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Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act

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PRACTICAL SOVEREIGNTY, POLITICAL SOVEREIGNTY, AND THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF- DETERMINATION ACT[♦]

by
Judith V. Royster*

This Article addresses the latest attempt by Congress to promote tribal self-determination through a statute designed to increase tribal control over energy resource development on Indian lands. The author begins with a brief history of the gradual transfer of control over tribal resources from the federal government to tribes. This shift in government policy has culminated in the recent passage of the Indian Tribal Energy Development and Self-Determination Act (ITEDSA), which allows some resource development without federal approval. ITEDSA allows tribes to enter into tribal energy resource agreements (TERAs) which give the tribes final decision-making power over their energy-related resources. The author notes that the increased sovereignty conferred by TERAs comes with several trade-offs. TERAs increase the risks of resource development while reducing some of the government's trust responsibilities. TERAs shift some of the cost of resource development from the government to the tribes and provide for more public scrutiny of tribal affairs. The author ultimately concludes that the benefits of ITEDSA will outweigh the costs for certain tribes.

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I. INTRODUCTION

One of the primary means of economic development for many Indian tribes is development of the reservation's natural resources.¹ Prior to the growth of the gaming industry in the 1990s, in fact, resource development was likely the major source of tribal economic development, and it remains so today for a substantial number of tribes.²

The tribal mineral resource base is extensive.³ Nearly two million acres of Indian lands are subject to mineral leases administered by the

¹ See Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 634 (2004) (noting that long-term leasing is "an important revenue stream for many tribes, particularly those rich in natural resources"); Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 2, 9 (Stephen Cornell & Joseph P. Kalt eds., 1992) (positing that "[a]s natural resource endowments rise, so do the chances of success" in economic development).

² See, e.g., *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Comm. on Indian Affairs*, 108th Cong. 115 (2003) [hereinafter *ITEDSA Hearing*] (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Reservation) (noting that "the production of oil and gas reserves on the Wind River Reservation is the primary source of revenue for the Tribes"); *Indian Energy Development: Regaining Self-Determination Over Reservation Resources: Oversight Hearing before S. Comm. on Indian Affairs*, 110th Cong., 2nd Sess. 15 (2008) [hereinafter *Oversight Hearing*] (testimony of Chairman Carl Venne, Crow Nation) (stating that "most of our governmental revenue is derived from our 35-year relationship with Westmoreland Resources, Inc.").

³ In addition to the mineral resources noted in the text, more than 43 million acres of tribal lands are range and grazing land, and another 2.5 million acres are "crop areas." Forest Service National Resource Guide to American Indian and Alaska Native Relations, App. D: Indian Nations (1997), available at <http://www.fs.fed.us/people/tribal/tribexd.pdf>. Some 16–18 million acres, located on well over 200 Indian reservations in about half the states, are forest lands. INTERTRIBAL TIMBER COUNCIL, INDIAN FOREST MANAGEMENT ASSESSMENT TEAM, AN ASSESSMENT OF INDIAN FORESTS AND FOREST MANAGEMENT IN THE UNITED STATES 1 (1993), available at <http://cnie.org/nae/docs/assessment.html#top> [hereafter IFMAT Report] reports 16 million acres of forested land on 214 reservations in twenty-three states. Fiscal

Department of the Interior,⁴ and the Bureau of Indian Affairs estimates that approximately 15 million additional acres of energy resources lie undeveloped.⁵ The direct economic impact of the resource base is likewise substantial. In fiscal year 2007, the Department of the Interior distributed more than \$465.5 million in royalties and other mineral revenues.⁶ Production of energy resources on Indian lands represents more than ten percent of the total of federal on-shore energy production.⁷

Despite the extent and economic importance of the mineral resources, however, tribal control over the development and use of tribal natural resources has historically been limited. In the last few decades, Indian tribes have gained a far greater role in decision-making concerning the use of their mineral resources. In part, this increased role results from tribes asserting a greater say in what occurs within their territories (practical sovereignty), and in part from new federal laws that place more of the decision-making power in tribal hands (political sovereignty).

Using mineral development as an example, this Article briefly traces the historic trajectory of federal laws: comprehensive federal control and exploitation during the allotment period; a slight loosening of federal control, tribal consent, and concern with tribal revenue streams in the reorganization period; and new approaches focusing more on tribal participation, partnerships, and increased control during the modern era of self-determination. Most recently, Congress has begun to enact a next generation of resource development statutes that authorize tribes, subject

report, U.S. Bureau of Indian Affairs, Performance and Accountability Report, Fiscal Year 2005, at 10, www.doi.gov/bia/BIA_PAR_2005_FINAL_02232006_web.pdf reports nearly 18 million acres of forested land on 275 reservations in twenty-six states.

⁴ U.S. Minerals Management Service, Total Producing and Non-Producing Leases by Category, Fiscal Year 2007, <http://www.mrm.mms.gov/MRMWebStats/Home.aspx> (follow “Lease Data” hyperlink; then follow “Total by Category” hyperlink).

⁵ *ITEDSA Hearing*, *supra* note 2, at 93 (statement of Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department of the Interior). The department estimates that the undeveloped lands “contain over 5 billion barrels of oil, 37 trillion cubic feet of natural gas, and 53 billion tons of coal that are technically recoverable with current technologies.” *Oversight Hearing*, *supra* note 2, at 47 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior). In addition, the department identifies “118 reservations with a high potential for biomass production,” tribes with geothermal resources and opportunities for solar development, and approximately 23 million acres on seventy-seven reservations “with class three or higher wind potential.” *Id.*

⁶ U.S. Minerals Management Service, American Indian Reported Royalty Revenues, Fiscal Year 2007, <http://www.mrm.mms.gov/MRMWebStats/Home.aspx> (follow “Reported Royalties Revenue” hyperlink; then follow “American Indian Reported Royalty Revenues” hyperlink).

⁷ *ITEDSA Hearing*, *supra* note 2, at 93–94 (statement of Theresa Rosier).

to Department of the Interior-approved general regulations, to enter into specific development agreements without federal approval. The most recent and wide-ranging of these next generation statutes is the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) of 2005. This Article examines the approach taken by ITEDSA, and then critiques the statute in light of its stated purpose of promoting tribal self-determination.

II. POLITICAL SOVEREIGNTY, PRACTICAL SOVEREIGNTY, AND TRIBAL RESOURCE DEVELOPMENT

The Harvard Project on American Indian Economic Development has spent more than a decade and a half identifying the key factors in successful tribal economic development. Although by no means the sole factor, sovereignty has emerged as one of the crucial attributes of viable economic development. Sovereignty, in turn, has two aspects as identified by Harvard Project researchers Stephen Cornell and Joseph Kalt: “practical” and “political.” Political sovereignty, a part of the externalities of economic development, is largely “the extent to which a tribe has genuine control over reservation decision-making, the use of reservation resources, and relations with the outside world.”⁸ Federal Indian policy, the researchers contend, is “[t]he central determinant of political sovereignty.”⁹ The more that federal policy promotes true tribal control over decision-making and resource use, the more likely development is to be successful.”¹⁰

More important than political sovereignty, however, is what Cornell and Kalt refer to as “practical sovereignty,” that is: putting “*practical decision-making power in the hands of Indian nations.*”¹¹ The concept of practical sovereignty builds upon political sovereignty, but moves beyond law and policy to actual on-the-ground governance. Practical sovereignty “puts the development agenda in Indian hands” and “marries decisions and their consequences, leading to better decisions.”¹² Tribes exercising actual decision-making powers “consistently out-perform outside decision-makers.”¹³ So central is practical sovereignty to successful economic development that Cornell and Kalt state categorically that:

⁸ Cornell & Kalt, *Reloading the Dice*, *supra* note 1, at 8.

⁹ *Id.* at 13.

¹⁰ *Id.* at 8.

¹¹ Stephen Cornell & Joseph P. Kalt, Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't, (Joint Occasional Papers on Native Affairs, No. 2005-02, 2006), at 12, *available at* http://www.jopna.net/pubs/Jopna_2005-02_Approaches.pdf.

¹² *Id.* at 13.

¹³ Miriam Jorgensen & Jonathan B. Taylor, What Determines Tribal Economic Success? Evidence from Tribal and Individual Indian Enterprises, (Harvard Project on American Indian Economic Development, PRS 00 -3, 2000), at 3, *available at*

After fifteen years of research and work in Indian Country, we cannot find a single case of sustained economic development in which an entity other than the Indian nation is making the major decisions about development strategy, resource use, or internal organization. In short, practical sovereignty appears to be a *necessary* (but not sufficient) condition for reservation economic development.¹⁴

Thus, practical sovereignty “does not guarantee success,”¹⁵ but success without it is rare to nonexistent.

Practical sovereignty, no less than political sovereignty, requires reducing the role of the federal government. Federal decision-making is “the default mode” of reservation economic development,¹⁶ but also the approach that does not work.¹⁷ Indeed, Cornell and Kalt identify federal control over economic decision-making as “the core problem in the standard approach to development and a primary hindrance to reservation prosperity.”¹⁸ In order to further successful tribal economic development, then, the federal government must make the difficult transition from decision-maker to advisor, from controlling the process to providing information and technical assistance and serving as a resource for tribes.¹⁹

The history of tribal mineral development laws and practice demonstrates a trend toward increasing political and practical sovereignty. With the advent of the push for tribal self-determination in the 1970s, tribes asserted the right to a more significant say—greater practical sovereignty—in the development of their resources. Congress, in turn, has enacted resource statutes that increased tribal political sovereignty over resource decisions and decreased the control of the federal government.

One of the earliest and most far-reaching of Congress’s efforts was Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1974.²⁰ Under P.L. 638, tribes may enter into contracts and self-governance compacts to assume administration of federal Indian

<http://www.hks.harvard.edu/hpaied/pubs/documents/WhatDeterminesIndianEconomicSuccess.pdf>.

¹⁴ Cornell & Kalt, Two Approaches, *supra* note 11, at 14.

¹⁵ Cornell & Kalt, *Reloading the Dice*, *supra* note 1, at 15.

¹⁶ *Id.* at 35.

¹⁷ See generally Cornell & Kalt, Two Approaches, *supra* note 11.

¹⁸ *Id.* at 18.

¹⁹ Cornell & Kalt, *Reloading the Dice*, *supra* note 1, at 15; Cornell & Kalt, Two Approaches, *supra* note 11, at 18. See also Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 HARV. J. L. & PUB. POL’Y 445, 485 (1993) (arguing that “[s]uccessful tribal governments” should be able to manage their own resources and property, allowing the Bureau of Indian Affairs to “become a true service bureau” rather than the primary manager of tribal resources).

²⁰ 88 Stat. 2203–17 (codified as amended in scattered sections of 25 U.S.C.).

programs,²¹ and may use the 638 program to gain significant control over natural resources development. For example, a statistical analysis of seventy-five forestry tribes showed that in the 1980s, forty-nine of the tribes used the 638 program to take some degree of management over their forest resources.²² The study concluded that “tribal control of forestry under PL 638 results in significantly better timber management.” When tribes took complete management over their forest resources under 638, output rose as much as forty percent with no increase in the number of workers, and the tribes received prices as much as six percent higher than they had when the forest resources were managed by the Bureau of Indian Affairs.²³ Despite this type of success, the 638 program has been criticized as a half-measure. Although it pushes tribes away from the federal control model,²⁴ and authorizes tribes to administer federal programs, it “does not give tribes a major role in determining what the programs look like or whether the policies that drive those programs are appropriate.”²⁵ Tribal control of federal programs is thus better than federal control, but a clear second-best to tribal choices of what programs and development opportunities to pursue.

The surest way for tribes to control natural resources development, of course, is to develop the resources as a tribal enterprise.²⁶ But while some tribes do engage directly in mineral production,²⁷ as well as other

²¹ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.02 (LexisNexis 2005) (1941).

²² Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, in WHAT CAN TRIBES DO?, *supra* note 1, at 179, 182. The National Indian Forest Resources Management Act of 1990 specifically preserves and authorizes the use of contracts, grants, and cooperative agreements with tribes for the management of forest resources. See 25 U.S.C. § 3104(a) (2000). The American Indian Agricultural Resource Management Act, enacted the same year, similarly authorizes tribes to use 638 contracts or self-governance compacts to develop and implement agricultural resource management plans. 25 U.S.C. § 3711(b)(1) (2000).

²³ Krepps, *supra* note 22, at 183.

²⁴ Cornell & Kalt, *Reloading the Dice*, *supra* note 1, at 36.

²⁵ Cornell & Kalt, *Two Approaches*, *supra* note 11, at 9. See also George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY 212, 221 (George Pierre Castile & Robert L. Bee eds., 1992) (“The Indian Self Determination Act is not a self-determination policy but an invitation to participate.”).

²⁶ Despite tribal control when tribes are the developers, the Harvard Project notes that “both inside and outside Indian Country, it is difficult to make government ownership of business work,” citing problems with motivating top management and “separation of politics from day-to-day business management.” Cornell & Kalt, *Reloading the Dice*, *supra* note 1, at 36–37.

²⁷ For example, the Colorado River Indian Tribes’ sand and gravel operation produces materials for highway and construction projects. See Colorado River Indian Tribes, *Business Opportunities*, http://critonline.com/crit_contents/business. The Southern Ute Tribe has an oil and gas operating company that produces natural gas

resource development activities,²⁸ most large-scale mineral development is still the province of non-Indian companies that enter into leases or other agreements with Indian tribes. The remainder of this Article will therefore concentrate on the federal mineral development statutes and the tribes' exercise of political and practical sovereignty over those resources.

III. THE TRAJECTORY OF TRIBAL SAY IN MINERAL DEVELOPMENT

The three major natural resources traditionally subject to leasing are agricultural and grazing lands, forests, and minerals. Each has been subject to federal statutes that follow a similar arc—comprehensive federal control and exploitation during the allotment period; a slight loosening of federal control, tribal consent, and concern with tribal revenue streams in the reorganization period; and new approaches focusing more on tribal participation, partnerships, and increased control during the modern era of self-determination.²⁹ This Section will focus on the trajectory of federal laws promoting mineral development on Indian lands.

A. *The Federal Government as Decision Maker*

1. *The Allotment Era Jumble*

Widespread leasing of minerals, like leasing of other resources, began in the allotment era³⁰ under the rubric that Indian lands should

from hundreds of on-reservation wells. Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, NAT. RES. & ENVT., Summer 2007, at 55, 56.

²⁸ Tribes operate tribal farms, keep tribal herds, and manage tribal forest industries. As examples, at least half a dozen Arizona tribes engage in large-scale farming, see *Tribal Farms are a Growing Part of Arizona Agricultural Economy*, NEWS FROM INDIAN COUNTRY, Aug. 2007, available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=1197&Itemid=84; the Colorado River Indian Tribes' CRIT Farms alone manages over 15,000 acres of croplands. See Colorado River Indian Tribes, *supra* note 27. The InterTribal Bison Cooperative has 57 member tribes in 19 states; collectively, the tribes manage herds totaling over 15,000 buffalo. See InterTribal Bison Cooperative, *Who We Are*, www.itbcbison.com/about.php; Douglas H. Chadwick, *Where the Buffalo Now Roam*, DEFENDERS, Fall 2006, available at www.defenders.org/newsroom/defenders_magazine/fall_2006. Menominee Tribal Enterprises, the business arm of the Menominee Tribe in Wisconsin, manages the forest resources of the reservation for timber production and reforestation, including operation of the tribe's sawmill. See Sustainable Development Institute, Menominee Forest, www.sustainabledevelopmentinstitute.org/SustainingtheForest/MenomineeTribalEnterprises.asp.

²⁹ For a more detailed look at the history of resource development statutes, see COHEN, *supra* note 21, at § 17; Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541 (1994).

³⁰ The allotment era of federal Indian law and policy ran from approximately 1871 to 1934. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1

be made productive. The first general authorization for leasing of Indian lands was an 1891 statute authorizing tribal councils to issue grazing and mining leases.³¹ Mineral leasing was expanded in a series of acts in the 1910s and 1920s. Some of these later statutes required tribal consent; some did not.³² All of them expanded the term of mineral leases from the 1891 ten-year maximum, although not in a consistent manner.³³ And all of them authorized state taxation on production.³⁴

The allotment years were thus a period during which the federal government first authorized, and then expanded, the availability of Indian mineral resources for development by non-Indians. After a cautious beginning in 1891, statute after statute opened more lands and more resources. The statutes were a jumble of requirements, however. Lease durations were not uniform; tribal consent was not always required; and state taxation was often permitted. Regardless of the specifics, however, the federal government was entirely in charge—of what resources could be developed, for what length of time, and under what circumstances. In most cases, tribes could consent to non-Indian development, but had little control otherwise over the management and development of their natural resources.

2. *The Reorganization Era Consolidation*

With the onset of the reorganization era,³⁵ Congress responded to problems with allotment era leasing statutes and practices. The Indian

(1995). In addition to the statutes discussed in the text, timber sales on Indian forest lands were also first authorized during this era, in 1910. 25 U.S.C. § 407 (2000).

³¹ 25 U.S.C. § 397 (2000). The act authorized leases on reservation lands “bought and paid for” that were not needed for agricultural purposes or allotments. The U.S. Supreme Court interpreted “bought and paid for” to mean lands set aside by treaty or agreement, but not by executive order. *See* *British-American Oil Prod. Co. v. Bd. of Equalization*, 299 U.S. 159, 164 (1936). The act required secretarial consent and limited leases to five years for grazing and ten years for mining. Agricultural leases for five-year terms were first authorized on the same basis in 1894, 25 U.S.C. § 402 (2000), with the term extended to ten years for irrigable lands in 1926. 25 U.S.C. § 402a.

³² Tribal consent was not required by the act of 1919, amended in 1926, authorizing leases in nine western states for minerals other than oil and gas. 25 U.S.C. § 399 (2000). Oil and gas leasing statutes in 1924 and 1927 did require tribal consent. 25 U.S.C. §§ 398–398a (2000).

³³ The act of 1919, amended in 1926, authorized twenty year leases for resources other than oil and gas. 25 U.S.C. § 399. The acts of 1924 and 1927 lengthened the oil and gas lease term to ten years and “as much longer as oil or gas shall be found in paying quantities.” 25 U.S.C. §§ 398–398a.

³⁴ 25 U.S.C. §§ 398–399. The oil and gas leasing statutes of 1924 and 1927 further directed that the state production taxes could be levied against Indian royalties. 25 U.S.C. §§ 398, 398c.

³⁵ The reorganization era of federal Indian law and policy was ushered in formally by the Indian Reorganization Act of June 18, 1934, 48 Stat. 985, codified as amended at 25 U.S.C. §§ 464–479. Reorganization repudiated the allotment and assimilation approach of the previous decades, and focused on the revitalization of

Reorganization Act itself addressed general leasing authority, while a separate reorganization era statute made major changes in the way mineral leasing was conducted. Although these statutes attempted to correct prior abuses and provide a measure of authority to Indian tribes, federal management and control remained the norm for resource development.

The 1934 Indian Reorganization Act (IRA), the cornerstone legislation of the reorganization era, authorized Indian tribes to form IRA constitutional governments and receive federal charters of incorporation. For those tribes that elected the IRA,³⁶ IRA constitutions included a provision that tribal consent was required for the lease or encumbrance of tribal lands,³⁷ and tribal business councils operating under IRA charters of incorporation were authorized to manage tribal property, including the authority to enter into leases of up to ten years without secretarial approval.³⁸

Mining was not specifically mentioned in the IRA, but in 1938 Congress enacted the Indian Mineral Leasing Act (IMLA),³⁹ intended in part to help achieve the IRA goal of revitalizing tribal governments.⁴⁰ The IMLA substituted a single set of mineral leasing procedures for the allotment era jumble. All new mineral leases of tribal lands required both tribal consent and secretarial approval, and all new leases would issue for a term of ten years and “as long thereafter as minerals are produced in paying quantities.”⁴¹ To ensure that tribes received “the greatest return” on their minerals,⁴² regulations established a system of payments with minimum rates for rents and royalties.⁴³ The IMLA was silent on state taxation, but the U.S. Supreme Court subsequently interpreted it as disallowing the practice of deducting state taxes from Indian royalty payments.⁴⁴

The reorganization era was thus a time of consolidating and streamlining federal mineral leasing statutes. In keeping with the federal

tribal governments. *See generally* GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934–1945* (1980).

³⁶ *See* COHEN, *supra* note 21, at § 1.05.

³⁷ 25 U.S.C. § 476 (2000).

³⁸ *Id.* § 477; *see also* 25 C.F.R. § 84.004(b),(f) (2008). The term was extended from ten years to 25 years in 1990. Act of May 24, 1990, Pub. L. No. 101-301, § 3(c)(3), 104 Stat. 206 (1990).

³⁹ 25 U.S.C. §§ 396a–396g (2000).

⁴⁰ S. REP. NO. 75-985, at 2–3; H.R. REP. NO. 75-1872, at 1–3.

⁴¹ 25 U.S.C. § 396a.

⁴² S. REP. NO. 75-985, at 2; H.R. REP. NO. 75-1872, at 2.

⁴³ 25 C.F.R. §§ 211.20, 211.41–211.43 (2008).

⁴⁴ *Montana v. Blackfeet Tribe*, 471 U.S. 759, 768 (1985). A few years later, however, the Court held that neither the IMLA nor general principles of Indian law preemption prevented states from taxing non-Indian mineral producers directly. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–87 (1989).

policy focus on the revitalization of tribal governments, tribal consent was uniformly required for resource development, and Congress paid more attention to tribal revenues from mining activities. Nonetheless, tribes had more authority over resource development on paper than in practice.⁴⁵ IRA corporations could enter freely into leases, but the ten-year maximum lease term curtailed any real utility for mineral development. Leasing was the sole route for mineral development by non-Indians, and the Bureau of Indian Affairs (BIA) set standard lease terms and developed standard lease forms. Mineral leases were essentially perpetual once minerals were produced in paying quantities, preventing tribes from renegotiating more favorable terms as conditions changed. Royalty rates were low, and industry often nominated tracts for sale, reducing the tribal role to simple consent. And federal surveys of Indian lands were generally lacking, leaving tribes with little real information about their natural resources before entering into leases.⁴⁶ In the reorganization era, therefore, political sovereignty was minimal and the federal government retained most of the practical decision-making about Indian natural resources development and use.

B. Increasing Practical and Political Sovereignty: The IMDA

The 1970s ushered in a new federal Indian policy, one of tribal self-determination.⁴⁷ In this era, Congress enacted new measures for mining on tribal lands, providing for greater tribal participation in resource use and development. The legislative push under the self-determination policy began in earnest in the mid-1970s. The Indian Financing Act of 1974 called for tribes to “fully exercise responsibility for the utilization and management of their own resources.”⁴⁸ The Indian Self-Determination and Education Assistance Act of 1975 called for “a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.”⁴⁹ Viewed through this new lens of tribal self-determination and management of resources,⁵⁰ the resource statutes of the reorganization years were woefully out of sync.

⁴⁵ Because “salvaging Indian economies” was a priority in the reorganization era, BIA officials believed that “that task required the continuation of maximum administrative control over Indian resources.” TAYLOR, *supra* note 35, at 93.

⁴⁶ See MARJANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT* 56 (1990).

⁴⁷ See generally COHEN, *supra* note 21, at § 1.07.

⁴⁸ 25 U.S.C. § 1451 (2000).

⁴⁹ 25 U.S.C. § 450a(b) (2000).

⁵⁰ See Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983). As a means to reduce tribal dependence on federal funding, President Reagan pledged that his administration would “assist tribes in strengthening their governments by removing

Agitation for change struck in the mining arena. Not only did the new policy of self-determination highlight the essentially passive role assigned to tribes under the 1938 IMLA, but the energy boom of the 1970s left tribes with an ever smaller fraction of their resources' value.⁵¹ Western energy tribes, at least those not already bound to long-term leases under the IMLA or earlier statutes, tried several strategies. One was a moratorium on new mineral development called by several tribes while they engaged in careful planning for development.⁵² A second was formation of the Council of Energy Resources Tribes as a means of providing energy tribes with information, advice, and technical assistance.⁵³ A third was the negotiation of mineral development agreements with energy companies. Relying on statutory authority to enter into service contracts "relative to their lands,"⁵⁴ several tribes bypassed the restrictive provisions of the IMLA and entered into negotiated agreements that provided more tribal decision-making authority and greater tribal profits.⁵⁵ The Secretary of the Interior initially approved several of these agreements, but determined in 1980 that the department did not have the authority to approve an oil and gas agreement.⁵⁶ The result was to call into question the legitimacy of the existing approved agreements. But energy tribes had begun to exercise practical sovereignty over their mineral resources, and there was no going back.

Congress responded with an exercise of political sovereignty: the Indian Mineral Development Act (IMDA) of 1982.⁵⁷ The IMDA's goals were "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources."⁵⁸ Under the IMDA, all tribes were authorized to enter into minerals agreements of any kind, including "any joint venture, operating, production sharing, service, managerial, lease or other agreement"⁵⁹

the Federal impediments to tribal self-government and tribal resource development." *Id.* at 97. He further stated that "Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources." *Id.* at 98.

⁵¹ For example, many coal leases set a flat royalty rate of 17.5 cents per ton. When the price of coal increased by 237 percent from the 1950s to the mid-1970s, the average royalty per ton increased by only thirty-five percent. AMBLER, *supra* note 46, at 66.

⁵² *Id.* at 62, 72.

⁵³ *Id.* at 91–117.

⁵⁴ 25 U.S.C. § 81 (2000).

⁵⁵ Royster, *supra* note 29, at 583–84.

⁵⁶ AMBLER, *supra* note 46, at 87.

⁵⁷ 25 U.S.C. §§ 2101–2108 (2000). The IMDA directed the Secretary to review agreements approved in the 1970s, and take any steps necessary to bring them into compliance with the IMDA. *Id.* § 2104(a).

⁵⁸ S. REP. NO. 97-472, at 2 (1982).

⁵⁹ 25 U.S.C. § 2102(a).

Subject to the approval of the Secretary of the Interior,⁶⁰ a tribe could choose what degree of control it wished to exercise, and what degree of risk it was willing to take, by its method of structuring an agreement.⁶¹ Moreover, the statute obligated the Secretary, upon the request of the tribe and “to the extent of his available resources,” to provide advice, assistance, and information to tribes during the minerals agreements negotiations.⁶² The IMDA was thus a significant leap: not only were tribes authorized for the first time to directly negotiate the terms of their mineral development, but they were also authorized to move beyond leases into any type of arrangement they found beneficial.

The exercise of practical sovereignty under the IMDA, however, had certain drawbacks for tribes. A depressed energy market in the 1980s, a lack of information and expertise with which to negotiate, and the potential financial risk sometimes made IMLA leases more attractive to tribes than the uncertainties of IMDA agreements.⁶³ Nonetheless, IMDA agreements appear to have been early and widely adopted.⁶⁴

The IMDA, like the self-determination era statutes for resource development generally,⁶⁵ represented a substantial increase in political sovereignty. Congress opened up options for tribes that wished to take advantage of them, and took important preliminary steps toward the Secretary’s transition from decision-maker to advisor. The political sovereignty instituted by a change in federal Indian policy was accompanied by the practical sovereignty of tribes choosing to take advantage of the new statutory opportunities.

Little, if any, research appears to exist on whether these practical exercises of sovereignty are working well for the tribes that choose them, but there are indicators. The 1980s study of tribes that chose to take control of forest management under the 638 program concluded that tribes provided significantly better management, resulting in higher

⁶⁰ *Id.*

⁶¹ Royster, *supra* note 29, at 586–87.

⁶² 25 U.S.C. § 2106.

⁶³ The IMDA preserved tribes’ ability to use the 1938 IMLA if they chose, as well as the leasing rights of IRA tribes. 25 U.S.C. § 2105 (2000).

⁶⁴ AMBLER, *supra* note 46, at 241–43.

⁶⁵ Congress did not address increased tribal authority over farming, range, and forest resources until 1990. When it did, Congress took a somewhat different approach than it had to mineral resources, focusing on tribal resource and management plans and the development of tribal law, as well as federally-approved sales and leases. In 1990, Congress enacted both the American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. §§ 3701–3745 (2000), and the National Indian Forest Resources Management Act (NIFRMA), *id.* §§ 3101–3120. Both statutes call for increased tribal participation in management of the resources; state that the Secretary’s participation in management should be consistent not only with federal trust responsibilities, but also with tribal objectives; and provide training and education opportunities for tribal members.

output and increased prices.⁶⁶ As to minerals specifically, there has been only a single reported court case under the 1982 IMDA, and that was resolved in 1986.⁶⁷ It is certainly possible, indeed likely, that the lack of litigation concerning IMDA minerals agreements means that the IMDA is working well as a form of both political and practical sovereignty for tribes.⁶⁸

C. *The Next Generation Approach To Resource Development*

Despite the substantial practical sovereignty embodied in the IMDA, that statute, like all the leasing acts that preceded it, required the cumbersome process of secretarial approval of each specific lease or agreement.⁶⁹ Secretarial approval of development instruments traces back to the Nonintercourse Act, first enacted by the first Congress in 1790, and unchanged since 1834. The Nonintercourse Act provides that no lease or other encumbrance of Indian land is valid under United States law without the consent of the federal government.⁷⁰ In 1871, at the onset of the allotment period of federal Indian policy, Congress provided that any contract or agreement with an Indian tribe for the provision of services “relative to their lands” must be approved by the Secretary of the Interior,⁷¹ and it incorporated the approval requirement into subsequent mineral development statutes as well.⁷²

⁶⁶ Krepps, *supra* note 22, at 183. See the discussion *supra* at text accompanying notes 22–23.

⁶⁷ *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457 (9th Cir. 1986). Quantum Exploration sought to bind the Blackfeet Indian Tribe to a minerals agreement, arguing that the tribe did not have the right to rescind the agreement prior to the Secretary’s approval, and that the BIA should not have provided the tribe with advice about problems with the agreement. The court easily rejected both arguments, concluding that both the tribe and the federal government were acting well within the IMDA.

⁶⁸ See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 191 (2004) (noting that “[t]he many unremarkably normal events are left unreported.”).

⁶⁹ See, e.g., *Oversight Hearing*, *supra* note 2, at 8 (written testimony of Chairman Marcus D. Well, Jr., for the Three Affiliated Tribes of the Fort Berthold Reservation) (noting that secretarial approval of the tribe’s IMDA agreements took “over three years”); *id.* at 18 (testimony of Chairman Carl Venne, Crow Nation) (noting “an extremely slow BIA approval process”).

⁷⁰ 25 U.S.C. § 177 (2000).

⁷¹ *Id.* § 81. An amendment in 2000 removed the phrase “relative to their lands,” and provided instead that any “agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years” requires secretarial approval. See Act of Mar. 14, 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000).

⁷² See, e.g., 25 U.S.C. § 396a (2000) (Indian Mineral Leasing Act); 25 U.S.C. § 2102(a) (2000) (Indian Mineral Development Act).

Since 1934, Congress has occasionally granted exceptions to the Nonintercourse Act requirement of federal approval for every instrument encumbering of Indian lands. As already noted, tribal corporations chartered under § 17 of the Indian Reorganization Act may be empowered to “manage, operate, and dispose of property,” although their leasing authority is time-limited.⁷³ Originally, IRA corporations were authorized to issue leases for up to ten-year terms, but in 1990 Congress extended that authority to twenty-five years.⁷⁴ Similarly, in 2000 Congress amended the 1871 general statute addressing contracts and agreements with Indian tribes to provide that agreements and contracts that encumber Indian lands for a period of less than seven years do not require secretarial approval.⁷⁵

Although these provisions place significant independent decision-making with tribes, the short-term leasing authority has not been overly useful for the economic development of tribal mineral resources. First, it appears that less than a third of all federally recognized tribes has a federal corporate charter.⁷⁶ Most tribes, therefore, are likely unable to take advantage of the IRA provision for leasing without secretarial approval. Moreover, non-Indian companies entering into mineral leases or agreements are unlikely to accept terms that extend for only seven to ten years. Even though both the Indian Mineral Leasing Act of 1938⁷⁷ and the Indian Mineral Development Act of 1982⁷⁸ preserve the leasing rights of IRA corporations, the IRA is little used for mining purposes.⁷⁹ By the time a mining company engages in exploration and development activities, production will often just reach economic feasibility in ten

⁷³ 25 U.S.C. § 477 (2000).

⁷⁴ Pub. L. No. 101-301, § 3(c), 104 Stat. 207 (1990).

⁷⁵ 25 U.S.C. § 81(b); *see also* 25 C.F.R. § 84.003 (2008). The legislative history of the amendment notes that § 81 was “concerned primarily with federal control” over agreements between tribes and non-Indians, but that “[o]ver the decades many provisions of this law have come to be antiquated and unnecessary.” H.R. REP. NO. 106-501, *reprinted in* 2000 U.S.C.C.A.N. 69.

⁷⁶ In 2007, there were 561 federally recognized tribes. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007). At least 157 Indian tribes, including sixty-six in Alaska, have corporate charters, although the information at the website visited seems limited largely to those charters issued in the 1930s and 1940s. *See* Univ. of Okla. Law Ctr., Indian Reorganization Act Era Constitutions and Charters, <http://thorpe.ou.edu/IRA.html>.

⁷⁷ 25 U.S.C. § 396b.

⁷⁸ The IMDA, 25 U.S.C. § 2105, provides that leasing rights under the IMLA remain unaffected, and the IMLA preserves the right of IRA tribes to lease under their corporate charters. 25 U.S.C. § 396b.

⁷⁹ *See To Permit Indian Tribes to Enter into Certain Agreements for the Disposition of Tribal Mineral Resources: Hearings on S. 1894 Before the S. Select Comm. on Indian Affairs*, 97th Cong., 2d Sess. 62–63 (1982) (statement of Joe McKay, Member, Blackfeet Tribe of Montana).

years' time.⁸⁰ The 1990 extension of IRA corporate leasing to twenty-five year terms might have resulted in greater use of IRA leases, but by the time that extension was enacted, many tribes with mineral resources had moved away from leases to the more flexible arrangements authorized by the 1982 IMDA.

Early in the self-determination era, Congress began to experiment cautiously with a new approach, one that eliminated secretarial approval of specific leases if the leases were issued in accordance with Interior-approved tribal regulations. In each instance, the legislative history declares that the new approach is intended to further tribal independence in development decisions.

In 1970, Congress amended the general surface leasing statute, known as § 415,⁸¹ to authorize the Tulalip Tribes to issue surface leases that do not involve "the exploitation of any natural resource" for up to fifteen years, or for certain longer periods if the lease is executed under tribal regulations approved by the Secretary.⁸² Specific leases that comply with these requirements do not require secretarial approval. The Department of the Interior, in support of the legislation, noted that the tribes wished to remove federal restrictions that they viewed as "an impediment to tribal progress."⁸³

Thirty years later, Congress again amended 25 U.S.C. § 415 to provide a broader authorization to the Navajo Nation.⁸⁴ In 2000, at the urging of the tribe,⁸⁵ Congress authorized the Navajo Nation to issue business and agricultural leases for up to twenty-five years and other surface leases for up to seventy-five years if the lease is executed under tribal regulations approved by the Secretary.⁸⁶ The Secretary is directed

⁸⁰ See, e.g., *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1433–34 (Fed. Cir. 1990) (noting that the company spent nearly six years in exploration and related activities before submitting a mining plan). In recognition of this, the standard Indian mineral lease term is ten years and as long thereafter as the minerals are produced in paying quantities.

⁸¹ 25 U.S.C. § 415 (2000). Surface leases under § 415 may include "the development or utilization of natural resources in connection with operations under such leases." *Id.* § 415(a).

⁸² 25 U.S.C. § 415(b). Subsection (b) was created by Act of June 2, 1970, Pub. L. No. 91-274, § 3, 84 Stat. 301, 302 (1970), and amended by Pub. L. No. 99-500, § 122, 100 Stat. 1783 (1986).

⁸³ S. REP. NO. 91-773, at 3239 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3237. The legislative history reveals, however, that the federal government was concerned with far more than supporting tribal decision-making. Congress noted that the tribal lands were "strategically located" close to downtown Seattle, and suited for "high-quality residential, industrial, and recreational purposes." *Id.* at 3237–38.

⁸⁴ The Navajo Nation is not an IRA tribe; it has neither an IRA constitution nor an IRA corporate charter. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985).

⁸⁵ See Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 361 (2006).

⁸⁶ 25 U.S.C. § 415(e).

to approve tribal regulations if the regulations are consistent with Interior regulations for surface leasing and “provide for an environmental review process.”⁸⁷ As with the Tulalip provision, specific leases that comply with the special statutory requirements do not require secretarial approval. Congress specified, however, that the authorization did not extend to any lease for “the exploration, development, or extraction of any mineral resources.”⁸⁸ In enacting the statute, Congress expressly found that one purpose was to “revitalize” the Navajo Nation “by promoting political self-determination, and encouraging economic self-sufficiency.”⁸⁹

In 2005, Congress expanded the new approach dramatically, reaching well beyond specific tribes. As part of the massive Energy Policy Act, Congress enacted the Indian Tribal Energy Development and Self-Determination Act (ITEDSA),⁹⁰ which has the potential to fundamentally change the way that tribal resource development occurs.

D. The Next Generation Mineral Statute: ITEDSA

ITEDSA authorizes Indian tribes, at their option, to enter into tribal energy resource agreements (TERAs) with the Department of the Interior.⁹¹ The Secretary is mandated to approve a TERA if the proposed agreement complies with a slew of statutory requirements, foremost among which is that the tribe demonstrate “sufficient capacity to regulate the development” of the tribal resources.⁹² Once a tribe has an approved TERA, it is authorized to enter into leases and business agreements⁹³ for energy resource development, and to grant rights of way for pipelines and electric transmission and distribution lines, without the approval of

⁸⁷ *Id.* § 415(e)(3).

⁸⁸ *Id.* § 415(e)(1).

⁸⁹ Omnibus Indian Advancement Act, Pub. L. No. 106-568, § 1202(b)(3), 114 Stat. 2868, 2934 (2000).

⁹⁰ 25 U.S.C. §§ 3501–3506 (2000).

⁹¹ *Id.* § 3504(e). This option became available on April 9, 2008, when the final federal regulations took effect. *See* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12808 (March 10, 2008).

⁹² ITEDSA § 3504(e)(2)(B)–(D). The regulations require a tribe to demonstrate its capacity by describing its “ability to negotiate and enter into” development instruments, discussing the tribe’s costs and sources of revenue associated with those responsibilities, and describing any 638 contracts or environmental programs that the tribe has assumed under federal laws. 25 C.F.R. § 224.53(f) (2008).

⁹³ Business agreements are broadly defined to include “[a]ny permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land,” as well as amendments, supplements, and modifications to such agreements, and “[a]ny other business agreement entered into to or subject to administration under a TERA.” 25 C.F.R. § 224.30 (2008).

the Secretary.⁹⁴ With the exception of oil and gas leases, which may be made for the standard term of ten years and as long thereafter as the oil or gas is produced in paying quantities, leases, business agreements, and rights of way may be made for terms not to exceed thirty years.⁹⁵ Thus, unlike the IMDA and its predecessor mineral leasing statutes, all of which require secretarial approval for each lease or minerals agreement that a tribe enters into, ITEDSA abolishes the need for secretarial approval of the specific development instrument.

The exercise of tribal self-governance under ITEDSA is still some time away. The final regulations went into effect on April 9, 2008.⁹⁶ Any tribe that wishes to may then begin the TERA process.⁹⁷ The first step is a pre-application consultation between the tribe and the Director of the Office of Indian Energy and Economic Development.⁹⁸ Following that consultation, the tribe submits its application for a TERA, including the text of its proposed TERA.⁹⁹ The Director determines if the application is complete and, if so, holds an application consultation meeting, intended to help the Director determine whether the tribe has the requisite energy resource development capacity.¹⁰⁰ The tribe may then submit a final proposed TERA for approval.¹⁰¹ Once the final proposed TERA is received, the Secretary publishes notice in the Federal Register and requests public comment,¹⁰² and conducts a review under the National Environmental Policy Act (NEPA) to determine potential environmental impacts that might arise from the TERA.¹⁰³ Ultimately, the Secretary has 270 days from submission of a final proposed TERA to approve it or not, and “shall” approve it if the TERA meets the statutory requirements and the tribe has demonstrated sufficient capacity.¹⁰⁴ Even if the process moves smoothly and as swiftly as possible,¹⁰⁵ it will easily be a year or more from the pre-application consultation to an approved TERA.

⁹⁴ ITEDSA §§ 3504(a)–(b).

⁹⁵ ITEDSA § 3504(a) (2) (B), (b) (2). Leases, agreements, and rights-of-way may be renewed at the discretion of the tribe. ITEDSA § 3504(c).

⁹⁶ See 73 Fed. Reg. at 12,808.

⁹⁷ By May 1, 2008, “[s]everal tribes” had already expressed interest in pursuing a TERA, and the Department of the Interior had convened a national meeting with interested tribes on April 29. See Oversight Hearing, *supra* note 2, at 45 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior).

⁹⁸ 25 C.F.R. § 224.51 (2008).

⁹⁹ 25 C.F.R. § 224.53 (2008).

¹⁰⁰ 25 C.F.R. §§ 224.57–59 (2008).

¹⁰¹ 25 C.F.R. § 224.61 (2008).

¹⁰² 25 C.F.R. §§ 224.67–68 (2008).

¹⁰³ 25 C.F.R. § 224.70 (2008). The public comment period under NEPA will run concurrently with the public comment period on the TERA.

¹⁰⁴ 25 U.S.C. § 3504(e) (2); 25 C.F.R. § 224.71 (2008).

¹⁰⁵ The likelihood of a smooth and swift process is, of course, small. In the 2003 hearing on ITEDSA, the Navajo Nation noted that, with respect to its special leasing

IV. CRITIQUES OF ITEDSA

ITEDSA, as the most far-reaching of the next generation of development statutes, represents a significant step beyond the self-determination era statutes of the 1980s and 1990s, toward increased political sovereignty and greater practical sovereignty. There is no question that ITEDSA opens new options for tribes, reduces the day-to-day management role of the federal government, and places greater practical decision-making in the hands of energy tribes. It also streamlines the resource development process by eliminating the often time-consuming step of secretarial approval of specific instruments. As such, it may stand as a model for future resource development statutes.

Nonetheless, ITEDSA has potential down sides and drawbacks, both small and large. Many of these were noted in the hearing held on earlier versions of the statute, but not addressed or corrected in the final enacted version. If ITEDSA represents the model of future resource development statutes, the concerns raised by ITEDSA may be instructive of ways to structure future statutes to reduce or eliminate problems.

A. *Energy Resources Limitation*

The first concern is the limitation on the resources to which ITEDSA applies. Enacted as an energy development measure as well as a tribal self-determination measure,¹⁰⁶ ITEDSA does not apply to all tribal mineral resources. The statute itself contains no definition of energy resources, but the regulations define them as “both renewable and nonrenewable energy sources, including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrologic resources.”¹⁰⁷ Tribes’ ability to exercise greater practical sovereignty over their mineral resources thus does not extend to such minerals as clay or sand and gravel. This artificial division of tribal mineral resources into energy and non-energy resources means that instruments for the development of non-energy minerals must still go through a secretarial review process even for tribes that enter into TERAs. Consigning sand and gravel development to a more onerous process than, say, uranium or coal development makes little sense. Amending ITEDSA to apply to the full range of mineral resources

provisions under § 415, “it has taken several years to develop the regulations which have now been adopted by the Navajo Nation but have yet to be approved by the Secretary.” *ITEDSA Hearing, supra* note 2, at 109 (Navajo Nation Response to Questions on S. 424 and S. 522).

¹⁰⁶ See, e.g., *ITEDSA Hearing, supra* note 2, at 70 (statement of Sen. Daniel K. Inouye) (noting that the bill was “intended to provide support to tribal governments in the development of energy resources on Indian lands”); *id.* at 93 (statement of Sen. Craig Thomas) (“As Congress continues to develop a comprehensive energy bill, Indian resources should not be overlooked.”).

¹⁰⁷ 25 C.F.R. § 224.30 (2008).

covered by the Indian Mineral Development Act¹⁰⁸ would not only harmonize the two statutes, but ensure that tribes could address all their mineral resources in the same manner.

B. Access to Financial, Technical, and Scientific Resources

A second concern with ITEDSA is the availability of financial resources and technical and scientific expertise. Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts, or the financial wherewithal to hire or train them, to provide the tribe with accurate and reliable information about its energy resources and the environmental and financial impacts of resource decisions. Building sufficient tribal capacity to regulate energy development is not merely a matter of tribal interest and determination, but first and foremost a need for “financial and technical resources” to ensure that tribes approach negotiations with energy companies on a level field.¹⁰⁹ In the congressional hearing on ITEDSA’s predecessor bills, both tribal and environmental representatives stressed the need for “symmetry in capacity” between tribes and energy companies.¹¹⁰

ITEDSA provides for Department of Interior grants and loans to Indian tribes and grants and technical assistance to multi-tribal environmental organizations, and Department of Energy grants and loan

¹⁰⁸ The statute defines mineral resources as “oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources.” 25 U.S.C. § 2102(a). The IMDA regulations are more detailed: “Minerals includes both metalliferous and non-metalliferous minerals; all hydrocarbons, including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to, sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral.” 25 C.F.R. § 211.3 (2008) (leases) and 25 C.F.R. § 225.3 (2008) (minerals agreements).

¹⁰⁹ *ITEDSA Hearing*, *supra* note 2, at 125 (statement of A. David Lester, Director, Council of Energy Resource Tribes); *see also Oversight Hearing*, *supra* note 2, at 42 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior) (“if a tribe wants to take advantage of the opportunity to develop Tribal Energy Resource Agreements with the Department, we must ensure that the tribe has identified resources and land title information, and the technical and administrative capability to develop those resources”).

¹¹⁰ *ITEDSA Hearing*, *supra* note 2, at 125 (statement of A. David Lester, Director, Council of Energy Resource Tribes); *see also id.* at 140 (email from Rebecca L. Adamson, President, First Nations), *id.* at 152 (statement of Sharon Buccino, Senior Attorney, Natural Resources Defense Council). Another tribal representative specifically noted the need for adequate resources to support the “lengthy and costly” environmental review process mandated in TERAs. *Id.* at 120–21 (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Indian Reservation). *See also* Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV., 943, 946 (2008) (discussing “information asymmetry” in the context of financial and business relationships).

guarantee programs.¹¹¹ It further provides for Department of Interior grants to tribes for the development of energy resource inventories or energy resources, feasibility studies, tribal law and technical infrastructure for environmental protection, and employee training.¹¹² Either directly through the use of federal officials, or indirectly by providing the finances to hire outside experts, the Secretary is directed to “ensure, to the maximum extent practicable and to the extent of available resources, that on the request of an Indian tribe, the Indian tribe shall have available scientific and technical information and expertise, for use in the regulation, development, and management of energy resources of the Indian tribe on Indian land.”¹¹³

Whether this mandate is sufficient to address the concerns expressed during the hearings is problematic. Certainly Congress intended that federal resources be made available to assist tribes in the technical, scientific, and management aspects of regulating the development of their energy resources. And as certainly, the department has been providing some significant assistance.¹¹⁴ But the “extent of available resources” at Interior is nonetheless unlikely to be adequate to meet the needs of all tribes that wish to take advantage of the TERA program.¹¹⁵

¹¹¹ 25 U.S.C. § 3502 (2008). For recent descriptions of DOI and DOE financial and technical support, see *Oversight Hearing*, *supra* note 2 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior and statement of Steven J. Morello, Director, Office of Indian Energy Policy and Programs, U.S. Department of Energy).

¹¹² 25 U.S.C. § 3503(a)–(b). For recent information on DOI support, see *Oversight Hearing*, *supra* note 2 (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior).

¹¹³ 25 U.S.C. § 3503(c). The provision is all but identical to one in the Indian Mineral Development Act. The IMDA provides that upon the request of a tribe and “to the extent of his available resources,” the Secretary should provide “advice, assistance, and information” during the negotiation process, either directly or indirectly through financial assistance. 25 U.S.C. § 2106.

¹¹⁴ For example, the Department of the Interior, Office of Indian Energy and Economic Development, maintains the Division of Energy and Mineral Development (DEMD) in Denver. As described by the Chairman of the Crow Tribe, “DEMD is a group of geotechnical experts that has provided us with professional appraisals of our mineral assets, including coal, oil, natural gas, wind energy, and limestone. DEMD is staffed by experienced industry-based professionals who provide sound advice and counsel on energy and resource development as well as strategic business-decision making.” *Oversight Hearing*, *supra* note 2, at 16 (testimony of Chairman Carl Venne, Crow Nation); *see also id.* (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Department of the Interior) (describing the work of the Office). Chairman Venne stated that the Crow Nation “would not be in a favorable position to engage in large scale industrial development without DEMD’s assistance,” and urged Congress to continue its support. *Id.* at 19.

¹¹⁵ The lack of federal financial resources may have the unintended and unfortunate consequence of creating a haves-and-have-nots situation among energy tribes: those with sufficient internal resources being able to take advantage of the

Moreover, helping to ensure that tribes negotiate on a level field requires the Secretary to do more than provide assistance as requested and feasible. It also requires that the Secretary refrain from providing information to energy companies that is withheld from the tribes. In the egregious case of Navajo Nation coal leases in the 1980s, the Secretary of the Interior supplied crucial information to the coal company which he did not supply to the tribe.¹¹⁶ The coal company then used that information in negotiating a new royalty rate on coal leases, a royalty rate that ultimately cost the tribe some \$600 million in lost revenues.¹¹⁷ Despite the overt breach of a common-law trustee's duties,¹¹⁸ the U.S. Supreme Court ruled that the Secretary's action did not constitute a breach of trust under the Indian Mineral Leasing Act and its implementing regulations, and held therefore that the Navajo Nation could not recover for its losses under that statute.¹¹⁹ So long as the Secretary's legal obligations to tribes do not prevent this type of dealing, tribes cannot be sure that the negotiating field is indeed level.

The remaining concerns about ITEDSA and its approach focus on the extent to which the federal government still retains control, the extent to which tribal decision-making is constrained by federal law, or both.

greater practical sovereignty that a TERA offers, and those without sufficient internal resources relegated to secretarial approval of every resource decision.

¹¹⁶ *United States v. Navajo Nation*, 537 U.S. 488, 497 (2003).

¹¹⁷ *Id.* at 500.

¹¹⁸ *See Navajo Nation v. United States*, 46 Fed. Cl. 217, 236 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 527 U.S. 488 (2003) ("The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty—a classic violation of common law fiduciary obligations."). The Court of Federal Claims nonetheless ruled against the Navajo Nation on its breach of trust claim, finding that neither federal violations of "the most fundamental fiduciary duties of care, loyalty and candor," *id.* at 227, nor anything in the Indian Mineral Leasing Act entitled the tribe to money damages on its royalty claim. *Id.* at 236, *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

¹¹⁹ *Navajo Nation*, 537 U.S. at 514. The case is on-going. On remand from the Supreme Court decision, the Navajo Nation asserted that a "network" of other authorities—including its treaties, the Surface Mining Control and Reclamation Act, and the Federal Oil and Gas Royalty Management Act, among others—established a claim for money damages. The Court of Federal Claims ruled against the Nation, but the Federal Circuit reversed, holding that the network of statutes and regulations "demonstrates that the government exercises comprehensive control over coal resource planning, coal mining operations, and coal royalty management and collection." *Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007), *cert. granted*, 2008 WL 2047578 (Oct. 1, 2008).

C. *Public Input Into Tribal Decision-Making*

A substantial concern expressed in the legislative history is that ITEDSA provides multiple points for public input into tribal decision-making concerning energy development. First, a proposed TERA is itself subject to public notice and comment,¹²⁰ and the Secretary is required to take public comments into account in the decision whether to approve a TERA.¹²¹ In addition, TERA requirements include that the tribe must provide for public notice of final approvals of development instruments,¹²² and must establish an environmental review process to identify significant environmental effects and any proposed mitigation measures.¹²³ As part of the environmental review process, the tribe must provide an opportunity for public notice and comment, respond to comments prior to approving an instrument, and provide a process for consultation with the state regarding any off-reservation impacts.¹²⁴ And finally, any “interested party” may, after exhausting tribal remedies, petition the Secretary to review the tribe’s compliance with its TERA.¹²⁵

Many of the public input provisions of ITEDSA, although not necessarily all, conflict sharply with tribal self-governance. One tribe’s attorneys summed up the various public input requirements as “a trade-off that may be unacceptable” to tribes that otherwise would take advantage of the TERA program:

Essentially, the measures propose the elimination of Secretarial approval in exchange for the promulgation of tribal regulations that not only require consultation with State officials, but also require public notification and comment processes, and, ultimately, private citizen challenges of approved leases or rights-of-way based on allegations of non-compliance with tribal regulations. Traditional notions of tribal sovereignty would protect tribes against the incursion of State governments or the views of non-members in the process of tribal decision-making. To ask tribes to forsake such a fundamental aspect of sovereignty in exchange for the elimination of Secretarial approval, may simply be too much for most tribes.¹²⁶

1. *Public Notice and Comment On TERAs*

The Secretary of the Interior is directed to publish notice of a proposed TERA in the Federal Register for public comment and to conduct a review of the proposed TERA under NEPA, although regulations state that the public comment period under NEPA will run

¹²⁰ 25 U.S.C. § 3504(e)(3) (2000).

¹²¹ 25 C.F.R. § 224.68 (2008).

¹²² 25 U.S.C. § 3504(e)(2)(B)(iii)(IX) (2000).

¹²³ *Id.* § 3504(e)(2)(C).

¹²⁴ *Id.* § 3504(e)(2)(B)(iii)(X), (C)(iii).

¹²⁵ *Id.* § 3504(e)(7).

¹²⁶ *ITEDSA Hearing*, *supra* note 2, at 159 (statement of Maynes, Bradford, Shippis & Sheffel, LLP, Attorneys for the Southern Ute Indian Tribe).

concurrently with the TERA comment period.¹²⁷ Tribal representatives objected to this process, concerned about “subjecting internal tribal regulations to the public notice and comment process through the federal register.”¹²⁸

It is not entirely clear what role the public comments on proposed TERAs will play. As noted earlier, the regulations require the Secretary to take the public comments into account in determining whether to approve a proposed TERA,¹²⁹ and indeed public comment would be a useless exercise otherwise. But ITEDSA also requires the Secretary to approve a proposed TERA if it meets the statutory requirements.¹³⁰ In order to reconcile these provisions, it would seem that public comments, in order to be considered by the Secretary, must be restricted to whether a proposed TERA meets the statutory requirements.¹³¹

The statutory requirements for approval of a TERA are multiple, but can be divided into three broad categories: first, a requirement that a TERA must include such provisions as setting forth the terms of the agreement, establishing an environmental review process, describing remedies for breach, and so forth;¹³² second, a requirement that a TERA must provide for periodic monitoring by the Department of the Interior;¹³³ and third, a requirement that the Secretary determine “that the Indian tribe has demonstrated that the Indian tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe.”¹³⁴ Criteria for determining whether a tribe has demonstrated sufficient capacity include the scope of activities the tribe proposes to assume, the history of the tribe’s role in energy development, the tribe’s administrative capacity, its financial ability to obtain technical expertise, its past performance with contracts, grants, and leases, and “[a]ny other factors the Secretary finds to be relevant in light of the scope of the proposed TERA.”¹³⁵

¹²⁷ 25 C.F.R. § 224.70.

¹²⁸ *ITEDSA Hearing*, *supra* note 2, at 105 (statement of Joe Shirley, Jr., President, Navajo Nation).

¹²⁹ 25 C.F.R. §§ 224.67–68 (2008). The regulations specifically provide that “[t]he Secretary will review and consider public comments in deciding whether to approve or disapprove the final proposed TERA.” § 224.68(a).

¹³⁰ 25 U.S.C. § 3504(e)(2)(B); *see also* 25 C.F.R. § 224.71.

¹³¹ If the Secretary were to take into account public comments that go beyond the statutory requirements for a TERA, that would introduce extra-statutory factors into the Secretary’s determination. It would also appear to violate the fundamental trust duties that the Secretary owes to Indian tribes. Congress has mandated approval of TERAs that meet certain statutory requirements, and for the Secretary to introduce such additional factors into the approval process as public comments may raise, would subordinate the beneficiary’s interests.

¹³² 25 U.S.C. § 3504(e)(2)(B)(iii).

¹³³ *Id.* § 3504(e)(2)(B)(ii), (e)(2)(D).

¹³⁴ 25 U.S.C. § 3504(e)(2)(B)(i); *see also* 25 C.F.R. § 224.71.

¹³⁵ 25 C.F.R. § 224.72 (2008).

This potentially opens up the realm of public comments. Since tribal capacity is a statutory requirement, and since the Department of the Interior has given itself the authority to consider any other (relevant) factors in determining capacity, public comments are arguably appropriate on virtually any topic relating to tribal energy development. That, in turn, becomes an issue not only at the point of the Secretary's decision on a TERA, but during the administrative appeals process¹³⁶ and the judicial review process.¹³⁷ Both the comments and the agency's response form part of the administrative record if the Secretary's decision to approve or disapprove a TERA is challenged in court.¹³⁸ With all that, tribal fears of subjecting tribal regulations to public comment may well be justified.

There are, however, important principles that both the Secretary and the reviewing court, if any, must take into account. First, ITEDSA confines the Secretary's review of a proposed TERA "to activities specified by the provisions of the tribal energy resource agreement."¹³⁹ Moreover, Congress directed that the Secretary "act in accordance with the trust responsibility . . . [and] in good faith and in the best interests of the Indian tribes."¹⁴⁰ The Secretary of the Interior has announced specific trust principles for the interpretation and implementation of ITEDSA. Under the ITEDSA regulations:

(a) The Secretary will interpret and implement [the statute and the regulations] in accordance with the self-determination and energy development provisions and policies in the Act.

(b) The Secretary will liberally construe [the statute and the regulations] for the benefit of tribes to implement the Federal policy of self-determination. The Secretary will construe any ambiguities in [the statute or the regulations] in favor of the tribe to implement a TERA as authorized by [the statute and regulations].¹⁴¹

These provisions obligate the Secretary, in considering the approval of a TERA, to place tribal self-determination at the core of the decision. Although the Secretary will consider and respond to relevant public comments on a proposed TERA, the Secretary should do so in light of

¹³⁶ ITEDSA establishes an administrative review process. *See* 25 C.F.R. §§ 224.180–185 (2008).

¹³⁷ The Secretary's approval of a TERA is a final agency action that can be challenged in court. 25 C.F.R. § 224.77 (2008) (stating that a TERA approval is a final agency action); 5 U.S.C. § 704 (2000) (providing that final agency actions are subject to judicial review).

¹³⁸ The only entity with the standing to appeal the Secretary's decision to disapprove a TERA is the tribe that proposed it. 25 C.F.R. § 224.77.

¹³⁹ 25 U.S.C. § 3504(e)(3) (2000).

¹⁴⁰ *Id.* § 3504(e)(6)(A).

¹⁴¹ 25 C.F.R. § 224.20 (2008).

the policies and regulations promoting tribal self-determination and energy development.

A reviewing court should take the same approach. A basic canon of federal Indian law is that statutes such as ITEDSA “be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians.”¹⁴² Moreover, as just discussed, Congress was clear in ITEDSA itself that these principles apply. An equally basic principle of administrative law, the *Chevron* doctrine, is that federal reviewing courts should normally defer to an agency’s reasonable interpretation of ambiguous statutory language.¹⁴³ Although there is some disagreement, the majority of federal courts that have addressed the interplay of the Indian law canons and the *Chevron* doctrine have concluded that if the two interpretive principles conflict, the Indian law canons—liberal construction in favor of tribal rights—trump the usual deference to agency decision-making.¹⁴⁴ Thus, to the extent that there is ambiguity in ITEDSA concerning the Secretary’s use of public comments in the approval of TERAs, those ambiguities should be resolved in favor of the tribes. An agency interpretation that runs counter to the canons would violate not only the agency’s own rules, but the clearly expressed wishes of Congress as well, thus rendering the interpretation unreasonable.

2. *Environmental Review of Tribal Decisions*

ITEDSA requires that a TERA establish an environmental review process for tribal development instruments and provide public notification of final tribal approvals.¹⁴⁵ Some tribal representatives objected to the environmental review process either on the basis of inadequate tribal financial resources to carry out environmental reviews,

¹⁴² COHEN, *supra* note 21, at § 2.02[1] (footnote omitted).

¹⁴³ *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹⁴⁴ *See* COHEN, *supra* note 21, at § 2.02[3] (collecting cases). The interplay has been examined in the scholarly literature. *See* Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495 (2004) (arguing that because congressional intent to diminish tribal rights must be clear, statutory ambiguities do not allow an agency to interpret the statute so as to diminish those rights, and the Indian law canons must therefore trump *Chevron* if the agency does so); Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies’ Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the “Tribes as States” Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15 (1998) (arguing that an agency’s interpretation of an ambiguous Indian statute should be found permissible under *Chevron* only if the agency has applied the Indian canons of construction in reaching its interpretation).

¹⁴⁵ 25 U.S.C. § 3504(e)(2)(C), (B)(iii)(IX) (2000). Although a tribe is required by ITEDSA to provide an environmental review process, including public notice and comment, it need not as a matter of federal law establish procedures for public input on non-environmental matters. 25 C.F.R. §§ 224.102–103 (2008).

or on the ground that the federal government should not mandate what tribal governments choose to do.¹⁴⁶

The structure of a tribal environmental review process under ITEDSA is set out in the statute.¹⁴⁷ The tribal process must provide for the identification and evaluation of significant environmental effects of the proposed instrument, identify any mitigation measures and incorporate those that are appropriate, provide for public notice and comment as well as tribal response to substantive public comments prior to tribal approval of the instrument, provide for tribal technical and administrative capacity to carry out an environmental review, and provide a tribal environmental oversight process for TERA activities. This requirement is intended in large part to mirror the provisions of the National Environmental Policy Act (NEPA).¹⁴⁸ NEPA, which requires an environmental review process for major federal actions significantly affecting the quality of the human environment, applies to federal approvals of tribal resource development leases and agreements.¹⁴⁹ Once the Secretary no longer approves each instrument, however, NEPA does not apply to the tribe's development decisions.

There is no question that the environmental review process under a TERA will be costly, and it will undeniably have the potential to delay implementation of tribal resource decisions.¹⁵⁰ Nonetheless, the TERA provisions for environmental review of specific tribal development

¹⁴⁶ *ITEDSA Hearing*, *supra* note 2, at 120 (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Indian Reservation) (urging that the federal government should provide tribes the financial support to conduct environmental reviews), and 155 (statement of Howard D. Richards, Sr., Chairman, Southern Ute Indian Tribal Council) (arguing that no environmental review is required for energy development on neighboring private lands, and that "Congress should resist efforts designed to change tribal decision-making into public decision-making."). Comments from state government and environmental organization representatives, on the other hand, supported public involvement in the tribal environmental review process. *Id.* at 150 (statement of Sharon Buccino, Senior Attorney, Natural Resources Defense Council), and 172 (statement of Bill Richardson, Governor, State of New Mexico).

¹⁴⁷ 25 U.S.C. § 3504(e)(2)(C); *see also* 25 C.F.R. § 224.63(c) (2008).

¹⁴⁸ National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. §§ 4321–4347 (2000). The Secretary "agrees," however, that the regulatory provisions for environmental review, consistent with the statutory language, "go beyond the requirements of NEPA." Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,808, 12,814 (Mar. 10, 2008).

¹⁴⁹ *See Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); *see generally* 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY §§ 1:14–1:26 (2005).

¹⁵⁰ And in that sense, ITEDSA does not streamline the process of energy development on tribal lands.

decisions are not necessarily incompatible with practical sovereignty.¹⁵¹ First, like NEPA, the environmental review provisions of ITEDSA mandate a process rather than a substantive outcome.¹⁵² Tribes must identify and evaluate significant environmental effects, identify proposed mitigation measures, and include appropriate mitigation measures in specific instruments.¹⁵³ Nothing in this process contemplates a particular substantive decision, but rather that decisions are made in light of full environmental information. The intent, as with NEPA, is that more information leads to more informed, and therefore “better,” decision making.¹⁵⁴

Second, public notice and comment on environmental matters has long been a feature of tribal mineral development decisions, by way of the NEPA process. Under current mineral development statutes other than ITEDSA—the Indian Mineral Development Act of 1982 and the Indian Mineral Leasing Act of 1938—the Secretary must approve each specific lease or development agreement. The Secretary’s approval, in turn, constitutes “major federal action,” which triggers the environmental review process of NEPA if the action significantly affects the quality of the human environment.¹⁵⁵ Virtually all mineral development has significant enough effects to require an environmental impact statement.¹⁵⁶ An environmental impact statement for tribal mineral development, whether undertaken by the Bureau of Indian Affairs or another federal agency,¹⁵⁷ is subject to public notice and comment in draft form,¹⁵⁸ and the federal agency is required to consider and respond to substantive comments in preparing the final statement.¹⁵⁹

There are at least two important differences between public notice and comment as part of the NEPA process and as part of the TERA process. Like other aspects of the TERA environmental review process,

¹⁵¹ It is true, however, that these requirements are imposed on tribes by federal law, and thus do not necessarily represent tribal choices concerning the balance between resource development and environmental protection.

¹⁵² See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

¹⁵³ 25 U.S.C. § 3504(e)(2)(C).

¹⁵⁴ See, e.g., Dean B. Suagee, *The Application of the National Environmental Policy Act to “Development” in Indian Country*, 16 AM. INDIAN L. REV. 377, 427 (1991) (noting that “tribes can use the NEPA process to reach better decisions, at least in the environmental sense.”).

¹⁵⁵ *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972).

¹⁵⁶ See National Environmental Policy Act: Implementing Procedures, 61 Fed. Reg. 67845, 67847 (Dec. 24, 1996) (listing certain mineral development projects as automatically requiring a full environmental impact statement without the preliminary screening stage of an environmental assessment).

¹⁵⁷ See COHEN, *supra* note 21, at § 10.08.

¹⁵⁸ 40 C.F.R. § 1503.1(a)(4) (2008).

¹⁵⁹ *Id.* § 1503.4.

the costs of notice and comment will be borne by the tribe rather than the Bureau of Indian Affairs or other federal governmental agency. This cost-shifting places a significant burden on the tribes. On the other hand, the consideration of and response to comments will be undertaken by the tribe rather than a federal agency. Although tribes have substantial input at the NEPA comment stage,¹⁶⁰ the consideration of all comments and the response to them are matters for the federal agency. The shift to a tribal environmental review process ensures that comments will be reviewed in light of tribal values, priorities, and decisions, rather than filtered through a federal lens.

Third, although the environmental review process introduces the requirement of public comment on the environmental effects of a proposed instrument, and the requirement that the tribe respond to relevant and substantive comments before it approves the instrument, this type of public participation can serve important tribal interests.¹⁶¹ First, it allows input by tribal citizens; although tribal members have indirect influence through their voting powers for tribal government officials, public comment allows more direct participation in tribal government. In addition, the public comment provision allows nonmembers who may be affected by the tribe's decisions an opportunity to have their say, and to have the tribe respond directly to their substantive environmental concerns. Not only does that address legitimate interests of reservation residents and neighbors who have no direct say in tribal government, but it helps alleviate the often still-lingering perception that tribal governments are not responsive to valid non-tribal concerns.¹⁶² On the other hand, of course, there is little question that the public comment process also allows those who oppose or fear tribal actions generally to make their misgivings part of the record. Nonetheless, the values of public participation may outweigh the concerns those types of comments can pose.

In addition, some tribes pursuing a TERA may already have a tribal environmental review process in place. Tribal environmental policy acts

¹⁶⁰ For example, NEPA regulations require a federal agency to request comments specifically from Indian tribes "when the effects may be on a reservation." *Id.* § 1503.1(a)(2)(ii).

¹⁶¹ The advantages identified here build on the section "why public participation and due process matter" in Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 5-9 (1999). Suagee and Lowndes also note that tribes treated as states for purposes of federal environmental laws may also be subject to various public participation requirements. *See id.* at 25-32.

¹⁶² *See id.* at 9 ("Public perceptions of tribal governments are probably more important, pragmatically, than many tribal leaders and tribal attorneys would like to acknowledge.").

(TEPAs) have long been advocated,¹⁶³ and in 2000 the Tulalip Tribes published a guide for Indian tribes interested in developing TEPAs.¹⁶⁴ Tribes that have chosen to develop TEPAs generally cite the importance of “proper and meaningful consideration of environmental, cultural, historical, and ecological factors” before development occurs,¹⁶⁵ and the need “to protect and preserve” the reservation and “to provide a safe and habitable homeland” for the generations.¹⁶⁶ It is difficult to determine how many tribes have TEPAs currently in place,¹⁶⁷ but of those tribal TEPAs readily available online, at least some provide either a public notice and comment process or some method of public participation in the environmental review process.¹⁶⁸ Although those tribes have chosen to include public participation in the environmental review process, and tribes entering into TERAs are required by federal law to do so, there is

¹⁶³ See, e.g., Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 AM. INDIAN L. REV. 297, 299 (1997).

¹⁶⁴ GILLIAN MITTELSTAEDT, DEAN SUAGEE, & LIBBY HALPIN NELSON, PARTICIPATING IN THE NATIONAL ENVIRONMENTAL POLICY ACT: DEVELOPING A TRIBAL ENVIRONMENTAL POLICY ACT: A COMPREHENSIVE GUIDE FOR AMERICAN INDIAN AND NATIVE ALASKAN COMMUNITIES (Tulalip Tribes 2000), available at [http://nepa.flhwa.dot.gov/ReNEPA/ReNEPA.nsf/All+Documents/C3A140A5BC48BC8D852570240073CFA3/\\$FILE/TEPA.pdf](http://nepa.flhwa.dot.gov/ReNEPA/ReNEPA.nsf/All+Documents/C3A140A5BC48BC8D852570240073CFA3/$FILE/TEPA.pdf).

¹⁶⁵ JICARILLA APACHE ENVIRONMENTAL PROTECTION TRIBAL CODE tit. 14, § 1, reprinted in Kathleen M. Sloan, *Enhancing Cultural Resources Management and Improving Tribal Involvement in the NEPA Process Through the Development of a Tribal Environmental Policy Act* 273, 277 app. (May 25, 2007) (Ph.D. dissertation, Oregon State University), available at <http://hdl.handle.net/1957/6149>.

¹⁶⁶ Oglala Sioux Tribal Environmental Review Code (2002), available at <http://narf.org/nill/Codes/oglalacode/oglaenviro.htm>.

¹⁶⁷ See, e.g., Sloan, *supra* note 165, at 212 (“While I have found a variety of environmental codes and ordinances, I have only located two actual copies of TEPAs.”). Dr. Sloan’s dissertation includes the two TEPAs that she located—for the Swinomish Tribe in Washington State and the Jicarilla Apache Tribe in New Mexico—as appendices. At least one other TEPA is available online: the Oglala Sioux Tribal Environmental Review Code, *supra* note 166. Others are referenced in documents, but not available online. See, e.g., Press Release, Agua Caliente Band of Cahuilla Indians, Agua Caliente Band of Cahuilla Indians to Redevelop Hotel (Dec. 1, 2006), available at <http://www.aguacaliente.org/GovernmentAffairsPress/tabid/55/Default.aspx#redevelophotel> (noting that the tribe “has filed formal paperwork under the Tribal Environmental Policy Act”).

¹⁶⁸ See, e.g., Swinomish Tribe Environmental Policy Act, §§ 19-01.130–19-01.150, reprinted in Sloan, *supra* note 165, at 270–72, App. B (providing for public notice and comment, public hearings “whenever appropriate,” and “meaningful reference” in the final review document to opposing views); see also Oglala Sioux Tribal Environmental Review Code, *supra* note 166, §§ 106–107 (providing that environmental review permits be made available for public inspection, and for an administrative review process for “[a]ny person aggrieved by an Environmental Review Permit being issued or denied”).

no indication that such provisions have proven problematic for the tribes that adopted them.

One further aspect of the environmental review process under ITEDSA that was troubling to tribal representatives is the requirement for specific tribal consultation with state governments on off-reservation environmental impacts.¹⁶⁹ State input into tribal decision-making raises the specter of historic interference by states with tribal matters,¹⁷⁰ as well as the issue of a lack of symmetry. States are not required by federal law to consult with tribes concerning on-reservation environmental impacts of state development initiatives, and few states include a government-to-government tribal consultation requirement as a matter of state environmental review law.¹⁷¹ In general, tribes are able to participate in state environmental reviews¹⁷² on the same basis as the public generally. State governments would have a similar right to participate in the public notice and comment phase of tribal environmental reviews under TERAs. Although specific government-to-government consultation on cross-border environmental impacts is likely positive for both tribal and state interests, the asymmetry of requiring consultation only one way is

¹⁶⁹ See 25 U.S.C. § 3504(e)(2)(B)(iii)(X).

¹⁷⁰ See, e.g., *ITEDSA Hearing*, *supra* note 2, at 159 (statement of Maynes, Bradford, Shippis & Sheffel, LLP, Attorneys for the Southern Ute Tribe). Increasingly, however, states and tribes are moving toward intergovernmental cooperation in a number of areas. See Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007). One significant difference in the types of situations chronicled by Professor Fletcher, of course, is the symmetry of the cooperation; ITEDSA mandates a one-way process. See *id.* at 74, 82–86.

¹⁷¹ Even those provisions that do exist appear to be limited. See, e.g., S. B. 18, 2004 Leg., 2003–2004 Sess. (Cal. 2004) (requiring city and county governments to consult with tribes for the protection of traditional tribal cultural places prior to making specific land use decisions); see also State of California, Governor's Office of Planning and Research, Tribal Consultation Guidelines: Supplement to General Plan Guidelines 12 (Nov. 14, 2005), available at <http://www.opr.ca.gov/index.php?a=planning/publications.html#pubs-T>. See also, e.g., OR. REV. STAT. § 540.530(1)(d)(A)(2007) (requiring tribal consultation if an in-stream water right would be injured by a proposed change of use, place of use, or point of diversion); WASH. REV. CODE § 90.82.080(3) (2004) (requiring "government-to-government consultation with affected tribes" before setting minimum instream flows). The state of Oregon requires that all state agencies "make a reasonable effort to cooperate with tribes in the development and implementation of programs of the state agency that affect tribes," OR. REV. STAT. § 182.164(3)(2007). It also provides that nothing in that requirement "creates a right of action against a state agency or a right of review of an action of a state agency." *Id.* § 182.168.

¹⁷² Approximately 15 states have enacted state environmental policy acts (SEPAs) that require state or local agencies to consider the environmental impacts of their proposed activities. See Catherine J. LaCroix, *SEPAs, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 CASE W. RES. L. REV.—n.18 (forthcoming 2008).

troublesome.¹⁷³ A better approach would allow tribes to choose whether to include state consultation as a category separate from public participation, perhaps conditioned on a reciprocal provision in state law.

3. *Interested Party Challenges*

The third area of concern in public input is the ITEDSA provision for “interested party” challenges to tribal compliance with TERAs.¹⁷⁴ The federal statute defines an “interested party” as a person or entity that will sustain or has sustained an adverse environmental impact because the tribe failed to comply with its TERA.¹⁷⁵ Any interested party may, after exhausting any available tribal remedies, petition the Secretary to review the tribe’s compliance with its TERA.¹⁷⁶ After consultation with the tribe and opportunity for the tribe to respond, if the Secretary determines that the tribe is not in compliance, the Secretary may take such action as the Secretary deems to be necessary to ensure compliance.¹⁷⁷ The ability of interested parties to challenge a tribe’s compliance with its TERA may prove to inject considerable delay and expense into tribal resource development. In particular, the potential for nuisance suits by disgruntled neighbors is certainly present.

Although interested parties are required to exhaust any tribal remedies available before petitioning the Secretary, the regulations contain an odd provision that could discourage tribes from providing such remedies, or at least pose a potential roadblock to tribal remedies. The regulations provide that a tribe may resolve the party’s claims “with

¹⁷³ In Russel Barsh’s classic phrase, “Spillovers spill over both ways.” Russel Lawrence Barsh, *Is There Any Indian “Law” Left? A Review of the Supreme Court’s 1982 Term*, 59 WASH. L. REV. 863, 875 (1984).

¹⁷⁴ 25 U.S.C. § 3504(e)(7); *see also* 25 C.F.R. §§ 224.100–121 (2008).

¹⁷⁵ 25 U.S.C. § 3504(e)(7)(A). Some commenters on the proposed rules indicated that the definition “unfairly limits the interests of parties that could appeal actions taken under a TERA.” Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12808, 12812 (Mar. 10, 2008). Interior declined to amend the regulatory definition because it tracks the statutory definition, but “recognize[d] the limitation of the definition.” *Id.* at 12812; *see* 25 C.F.R. § 224.30. The Department also noted that “there are other avenues for appeal of TERA approved actions,” directing readers to the final rules for appeals of Interior’s decisions. *Id.* The appeals procedures in turn specify that appeals may be taken by an adversely affected tribe, an adversely affected third party to a lease, agreement, or right-of-way entered into pursuant to a TERA, or an “interested party” under the statutory definition. *See* 25 C.F.R. § 224.181. The regulations are thus consistent with congressional intent that public challenges to TERA-approved instruments are limited to those alleging environmental injury in fact as a result of tribal non-compliance with the instrument.

¹⁷⁶ 25 U.S.C. § 3504(e)(7)(B). Tribes are not required by ITEDSA to provide a tribal procedure for interested party challenges. *See* 25 C.F.R. § 224.104. If, however, the tribe provides a process, it must issue a final written decision within a “reasonable time” of receiving the interested party’s petition. *Id.* § 224.106.

¹⁷⁷ 25 U.S.C. §§ 3504(e)(7)(C)–(D).

the petitioner's written consent."¹⁷⁸ It is likely that this provision applies to a petition filed with the Secretary of the Interior after exhaustion of tribal remedies, and not to the interested party's petition to the tribal court or administrative body. While that was quite clear in the proposed regulations, however, it is less clear in the final version.

In the proposed regulations, the provision was placed immediately after the provision for an interested party to file a petition with the Secretary.¹⁷⁹ The proposed regulation stated that: "If the tribe submits a proposed resolution and a written statement signed by the petitioner that shows the petitioner concurs with the tribe's proposed resolution of the claim," the department may accept the resolution and dismiss the petition.¹⁸⁰ It was thus clear that the tribe and the petitioner could submit a resolution in which they both concurred after a petition was filed with the Secretary. Although it appears that Interior received no comments on the proposed provision,¹⁸¹ it reworded the provision and changed its place in the order of the provisions. The final provision is located immediately after a provision stating what a petitioner must do *before* filing a petition with the Secretary.¹⁸² Further, it states that the tribe may resolve the petitioner's claims, "with the petitioner's written consent," when the tribe is "responding to a petition filed under tribal laws, regulations or procedures."¹⁸³ The regulations use the term "petition . . . under those tribal laws, regulations, or procedures" to describe a petition which is filed with the tribe itself in order to exhaust any available tribal remedies.¹⁸⁴ It thus appears that Interior, acting on its own without explanation, has created a potentially serious problem.

Read literally, the current provision appears to state that a petitioner must consent in writing to any resolution offered through the tribal administrative or judicial process. If the regulation is interpreted in that manner, however, it would effectively nullify any tribal process. If an interested party is unsatisfied with the outcome of any tribal process, the party has the right to file a petition with the Secretary. If an interested party is satisfied with the outcome of the tribal process, or not sufficiently unsatisfied to pursue further remedies, then the tribal resolution of the matter should stand without more. Anything else makes a mockery of the tribal remedies.

¹⁷⁸ 25 C.F.R. § 224.108.

¹⁷⁹ See Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 71 Fed. Reg. 48,626, 48,639 (proposed Aug. 21, 2006) (to be codified at 40 C.F.R. § 224.114).

¹⁸⁰ *Id.* at 48,640.

¹⁸¹ See Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,808, 12,817 (March 10, 2008) (showing no response to any commentary on 25 C.F.R. § 224.108).

¹⁸² See 25 C.F.R. § 224.107.

¹⁸³ *Id.* § 224.108.

¹⁸⁴ See *id.* §§ 224.105(b), 224.106(c).

In order to remain consistent with the purposes of ITEDSA and the Secretary's rules for carrying out ITEDSA¹⁸⁵—the promotion of tribal self-government and the economic development of tribal energy resources—the provision must be interpreted as it was understood from the proposed rules. The final rules provide that, in responding to a petition filed with the Secretary, a tribe may “[p]ropose to cure or otherwise resolve the claims”¹⁸⁶ and that the Department will investigate the petitioner's claim only if the tribe fails to respond to the claim, or fails, refuses, or is unable “to cure or otherwise resolve” the claim.¹⁸⁷ Even though the provision for a petitioner's written consent to a proposed tribal resolution of the claim is placed several sections ahead of these provisions, reading all the provisions together is the only logical choice. If they are read together, the rules then offer a tribe without its own process, or a tribe that has proceeded through its tribal process but left an unsatisfied interested party, an additional opportunity to resolve the matter. That is, after the interested party has filed a proper petition with the Secretary, the tribe may propose a resolution. If the interested party consents to that proposal in writing, and the Director of the Office of Indian Energy and Economic Development concurs,¹⁸⁸ then the matter is settled. This understanding of the rules not only demonstrates proper respect for tribal processes, but also offers a further opportunity for settlement directly between the tribe and the interested party.

D. Trust Responsibility

A final crucial concern with the ITEDSA model is the nature of the Secretary's trust responsibility. The statute directly addresses federal trust obligations. The Secretary is directed to “act in accordance with the trust responsibility” and to “act in good faith and in the best interests of the

¹⁸⁵ The rules expressly require the department to interpret ITEDSA and its implementing regulations “in accordance with the self-determination and energy development provisions and policies in the Act” and “liberally construe” the statute and regulations “for the benefit of tribes to implement the Federal policy of self-determination.” *Id.* § 224.20.

¹⁸⁶ *Id.* § 224.114(d).

¹⁸⁷ *Id.* § 224.115.

¹⁸⁸ The rules provide that Interior must investigate a petitioner's claim unless “[t]he tribe has failed, refused, or was unable to cure or otherwise resolve each claim made in the petition within a reasonable period, as determined by the Director.” *Id.* § 224.115(b). Although it is unclear from the plain language what “as determined by the Director” modifies, Interior reads the phrase as applying to the tribe's proposed resolution of the claim. *See* 73 Fed. Reg. at 12,816. The proposed rule on the same subject provided expressly that the Director should investigate if “[t]he Director did not accept the tribe's proposed resolution in which the petitioner agreed.” 71 Fed. Reg. at 48,640. One commenter objected that the Director should not be able to reject solutions mutually agreed upon by the tribe and the interested party, but Interior responded that it believed its trust responsibility required it to maintain oversight of negotiated resolutions. 73 Fed. Reg. at 12,816.

Indian tribes.”¹⁸⁹ Nothing in ITEDSA “shall absolve the United States from any responsibility to Indians or Indian tribes.”¹⁹⁰ The Secretary is obligated to protect the interests of tribes in case any other party to a specific instrument violates the terms of the instrument or any federal law, or any provision of a specific instrument violates a TERA.¹⁹¹ Nonetheless, ITEDSA specifies that “the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of” any instrument executed pursuant to an approved TERA.¹⁹²

In hearings prior to passage of the statute, tribal representatives argued that ITEDSA absolves the federal government of its trust responsibilities for energy resources without removing ultimate federal control over resource development.¹⁹³ The Navajo Nation, which had just received an adverse decision from the U.S. Supreme Court regarding federal liability for the loss of some \$600 million in coal royalties,¹⁹⁴ was particularly vehement. The Nation favored “streamlining” the resource development process as a way of promoting “efficiency, accountability, and self-determination.”¹⁹⁵ However, it did not believe that ITEDSA promoted true tribal decision-making:

While these bills purport to put tribes in the driver[‘s] seat of decision making, they continue to empower the federal government to act as the traffic cop who is authorized to put its hand out to stop a tribe’s car from moving. Both bills ultimately preserve the federal government’s final authority over energy leases. Such final authority constitutes the lead role. This scheme, wherein a cabinet Secretary has prescriptive control over decisions regarding Indian energy development, but no subsequent liability, is an abdication of the federal trust responsibility that is patently unfair to tribes.¹⁹⁶

The concerns reflected in this statement are multiple. Tribes are concerned that all the costs of energy development are being shifted onto them without sufficient resources to meet those costs. Tribes will absorb the costs—both direct and indirect—of preparing TERAs, negotiating leases, agreements, and rights-of-way, conducting environmental reviews, and responding to challenges by “interested

¹⁸⁹ 25 U.S.C. § 3504(e)(6)(A).

¹⁹⁰ *Id.* § 3504(e)(6)(B).

¹⁹¹ *Id.* § 3504(e)(6)(C).

¹⁹² *Id.* § 3504(e)(6)(D)(ii).

¹⁹³ *ITEDSA Hearing*, *supra* note 2, at 101 (testimony of the Navajo Nation); *see id.* at 107 (supplemental statement of Joe Shirley, Jr., President, Navajo Nation); *see id.* at 118 (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council of the Wind River Indian Reservation).

¹⁹⁴ *United States v. Navajo Nation*, 537 U.S. 488, 500, 514 (2003).

¹⁹⁵ *ITEDSA Hearing*, *supra* note 2, at 104 (supplemental statement of Joe Shirley, Jr., President, Navajo Nation).

¹⁹⁶ *Id.* at 107.

parties.” Grant funds will be available to offset some of the costs, and the Department of the Interior is instructed to assist with advice and expertise to the extent that it can. But inevitably tribes will bear substantial costs.

Tribes will also bear substantial liabilities in the event that things go awry. If a tribe does not have adequate resources to provide information and expertise in negotiations, and sufficient federal assistance is not forthcoming, the federal government bears no responsibility. If the Secretary provides information to the energy companies, but not the tribes, the federal government bears no responsibility.

To a great extent, the trust provisions of ITEDSA mirror those of the 1982 Indian Mineral Development Act. Under the IMDA, the Secretary is directed to act “in the best interest of the Indian tribe.”¹⁹⁷ Nothing in the statute “shall absolve the United States from any responsibility to Indians” arising from the trust doctrine, and the Secretary is obligated to protect tribal rights in case of a violation of any minerals agreement.¹⁹⁸ The Secretary is also obligated to provide “advice, assistance, and information” to tribes during negotiations “to the extent of his [sic] available resources.”¹⁹⁹ But as with ITEDSA, the IMDA specifically provides that “the United States shall not be liable for losses sustained by a tribe” under a minerals agreement.²⁰⁰ The absence of trust litigation under the IMDA may indicate that the statutory structure of the trust responsibility functions reasonably well.²⁰¹

There is, however, one significant difference between the IMDA and ITEDSA: under the IMDA, the Secretary approves or disapproves each specific agreement for mineral development. In making that determination, the Secretary is bound not only by the vague “best interest of the Indian tribe” standard, but is instructed to consider such factors as potential economic return, financial effects on the tribe, marketability of the minerals, and environmental, social, and cultural effects on the tribe.²⁰² Thus, while the Secretary is not a guarantor against tribal financial losses, the Secretary’s failure to consider or adequately account for specified factors might subject the government to damages for breach of trust.

No such potential fall-back exists with ITEDSA. Once a TERA is approved, tribes make the unilateral decisions whether to enter into a specific development instrument and how each specific instrument should be structured. The Secretary retains the obligation to protect

¹⁹⁷ 25 U.S.C. § 2103(b) (2000).

¹⁹⁸ *Id.* § 2103(e).

¹⁹⁹ *Id.* § 2106.

²⁰⁰ *Id.* § 2103(e).

²⁰¹ As noted earlier, there has been only one reported case litigated under the IMDA, and it did not involve an allegation of breach of trust. *See Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457 (9th Cir. 1986).

²⁰² 25 U.S.C. § 2103(b); 25 C.F.R. § 225.3.

tribes against violations of specific instruments by other parties, but otherwise is free of responsibility.

Nonetheless, I am not convinced it is going to be a problem. What made the Navajo coal lease case²⁰³ such a betrayal was that there was nothing the Navajo Nation could have done to see it coming or to head it off. The leases were issued under the 1938 Indian Mineral Leasing Act. Despite the Supreme Court's protestations to the contrary, the federal government controlled IMLA leases, subject only to tribal consent. Tribes relied on the Secretary's expertise and obligations, in part because they had no choice if they wished to develop their resources. The coal lease at issue called for adjustment of the royalty rate after twenty years, and the Navajo Nation negotiated without knowing that the Secretary of the Interior was undermining its efforts by providing crucial information only to the coal company.²⁰⁴ The Navajo Nation acted in good faith reliance on the government's trusteeship, and the government betrayed that trust. Then, to make matters worse, the Supreme Court held that the government did not violate any specific statutory or regulatory duty under the IMLA, and was therefore not liable in damages under that statute. The outrage of that decision is palpable in comments on the bills that became ITEDSA.

But that level of tribal trust in the government may, and should be, a thing of the past. Even if Secretary Hodel's actions in the Navajo coal case were not in violation of the IMLA or its regulations, simple ethics should prevent a repeat of the situation. And even if they don't, the clear lesson of the Navajo case for tribes is that over-reliance on the good faith of the government can be a dangerous thing. Tribes need, as a practical matter if nothing else, to look out for their own interests.²⁰⁵

And the modern statutes—ITEDSA as well as the IMDA—make that clear. Unlike the Indian Mineral Leasing Act, which encouraged tribal dependence on government decision-making, the modern statutes set forth a clear bargain. Tribes can take advantage of new options and increased practical sovereignty, but in exchange the government has a

²⁰³ *Navajo Nation*, 537 U.S. at 488, discussed *supra* at text accompanying notes 116–19.

²⁰⁴ In fact, the lease authorized the Secretary to readjust the royalties to a “reasonable” rate after twenty years. The Navajo Nation initiated proceedings several years before the adjustment provision would take effect, and the department's initial decision was to raise the royalties from the “extremely low” rate of thirty-seven and one-half cents per ton to twenty percent. The coal company appealed, and the Secretary then directed that any decision on the appeal be deferred so that the coal company and the Navajo Nation could negotiate an adjusted royalty rate. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (2000). Those negotiations, based in part on the Secretary's *ex parte* communications with the coal company, resulted in a royalty rate of twelve and one-half percent, the federal minimum, which the Secretary then approved. *Id.*

²⁰⁵ Said with full understanding that many tribes simply don't have the resources to be able to do so.

deeply discounted trust responsibility. Tribes can opt in to this system or not, at their discretion. The overt nature of the statutory deal, along with the stark reminder of the Navajo case, should mean that tribes are sufficiently on notice if they choose the TERA route offered by ITEDSA. Whether the trade-off is worthwhile is a decision for each tribe to make for itself.

V. CONCLUSION

Mineral development in Indian country is embarking on an exciting new phase. ITEDSA offers tribes a new approach, one where tribes themselves make the ultimate decisions about specific development activities. Like any new approach, however, ITEDSA is fraught with potential snags and problems. It still requires federal approval of tribal regulations for mineral development. It is too limited in the minerals it covers, does not adequately address tribal financial and technical concerns, mandates considerable public input into tribal decision-making, and limits the federal government's trust responsibilities. The TERA approach under ITEDSA is not the best approach for all mineral-owning tribes, but it will be the best approach for some. For those tribes with the willingness, as well as the technical and financial capabilities, to take advantage of ITEDSA, the statute provides a major step toward true tribal self-determination over resource development.