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Indian natural resources development: Tribal energy resource agreements under the Energy Policy Act of 2005

BY JUDITH ROYSTER


While Indian tribes are free to develop their natural resources themselves without federal involvement or approval, most large-scale resource development in Indian country is undertaken by non-Indian companies according to leases or other agreements with the tribes. Under the Nonintercourse Act of 1834, any lease or other type of conveyance of any interest in trust or restricted property is not valid under U.S. law without federal consent. 25 U.S.C. § 177. Moreover, Congress has specified that any agreement or contract with a tribe “that encumbers Indian lands for a period of seven or more years” requires the approval of the secretary of the Interior. 25 U.S.C. § 81(b). Non-Indian development of tribal resources, therefore, requires statutory authority and secretarial approval.


In the case of mineral resources, Congress has also authorized the use of conveyances other than leases, including joint ventures, operating, production sharing, service or managerial agreements or any other type of agreement. See Indian Mineral Development Act of 1982, 25 U.S.C. § 2101-2108. Under these various resource development statutes, each lease or minerals agreement requires the approval of the secretary of the Interior.

In addition, Congress has authorized the secretary to grant rights-of-way across trust and restricted Indian lands. 25 U.S.C. § 323-328. The statute requires the consent of certain tribes and the regulations extend the consent requirement to all tribes. See 25 C.F.R. § 169.3.

Tribal energy resource agreements

The Indian Energy Act establishes a procedure under which the secretary’s approval of individual instruments would no longer occur. The act authorizes Indian tribes to enter into leases and business agreements for energy resources development and to grant rights-of-way for pipelines and electric transmission and distribution lines. 25 U.S.C. § 3504(a)-(b).

In general, leases, agreements and rights-of-way may be for a term of no more than 30 years; oil and gas leases, however, may be for 10 years and as long thereafter as the mineral is produced in paying quantities. All such instruments will only be valid if they are authorized by a tribal energy resource agreement approved by the secretary of the Interior. 25 U.S.C. § 3504(d).

Once federal regulations are in place, Indian tribes may, at their option, develop tribal energy resource agreements with the Department of the Interior. 25 U.S.C. § 3504(e). The secretary “shall approve” an agreement if the tribe has demonstrated that it has “sufficient capacity to regulate the development” of the tribe’s energy resources and the energy resource agreement includes statutorily required provisions; the statutory requirements are found at 25 U.S.C. § 3504(e)(2)(B)-(D). Proposed tribal energy resource agreements are, however, subject to public notice and comment. 25 U.S.C. § 3504(e)(3).

Once an Indian tribe has an approved energy resource agreement, the tribe has the sole discretion to enter into agreements for energy resource development and to grant rights-of-way for pipelines and electric lines. The statute expressly provides that leases, business agreements and rights-of-way entered into according to an approved energy resource agreement do not require secretarial approval or review. 25 U.S.C. § 3504(a)(2), (b). Renewals of leases, business agreements and rights-of-way also do not require secretarial approval. 25 U.S.C. § 3504(c).

Environmental review

One of the primary issues in the congressional debates about the Indian title of the Energy Policy Act was the question of environmental review of leases, business agreements and rights-of-way granted by Indian tribes without secretarial approval.

The National Environmental Policy Act (NEPA) requires an environmental review process for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Secretarial approval of leases and other agreements for natural resources development on Indian lands constitutes federal action and therefore triggers the application of NEPA. Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). In fact, a lease or agreement entered into without complying with NEPA is invalid. See 25 C.F.R. § 211.7(a) (mineral leases) and § 225.24(a) (minerals agreements).

Under the provisions of the new Indian Energy Act, however, the secretary of the Interior will no longer be approving specific
The result is that while NEPA itself will not apply ... an equivalent tribal environmental review process will be in place ....

The federal trust responsibility

As the Indian title of the Energy Policy Act was being debated in Congress, one concern of some tribes was the effect on federal trust responsibilities if the secretary of Interior were no longer required to approve specific instruments. Much of that concern stemmed from the U.S. Supreme Court's decision in United States v. Navajo Nation, 537 U.S. 488 (2003). The court ruled that the coal leasing provisions of the Indian Mineral Leasing Act of 1938 did not create any enforceable fiduciary duties on the part of the government because the provisions placed primary responsibility for coal leasing on the tribes rather than the secretary.

The Navajo Nation, which had lost tens of millions of dollars in royalties because of federal actions with respect to negotiations of its coal leases, was left without a remedy against the government.

The Indian Energy Act addresses what trust responsibilities the secretary has with respect to tribal energy resource agreements and instruments approved according to them. The act provides that the secretary must "act in accordance with the trust responsibility ... and in good faith and in the best interests of the Indian tribes." It further provides that, except for the provisions waiving secretarial approval of leases, business agreements and rights-of-way, nothing in the act absolves the federal government of its trust responsibilities under any treaty or other federal law. 25 U.S.C. § 3504(e)(6)(A)-(B).

The secretary is specifically obligated to ensure that tribal rights and interests are protected in situations where any other party to a lease, business agreement or right-of-way violates the terms of the instrument or any applicable federal law or where any provision in such an instrument violates the tribal energy resource agreement. 25 U.S.C. § 3504(e)(6)(C).

Implementation

Implementation of the Indian Energy Act is still some time away. The act provides that the secretary has until Aug. 1, 2006 to promulgate regulations. 25 U.S.C. § 3504(e)(8). Tribes may submit proposed tribal energy resource plans as soon as the final regulations are issued and the secretary has 270 days to review a plan for approval. 25 U.S.C. § 3504(e)(7). Any such person or entity must first exhaust available tribal remedies.

If tribal remedies do not prove satisfactory, the person or entity may petition the secretary to review the tribe's compliance with the energy resource agreement. If consultation with the tribe fails to resolve the claim of environmental harm, the secretary will determine if the tribe is out of compliance with the energy resource agreement and, if so, take appropriate remedial action.

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