals shall first file an application and obtain a permit from the Department before commencing. The operator shall pay an application fee specified by the Department. The Department shall require the applicant to certify that an agreement with the landowner or lessee is being negotiated regarding compensation for damages to lands and property resulting from the intended operations.

With thousands of oil and gas wells having been installed in Tribal lands under Bureau of Indian Affairs authority—often with little or no information provided to the Tribes—it is crucial for Tribal governments to build accurate and current databases of ownership over the energy producing facilities within their lands.¹⁶⁰ Section 100.70.5 provides the legal basis for Tribal governments to obtain this information and apply it for regulatory compliance, revenue collection, and related purposes:

100.70.5. Identification of Ownership of Facilities for Producing Oil or Gas. The Department may at any time require identification of ownership of oil or gas wells, producing leases, tanks, plants, structures, and facilities for the transportation or refining of oil and gas.

Oil and gas companies continually transform the techniques and technology within their operations, striving to improve the availability, reliability, and efficiency of production assets.¹⁶¹ In order to keep pace with industry advancements, Section 100.70.11 provides the Tribal government the authority to issue and update regulations for oil and gas production, at the Tribe's discretion and when needed:

100.70.11. Operations for Production of Oil or Gas, Regulation. The Department shall promulgate rules pursuant to this chapter to regulate or to provide for:

- (1) The drilling, producing, and plugging of wells, and all other operations for the production of oil or gas;
- (2) The shooting and chemical or physical treatment of wells;

160. See Rachel Adams-Heard & Allison Herrera, *Who Gets Osage Oil Money? A List From BIA Raises New Questions*, BLOOMBERG NEWS (Sept. 5, 2022), <https://www.bloomberg.com/news/articles/2022-09-06/who-gets-osage-oil-money-a-list-from-us-raises-new-questions?>.

161. Thomas Hansmann et al., *Harnessing Volatility: Technology Transformation in Oil and Gas*, MCKINSEY & COMPANY (Sept. 1, 2022), <https://www.mckinsey.com/capabilities/operations/our-insights/harnessing-volatility-technology-transformation-in-oil-and-gas>.

- (3) The spacing or locating of wells;
- (4) Operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; and
- (5) Disposal of salt water and oil field wastes.

The Department may delegate the authority to monitor and enforce compliance with rules promulgated pursuant to this section.

The thousands of abandoned oil and gas wells on Tribal lands require extensive remediation to eliminate hazards to public health and the environment, and the federal government recently allocated \$150 million to begin this process.¹⁶² To prevent the problem from expanding further, section 100.70.15 gives the Tribe the authority to require producers to commit financial resources for remediation in advance of receiving a permit for well drilling:

100.70.15. Plugging and Performance Bond for Wells. The Department may require the furnishing of a plugging and performance bond in the amount sufficient to guarantee the costs of well site reclamation, with good and sufficient surety, conditioned for the performance of the duty to plug each dry or abandoned well, to restore the premises, insofar as possible, to the condition that existed before the filing of the application to drill; and conditioned on the proper performance of all of the requirements of applicable law and regulations. The condition of the bond relating to restoration of the surface is met if the landowner or lessee and the producer or driller adopt a different plan approved by the Department. The Department may in its discretion require additional bond if the circumstances require.

To facilitate the accountability for oil and gas resources stated in the opening purpose of Chapter 100.70, the Tribe may require that every person who produces, sells, purchases, acquires, stores, transports, refines, or processes oil or gas within its jurisdiction keep and maintain complete and accurate records of the quantities, which the Tribe can then utilize for confirmation of appropriate revenue payments.¹⁶³

100.80. RENEWABLE ENERGY.

The virtually unlimited resources of solar, wind, and geothermal energy available to Tribes as illustrated earlier make Native American Nations significant players in America's renewable energy industry.¹⁶⁴ Chapter 100.80 sets forth policies and procedures for the development of wind, solar, geothermal, water, and other forms of renewable energy within the Tribe's territory, including requirements for the decommissioning of systems

162. U.S. Dept. of the Interior—Indian Affs., *Orphaned Wells on Tribal Lands*, <https://www.bia.gov/service/orphaned-wells> (last visited Nov. 19, 2023).

163. MODEL TRIBAL ENERGY CODE § 100.70.17 (Tribal Energy Consortium 2023).

164. See generally U.S. DEPT. OF THE INTERIOR—INDIAN AFFS., TRIBAL RENEWABLE ENERGY DEVELOPMENT LITERATURE REVIEW (2023).

such as windmills at the end of their useful life.¹⁶⁵ The purpose, opportunities, and benefits of renewable energy development for the Tribal community are outlined in section 100.80.1:

100.80.1. Findings. The Nation hereby makes the following findings:

- (1) The development of renewable energy resources within the Nation's territory promotes the health, safety and general welfare of the Nation, its members, and the public.
- (2) The generation of electrical power from renewable energy resources to serve buildings and facilities located on lands owned by the Nation will increase the efficiency of its economic resources, while also reducing the direct or indirect reliance on energy sources which have adverse environmental impacts.
- (3) Because renewable energy resources are not finite or subject to depletion, the generation of power from and use of renewable resources will provide a long-term, sustainable alternative to conventional energy use for a significant portion of the Nation's energy needs.
- (4) The distribution of electric power to serve consumers within the Nation's jurisdiction requires the use of Tribal land for the location of transmission and distribution lines, facilities, and equipment.
- (5) Since renewable energy generation facilities cannot always produce electric energy at all times, utilization of solar generation facilities also requires access to and use of conventional or other electric energy resources to replace electricity produced by renewable generation facilities when such energy generation is interrupted or not available.
- (6) Since renewable energy generating equipment typically has a finite lifespan, the costs, and logistics of decommissioning such equipment at the end of its useful life is an important consideration for the Nation's long-term strategic energy planning.

While renewable energy facilities typically produce beneficial clean and sustainable power, it is also increasingly recognized that clean energy infrastructure like windmills have a finite useful life, and that significant costs can be incurred to decommission these facilities when they reach the end of their operational cycle.¹⁶⁶ To address these costs in advance, Section 100.80.7 authorizes the Tribe to require renewable energy system operators to commit financial resources for decommissioning in advance of receiving a permit:

165. MODEL TRIBAL ENERGY CODE § 100.80 (Tribal Energy Consortium 2023).

166. U.S. DEPT. OF ENERGY, WIND ENERGY END-OF-SERVICE GUIDE (2023). Data from a review of eight decommissioning estimates for wind energy projects proposed in 2019–2021 showed per-turbine decommissioning costs (total decommissioning costs divided by number of turbines) of \$114,000–\$195,000.

100.80.7. Decommissioning of Renewable Energy Facilities.

1. The owner or responsible operator of a renewable energy facility shall be responsible, at its expense, for the proper decommissioning of the facility upon abandonment or the end of the useful life of the equipment in the facility. Proper decommissioning of a renewable energy facility shall include:

a. Removal of equipment, towers, buildings, cabling, electrical components, foundations, and any other associated facilities, to a minimum depth of thirty (30) inches below grade or such deeper level as specified by the Department; and

b. Disturbed earth being graded and reseeded or otherwise restored to substantially the same physical condition as existed prior to the construction of the renewable energy facility by the owner, excluding roads, unless the Nation requests that the roads or other land surface areas be restored.

2. The decommissioning of the renewable energy facility, or individual pieces of energy equipment, shall be completed as follows:

a. By the owner of the facility within twelve (12) months after abandonment or the end of the useful life of the equipment in the facility; and

b. If the owner of the facility fails to complete the decommissioning within the required period prescribed in this subsection, the Department shall take such measures as are necessary to complete the decommissioning, and the owner of the facility shall be responsible for all costs and expenses incurred.

3. A permit, lease, or other agreement between the Nation and an owner of a renewable energy facility may contain provisions for decommissioning that are more restrictive than provided for in this section, including the requirement of bonds or other financial security to ensure the funds necessary for future decommissioning. As a prerequisite to constructing any renewable energy facility within the Nation's jurisdiction, the owner of an intended facility shall submit to the Department evidence of financial security to cover the anticipated costs of decommissioning the renewable energy facility.

While facilitating Tribal development (and potential ownership) of renewable energy systems, Chapter 100.80 also confirms the Tribe's ability to take service from an existing energy distribution company authorized to serve customers within the Tribe's jurisdiction.¹⁶⁷

100.90. TAXATION.

The taxation of energy production, particularly oil and gas, is a significant source of governmental revenue in the United States. State and local governments collected a

167. MODEL TRIBAL ENERGY CODE § 100.80.5 (Tribal Energy Consortium 2023).

combined \$12 billion in revenue from severance taxes in 2020, and in some energy-rich states oil and gas severance taxes account for nearly one-fifth of total annual revenue.¹⁶⁸ In 1982, the U.S. Supreme Court in *Merrion v. Jicarilla Apache Tribe* explicitly upheld the authority of Tribes to impose severance taxes on non-tribal member lessees removing oil and gas from Tribal lands, thereby providing the opportunity for Tribal governments to access this substantial revenue source.¹⁶⁹

Chapter 100.90 provides the basis for the Tribal government to tax energy resources that are developed within its jurisdiction, including severance taxes for the removal of oil, gas, and minerals from Tribal lands.¹⁷⁰ This Chapter establishes an equitable source of revenue to help sustain the economic viability of the Nation following the severance, depletion, or exhaustion of minerals from its lands, and to fund the delivery of services to Tribal members and non-Tribal members located within the Nation's jurisdiction.¹⁷¹ Section 100.90.1 provides a declaration of the Tribe's taxing authority over the development and utilization of its energy resources, and the purposes for asserting this revenue generation authority:

100.90.1. Purpose. The purpose of this chapter includes:

- (1) To impose a tax upon the severance of non-renewable energy minerals from the Nation's trust lands, Tribally owned fee lands, and allotted or restricted lands within the Nation's jurisdiction;
- (2) To provide the Nation an equitable source of revenue which can help sustain the economic viability of the Nation following the severance, depletion, or exhaustion of minerals from lands within the jurisdiction of the Nation;
- (3) To provide the Nation financial support to help fund the delivery of services to Tribal members and non-Tribal members located within the Nation's jurisdiction.

Effective taxation is dependent upon detailed revenue accounting and timely payments, and section 100.90.12 provides a clear structure for tax report and payment submissions by energy producers operating within the Tribe's territory:

100.90.12. Reports and Payment.

- (1) The operator and any working interest owner of a mine, well, or similar source shall provide a written division of interests statement for such

168. In 2020, eighteen percent of North Dakota's general tax revenue was derived from oil and gas severance taxes. See *State and Local Backgrounds—Severance Taxes*, URBAN INSTITUTE, <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/severance-taxes> (last visited Nov. 19, 2023).

169. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); see also Andrew Huff, *Taxation in Indian Country: An Overview of the Causes of Tax Inequity in Indian Country and Modern Reform Efforts*, CTR. FOR INDIAN COUNTRY DEV. (2023), <https://www.minneapolisfed.org/-/media/assets/papers/cicd-policy-discussion-papers/2023/taxation-in-indian-country-an-overview-of-the-causes-of-tax-inequity-in-indian-country-and-modern-reform-efforts.pdf>.

170. MODEL TRIBAL ENERGY CODE § 100.90 (Tribal Energy Consortium 2023).

171. *Id.*

location upon request of the Tribal Council or its authorized representative. Additionally, a taxpayer shall be required to provide any additional reports or information that the Tribal Council or its authorized representative deems necessary for the proper administration of this chapter.

(2) Any taxpayer who is required by this chapter to make payment of this tax shall submit a monthly return to the Nation upon a form prescribed by the Tribal Council or its authorized representative. A taxpayer for whom payment is being made by a working interest owner or a well operator shall be excused from the requirement imposed by this section provided that those paying on his behalf properly submit reports associated with the taxpayer's interest in severed minerals.

(3) Payment of the tax shown on the monthly return shall be made at the time such return is filed.

(4) All monthly returns and corresponding tax payments shall be due on or before the last day of the second month following the month of severance (for example, taxes associated with January production are due on the last day of March). If the due date falls on a weekend, a federally recognized holiday, or a Tribally recognized holiday, then the monthly reports and payments shall be due on the working day immediately following. For purposes of this section, a return and payment shall be deemed as filed on the date postmarked.

With the substantial fossil and mineral energy deposits within Tribal lands illustrated in the maps discussed above, Chapter 100.90 provides the authority and structure for Tribes to implement a taxation regime on par with the federal and state governments and reap the corresponding financial benefits for the Tribal community from the self-management of their resources.

100.100. TRIBAL UTILITY COMMISSION.

Distinct from energy companies that produce energy from traditional or renewable sources, utility companies are involved in the operation of distribution facilities for the delivery of energy for use primarily by the public.¹⁷² Utility companies are crucial to the delivery of energy within Tribal communities, and the regulation of utility activities within Tribal lands has traditionally been managed by the Federal Energy Regulatory Commission.¹⁷³ Chapter 100 establishes Tribal authority for the creation and regulation of utility companies and systems operating within the Tribe's jurisdiction, including requirements for service standards and equitable pricing of energy provided to Tribal citizens.¹⁷⁴ This provides the basis for the Tribe to ensure consumers of utility services and commodities receive reliable services at reasonable rates, to avoid unnecessary duplication of facilities which increase the costs of service to the community, and to minimize disputes between utilities which may result in inconvenience or diminished efficiency in service.¹⁷⁵

172. U.S. Energy Information Administration: "Electric Utility," https://www.eia.gov/tools/glossary/index.php?id=E#el_utility (last visited Dec. 21, 2023).

173. Details on the Federal Energy Regulatory Commission's utility-related regulatory activities and relations with Tribal nations is available at <https://www.ferc.gov/tribalrelations>.

174. Model Tribal Energy Code, 100 MTEC § 100.100 (2023).

175. *Id.*

To identify the need for and explain the benefits of Tribal regulation of utility companies serving Tribal citizens, section 100.100.1 provides findings regarding utility activities within the Tribe's jurisdiction, and section 100.100.2 codifies a statement of purpose for the Tribe's utility regulations:

100.100.1. Findings.

1. The Tribal Council finds that every public utility which enters and operates within the Nation's territory enters into consensual relations, commercial dealings, and contracts with residents and with the Nation, to provide services, operate facilities, construct pipelines, transmission lines, poles, towers and other improvements upon and across the Nation's lands owned by Indians, non-Indians, and the Nation.

2. The Tribal Council further finds that the services, rates, policies, procedures, and practices of every utility located and operating within the Nation's jurisdiction have a significant impact on the economic security, health, welfare and general well-being of the Nation, its citizens, and all community members and that regulation of every such utility by the Nation is a necessary and proper exercise of the sovereign authority of the Nation.

3. The Tribal Council further finds that regulation of such utilities located, operating or providing services within the Nation's jurisdiction is an essential governmental function of the Nation and that regulation of every such utility by any state, municipality, or political subdivision of a State is incompatible with the sovereign right of the Nation to make its own laws and be governed by them, and demonstrably imperils the political integrity and right of self-government of the Nation.

100.100.2. Purpose.

1. The Tribal Council hereby declares it to be in the public interest that all utilities located, operating, or providing services within Nation's jurisdiction to be regulated as hereinafter provided in order to provide all retail consumers of utility services and commodities with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of such utilities and their need to construct facilities to provide such services and commodities or otherwise to obtain utility supplies, to avoid unnecessary duplication of facilities which increase the costs of service to the consumer and to minimize disputes between utilities which may result in inconvenience or diminished efficiency in service to such consumers.

2. The purpose of this chapter shall also be to regulate all utility policies located, operating, or providing services within the Nation's jurisdiction, including connection of service, disconnection of service, re-connection, deposit and overdue payment charges, and to prohibit unlawful discriminatory or unreasonable preferences or advantages to any consumer or group of consumers by providers of utility services. The regulation of

utilities within the Nation's jurisdiction by this chapter shall be deemed exclusive and shall preempt all other regulatory authority with respect to all utilities located, operating or providing services within the Nation's jurisdiction.

To bring Tribal regulation of utilities on par with federal and state regulatory oversight, section 100.100.21 establishes the authority and priorities of a dedicated Tribal Utility Commission, with the powers of rulemaking, investigation, and enforcement:

100.100.21. Jurisdiction and Powers of Commission.

1. The general jurisdiction of the Commission shall extend to and include:

a. Telecommunications companies engaged in the furnishing of telecommunications services, including telegraph and telephone companies engaged in the transmission of messages or conversations by voice or electronic means, as well as video distribution systems whether by cable, local re-broadcast, or satellite distribution within the Nation's jurisdiction;

b. Pipeline utilities engaged in the transportation of gas, oil, coal, and water;

c. Electric utilities engaged in the generation and distribution of light or power;

d. Gas utilities engaged in the distribution of natural, synthetic or artificial gas, whether by pipeline or by bulk distribution to storage facilities;

e. Water companies for the storage and distribution of water for domestic or other beneficial use;

f. Heating utilities engaged in the distribution of heat; and

g. All other utilities which operate, maintain, or control any equipment or facilities within the Nation's jurisdiction.

Nothing in this chapter shall prohibit the Commission from making any order affecting rates, contracts, services rendered, adequacy or sufficiency of facilities, of any utility, whether privately owned, or whether owned and operated by any state or by any political subdivision of any state or any utility that is not operated for profit.

2. The Commission shall have power to:

a. Investigate all methods and practices of utilities or other persons subject to the provisions of this chapter. In so doing, it may require copies of reports, rates, classifications, schedules, and timetables in effect and used by such utilities or other persons and all other information desired by the Commission relating to such investigations and requirements to be filed with the Commission;

b. Require utilities or other persons to conform to the laws of the Nation and to all rules, regulations, and orders of the Commission;

c. To compel obedience to its lawful orders by proceedings of mandamus or injunction or other proper proceedings, in the name of the Nation, in any court having jurisdiction of the parties or of the subject matter, including the Tribal Court.

As with Chapter 100.20 for the Tribal Department of Energy, the provisions of Chapter 100.100 are also intended to serve as the basis for grant applications to obtain the funding and technical assistance necessary to establish the Tribal Utility Commission and support its regulatory operations.

Every Tribal government has a clear and continual obligation to ensure that the development and distribution of energy within its jurisdiction is done in a manner that is safe, promotes the Nation's economy, and protects the Nation's environment and cultural heritage.¹⁷⁶ The absence of Tribal laws for the regulation of energy development and public utility services will inevitably result in wasteful misallocations of resources by outside agencies, while at the same time failing to support existing and future energy development for the benefit of Tribal citizens.¹⁷⁷ The Model Tribal Energy Code provides the comprehensive legal structure needed for Tribal governments to operationalize their sovereignty over the energy sector, and to self-govern the development and use of the substantial and precious energy resources within their lands.¹⁷⁸

VI. PARTNERING FOR TRIBAL CAPACITY BUILDING AND ENERGY GOVERNANCE

In conjunction with the need for Tribal governments to enact laws for the regulation of energy development, there is a corresponding need to obtain funding and technical assistance to effectively implement these laws for the benefit of the community.¹⁷⁹ Presently, the United States government is offering significant resources for the development of Tribal energy governance capacity, including billions of dollars in available grants for planning, personnel, and facilities.¹⁸⁰ The chapters of the MTEC are designed to serve as the basis of grant applications to help Tribes obtain the resources for exercising governance over energy activities.¹⁸¹

For example, the BIA's Tribal Energy Development Capacity Grants are awarded:

to develop the Tribal management, organizational, and technical capacity Tribes need to maximize the economic impact of energy resource development on Indian land. Each year, the program awards funding that

176. MODEL TRIBAL ENERGY CODE § 100.10.3(6) (Tribal Energy Consortium 2023).

177. *Id.* § 100.10.3(9).

178. W. Gregory Guedel, *Energy Sovereignty for Native American Nations*, Tribal Energy Consortium Conf. 1, 6, 10 (June 22, 2023).

179. MODEL TRIBAL ENERGY CODE § 100.100.21(j) (Tribal Energy Consortium 2023).

180. *GRANTS*, <https://www.grants.gov/> (2023).

181. W. Gregory Guedel, *Energy Sovereignty for Native American Nations*, Tribal Energy Consortium Conf. 1, 10 (June 22, 2023).

provides Tribes with necessary resources to develop or enhance Tribal policies, codes, regulations, or ordinances related to energy resources, including land-lease regulations for energy development purposes.¹⁸²

A Tribe that adopts the MTEC can immediately apply for grant funding to support the creation of the Tribal Energy Department and/or Tribal Utility Commission, using the MTEC chapters to describe the structure and activities that will be supported by the grant funding.¹⁸³

The following listings, organized by U.S. Government agency, provides a sample selection of current grant opportunities and other funding support for Tribal energy programs.¹⁸⁴ Searches for current federal agency grant opportunities should begin at GRANTS.GOV: <https://www.grants.gov/>. The “Search Grants” tab can be selected, then select “Grant” as the “Funding Instrument Type”. Under “Eligibility”, select either “Native American tribal governments (Federally recognized)” or “Native American tribal organizations (other than Federally recognized tribal governments)”. In addition to the cross-agency information available at GRANTS.GOV, there is significant information available within the primary federal agencies that work with Tribes on development projects, including the following resources grouped by government agency:

DEPARTMENT OF ENERGY (www.energy.gov)

From DOE’s Office of Indian Energy Policy and Programs: <https://www.energy.gov/indianenergy/>

<https://www.energy.gov/indianenergy/current-funding-opportunities>

<https://www.energy.gov/indianenergy/ongoing-funding-opportunities>

Tribal Energy Financing (loan guarantees): www.energy.gov/lpo/tribal-energy-financing

Tribal Collaboration: <https://www.energy.gov/lm/tribal-collaboration>

DEPARTMENT OF THE INTERIOR

(Bureau of Indian Affairs (BIA) and the Division of Energy and Mineral Development (DEMD))

DEMD Grants General Information: <https://www.bia.gov/service/grants/general-information>

182. See Bureau of Indian Affairs webpage on Tribal Energy Development Capacity Grants: <https://www.bia.gov/news/indian-affairs-announces-tribal-energy-development-capacity-grants>.

183. W. Gregory Guedel, *Energy Sovereignty for Native American Nations*, Tribal Energy Consortium Conf. 1, 10 (June 22, 2023).

184. Note that there are also loan guarantee opportunities available. Philip Viles served as the Director of a federal loan guarantee program for six years and has assisted banks and Tribal entities with loan guarantees and discussions on grants and other federal support.

Grant Assistance for Energy & Mineral Grants: <https://www.bia.gov/service/grant-assistance-energy-grants>

Technical and Business Advisory Services for Energy & Mineral Projects:
<https://www.bia.gov/service/technical-business-advisory-energy>

Tribal Energy Development Capacity (TEDC) Grants: <https://www.bia.gov/service/grants/tedc>

Energy and Mineral Development Program (EMDP) Grants: <https://www.bia.gov/service/grants/emdp>

U.S. ENVIRONMENTAL PROTECTION AGENCY (www.epa.gov)

EPA Grants home page, including Grants Webinars, forms, training, and guidance:
<https://www.epa.gov/grants/epa-grants-webinars>

Federal, tribal and some state agencies provide grants and loans that can be used to support tribal green building. <https://www.epa.gov/green-building-tools-tribes/funding-opportunities-tribal-green-building>

Cleaning Up, Protecting and Preserving Tribal Lands is the page title, but many more topics are discussed here: <https://www.epa.gov/tribal-lands>

U.S. DEPARTMENT OF AGRICULTURE (www.usda.gov)

USDA RD Energy Programs: <https://www.rd.usda.gov/programs-services/energy-programs>

All RD Programs (searchable): https://www.rd.usda.gov/programs-services/all-programs?program_area=6978&keywords=

USDA RD Tribal Outreach: <https://www.rd.usda.gov/newsroom/tribal-outreach>

USDA RD Federal Funding Opportunities (searchable): <https://www.rd.usda.gov/newsroom/federal-funding-opportunities>

Renewable Energy Systems & Energy Efficiency Improvement Guaranteed Loans & Grants: <https://www.rd.usda.gov/programs-services/energy-programs/rural-energy-america-program-renewable-energy-systems-energy-efficiency-improvement-guaranteed-loans>

FEDERAL EMERGENCY MANAGEMENT AGENCY (www.fema.gov)

Capability- and capacity-building, along with Direct Technical Assistance:
<https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities>

U.S. DEPARTMENT OF LABOR (www.dol.gov)

Grant Funding Opportunities: <https://www.dol.gov/agencies/eta/grants/apply/find-opportunities>

VII. CONCLUSION

Energy is fundamental to the quality of life of families, communities, and nations. With the crucial role of energy in the well-being of Native American communities, Tribal governments need to enact specific laws to regulate the activities of the energy industry within their jurisdictions. To help fill this need, the Tribal Energy Consortium has developed the Model Tribal Energy Code in partnership with Tribal governments, Native-owned enterprises, industry professionals, and members of Native American communities throughout the United States. The Model Tribal Energy Code combines and adapts provisions from existing federal, state, and Tribal laws governing the energy industry, and incorporates new provisions designed for the particular conditions affecting Native American energy development. It is intended to serve as a starting point for Native American governments to replace federal agency management and assert full sovereign control over energy resources within their territories. The Model Tribal Energy Code is designed to be readily customized and adapted by Tribal governments to support the specific needs and goals of their respective nations, creating a comprehensive set of energy governance laws that are consistent with each nation's unique conditions, culture, and priorities. The establishment of energy governance laws can be paired with capacity-building grants and technical assistance programs to beneficially achieve the resource potential within Tribal lands, providing an innovative development model for building a sustainable energy future within Native American nations.

The Model Tribal Energy Code is currently being adapted by numerous Tribes to form the legal basis for operationalizing their sovereignty for self-governed energy development. Tribal Energy Consortium is ready to assist Tribes and intertribal agencies with implementation of their own energy laws and programs and applying for and utilizing grants and technical assistance. Please feel free to contact the authors to discuss the Model Tribal Energy Code and related programs supporting Native American energy sovereignty.