INDIAN TRIBES—BUSINESS PARTNERS AND MARKET PARTICIPANTS: STRATEGIES FOR EFFECTIVE TRIBAL / INDUSTRY PARTNERSHIP

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Paper 3B

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I. Introduction.

Energy and mineral development on Indian lands, like federal Indian law and policy, has evolved over the past century and a half. Balancing tribes' economic and other involved interests and the need for federal protection against improvident transactions, many tribes have grown from passive recipients of revenues generated by federal government management of resources to co-participants, in a sense partners, in development and active participants in energy and mineral resource markets. [2]

Mineral leasing of tribal lands began in 1891 with a statute that authorized leasing of lands "bought and paid for" by the tribe.[3] The 1891 Act provided a format that became a longstanding model: leases could be made "by the council speaking for such Indians," for statutorily restricted terms, "subject to the approval of the Secretary of the Interior." A 1909 statute expanded the authorization to allotted lands,[4] and a series of inconsistent statutes expanded mineral leasing of tribal lands, but left mineral leasing on Indian lands "in a state of

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[2] This Paper draws substantially on my earlier paper, "Mineral and Energy Development on Native American Lands: Strategies For Addressing Sovereignty, Regulation, Rights And Culture," 56 Rocky Mt. Min. L. Inst. Ch. 5A (2010) ("Slade, *Mineral and Energy Development*").
[3] *See* 25 U.S.C. § 397, Act of Feb. 28, 1891, c. 383, § 3.
[4] See *25* U.S.C. § 396.

confusion."[5] Congress attempted to inject uniformity into tribal mineral leasing by enacting the Indian Mineral Leasing Act of 1938 ("IMLA").[6]

The IMLA's format of Bureau of Indian Affairs ("BIA")-supervised leasing employing standardized lease forms, governed by prescriptive regulations, and subject to tribal consent, became the template for energy and mineral development of Indian lands for nearly half a century. The IMLA called for tribes to receive a percentage royalty. As tribes became more sophisticated, and increasingly dissatisfied with the economic returns from BIA leasing, they began negotiating their own agreements on forms very different from those the BIA regulations prescribed, and questions arose as to whether the extant leasing statutes authorized such agreements.[7] Formation of the Council of Energy Resource Tribes provided a forum for focus on tribal initiative and management in energy and resource development and technical support for those efforts.[8]

Tribes, and supportive industry, went to Congress, calling for a greater tribal role in formulating the terms of energy and mineral development agreements and for the flexibility to pursue equity or other non-royalty interests in developments through joint venture or other forms of agreement. Those demands led to enactment of the Indian Mineral Development Act of 1982 ("IMDA").[9] More recently, some tribes proposed they were burdened competitively by the requirements for securing federal approval of energy and mineral development agreements, and sought statutory authority to assume the BIA's duties in leasing tribal lands. Those demands led

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[5] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 17.03[2][a] (Nell Jessup Newton, et al., eds. 3d ed. 2005) ("COHEN 2005"); for a detailed history of this development, *see* Marjane Ambler, BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT 35-51 (1990) ("AMBLER").

[6] 25 U.S.C. §§ 396a-396f.

[7] *See* AMBLER 62-90; for CERT's current activities, *see also* www.certredearth.com.

[8] *See* AMBLER 91-117.

[9] 25 U.S.C. §§ 2101-2109; *See infra* Section II[2][a].

to enactment of the Indian Tribal Energy Development and Self-Determination Act of 2005 ("ITEDSA").[10] ITEDSA authorized tribes that develop economic and environmental review capacities to enter into Tribal Energy Resource Agreements ("TERAs") and secure Secretarial approval to review and approve their own energy and mineral agreements, eliminating BIA approval.[11]

Leasing of Indian lands for non-resource-extractive development, now reflected in numerous renewable energy proposals, may rely on different authority. Prior to 1955, there was no uniform authority for business leasing of tribal lands. The Business Site Leasing Act of 1955 ("BSLA") was enacted to provide a template and flexible authority; it likely will afford the basic authority for renewable energy developments other than geothermal development. The BSLA may offer opportunities to bypass BIA approval requirements in some transactions. [12]

This Paper seeks to provide guidance on how tribes and developers may employ these statutory authorities, and some others, taking flexible approaches to harmonizing parties' interests, to develop win-win agreements for "partnering" in energy and mineral development in Indian country.[13] The paper will touch briefly on tribes' roles as market participants in energy and mineral development.[14]

II. The Development Package: Securing Necessary Property and Development Rights.

Mineral and energy, including renewable energy, development require rights to explore for and extract or use needed lands and natural resources, and to access associated real property

[10] Title V of the Energy Policy Act of 2005, 109-59, 119 Stat. 594, *compiled* at 25 U.S.C. §§ 3501-3504 (West Supp. 2009); *see infra* Section II[2][d].
[11] *See generally* Scot W. Anderson, *The Indian Tribal Development and Self Determination Act of 2005: Opportunities for Cooperative Ventures*, Natural Resource Development in Indian Country, Paper No. 8 (Rocky Mt. Min. L. Fdn. 2005).
[12] 25 USC § 415; *see infra* Section II[4][b].
[13] *See infra* Section III.
[14] *See infra* Section IV.

for ingress to and egress from the lands involved for personnel or products, and, often, to use other lands for processing or administration.[15] The federal trust responsibility with respect to Indians and their lands and minerals may affect every stage of the development process. The Indian Non-Intercourse Act, enacted originally by the very first Congress, underlies all federal statutes authorizing tribes to transfer interests in lands or minerals: absent valid federal approval, no transaction within its scope by any "Indian nation or tribe of Indians, shall be of any validity in law or equity."[16] As a result, in every transaction, it must be determined whether the transfer is subject to the Non-Intercourse Act and, if so, what statute authorizes the transfer

Agreements that grant rights to operate on tribal or allotted lands or minerals generally must be authorized by a specific statute and approved by duly authorized federal officials, usually of the BIA,[17] who must, in turn, satisfy requirements for federal environmental and cultural resource review similar to those applicable on federal public lands.[18] Securing required approvals can be time-consuming and expensive, but the consequences of failure to secure proper approvals can be severe.[19] There are only limited exceptions to the Secretarial approval requirement. Secretarial approval may not be required for agreements that do not "encumber"

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[15] *See generally* Tim Vollmann, *Exploration and Development Agreements on Indian Lands*, 50 Rocky Mt. Min. L. Inst., ch. 12 (2004).

[16] *See* 25 U.S.C. § 177; *see generally* Thomas H. Shipps, *The Non-Intercourse Act and Statutory Restrictions on Tribal Resource Development and Contracting*, Natural Resource Development in Indian Country, Paper No. 2 at 2- 3 to 2-10 (Rocky Mt. Min. L. Fdn. 2005).

[17] *See* Slade, *Mineral and Energy Development, supra* note 2 at § 5A.04 [1].

[18] *See infra* Section II[6]**;** this paper does not address federal approval and supervision of on-the-ground operations by BIA or the Bureau of Land Management ("BLM"), or the Office of Natural Resources Revenue ("ONRR") with respect to royalty or other compensation. *See* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5A.04 [4**]**.

[19] *See Rosebud Sioux Tribe v. Sun Prairie*, 286 F.3d 1031, 1036-1040 (8th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003) (agreement cancelled administratively for non-compliance with National Environmental Policy Act ("NEPA") and other statutes.

tribal lands for seven or more years under as provided by 25 U.S.C. § 81,[20] tribally approved agreements under "TERA Agreements" authorizing tribes to approve agreements in lieu of BIA approval,[21] and leases by certain tribally owned corporations chartered under Section 17 of the Indian Reorganization Act of 1934.[22] Developers and tribal partners face a common challenge: structuring a transaction that optimizes the compatible interests of the tribe and developer, including possibly a tribally or Native American-owned developer, and that accommodates securing required federal authorization in the manner best suited to furthering those interests.

[1] Identifying the Parties' Interests.

Energy and mineral development in Indian country may bring into play interests and concerns not present elsewhere. The differences stem from the sovereignty of the tribe involved and the federal government's trust responsibility. For a tribal participant, in addition to the interests of land- or resource-owners common outside Indian country, optimizing financial returns while managing risk, a tribe occupies a unique financial status and has governmental and, often, political interests beyond its .proprietary economic concerns. A tribe's and some tribal entities' financial interests in proprietary development activity differ from private parties' interests primarily because presumptively they are not federal or state taxpayers. Their status as governments (or as governmentally-related entitites) may invoke a broad set of additional interests, including the need for revenues to support services to, and enhance and protect the economy and welfare of, tribal communities. Those interests may lead to taxation and regulation and desires to invoke sovereign immunity from suit and to secure dispute resolution in tribal courts. Tribes also may face concerns that may arise from internal political divisions over

[20] *See infra* Section II[3][b].
[21] *See infra* Section II[2][b].
[22] *See infra* Section II[3][a}.

transactions that may figure prominently in the community's economics, and sometimes its natural environment and cultural heritage, for many years. Increasingly at play are tribal leaders' concerns that reservation resources have been exploited by others and that earlier resource developments have not adequately benefitted the tribe, tribal members or entities, or advanced tribal members' expertise and entrepreneurial capital.[23]

Non-Indian and tribally-affiliated developers may have different interests and concerns from tribes. The basic need to structure a development that meets economic criteria invariably entails consideration of costs, including those arising from taxation and regulation, and of the time gap between making a capital investment and realizing anticipated revenues. Assessing tax and regulatory costs requires developers to address the unique tribal lands setting in which federal, state, and tribal governments may have tax and regulatory authorities, and the allocation of authority among them is not always clearly defined by existing statutes and caselaw. The federal administrative lease or contract approval process also may lengthen the always substantial time period between when bonus or other exploratory expenditures must be made and energy or mineral resources may be sold and revenues may accrue. And, developers, who need long-term certainty, face risks posed by the sometimes draconian consequences of non-compliance with federal requirements governing approval of agreements and the ability of third parties to employ federal law to collaterally attack proposed or approved agreements. Overlying all of these considerations are the unique challenges facing developers' needs for confidence regarding long-term returns on capital arising from tribal immunity from suit and from tribes'—

[23] This concern was expressed perhaps most forcefully by recently elected Navajo Nation President Ben Shelly, who called for greater Navajo-entity involvement in energy development, comparing outside energy developers to "pirates" who "come in, make money off of us, and then disappear." "Shelly Mulls Ways to Increase Revenue," NAVAJO TIMES (January 20, 2011).

and some non-tribal courts'—frequent preference for tribal court dispute resolution and tribal law.

But the interests of the participants in any proposed development cannot be presumed. Tribes and developers are well served by taking steps to identify and communicate the key concerns and priorities of the parties in the transaction at hand at an early stage. Often, an early-stage meeting between the tribe and/or tribally-related party and any non-member developer specifically to discuss key interests and potential approaches to harmonizing those interests will smooth the way to a mutually beneficial agreement.

Successful negotiations for agreements that reflect the interests and address the concerns of all involved parties requires a flexible approach and thoughtful planning and structuring. The discussion that follows will address, first, the forms of agreement available to structure a energy and mineral development transaction and, second, the key considerations affecting the Indian country-specific issues that may facilitate partnerships for energy and mineral development.

[2] Agreements for Partnering in Energy and Mineral Development.

The statute most commonly used to authorize fossil fuel, including coal, geothermal energy and hard mineral development of tribal lands is the Indian Mineral Development Act of 1982.[24] The IMDA also may provide an alternative vehicle for leasing individually owned "allotted" lands when they can be combined under an IMDA agreement with tribal lands. In addition, Title V of the Energy Policy Act of 2005[25] provides a format a tribe may use to assume federal officials' roles in review and approval of energy and mineral development agreements.[26]

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[24] 25 U.S.C. §§ 2101-2109 ("IMDA").
[25] 25 U.S.C. §§ 3501-3504 (Supp. 2009).
[26] For a detailed analysis of the statutes and applicable history and policies, *see* Michael P. O'Connell, *Basics of Successful Natural Resource Development Projects in Indian Country,* Natural Resource Development in Indian Country, Paper No. 1 at 1-3 to 1-14, Rocky Mt. Min. L. Fdn. (2005).

Although they address geothermal energy, the IMDA and IMLA do not expressly authorize other forms of renewable energy development. Consequently, the Business Site Leasing Act,[27] authorization or guidance under "Section 81,"[28] and the Right-of-Way Act[29] generally are necessary for wind, solar, and other renewable energy developments and, often, for specific elements of energy and mineral developments under the IMDA. In narrow situations, the parties may still prefer at least a portion of the development to be authorized under the Indian Mineral Leasing Act of 1938,[30] and the Allotted Lands Mineral Leasing Act of March 3, 1909.[31] Those statutes are discussed in turn below.

[a] Indian Mineral Development Act. As tribes became more actively involved in the development of tribal minerals, tribes desired more flexibility regarding the structure and provisions of agreements, as well as a greater role in the negotiation of agreements. The Indian Mineral Development Act of 1982 was enacted to further those goals.[32] The IMDA allows tribes and developers to use any form of agreement, including a mineral lease, joint venture or joint operating agreement, or a service or operating agreement to develop tribal trust or restricted resources.[33] A "minerals agreement" under the IMDA may provide for "exploration for, or extraction, processing or other development of, oil, gas, uranium, coal, geothermal, or other energy resources or non-energy mineral resource," defined collectively as "mineral resources," or for the "sale or other disposition of the production or products of such mineral

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[27] *See* 25 USC § 415.
[28] Rev. Stat. § 2103, 25 U.S.C. § 81
[29] *See* 25 USC §§ 323-328.
[30] 25 U.S.C. §§ 396a-396f ("IMLA").
[31] 25 U.S.C. § 396.
[32] 25 U.S.C. §§ 2101-2109; the IMDA regulations are in 25 C.F.R. pt. 225 (2009); *see generally* Michael E. Webster, *Negotiating and Drafting Indian Mineral Development Act Agreements*, Natural Resource Development and Environmental Regulation in Indian Country, Paper No. 6 (Rocky Mt. Min. L. Fdn. 1999).
[33] *See* 25 U.S.C. § 2102(a).

resources."[34] Because of its flexibility, the IMDA is the preferred vehicle for tribal energy and mineral development agreements.

An IMDA minerals agreement may include allotted minerals, but only if included with tribal resources.[35] When tribal and allotted lands are in close proximity, including allotted lands with tribal lands in a single IMDA agreement offers practical benefits. It can insure uniform terms apply to a contract area and focus BIA approval steps on a single undertaking. When tribal and allotted lands are interspersed, some existing or proposed agreements define the broad area encompassing tribal IMDA agreement lands and allow the inclusion of allotted tracts within the tribal IMDA area. The allotted tracts could be included on the same or similar economic, but not sovereignty-related, terms as the tribal IMDA agreement provides, upon the developer's securing the requisite percentage consents of owners of each allotment. Although the author is not aware of formal agency guidance on this very practical approach, it would comport with IMDA goals, and tribes as partners in development may favor an approach that gives allottee-members who are mineral owners the economic benefit of the tribe's negotiations.

Although the IMDA does not require use of BIA forms of agreement or impose the acreage limitations prescribed under the IMLA, the IMDA regulations provide a detailed list of provisions that must be included in an IMDA agreement and the procedures the Secretary must follow in approval. The minerals agreement must include provisions addressing twenty-one required subjects, including the duration or term of the agreement, indemnification of the tribe and the United States from claims of third parties, payment obligations, accounting and mineral valuation procedures, bond and insurance requirements, operating and management procedures,

[34] *Id.*
[35] 25 U.S.C. § 2102(b).

the "development schedule," and "provisions for resolving disputes."[36] The drafters of an IMDA agreement should insure it addresses each of these and other required subjects.

The IMDA outlines Interior Department agencies' roles under a minerals agreement. The IMDA contemplates the tribe, rather than BIA, taking the lead on IMDA agreement negotiations, though the tribe "may" consult with the Secretary during the negotiation process.[37] The Interior Department has precisely defined roles in reviewing a signed IMDA agreement for approval. Following approval, Interior Department agencies have substantially the same roles they occupy under an IMLA lease. The Part 225 regulations[38] specify roles for the Bureau of Land Management (approval for technical operations and facility inspections for oil and gas),[39] the Office of Surface Mining ("OSM") (operational approvals for coal surface mining),[40] and the Office of Natural Resource Revenue ("ONRR") (production reporting, royalty accounting, financial auditing).[41]

When a fully negotiated and executed minerals agreement is presented to the Interior Department, it is required to prepare both a written economic assessment of the agreement[42] and environmental and cultural resource reviews under NEPA and related statutes.[43] The Secretary may make recommendations to the Indian mineral owners for changes to the agreement, disapprove, or, if the Department finds based on the reviews that the agreement is in "the best

[36] 25 C.F.R. § 225.21(b).
[37] *See* 25 C.F.R. § 225.21(a).
[38] *See* 25 C.F.R. § 225.1(c).
[39] *See* 25 C.F.R. § 225.4; referencing the BLM's regulations in 43 C.F.R. Parts 3160, 3180 (onshore oil and gas), 3280 and 3480 (geothermal), and 3590 (solid minerals—other than coal).
[40] *See* 25 C.F.R. § 225.5, referencing coal surface mining regulations in 30 C.F.R. Part 760.
[41] Formerly the Minerals Management Service, *see* 25 C.F.R. § 225.6.
[42] *See* 25 C.F.R. § 225.23.
[43] *See* 25 C.F.R. § 225.24.

interests of the Indian mineral owners," approve the minerals agreement.[44] The Secretary must put his or her findings in writing and may not approve a minerals agreement until thirty days after the written findings "are received" by the Indian mineral owners,[45] allowing the parties an opportunity to cure or address any issues the Secretary may raise. Significantly, the tribe and included allotted minerals owners may withdraw their agreement to a minerals agreement at any time before final Secretarial approval.[46]

[b] Tribal Energy Resource Agreements. Responding to demand for still greater flexibility and tribal autonomy, the Indian Tribal Energy Development and Self-Determination Act of 2005 ("ITEDSA"),[47] authorizes tribes to develop economic and environmental review capacities and secure Secretarial approval to review and approve certain agreements, eliminating BIA approval. [48] ITEDSA § 3504 authorizes tribes and the Secretary to enter into Tribal Energy Resource Agreements ("TERAs") pursuant to which a tribal agency may review, approve, and regulate energy resource development without BIA approval.[49] Section 3504 authorizes TERAs covering "leases or business agreements" for (A) "exploration for, extraction of, processing of, or other development of energy mineral resources of the Indian tribe located on tribal lands" or (B) construction or operation of (i) an "electric generation,

[44] *See* 25 C.F.R. § 225.22; however, although approval authority may, and usually is, delegated to regional BIA officials, only the Secretary may disapprove a minerals agreement. 25 C.F.R. § 225.22(f).
[45] 25 U.S.C. § 2103(a).
[46] *See* 25 C.F.R. § 225.22; *and* Quantum Exploration v. Clark, 780 F.2d 1457 (10th Cir. 1986).
[47] Title V of the Energy Policy Act of 2005, 109-59, 119 Stat. 594, *compiled* at 25 U.S.C. §§ 3501-3504 (West Supp. 2010).
[48] *See generally* Scot W. Anderson, *The Indian Tribal Development and Self Determination Act of 2005: Opportunities for Cooperative Ventures*, Natural Resource Development in Indian Country, Paper No. 8 (Rocky Mt. Min. L. Fdn. 2005).
[49] *See* 25 U.S.C. § 3504, with regulations compiled at 25 C.F.R. pt. 224 (2010), *adopted,* 73 Fed. Reg. 12807- 12836 (March 10, 2008).

transmission, or distribution facility located on tribal land" or (ii) "a facility to process or refine energy resources developed on tribal land."[50]

An approved TERA may also authorize a tribe to grant rights-of-way, but the authorization for rights-of-way extends only to pipelines and electric transmission or distribution lines, and only if "the pipeline or electric transmission line serves" an electric generation, transmission, or distribution facility, or a energy resource processing or refining facility, that is located on tribal lands.[51] The statute simply does not authorize a right-of-way for roads or other non-pipeline, non-transmission access or facilities, often necessary for energy development. Because a BIA-granted right-of-way may be necessary for roads or other surface uses, or pipeline or transmission rights-of-way uses not tied to a generation, distribution, or processing facility located on Indian lands, for many projects, a TERA may not obviate the need for BIA environmental review and processing, thus defeating the intention of Section 3504 to allow tribes and development partners to by-pass BIA environmental reviews and expedite approvals.[52]

Although no tribe has yet filed a TERA application, at least one tribe is developing an application with assistance from the Department of the Interior.[53] Title V provided no funding to support tribal TERA programs, and tribes may have concerns over the substantial administrative

[50] *See* 25 U.S.C. § 3504(a); the regulation clarifies that the authorization to cover extraction activities includes "marketing or distribution." 25 C.F.R. § 224.85.

[51] *See* 25 U.S.C. § 3504(b); the regulation does not broaden the statutory authorization. In response to a comment on the proposed regulation that the proposed regulation too limited tribes' authorities to approve rights-of-way, BIA stated: "the limitations in the regulations regarding rights-of-way are fully consistent with the Act." 73 Fed. Reg. at 12815.

[52] And, under a "small handles" analysis, *see* Comment: *Small-Handles, Big Impacts: When Should The National Environmental Policy Act Require An Environmental Impact Statement?,* 23 B.C. ENVTL. AFF. L. REV. 437 (1996), if the federally granted right-of-way is necessary to implement the larger project, NEPA environmental review for the right-of-way may have to assess the impacts of the entire project, subjecting the project to both tribal environmental review under the TERA and federal review under NEPA.

[53] Telephone conference with Mr. David Johnson, Department of the Interior, Office of Indian Energy and Economic Development, January 31, 2011.

structures likely necessary to discharge TERA duties, impacts on tribal budgets, and the effect of injecting public participation into tribal deliberations.

[3] Surface Use for Energy, Including Renewable Energy, and Mineral Development.

Wind, solar, and other renewable energy developments are not expressly authorized under the IMDA or TERA statutes. Additonally, even conventional energy or mineral development often requires real property rights not granted in an underlying lease or minerals agreement, including a surface lease or other agreements for office, shop, or communications facilities or rights-of-way for roads, pipelines, electric transmission, or other facilities. The authorities discussed below are the primary vehicles for addressing those development scenarios.

[a] Business Site Leasing. The Long-Term Leasing Act of 1955, also known as the Business Site Leasing Act ("BSLA"),[54] authorizes a lease for any purpose, and can provide authority for essentially any lease not covered under the IMDA or IMLA, "including the development or utilization of natural resources in connection with operations under such leases."[55] For most tribes, the statute authorizes lease terms of 25 years, with authorization for one agreed renewal term of 25 years.[56] The Business Site Leasing Act can be particularly important when collateral is necessary to financing a business on tribal lands.[57] Generally, a Business Site Leasing Act lease must be approved following compliance with NEPA, and a tribe

[54] *See* 25 USC § 415 and implementing regulations at 25 C.F.R. pt. 162 (2009).
[55] *See* 25 USC § 415(a). For detailed discussion of the application and requirements of the BSLA and regulations, *see* Michael P. O'Connell, *Fundamentals of Contracting By and With Indian Tribes*, Special Institute on Natural Resource Development on Indian Lands 21, Rocky Mt. Min. L. Fdn. (2011).
[56] *Id*; the statute authorizes longer terms for a growing list of specifically designated tribes.
[57] *See* 25 C.F.R. § 162.610(c); for discussion of collateralizing Indian county financing, *see infra* at Section III[7][b].

may back out of the lease at any time before the BIA completes NEPA compliance and approves the lease.[58]

While seldom applied in recent practice, Section 17 of the Indian Reorganization Act ("IRA")[59] suggests an interpretation that may present a useful exception to the Secretarial approval requirement. An Indian tribe, whether or not organized under Section 16 of the IRA, is entitled to adopt a charter for a corporation under Section 17 of the IRA, 25 U.S.C. § 477, subject to BIA approval. This type of corporation is referred to as a "Section 17 corporation." A Section 17 corporation usually is an entity for business purposes of a tribe. It must be wholly owned by the tribe. Section 17 provides that the Secretary may, upon petition by a tribe, issue a charter of incorporation to the tribe and

> "[s]uch charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, *or otherwise, own, hold, manage, operate, and dispose of* property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property . . . *but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five-years any trust or restricted lands included in the limits of a reservation*." (emphasis added).

The language of 25 U.S.C. § 477 implies, but does not expressly state, that a Section 17 corporation can be authorized to lease lands held communally by the tribe without Secretarial approval for periods shorter than 25 years:

The statutory intent underlying this language of Section 17 may be indicated in the original 1943 edition of Felix Cohen's authoritative text on federal Indian law.[60] Cohen, who

[58] *See* Sangre de Cristo Devel. Co. v. United States, 932 F.2d 891, 894-895 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992).
[59] 25 U.S.C. § 477.
[60] FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 328-331(1943).

was in a position to know,[61] wrote that the corporate leasing provisions of IRA Section 17 were intended to allow tribes to undertake commercial business leasing then stymied by "large gaps" in the federal statutes authorizing tribal leasing (later filled by 25 U.S.C. § 415). While Cohen recommended statutory revisions to fill those gaps, he stated that IRA Section 17 provided a then-existing alternative:

> "[f]or those Indian tribes within the scope of [the IRA], those gaps are largely covered by Section 17 . . ., which provides that the Secretary . . . may issue a charter of incorporation . . ., which charter may convey comprehensive power to manage and dispose of tribal property subject to the proviso that tribal land within the limits of the reservation may not be leased for periods exceeding 10 years. Such charters may or may not provide for departmental approval of tribal leases. Most charters provide for a trial period during which all tribal leases are subject to departmental approval, to be followed by free tribal leasing within the limits prescribed by the act and the particular charter."[62]

Cohen drew a sharp distinction between leasing under "tribal constitutions," under IRA Section 16, and "tribal charters," under IRA Section 17: tribal constitutions determine "the manner in which the tribe shall exercise powers based upon existing law, [whereas] tribal charters, on the other hand, involve new grants of power, and leasing provision are therefore not limited by prior law."[63] Felix Cohen's 1943 analysis supports that Section 17 was intended to provide a vehicle to authorize commercial leasing of tribal lands that was otherwise unavailable under the statutes in place in 1934. Because there was no specific statutory authority for a tribe to transfer to a Section `17 corporation, the "gaps" impeding leasing by tribes to others equally

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[61] Cohen joined the Interior Department in 1933 to help draft the IRA and has been described as the "chief legal architect" of New Deal Indian policy. *See* Dahlia Tsuk, *The New Deal Origins of American Legal Pluralism,* 29 FLA. ST. L. REV. 189, 191 (2001).

[62] *Id.*at 329; *see also id.* at 326 n. 433; the 1982 edition of Cohen's treatise reflects a similar analysis and recognizes the practice of specifically addressing whether a Section 17 corporation could lease without Secretarial approval. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 529 (Rennard Strickland, et al., eds. 1982).

[63] *Id.* at 330.

would impede leasing by the tribe to its Section 17 corporation. Consequently, a statutory purpose to provide "free tribal leasing" through the Section `17 corporation could not be achieved unless the corporation had power to lease tribal lands at large, and not just lands previously transferred to it by the tribe or owned by the corporation.

Cohen's contemporaneous interpretation is also consistent with a companion purpose of Section 17, to facilitate commercial transactions by tribes by providing a corporate vehicle that may waive its immunity from suit without requiring a waiver of the tribe's immunity. Additionally, by indicating that some Section 17 charters do not authorize leasing of tribal lands but others do, Cohen's analysis suggests that a tribe, with Secretarial approval of its corporation's Section 17 charter, may determine the leasing authority its chartered corporation may exercise.

Early Interior Department opinions interpreted Section 17 to authorize an approved charter to grant broad authority to convey tribal real property. In Solicitor's Opinion No. M-36119, the Solicitor was called upon to decide whether a contract entered into by a tribal corporation for a tribal enterprise on tribal land required Secretarial approval under Section 81.[64] The Solicitor noted that the tribe had a corporation chartered under Section 17 and that the "charter confers on the band authority to manage enterprises and to administer *tribal land*." *Id.* at 9 (emphasis added). The Solicitor explained that Section 17 authorizes the Secretary "to grant to incorporated tribes far-reaching powers with respect to the conduct of business activities." *Id.* The Solicitor further explained that the only limit on the Secretary's powers were those contained in 25 U.S.C. § 477. The Solicitor concluded that the charter, which was a typical

[64] Opinion of the Solicitor, Department of the Interior ("Contract for the Management of the Grand Portage Trading Post and Resort Enterprises"), No. M-36119, 61 I.D. 8 (Feb. 14, 1952).

charter, granted the tribe the authority to enter into contracts so long as the "tribal lands" were not sold or mortgaged, or leased for periods in excess of 10 years."[65]

Similarly, in Opinion No. M-36515, the Solicitor reiterated the broad grant of authority given to tribal corporations under Section 17.[66] The Solicitor interpreted Opinion No. M-36119, discussed above, as having "concluded that the purpose of Section 17 was to authorize the Secretary, in his discretion, to grant any or all powers incidental to the conduct of business which a corporation can legally exercise, except the power to sell or mortgage reservation lands, or to lease them for a period in excess of 10 years."[67]

That this early interpretation remains applicable after the 1955 enactment of the BSLA is indicated by the BSLA regulations. Although the regulations require BIA approval of leases to which they apply, they expressly provide that the regulations in Part 162 do not apply to "tribal land that is leased under a corporate charter issued by us [BIA] pursuant to 25 U.S.C. § 477."[68]

These authorities provide substantial support for the proposition that a Section 17 corporation may have authority to enter into business leases of tribal "at large" lands. Given Section 17's language authorizing the chartered corporation to "manage and dispose of" tribal lands, the statute also may authorize the corporation to grant mineral leases, grants of rights-of-way, or development agreements, including IMDA-type agreements without BIA approval. However, research disclosed no authority addressing transactions other than business leases.

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[65] *Id.* at 10. The original IRA ten year limit on the term of corporate leases has since been extended to 25 years in 1990. *See* Pub. L. 101-301, § 3(c), 104 Stat. 207.
[66] *See* Opinion of the Solicitor, Department of the Interior ("Separability of Tribal Organizations Organized under Sections 16 and 17 of the Indian Reorganization Act"), No. M-36515, 65 I.D. 483 (Nov. 20, 1958).
[67] *Id.* at 483-484.
[68] *See* 25 C.F.R. § 162.102(d).

Widespread acceptance of Section 17's authorization of corporate leasing would provide significant new authority for tribes to manage tribal lands without BIA supervision. However, development partners using Section 17 corporations to authorize a transaction should take steps to bring the transaction within the parameters Felix Cohen and the cited authorities set out. It is desirable for the corporation's charter to provide clear and express authority for the corporation to transfer tribal lands. In addition, clear written tribal authorization for a Section 17 corporation to lease the specific tribal lands involved, if not previously owned by or leased to the corporation, may be desirable. Some tribes have multiple Section 17 corporations, which may have different boards, and a tribe may not be presumed to intend each to have authority to lease any tribal lands. Acceptance of corporate authority to lease or, possibly, effect other transfers, under Section 17 would be a significant step towards putting tribal lands on equal footing with off-reservation lands.

An alternative, but presently limited approach to by-passing BIA approval of business site leases is available for leases of Navajo Nation lands. Pursuant to Business Site Leasing Act amendments enacted in 2000, the Navajo Nation has assumed review and approval of business site leases on Navajo Nation lands pursuant to the Navajo Nation Business Site Leasing Regulations of 2005 approved by BIA on July 10, 2006.[69] The Navajo-specific amendment has been proposed as a model for tribes generally.[70]

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[69] *See* 25 U.S.C. § 415(e); for the Navajo Nation's Business Site Lease Application Requirements And Procedures Check List, *see* http://www.navajobusiness.com/pdf/DngBus/Leasing/Bus%20Site%20Lease.pdf. Business, but not mineral, leases also can be made without BIA approval on lands of certain other tribes. *See* O'Connell, *supra* note 55 at 21.

[70] Legislation proposed in the 111th Congress would amend the Navajo-specific provisions of the 2000 amendments to Section 415 to make them available to all tribes. *See* Helping Expedite and Advance Responsible Tribal Homeownership Act, H.R. 2523, 111th Cong. (2009).

[b] Approval of Contracts under 25 U.S.C. § 81. Agreements pertaining to tribal lands that do not fall under the IMDA, the BSLA, or other statutes may still require approval of the Secretary under the Indian Contracts Statute, known as "Section 81."[71] However, as revised in 2000, Section 81 also implies a "safe haven": contracts for shorter periods than 7 years generally do not require Secretarial approval. Accordingly, it presents a further vehicle for enhancing the competitiveness of tribal lands.

As enacted in 1871, Section 81 required a written agreement approved by the Secretary to validate any agreement with any tribe or individual Indian "relative to their lands." Under "old" Section 81, it was difficult to predict whether a contract was "relative to" tribal lands and, therefore, whether the approval requirement applied.[72] To enhance tribal economic development by affording greater legal predictability, Section 81 was amended in 2000 to require approval only for contracts that "encumber" tribal lands for seven years or more. "New" Section 81 also requires the contract to address enforceability of the contract up front, by either providing an enforceable remedy, including a waiver of immunity from suit--or warning the non-tribal party of tribal immunity from suit.[73]

The 2000 amendments promise to facilitate greater comfort in transactions. At least one court has given teeth to the requirement of the 2000 amendments that the contract must, in some legal sense, "encumber" tribal lands.[74] The exclusion of contracts for terms shorter than seven

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[71] Rev. Stat. § 2103, 25 U.S.C. § 81. For a detailed analysis of Section 81, *see* Shipps, *supra* note 16 at 2-11 to 2-16.

[72] The consequence of misjudging the requirement can be severe. *See* A. K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 789 (9th Cir. 1986) (voiding contract).

[73] *See* 25 U.S.C. § 81(d) (2). The Section 81 regulations provide specific standards to implement this requirement. 25 C.F.R. § 84.006 (2010).

[74] *See* GasPlus, LLC v. U.S. Dept. of Interior, 510 F.Supp. 2d 18, 36-37 (D.D.C. 2007) (Section 81 not applicable because an agreement authorizing a company to manage a business did not provide a "legal interest in land" that "encumbers" tribal lands).

years provides another possible safe haven for drafters of Indian country agreements.[75] In cases of uncertainty, the regulations allow submission of the contract to the Secretary, who will approve, disapprove, or state that the agreement does not require approval.[76]

[c] Rights-of-Way and Access. In structuring a development package, tribes and development partners often will need to insure access across lands not covered by the basic agreement. The General Purpose Right of Way Act of 1948 ("Right-of-Way Act") [77] authorizes the United States to grant rights-of-way or easements across tribal or allotted lands for any purpose necessary for energy and mineral development with consent of tribal landowners. It authorizes conventional rights-of-way and may also be employed for certain renewable energy development purposes that do not strictly provide access, when non-exclusive surface use is not required. The Right-of-Way Act vests broad discretion in the Secretary: as to compensation, it laid down only a broad, essentially procedural, guideline that no rights-of-way shall be granted "without the payment of such compensation as the Secretary . . . shall determine to be just."[78] The statute did not impose specific limitations as to terms of rights-of-way.[79] Perhaps most significantly, the Right-of-Way Act imposed new requirements for the consent of tribal and individual landowners.[80] Although 25 U.S.C. § 324 only imposed the tribal consent requirement on lands of tribes organized under the Indian Reorganization Act, the Interior Department's regulations implementing the Act broadened the requirement to apply to all tribes.[81]

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[75] There remains uncertainty whether contracts of tribal "Section 17 corporations" are subject to Section 81; *see* Shipps, *supra* note 26 at 2-13.
[76] *See* 25 C.F.R. § 84.005-84.007.
[77] *See* 25 USC §§ 323-328, with regulations compiled at 25 CFR pt. 169 (2010).
[78] 25 U.S.C. § 325.
[79] 25 U.S.C. § 328.
[80] 25 U.S.C. § 324.
[81] *See* 25 C.F.R. § 169.3; see , *e.g.,* Southern Pacific Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1982) (requiring the consent of non-IRA tribes to grants of rights-of-way); *see generally*

In many developments, compensation for rights-of-way is factored into a broader compensation package for the tribe's participation in the development. When a long term development contemplates the need for additional rights-of-way over time, some transactions attribute a base value per unit of land to be acquired and provide for the tribe's advance consent based on additional compensation, sometimes adjusted for inflation, to be paid when the additional right-of-way is needed. Unless the lands can be identified and evaluated at the time of the initial transaction, further NEPA and related review may be required when the later right-of-way is needed. However, tribes may attribute greater value to right-of-way than non-Indian developers expect. Some tribes consider the consent requirement gives them considerable leverage in negotiating right-of-way compensation, arguing that the value companies derive from rights-of-way supports charging amounts substantially greater than the value per acre of comparable land.[82]

Rights-of-way across allotted lands present different compensation considerations. The 1948 Act and regulations require consent of allotted landowners holding a majority interest in each allotment the right-of-way crosses, with exceptions for undetermined heirs and "unlocatable" or non-competent allotted owners.[83] However, federal law also authorizes

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Colby L. Branch, *Accessing Indian Lands for Mineral Development*, Natural Resource Development in Indian Country, Paper No. 3 at 3-6 to 3-8, 3-12 to 3-14 (Rocky Mt. Min. L. Fdn. 2005; Slade, *Mineral and Energy Development*, *supra* note 2 at § 5A.04[1][g][iv].

[82] Caselaw generally has rejected basing compensation of the right-of-way on value the it has for transporting energy. *See* Questar Southern Trails Pipeline v. 3.47 Acres of Land, U.S.D.C., D.N.M. No. Civ. 02-10, Mem. Op. July 31, 2003) (excluding evidence of "pipeline corridor" theory of value); Northwest Pipeline Corp. v. 95l.02 Acres of Land, U.S.D.C., D. Idaho, No. CV-01-628-E-BLW (Dec. 19, 2003) ("project enhancement" rule precludes evidence of value addition from condemnor's use of land).

[83] 25 C.F.R. § 169.3(c).

condemnation under state law procedures.[84] A recent challenge has focused attention on the procedures and valuation underlying allotted lands rights-of-way.[85] Applicants for rights-of-way should heed the Part 169 regulations and agency guidance regarding appraisals.[86]

The Part 169 regulations provide that the terms of rights-of-way for oil and gas pipelines, roads, and electric transmission lines, among other described uses, may be perpetual.[87] They also prescribe detailed application procedures. Of course, BIA approval of a right-of-way is a federal action requiring consideration and compliance with NEPA and related statutes.

Arising from the decision in *Strate v. A-1 Contractors,*[88] some tribes recently have expressed concerns over whether issuance of a right-of-way, instead of a lease, will impair the tribe's sovereign powers over nonmember right-of-way holders. This concern has caused some tribes to propose employing a "linear lease" under the Business Site Leasing Act or a minerals agreement under the IMDA instead of a right-of-way. However, it is uncertain whether using a lease or minerals agreement, as compared to a right-of-way, without specific provisions, would change the federal courts' analysis regarding tribal jurisdiction.[89] The most effective way to

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[84] *See* 25 U.S.C. § 357; *see* Yellowfish v. City of Stillwater, 691 F.2d 926, 930 (10th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (1948 Act does not manifest intent to repeal 25 U.S.C. § 357). However, when fractional interests in allotted lands are transferred to a tribe, the tribe's immunity from suit may prevent the condemnation from going forward. *See* Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 962 (8th Cir. 1983); *discussed*, Branch, *supra* note 81 at 3-27.

[85] *See* Begay v. PNM, *et al.*, U.S.D. Ct., D.N.M. No. CV 09-137-MV-RLP, dismissed (April 6, 2009) (BIA appeal dismissed, June 4, 2010, further BIA appeals filed, September 24, 2010).

[86] The Office of Appraisal Services ("OAS"), a subagency of Interior's Office of the Special Trustee for American Indians ("OST"), has adopted the federal appraisal standards from the *Uniform Standards of Professional Appraisal Practice* ("USPAP") and the *Uniform Appraisal Standards for Federal Land Acquisitions* ("the *Yellowbook"*). *See* Branch, *supra* note 96.

[87] *See* 25 C.F.R. § 169.18, whereas rights-of-way for other listed purpose are limited to 50 years.

[88] 520 U.S. 438, 455-56 (1997).

[89] *See* Nevada v. Hicks, 533 U.S. 353, 360 (2001)("the ownership status of the land . . . is only one factor" determining tribal jurisdiction over nonmembers).

ensure that an agreement provides the desired tribal role is for the parties to stipulate contractually regarding the tribe's jurisdiction.[90]

[4] Other Statutory Authority.

While most transactions will be documented under the statutory authority outlined above, other statutes may be useful for energy and mineral development in specific situations.

[a] The Indian Mineral Leasing Act. While now less frequently used than the IMDA, the IMLA and related statutes for specific tribes, and applicable regulations,[91] were for many years the primary authority for mineral leasing of tribal lands. The IMLA provides for leasing by competitive bidding or on negotiated terms using BIA standard form agreements. Enacted in 1938 following passage of the Indian Reorganization Act of 1934 ("IRA"), the IMLA was intended to provide a uniform template for minerals leasing on tribal lands, to bring mineral leasing into harmony with the IRA's policies to enhance tribal autonomy, and, it has been said, to "ensure that Indians receive 'the greatest return from their property."[92] The IMLA authorizes leases for a primary term not exceeding 10 years and calls for leasing "at public auction or on

[90] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S.316, 346 (2008) (Ginsburg, J., concurring and dissenting) (suggesting parties can control judicial jurisdiction by contractual stipulations); Montana v. United States, 450 U.S. 544, 565-66 (1981) (tribal jurisdiction can be premised on a "consensual relationship"); for a discussion of tribal jurisdiction and provisions addressing jurisdiction, *see* Neil G. Westesen, *From* Montana *to Plains Commerce Bank and Beyond, the Supreme Court's View of Tribal Jurisdiction Over Non-Members,* Special Institute on Natural Resource Development on Indian Lands, Rocky Mt. Min. L. Fdn. (2011); *see also* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5A.04[1][g][6]-[8].

[91] *See* 25 C.F.R. pt. 211 (2009) (IMLA regulation leasing on tribal lands).

[92] *See* Montana v. Blackfeet Indian Tribe, 471 U.S. 759, 767 n. 5 (1985); *but see* United States v. Navajo Nation, 537 U.S. 488, 511 (2003) (rejecting giving "talismanic effect" to such language, regarding coal leases under the IMLA).

sealed bids."[93] The BIA's regulations under the IMLA authorize leases for essentially any "energy or non-energy mineral" resource and for geothermal resources,[94] and for subsurface storage of oil or gas.[95] IMLA leases typically were executed on standard BIA forms that have changed little from the 1930's to the present.

Seeking to prevent improvident transactions through detailed prescriptive standards, the IMLA regulations specify lessees' bonding requirements, impose acreage limitations on the size of leases,[96] and specify detailed procedures governing the BIA's approval of a lease.[97] Early uncertainty regarding whether the National Environmental Policy Act would apply to IMLA lease approval decisions was resolved in favor of application. Hence, the IMLA regulations also require that "all environmental studies are prepared" and cultural resources are addressed, as required by the National Historic Preservation Act and related statutes.[98]

[b] Allotted Lands Leasing Act of 1909. Allotted lands frequently are near or adjacent to tribal lands and must sometimes be part of an effective energy or mineral development. The IMLA did not address leasing of allotted lands, and the IMDA applies to allotted lands only when they are included in a minerals agreement with tribal lands.[99] Consequently, for many transactions, allotted lands remain subject to the provisions of the 1909 Act, 25 U.S.C. § 396. Allotted lands leasing, and right-of-way acquisition, is often complicated

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[93] 25 U.S.C. §§ 396a, 396b; the IMLA does not apply to certain lands of the Crow (Montana), Shoshone (Wyoming), and Osage (Oklahoma) Tribes or to coal and asphalt land of the Choctaw and Chickasaw Tribes (Oklahoma). *See* 25 U.S.C. § 396f.
[94] 25 C.F.R. § 211.3.
[95] 25 C.F.R. § 211.22.
[96] *See* 25 C.F.R. §§ 211.24-28.
[97] 25 C.F.R. §§ 211.20-211.27; *see* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1331-33 (10th Cir. 1982) (compliance with regulations governing manner of publication of leases sales is mandatory).
[98] 25 C.F.R. § 211.7.
[99] *See supra* Section II[2][a] for a discussion of the IMDA's authority to include allotted lands in a Minerals Agreement.

by large numbers of owners of individual allotments, generally the descendants of the allottee to whom the allotment was issued perhaps a hundred or more years ago. Fortunately, the 1909 Act gives the Secretary authority to transfer with the consent of less than all allotted landowners.[100] Amendments to the Indian Lands Consolidation Act in 2000 provide the Secretary with additional authority to execute "any lease or agreement," except for coal or uranium leases, with the consent of the owners of certain specified percentages of the allotment owners.[101] The BIA's allotted lands mineral leasing regulations in 25 CFR Part 212 generally incorporate by reference the comparable IMLA tribal lands regulation in Part 211.

[f] Other Authorizations or Guidance. Other statutes or specific regulations may be necessary for successful non-renewable energy and mineral development in Indian country, but detailed treatment of them lies outside the scope of this paper.[102] Specific regulations govern permits to conduct geological and geophysical operations and related agreements under the IMLA[103] and the allotted lands leasing regulations..[104] While coal may be developed pursuant to the IMLA and IMDA, specific regulations govern limited aspects of coal leasing and also cover surface operations for coal. 25 CFR Part 200 states the Coal Surface Mining and Reclamation Act of 1977 ("SMCRA"),[105] applies to Indian lands. Finally, Indian Trader licensing may apply to certain development partners.[106]

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[100] *Id.* BIA regulations implement this authority. *See* 25 C.F.R. § 212.21(b) (2009).
[101] 25 U.S.C. § 2218(b); s*ee* O'Connell, *supra* note 26 at 1-5 to 1-6. The ILCA amendments have not yet been reflected in the Part 212 regulations.
[102] *See generally* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5.04[1][e],[f].
[103] *See* 25 C.F.R. § 211.56.
[104] *See* 25 C.F.R. § 212.56.
[105] *See* 30 U.S.C. §§ 1201; 25 C.F.R. § 200.12 (2009) makes applicable the provisions of 30 C.F.R. pt. 750, which "provides the regulation of surface coal mining and reclamation operations on Indian lands and constitutes the federal program for Indian lands."
[106] *See* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5.04[1][g][vi].

[5] Renewable Energy Development. "Renewable" is a broad and sometimes controversial term. Here, it denotes energy development technologies or techniques that afford alternatives to fossil fuel energy sources, including wind, solar, geothermal, biomass, and hydroelectric power generation, or that apply to mitigate carbon dioxide emissions from carbon energy sources, such as carbon sequestration. [107] There is tremendous interest in renewable energy development in Indian country,[108] but few substantial projects have become operational.[109] Numerous smaller projects are in development.[110]

Acquiring development rights for renewable energy likely may entail a business site lease under 25 U.S.C. § 415, a right-of-way under 25 U.S.C. § 323, or, for geothermal development, an IMDA agreement or IMLA lease. A business site lease may authorize any renewable development, except for geothermal projects or portions of them which are expressly authorized under the IMDA or IMLA.[111] As of this writing, Interior has begun drafting proposed model form leases for wind and solar development of Indian lands.[112] An IMDA agreement likely

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[107] *See infra* § 5A.05 [1] regarding financial incentives for renewable development in Indian country.

[108] *See* Kevin L. Shaw & Richard C. Deutsch, *Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development in Indian Country*, Natural Resource Development in Indian Country, Paper No. 9 (Rocky Mt. Min. L. Fdn. 2005); Patrick M. Garry, et al., *Wind Energy in Indian Country: A Study of the Challenges and Opportunities Facing South Dakota Tribes*, 54 S.D.L. Rev. 448 (2009).

[109] The Campo Band of Kumeyaay Indians currently hosts the largest renewable energy facility on tribal land, a 50 MW wind turbine facility. It has recently executed agreements for a 160 MW facility on its lands. *See* Reuters, Jun. 11, 2009, *California Tribe, Invenergy, Sempra Sign Wind MOU*, *available at* http://www.reuters.com/article/idUSTRE55A75X20090611.

[110] *See* the Department of Energy's list of its supported projects in development as of late 2009: http://apps1.eere.energy.gov/tribalenergy/prog_review_1109.cfm.

[111] *See* 25 U.S.C. § 2102(a); the regulations define geothermal broadly. *See* 25 C.F.R. § 225.2.

[112] Telephone conference with Mr. David Johnson, Department of the Interior, Office of Indian Energy and Economic Development, January 31, 2011.

cannot cover a wind or solar development, because it authorizes contracts for the "development of energy or non-energy *mineral* resources."[113]

Rights-of-way may be needed in addition to the rights granted under leasing statutes or the IMDA, to provide access by road and for electric transmission, water or gas pipelines, and other ingress or egress. Formal guidance or caselaw does not address whether a lease or IMDA agreement can supply the needed rights-of-way, without a separate right-of-way.

[6] Compliance with Requirements for Valid Federal Approval.

The validity and enforceability of the basic agreements authorizing access to and use of tribal or allotted lands will depend upon compliance with the statutes authorizing the agreements, such as the IMDA, IMLA, or Right-of-Way Act, and with other statutes imposing mandatory duties on the federal officials having approval functions. Generally, the tribe or other mineral or land owner will execute required agreements and then present the agreements to the BIA for approval. However, the parties are well advised to consult early with federal officials regarding their expectations and requirements regarding the transaction and what steps may be taken early to expedite or facilitate their approvals. Beyond the specific requirements of the authorizing statutes mentioned above, the most significant statutory conditions necessary to validate the parties' agreement is compliance with the complex of statutory considerations and procedures described generally as "the NEPA process." While NEPA requires consideration of several statutes, each imposing its own requirements, this paper will discuss only broad requirements of

[113] 25 U.S.C. § 2102(a) (emphasis added).

the National Environmental Policy Act ("NEPA")[114] and summarize briefly required consideration of related cultural resources.

[a] National Environmental Policy Act ("NEPA"). Section 102(2)(C) of NEPA sets forth the requirement that an extensive, interdisciplinary analysis be prepared with respect to any "major federal action significantly affecting the quality of the human environment." Caselaw and regulations of the Council on Environmental Quality,[115] contemplate a multi-step process. First, the agency must determine whether the action falls under a "categorical exclusion" ("CatEx"), classes of actions for which the agency has concluded significant environmental effects cannot be predicted, such as renewals of existing agreements that will not entail new surface disturbance.[116] Unless a CatEx applies, the agency must prepare an environmental assessment ("EA"), which compiles information sufficient to address the magnitude of the environmental effects, to inform the decision whether the action is one that may "significantly" affect the quality of the human environment. If it does not, the agency may enter a "finding of no significant impact" ("FONSI").[117] If the EA concludes the effects on the human environment may be "significant," the agency must undertake the rigorous and public process to prepare an environmental impact statement ("EIS").

Guidance applicable to approvals for energy and mineral development may be found in the Interior Department[118] and BIA[119] Manuals. The agencies' guidance addresses both actions

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[114] 42 U.S.C. § 4332(2)(C); *see generally* Dean B. Suagee, *Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 541 (1991).
[115] *See* 40 C.F.R. § 1508 (2010).
[116] *See* 40 C.F.R. § 1508.9.
[117] *See* 40 C.F.R. § 1508.13.
[118] *See* 516 DM 1-6, http://206.131.241.18/app_DM/act_getfiles.cfm?relnum=3846.
[119] The BIA's applicable guidance is in "Managing the NEPA Process-Bureau of Indian Affairs," (May 27, 2004), 516 DM 10, elips.doi.gov/elips/DM_word/3620.doc, and in the BIA's National

normally requiring preparation of the oft-dreaded EIS[120] and categorical exclusions from the EA requirement.[121] While it is beyond the scope of this paper to detail the requirements of each part of the NEPA process,[122] the guidance addresses applicants' responsibilities, including to "prepare a milestone chart for BIA use at the earliest possible stage in order to coordinate the efforts of both parties,"[123] and, for externally initiated proposals, "such as approval of the lease of trust land . . ., [t]he applicant (tribe or third party) normally prepares the EA."[124] Consistent with the CEQ regulations, "[t]the Bureau shall, however, make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA."[125] NEPA requires consideration of a broad range of effects, including those on plants and animals protected under the Endangered Species Act and cultural resources, discussed below. A BIA NEPA document must consider and contemplate compliance with any applicable tribal environmental laws.[126]

Consultation with any potentially affected tribes is a key step in a project, critical for timely and effective compliance with NEPA[127] and other federal natural resource and cultural

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Environmental Policy Act Handbook, 59 IAM 3-H (April 2005), http://passthrough.fw-notify.net/static/797640/downloader.js. ("BIA NEPA Handbook"). For background on the BIA's somewhat reluctant acceptance of NEPA duties, *see* Vollmann, *supra* note 55 at 12-22.

[120] *See* 516 DM 10.4, including certain proposed "mining contracts (other than oil and gas)," major water projects, and certain hazardous and solid waste facilities.

[121] *See* 516 DM 10.5, listing over 40 CatEx actions, including approvals relating to rights-of-way or mineral leases that will not entail substantial surface disturbance.

[122] *See generally* Joan E. Drake, *The NEPA Process: What Do We Need To Do and When?*, 43 Rocky Mt. Min. L. Fdn. J. 117 (2006), on the nuts and bolts of compliance with NEPA.

[123] *See* 516 DM 10.3.A(1)(d).

[124] *See* BIA NEPA Handbook § 4.2.B. The applicant should submit the EA with, or soon after, the submittal of the application (agreement proposed for approval). *Id.*

[125] *Id., citing* 40 C.F.R. § 1505.5(b).

[126] *See* BIA NEPA Handbook § 2.5.C.

[127] *See* 40 C.F.R. §§ 1501.7(a)(1), 1501.2(d).

resource protective statutes.[128] Generally, consultation consists of notifying a tribe or tribal community of the project and possible effects of a proposed action and securing the input of tribal communities. There are specific consultation requirements for several statutes.[129] Project proponents and responsible agencies should take care to comply with the requirements of each potentially involved statute. Failure to consult adequately can result in litigation and, potentially, project delay.[130] Consultation is required not just with a tribe directly impacted by a development, but also with other tribes who may be affected. [131]

There must be adequate compliance with NEPA before a federal official enters a decision that authorizes surface-disturbing activities to take place on the ground or irretrievably commits resources.[132] Nonetheless some agreements to authorize studies or exploration activities may be approved prior to completion of the final EA or EIS based on NEPA categorical exclusions.

[b] Cultural Resource-Protective Statutes and Regulations. Part and parcel of the NEPA process for a project will be review under the National Historic Preservation Act ,[133] the Native American Graves Protection and Repatriation Act,[134] other federal statutes,[135]

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[128] *See* Walter E. Stern, *Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective)*, Energy Development: Access, Permitting, and Delivery on Public Lands, Paper No. 15B (Rocky Mt. Min. L. Fdn. 2009).
[129] *See* Paul E. Frye, *Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Tribal Perspective)*, Energy Development: Access, Permitting, and Delivery on Public lands, Paper No. 15A (Rocky Mt. Min. L. Fdn. 2009).
[130] *See* Pueblo of Sandia v. United States, 50 F.3d 856, 860 (10th Cir. 1995); discussed in Stern, *supra* note 128 at 15A-12 to 15A-14.
[131] The Interior Department published for comment a draft tribal consultation policy, entitled Department of the Interior Policy on Consultation with Indian Tribes, on January 14, 2010. *See http://www.bia.gov/idc/groups/public/documents/text/idc012835.pdf.*
[132] *See* Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976); Stand Together Against Neighborhood Decay v. Board of Estimate, 690 F. Supp. 1192, 1199-1200 (E.D.N.Y. 1988) (NEPA studies must be completed before authority to construct granted, not before acquisition of land).
[133] *See* 16 U.S.C. §§ 470-470w-6 ("NHPA") *and* NHPA regulations at 36 C.F.R. pt. 800.
[134] 25 U.S.C. §§ 3001-3013 ("NAGPRA").

and, possibly, tribal laws and regulations.[136] The interests recognized and protected in these statutes may figure prominently in consultations, not just for the specific tribe involved in a development but also for other nearby or even regionally related tribes. While a detailed review of these statutes and their requirements is beyond the scope of this paper, careful and proactive attention to their requirements and subject matter will be important at every stage of an effective development.

III. Structuring the Deal: Property and Partnership.

The preceding portions of this paper describe available statutory authority for a transaction and discuss requirements for agreements imposed by federal law. The discussion that follows outlines considerations affecting how a transaction might be documented and structured to optimize the interests of the participating parties. It addresses determining the parties to a transaction, tailoring enforceability to the needs of the transaction, and documenting and structuring the transaction to minimize taxation and allocate tax benefits and optimize financial benefits to the partners.

[1] Determining Proper Parties: Tribes and Tribal Entities. Under increasingly complex IMDA agreements, multiple parties or forms of entity may join in agreements. Tribal entities may take forms unfamiliar to non-tribal parties. Some traditional tribes may have no written foundational document, such as a tribal constitution, at all. However, most tribes have written constitutions or other documents that define the powers of tribal governments, branches,

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[135] *See, e.g.,* American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("AIRFA"), *discussed* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5A.04[4][c][iii]; *and,* Archaeological Resource Protection Act, 16 U.S.C. § 470aa to 470ll ("ARPA").

[136] For a broad review of the legal requirements imposed by cultural property laws, *see* Hutt, Blanco, Stern & Harris, CULTURAL PROPERTY LAW (ABA 2004); *see also* Slade, *Mineral and Energy Development*, *supra* note 2 at § 5.04[1][g][4][c].

and officials.[137] Many tribes' constitutions are authorized under Section 16 of the Indian Reorganization Act of 1934 ("IRA"),[138] and their constitutions and by-laws may be similar in structure to these of many corporations[139]

Like corporations, tribes often act through sub-entities, owned and to different degrees controlled by the tribe. Prominent among these are corporations organized under IRA § 17.[140] IRA Section 17 corporations must be wholly owned by a tribe, though the tribe need not be an IRA-organized tribe, and they share a tribe's immunity from certain forms of taxation and, unless waived, from suit without their consent. However, tribes may also operate through tribally or state chartered corporations, which present multiple considerations concerning whether they enjoy immunity from suit and their authority to contract or to waive any immunity.[141] The form of entity a tribe may prefer, or that a partnering developer and the tribe may use to facilitate a transaction, requires an analysis of tax, control, and liability considerations. If a tribe acts in a transaction through a subsidiary, a transfer of real property interests to the subsidiary pursuant to the IMDA, a leasing, or right-of-way statute may be required.[142]

[2] Structuring the Deal: Tribal Equity vs. Lease. The considerations affecting how Indian country energy and mineral development transactions are structured are as varied as those applying off-reservation. The IMDA is the default form of agreement for most tribal transactions accessing oil and gas, coal, hard minerals, or geothermal resources, even when the

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[137] A useful source of information at an early stage of a negotiation may be the BIA's Tribal Leaders Directory. *See* www.doi.gov/bureau-endian-affairs.html.
[138] 25 U.S.C. § 476.
[139] For a thorough review of forms of entity in which tribes or tribally owned entities may participate in development, *see* O'Connell, *supra* note 55 at 2-6.
[140] 25 U.S.C. § 477.
[141] *See infra* § III[6] for a brief discussion of waivers of sovereign immunity and enforceability provisions.
[142] *See supra* Section II[3][a], concerning authority of IRA Section 17 corporations to lease tribal lands.

parties prefer a lease format for the transaction. Because the IMDA imposes no limitations on how a deal may be formatted, the optimal structure is a function of the capital resources, including tribal land and mineral resources, and the economic needs, expertise, and business preferences of the participants. The Business Site Leasing Act is the default format for exclusive surface use and when minerals are not involved, including for most wind, solar, and other renewable energy (but not geothermal) developments. The BSLA will provide the basic agreement for use of tribal land; however, if the parties want a joint venture or other non-lease participation structure in a renewable energy transaction, the parties should consider forming a lessee entity that is structured to achieve the parties' desired allocations of costs, capital requirements, economic benefits, and control. Complementing an IMDA or BSLA agreement, a right-of-way under the Right-of-Way Act may be needed for access across unleased areas. When more than one statutory form of agreement is involved, a memorandum of understanding or other umbrella agreement describing the broad agreement and structure, the inter-relationship between the component agreements, and key terms intended for all subsidiary agreements, is common. Such umbrella agreements may not need to be separately approved by BIA if they are attached to and incorporated in other instruments that receive BIA approval.

To apportion control, facilitate financing, maximize tax benefits, or minimize tax burdens, tribes and developers often agree upon a tribal equity interest in a project. That may take several forms: (1) the tribe or tribal sub-entity may own the minerals or renewable project, with a nonmember developer contracting to serve as operator or manager; (2) the tribe or tribal sub-entity and developer may each own equity interests through a joint venture agreement, often joined with an operating agreement governing management, accounting, and related issues; or (3) a lease/option agreement pursuant to which the tribe or tribal sub-entity may "back-in" to

equity participation by contributions to capital or other credits during the term of the agreement.[143] Some tribes, considering risk, available expertise, and other factors, do not seek equity participation and prefer a lease or lease/option under the IMDA with terms addressing key tribal interests.

[3] Structuring Development to Minimize Total Taxation. A few broad concepts provide a helpful overview of federal, tribal, and state taxation of energy and mineral development in Indian country. Tribes may tax severance of minerals under tribal leases.[144] States also may tax severance of minerals under tribal leases, even when the tribe imposes its own severance tax, creating "dual taxation" of the same activity.[145] Tribes and tribally-owned IRA "Section 17" corporations generally do not pay federal income tax,[146] or state income, *ad valorem* property or severance taxes, or gross receipts or sales taxes on purchases they make within Indian country,[147] unless Congress has indicated the intent to allow the state taxation.[148] Tribes, generally, are taxable on activity outside of Indian country.[149] Importantly, the Supreme Court looks at the "legal incidence" of the tax, not the "economic reality" of its effect.[150]

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[143] *See infra* Section III[3] regarding tax implications of alternative transaction structures.
[144] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. at 152; Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); *see generally* Charles G. Cole, *Tribal Taxation of Mineral Resource Development After* Atkinson, Natural Resource Development in Indian Country, Paper No. 12 (Rocky Mt. Min. L. Fdn. 2005).
[145] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-192 (1989).
[146] *See* Rev. Rul. 94-16, 1994-1 CB 19; the Revenue Ruling applies to tribes and corporations a tribe organizes under § 17 of the Indian Reorganization Act. *See* Michael P. O'Connell, *Tax Considerations in Natural Resource Development Projects on Indian Lands*, Natural Resource Development and Environmental Regulation in Indian Country, Paper No. 7 (Rocky Mt. Min. L. Fdn. 1999).
[147] *See* Montana v. Blackfeet Tribe of Indian, 471 U.S. 759, 764-765 (1985).
[148] *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113-114 (1998).
[149] *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158-159 (1973); *see also* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).
[150] *See* O'Connell, *supra* note 146 at 7-30 to 7-33.

These general rules are starting points in a taxation analysis of a proposed venture. The law is not settled as to many of these generalizations and other distinctions exist as to certain taxes and taxpayers. For example, the Supreme Court has held that imposition of at least some tribal taxes on nonmembers must be supported by the showing of a "consensual relationship" or "health and welfare" impacts under *Montana v. United States*.[151] Similarly, the holding in *Cotton Petroleum*, premised on a record showing "no economic burden falls on the tribe by virtue of the state taxes,"[152] may not govern a case where the state taxes significantly burden a tribe.[153]

Faced with the prospect of dual, state and tribal, taxation, development participants should consider alternatives to minimize overall tax burdens. First, existing law may afford tax credits or other incentives for energy and mineral development on tribal lands.[154] Second, the Indian Mineral Development Act and Business Site Leasing Act allow flexibility for structures that facilitate tax planning. For example, if a tribe retains a working interest in minerals, state oil and gas severance taxation likely will not apply to the tribe's equity interest in production. A non-Indian entity may have an argument that a state tax is preempted if the tax materially and adversely affects the tribe's ability to provide government services and the state affords few or

[151] *See* Atkinson Trading, 532 U.S. at 652-53.
[152] *See* Cotton Petroleum, 490 U.S. at 185.
[153] That was the holding of District Judge James A. Parker in Ute Mtn. Ute Tribe v. Homans, No. CIV 07-772 JP/WDS, Findings of Fact, Conclusions of Law, and Memorandum Opinion at 62 (D. N.M. Oct. 2, 2009), *on appeal*, Tenth Circuit No. 09-2276 (New Mexico severance taxes preempted as applied to oil and gas on Ute Mountain Ute Reservation, distinguishing *Cotton Petroleum*).
[154] *See, e.g.*, NMSA 1978, § 7-29C-1 (credits against New Mexico severance taxes for certain tribal severance taxes paid); C.R.S. 24-61-102 (2009) (Taxation compact between the Southern Ute Indian tribe, La Plata County, and the State of Colorado).

no services to the producer.[155] A transaction can be structured to motivate a developer to prosecute a tax challenge by providing for a division of tax revenues saved between the tribal and non-tribal parties. Similarly, a tribe's purchase of materials or equipment, or contracting to construct facilities, may defeat state gross receipts or sales tax. In a joint venture format, allocating depreciable assets to a taxable joint venturer, rather than a non-taxable tribe or tribal entity, may also reduce overall federal and state income taxation.

[4] Addressing Commercial Law in Indian Country. Commercial law in Indian country often is ill-defined. Although increasingly more tribes have enacted, or construed judicially, effective commercial laws, many tribes have not, and state law does not ordinarily apply. Although Federal law will govern BIA-approved leases, minerals agreements, or contracts pertaining to real property, there is no generally applicable federal commercial law governing agreements in Indian country. Consequently, except regarding rights and duties under federally approved agreements, tribal law or law selected by the parties likely will supply any commercial law for the transaction.

The content and complexity of tribal commercial laws varies widely. Some tribes have adopted tribal versions of certain titles of the Uniform Commercial Code.[156] The National Conference of Commissioners on Uniform State Laws has developed a Model Tribal Secured Transactions Act that has been adopted, with variations, by the Crow Tribe,[157] and the Tribe and Montana have entered into an agreement for a "Joint Sovereign Filing System" for secured

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[155] *See* Ute Mtn. Ute Tribe v. Homans, No. CIV 07-772 JP/WDS, *supra* note 137.

[156] *See, e.g.,* 5A N.N.C Navajo Nation Code). chs. 1, 2, 3 (West. Supp. 2008) (general provisions, sales, commercial paper); *see generally* Mark A. Jarboe, *Financing and Securing Indian Economic Development Projects,* Natural Resource Development and Environmental Regulation in Indian Country, Paper No. 14 (Rocky Mt. Min. L. Fdn. 1999).

[157] For information concering the Model Code and related agreements as implemented by the Crow Tribe and Montana, *see* http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=139.

transaction filings under UCC Article 9.[158] At least one tribe has legislatively adopted state substantive law for transactions exceeding a certain amount.[159] Providing reasonable certainty as to the commercial law applicable through the term of a project requires analysis of existing tribal commercial law and underscores the need for effective, well thought out, choice of law provisions in applicable agreements.

[5] Designing Enforceability Provisions. The need to address sovereign immunity, choice of law, and forum selection in agreements between tribes and their development partners is well-recognized and has been addressed in other writings.[160] This brief discussion only spots the issue and summarizes the most general concepts. Most tribes are willing to provide a limited waiver of immunity from suit, appropriately tailored to address the interests at stake in an agreement, as a condition of agreement. Sovereign immunity must be waived by "clear" language by Congress or by the tribe through properly authorized action complying with tribal law.[161] Choice of forum and choice of law may take into account the degree of development of tribal law and forums, but should address both parties' needs for predictable, cost-effective dispute resolution. Waiver of immunity, choice of forum, and choice of law provisions should be drafted to unambiguously describe the subject matter they address, the desired forums, including any alternative dispute resolution, and the available remedies, including forums for enforcement of the waiver and dispute resolution procedures.

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[158] *See* http://sos.mt.gov/business/Tribal/index.asp.
[159] *See* Jarboe, *supra* note 156 at 14-10.
[160] *see generally*, O'Connell, *supra* note 90 at 15-20; Slade, *Mineral and Energy Agreements*, *supra* note 2 at §5A.04[5][a]-[c]; Neil G. Westesen, *Contracting with Indian Tribes and Resolving Disputes: Covering the Basics*, Natural Resource Development in Indian Country, Paper No. 11A (Rocky Mt. Min. L. Fdn. 2005).
[161] *See* Oklahoma Tax Comm'n v. Citizens Band Potawatomie Indian Tribe, 498 U.S. 505, 509 (1991).

[6] Contractually Fostering Economic Stability. Recognition that tribes may have authority to regulate and tax energy and mineral development—and developers' needs to reasonably predict costs—have led some tribes and developers to agree to contours of future regulation and taxation. "Stability provisions" intended to promote consistent legal requirements and costs for a project, may take several forms: (1) some agreements stipulate tribal regulation or tax will not be more stringent or costly than current levels (including combined state and tribal tax levels) or than a referenced state or federal standard; others (2) identify applicable tribal law, including taxation (by citation or, if not readily verifiable by citation, attaching copies of applicable laws to the agreement), with agreed procedures addressing changes in tribal law; still others, (3) simply incorporate applicable state or federal law or taxation pursuant to tribal law.

To give teeth to "stability provisions," an agreement can provide a standard for the degree of economic impact that is acceptable, and provide the developer the right to secure either injunctive relief preventing the imposition of measures that have a more onerous effect or a damage remedy, measured by the adverse economic impact of the changed regulation or increased taxes in excess of the agreed standard. Such a damage remedy may be effectuated by deductions from the developer's payments to the tribe or by a suit for damages. The dispute resolution provisions should provide clearly for effective enforcement of such provisions.

The more difficult question may be whether a tribal government's agreement to such commitments is binding on a later tribal government. The rule the Supreme Court applies to this defense when asserted by the United States[162] or by a tribe[163] requires a very specific promise and implies a limitation of remedy: "sovereign power . . . governs all contracts subject to the

[162] *See* United States v. Winstar, 518 U.S. 839, 872 (1996).
[163] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. at 148.

sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms*."[164] The doctrine usually does not allow the contracting party to prohibit the government from exercising sovereign powers; rather, it provides the government "can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act."[165]

Tribes also may seek contractual stipulations to tribal regulatory or judicial jurisdiction, or to limit the effect of *Strate v. A-1 Contractors* and its progeny on tribal jurisdiction. The Navajo Nation, for example, employs Standard Terms and Conditions with broad covenants to comply with tribal law and taxation and to submit to Navajo Nation court jurisdiction.

[7] Financing the Deal.

[a] Federal Financial Incentives. The good news regarding financing energy and mineral development in Indian country is that there may be available federal financial assistance. While detailed analysis of available options is beyond the scope of this paper, they may include BIA loan guarantees for financing a tribe secures for its participation in a project.[166] In addition, tribes, and tribally-owned corporations organized under Section 17 of the Indian Reorganization Act of 1934, are to be "treated as States" for purposes of issuing bonds under Section 103(c) of the Internal Revenue Code; hence, interest on such bonds generally is not subject to federal income tax.[167] Tax exempt bond financing may also apply to certain tribal

[164] *Id.* (emphasis added) (tribal oil and gas leases, though specifying royalty rates, did not contain "clear and unmistakable surrender of taxing power").
[165] *Winstar*, 518 U.S. at 882 (quotations omitted).
[166] *See* 25 U.S.C. § 1461, implemented by regulations in 25 C.F.R. pt. 103 (2009) (BIA guarantee of up to 90% of certain loans to tribes).
[167] *See* Internal Revenue Service Private Letter Ruling, PLR 9847018, 1998 WL 803375 (November 20, 1998).

investments in energy development.[168] The IRS has collected references to numerous private letter rulings that address different fact patterns arising as tribes explore tax exempt financings.[169] Additionally, Indian country projects have advantages in competing for federal agencies' renewable energy portfolio purchasing of electric energy.[170]

There is also available federal financial support specifically applicable to renewable development in Indian country.[171] Although many federal inducements to develop renewable energy projects provide tax credits for project investments, tribes do not pay federal income tax and, accordingly, cannot take advantage of the credits.[172] Consequently, renewable ventures seeking to access available tax credits or the value of renewable energy certificates ("RECs") often allocate equity necessary for such benefits to the taxable party at least for a period allowing recovery of certain funds.

The "bad news" is that federal support specifically tailored to Indian country development presently is limited. Several Internal Revenue Code incentives, including broader

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[168] Tribally issued bonds are subject to limitations to which states and municipalities are not, most notably that they be for an "essential government function." *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N. C. L. Rev. 1009 (2007). However, an Internal Revenue Service private letter ruling concludes a tribally owned entity's issuance of bonds for utility purposes to be for essential government functions, not commercial activity; hence tax exempt under IRC § 103. *See http://www.nativelegalupdate.com/uploads/file/PLR%2020091101%20(Tribal).pdf*

[169] *See* http://www.irs.gov/govt/tribes/article/0,,id=154954,00.html.

[170] *See* 42 U.S.C. § 15852(c).

[171] *See* Dept. of the Interior, Division of Energy and Mineral Development, http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/index.htm.

[172] Legislation proposed in the 111th Congress would allow tribes to transfer to taxpaying entities (i) tax credits for renewable electricity generation ("RECs"), and (ii) their basis in a renewable project applicable to the tribal ownership interests in a project for investment tax credits purposes. These would be effective incentives. *See* Senate Indian Affairs Committee draft of proposed amendments to Energy Policy Act of 2005, Title III. *http://www.indian.senate.gov/issues/upload/CoverLetterandIndianEnergyBillDiscussionDraft.pdf*.

availability of tax exempt bond finance and accelerated depreciation on certain on-reservation investments,[173] expired as of December 31, 2009 or require issuance during 2010.[174]

Although the full range of federal incentives available to incentivize renewable development off-reservation are available in Indian country, they now favor privately financed renewable energy development.

[b] Collateralizing Indian Country Financing. Commercial financing of energy and mineral development in Indian country faces unique hurdles. The most significant is the difficulty of providing a lender with collateral that can be accessed in commercially reasonable fashion in the event of default. The only express authorization for securing financing with a BIA-approved lease or contract is contained in the Business Site Leasing Act regulations, which authorize BIA to approve a mortgage of the lease "for the purpose of borrowing capital for the development and improvement of the leased premises."[175] In the event of default, if the approved encumbrancer is the purchaser in a sale upon foreclosure, the encumbrancer may assign the leasehold without the further consent of the Secretary, provided the purchaser agrees to be bound by all terms of the lease.[176] However, for someone other than the approved encumbrancer to purchase at foreclosure sale requires a further BIA approval. These restrictions lead some developers (and some tribes) to use letters of credit to facilitate financing of Indian country developments.

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[173] *See* 26 U.S.C. § 168(j).

[174] *See generally* http://apps1.eere.energy.gov/tribalenergy/. Short-lived incentives include tribal economic development bonds and clean renewable energy bonds under the American Recovery and Reinvestment Act of 2009, 111th Cong. H.R. 1 (Feb. 17, 2009).

[175] *See* 25 C.F.R. § 162.610(c) (2009).

[176] *Id.*; if someone other than the encumbrancer is the purchaser at sale, the Secretary must approve any assignment. *Id.* An encumbrance not approved by the Secretary is unenforceable, *In re:* Epic Capital Corp., 290 B.R. 514, 521 (Bankr. D. Del. 2003), *aff'd in part*, 2004 U.S. Dist. LEXIS 4932 (D.Del. 2004).

There is a paucity of caselaw addressing whether mortgages of IMDA agreements or IMLA leases may be made, including whether such a mortgage may be validated by approval of the Secretary. The applicable regulations require the approval of assignments of the lease or minerals agreement "or any interest therein" by the Secretary in all cases and the approval of the Indian mineral owner if required by the lease or agreement. Analogizing a mortgagee's interest to be "any interest" in a lease or minerals agreement suggests a mortgage could be validated by approval by the Secretary.[177] However, the Jicarilla Apache Nation recently took the litigation position that there was no statutory authority for any mortgage or security interest in an IMLA lease, and that "any attempt to grant a lien on, security interest in, mortgage or otherwise encumber an IMLA-governed lease is void."[178] The case was settled, and no opinion addressed the Nation's contention. In addition, the presumption that county real property records and standard Uniform Commercial Code recordation are adequate to protect a lender's interest likely will not apply: BIA regulations specify BIA Land Title and Records Offices as official repositories for instruments affecting certain Indian titles, and specific requirements for recording and determining notice of encumbrances apply.[179]

IV. Tribes as Market Participants. Several tribes have evolved from landowners and royalty owners to participants as buyers and sellers in energy and mineral markets. Often a tribal role as participant grew out of a tribe's retaining an equity interest in a development. The IMDA

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[177] *See* Lynn P. Hendrix and Phillip R. Clark, *Perfecting and Enforcing Liens and Other Impediments to Lending in Indian Country*, Natural Resource Development in Indian Country, Paper No. 4, at 4-21 (Rocky Mt. Min. L. Fdn. 2005).

[178] *See* Jicarilla Apache Nation v. Bank of Montreal, Objection by Jicarilla Apache Nation and Jicarilla Apache Utility Auth. to Proposed Disclosure Statement at 7, Case No. 09-03239, *jointly admin. under* Case No. 08-37922, (Bankr. S.D. Tex 2009); *dismissed*, Order Confirming Plan of Reorganization at 16, *In re:* CDX Gas, LLC, Case No. 08-37922 (S.D. Tex. July 7, 2009).

[179] *See* O'Connell, *supra* note 55 at 30-33; *and In re* Emerald Outdoor Advertising, LLC, 444 F.3d 1077, 1081-1082 (9th Cir. 2006).

authorizes a tribe to assume roles ranging from equity owner in joint development to owner of the mineral resource, contracting for management or operations with a development company. Several tribes, including the Navajo Nation, Southern Ute Tribe, and Jicarilla Apache Nation, have created wholly owned subsidiaries that operate or own interests in oil and gas wells and gathering or electric transmission or distribution companies. Many tribes have tribal utilities. Of course, a tribe has unqualified authority to simply develop its energy and mineral resources, including renewable energy resources, itself.

Tribes may, but are not required to, take royalty or "working interests" shares of oil and gas production "in kind" and sell the production for their own account, though some tribes prefer to let an operator manage such sales. Tribes or tribal entities also operate wells on tribal and even non-tribal lands outside traditional tribal areas. Those interests put tribes in positions to sell oil and natural gas. Tribal interests in renewable energy developments could put tribes in positions to be sellers in electric energy markets. The federal Buy Indian Act provides authority for federal agencies to set aside procurement contracts for qualified Indian-owned businesses.[180] In addition, many large purchasers of well-head oil and natural gas and electricity, including major energy companies and utilities have internal policies favoring purchasing from minority, including Indian-owned businesses. Consequently, tribes as energy and mineral development partners face favorable conditions as participants in energy and resource markets.

V. Conclusion.

Partnering for energy and mineral development in Indian country presents opportunity and challenge. Tribes and developers who effectively address the challenge of analyzing a unique legal environment, bridging cultural differences, and ascertaining congruent interests may

[180] 25 U.S.C. 47.

find opportunities for successful development. Careful analysis and thoughtful and proactive planning are critical to timely and effective development. Tribes' abilities to function effectively as participants in energy and resource markets can support the economics of a sound development.

ADDENDUM

On February 15, 2011, the Department of the Interior issued for consultation with Tribal Leaders, draft regulation governing leasing of tribal lands under 25 U.S.C. § 415 and 25 C.F.R. pt. 162. The draft regulations would establish sub-parts to 25 C.F.R. pt. 162 addressing residential leasing, business leasing, and wind and solar resource permitting and leasing. *See* Letter, Del Laverdure, Principal Deputy Assistant Secretary-Indian Affairs, to Tribal Leaders, February 15, 2011.

See http://www.indianaffairs.gov/WhoWeAre/AS-IA/Consultation/index.htm.