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Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures

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Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures

Judith V. Royster*

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I. INTRODUCTION

Energy development is the economic lifeblood of many Indian tribes. A number of tribal economies are heavily dependent upon fossil fuel extraction, and for many tribes, fossil fuels are the single greatest source of tribal revenue.¹

Indian lands contain extensive reserves of fossil fuels and other energy minerals: three to four percent of known oil and gas reserves, up to thirty percent of the coal west of the Mississippi, and approximately one third of the country's uranium resources.² Over 2.7 million acres of Indian lands support more than 4800 producing mineral leases, almost all of which are for oil and gas.³ Production on Indian lands represents 5% of domestic oil production, 8% of natural gas production, and 2% of coal production.⁴ Royalties exceed \$542 million, the vast majority of

1. See, e.g., *Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands, Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources*, 112th Cong. 44 (2011) [hereinafter *Tribal Development Hearing*] (statement of Irene C. Cuch, Ute Tribal Business Committee) (“[T]he Tribe’s primary source of income is from oil and gas.”); *Indian Energy Development: Oversight Hearing Before S. Comm. on Indian Affairs*, 110th Cong. 15 (2008) [hereinafter *Indian Energy Hearing 2008*] (testimony of Chairman Carl Venne, Crow Nation) (stating that “most of our governmental revenue is derived from” mineral development); *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Comm. on Indian Affairs*, 108th Cong. 115 (2003) [hereinafter *Tribal Energy Hearing*] (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Reservation) (noting that oil and gas production “is the primary source of revenue for the Tribes”); see also Mireya Navarro, *Navajos Hope to Shift from Coal to Wind and Sun*, N.Y. TIMES, Oct. 25, 2010, at A12, available at http://www.nytimes.com/2010/10/26/science/earth/26navajo.html?_r=1&emc=etal (reporting that coal accounts for more than one third of the Navajo Nation operating budget, and is the largest source of revenue after government grants and taxes).

2. MARJANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT* 74 (1990); U.S. FOREST SERV., *FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS* app. D at D-1 (1997), available at www.fs.fed.us/people/tribal/tribexd.pdf. Other minerals produced on Indian lands have included copper, gypsum, sand and gravel, silica sand, and sulfur. U.S. MINERALS MGMT. SERV., *MINERAL REVENUES 2000: REPORT ON RECEIPTS FROM FEDERAL AND AMERICAN INDIAN LEASES 92-93* (2000), available at <http://www.onrr.gov/stats/pdfdocs/mrr00.pdf>.

3. OFFICE OF NATURAL RESOURCES REVENUE, U.S. DEP’T OF THE INTERIOR, *TOTAL PRODUCING AND NON-PRODUCING LEASES BY CATEGORY AND MINERAL PRODUCTION TYPE*, (Oct. 26, 2011), www.onrr.gov/ONRRWebStats/Home.aspx (showing that the Department of Interior administered 5204 Native American leases, of which 4843 were producing; the producing leases included 4795 oil and gas leases, 7 coal leases, and 56 leases for other minerals, including one geothermal lease).

4. Lynn H. Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights and Culture*, 56 ROCKY MTN. MINERAL L. INST. 5A-1 (2010).

which are generated by oil, gas, and coal production.⁵ All told, Indian lands account for more than ten percent of federal on-shore energy production.⁶ Moreover, the Department of the Interior estimates that 15 million additional acres of energy resources on Indian lands, containing some “5 billion barrels of oil, 37 trillion cubic feet of natural gas, and 53 billion tons of coal that are technically recoverable with current technologies,” lie undeveloped.⁷

Renewable energy resources on Indian lands are similarly abundant.⁸ Several dozen tribes have lands suitable for wind power development,⁹ and a number of other tribes possess geothermal resources¹⁰ and opportunities for solar development.¹¹ Biomass

5. OFFICE OF NATURAL RESOURCES REVENUE, U.S. DEP'T. OF THE INTERIOR, AMERICAN INDIAN REPORTED ROYALTY REVENUES FISCAL YEAR (2011), available at www.onrr.gov/ONRRWebStats/Home.aspx (reporting total royalties of \$542.7 million, including \$144.7 million from gas, \$270.6 million from oil, and \$74.4 million from coal; royalties accounted for 99.5% of all lease revenues, and coal, gas, natural gas liquids, and oil accounted for more than 93% of fiscal year 2011 royalties).

6. *Tribal Energy Hearing*, *supra* note 1, at 93-94 (statement of Theresa Rosier, Counselor to the Asst. Sec. for Indian Affairs, Department of the Interior).

7. *Indian Energy Hearing 2008*, *supra* note 1, at 47 (statement of Dr. Robert W. Middleton, Dir., Office of Indian Energy and Economic Development, Department of the Interior).

8. See ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ENERGY CONSUMPTION AND RENEWABLE ENERGY DEVELOPMENT ON INDIAN LANDS 23-26 (2000), available at [ftp://ftp.eia.doe.gov/pub/pdf/renewables/ilands.pdf](http://ftp.eia.doe.gov/pub/pdf/renewables/ilands.pdf) [hereinafter *Energy Consumption*] (listing and discussing reservations with the highest potential for renewable energy projects). The National Renewable Energy Laboratory has produced a series of maps showing the overlap of tribal lands and the resource potential for solar photovoltaic (PV), concentrated solar power (CSP), wind, biomass and biofuels, and geothermal energy. *Id.* at 13-17. The Argonne National Laboratory has also produced maps showing the overlap of tribal lands and solar potential from PV panels and from concentrating collectors. See ARGONNE NAT'L LAB., SOLAR POTENTIAL FROM PV PANEL, <http://teec.anl.gov/documents/maps/sol114.pdf>; ARGONNE NAT'L LAB., SOLAR POTENTIAL FROM CONCENTRATING COLLECTOR, <http://teec.anl.gov/documents/maps/sol113.pdf>.

9. *Energy Consumption*, *supra* note 8, at 28 (identifying approximately 45 reservations with Class 5 or 6 winds, and 48 more with Class 4 winds); *id.* at 21 (“Areas designated class 4 or greater are suitable for most utility-scale wind turbine applications. . . .”); *Indian Energy Hearing 2008*, *supra* note 1, at 47 (statement of Dr. Robert W. Middleton, Dir., Office of Indian Energy and Econ. Dev., Dep't of the Interior) (identifying 23 million acres on 77 reservations with significant wind power potential). For discussions of tribal wind projects, see Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, 23-SUM. NAT. RESOURCES & ENV'T 25 (2008); Patrick M. Garry, Candice J. Spurlin & Derek A. Nelsen, *Wind Energy in Indian Country: A Study of the Challenges and Opportunities Facing South Dakota Tribes*, 54 S.D. L. REV. 448 (2009).

10. *Energy Consumption*, *supra* note 8, at 29 (identifying 57 reservations with “some potential” for geothermal electricity production, an additional 72 with potential for geothermal direct heat applications, and the remaining with “the potential for geothermal

potential is even more widespread, with the Department of the Interior identifying 118 reservations with “a high potential” of producing biomass.¹²

Renewable energy resources are taking on increasing importance for both Indian tribes and the nation as a whole.¹³ A variety of factors has sparked the current national interest in renewable energy, including energy independence and security, climate change, and increasing energy prices.¹⁴ Indian tribes share these interests, but bear some disproportionate consequences. Tribes have historically benefitted less from the extraction of fossil fuels from tribal lands than their non-Indian lessees and the states.¹⁵ The effects of climate change and other negative impacts of extractive resource industries may hit tribes especially hard, particularly because their cultural and economic well-being is intimately connected to the “place” of the tribe’s homeland.¹⁶ In

heat pump use”).

11. *Id.* at 30 (identifying 17 reservations “with some areas” having the highest level of solar radiation energy (insolation), and 66 reservations with the next highest level). For a discussion of tribal solar development, see Ryan David Drevskracht, *Native Nation Economic Development via the Implementation of Solar Projects: How to Make It Work*, 68 WASH. & LEE L. REV. 27 (2011).

12. *Tribal Development Hearing 2008*, *supra* note 1, at 47 (statement of Dr. Robert W. Middleton, Dir., Office of Indian Energy and Economic Development, Department of the Interior); see also *Energy Consumption*, *supra* note 8, at 29 (noting 118 reservations with 5-40 megawatt levels of biomass resource; reservations with less than 5 megawatt levels “would not be candidates for biomass development”).

13. See *Indian Energy and Energy Efficiency: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 29 (2009) [hereinafter *Indian Energy Hearing 2009*] (statement of Hon. James Roan Gray, Chairman, Indian Country Renewable Energy Consortium Board of Directors) (“It is simply not possible . . . [for the United States] to achieve our renewable energy goals that the President has laid out without the serious development of those resources in Indian Country.”).

14. See, e.g., Ronald H. Rosenberg, *Diversifying America’s Energy Future: The Future of Renewable Wind Power*, 26 VA. ENVTL. L.J. 505, 505-07 (2008); Carolyn Fischer & Louis Preonas, *Combining Policies for Renewable Energy: Is the Whole Less than the Sum of Its Parts?* (Resources for the Future, Discussion Paper No. 10-19, 2010) at 3, available at <http://ssrn.com/abstract=1569634>.

15. See, e.g., Connolly, *supra* note 9, at 25 (noting that in the case of a wind project, “the county receives more revenue from taxing the tribe’s lessee business partners than the tribe receives from lease payments”); Robert Gough, *Tribal Wind Power Development in the Northern Great Plains*, 19-Fall NAT. RESOURCES & ENV’T 57 (2004) (noting that reservations bear the impacts of extractive energy activities while “the resident tribal communities are the limited end-use consumers of relatively higher-priced energy services”).

16. See, e.g., Dana E. Powell & Dáilan J. Long, *Landscapes of Power: Renewable Energy Activism in Diné Bikéyah*, in *INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST* 231 (Sherry L. Smith & Brian Frehner eds., 2010); Daniel Cordalis

addition, the economic value of extractive industries fluctuates dramatically, as indicated by a significant drop in tribal royalties from fossil fuels in fiscal years 2009 and 2010.¹⁷

Despite the central importance of energy production for many tribes, very few engage directly in energy development. Far more commonly, energy tribes partner with, or even depend upon, non-Indian companies for exploration, extraction, and processing. The presence of non-Indian companies, in turn, triggers application of the Nonintercourse Act¹⁸ and the necessity of federal statutory authority for energy development activities.¹⁹

Current statutory authority works reasonably well for the development of traditional extractive mineral resources. Tribes have the opportunity to enter into virtually any type of development deal that suits their needs, although most mineral deals are still subject to approval by the Secretary of the Interior. The statutory scheme, however, is less than ideal for the

& Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22-Wtr. NAT. RESOURCES & ENV'T 45, 46-47 (2008); Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 451-56 (2010); Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 208-37 (2009); Aileo Weinmann, *The New Energy Future in Indian Country*, NAT'L WILDLIFE FED., March 23, 2010, available at <http://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/The-New-Energy-Future-in-Indian-Country.aspx>.

17. Mineral royalties in fiscal year 2010 were \$395.5 million, and were \$389.5 million in fiscal year 2009. In fiscal year 2011, royalties rebounded to \$542.6 million, close to the \$543.2 million in royalties earned in fiscal year 2008. During each of these years, royalties from fossil fuels (coal, oil, gas, and natural gas liquids) comprised between 89 and 97% of all mineral royalties. U.S. OFFICE OF NATURAL RES. REVENUE, *supra* note 5; see also Navarro, *supra* note 1 (reporting a decline of 15 to 20% in Navajo revenues from coal in recent years).

18. 25 U.S.C. § 177 (2006) (originally enacted as Nonintercourse Act of 1834, amending 1 Stat. 137 (1790)) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from an Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

19. See *Jones v. Meehan*, 175 U.S. 1, 8 (1899) (conveyance of Indian title requires "the consent of the United States"); *Coey v. Low*, 77 P. 1077, 1079 (Wash. 1904) (leases and agreements encumbering Indian lands "must be authorized and sanctioned by some act of Congress or treaty regulation"); see also *Lease of Indian Lands for Grazing Purposes*, 18 U.S. Op. Att'y Gen. 235, 237 (1885) (Nonintercourse Act prevents tribes from "imparting any interest or claim" in lands "without the consent of the Government of the United States."). Tribal trust lands—the type of Indian lands at issue in this article—are inalienable and therefore not subject to taxation or other encumbrance without congressional consent. See *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 112-13 (1998).

development of renewable energy resources. The mineral development statutes offer great flexibility, but the uncertainty of whether all energy sources are “minerals” impedes the statutes’ usefulness for renewable energy projects. A variety of other federal laws are available for renewables development, but none applies to all renewable energy sources and all have limits on what role the tribes may take in the development process. The recent Indian Tribal Energy Development and Self-Determination Act²⁰ (ITEDSA) appears to solve the issues posed by the other statutes, but it has so far proven unattractive to energy tribes.

This Article discusses the range of current statutes and the problems attendant on using them for renewable energy development: the definitional issue in using the mineral statutes, the passive role assigned to tribes in the other statutes, and why ITEDSA, designed to resolve these issues, has not worked. Recent congressional initiatives to broaden tribal options are then surveyed and critiqued. The Article concludes with some suggestions to ease the process of tribal renewable energy development and allow tribes to take more active roles in that development.

II. THE ISSUE OF “MINERALS”

For tribes that wish to develop their fossil fuels or other traditional energy resources such as uranium, the existing federal statutory scheme offers fairly limitless possibilities. Tribes can enter into standard leases under the 1938 Indian Mineral Leasing Act (IMLA)²¹ or into virtually any kind of negotiated lease or agreement under the 1982 Indian Mineral Development Act (IMDA).²² The structure of an IMDA development deal is subject to negotiation between the tribe and the non-Indian entity, subject only to the approval of the Secretary of the Interior. Minerals agreements under the IMDA appear to be widely and successfully used.

20. Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-06.

21. 25 U.S.C. §§ 396a-396g. Although IMLA leases are still available to tribes, they were little used within a few years of enactment of the IMDA. *See* AMBLER, *supra* note 2, at 241.

22. 25 U.S.C. § 2102(a) (authorizing tribes to “enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement” for “the exploration for, or extraction, processing, or other development” of their mineral resources).

There is, however, a definitional issue. The IMLA and IMDA apply to *mineral* development. The IMDA specifies that minerals include fossil fuels (oil, natural gas, coal), as well as other traditional energy resources (uranium, geothermal).²³ Those minerals named, however, are not intended to be an exclusive list. The IMDA definition includes “other energy or non-energy mineral resources,” and the regulations for both statutes refer to “any other energy or non-energy mineral.”²⁴ But the potential for mischief lies in the word “mineral.”

There is no single, universally-accepted definition of what a mineral is, although most definitions include some or all of the following characteristics: inorganic, solid, usually crystalline, having a definite chemical composition, and formed as a result of geological processes.²⁵ The International Mineralogical Association defines a mineral as “an element or chemical compound that is normally crystalline and that has been formed as a result of geological processes.”²⁶ Similarly, the Mineralogical Society of America provides that “[a] mineral substance is defined as a naturally occurring, homogeneous solid, inorganically formed, with a well defined chemical composition (or range of compositions), and an ordered atomic arrangement, that has been formed by geological processes, either on earth or in

23. *Id.* (“oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as ‘mineral resources’)”). The IMLA, other than scattered references to oil and gas as well as “other” minerals or mining, does not contain a statutory definition.

24. The regulatory definition of minerals for purposes of leases, 25 C.F.R. § 211.3 (2011), and for minerals agreements, 25 C.F.R. § 225.3, is identical: “Minerals includes both metalliferous and nonmetalliferous minerals; all hydrocarbons, including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to, sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral.” The regulatory definition is more expansive than the statutory definition, including specific non-energy minerals such as sand that the statute encompasses in “other.”

25. See David Barthelmy, *What Is a Mineral?*, WEB MINERAL, http://webmineral.com/Mineral_Definition.shtml (last visited Oct. 21, 2011) (collecting definitions of “mineral”); see also *Many Definitions of Minerals*, KY. GEOLOGICAL SURVEY, www.uky.edu/KGS/rocksmn/definition.htm (last visited Oct. 21, 2011) (noting that “mineral” has earth science, legal, federal, economic, and biological-medical definitions, all of which vary to some extent).

26. Ernest H. Nickel, *The Definition of a Mineral*, 33 CANADIAN MINERALOGIST 689 (1995) (noting that this definition “suffices to include the vast majority of substances that are generally accepted as minerals” and “represents a general consensus” of the IMA Commission on New Minerals and Mineral Names).

extraterrestrial bodies.”²⁷

These definitions of mineral, of course, exclude the most common “minerals” extracted from Indian lands: oil and natural gas. Neither, for example, is a solid or crystalline in structure. Nonetheless, Congress has consistently been explicit that all the fossil fuels are included within the mineral development statutes,²⁸ and a statutory definition trumps a scientific definition for purposes of law. Consequently, the term “mineral” in Indian law is routinely used to include oil and natural gas.²⁹

What, then, of the renewable energy resources—wind, solar, and biomass? They are not crystalline in structure, they have not been formed as a result of geological processes, and the one that is a solid is most definitely not inorganic. Are these energy resources “minerals” within the meaning of the IMDA?

At the time the IMDA was under consideration and drafting, no one was thinking in terms of wind energy, solar power, or biomass. The focus at the time was on traditional energy sources that had routinely been considered minerals under the IMLA: oil and gas, coal, and uranium.³⁰ Many of the traditional energy tribes were chafing against the bounds of the IMLA in light of the new federal policy of tribal self-determination.³¹ As a result, the discussion and testimony surrounding passage of the IMDA focused on freeing the energy tribes to develop their fuel resources in ways that would benefit the tribes to a far greater degree than standard leasing ever did or could. There is thus no express statutory language about renewable energy resources. And

27. See *Frequently Asked Questions*, MINERALOGICAL SOC'Y OF AM., http://www.minsocam.org/msa/collectors_corner/faq/faqmingen.htm (last visited Oct. 21, 2011).

28. 25 U.S.C. § 2102(a) (2006) (IMDA, expressly including oil and gas as mineral resources); *id.* § 396d (IMLA, referring to “any oil, gas, or other mineral lease”); see also Mining and Mineral Policy Act of 1970, as amended, 30 U.S.C. § 21a (2006) (defining “minerals” to include “all minerals and mineral fuels including oil, gas, coal, oil shale and uranium”).

29. This legal expansion of science extends as well to other non-mineral resources that Congress includes within its definitions of “mineral.” Thus, for example, the IMDA expressly includes the renewable energy resource “geothermal” as a mineral. 25 U.S.C. § 2102(a).

30. See AMBLER, *supra* note 2, at 86-87 (discussing the non-lease agreements submitted to Interior in the years just prior to passage of the IMDA).

31. See *Indian Mineral Development: Hearings on S. 1894 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 33-34 (1982) [hereinafter *Indian Mineral Development Hearings*] (statement of Gilbert Harrison, Assoc. Dir. for Energy Dev., Navajo Tribe); H.R. REP. NO. 97-746, at 4 (1982), reprinted in 1982 U.S.C.A.N. 3465, 3466; AMBLER, *supra* note 2, at 87.

although the legislative history and rules of statutory construction provide clues, there is no real clarity.

First, there is essentially no discussion in the legislative history of the IMDA about what a “mineral” is, likely because everyone involved understood that “mineral” meant actual minerals plus fossil fuels. Congress did include a definition of “mineral resources” in the statute itself, a definition that tracks that common understanding: “oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources.”³² From that formulation, it appears certain that Congress intended the IMDA to apply broadly. Both the statutory and regulatory language includes “other energy” in the definition of minerals. Remarks by IMDA sponsors in the Congressional Record focused on the need for “energy” development. Senator Melcher spoke of tribal “energy development,” and he, Representative Udall, and Representative Bereuter all commented on the need for increased development and production of domestic energy to meet national needs.³³

Moreover, reading the IMDA broadly to apply to all energy resources is consistent with the Indian law canons of construction. The interpretive rules for Indian legislation mandate that statutes be construed in favor of the Indians and that ambiguities be resolved in favor of the tribes.³⁴ Construing “other energy” in the IMDA definition of minerals broadly in favor of the tribes means that renewable energy resources such as wind, solar, and biomass would be included. If “other energy” is ambiguous, then the canons would require that “energy” be interpreted to include renewable sources in addition to traditional fuel sources. Reading the IMDA in the light most favorable to the tribes, Congress did not intend to restrict its application to traditional minerals, but to open up development alternatives for tribes.

On the other hand, the actual wording of the IMDA is “other energy or nonenergy mineral resources.” Although this could be parsed as “other energy resources or other nonenergy mineral resources,” that is a far more awkward reading than the assumption that the word “mineral” applies to both energy

32. 25 U.S.C. § 2102(a).

33. 128 CONG. REC. 29,400-01 (1982) (statement of Sen. Melcher); 128 CONG. REC. 21,333 (remarks of Rep. Udall); 128 CONG. REC. 21,334 (statement of Rep. Bereuter).

34. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Neil Jessup Newton et al., eds., 2005).

resources and nonenergy resources. When Congress intended to include non-“minerals” within the reach of the IMDA, it specified what those resources were. Thus, oil, natural gas, and geothermal resources—none of which comes within the usual definitions of a mineral—are expressly included. Given this specificity, the typical rule of statutory construction, that the inclusion of some implies the exclusion of all others,³⁵ would mandate that non-“mineral” resources not included in the statutory definition be excluded.

The Supreme Court has announced, however, that “standard principles of statutory construction do not have their usual force in cases involving Indian law.”³⁶ More specifically, the Court has rejected the use of the inclusion/exclusion principle in Indian law cases. In *Bryan v. Itasca County*, the state of Minnesota argued that Public Law 280,³⁷ providing that the “civil laws of such State” applied in Indian country, granted the state the authority to impose a personal property tax on a mobile home owned by tribal members and located on trust lands.³⁸ The state based its argument on a second provision of Public Law 280, which stated that nothing in that statute authorized the “taxation of real or personal property” held in trust.³⁹ The state thus argued that “civil laws” must include the general authority to tax within Indian country, because otherwise the specific exclusion for taxation of trust property had no meaning.⁴⁰ Under the state’s approach, the state could tax non-trust personal property (such as the mobile home) because Public Law 280 excluded only taxation of trust property. The Court unanimously rejected the state’s approach. Noting that the statute was ambiguous, the Court stated that “we must be guided” by the Indian law canons of construction and resolve the statutory ambiguity in favor of the Indians.⁴¹

As strong as the preference for the Indian law canons of construction may be, however, the Supreme Court has not

35. Or, for those who prefer Latin, *inclusio unius est exclusio alterius*.

36. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985).

37. Public Law 280 granted civil jurisdiction over Indian country to certain states, including Minnesota. 28 U.S.C. § 1360(a) (2006).

38. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 377-78 (1976). The Court ultimately held that Public Law 280’s grant of civil jurisdiction did not include regulatory laws such as taxes. *Id.* at 390.

39. 28 U.S.C. § 1360(b).

40. *Bryan*, 426 U.S. at 378-79.

41. *Id.* at 392.

hesitated to abandon these canons when it suits.⁴² As a result, while the IMDA perhaps *should* be interpreted broadly to apply to energy resources as well as traditional minerals and fossil fuels, an interpretation favoring Indian tribes is by no means guaranteed. Thus, whether the IMDA would apply to non-“mineral” energy resources—that is, renewables other than geothermal—is uncertain. And uncertainty impedes development.⁴³

A good illustration of the problem that uncertainty creates is the situation that led to passage of the IMDA itself. Tribes chafing under the IMLA restrictions in the 1970s began to negotiate non-lease development deals, and between 1975 and 1980, the Secretary of the Interior approved a number of these deals, relying either on the tribe’s authority to contract or on the theory that modern mineral “leases” needed to include more than the standard IMLA lease form.⁴⁴ In essence, Interior began to define “lease” in broad terms. As more and more tribes submitted negotiated agreements, however, Interior became increasingly ambivalent about its role.⁴⁵ An Assistant Secretary for Indian Affairs noted that “the most serious [problem with using the IMLA

42. Perhaps the strangest example is *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). The county leveled its ad valorem property tax on fee lands within the reservation owned by the tribe and its members, and the tribe argued that state taxes on Indian property were not permissible without clear congressional intent. Without mention of the Indian law canons of construction, the Court concluded that the General Allotment Act authorized state taxation of the fee lands, even though the statute expressly allowed taxation only for certain types of fee lands that were not at issue in the case. *Id.* at 258-59. The Court then addressed the issue of whether the state could also impose its excise tax on the sale of Indian-owned fee land, and concluded that the state could not do so. The statute authorized taxation of “land” and, applying the canon of liberal interpretation in favor of the Indians, a tax on the sale of land was not a tax on the land itself, and therefore was not authorized by Congress. *Id.* at 268-70. In regard to the excise tax, the Court stated that “[w]hen we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’” *Id.* at 269. The Court thus declined to cite, much less employ, the canons to determine whether the fee lands were taxable, but found the canons indispensable in determining whether the sale of the same lands would be subject to taxation.

43. See AMBLER, *supra* note 2, at 87 (noting that the uncertainty surrounding non-lease agreements in the years leading up to the IMDA “penalized the companies that were willing to work with tribes” and led some to break off negotiations).

44. See *Indian Mineral Development Hearings*, *supra* note 31, at 4.

45. See H.R. REP. NO. 97-746, at 4-5 (1982), reprinted in 1982 U.S.C.C.A.N. 3465, 3467; Tim Vollmann, *Exploration and Development Agreements on Indian Lands*, 50 ROCKY MTN. MINERAL L. INST. 12-1, 12-13 (2004) (“The question of the continuing validity of these agreements became the driving force behind the enactment of the IMDA in 1982.”).

as authority] is that it authorized development of tribal oil and gas resources only by leasing,” and not by other types of ventures.⁴⁶ He added that the use of a tribal contracting statute⁴⁷ was also “inadequate,” and concluded that “there is a question whether we have adequate authority to approve those nonlease ventures even by utilizing both acts.”⁴⁸ That uncertainty led the Interior Solicitor to question the approval of non-lease agreements in 1980,⁴⁹ throwing the validity of existing approved agreements into doubt. It took passage of the IMDA in 1982 to resolve the issue of tribal authority to use non-lease options for mineral development.

The IMDA was a clear “fix,” and it effectively grandfathered in the existing approved agreements.⁵⁰ The same thing could happen if the Secretary of the Interior were to treat solar power, say, as a mineral under the IMDA. But just as Interior became squeamish about its approach to non-lease arrangements in 1980, so Interior could react squeamishly to treating sunlight as a mineral. If that were to happen, Congress would undoubtedly enact a legislative fix (such as the IMDA for non-leases), and existing agreements would undoubtedly be grandfathered in. But the period of uncertainty between Interior’s doubts and congressional action is a wasted period. It is wasted time for Indian tribes, their non-Indian partners, and domestic energy production. It is much more preferable to have appropriate legislation in place before deals are struck, removing a potential impediment to renewable energy development.

46. *Indian Mineral Development Hearings*, *supra* note 31, at 71 (statement of Kenneth L. Smith, Asst. Sec. for Indian Affairs, Department of the Interior).

47. 25 U.S.C. § 81 (2006). At the time the IMDA was under consideration, § 81 applied to contracts for “services for said Indians relative to their lands.” 25 U.S.C. § 81 (1982) (amended 2000). *See* Act of May 21, 1872, 17 Stat. 136, *amended by* Pub. L. No. 85-770, 72 Stat. 927 (1958). The current version, which authorizes contracts and agreements that encumber Indian lands, subject to secretarial approval if the instrument is for seven years or longer, was enacted in 2000. Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000). For discussion of § 81, see *infra* Part III.A.2.

48. *Indian Mineral Development Hearings*, *supra* note 31, at 71 (statement of Kenneth L. Smith, Asst. Sec. for Indian Affairs, Department of the Interior).

49. *See id.* at 72 (statement of Tim Vollman, Solicitor’s Office, Department of the Interior); *see also* AMBLER, *supra* note 2, at 87.

50. 25 U.S.C. § 2104(a) (treating as valid any existing approved agreement that complied with, or could be brought into compliance with, the purposes of the IMDA).

III. THE RANGE OF STATUTORY OPTIONS FOR RENEWABLES DEVELOPMENT

If the IMDA is not available as a development tool for most renewable energy resources, what then can tribes use? There are a number of statutes not designed specifically for energy development that nonetheless may provide authority for particular types of renewable energy resources. For the most part, however, these statutes force tribes into a passive role regarding energy development, putting tribes back into the position they occupied with respect to mineral development prior to passage of the IMDA. In the same way that the lease-only option under the IMLA proved too confining for tribes in a self-determination era, so too will the constraints of the available statutes discussed here.

A. *Solar and Wind Power*

1. *Indian Long-Term Leasing Act*

Certain types of renewable energy development—solar and wind—involve the surface use of tribal land for the placement of solar panels or wind turbines. The Indian Long-Term Leasing Act, also known as § 415, authorizes tribes to lease the surface of their lands for virtually any “business” use.⁵¹ Lease terms are sufficiently long to justify investment by lessees: the standard § 415 lease term is 25 years with an option to renew for an additional 25 years, and more than 40 named tribes are authorized to enter into 99-year leases.⁵² Section 415 leases have been employed for everything

51. *Id.* § 415 (authorizing land leases “for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary”). Forestry and most agriculture, as described subsequently in the text, have separate statutory authority.

52. *Id.* Leases for ninety-nine years have serious potential problems. See *Discussion Draft of the Indian Energy Promotion and Parity Act of 2010, Hearing Before the S. Comm. on Indian Affairs, 111th Cong. 10* (2010) [hereinafter *Discussion Draft Hearing*] (statement of the National Congress of American Indians) (“[C]ertain 99-year leases can amount to a *de facto* sale of tribal land (for example, non-Indian residential housing). Historic experience has shown that it is very difficult for a tribe to recover its property once a non-Indian residential community is established.”). Despite such misgivings, Indian energy legislation introduced in 2010 would have extended ninety-nine year leasing authority to all tribes, as well as permitting tribes with corporate charters to issue ninety-nine year leases without secretarial approval. See *Indian Energy Parity Act of 2010, S. 3752, 111th Cong. § 301(c), (f)* (2010), discussed *infra* Part V.B. For discussion of leasing authority of tribes with

from billboards⁵³ to such energy-related projects as liquefied natural gas terminals⁵⁴ and oil production facilities.⁵⁵ The construction and operation of solar and wind facilities on tribal lands are thus well within the purview of § 415. New § 415 regulations proposed in late November 2011 would make this explicit.⁵⁶

The primary drawback of § 415 is that it authorizes leases only, and only those leases approved by the Secretary.⁵⁷ Surface leases are negotiated between the parties, and thus may include terms beneficial to the tribal lessor. But nonetheless, tribes are restricted to the passive role of lessor, the same restriction under the IMLA that tribes rebelled against in the modern era.

2. Section 81 Contracts Encumbering Indian Lands

Section 81 provides that an Indian tribe may enter into a contract or agreement that “encumbers Indian lands,”⁵⁸ although it applies only if other statutory authority does not. Thus, § 81 does not apply to mineral leases, minerals agreements, agricultural leases, timber contracts, or surface leases.⁵⁹ Nonetheless, it does

corporate charters, see *infra* Part III.C.

53. *People ex rel. Dep't of Transp. v. Naegele Outdoor Advers. Co.*, 698 P.2d 150, 152 (Cal. 1985).

54. *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 23-24 (1st Cir. 2007).

55. *Oenga v. United States*, 78 Fed. Cl. 427, 428 (2007).

56. Noting that the existing § 415 regulations are fifty years old and “take an antiquated, ‘one-size fits all’ approach,” DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, SIGNIFICANT LEASING REFORM WILL SPUR COMMERCIAL, RESIDENTIAL AND RENEWABLE ENERGY DEVELOPMENT ON INDIAN LANDS (Nov. 28, 2011), *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc015725.pdf>, the Department of the Interior proposed to create new regulatory subparts for residential leases, business leases, and wind energy evaluation leases and wind and solar resource leases. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784 (Nov. 29, 2011). The new regulations for business leases would expressly apply to biomass development. *Id.* at 73,805 (proposed § 162.401(a)(4)). Interior anticipates that the final rule will be published in 2012.

57. A few specifically-named tribes have the authority to grant § 415 leases for fifteen years without an option to renew, without secretarial approval. Excepted from this process, however, is any lease “for the exploitation of any natural resource.” 25 U.S.C. § 415(b) (2006) (specifying Tulalip Tribes, Puyallup Tribe, Swinomish Indian Tribal Community, and Kalispel Tribe, all in Washington State).

58. 25 U.S.C. § 81(b) (“No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”).

59. 25 C.F.R. § 84.004(a)-(b) (2011).

have some application for renewable energy projects.

According to Department of the Interior regulations, a contract or agreement “encumbers Indian lands” if it “attach[es] a claim, lien, charge, right of entry or liability to real property.”⁶⁰ As clarified by the courts, an encumbrance occurs when a contract or agreement “by its terms, provides a third party with a legal interest in the land itself; that is, a right or claim attached to the real property that would interfere with the tribe’s exclusive proprietary control over the land.”⁶¹ By the plain terms of the regulations and the meaning of encumbrance, an easement is thus a contract or agreement that encumbers Indian lands.⁶²

An easement for wind turbines or solar panels is an alternative to a lease of the land itself.⁶³ In some ways, an easement may be preferable, because it permits the tribe as servient estate holder the continued right to use the land for purposes not inconsistent with the easement.⁶⁴ Thus, for example, the tribe could use a wind farm corridor for grazing or agricultural uses once the wind

60.. *Id.* § 84.002.

61. *GasPlus, L.L.C. v. Dep’t of the Interior*, 510 F. Supp. 2d 18, 29 (D.D.C. 2007). The focus is on transferring proprietary control, but not ownership, to a third party. *Id.* at 30 (referencing the legislative history); 25 C.F.R. § 84.002; *see also Business Development on Indian Lands: Hearing on S. 613 and S. 614 Before the S. Comm. on Indian Affairs*, 106th Cong. 44 (1999) [hereinafter *Business Development Hearing*] (testimony of David Tovey, Exec. Dir., Confederated Tribes of the Umatilla Indian Reservation) (urging that § 81 approval be required only “for tribal agreements that involve a contracting party receiving some possessory interest in tribal lands, such as an easement or license”).

62. 25 C.F.R. § 84.002. This is consistent with the well-understood legal meaning of the term “encumbrance.” *See, e.g., GasPlus*, 510 F. Supp. 2d at 28; *see also* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 170 (2001) (holding that an easement grants specific limited rights in land).

63. *See* Alternative Energy and Alternate Usage of Existing Facilities on the Outer Continental Shelf, 73 Fed. Reg. 39,376, 39,407 (July 9, 2008) (noting that both leases and easements are “common arrangement[s]” for wind farms on private lands); Ernest E. Smith & Becky H. Diffen, *Winds of Change: The Creation of Wind Law*, 5 TEX. J. OIL GAS & ENERGY L. 165, 166 (2009-10) (noting “hundreds of thousands of easements, wind leases, and other types of development rights” for wind farms on non-Indian lands). *See generally* Kathleen K. Law, *Wind Power: Developing Real Property for a Wind Project*, 23 PROB. & PROP. 57 (2009) (discussing common provisions of easements for wind farms).

64. New proposed regulations for surface leases would expressly allow for similar uses. The proposed regulations state that a biomass, wind, or solar lease “may provide for the Indian landowner to use, or authorize others to use, the leased premises for other uses” that are compatible and consistent with the energy lease. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,807 (proposed § 162.418) (business leases, including biomass), 73,820 (proposed § 162.544) (wind and solar leases) (Nov. 29, 2011).

turbines were constructed and operational.⁶⁵ In addition, agreements encumbering Indian lands for a term less than seven years do not require secretarial approval,⁶⁶ eliminating a time-consuming and often cumbersome step in Indian lands development. This advantage is offset, however, by the fact that seven years is likely not sufficient time for a wind developer to risk investing in a project on Indian lands. Wind farm easements tend to run for twenty-five to thirty years,⁶⁷ a term which would require secretarial approval.⁶⁸

Nonetheless, easements are potentially more problematic for tribes than leases. An easement is, like a right-of-way, a servitude in land.⁶⁹ Although servitudes do not transfer ownership of the land itself, federal courts have repeatedly found that tribes retain only limited authority over non-tribal members on rights-of-way across Indian lands.

In *Strate v. A-1 Contractors*, a nonmember sued another nonmember in tribal court over an accident that occurred on a state highway through the reservation.⁷⁰ The U.S. Supreme Court held that the tribes “expressly reserved no right to exercise dominion or control over the right-of-way;” they had “retained no gatekeeping right.”⁷¹ As a result, the Court stated, the tribes had given up their inherent right to exclude nonmembers from the

65. See, e.g., Law, *supra* note 63, at 60 (noting that “[m]any wind projects are placed on agricultural land,” but that crop damage is a common occurrence during the construction phase).

66. 25 U.S.C. § 81(b) (2006).

67. See, e.g., Law, *supra* note 63, at 59.

68. See 25 U.S.C. § 81(b), (d); see also 25 C.F.R. § 84.006 (2011) (requiring that if secretarial approval is required, the Secretary will disapprove a contract or agreement that violates federal law or does not make provision regarding tribal sovereign immunity; the Secretary will also consult with the tribe prior to disapproving a contract or agreement).

69. See SINGER, *supra* note 62, at 170-71. Two statutes govern rights-of-way across tribal lands. Under the Indian Right-of-Way Act of 1948, rights-of-way may be granted “for all purposes.” 25 U.S.C. § 323; see also 25 C.F.R. pt. 169. Some of these rights-of-way are limited to fifty-year terms, but most energy-related rights-of-way such as oil and gas pipelines and electric transmission lines may be granted “without limitation as to term of years.” 25 C.F.R. § 169.18. Tribes granting rights-of-way for oil and gas pipelines may choose instead to use a 1904 statute, ch. 505, §§ 1, 2, 33 Stat. 65 (1904) (codified as amended at 25 U.S.C. § 321), the regulations for which limit the right-of-way term to twenty years. 33 Fed. Reg. 19803 (Dec. 27, 1968) (codified at 25 C.F.R. § 169.25(b)); see also *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1059 (9th Cir. 1988) (holding that the general 1948 Act did not repeal the 1904 oil and gas pipeline statute, and thus tribes could choose which statute to use for oil and gas pipelines).

70. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

71. *Id.* at 455-56.

encumbered lands.⁷² By ceding the right to exclude, the tribes had also given up the lesser right to exercise governmental authority over the nonmembers on the highway unless the tribes could demonstrate either nonmember consent to tribal jurisdiction or nonmember impacts on tribal health, safety, economic integrity, or political security.⁷³ In *Strate*, the Court determined that neither consent nor sufficient impacts on the tribe were present, and thus that the tort action could not be heard in tribal court.⁷⁴

Lower federal courts have subsequently extended this approach to a tribe's ability to tax and regulate holders of rights-of-way on Indian lands, spurning tribal attempts to impose property taxes.⁷⁵ These courts have determined that although the non-Indian parties holding the rights-of-way had formed a consent relationship with the tribe, they had consented to taxes only on their activities, not taxes on their property interests.⁷⁶ In addition, the courts have generally rejected the tribes' argument that the ability to tax right-of-way holders is necessary to protect the tribes' governmental interests in health, welfare, or economic security.⁷⁷

72. *Id.* at 456.

73. The requirement that tribes show either nonmember consent or "direct effect on the political integrity, the economic security, or the health and welfare of the tribe" in order to exercise governmental authority over nonmembers traces to *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Although the requirement was designed to apply to nonmembers on fee lands only, *id.*, the Court in *Strate* determined that the state highway was the jurisdictional equivalent of fee land because the tribes retained no property owner's right to exclude the nonmembers. *Strate*, 520 U.S. at 456.

74. *Strate*, 520 U.S. at 456-59. Lower courts have followed suit, holding that tribal courts do not have jurisdiction over tort actions against nonmember defendants for causes of action arising on rights-of-way. *See, e.g.*, *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 2000) ("[T]he Tribe had no reserved power to exclude the Railroad from the reservation, nor to exercise dominion or control over the right-of-way."); *cf. McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (refusing to extend *Strate* to a Bureau of Indian Affairs highway right-of-way, and noting that the tribe retained significant gatekeeping rights in the BIA roadway).

75. *Burlington N. Santa Fe R.R. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767 (9th Cir. 2003) (ad valorem tax on railroad right-of-way); *Big Horn Cnty. Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (ad valorem tax on utility right-of-way).

76. *Burlington N.*, 323 F.3d at 772; *Big Horn*, 219 F.3d at 951. In *Montana*, the Supreme Court had stated that: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The lower courts focused their analysis on a narrow reading of the word "activities," ignoring the broader principle that those who enter into arrangements such as rights-of-way with Indian tribes consent to the exercise of tribal jurisdiction.

77. *Big Horn*, 219 F.3d at 951; *see also Burlington N.*, 323 F.3d at 773-74 (remanding to

This restrictive view of tribal governmental authority over nonmember rights-of-way stands in stark contrast to the approach to tribal governmental authority over nonmember lessees. In *Merrion v. Jicarilla Apache Tribe*, the U.S. Supreme Court affirmed that Indian tribes retain the inherent power to tax, and that the power to tax is not affected by a lease.⁷⁸ The tribe's power to tax nonmembers, the Court held, does not derive solely from its power to exclude them, but rather from its inherent power as a sovereign.⁷⁹ When a tribe enters into a lease, the Court explained, it gives up its landowner's right to exclude the lessee for the lease term, subject to the conditions in the lease, and the right to unilaterally impose new business conditions. The tribe does not, however, give up its right to act as a sovereign unless restrictions on governmental authority are expressly set forth in the lease itself.⁸⁰ In particular, the Court rejected the notion that a tribe must expressly reserve its sovereign powers in a contract in order to preserve them.⁸¹ Thus, the Court held, the tribe retained the governmental authority to impose severance taxes on its oil and gas lessees.

The federal courts have thus taken very different approaches to tribal authority over nonmembers who lease tribal lands and nonmembers who hold rights-of-way across tribal lands. The Court has not, however, ruled on tribal governmental authority over easement holders. If an easement is used as an alternative to a lease—the case with wind farms, for example—then federal courts should find that tribal authority over easement holders mirrors tribal authority over lessees. But if the federal courts' approach to tribal authority over rights-of-way extends to all servitudes, including easements, then Indian tribes considering a § 81 easement for wind turbines might be better advised to enter into a § 415 lease, or at least to carefully draft any easement to ensure that the tribe grants only property rights to the easement holder and expressly retains all governmental authority.

In addition to the potential for restricted tribal authority over an easement holder, an easement under § 81 shares some of the

determine whether railroad's activities had sufficient effects on these tribal governmental interests).

78. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-37 (1982).

79. *Id.* at 141.

80. *Id.* at 144-46.

81. *Id.* at 146, 148.

drawbacks of a lease under § 415, particularly if the easement is for seven years or longer and thus requires secretarial approval. Easements, like surface leases, are subject to negotiation between the parties, but the tribe remains in an essentially passive role in the development of the renewable energy resources. It is the servient estate holder rather than the lessor, and thus may negotiate greater rights to use the land subject to the easement, but its role in the energy development project remains limited.

B. *Biomass Resources*

Biomass consists of certain plant matter and other organic materials that can be converted to energy. The National Renewable Energy Laboratory defines biomass as primarily wood, but also including “food crops, grassy and woody plants, residues from agriculture or forestry, oil-rich algae, and the organic component of municipal and industrial wastes.”⁸² The development of this biomass feedstock—the raw materials of biomass energy production—implicates additional federal statutes.

1. *National Indian Forest Resource Management Act*

One source of biomass feedstock is forest residue.⁸³ Prior to passage of the National Indian Forest Resource Management Act (NIFRMA)⁸⁴ in 1990, the economic potential of Indian forest lands lay in timber, with timber sales governed by a 1910 statute.⁸⁵ The 1990 NIFRMA, however, broadened the approach from timber to “forest products” in a deliberate effort to ensure that tribes received the widest economic return from their forest resources.⁸⁶

82. *Learning About Renewable Energy*, U.S. NAT'L RENEWABLE ENERGY LAB., http://www.nrel.gov/learning/re_biomass.html (last visited Oct. 21, 2011); see also *Guide to Tribal Energy Development: Biomass Energy Resources*, U.S. DEP'T OF ENERGY, <http://www1.eere.energy.gov/tribalenergy/guide/biomass.html> (last visited Oct. 21, 2011) (detailing potential sources of biomass).

83. Forest residue can include “logging and mill residues, and other removal (pre-commercial thinnings, land clearing, timber stand improvements, etc.)” *Energy Consumption*, *supra* note 8, at 21.

84. National Indian Forest Resource Management Act, 25 U.S.C. §§ 3101-20 (2006).

85. *Id.* § 407 (authorizing the Secretary to sell timber on unallotted trust lands).

86. See 25 C.F.R. § 163.3(b)(4) (2011) (noting that one objective of NIFRMA is to ensure “that Indians may receive from their Indian forest land not only stumpage value, but also the benefit of all the labor and profit that such Indian forest land is capable of yielding”).

The term forest products is defined not only as traditional timber and timber products, but also such items as nuts, roots, berries, Christmas trees, and “other marketable material.”⁸⁷ To the extent that forest residue—what remains after timber production—is marketable as biomass feedstock, NIFRMA would apply.

Under NIFRMA, forest products may be sold on the open market with the consent of the Secretary and the tribe.⁸⁸ Any sale of forest products with a stumpage value exceeding \$15,000 must use federally approved contract forms,⁸⁹ and the harvester has no more than five years to complete the contract.⁹⁰ Forest products not subject to sales contracts may be harvested under permits with the consent of the Indian owner and the approval of the Secretary.⁹¹

As with other statutes available for renewable energy development, NIFRMA takes tribes out of an active role in developing biomass energy. The tribe is the seller of the forest products, with no opportunity to enter into joint ventures or other arrangements with non-Indian harvesters.

2. *American Indian Agricultural Resources Management Act*

Another source of biomass feedstock is crop residues or even crops grown specifically for feedstock purposes. Native grasses, for example, may be grown as wildlife habitat and harvested on an appropriate periodic schedule for use in biomass energy production.⁹² While tribes are likely to carry out most native grass planting for feedstock “in-house,” the majority of tribal croplands are leased.⁹³ Thus, if a non-Indian entity undertakes the feedstock

87. 25 U.S.C. § 3103(6); *see also* 25 C.F.R. § 163.1.

88. 25 C.F.R. § 163.14(a). In general, sales must be advertised, although the advertisement may limit sales to tribal members or to Indian forest enterprises. *Id.* § 163.15(a) (2011).

89. *Id.* § 163.19(a) (noting that special forms may also be approved).

90. *Id.* § 163.24 (specifying the maximum time “for harvesting the estimated volume of timber purchased” on a “forest product contract”).

91. *Id.* § 163.26(a). Free use permits may be issued for forest products valued at \$5000 or less, and the forest products may not then be sold: *Id.* § 163.26(b). Paid permits may be issued for values not to exceed \$25,000. *Id.* § 163.26(c). Indians may, with consent of the Indian owner and the Secretary, harvest forest products for personal use without a permit or a contract. *Id.* § 163.27.

92. *See The New Energy Future in Indian Country*, *supra* note 16, at 12.

93. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 167 (2008) (estimating that 70% of Indian croplands are leased to non-Indians).

project, or if the feedstock consists of residues from agricultural leases, then the American Indian Agricultural Resources Management Act (AIARMA)⁹⁴ of 1993 comes into play.

Under AIARMA, an Indian tribe may lease its land for agricultural purposes for terms of up to ten years, or twenty-five years if the longer term is in the best interest of the tribe and the lease requires a substantial investment by the lessee.⁹⁵ Agricultural leases may not, however, be renewed.⁹⁶ As with § 415 surface leases, agricultural leases may be negotiated by the landowner, but are ultimately subject to the approval of the Secretary of the Interior.⁹⁷ In addition, as with § 415 surface leases, AIARMA puts tribes in the position of lessors only, without provision for other types of agreements and arrangements that might better suit modern tribal realities. Moreover, lease terms are relatively short, and without the option of renewal, the time limitation may suppress non-Indian investment.

C. *Indian Reorganization Act*

Under section 17 of the Indian Reorganization Act (IRA) of 1934, any Indian tribe may petition the Secretary of the Interior for a corporate charter.⁹⁸ A section 17 charter empowers the tribal corporation to “manage, operate, and dispose of property” of all kinds, as well as grants “such further powers as may be incidental to the conduct of corporate business, not inconsistent with law.” A corporate charter may not, however, authorize the corporation to sell or mortgage trust property within a reservation, or to lease property for a term greater than twenty-five years.

Although it is difficult to determine how many tribes hold

94. 25 U.S.C. §§ 3701-45 (2006).

95. *Id.* § 3715(a)(1). Agricultural leases and permits must comply with the provisions of agricultural resource management plans developed by the tribe or by the Bureau of Indian Affairs in conjunction with the tribe. *Id.* § 3711; 25 C.F.R. § 162.201 (2011); *see also id.* § 162.231(b).

96. 25 C.F.R. § 162.229(d).

97. *Id.* §§ 162.206-207. Agricultural permits for tribal lands operate under the same regulations. *Id.* § 162.210(c). Proposed regulatory changes to the surface leasing provisions would make only minor, technical changes to the agricultural leasing regulations. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,795 (Nov. 29, 2011).

98. 25 C.F.R. § 477. The process of obtaining a corporate charter can be “cumbersome.” COHEN’S HANDBOOK, *supra* note 34, at § 21.02[1][b] (describing the process); *see also* 25 C.F.R. pt. 81.

section 17 corporate charters,⁹⁹ those that do may use their leasing authority for renewable energy projects.¹⁰⁰ A lease granted under section 17 has advantages over leases under other statutes. The approval of the Secretary of the Interior is not required, and the lease term is long enough to attract non-Indian investment. However, a lease granted by an IRA corporation is still a lease, leaving the tribe in the essentially passive role of lessor.

Absent language in a specific charter, it is not clear whether a section 17 corporation has the authority to encumber Indian lands by other than a lease: whether, for example, a section 17 corporation could grant an easement for the development of a wind farm. On the one hand, the IRA authorizes such corporations to “manage, operate, and dispose of” tribal interests in property, which would appear to grant broader authority than just the right to issue leases. On the other hand, the only authorized encumbrances in section 17 are leases; this statutory specificity could be interpreted as restricting the corporations to grant only those instruments.¹⁰¹ In any event, a section 17 corporation’s ability to grant an easement is uncertain and, as noted earlier, uncertainty impedes development.

D. *Problems with the Existing Statutory Options*

The non-minerals statutes that might be used for renewable energy development share a pair of significant disadvantages. First, like the minerals statutes, they generally require the approval of the Secretary of the Interior for each development deal. And

99. According to one source, at least 157 Indian tribes, including 66 in Alaska, have corporate charters, although the information seems limited largely to those charters issued in the 1930s and 1940s. See *Indian Reorganization Act Era Constitutions and Charters*, UNIV. OF OKLA. LAW CTR., <http://thorpe.ou.edu/IRA.html> (last visited Oct. 21, 2011).

100. Section 17 corporations may use their leasing authority for traditional energy sources as well. The Indian Mineral Leasing Act preserves the leasing rights of section 17 corporations, 25 U.S.C. § 396b (2006), and IMLA leasing rights remain unaffected by the Indian Mineral Development Act. *Id.* § 2105. Corporate leasing authority was little used for mining, however. Prior to 1990, the maximum lease term a section 17 corporation could authorize was only ten years; by the time section 17 was amended to allow for twenty-five year leases, Pub. L. No. 101-301, § 3(c), 104 Stat. 207 (1990), mineral tribes were generally using IMDA minerals agreements rather than leases. See *To Permit Indian Tribes to Enter into Certain Agreements for the Disposition of Tribal Mineral Resources: Hearings on S. 1894 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 62–63 (1982) (statement of Joe McKay, Blackfeet Tribe of Mont.).

101. Even though the statutory principle of interpretation that items not listed are excluded has little force in Indian law, see *supra* text accompanying notes 35-41, a grant of the right to issue one specific type of encumbrance is not necessarily ambiguous.

second, they restrict Indian tribes to a passive role in the development of tribal renewable resources.

Almost all of the nonminerals statutes require the approval of the Secretary of the Interior for the specific lease, agreement, or sale.¹⁰² Just as the Secretary must approve all IMLA leases and all IMDA agreements for traditional mineral development,¹⁰³ the Secretary must also approve all § 415 leases,¹⁰⁴ all easements lasting seven years or longer,¹⁰⁵ all open-market sales of forest products,¹⁰⁶ and all agricultural leases.¹⁰⁷

This instrument-by-instrument approval process introduces both delay and potential federal override of tribal decisions. First, the process itself is time-consuming. Federal approval may take years,¹⁰⁸ potentially inflating the costs of a project as well as increasing the likelihood that non-Indian partners and investors will look elsewhere.¹⁰⁹ Second, in exercising the approval power,

102. The exceptions are short-term easements granted under 25 U.S.C. § 81 and leases granted by section 17 tribal corporations.

103. 25 U.S.C. § 396a (IMLA leases); *id.* § 2102(a) (IMDA minerals agreements).

104. *Id.* § 415(a).

105. *Id.* § 81(b).

106. 25 C.F.R. § 163.14 (2011).

107. 25 U.S.C. § 3715(a) (2006).

108. *See, e.g., Tribal Development Hearing, supra* note 1, at 8 (statement of Tex G. Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation) (noting the Department's "49-step process" for approval of tribal oil and gas leases that "can take as long as two (2) years to complete"); *Tribal Development Hearing, supra* note 1, at 8 (written testimony of Marcus D. Well, Jr., Chairman, Three Affiliated Tribes of the Fort Berthold Reservation) (noting that secretarial approval of the tribe's IMDA agreements took "over three years"); *id.* at 18 (testimony of Carl Venne, Chairman, Crow Nation) (noting "an extremely slow BIA approval process"). Proposed regulations for surface leases would address this problem in part by providing that Interior has sixty days to approve or disapprove a lease, or return it for revision, or request additional time. If Interior requests additional review time, it must identify its concerns and offer the opportunity to respond. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,809 (proposed 25 C.F.R. § 162.439(b)) (business leases, including biomass), 73,823 (proposed 25 C.F.R. § 162.564(b)) (wind and solar leases) (Nov. 29, 2011). If Interior fails to meet the deadlines, the parties may appeal under the provisions of 25 C.F.R. pt. 2.

109. *See, e.g., Discussion Draft Hearing, supra* note 52, at 39 (testimony of Clipper Windpower) (noting that the lack of clarity in leasing Indian lands makes "it more attractive to invest precious capital" outside Indian country); *Indian Energy Hearing, supra* note 13, at 32 (prepared statement of Hon. James Roan Gray, Chairman, Indian Country Renewable Energy Consortium Board of Directors)

(Investors, developers and Tribes who seek to invest capital on renewable projects are finding that the lack of clarity with respect to trust and Indian land lease reviews and permitting, and the often severe delays and extraordinary and unpredictable length of time involved in such federal reviews and the federal

the Secretary is generally obligated to determine whether the proposed lease, agreement, or sale is “in the best interest of” the Indian tribe.¹¹⁰ The determination of best interest involves an exercise of the trust responsibility on the one hand and federal paternalism on the other. While the approval process may have saved more than one tribe from an improvident deal,¹¹¹ it also allows the federal government to override a tribe’s determination of tribal needs and priorities. In the current era of tribal self-determination and increased tribal sophistication in negotiating with energy companies, federal disapproval of proposed energy deals may be rare,¹¹² but the potential nonetheless exists for the federal government to reject a deal that a tribe has chosen to undertake. Thus, even where the Secretary is obligated to defer to tribal choices, that deference is tempered by the federal oversight responsibility.¹¹³

The second major disadvantage with the approaches discussed in this Section is that none allows Indian tribes to take on the active role in development that is authorized in IMDA minerals agreements. As noted earlier, tribes using the IMDA for mineral

issuance of permits, serve as a great disincentive to capital deployment.”);

Business Development Hearing, *supra* note 61, at 43 (testimony of David Tovey, Exec. Dir., Confederated Tribes of the Umatilla Indian Reservation) (“In many commercial settings, time is of the essence and a prolonged period of federal agency review of documents can increase transaction costs or even render a project infeasible.”).

110. *See, e.g.*, 25 C.F.R. § 162.107(a) (2011) (surface leases); *id.* § 162.214(a) (agricultural leases); *see also* 25 U.S.C. § 2103(b) (IMDA minerals agreements); *cf.* 25 C.F.R. § 84.006(a) (stating that the Secretary will disapprove a § 81 agreement only if it violates federal law or fails to provide for remedies upon breach or waive tribal sovereign immunity).

111. *See, e.g.*, *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891 (10th Cir. 1991) (noting that at request of tribe, Secretary rescinded prior approval of lease based on environmental concerns discovered during mandated environmental review period); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457 (9th Cir. 1986) (noting that while negotiated mineral agreement was pending before Secretary, tribal council rescinded its approval after consultation with Bureau of Indian Affairs).

112. *See, e.g.*, *Business Development Hearing*, *supra* note 61, at 31 (statement of Michael J. Anderson, Dep. Assist. Sec’y of Indian Affairs, Department of the Interior) (“We do not believe that it is appropriate for the BIA to be second guessing the decisions of tribes and their consultants over business decisions made by the tribes.”).

113. *See, e.g.*, 25 C.F.R. § 162.107(a) (agricultural and other surface leases) (“In reviewing a negotiated lease for approval, we will defer to the landowners’ determination that the lease is in their best interest, *to the maximum extent possible.*”) (emphasis added). Proposed regulatory changes for surface leasing preserve this language. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,809 (proposed 25 C.F.R. § 162.439(a)(5)) (business leases, including biomass), 73,822-23 (proposed 25 C.F.R. § 162.564(a)(5)) (wind and solar leases) (Nov. 29, 2011).

development may enter into negotiated leases or “any joint venture, operating, production sharing, service, managerial. . . or other agreement” with a non-Indian company.¹¹⁴ Tribes may choose any role that best suits their needs, from the relatively passive lessor through the partnership of a joint venture to a service contract in which the tribe merely hires a company to perform the mining activities.¹¹⁵ Moreover, tribes are not confined to the types of agreements listed in the IMDA,¹¹⁶ and many minerals agreements have been hybrid arrangements.¹¹⁷

By contrast, as noted throughout the discussion above, none of the nonminerals statutes envisions an active tribal role in development. Tribes may either bypass the statutes altogether and develop their renewable energy resources themselves, or serve as lessors, servient estate holders, or sellers.¹¹⁸ Unlike the IMDA, none of these statutes provides for the vast middle ground of tribal partnerships with non-Indian energy companies. And that vast middle ground is crucial. Tribes with some ownership component in energy projects not only retain a more significant say in the project itself, but may realize greater revenues, increased professional opportunities for tribal members, and the ability to “create a management team with a long-term stake in the community.”¹¹⁹

114. 25 U.S.C. § 2102(a) (2006).

115. For more detailed descriptions of minerals agreement options, see AMBLER, *supra* note 2, at 241-43; Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 586-87 (1994).

116. See 25 C.F.R. § 225.21(b) (“No particular form of minerals agreement is prescribed.”).

117. See AMBLER, *supra* note 2, at 242.

118. See *Tribal Development Hearing*, *supra* note 1, at 54 (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.) (noting that the role of lessor is “the relationship that offers the lowest value for the tribal community and represents, sadly, a repeat of the historical method of resource removal and exploitation that tribes have fought so hard to overcome.”). Proposed regulatory changes for surface leasing would offer some expanded possibilities to tribal lessors. Leases for biomass, wind, and solar purposes would specify ownership of improvements, and could provide that improvements be conveyed to the tribe during the lease term. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,806 (proposed 25 C.F.R. § 162.415(a)) (business leases, including biomass), 73,822-23 (proposed 25 C.F.R. § 162.541(a)) (wind and solar leases) (Nov. 29, 2011). In addition, with Interior’s approval, leases may provide for alternative forms of compensation such as in-kind consideration, and for varying types of compensation at different stages of the lease. *Id.* at 73,808 (proposed 25 C.F.R. § 162.426(a)) (biomass), 73,821 (proposed 25 C.F.R. § 162.552(a)) (wind and solar) .

119. See, e.g., Connolly, *supra* note 9, at 26 (noting that for reasons such as these,

Tribes that want a more active role in renewable energy development must use more creative means. One example is Koda Energy, a limited liability company formed under Delaware law between the Shakopee Mdewakanton Sioux Community as majority partner and Rahr Malting, a non-Indian company.¹²⁰ At present, Koda Energy operates a heat and power plant that burns biomass, located a few miles from the Shakopee Mdewakanton Reservation. But if Koda Energy were, for example, to lease tribal lands for wind farm purposes, then the tribe would act not only as lessor, but also as developer through its stake in the energy company. While an arrangement like this puts tribes in a more active role, it does so indirectly and with some potential drawbacks. As a state corporation engaged in off-reservation activities, Koda Energy is subject to state law and state courts. Even if it were acting on tribal lands, it might still be subject to state law and might not enjoy tax advantages available to tribes entering into direct agreements with energy partners.¹²¹ Clear statutory authority for

"[t]he Campo tribe seeks an ownership stake in all projects on the reservation as a matter of policy").

120. See *Koda Energy Fact Sheet*, SHAKOPEE MDEWAKANTAON SIOUX CMTY., www.shakopeedakota.org/newsroom/fact-sheets/koda-energy-fact-sheet (last visited Oct. 22, 2011); DIV. OF CORP., STATE OF DEL., <https://delecorp.delaware.gov/tin/controller> (providing information of Koda Energy LLC's status).

121. Although states may be able to impose taxes on non-Indian development companies for their on-reservation activities, see, for example, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), Indian tribes acting on tribal lands are immune from state taxation without express congressional consent, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768 (1985). Thus, the tribal share of an on-reservation joint energy development project may be free from state taxes, even though the non-Indian partner's share may be taxable. See Lynn H. Slade, *Indian Tribes—Business Partners and Market Participants: Strategies for Effective Tribal/Industry Partnership*, in NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS 3B, 3B-35 (Rocky Mt. Mineral L. Inst. 2011); Royster, *supra* note 115, at 592-94. Courts are split on whether states can tax and otherwise exercise authority over state corporations in which an Indian tribe or tribal members are partners. Some courts treat a majority-Indian-owned state corporation as an Indian entity. See, e.g., *Pourier v. Dep't of Revenue*, 658 N.W. 2d 395 (S.D. 2003) (barring state tax on the importation of motor fuels for a state corporation with tribal member as sole shareholder); *E. Navajo Indus., Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App. 1976) (barring state gross receipts taxes for a state corporation fifty-one percent owned by tribal members). Other courts, however, refuse to find that the legal fiction of the corporation is a member of the tribe or tribal entity. See, e.g., *Baraga Prod., Inc. v. Comm'r of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997) (holding that a state corporation with a tribal member as the sole shareholder is subject to state single business tax); *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983) (holding that a state corporation fifty-one percent owned by a tribe is subject to the jurisdiction of state court); see also *Confederated Tribes of the Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, No. C08-5562BHS, 2010 WL 1406524 (W.D. Wash. Apr. 2, 2010) (noting that the tribe

tribes to enter into non-lease arrangements for renewable energy resources would allow tribes a more direct route to participate in renewable energy development.

IV. ITEDSA: THE SOLUTION THAT ISN'T

Perhaps the solution is one nice neat statutory package that would authorize a tribe to develop any or all of its energy resources—without regard to whether those resources constitute “minerals” or not—using whatever type of development deal the tribe believes is best. And one exists. Under the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) of 2005,¹²² tribes may enter into leases or agreements of any kind for the development of any energy resource. ITEDSA solves many of the problems noted here with the scattershot statutory approach.

First, it unambiguously applies to all energy resources. Although the statute does not contain a definition of energy resources, the implementing regulations define energy resources as “both renewable and nonrenewable energy sources, including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrological resources.”¹²³ There is simply no question, as there is with the minerals statutes, that renewable energy sources are covered along with traditional energy minerals.

Second, ITEDSA normalizes the lease and agreement term. With the exception of oil and gas leases, which may be entered into for the standard ten years and so long thereafter as the oil or gas is produced in paying quantities,¹²⁴ all leases and agreements run for a maximum of thirty years, with an option to renew at the discretion of the tribe.¹²⁵ Having a single term applicable to all energy development eliminates the confusion of twenty-five years

withdrew the claim that a company that was fifty-one percent owned by the tribe was a tribal entity for purposes of state personal property tax).

122. Indian Tribal Energy Development and Self-Determination Act, 25 U.S.C. §§ 3501-06 (2006); *see also* 25 C.F.R. pt. 224 (2011).

123. 25 C.F.R. § 224.30. The ITEDSA definition, however, includes *only* energy resources, and excludes non-energy minerals such as sand and gravel. I have argued elsewhere that the ITEDSA definition should be amended to include non-energy minerals. *See* Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1082-83 (2008).

124. The 1938 IMLA applied this term to all mineral leases of tribal land. 25 U.S.C. § 396(a).

125. *Id.* §§ 3504(a)(2)(B), 3504(c).

for surface leases, ten years for agricultural leases, and five years to accomplish forest products harvesting. Moreover, the thirty-year term is sufficiently long, especially with a thirty-year renewal option, to justify the necessary investments by the non-Indian parties.

Third, ITEDSA adopts the best innovation of the 1982 IMDA: it opens up the tribal role beyond that of passive lessor or seller. Tribes are authorized to enter into leases or business agreements, without limitation on the kind or structure, “for the purpose of energy resource development on tribal land.”¹²⁶ Business agreements are broadly defined in the regulations as “[a]ny permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land,” and “[a]ny other business agreement entered into or subject to administration under a TERA [tribal energy resource agreement].”¹²⁷ A tribe would thus be free, for example, to enter into a joint operating agreement for the construction and operation of solar collectors, something that is unavailable, or at best uncertain, under current statutory authority. The IMDA allows joint ventures, but its applicability to renewable energy resources is questionable: § 415 allows the placement of solar panels and collectors on tribal land, but it is restricted to leases only. ITEDSA eliminates the problems inherent in using these statutes for renewable energy production by authorizing non-lease arrangements for alternative energy production.

Fourth, ITEDSA goes a leap beyond most current statutes, and eliminates the cumbersome step of secretarial approval for every lease and business agreement. Under ITEDSA, tribes may enter into these instruments on their own authorization, without involving the Secretary of the Interior.¹²⁸ This provision eliminates one of the drawbacks of the existing development statutes—mineral, surface, forest, and agricultural. As discussed earlier, those statutes generally require the approval of the Secretary of the Interior for each lease, agreement, or sale, with its attendant time delays and the possibility that the Secretary could deny development desired by the tribe.

ITEDSA thus presents a solution to the problems with other

126. 25 U.S.C. § 3504(a)(1).

127. 25 C.F.R. § 224.30 (2011).

128. 25 U.S.C. § 3504(a).

development statutes discussed in Parts II and III. So what is the drawback? The drawback to ITEDSA is that an Indian tribe, to enter into energy leases and agreements without specific secretarial approval, must first enter into a tribal energy resource agreement (TERA) with the Secretary of the Interior.¹²⁹ The development of a TERA requires a tribe to meet a number of statutory criteria, develop an extensive tribal environmental review process for each energy development project, and demonstrate to the Secretary that the tribe has “sufficient capacity to regulate the development” of its energy resources.¹³⁰ At present, only a handful of tribes even potentially meets the last requirement. Although several tribes have expressed interest in developing a TERA,¹³¹ by mid-2011 no tribe had submitted a TERA application.¹³²

This signifies that ITEDSA, designed as a solution, in fact is not one for the vast majority of tribes with energy resources. The front-end costs of time, money, and staffing to develop a TERA and shepherd it through the approval process are substantial, if not prohibitive.¹³³ The back-end costs of providing an environmental review process and addressing public input into tribal decisions and compliance are similarly substantial. These costs mean that ITEDSA may ultimately be useful to only a small cadre of tribes with considerable energy resources to develop.¹³⁴ For a tribe

129. *Id.* § 3504(a).

130. *Id.* § 3504(e)(2); *see also* 25 C.F.R. § 224.53(f). The TERA process is subject to considerable critique: it covers only energy resources, does not adequately address tribal financial and technical concerns, mandates significant public input into tribal decision-making both through the required environmental review process and in requiring public notice and comment on TERA applications, authorizes “interested party” challenges to tribal compliance with TERAs, and limits federal trust responsibilities to tribes. *See* Royster, *supra* note 123, at 1080-81; *see also* Kathleen R. Unger, Note, *Change Is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L.A. L. REV. 329, 356-57 (2009) (critiquing the “inherently Federal functions” exception to activities that tribes may regulate under TERAs).

131. *See Indian Energy Hearing, supra* note 1, at 45 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior) (noting that “[s]everal tribes” had already expressed interest in pursuing a TERA, and that the Department of the Interior had convened a national meeting with interested tribes).

132. *See* 157 CONG. REC. S6463 (daily ed. Oct. 12, 2011) (statement of Sen. Barrasso); *see also Discussion Draft Hearing, supra* note 52, at 19-20 (statement of Hon. Matthew J. Box, Chairman, Southern Ute Indian Tribe) (noting that although the tribe was a “vigorous supporter” of ITEDSA, neither it nor any other tribe has entered into a TERA because of the difficulties and uncertainties involved).

133. *See* Royster, *supra* note 123, at 1081-82 (detailing the TERA process).

134. *See id.* at 1101 (“The TERA approach under ITEDSA is not the best approach

seeking to place a few solar collectors on tribal land or harvest forest residues as biomass, however, the TERA process may be more of a barrier than an opportunity.¹³⁵

V. SUBSEQUENT LEGISLATIVE INITIATIVES

Since the enactment of ITEDSA in 2005, Congress has considered a number of measures that would impact tribal development of renewable energy resources. Following a Senate Committee on Indian Affairs hearing on energy development in 2008,¹³⁶ the Committee issued an Indian Energy Concept Paper which identified “outdated laws and cumbersome regulations” as one of the primary barriers to tribal energy development.¹³⁷ The Committee held a follow-up hearing in 2009,¹³⁸ and from that emerged the proposed Indian Energy Parity Act (IEPA) of 2010,¹³⁹ which contained amendments to the TERA process. The IEPA was referred to the Committee on Indian Affairs, which took no action on the bill before the end of the session.¹⁴⁰ In October 2011, Senator Barrasso introduced the Indian Tribal Energy Development and Self-Determination Act Amendments of 2011.¹⁴¹ In addition, the proposed HEARTH Act, which would amend the surface leasing process to include a TERA-like process, was introduced in 2010 and referred to the Senate Committee on

for all mineral-owning tribes, but it will be the best approach for some.”).

135. *Cf.* Unger, *supra* note 130, at 361-62 (arguing that wind power presents the best case for use of TERAs, largely because wind power has fewer environmental impacts and thus raises fewer concerns about tribal regulatory authority and the federal trust responsibility).

136. *Indian Energy Hearing, supra* note 1.

137. *See* Press Release, Dorgan and Barrasso Release Concept Paper on Indian Energy and Energy Efficiency (Sept. 10, 2009), *available at* <http://indian.senate.gov/news/pressreleases/2009-09-10.cfm> (copy of Concept Paper on file with author). The other two significant barriers identified by the Concept Paper were lack of access to the transmission grid and difficulty obtaining financing and investment.

138. *Indian Energy Hearing, supra* note 13.

139. S. 3752, 111th Cong. (2010). *See generally* Kelly de la Torre & Robert S. Thompson III, *The Indian Energy Promotion and Parity Act of 2010: Opportunities for Renewable Energy Projects in Indian Country*, in NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS 8-1 (Rocky Mtn. Mineral L. Inst. 2011).

140. A hearing was held on the IEPA discussion draft in April 2010 before the bill was introduced in August. *See Discussion Draft Hearing, supra* note 52.

141. S. 1684, 112th Cong. (2011). The TERA amendments are “intended to facilitate the use of that section—to make the process easier for Indian tribes to follow and more predictable—b[y] clearing away some of the red tape and other impediments.” 157 CONG. REC. S6463 (daily ed. Oct. 12, 2011) (statement of Sen. Barrasso). The bill was referred to the Senate Committee on Indian Affairs.

Indian Affairs.¹⁴² Although the Committee approved the bill, the Senate did not act on it before the end of session.¹⁴³ The HEARTH Act was then reintroduced in 2011.¹⁴⁴

These congressional initiatives demonstrate that Congress is aware of some of the major shortcomings of the current Indian energy legislation.¹⁴⁵ Nonetheless, the proposals to streamline the TERA process and to provide a TERA-like alternative for surface leases, while welcome measures, are ultimately flawed. Despite easing the burden of seeking a TERA, the proposed energy bills might not offer enough relief to persuade many tribes to submit TERA applications. And the HEARTH Act proposals not only replicate many of the TERA-process drawbacks, but continue to restrict tribes to leasing their lands, and raise questions about their applicability to renewable energy development.

A. *Proposed Surface Leasing Amendments*

The HEARTH Act would amend § 415¹⁴⁶ to authorize tribes to enter into surface leases without secretarial approval if the tribe has surface leasing regulations approved by the Secretary.¹⁴⁷ At the urging of the National Congress of American Indians,¹⁴⁸ the Indian Energy Parity Act bill included a virtually identical provision.¹⁴⁹

At present, § 415 authorizes only a few named tribes to bypass the process of obtaining secretarial approval of individual leases.¹⁵⁰

142. S. 3235, 111th Cong. (2010). HEARTH is the acronym for Helping Expedite and Advance Responsible Tribal Homeownership, although the bills go well beyond home ownership promotion.

143. See 157 CONG. REC. S2048, S2051 (daily ed. Mar. 31, 2011) (statement of Sen. Barrasso).

144. S. 703, 112th Cong. (2011); H.R. 205, 112th Cong. (2011). The bills were referred to the appropriate committees in each house.

145. Senator John Barrasso (R-Wyo.) and former Senator Byron Dorgan (D-N.D.) deserve special mention. Senator Barrasso, elected to the Senate in 2008, is the sponsor of the HEARTH Act of 2011 and one of the sponsors of the ITEDSA Amendments of 2011. The HEARTH Act of 2010 and the Indian Energy Parity Act bill of 2010 (in part) were sponsored by Senator Dorgan, who retired from the Senate in 2010.

146. Indian Long-Term Leasing Act, 25 U.S.C. § 415 (2006). See *supra* Part III.A.1.

147. S. 703, 112th Cong. § 2 (2011); H.R. 205, 112th Cong. § 2 (2011).

148. See *Discussion Draft Hearing*, *supra* note 52, at 11 (testimony of the National Congress of American Indians) (urging that IEPA include provisions similar to the HEARTH Act).

149. S. 3752, 111th Cong. § 301(d) (2010).

150. 25 U.S.C. § 415(d)-(e).

Four Washington State tribes may enter into nonrenewable leases if the lease is executed under tribal regulations approved by the Secretary.¹⁵¹ The Navajo Nation may develop tribal regulations that are consistent with federal regulations and provide for an environmental review process, and submit those regulations to the Secretary for approval. Once the Secretary approves the tribal regulations, the Nation may enter into most business or agricultural leases for twenty-five years, plus an option to renew for up to two additional terms, without secretarial approval of the specific lease.¹⁵² The proposed HEARTH Act would extend the Navajo authority to all Indian tribes.¹⁵³

In essence, the current Navajo Leasing Act and the proposed HEARTH Act replicate for surface leases the provisions of a TERA for energy leases and agreements.¹⁵⁴ Like the TERA provision of ITEDSA, the proposed HEARTH Act is intended to promote tribal self-determination and control over tribal lands.¹⁵⁵ Like the TERA provision, the proposed HEARTH Act would authorize a sufficiently long lease term, especially with the options to renew, to encourage both tribal and non-Indian investment. Like the TERA provision, the proposed HEARTH Act would remove the delay and other frustrations attendant on secretarial approval of each specific instrument authorized by the tribe. But also like the TERA provision, the proposed HEARTH Act requires any interested tribe to engage in a lengthy and costly process of developing approvable regulations, and to agree to undertake lengthy and costly environmental reviews.¹⁵⁶

In addition, the HEARTH Act as drafted, as well as the existing

151. *Id.* § 415(b) (Tulalip Tribes, Puyallup Tribe, Swinomish Indian Tribal Community, and Kalispel Tribe). The lease terms may be either thirty years or seventy-five years; it appears from the statutory language that the tribal regulations authorizing these leases must be specific to one lease term or the other.

152. *Id.* § 415(e)(1), (3). The Nation may also enter into seventy-five year leases for “public, religious, educational, recreational, or residential purposes” on the same basis.

153. S. 703, 112th Cong. § 2 (2011); H.R. 205, 112th Cong. § 2 (2011).

154. *See supra* Part IV.

155. *See* 157 CONG. REC. S2048, S2051 (daily ed. Mar. 31, 2011) (statement of Sen. John Barrasso); *The Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011, Hearing on S. 703 Before S. Comm. on Indian Affairs*, 112th Cong. (2011) 9 [hereinafter *HEARTH Act Hearing*] (statement of Donald “Del” Laverdure, Principal Dep. Assist. Sec. for Indian Affairs, Department of the Interior); *id.* at 57 (statement of the National Congress of American Indians).

156. The Navajo Nation stated that it took “several years to develop” the required tribal regulations under its § 415 authority. *Tribal Energy Hearing, supra* note 1, at 109 (Navajo Nation Response to Questions on S. 424 and S. 522).

Navajo Leasing Act, contains a provision with the potential to render the new process useless for renewable energy development. Although the Act authorizes twenty-five-year surface leases without secretarial approval, it specifically excepts “a lease for the exploration, development, or extraction of any mineral resources.”¹⁵⁷ Neither the proposed legislation nor the Navajo Leasing Act defines “mineral resources.” It is likely that any eventual regulations would define the term, and that definition is likely to parallel the definition of minerals for the IMLA and IMDA: that is, traditional minerals, fossil fuels, uranium, geothermal, and “any other energy or non-energy mineral.”¹⁵⁸ And that leads back to the problem discussed in Part II of whether renewable energy sources such as wind, solar, and biomass are considered minerals for purposes of federal statutes.

It is doubtful that the HEARTH Act sponsors intended to exclude renewable energy projects such as wind farms from the new process. Senator Barrasso, in his comments introducing the legislation, stated that the bill would streamline the leasing process and reduce delays for tribes pursuing “economic development opportunities, providing housing and *developing natural resources* on Indian lands.”¹⁵⁹ The Department of the Interior praised the bill for its role “in promoting homeownership, economic development, and *renewable energy development* by restoring tribal authority over tribal lands.”¹⁶⁰ Moreover, the same § 415 amendments were proposed as part of the IEPA, a bill specifically focused on energy development.¹⁶¹ It thus appears that the bill sponsors intended to except only leases for the extractive minerals (including exploration and development activities), not “any” mineral resources. In all likelihood, the sponsors were not considering that “mineral resources” might include non-extractive renewable energy resources. Incorporating a definition of mineral

157. S. 703, 112th Cong. § 2(b) (2011); H.R. 205, 112th Cong. § 2(h)(1) (2011); *see also* 25 U.S.C. § 415(e)(1) (2006) (Navajo Leasing Act).

158. *See* 25 U.S.C. § 2102(a) (IMDA); 25 C.F.R. § 211.3 (2011) (IMLA regulations); *id.* § 225.3 (IMDA regulations). This would also likely serve as a default definition pending regulations.

159. 157 CONG. REC. S2048, S2051 (daily ed. Mar. 31, 2011) (statement of Sen. John Barrasso) (emphasis added).

160. *HEARTH Act Hearing*, *supra* note 155, at 9 (statement of Donald “Del” Laverdure, Principal Dep. Assist. Sec’y for Indian Affairs, Department of the Interior) (emphasis added).

161. S. 3752, 111th Cong. § 301(d) (2010).

resources in the HEARTH Act bill would go far in clarifying the scope of the bill for renewable energy projects.

The proposed HEARTH Act, should it become law, thus promises only a limited solution to the issues posed by the current statutes available for renewable energy projects. It is a welcome and well-intentioned attempt to authorize Indian tribes to exercise much greater control over the surface leases of their lands.¹⁶² It suffers, however, from several drawbacks. First, it requires a TERA-like process of tribal regulations approved by the Secretary. Although it may well be easier for tribes to develop those regulations for surface leasing than for energy development, the process itself imposes delay, cost, and resource commitment at the front end. The process also requires that tribes be willing to undertake extensive environmental reviews of proposed leases. More tribes may take advantage of the HEARTH Act provision than have pursued a TERA, but the numbers of tribes willing and able to do so may still be small. Second, whether the HEARTH Act may be applied to renewable energy projects is in doubt; the language excepting leases for “any mineral resources” activities needs clarification. And finally, the HEARTH Act, as an amendment to a leasing act, continues to authorize tribal leases only. A tribe choosing the HEARTH Act process would be entitled to enter into, without secretarial approval, only leases, not other types of development instruments.

B. *Proposed TERA Amendments*

The Concept Paper issued by the Senate Committee on Indian Affairs, the subsequent hearing testimony, the proposed Indian Energy Parity Act of 2010 (IEPA), and the proposed Indian Tribal Energy Development and Self-Determination Act Amendments of 2011 (ITEDSA Amendments) all address amendments to ITEDSA and the TERA process.¹⁶³ The Concept Paper called for making “the TERA process a more practical, effective and attractive

162. See *HEARTH Act Hearing*, *supra* note 155, at 10 (statement of Donald “Del” Laverdure, Principal Deputy Assistant Sec’y for Indian Affairs, Dep’t of the Interior) (“The Department strongly supports” the bill.); *id.* at 56 (testimony of the National Congress of American Indians) (“NCAI strongly supports” the bill; including text of NCAI Resolution #PSP-09-016 in support of the bill.).

163. The primary focus of the first three, however, was on issues of streamlining the federal permitting process (e.g., “one-stop” shops), obtaining financing, and energy efficiency.

alternative to the IMDA or the Mineral Leasing Act.”¹⁶⁴ The IEPA and the ITEDSA Amendments propose nearly identical amendments to address some of the more troublesome provisions of the TERA process.¹⁶⁵ In particular, the proposals modify the tribal environmental review process, expand a tribe’s ability to demonstrate regulatory capability, and streamline the Secretary’s approval process for TERAs.

Currently, a TERA must include a tribal environmental review process that substantially parallels the federal environmental review process under the National Environmental Policy Act.¹⁶⁶ Tribes objected to the environmental review requirement both because of the substantial costs involved and because of the inroads on tribal self-determination.¹⁶⁷ Not only would the process mandate considerable public input into tribal decision-making, but the federal government would be decreeing how tribes approach balancing environmental concerns and development.

The bills modify the TERA environmental review process in two significant ways. First, rather than require a tribal environmental review to identify mitigation measures and incorporate them into the lease or agreement, the bills provide for the identification and incorporation of mitigation measures “if any” that the tribe in its discretion chooses to propose.¹⁶⁸ Second, a new provision would permit a tribe to identify categories of actions deemed not to have significant effects on the environment and therefore excluded from environmental review.¹⁶⁹ Although

164. *Concept Paper*, *supra* note 137, at 4. No specific proposals were included. The generality of this suggestion stands in contrast to the document’s fairly detailed ideas regarding federal processing of permits, financial incentives, and energy efficiency.

165. *See* S. 3752, 111th Cong. § 307 (2010); S. 1684, 112th Cong. § 103 (2011). Because the proposals are virtually identical for the aspects discussed here, citations will be to the proposed 2011 ITEDSA Amendments.

166. 25 U.S.C. § 3504(e)(2)(C) (2006). The National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (2006), requires environmental reviews for all “major Federal actions significantly affecting the quality of the human environment.” *Id.* § 4332(C). Federal approval of a lease or other use of Indian lands is a federal action triggering NEPA review. *See* *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). Under a TERA, however, the Secretary no longer approves specific leases or agreements, rendering NEPA inapplicable to those instruments.

167. *See* Royster, *supra* note 123, at 1090-95 (discussing TERA environmental review provision and tribal concerns).

168. S. 1684, 112th Cong. § 103(a)(4)(A)(iii) (2011).

169. *Id.* (amending 25 U.S.C. § 3504 to add § 3504(e)(2)(C)(vi)). The identification of categorical exclusions from the environmental review process would parallel what the federal government may do under the National Environmental Policy Act regulations. *See*

these amendments would not eliminate tribal concerns with the TERA environmental review process, they would provide some relief both by streamlining the process and enhancing the role of tribal decision-making.

In addition, the bills substantially alter the ways in which a tribe may show the required capacity to regulate energy development. Under the current TERA process, the Secretary may not approve a TERA unless the tribe demonstrates "sufficient capacity to regulate the development of energy resources."¹⁷⁰ The proposed bills provide instead that the Secretary shall disapprove a proposed TERA that does not demonstrate sufficient regulatory capacity,¹⁷¹ but further provides that meeting that criterion is not the only way in which a tribe "shall be considered to have demonstrated sufficient capacity."¹⁷² Sufficient capacity can be demonstrated in two additional ways. First, if the Secretary fails to determine within the statutory time period that a tribe has not demonstrated sufficient capacity, then the tribe is considered to have done so.¹⁷³ Second, if the Secretary determines that a tribe has successfully carried out a Public Law 638 compact or contract¹⁷⁴ for at least three consecutive years, the tribe shall also be considered to have demonstrated capacity.¹⁷⁵

These amendments would ease the TERA process for tribes.

40 C.F.R. § 1501.4(a) (2011).

170. 25 U.S.C. § 3504(e)(2)(B)(i); *see also* 25 C.F.R. § 224.53(f) (requirements for tribal showing of capacity to regulate).

171. S. 1684, 112th Cong. § 103(a)(4)(A)(ii) (2011) (amending 25 U.S.C. § 3504(e)(2)(B)(i)). The bill provides that the Secretary may only disapprove a proposed TERA if the Secretary makes this determination, or if the proposed TERA would violate federal law or does not include a required provision.

172. *Id.* § 103(a)(4)(A)(iii) (adding new § 3504(e)(2)(H)).

173. In addition, the time period for the Secretary to determine whether a tribe had demonstrated capacity would be shortened to 120 days, although the tribe and the Secretary could mutually agree to an extension. *Id.* § 103(a)(4)(A)(iii) (adding new § 3504(e)(2)(G)).

174. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1974) (codified at 25 U.S.C. § 450 *et seq.* (2006)). Under Public Law 638, tribes may enter into contracts to take over administration of federal programs or enter into self-governance compacts for the administration of all Department of the Interior Indian programs. *See generally* COHEN'S HANDBOOK, *supra* note 34, at § 22.02.

175. S. 1684, 112th Cong. § 103(a)(4)(A)(iii) (2011) (adding new § 3504(e)(2)(H)). The tribe must have carried out the contract or compact without material audit exceptions or without any such exceptions that were not corrected within a three-year period prior to the TERA application. Under current TERA regulations, a tribe's Public Law 638 contracts are one factor that a tribe may use to demonstrate its capacity. *See* 25 C.F.R. § 224.53(f) (2011).

There is a subtle but important shift in the burden of demonstrating sufficient capacity. Rather than place the whole burden on the tribe to demonstrate sufficient capacity, the Secretary is now charged with determining its absence from the evidence in the tribe's TERA application. Moreover, the Secretary is held to a short time frame to make that determination, and the consequence of the Secretary's failure to act in a timely manner benefits rather than disadvantages the tribal applicant. In addition, acknowledging successful Public Law 638 compacts and contracts as the equivalent of demonstrating capacity recognizes tribes' existing accomplishments in administering federal laws and programs. Providing that a tribe with a successful Public Law 638 record need not redemonstrate its governmental and regulatory capabilities is a practical recognition of tribal self-government.

Finally, the bills would streamline the approval timeline for TERAs. Currently, the Secretary has 270 days from receipt of a complete TERA application to approve or disapprove the TERA.¹⁷⁶ There is, however, no consequence attached to the Secretary's failure to meet this deadline. Because one of the primary tribal concerns that the TERA process was meant to address was the often substantial delay in secretarial approval of leases and agreements, it would indeed be ironic if a tribe had to wait years for approval of a TERA to avoid such delays. Consequently, the bills provide that 271 days after the tribe submits its TERA application, the TERA "shall" become effective if the Secretary has not disapproved it.¹⁷⁷ Although this may put substantial pressure on the Department of the Interior,¹⁷⁸ it furthers the intent of the Indian energy acts to promote tribal control over the development of their energy resources.

VI. SOME IMPERFECT PROPOSALS

There is no perfect solution to streamlining renewable energy

176. 25 U.S.C. § 3504(e)(2)(A); *see also* 25 C.F.R. § 224.56 (providing that the time can be extended with the consent of the tribe). If a tribe submits a revised TERA, the Secretary has sixty days to approve or disapprove it.

177. S. 1684, 112th Cong. § 103(a)(4)(A)(i) (2011) (amending 25 U.S.C. § 3504(e)(2)(A)). If the tribe submits a revised TERA, it would take effect in ninety-one days unless the Secretary disapproved it.

178. The TERA regulations establish a fairly elaborate pre-application process that should ease the Secretary's burden of acting on the final, complete TERA application within 270 days. *See Royster, Practical Sovereignty, supra* note 123, at 1081-82 (explaining the process).

development. The “best” approach, certainly, would be for tribes to develop the capacity and capability to engage in energy development directly, without the need to invoke any federal statutory authority. While several tribes are moving in that direction, it is an unrealistic short-term expectation for most tribes. For the near future, at least, the vast majority of Indian tribes seeking to develop their renewable energy resources will need to partner with non-Indian companies in one form or another.

Renewable energy development on tribal lands will thus be dependent on statutory authority and, most likely, on secretarial approval at some point in the development process. The proposals that follow address these two concerns. First, I propose a fairly simple amendment to the Indian Mineral Development Act that would allow tribes to take active roles in the development of their renewable energy resources. And second, I propose a few suggestions for streamlining the secretarial approval process under the IMDA.

These suggestions are necessarily imperfect. Like many of the recent statutes and proposed pieces of legislation, they represent a step in the right direction. But they are equally subject to the criticism that they don’t go far enough. However, these proposals are offered in the spirit of what perhaps can be done, not what should be done. And offered as well with the belief that continued progress toward tribal self-determination in energy development is preferable to immobility pending a perfect solution.

A. *Renewable Energy Resources as IMDA “Minerals”*

The heart of my proposal is a small and likely uncontroversial amendment to the Indian Mineral Development Act of 1982. The statutory definition of “mineral resources” should be amended to clarify that mineral resources includes all renewable energy resources. Although that is arguably the case now, the clear inclusion of renewable energy resources would remove a point of contention and confusion.

At present, the IMDA defines “mineral resources” as “oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources.”¹⁷⁹ Congress should amend the definition to something like, “oil, gas, uranium, coal, other energy and nonenergy mineral resources, or any renewable energy resources including, but not

179. 25 U.S.C. § 2102(a) (2006).

limited to, wind, solar, geothermal, biomass, and hydrologic resources.”¹⁸⁰ Language such as this leaves no question that renewable energy resources are included in the scope of the IMDA.

Alternatively, the definition could be amended in the regulations without amending the statute itself. The regulatory definition of minerals for purposes of leases and minerals agreements expands on the statutory definition: “both metalliferous and non-metalliferous minerals; all hydrocarbons, including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to, sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral.”¹⁸¹ This definition helps to clarify the meaning of “other” minerals in the statute by specifying such minerals as sand and gravel. The regulatory definition could similarly help clarify the meaning of “other energy” in the statute by specifying that it includes “both renewable and nonrenewable energy sources, including, but not limited to, wind, solar, geothermal, biomass, and hydrologic resources.”¹⁸² A statutory amendment would be preferable to a regulatory amendment, but a regulatory amendment could likely be accomplished more quickly.¹⁸³

Expanding the minerals definition of the IMDA to specify energy resources regardless of their classification would broaden, simplify, and normalize Indian tribes’ ability to engage in renewable energy development. Any tribe with renewable resources could enter into any type of development agreement that suited its needs. Tribes could employ not only the current structure of leases, but joint ventures, partnerships, and business agreements of all kinds. This simple amendment would thus authorize all Indian tribes to move into more active roles in the

180. This language incorporates elements of the regulatory definition of energy resources for purposes of ITEDSA. See 25 C.F.R. § 224.30 (2011).

181. 25 C.F.R. § 211.3 (defining “minerals” for the purpose of leases); *id.* § 225.3 (defining “minerals” for the purpose of minerals agreements).

182. This language is borrowed from the regulatory definition of energy resources for purposes of ITEDSA. See *id.* § 224.30.

183. For example, the Department of the Interior proposed new surface leasing regulations in late 2011 that would create specific regulatory regimes for biomass leases (included within business leases) and wind and solar leases. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784 (Nov. 29, 2011). The proposed regulations are intended to “expedite economic development and spur renewable energy development in Indian Country.” DEP’T OF THE INTERIOR, *supra* note 56.

development of their renewables. Tribes seeking to partner with non-Indian companies to develop wind farms, solar collectors, or biomass feedstock operations would no longer be confined to the passive role of lessor. And it makes common sense. There is no reason to deny a tribe with wind resources the ability to enter into a joint venture, for example, when a tribe with coal resources may do so.

Clarifying that the IMDA may be used for renewables development could, however, impact the tribes' ability to use § 81 easements for wind and solar power development. Under current § 81 regulations, contracts and agreements that encumber Indian lands do not need secretarial approval if they are subject to approval under another statute or regulation, specifically including surface leases, agricultural leases, timber contracts, mineral leases, and minerals agreements.¹⁸⁴ The regulations thus appear to put those types of leases and agreements, including IMDA leases and agreements, outside § 81. If the IMDA definition of minerals is amended to specifically include renewable energy resources, then it may mean that a tribe could no longer use § 81 for renewable energy easements.

To prevent this possible unintended consequence, a further amendment to the IMDA may be necessary. The IMDA now provides that nothing in the statute "shall affect" the Indian Mineral Leasing Act "or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe."¹⁸⁵ An amendment to clarify that it also does not affect tribes' authority to enter into § 81 easements would preserve that option for renewable energy development. This amendment would need to be carefully worded, however, if Congress wished to preserve the current practice that § 81 contracts and agreements cannot otherwise be used to substitute for mineral leases and agreements.

It is possible that a broader amendment may be necessary to preserve tribes' options under other statutes if the IMDA definition of minerals is expanded to include renewables. The proposed expansion of the IMDA suggested here is not intended to replace any existing authorities, but to supplement them. Just as the IMDA authorization of minerals agreements did not replace

184. 25 C.F.R. § 84.004(a).

185. 25 U.S.C. § 2105.

the IMLA authority to enter into mineral leases, and the TERA process for energy agreements did not replace either IMDA agreements or IMLA leases,¹⁸⁶ the proposed expansion of the IMDA is intended as one more option for tribes.

Under the proposed amendment to the IMDA definition of minerals, for example, a tribe seeking to construct a wind farm on tribal land could do so using a lease under § 415, an easement under § 81, a negotiated lease or other minerals agreement under the IMDA, or an agreement pursuant to an approved TERA under ITEDSA. The tribe could weigh the advantages and drawbacks of each alternative, and chose the one that best suits its needs. Including a statement in the IMDA that it is not intended to replace other existing options would preserve tribes' self-determination rights to choose the best approach for that tribe.

Wind power development, in fact, contains a cautionary tale about preserving tribes' development options under the various statutory approaches. Because of the structure of federal tax incentives, a tribal ownership stake in a wind power deal may actually decrease the profitability of the enterprise. Federal tax incentives, which currently can account for a majority of the profitability of wind power projects, are only available to tax-paying entities and thus are not available to tribes.¹⁸⁷ To take advantage of the tax credits, a tribe seeking wind power development would consequently be more likely to use an instrument that did not retain a tribal ownership interest, such as a surface lease or an easement, or perhaps a negotiated lease under the IMDA. Tribes do currently have available the alternative of a "flip" project, in which the tribe initially owns only a one percent interest.¹⁸⁸ At the end of the ten-year life of the tax credits, the project is "flipped" from the private investor to the tribe. If IMDA minerals agreements were available to tribes, such an agreement could be structured in much the same way.

186. See *id.* § 3504(a) (noting that pursuing the TERA option is "at the discretion of the Indian tribe").

187. See Connolly, *supra* note 9, at 26; Mark Shahinian, *The Tax Man Cometh Not: How the Non-Transferability of Tax Credits Harms Indian Tribes*, 32 AM. INDIAN L. REV. 267 (2007-08) (discussing the problems of non-transferability in the context of wind projects).

188. See de la Torre & Thompson, *supra* note 139, at 8-4 to 8-5 (discussing "flip" projects and their risks).

B. *Secretarial Approval*

The proposed amendment to the definition of “mineral resources” in the IMDA would eliminate one of the serious disadvantages of the statutes presently available for renewable energy development by allowing tribes to take as active a role in the development process as they choose. But it does not address the other major drawback, that of secretarial approval. Under the IMDA, the Secretary is responsible for individually approving every negotiated lease and minerals agreement.

Discarding any approval role for the Secretary of the Interior is, at least in the short term, unrealistic. In only one limited situation relevant to renewable energy has Congress eliminated secretarial approval entirely: the 2000 amendment to § 81 to authorize contracts or agreements that encumber Indian lands for less than seven years without any federal approval. As noted earlier, § 81 applies only if other statutory authority does not.

More commonly, Congress has been willing to ease up on the Secretary's approval power, allowing tribes to bypass federal approval of specific instruments if a more global approval has already been granted. Thus, the original ten-year authority of section 17 corporations to lease without secretarial approval was expanded in 1990 to twenty-five years. Nonetheless, the section 17 corporate charter itself is issued by the Secretary, and the powers granted in the charter are thus subject to secretarial approval. The surface leasing statute was amended several times to authorize specific tribes to lease without secretarial approval of the individual lease, as long as the tribe first has in place tribal regulations approved by the Secretary. Legislation introduced in the 111th and 112th Congresses would have extended this authority to all tribes. Similarly, the TERA process enacted in 2005 authorizes any tribe to use the same approach for energy leases and agreements.

While these statutes and amendments clearly indicate a trend toward a somewhat less intrusive role for the Secretary, it is equally clear that Congress wants some level of federal oversight for long-term encumbrances of Indian lands. It is willing to have that oversight one step removed from specific development instruments, but not removed altogether. Any realistic solution at this point, therefore, must retain some sort of secretarial approval.

Nonetheless, there are steps that can be taken to tighten up the approval process and make it friendlier to renewable energy development. The two amendments to the IMDA proposed here

would provide that the Secretary's failure to act within the time allotted constitutes approval, and that in determining whether a minerals agreement is in the tribe's best interest, the Secretary will defer to the tribe's decision.

Under the IMDA, the Secretary has 180 days to approve or disapprove a minerals agreement, or 60 days after compliance with the National Environmental Policy Act (NEPA), whichever is later.¹⁸⁹ The statute specifically provides that the Secretary's failure to meet the deadline is enforceable by a mandamus action in federal court.¹⁹⁰ Making the Secretary's deadline mandatory is useful, but authorizing enforcement by court action is not. Civil suits proceed slowly through the federal courts, and it is unlikely that a writ of mandamus would be issued before the Secretary reached a decision on the minerals agreement. Waiting two years for the court's decision is no better than waiting two years for the Secretary's.

A better approach would borrow from the proposed statutory amendments to the TERA process. The proposed TERA amendments would replace a provision giving the Secretary 270 days to approve a TERA, with a provision that 271 days after the tribe submits its TERA application, the TERA "shall" become effective if the Secretary has not disapproved it.¹⁹¹ A similar amendment to the IMDA could provide that 181 days after the tribe submits a proposed minerals agreement, or 61 days after compliance with NEPA, whichever is later, the agreement "shall" take effect if the Secretary has not disapproved it or has not provided the tribe with written findings of the intent to approve or disapprove the agreement.¹⁹² As with the proposed TERA

189. 25 U.S.C. § 2103(a) (2006).

190. *Id.* (authorizing enforcement action under 28 U.S.C. § 1361 (2006) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.")).

191. S. 1684, 112th Cong. § 103(a)(4)(A)(i) (2011) (amending 25 U.S.C. § 3504(e)(2)(A)). Proposed regulations for biomass, wind, and solar leases similarly provide that amendments to leases and subleases will be deemed approved if the Department of the Interior fails to act within thirty days, but do not extend that same approach to secretarial approval of the original lease. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,810 (proposed § 162.445) (amendments to business leases, including biomass), 73,811 (proposed § 162.453) (subleases of business leases), 73,823 (proposed § 162.570) (amendments to wind and solar leases), 73,824 (proposed § 162.578) (subleases of wind and solar leases) (Nov. 29, 2011).

192. *See* 25 U.S.C. § 2103(c) (providing that the Secretary shall give a tribe written

amendment, this would put substantial additional pressure on the Department of the Interior to act quickly. But the benefit to tribes of knowing whether their minerals agreements have been approved, and being able to implement their agreements within a reasonable time, outweigh those concerns.

The second way to streamline the approval process for renewable energy resources is to address the substance of the Secretary's review of mineral agreements. The IMDA provides that the Secretary must determine whether a proposed agreement "is in the best interest of the Indian tribe."¹⁹³ In so doing, the Secretary "shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement."¹⁹⁴ The statute expressly provides, however, that the Secretary is not responsible for preparing any studies regarding "environmental, socioeconomic, or cultural effects" other than the environmental studies required by NEPA.¹⁹⁵

The regulations, on the other hand, require that the Secretary determine both that the minerals agreement is in the tribe's best interest and that any adverse cultural, social, or environmental impacts do not outweigh the benefits of the agreement.¹⁹⁶ The "best interest" standard is further defined as requiring "the Secretary [to] consider any relevant factor, including, but not limited to: economic considerations, such as date of lease or minerals agreement expiration; probable financial effects on the Indian mineral owner; need for change in the terms of the existing minerals agreement; marketability of mineral products; and potential environmental, social and cultural effects."¹⁹⁷ The regulations further specify that the "best interest" standard is based on information supplied by the parties "and any other

findings of the intent to approve or disapprove at least thirty days prior to formal action); *see also* 25 C.F.R. § 225.22(b) (2011). The purpose of the thirty-day window is to allow a tribe to reconsider the minerals agreement in light of the Secretary's findings, should the tribe wish to do so. *See* *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1460 (9th Cir. 1986).

193. 25 U.S.C. § 2103(b).

194. *Id.*

195. *Id.*

196. 25 C.F.R. § 225.22(c) (2011). The IMDA makes consideration of the economic, social, and cultural aspects part of the best interests analysis, and not a separate factor.

197. *Id.* § 225.3.

information considered relevant by the Secretary.”¹⁹⁸ That information may include comparisons to other contracts or offers for similar resources, “insofar as that information is readily available.”¹⁹⁹

These standards, derived from judicial determinations that the Secretary must consider all relevant factors in reviewing mineral leases under the IMLA,²⁰⁰ place considerable decision-making power with the Secretary. During the rulemaking process, in fact, the Department of the Interior rejected a commenter’s suggestion that minerals agreements should be approved if the agreements were in compliance with law. The Department noted that the law itself “allow[s] the Secretary the discretion to weigh relevant factors and require[s] the Secretary to make, on the basis of the Secretary’s judgement, a best interest determination.”²⁰¹

At the time the IMDA was enacted in 1982, federal Indian policy had only recently focused on tribal self-determination,²⁰² and Indian tribes were still emerging from the uncertainties and destruction of the termination era.²⁰³ The Department of the Interior had experience with considering all relevant factors in the approval of IMLA leases, and carried that standard into the new world of minerals agreements. It took twelve years for the Department to issue IMDA regulations, but the regulations again reflected the central role of the Secretary and the importance of the Secretary’s judgment call. In the 1980s and even early 1990s, the Secretary’s stringent oversight may have been justified by the imbalance of knowledge and bargaining power between tribes and energy companies.

But nearly twenty years have passed since the regulations were

198. *Id.* § 225.22(d).

199. *Id.*

200. *See, e.g.,* *Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Kenai Oil & Gas, Inc. v. Dep’t of Interior*, 671 F.2d 383, 386-87 (10th Cir. 1982).

201. *Oil and Gas, Solid Mineral and Geothermal Minerals Agreements*, 59 Fed. Reg. 14,960, 14,966 (Mar. 30, 1994).

202. President Richard M. Nixon is generally credited with originating the modern federal Indian policy of self-determination. *See* Special Message on Indian Affairs, 1970 PUB. PAPERS 564. President Ronald Reagan issued the first modern federal Indian policy statement, calling for government-to-government relations, within a year of the IMDA’s enactment. Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983).

203. *See generally* DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945-1960* (1986) (discussing the formulation, implementation, and effects of federal policy and legislation toward Indian tribes).

promulgated in 1994. Indian tribes have thirty years of experience with IMDA minerals agreements, and many of the energy tribes have become sophisticated negotiators of development deals. Certainly tribes are the best determiners of cultural and social impacts, and often of the economic impacts as well. In light of those factors, the standards for approval of IMDA agreements are due for amendment.

Amending the statute itself to revisit the appropriate factors may be the best choice, but a simpler and perhaps quicker fix is also available. The Department could amend the regulations to reflect modern realities. Similar to the best interests determination in the regulations for agricultural and other surface leases, the IMDA regulations could provide that in reviewing an IMDA minerals agreement, the Secretary will defer to the tribe's determination that the agreement is in its best interest, to the maximum extent possible.²⁰⁴ Although the conditional "maximum extent possible" language preserves the Secretary's ultimate authority under the statute, the regulation would ensure that the Secretary will undertake the minerals agreement review process with due respect for the tribe's decision. Even if a deferential review is current practice, embedding it in the regulations strengthens the tribe's role in the decision making process.

VII. CONCLUSION

Renewable energy resources are taking on increased importance for tribal economies. While these resources are abundant in Indian country, the federal statutory authority for their development is dispersed and often problematic. Mineral development statutes may or may not apply; other statutes not originally intended for energy development fill the gap, but generally confine tribes to a passive role in renewables development. The recent energy statute solves many of the problems with the other approaches, but creates a process that is

204. See 25 C.F.R. § 162.107(a) (2011) (agricultural and other surface leases) ("In reviewing a negotiated lease for approval, we will defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible."). In its proposed regulatory changes for surface leasing, the Department of the Interior preserved the language that it will defer to the maximum extent possible to a tribe's determination in a negotiated lease that the lease is in its best interest. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784, 73,809 (proposed § 162.439(a)(5)) (business leases, including biomass), 73,822-23 (proposed § 162.564(a)(5)) (wind and solar leases) (Nov. 29, 2011).

complex and expensive enough to discourage most tribes from using it. Recent bills would tweak the energy statute and propose broader leasing authority, but none addresses the overarching problem of providing tribes with a way to take an active role in the development of renewable resources without undue expense or federal oversight.

The amendments to the IMDA and its regulations proposed here also do not solve that overarching problem entirely. They are intended to suggest steps in the direction of greater tribal self-determination in renewable energy development. They would free tribes to take more active roles in renewable energy projects, while preserving tribes' ability to use the variety of other available statutory approaches. And they would rein in the secretarial approval power by providing that federal inaction benefits the tribes and by reframing the best interests analysis. Under these proposals, Indian tribes could more easily develop their renewable energy resources, and do so with more direct say in the development itself.

