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# Tribal Energy Resource Agreements: The Unintended “Great Mischief for Indian Energy Development” and the Resulting Need for Reform

ELIZABETH ANN KRONK\*

## I. INTRODUCTION

Today, escaping stories of political acrimony seems impossible. Despite this intense atmosphere, the majority of Americans seem to agree that finding new sources of energy is a national priority.<sup>1</sup> These same citizens also believe that the United States is failing to adequately develop its domestic energy resources.<sup>2</sup> President Obama has made statements on numerous occasions indicating his strong support for the development of new energy sources, especially alternative energies.<sup>3</sup> The GOP

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\*Assistant Professor, Texas Tech University School of Law. J.D., University of Michigan School of Law; B.S., Cornell University. This article is dedicated to Professor David Getches, who walked on from this world on July 5, 2011. Thank you for teaching me, inspiring me and making the world a better place for all. The author would also like to thank Texas Tech University Law Librarian Eugenia Charles-Newton for her excellent research assistance. I also appreciated the helpful revisions and comments from Professor Chris Kulander, Mrs. Charles-Newton, Connor Warner, and Jessica Zalin.

1. See *81% Say Finding New Energy Sources is Urgent National Need*, RASMUSSEN REPORTS (Aug. 7, 2008), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/environment\\_energy/81\\_say\\_finding\\_new\\_energy\\_sources\\_is\\_urgent\\_national\\_need](http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/81_say_finding_new_energy_sources_is_urgent_national_need) [hereinafter *81% Say Finding New Energy Sources*].

2. See *75% Say U.S. Not Doing Enough To Develop Its Gas And Oil Resources*, RASMUSSEN REPORTS (June 29, 2011), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/environment\\_energy/75\\_say\\_u\\_s\\_not\\_doing\\_enough\\_to\\_develop\\_its\\_gas\\_and\\_oil\\_resources](http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/75_say_u_s_not_doing_enough_to_develop_its_gas_and_oil_resources). (Providing that:

Most voters continue to feel America needs to do more to develop domestic gas and oil resources. They also still give the edge to finding new sources of oil over reducing gas and oil consumption. . . . just 19% believe the United States does enough to develop its own gas and oil resources. Seventy-five percent . . . do not think the country is doing enough in this area.).

3. See Macon Phillips, *President Barack Obama’s Inaugural Address*, THE WHITE HOUSE BLOG (Jan. 21, 2009, 1:27 PM), <http://www.whitehouse.gov/blog/>

also supports energy independence.<sup>4</sup> Such widespread support for the development of domestic energy resources may exist<sup>5</sup> because the issue directly relates to national security.<sup>6</sup> As the foreign regions that the United States has typically relied upon for fossil fuels become increasingly unstable,<sup>7</sup> domestic energy resources must remain available in order to support the American populace and economy. In response to these opinions and pressures, the United States is already actively engaged in diversifying its energy asset portfolio and searching for domestic sources of energy.<sup>8</sup> “As David Rothkopf, a Carnegie Endowment

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inaugural-address (“[A]nd each day brings further evidence that the ways we use energy strengthen our adversaries and threaten our planet. . . . We will harness the sun and the winds and the soil to fuel our cars and run our factories.”); *see also* 81% Say Finding New Energy Sources, *supra* note 1 (“For the sake of our economy, our security and the future of our planet, we must end the age of oil in our time,” Democrat Barack Obama said . . . . Obama champions the development of renewable energy sources like wind and solar . . . .”); *see also* Tracey A. LeBeau, *The Green Road Ahead: Renewable Energy Takes a Stumble But is on the Right Path, Possibly Right Through Indian Country*, 56 *FED. LAW.* 38, 40 (2009) (“[A] new administration has its sights on utilizing the renewable sector as the linchpin in its economic plans to move the United States, once again, into a new economic era – the age of green energy.”).

4. *See Current Political Issues: Energy*, REPUBLICAN NATIONAL COMMITTEE, <http://www.gop.com/index.php/issues/issues> (“We believe in energy independence. We support an ‘all of the above’ approach that encourages the production of nuclear power, clean coal, natural gas, solar, wind, geothermal, hydropower, as well as offshore drilling in an environmentally responsible way.”).

5. *See* Tracey A. LeBeau, *Energy Security and Increasing North American Oil and Gas Production*, 16 *NAT. RESOURCES & ENV’T* 193, 193 (2002) [hereinafter *Energy Security*].

6. *See id.* (“The combination of the new war on terrorism, domestic economic pressures, and increasing tensions in the Middle East has heightened the concern of many legislators and the Bush administration on the United States’ reliance on foreign, and potentially unreliable, sources of oil, a concern expressed as an energy security risk.”).

7. *See* CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 6 (2007), *available at* <http://www.cna.org/sites/default/files/news/FlipBooks/Climate%20Change%20web/flipviewerxpress.html> (“Climate change acts as a threat multiplier for instability in some of the most volatile regions of the world. Projected climate change will seriously exacerbate already marginal living standards in many Asian, African, and Middle Eastern nations, causing widespread political instability and the likelihood of failed states.”).

8. *See* LeBeau, *supra* note 3, at 39 (Providing that:

Last year witnessed record growth, retraction, and gyrations in investment and financing activity in the renewable energy sectors.

scholar, recently noted, ‘Making America the world’s greenest country is not a selfless act of charity or naïve moral indulgence. It is now a core national security and economic interest.’<sup>9</sup>

Given this need to grow and to diversify the American energy portfolio and an American public that generally supports developing domestic energy resources, politicians are increasingly likely to look domestically to incorporate a variety of sources and types of energy into America’s energy portfolio. When looking for potential domestic energy resources, Indian country<sup>10</sup> stands out.<sup>11</sup> Former Senator Ben Nighthorse Campbell made the connection between the need for domestic energy production and Indian country when he stated:

I think America has to kick the habit on depending on foreign energy and start producing more of its own energy. One answer

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It has been estimated that, when the final numbers come in, the capacity of new wind generation in 2008 will have reached nearly 7,500 megawatts (at least 35 percent of new capacity added), bringing total installed wind capacity in the United States to about 24,000 mega-watts. According to some estimates, the solar industry will have nearly double installations of solar photovoltaic modules that same year.) (citations omitted)

See also Andrea S. Miles, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities?*, 30 AM. INDIAN L. REV. 461 (2005-2006).

9. LeBeau, *supra* note 3, at 41.

10. The term “Indian Country” refers to specific areas of land, defined as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

11. See LeBeau, *supra* note 3, at 42 (“The road to an area of great promise for a sustainable renewable energy market leads directly to – and through – Indian Country. Indian reservations, especially throughout the western United States, are rich in conventional energy resources that remain largely undeveloped.”); see also Miles, *supra* note 8, at 462.

to our energy future is in the domestic production, and I just don't mean in ANWR either. . . .

. . . Indian-owned energy resources are still largely undeveloped – 1.81 million acres are being explored or in production, but about 15 million more acres of energy resources are undeveloped. . . .

There are 90 tribes that own significant energy resources, both renewable and nonrenewable.<sup>12</sup>

Former Senator Campbell is not alone in his belief that substantial energy resources exist within Indian country. “The Bureau of Indian Affairs estimates that while Indian land comprises only five percent of the land area in the United States, it contains an estimated ten percent of all energy resources in the United States.”<sup>13</sup> With regard to traditional energy sources, “Native American reservations contain large reserves of oil and gas. There are an estimated 890 million barrels of oil and natural gas liquids, and 5.5 trillion cubic feet of gas on tribal lands.”<sup>14</sup> In

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12. *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. 1 (2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs) [hereinafter *Tribal Energy Self-Sufficiency Act Hearing*].

13. DOUGLAS C. MACCOURT, *RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY: A HANDBOOK FOR TRIBES* 1 (2010); see also Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 *LEWIS & CLARK L. REV.* 1065, 1066-67 (2008); see also Energy Policy Act of 2003, 149 *CONG. REC.* S5,751 (daily ed. May 6, 2003) (statement of Sen. Jeff Bingaman) (“[E]nergy resources on Indian land in the U.S. have not been as extensively developed as they might be. According to the Bureau of Indian Affairs, over 90 Indian reservations have significant untapped energy resource potential. That includes oil and gas, coal, coalbed methane, wind and geothermal resources.”).

14. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 73 (statement of Vicky Bailey, Assistant Sec’y for Policy and Int’l Affairs, Dep’t of Energy); see also 149 *CONG. REC.* S7459 (daily ed. June 5, 2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

Even though in one year alone over 9.3 million barrels of oil, 229 billion cubic feet of natural gas, and 21 million tons of coal were produced from Indian land, representing \$700 million in Indian energy revenue, the Department of Interior estimates that only 25 percent of the oil and less than 20 percent of all natural gas reserves on Indian land have been fully developed.

*Id.*

addition to traditional energy resources, Indian country also has substantial potential for development of alternative energy resources. In particular, there is huge potential for wind<sup>15</sup> and solar<sup>16</sup> energy development within certain regions of Indian country. As a result, “Indian tribes stand in a unique nexus between renewable energy resources and transmission of electricity in key areas of the West.”<sup>17</sup>

Recognizing the potential key role that tribes will play in the development of the country’s energy resources, both the Department of Energy (DOE) and some in Congress recognize that Indian tribes should be included in plans to develop these energy resources.<sup>18</sup> As a result, “[w]hile the movement toward energy independence is an important opportunity for tribes, the present political climate also offers tremendous opportunities for tribes to use their renewable resources to enter into the power-producer market and play an important role in regional and national energy planning.”<sup>19</sup>

Mirroring this desire, many tribes are also becoming interested in energy development opportunities:

Perhaps more importantly, tribes are beginning to perceive renewable energy development in a positive light, as something

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15. MACCOURT, *supra* note 13, at 1-2 (“NREL has estimated that there is the potential for about 535 billion kWh/year of wind energy alone available on Indian lands in the contiguous 48 states, which is equivalent to 14 percent of current U.S. total annual energy generation.”); Kathleen R. Unger, *Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L.A. L. REV. 329, 334 (2009) (“Tribal lands have substantial wind resources. The Energy Information Administration has identified almost one hundred reservations with winds great enough for energy development projects. Reservations on the Great Plains offer approximately 200 gigawatts of wind power potential – roughly one-third of the electrical capacity for the entire nation.”) (citations omitted); Donald M. Clary, *Commercial-Scale Renewable Energy Projects on Tribal Lands*, 25 NAT. RESOURCES & ENV’T 19, 19 (2011).

16. MACCOURT, *supra* note 13, at 2 (“NREL estimates that there is also 17,600 billion kWh/year of solar energy potential on Indian lands in the lower 48 states; this amount is equivalent to 4.5 times the total U.S. electrical generation in 2004.”).

17. LeBeau, *supra* note 3, at 44.

18. Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 NAT. RESOURCES J. 611, 638 (2010).

19. *Id.*

that is consistent with tribal culture and values. Many tribal leaders now see renewable energy as a vehicle for economic development in areas that may no longer be (or never were) suitable for agricultural development. Some also see this as a way for tribes to play a positive role in the nation's energy future.<sup>20</sup>

Accordingly, energy development in Indian country is attractive to the federal government. It both advances the federal interests discussed above, and provides some tribes a method to achieve economic diversification, promote tribal sovereignty and self-determination, and provide employment and other economic assistance to tribal members.

Despite the foregoing, extensive energy development within Indian country has yet to happen. Former Senator Campbell explained why this may be the case:

The answer lies partly in the fact that energy resource development is by its very nature capital intensive. Most tribes do not have the financial resources to fund extensive energy projects on their own and so must partner with private industry, or other outside entities, by leasing out their energy resources for development in return for royalty payments. . . . The unique legal and political relationship between the United States and Indian tribes sometime makes this leasing process cumbersome.

. . . .  
The Committee on Indian Affairs has been informed over the year that the Secretarial approval process is often so lengthy that outside parties, who otherwise would like to partner with Indian tribes to develop their energy resources are reluctant to become entangled in the bureaucratic red tape that inevitably accompanies the leasing of Tribal resources.<sup>21</sup>

Recognizing the importance of energy development in Indian country, the need to promote such development, and the fact that the existing structure for energy development in Indian country may actually act as a disincentive to private investors, Congress

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20. Donald M. Clary, *Commercial-Scale Renewable Energy Projects on Tribal Lands*, 25 NAT. RESOURCES & ENV'T 19, 23 (2011).

21. 149 CONG. REC. S7459-60 (daily ed. June 5, 2003) (statement of Senator Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

passed the Indian Tribal Energy Development and Self-Determination Act of 2005 as part of the Energy Policy Act of 2005.<sup>22</sup> In relevant part, the Act allows tribes who have met certain requirements to “enter into a lease or business agreement for the purpose of energy resource development on tribal land” without review by or approval of the Secretary of the Interior, which would otherwise be required under applicable federal law.<sup>23</sup> In order to qualify, a tribe must enter into a Tribal Energy Resource Agreement (TERA) with the Secretary of the Interior.<sup>24</sup> The Secretary must approve the TERA if the tribe meets several requirements.<sup>25</sup> One of these requirements is of particular importance to this article. Tribes are required to “establish requirements for environmental review,”<sup>26</sup> which must mirror the requirements of the National Environmental Policy Act (NEPA).<sup>27</sup> In addition, the Indian Tribal Energy Development

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22. Energy Policy Act of 2005, Pub. L. No. 109-58, tit. V, 119 Stat. 594, 763-779 (2005).

23. 25 U.S.C. § 3504(a)(1) (2006).

24. *Id.* § 3504(b).

25. *Id.* § 3504(e).

26. *Id.* § 3504(e)(2)(B)(VI).

27. At a minimum, tribes must include the following in the environmental review provisions contained within a TERA:

(i) the identification and evaluation of all significant environmental effects (as compared to a no-action alternative), including effects on cultural resources;

(ii) the identification of proposed mitigation measures, if any, and incorporation of appropriate mitigation measures into the lease, business agreement, or right-of-way;

(iii) a process for ensuring that –

(I) The public is informed of, and has an opportunity to comment on, the environmental impacts of the proposed action; and

(II) Responses to relevant and substantive comments are provided, before tribal approval of the lease, business agreement, or right-of-way;

(iv) sufficient administrative support and technical capability to carry out the environmental review process; and

(v) oversight by the Indian tribe of energy development activities by any other party under any lease, business agreement, or right-of-way entered into pursuant to the tribal energy resource agreement, to determine whether the activities are in compliance with the tribal energy resource agreement and applicable Federal environmental laws.



and Self-Determination Act of 2005 expounds upon the federal government's trust responsibility to tribes as related to TERAs. Specifically, the Act states:

[N]othing in this section shall absolve the United States from any responsibility to Indians or Indian tribes, including, but not limited to, those which derive from the trust relationship or from any treaties, statutes, and other laws of the United States, Executive orders, or agreements between the United States and any Indian tribe.<sup>28</sup>

However, the Act goes on to provide 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, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement."<sup>29</sup> The Act's mandated environmental review, statement on the federal government's trust responsibility, and general waiver of the federal government's liability will all be discussed in much greater detail below as they relate to why tribes have not taken advantage of the Act's TERA provisions.

From the text of the Act, it may be inferred that Congress hoped to promote energy development in Indian country by "streamlining" the bureaucratic process (i.e., removing the requirement of Secretarial approval for tribes that enter into a TERA with the Department of Interior). In 2003, Senator Domenici confirmed this conclusion, explaining the purpose of the then-proposed TERA provisions as follows:

The Indian people of the United States are the proprietors of large amounts of property. On this property and in this property lie various assets and resources . . . .

[T]he purpose of this bill will be to say to our Indian people, if you want to develop resources in the field of energy that lie within your lands, we are giving you the authority to do so and hopefully in a streamlined manner so that it will not be forever bogged down in the red-tape and bureaucracy of Indian lands

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*Id.* § 3504(e)(2)(C).

28. *Id.* § 3504(e)(6)(B).

29. 25 U.S.C. § 3504(e)(6)(D)(ii).

being subject to the Federal Government's fiduciary relationships.<sup>30</sup>

Tribal representatives initially indicated support for the TERA provisions, as the TERAs allowed for increased tribal self-determination and also encouraged efficiency in energy development in Indian country.<sup>31</sup>

In addition to tribal and federal governmental interests in the TERA provisions, third party investors may also be interested in TERAs, because “[i]f a TERA is properly structured, a mineral developer should gain greater certainty and efficiency in the development of energy resources on tribal lands.”<sup>32</sup> In this way, the TERA provisions represent a rare instance in the history of tribal-federal relations where both tribes and the federal government may benefit from a partnership. However, despite

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30. 149 CONG. REC. S5748 (daily ed. May 6, 2003) (statement of Sen. Pete Domenici).

31. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 104 (statement of Joe Shirley, Jr., President, Navajo Nation); *see also* Letter from Joe Shirley, Jr., President, Navajo Nation, to Sen. Ben Nighthorse Campbell (Apr. 9, 2003) (available at *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 108) (“Generally speaking, the concept of turning tribal resource management over to tribes while ‘eliminating’ federal oversight would seem to be a very simple infusion of sovereignty into the current statutory and regulatory scheme governing tribal resource development. The Navajo Nation certainly supports this general concept.”).

32. Scot W. Anderson, ROCKY MOUNTAIN MINERAL LAW INSTITUTE, *The Indian Tribal Energy Development and Self-Determination Act of 2005: Opportunities for Cooperative Ventures* 3 (2005), available at <http://www.dgslaw.com/documents/articles/670412.pdf>. Mr. Anderson went on to explain why this is the case, stating:

The TERA is also an opportunity for a tribe to market its commercial and legal environment to potential mineral developers. A TERA can assure investors of a stable investment environment by describing and incorporating an appropriate limited waiver of the Tribe's defense of sovereign immunity, and by setting forth a clearly defined process for resolving disputes. The certainty provided by a TERA can assist energy developers and tribes in securing financing for energy projects on tribal lands. Many investors and energy developers also want to know that they have an [sic] clear way to exit from a project. The TERA can set forth rules and principles governing the assignment and transfer of interest, and in that manner assist energy developers in designing their exit strategy.

*Id.* at 16.

this possibility, not a single tribe has taken advantage of the “streamlining” opportunity presented by the TERA provisions.

Despite the attractiveness of increased energy development in Indian country, tribes have failed to take advantage of the existing TERA provisions because they represent a mixture of federal paternalism, oversight, and limited liability that is not attractive to tribes. This article examines more deeply why tribes have, to date, failed to take advantage of the TERA provisions and then makes recommendations as to how TERA might be reformed in order to increase tribal participation. Accordingly, Section II examines the underlying purpose of the TERA provisions and associated legislative history. Three categories of tribal concerns related to the TERA provisions emerge following a review of the applicable legislative history. Each of these categories is explored in depth. Next, Section III discusses the general ability of tribes to develop their energy resources. This Section also discusses why such development may be generally attractive to tribes. The Section concludes that some tribes have both the capacity to, and economic interest in, developing their energy resources. Given the foregoing, Section IV theorizes that tribes have failed to enter into TERA agreements due to the concerns represented in the related legislative history. As a result, Section V presents two alternative proposals for reform, arguing that should either proposal be adopted by Congress, the likelihood that tribes would be willing to enter into TERA agreements would increase. Ultimately, this article concludes that adoption of either of the proposed TERA reforms will spur tribal promulgation of TERAs with the Secretary of Interior.

## **II.      PURPOSE OF AND LEGISLATIVE HISTORY RELATED TO TRIBAL ENERGY RESOURCE AGREEMENTS**

In order to better understand the TERA provisions and identify potential tribal concerns with the provisions, review of the legislative history behind enactment of the TERA provisions is helpful. Although legislative history is limited in that it does not reflect the understanding of all members of Congress, it may assist in understanding the issues raised in Congress as related to the TERA provisions. Moreover, considering the legislative

history behind the TERA provisions aids in understanding what a few key congressmen, such as then-Senators Bingaman (D-NM) and Campbell (R-CO), hoped to accomplish by incorporating the TERA provisions into the Energy Policy Act of 2005.

As an initial starting point, bills submitted by both Senators Bingaman and Campbell in 2002 served as the basis for the TERA provisions;<sup>33</sup> these bills were revised and resubmitted for consideration in 2003. On March 19, 2003, the Senate Committee on Indian Affairs held a hearing on two proposed amendments to the then-pending draft Energy Policy Act of 2005.<sup>34</sup> On February 14, 2003, Senator Bingaman introduced S. 424, “To Establish, Reauthorize, and Improve Energy Programs Relating to Indian Tribes.”<sup>35</sup> On March 5, 2003, Senator Campbell introduced S. 522, “To Amend the Energy Policy Act of 1992 to Assist Indian Tribes in Developing Energy Resources.”<sup>36</sup>

In addition to wanting to promote domestic energy production, Congress seemingly also intended to promote tribal sovereignty and self-determination by enacting the Indian Tribal Energy Development and Self-Determination Act of 2005.<sup>37</sup> Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs within the Department of Interior, explained that “[w]e [the Department of Interior] are supportive of having tribes have more self-determination and have more responsibility in the development of renewable and nonrenewable energies on their lands.”<sup>38</sup> In an effort to help promote tribal self-determination and to make energy development in Indian country easier and more efficient,<sup>39</sup> Congress adopted the Act to help streamline the process of energy development within Indian country.

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33. See 149 CONG. REC. S7460 (daily ed. June 5, 2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs); 149 CONG. REC. S7684 (daily ed. June 11, 2003) (statement of Sen. Jeff Bingaman).

34. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 1 (statement of Joe Shirley, Jr., President, Navajo Nation).

35. *Id.*

36. *Id.*

37. See Miles, *supra* note 8.

38. *Tribal Energy Self-Sufficiency Hearing*, *supra* note 12, at 76 (statement of Theresa Rosier, Counselor to the Assistant Sec’y for Indian Affairs, Dep’t of the Interior).

39. See Unger, *supra* note 15.

A review of the legislative history associated with specific aspects of the Act suggests that concerns related to the TERA provisions can generally be grouped into one of three categories, including: (1) the tribal trust relationship; (2) the institution of mandatory tribal environmental review provisions; and (3) the waiver of the federal government's liability once a tribe has entered into a TERA. At the outset of congressional discussion of the pending legislation, Senator Bingaman expressed his concerns related to two of these categories:

Unfortunately, in my view, the provisions have been marred by a proposal to make energy leasing on Indian lands both exempt from environmental analysis under NEPA, and exempt from the normal trust protections afforded Indian tribes. I fear this is a substantial flaw that needs to be addressed if the bill is to keep its balance among energy, environment, and the public interest.<sup>40</sup>

Accordingly, to better understand why tribes have been reticent to adopt TERAs, the discussion below more fully explores the legislative history related to these two categories, as well as the third category of the waiver of the federal government's liability.

### **A. Federal Trust Responsibility to Tribes**

Several comments related to the TERA provisions focused on the potential impacts of the then-proposed provisions on the federal government's trust responsibility to federally-recognized tribes.<sup>41</sup> In order to understand the legal context of these

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40. 149 CONG. REC. S5751 (daily ed. May 6, 2003) (statement of Sen. Jeff Bingaman).

41. There are generally thought to be three categories of claims that can be brought by tribes against the federal government. These three categories include: (1) general trust claims; (2) bare/limited trust claims; and (3) full trust claims. The cases discussed *infra*, *Cherokee Nation*, *Worcester*, *Kagama* and *Lone Wolf*, may be used as the basis to form a claim under the first category of trust responsibility cases – a general trust claim. Based on these cases and the historic relationship between the federal government and federally recognized tribes, it may be argued that liability exists. However, a claim based on a general trust responsibility is usually unsuccessful if the sole basis of the claim is the federal government's general trust responsibility to tribes. Later, the Court recognized a second category of liability under the federal trust

questions, one must understand the federal trust responsibility to tribes.

### **B. Historical Development of the Federal Trust Responsibility to Tribes**

Understanding the history and nuances of the trust responsibility to federally recognized tribes is critical in understanding the legislative history behind the TERA provisions.<sup>42</sup> One must look to three foundational cases of federal

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responsibility – a claim for breach of a bare or limited trust responsibility. In 1980, the Supreme Court decided *United States v. Mitchell*, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]. In *Mitchell I*, the Court considered whether the Secretary of the Interior was liable under section 5 of the General Allotment Act, 25 U.S.C. § 348, for an alleged breach of trust related to the management of timber resources and related funds. *Id.* at 537-38. Although the General Allotment Act included language that land was to be held “in trust,” the Court concluded that this language only created a bare trust responsibility because the Act did not require that the federal government manage the land. *Id.* at 542-43. Because the Act did not place any affirmative management duties on the federal government, the Court held in favor of the Secretary. *Id.* at 545. However, in 1983, the Court considered a related breach of trust claim from the same tribe in *United States v. Mitchell*, 463 U.S. 206 (1983) [hereinafter *Mitchell II*]. *Mitchell II* differed from *Mitchell I*, however, because in *Mitchell II* the tribe based its claim on several statutes that had not been at issue in *Mitchell I*, arguing that these statutes created an affirmative duty for the Secretary to manage the lands in question. *Id.* at 210-11. The Court agreed with the tribe, finding that the statutes in question “clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” *Id.* at 224. Having determined liability for the breach of trust, the Court then turned to private trust law precedent to determine the extent of the federal government’s liability, as the statutes did not expressly require compensation. *Id.* at 226. The Court’s decision in *Mitchell II* is an example of the third category of trust cases – a claim based on a full trust responsibility.

42. In fact, Senator Inouye provided substantial explanation of the history and legal importance of the federal trust responsibility when discussing the then-proposed amendments by Senators Campbell and Bingaman:

The large body of Federal Indian law is known as trust responsibility, and it was first given expression by the Chief Justice of the United States Supreme Court, John Marshall, in 1832. This relationship is premised upon the sovereignty of the Indian nations, a sovereignty that existed well before the U.S. government was formed, and it is memorialized in the United States Constitution.

This trust relationship that has always formed the course of dealings between the U.S. and Indian tribes is well understood and beyond debate. The United States holds legal title to lands that it held in trust for Indian tribes. Accordingly, activities affecting

Indian law, also known as the Marshall Trilogy,<sup>43</sup> in order to comprehend the genesis of the modern federal trust responsibility.<sup>44</sup> Two of the three cases, *Cherokee Nation v. Georgia*<sup>45</sup> and *Worcester v. Georgia*,<sup>46</sup> are particularly important in this regard. *Cherokee Nation* recognized the separate

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Indian lands and resources have always been the subject of approval by the Secretary of the Interior Department, acting as the principal agent for the United States. . . .

In the Congress, we have always understood the United States trust responsibility as being derived from treaties, statutes, regulations, executive orders, rulings and agreements between the Federal Government and Indian tribal governments. . . .

...

With the Government's advocacy for a new perspective on the United States trust responsibility, it is readily apparent why the eyes of Indian country are sharply focused on the tribal provisions of this bill and the amendments that are the subject of our discussion today.

Native America wants to see what position the Congress will adopt as it relates to the ongoing viability of the trust relationship. They are closely scrutinizing our words and our actions in the context of this measure to determine whether they signal a departure from the traditional and well-established principles of the United States trust responsibility.

149 CONG. REC. S7687-88 (daily ed. June 11, 2001).

43. The "Marshall Trilogy" is a reference to Chief Justice Marshall of the U.S. Supreme Court. See Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627 (1964).

44. The first of these cases, *Johnson v. McIntosh*, has less direct relevance to this discussion than the other two cases. This case raised the question of whether land grants made by tribal chiefs before the passage of the Trade and Intercourse Acts were valid. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 543-45 (1823). The Court held that these grants were invalid because the Doctrine of Discovery conveyed title to Great Britain, as the conquering European sovereign, and the United States of America obtained title to all land when it succeeded from Great Britain. *Id.* at 587-88. As a result, American Indians only retained a right of occupancy in the land. *Id.* at 592; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

45. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In *Cherokee Nation*, the Court addressed whether its original jurisdiction extended to Indian nations. In holding that it did not, the Court reasoned that Indian nations were not foreign nations, but, rather, "domestic dependent nations." *Id.* at 17.

46. *Worcester v. Georgia*, 31 U.S. 515 (1832). In *Worcester*, the Court considered whether the laws of Georgia applied within the territory of the Cherokee Nation. The Court concluded that the laws of Georgia had no force or effect within Indian country.

sovereignty of tribal nations.<sup>47</sup> At the same time, however, Chief Justice Marshall explained that in many respects, tribal nations had given up aspects of their external sovereignty to the federal government.<sup>48</sup> *Worcester* held that the laws of states generally do not apply in Indian country.<sup>49</sup> Taken together, *Cherokee Nation* and *Worcester* stand for several important principles. First, in becoming “dependent” nations, tribes became reliant on the federal government and, therefore, the federal government owed tribal nations external protection. Second, because of this historical relationship between tribal nations and the federal government, the relationship is primarily of a federal character.

The United States Supreme Court was relatively silent on the issue of federal Indian law following its decision in *Worcester* until the Major Crimes Act was challenged, approximately fifty years later.<sup>50</sup> In *United States v. Kagama*, the Court determined that Congress had the authority to enact the Major Crimes Act.<sup>51</sup> In reaching this decision, the Court stated that the United States owes Indian tribes a “duty of protection” and, therefore, the federal government has plenary authority over Indian country.<sup>52</sup> Since this time, the federal government has exercised substantial authority in Indian country.

Three cases demonstrate the modern application of the federal trust responsibility to tribes: *United States v. White Mountain Apache Tribe*,<sup>53</sup> *United States v. Navajo Nation*,<sup>54</sup> and *United States v. Jicarilla Apache Nation*.<sup>55</sup> In *United States v. White Mountain Apache*, the Supreme Court considered a claim brought by a federally recognized tribe alleging that the federal government had failed to adequately manage Fort Apache for the benefit of the tribe.<sup>56</sup> The statute at issue required the federal

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47. *Cherokee Nation*, 30 U.S. at 1.

48. *Id.*

49. *Worcester*, 31 U.S. at 515.

50. Major Crimes Act, 18 U.S.C. § 1153 (2006).

51. *United States v. Kagama*, 118 U.S. 375 (1886); *see also* *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

52. *Kagama*, 118 U.S. at 385.

53. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

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

55. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

56. *See generally* *White Mountain Apache Tribe*, 537 U.S. 465.



government to hold Fort Apache in trust for the tribe and, importantly, gave the federal government “authority to make direct use of portion of the trust corpus.”<sup>57</sup> As a result, the Court determined that the tribe had sufficiently alleged a breach of trust claim on a full trust (similar to the trust at issue in *Mitchell II*), and awarded the tribe damages.<sup>58</sup>

In *United States v. Navajo Nation*, the Court did not find in favor of the tribe.<sup>59</sup> Here, the Navajo Nation alleged that the Secretary of the Interior acted inappropriately in the negotiation of mineral leases on the Navajo Nation.<sup>60</sup> Ultimately, although the Court acknowledged the unprofessional behavior of the Secretary of the Interior, the Court held that the Navajo Nation had failed to establish a full trust.<sup>61</sup> This is because the statute in question gave the tribe the right to negotiate leases and, as a result, the Secretary of the Interior did not have full authority over management of the resources in question.<sup>62</sup>

In both *White Mountain Apache* and *Navajo Nation*, the Court seemed to focus its analysis on the amount of control exercised by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, as in *White Mountain Apache*, the Court found in the tribe’s favor. However, where the statute in question had given the tribe increased authority to negotiate

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57. *Id.* at 475.

58. *See id.*

59. *See generally Navajo Nation*, 537 U.S. 488.

60. *See id.*; *see also* 149 CONG. REC. S7684 (daily ed. June 11, 2003) (statement of Sen. Jeff Bingaman). At the time the TERA provisions were being considered in Congress, the potential ramifications of the *Navajo Nation* decision were of concern. For example, Senator Bingaman explained that:

Tribal concern is driven by a decision three months ago by the U.S. Supreme Court in the case of *United States v. Navajo Nation*. The Supreme Court specifically addressed the Federal trust responsibility and the standard for ensuring that statutes affecting Native Americans contain fiduciary duties by which the Federal Government as trustee can be held accountable for its actions that may have serious and negative impacts on tribal interests.

*Id.*

61. *See Navajo Nation*, 537 U.S. at 514.

62. *See id.* at 511.

leases, as in *Navajo Nation*, the Court found in favor of the federal government.

On June 13, 2011, the U.S. Supreme Court decided *United States v. Jicarilla Apache Nation*.<sup>63</sup> The Court's decision in *Jicarilla Apache Nation* built on the Court's past decisions regarding the extent of the federal trust relationship in *Mitchell I*, *Mitchell II*, *Navajo Nation*, and *White Mountain Apache*. The issue before the Court concerned whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when acting in its capacity as trustee for tribal trust assets.<sup>64</sup> In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances.<sup>65</sup> The Court reasoned that "[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians is a 'trust,' see, e.g., 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law."<sup>66</sup> Ultimately, the Court concluded that while common law principles may "inform our interpretation of statutes and [] determine the scope of liability that Congress has imposed . . . the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary obligations."<sup>67</sup> Based on the foregoing, the

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63. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). At issue in the underlying litigation was the federal government's management of the Nation's trust accounts from 1972 to 1992. Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation. The Nation filed a motion to compel production, and the Court of Federal Claims granted the motion in part. The Court of Federal Claims found that communication relating to the management of the Nation's trust funds fell within the "fiduciary exception" to the attorney-client privilege, and, as a result, that these documents should be produced. The federal government petitioned the Court of Appeals for the Federal Circuit with a writ of mandamus to prevent disclosure, but the Court of Appeals upheld the Court of Federal Claims decision.

64. *See id.* at 2318.

65. *See id.*

66. *Id.* at 2323.

67. *Id.* at 2325 (citing *United States v. Mitchell*, 463 U.S. 206 (1983)). The Court went on to explain that two features must exist in order for the common-law fiduciary exception to apply: (1) a "real client" and (2) duty to disclose

Court reversed and remanded to the Court of Appeals to determine whether the court's decision had met the standards for granting a writ of mandamus.

Whether or not the federal trust responsibility is consistent with increased tribal sovereignty or self-determination turns on how one conceives of the federal trust responsibility. On the one hand, the federal trust responsibility, when considered as an outgrowth of the Marshall trilogy of cases, may be perceived as a doctrine to protect tribes from federal and state infringement into internal tribal matters.<sup>68</sup> Alternatively, if based on the *Kagama* line of cases, the federal trust responsibility may be seen as "premised on dependency of tribes," which supports continued federal involvement in tribal matters.<sup>69</sup>

Both of these perspectives of the federal trust responsibility are represented in comments made regarding the then-pending TERA provisions. For example, Senator Campbell's comments and proposed amendment arguably represented the conception of the federal trust responsibility as originating in the Marshall trilogy of cases; Senator Bingaman's comments and proposed amendment generally represent the viewpoint that the federal trust responsibility originates in the *Kagama* line of cases.

### **C. Comments from the TERA Legislative History Related to the Federal Trust Relationship**

A review of the legislative history suggests that some commentators were concerned that the then-proposed TERA provisions would negatively impact the federal government's trust responsibility to federally-recognized tribes. These comments are more fully discussed below. As an initial starting point, The Department of Interior and former Senator Campbell did not share this view. On March 19, 2003, Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs,

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information regarding the trust, and concluded that the present case lacked both factors. *Id.* at 2316.

68. Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, ROCKY MTN. MIN. L. FOUND. J. 13A-1, 13A-32 (2005).

69. *Id.*

Department of Interior, explained that the language in the bills provided “a limited trust responsibility” on behalf of the federal government to the tribes.<sup>70</sup> On June 5, 2003, Senator Campbell agreed with Ms. Rosier’s prior testimony that the TERA provisions would not affect the federal government’s trust responsibilities to federally recognized tribes.<sup>71</sup>

The majority of the comments related to the pending legislation’s impact on the federal trust responsibility, however, indicating a concern that the legislation would have a negative impact. Some who testified before the Senate Committee on Indian Affairs expounded upon what the federal government’s role under the TERA provisions should be, in light of the existing federal trust responsibility to tribes. For example, David Lester, Executive Director of the Council for Energy Resource Tribes, stated that:

As we saw in the *Navajo* case, the companies have no obligation to put all the information on the table for the tribes to know. We believe that is a violation of the trust. We think that the trust requires that the tribe be given assistance so that the

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70. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 77 (statements of Sen. Inouye, Member, S. Comm. on Indian Affairs, and Theresa Rosier, Counselor to the Assistant Sec’y for Indian Affairs, Dep’t of Interior).

71. 149 CONG. REC. S7460 (daily ed. June 5, 2003) (statement of Sen. Ben Nighthorse Campbell) (“Section 2604 also discusses the Secretary’s trust responsibility. It expressly states that the section does not absolve the United States from that responsibility and expressly states that the Secretary will continue to have a trust obligation to protect a tribe when another party to a lease agreement or right-of-way is in breach. It does not affect trust responsibility at all.”).

It is notable that the contours of the federal trust responsibility to tribes may have changed in the intervening years since these comments were made. As discussed above, the Court explained in *Jicarilla Apache Nation* that the federal government is only liable to tribes where a duty has been explicitly made clear in a treaty or statute. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011). Accordingly, the language of the TERA provisions becomes increasingly important in light of the Court’s recent decision in *Jicarilla Apache Nation*, as the Court seems to suggest that the federal government’s liability would be, in the case of TERAs, limited to the explicit provisions of the TERA. It may therefore be the case that concerns raised during the hearings and discussions of the TERA provisions before adoption of the Energy Policy Act of 2005 would be magnified as a result of the Supreme Court’s decision in *Jicarilla Apache Nation*.

asymmetrical nature of the negotiations is removed and we have a level playing field.<sup>72</sup>

Some, such as Chairman Vernon Hill of the Eastern Shoshone Business Council of the Wind River Indian Reservation, believed that the TERA provisions amounted to a violation of the federal government's trust responsibilities to tribes.<sup>73</sup> Perhaps Rebecca L. Adamson, in an e-mail to Senator Campbell, summed up these concerns best when she stated that "[t]hese bills appear to be designed as tools for trust 'reform' either overtly, by legislated abrogation of the government's trust responsibility."<sup>74</sup> Moreover, as exemplified by the May 6, 2003 statement of Senator Bingaman (included in the introduction to this Section), at least one Senator was concerned that the proposed TERA provisions represented a departure from the federal government's historic trust responsibility to tribes.<sup>75</sup> Based on the foregoing, except for a handful of commentators, most people who commented on the then-pending TERA provisions and their relationship to the federal trust responsibility seemed concerned that such provisions would negatively impact the federal government's responsibility to federally recognized tribes.

#### **D. Mandatory Tribal Environmental Review**

In addition to concerns related to the status of the federal trust relationship following passage of the TERA provisions, commentators also expressed trepidation regarding the mandatory environmental review provisions included in the then-pending Act. In testimony before the Senate Committee on Indian Affairs, Arvin Trujillo, Director of Navajo Natural Resources, highlighted that federal control of tribal affairs, such as mandating environmental review in Indian country, is at odds

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72. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 88 (statement of David Lester, Executive Dir., Council for Energy Resource Tribes).

73. *Id.* at 118-20 (statement of Vernon Hill, Chairman, E. Shoshone Bus. Council of the Wind River Indian Reservation).

74. *Id.* at 139 (statement of Rebecca L. Adamson, President, First Peoples Worldwide).

75. 149 CONG. REC. S5751 (daily ed. May 6, 2003) (statement of Sen. Jeff Bingaman).

with Indian self-determination.<sup>76</sup> During the same hearing, Frank E. Maynes, tribal attorney for the Southern Ute Indian Tribal Chairman, expounded on concerns surrounding a federally-mandated process:

The leasing and rights-of-way proposals of both pieces of legislation propose a trade that may be unacceptable to some tribes. You eliminate the Secretarial approval in exchange for tribes' regulations that require consultation with State officials, some type of public notification, and ultimately private citizen challenges of approved leases and rights-of-way. Traditional notions of tribal sovereignty protect tribes from incursion of States and non-members in the decisionmaking process. The Southern Ute Tribe believes this is the wrong approach. We think that Congress should be concerned with whether or not the tribes are capable of making informed decisions in the first place and if they are capable of making those informed decisions, they should take the responsibility for their mistakes as well as for their goods decisions.<sup>77</sup>

Mr. Maynes went on to explain that the proposed TERA provisions would treat tribal lands like public lands by essentially mandating that tribes adopt NEPA-like environmental regulations.<sup>78</sup> Such mandatory regulations require tribes to comply with environmental regulations not applicable to the states.<sup>79</sup>

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76. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 81 (statement of Arvin Trujillo, Dir., Navajo Natural Res.).

77. *Id.* at 84 (statement of Frank E. Maynes, Tribal Att'y, for the S. Ute Indian Tribal Chairman, Howard D. Richards, Sr.).

78. *Id.* ("Tribes generally do not oppose Federal environmental laws. But the proposed legislation shouldn't treat tribal lands like public lands. For example, NEPA requirements and public comment are inconsistent with the internal decision-making aspect of tribal sovereignty."); *see also id.* at 155 (statement of Howard D. Richards, Sr., Chairman, S. Ute Indian Tribal Council).

79. Letter from Joe Shirley, Jr., President, Navajo Nation, to Sen. Ben Nighthorse Campbell (April 8, 2003), *available at Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 109 ("Thus, the regulatory requirement in S. 522 as now drafted, since it would apply *only to tribes*, would actually be a step backward away from self-determination because tribes would be held to additional regulatory approval that states do not have to undergo.") (emphasis added).

President Joe Shirley, Jr., of the Navajo Nation, shared these concerns related to potential infringement on tribal sovereignty in comments he submitted to the Senate Committee on Indian Affairs.<sup>80</sup> He explained that such regulations were unnecessary as they were largely duplicative of existing federal environmental requirements already applicable in Indian country.<sup>81</sup> One commentator, after reviewing the applicable legislative history, concluded that the mandated environmental review requirements would be “contrary to the twin-goals of fostering tribal self-determination and promoting the efficient development of tribal minerals.”<sup>82</sup>

Similarly, A. David Lester, Executive Director of the Council of Energy Resources Tribes (CERT), explained CERT’s misgivings regarding the mandatory environmental regulations:

One of our major concerns is the process that will be used to challenge tribal decisions made under their own regulations. These regulations provided for in both bills have a built-in extensive environmental review process that involves public notice and comment. Our view is that the right to appeal should be very limited and that any overriding of tribal decisions should be based on clear findings of failure of the tribe to follow its own rules. S. 424 provides that only an “interested party” (a State or a person whose interests may be adversely affected) can petition the Secretary when a tribe allegedly violates its own siting regulations. The new section of S. 522 contains similar requirements but appear to allow any person after exhaustion of tribal remedies, with or without a nexus to the project, to petition the Secretary for review of tribal compliance with its own regulations. We believe this could cause great mischief for Indian energy development and urge the Committee to revisit this language.<sup>83</sup>

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80. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 105 (statement of Joe Shirley, Jr., President, Navajo Nation) (“[B]oth bills authorize infringement of tribal sovereignty by subjecting internal tribal regulations to the public notice and comment process through the federal register.”).

81. *Id.*

82. ANDERSON, *supra* note 32, at 9.

83. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 124 (statement of A. David Lester, Executive Dir., Council of Energy Resource

Not all who commented on the then-pending TERA provisions wanted to limit the mandatory environmental regulations imposed on tribes. For example, Sharon Buccino, a senior attorney with the Natural Resources Defense Council, wanted to see the goals and purposes of NEPA promoted and protected through imposition of the TERA requirements on tribes.<sup>84</sup> Furthermore, Senator Bingaman explained that many external parties, including national and local environmental groups, the National Association of Counties, and a bipartisan group of attorneys general from several states, seemed to strongly support the imposition of mandatory environmental review provisions on tribes entering into TERAs.<sup>85</sup> He concluded that:

The concern expressed by those attorneys general and the counties underscores the fact that without some applicable Federal law related to the significant development activity contemplated under this section 2604, it is unclear what standard to apply.

. . . Tribal law can and should apply to energy development on tribal lands, but at the same time Congress has a responsibility to ensure that certain Federal parameters are in place.<sup>86</sup>

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Tribes); *see also id.* at 159 (statement of Maynes, Bradford, Shipp & Sheftel, LLP, Att'ys for the S. Ute Indian Tribe), stating:

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.

84. *Id.* at 150-51 (statement of Sharon Buccino, Senior Att'y, Natural Res. Def. Council). Ms. Buccino actually went so far as to request that the Committee add additional NEPA-like requirements to the then-proposed TERA provisions.

85. 149 CONG. REC. S7684 (daily ed. June 11, 2003) (statement of Sen. Bingaman).

86. *Id.*



Potentially in response to these concerns, on June 11, 2003, Senator Bingaman introduced an amendment to add the mandatory environmental review provisions to the then-pending TERA provisions.<sup>87</sup>

Senator Campbell opposed Senator Bingaman's proposed amendment, explaining that "[i]n my view, the Bingaman amendment would literally strip tribes of 30 years of that direction of self-determination and would circumvent the trust responsibilities this Government has to tribes because it would force the statutory equivalent of NEPA on all decisions they make with their own land."<sup>88</sup> Senator Domenici shared Senator Campbell's concerns regarding the mandatory provisions in Senator Bingaman's proposed amendment, adding that "the amendment before us takes the unprecedented step of applying the NEPA process to the Indian tribes just as if they were the Federal Government. This amendment goes well beyond current environmental regulations and adds unnecessary regulations and costs to the tribal energy project."<sup>89</sup>

Accordingly, the legislative history demonstrates commentators' concern about potential encroachments into tribal sovereignty and costs associated with the imposition of mandatory environmental review through the TERA provisions. These issues may explain in part tribes' ongoing reluctance to enter into TERAs.

### **E. Waiver of Federal Government's Liability**

As identified above, another concern of several commentators on the then-pending TERA provisions related to the waiver of federal government liability to third parties or tribes related to matters arising after approval of a TERA. On June 5, 2003, Senator Campbell explained the purpose of the liability waiver in the then-pending TERA provisions:

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87. *Id.*

88. *Id.* at S7,686 (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

89. *Id.*

Section 2604 provides that the United States will not be liable to any party, including a tribe, for losses resulting in the terms of any lease agreements or right-of-way executed by the tribe pursuant to the approved TERA, which makes sense; Liability follows responsibility. If a tribe makes the leasing decisions, it should certainly be held responsible. If the United States continues to make the leasing decisions, it will continue to be held responsible. If Indian self-determination means anything, it means the right of tribes to make their own decisions and their responsibility to the tribes to live with those decisions.<sup>90</sup>

Despite Senator Campbell's sentiments, concerns regarding this provision pervade the legislative history. Senator Bingaman acknowledged that the TERA provision waiving the federal government's liability was controversial, in stating that "[t]here are concerns with language in the bill that limits the liability of the Federal Government with respect to leases and rights-of-way approved by tribes under the citing provisions of the bill."<sup>91</sup> Chairman Vernon Hill shared this concern, explaining that given the government's pervasive role in energy development in Indian country, tribes would be unlikely to release the federal government from liability until the implications of the streamlined process were clear.<sup>92</sup> President Joe Shirley, Jr., shared and expounded upon the concerns raised by Chairman Hill, explaining that:

Both bills [submitted by Senator Bingaman and Senator Campbell] stipulate a waiver of federal liability, regardless of the degree of managerial control exercised by the federal government in Indian energy development. . . .

While these bills purport to put tribes in the driver 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

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90. Energy Policy Act of 2003, 149 CONG. REC. S7461 (daily ed. June 5, 2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

91. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 75 (statement of Sen. Jeff Bingaman).

92. *Id.* at 83 (statement of Vernon Hill, Chairman, E. Shoshone Bus. Council of the Wind River Indian Reservation).

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.<sup>93</sup>

President Shirley's comments also highlight the connection between the federal trust relationship and concerns associated with waiver of the federal government's liability following approval of TERAs.

Moreover, in comments submitted to the Senate Committee on Indian Affairs, Chairman Hill further explained that the then-proposed TERA regulations would disadvantage tribes that were not in the financial position to assume greater liability.<sup>94</sup> Conversely, the TERA provisions promote continued inequality between tribes, as those in an economic position to take on greater liability would be treated differently by the federal government.<sup>95</sup>

In a letter from Jacqueline Johnson, Executive Director of the National Congress of American Indians (NCAI),<sup>96</sup> to Senator Campbell, NCAI expressed discontent with the waiver of the federal government's liability, explaining that "[w]e shared in their [tribes' and tribal advocates'] concern regarding provisions that significantly limit the United States' liability and release the Secretary of Interior from any accountability to Indian tribes for

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93. *Id.* at 107 (statement of Joe Shirley, Jr., President, Navajo Nation).

94. *Id.* at 118 (statement of Vernon Hill, Chairman, E. Shoshone Bus. Council of the Wind River Indian Reservation) ("Our Tribes are concerned that the streamlining proposals embodied in both bills would require participating Indian tribes to absorb all of the costs and liability associated with approving business leases and rights-of-way. Many direct service tribes may not be prepared to assume these responsibilities and costs.").

95. *Id.* at 155 (statement of Howard D. Richards, Sr., Chairman, S. Ute Indian Tribal Council) ("Third, those tribes that are willing and able to proceed without the supervision of the United States will be required to assume greater responsibility for their actions, including their mistakes.").

96. The National Congress of American Indians, founded in 1944, is the oldest, largest and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. See NATIONAL CONGRESS OF AMERICAN INDIANS, <http://ncai.org/> (last visited Mar. 23, 2012).

actions that she is required to undertake pursuant to the legislation.”<sup>97</sup>

Nonetheless, the legislative history suggests that some individuals supported waiving the federal government’s liability for actions taken by tribes under the TERA provisions. For example, Theresa Rosier of the Department of Interior agreed with then-Chairman Campbell that tribes should be liable where they maintained managerial control over the resources at issue and related decisions.<sup>98</sup>

However, notably, on June 11, 2003, Senator Bingaman acknowledged that the waiver of the federal government’s liability likely violated the federal trust responsibility. He stated that:

Section 2604, the subject of our amendment here, as currently drafted does not meet the standards established by the Supreme Court. In fact, it goes in the opposite direction. It diminishes the Federal Government’s trust responsibility and accountability to tribes. This is inconsistent with the current Federal policy of tribal self-determination and self-governance.<sup>99</sup>

In reaction to his belief that the then-proposed TERA provisions violated the federal trust responsibility by waiving the federal government’s potential liability, Senator Bingaman proposed to amend the pending bill; his proposed amendment would have eliminated the waiver of federal liability.<sup>100</sup>

Senator Campbell reacted powerfully to Senator Bingaman’s proposed amendment, stating that:

I take strong issue with another aspect of the Bingaman amendment having to do with the liability of the United States

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97. Energy Policy Act of 2003, 149 CONG. REC. S7461 (daily ed. June 5, 2003). The NCAI letter went on to explain that “we were not satisfied with provisions pertaining to environmental review” as well.

98. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 96 (statements of Sen. Ben Night-Horse Campbell, Chairman, S. Comm. on Indian Affairs, and Theresa Rosier, Counselor to the Assistant Sec’y for Indian Affairs, Dep’t of Interior).

99. Energy Policy Act of 2003, 149 CONG. REC. S7684 (daily ed. June 11, 2003) (statement of Sen. Jeff Bingaman).

100. *Id.* at S7685 (statement of Sen. Jeff Bingaman).

for tribal decisions. Under title III [of the pending bill], along with the power to create approved leases, agreements, and rights-of-ways without Secretarial approval, the tribes have the responsibility for the decisions they make.

Mr. Bingaman's amendment in effect de-links the two, eliminating the language that says the Secretary will not be liable for losses arising under the terms of the leases the tribe negotiates on its own. That would mean he would keep the Secretary on the hook for those losses arising from lease terms negotiated by the tribe, even though the Secretary has nothing to do with the negotiations. I don't think that is very good policy, frankly.<sup>101</sup>

Despite Senator Campbell's reaction to Senator Bingaman's proposed amendment, a review of the legislative history related to this provision suggests that the majority of the commentators were concerned that the waiver of the federal government's liability contained in the then-pending TERA provisions amounted to an abrogation of the federal government's trust responsibility to federally recognized tribes. This concern, like the issues previously examined, has likely contributed to tribes' unwillingness to enter into a TERA.

#### **F. Insights Gained from Legislative History**

Generally, legislative history provides insight into the issues considered by policy makers; the legislative history behind the adoption of the TERA provisions is no different. The above discussion sheds light on several points. As previously suggested, the bulk of the comments associated with the TERA provisions fall into three categories: (1) concerns related to the impacts of the TERA provisions on the federal trust responsibility; (2) concerns related to the imposition of an environmental review program that must comply with federal mandates; and (3) concerns related to the waiver of the federal government's liability.

Legislative history also aids in understanding the underlying perspectives that contributed to the TERA provisions. The

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101. *Id.* (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs).

Bingaman and Campbell amendments discussed on June 11, 2003 are particularly notable in that they directly relate to the proposals suggested below. Senator Bingaman's amendment arguably represents a paternalistic or federal-focused viewpoint. As explained above, Senator Bingaman proposed an amendment that would have essentially mandated that all tribes comply with NEPA when developing energy projects in Indian country. Senator Bingaman's justification for this was that the federal government has a responsibility to ensure that federal law was applied in Indian country. Senator Bingaman's proposed amendment would have also removed the general waiver of the federal government's liability from the TERA provisions. His stated reason for advocating for the removal of this liability waiver was that such a waiver violated the federal government's trust responsibility. These provisions of Bingaman's proposed amendment were legally consistent in that they represent the viewpoint that the federal government should maintain a strong presence or oversight role in Indian country.

Conversely, Senator Campbell's proposed amendment demonstrates a perspective focused on tribal self-determination and sovereignty. In this regard, Senator Campbell opposed imposition of NEPA-like environmental review mandates, as such mandates would impose upon tribal sovereignty. Senator Campbell supported the general waiver of federal liability, however, explaining that if tribes undertake greater decision-making authority, they should also take on potentially greater liability. Senator Campbell's proposed amendment, therefore, is perhaps more consistent with tribal sovereignty and self-determination than Senator Bingaman's amendment. These themes will be revisited in Section V.

### **III. TRIBES ARE WELL-POSITIONED TO TAKE THE LEAD IN ENERGY DEVELOPMENT**

Section II of this article addressed the issues and concerns raised during the federal government's consideration of the TERA provisions. In discussing this issue, one should consider whether energy development in general – and the TERA provisions in particular – are attractive from a tribal perspective; this Section does so. Energy development not only benefits the United States

as a whole but also has the potential to benefit Indian tribes.<sup>102</sup> As explained more fully below, many tribes are well-positioned to engage in energy development within their territories. Many tribes are already participating in some form of energy development, from natural resource extraction to energy generation. As a result, this section considers potential benefits for tribal communities from, and their demonstrated ability to engage in, energy development.

Energy development within Indian country may bring much-needed economic development and infrastructure to Indian communities.<sup>103</sup> “[U]ncertainty about both the marketplace and policy gives Indian tribes a unique opportunity to become more active in supporting policies and solutions that address their own unique needs for infrastructure, diversification, and energy security.”<sup>104</sup> Recently, tribes have looked to diversify their

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102. See DOUGLAS C. MACCOURT, *RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY: A HANDBOOK FOR TRIBES 2* (2010), providing:

In addition to the significant tribal control of land and resources in the U.S. and the national focus on renewable energy, tribal interest in renewable energy projects will also likely be fueled by each tribe’s long-term goals relating to sovereignty, sustainability, and financial security. In Indian country the past decade has brought with it a renewed focus on tribal self-determination, with tribes asserting more control over their land, resources and self-governance. Renewable energy may support a wide range of tribal economic activities, from tourism and gaming to manufacturing and telecommunications. Many tribes have also begun to experiment with their unique legal status to accelerate their economic development efforts. Energy development is one way tribes are creating the infrastructure and capacity to achieve economic independence.

103. Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints – Recommendations for Economic Revitalization in Indian Country*, 44 *TULSA L. REV.* 383, 406 (2008); LeBeau, *supra* note 3, at 42-43; Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 *STAN. L. & POL’Y REV.* 237, 238 (2001) (“Reservation infrastructures, including basic services such as water, electricity, gas, and telecommunications, are currently incapable of supporting tribal populations. The Census Bureau in November 2000 reported that native populations will nearly double in the next fifty years and might reach 4.4 million.”).

104. LeBeau, *supra* note 3, at, 38.

economies<sup>105</sup> in order to generate revenue and create jobs.<sup>106</sup> Energy development, either through natural resource extraction or energy generation, may play an important role in tribal economies as many tribes move toward economic diversification.<sup>107</sup> Energy development is therefore an attractive option for tribes interested in economic diversification.

In addition to promoting economic diversification within tribes, energy development and generation may benefit tribal communities by providing much needed energy itself to people living on the reservations.<sup>108</sup> As Senator Bingaman explained:

Although some of our reservations are rich in energy resources, we have many people living on those reservations who, for example, have no electricity. We need to help both in the

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105. *Financial Roundtable: Economic Diversification in Indian Country*, TRIBAL GOVERNMENT GAMING (Apr. 4, 2011), <http://tribalgovernmentgaming.com/issue/tribal-government-gaming-2011/article/financial-roundtable-economic-diversification-in-indian-country> (last visited Aug. 22, 2011) [hereinafter *Financial Roundtable*].

106. *Id.*; see also MICHAEL W. CAMERON, A PROTOTYPICAL ECONOMIC DEVELOPMENT CORPORATION FOR NATIVE AMERICAN TRIBES (1990) (“As American Indian tribes continue their efforts to advance reservation standards of living, many are vigorously pursuing local economic development so as to provide employment and training for their citizens and revenue for tribal government programs.”).

107. See Leonard, *supra* note 18, at 630 (“Many states, municipalities, and tribes now see renewable energy not only as a source of ‘green’ power but also as a means of economic diversification. Given the momentum toward renewable energy development, the time is ripe to implement such projects.”); Ernest Stevens, Jr., *The Next Wave: Tribal Economic Diversification*, INDIAN GAMING 20 (Mar. 2007). Discussion of the appropriate business structure of such energy development is beyond the scope of this article. Given the numerous variations between tribal governments in Indian country, there are a multitude of options available to tribal governments. For a discussion of the different economic and business structures available to different tribal governments as well as a recognition of the fact that each tribe may define a “successful enterprise” differently, see Mary Emery et al., *Economic Development in Indian Country: Redefining Success*, 4 ONLINE J. RURAL RES. & POL’Y 1 (2006).

108. *Financial Roundtable*, *supra* note 105 (“I have seen many tribes take the approach to first seek opportunities to reduce costs by supplying their own energy.”) (statement of Eric Trevan, President and CEO, National Center for American Indian Enterprise Development).



development of the resources and help to ensure that the benefits of that development inure to the actual tribal members.<sup>109</sup>

Further, energy development in Indian country will lead to more jobs for people living within Indian country.<sup>110</sup> Indian communities, many residents of which are poor, will benefit from the increased availability of energy and jobs.<sup>111</sup>

Many tribes are currently engaged in some form of energy development.<sup>112</sup> A long history of energy development and

109. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 75 (statement of Sen. Bingaman).

110. *See, e.g., id.* at 71 (statement of Theresa Rosier, Counselor to the Assistant Sec'y for Indian Affairs, Dep't of the Interior) ("Increased energy development in Indian country means increased jobs. In many Indian and Alaska Native communities, joblessness and underemployment are painfully acute. More than ever, tribes need the job and training opportunities that go hand-in-hand with expanded mineral and energy development.").

111. STEPHEN CORNELL & JOSEPH P. KALT, PATHWAYS FROM POVERTY: DEVELOPMENT AND INSTITUTION-BUILDING ON AMERICAN INDIAN RESERVATIONS 3-5 (1989); Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 189 (1998). *See also* 149 CONG. REC. S7459 (daily ed. June 5, 2003) (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs), stating that:

Despite what we may read in the *Washington Post* or the *New York Times* about the so-called rich Indians and Indian gambling, it is also indisputable that Indians are the most economically-deprived ethnic group in the United States. Unemployment levels are far above the national average, in some cases as high as 70 percent. Per capita incomes are well below the national average. They have substandard housing, poor health, alcohol and drug abuse, diabetes, amputations, and a general malaise and hopelessness, even suicide among Indian youngsters.

112. Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 92 (2012) ("Energy development is the economic lifeblood of many Indian tribes. A number of tribal economies are heavily dependent upon fossil fuel extraction, and for many tribes, fossil fuels are the single greatest source of tribal revenue.") (citing *Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands: Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources*, 112th Cong. 44 (2011) (statement of Irene C. Cuch, Ute Tribal Business Committee) ("[T]he Tribe's primary source of income is from oil and gas."); *Indian Energy Development: Oversight Hearing Before S. Comm. on Indian Affairs*, 110th Cong. 15 (2008) (testimony of Chairman Carl Venne, Crow Nation) (stating that "most of our governmental revenue is derived from" mineral development); *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 115 (statement of Vernon

natural resource extraction exists in Indian country.<sup>113</sup> Within the past decade, tribes have increasingly tested their ability to branch out from their historical practice of providing access to energy resources through leases to third parties by self-development and management of energy resources. Moreover, those outside of Indian country have increasingly expressed a need for and interest in energy development within Indian country.<sup>114</sup> The list of existing and proposed tribal energy projects extends from the proposed Navajo-owned wind farm project in Arizona<sup>115</sup> to the proposed coal-to-liquids and biomass-to-liquids Many Stars Project on the Crow Reservation in Montana.<sup>116</sup> As a result of their historical and modern experiences, tribes have a demonstrated record of energy development. Today, many tribes are able to accomplish such energy development in a sustainable manner, thereby reducing further environmental degradation.<sup>117</sup>

Ultimately, energy development in Indian country is attractive to many tribes because of the potential benefits to the

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Hill, Chairman, Eastern Shoshone Business Council of the Wind River Reservation) (noting that oil and gas production “is the primary source of revenue for the Tribes”); see also Mireya Navarro, *Navajos Hope to Shift from Coal to Wind and Sun*, N.Y. TIMES, Oct. 25, 2010, at A12, available at [http://www.nytimes.com/2010/10/26/science/earth/26navajo.html?\\_r=1&emc=etal](http://www.nytimes.com/2010/10/26/science/earth/26navajo.html?_r=1&emc=etal) (reporting that coal accounts for more than one-third of the Navajo Nation operating budget, and is the largest source of revenue after government grants and taxes); LeBeau, *supra* note 103, at 239.

113. For a discussion of the history of energy development and natural resource extraction in Indian country, see Royster, *supra* note 13; LeBeau, *supra* note 103.

114. Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 459 (2010); Leonard, *supra* note 18, at 630-31.

115. *Navajo-owned Wind Farm in Works in Arizona*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 17, 2011), <http://indiancountrytodaymedianetwork.com/2011/08/navajo-owned-wind-farm-in-works-in-arizona/>.

116. *Project Overview*, MANY STARS PROJECT, <http://manystarsctl.com/overview.html> (last visited Aug. 22, 2011).

117. See LeBeau, *supra* note 3, at 44 (“Numerous tribes share a common cultural concept of walking in balance with the natural environment. Walking ‘the red road’ is a descriptive phrase that refers to the principle of walking the road of balance – living right and following the rules of the creator, among which is the need to take care of all living things so that they will, in turn, take care of you.”). See also LeBeau, *supra* note 103, at 239.

tribal community, as well as the ability to help the entire nation meet its energy goals.<sup>118</sup> Yet, despite the potential benefits and the demonstrated ability to engage in energy development, not a single Indian tribe has yet taken advantage of the “streamlining” benefits available under the TERA provisions of the Energy Policy Act of 2005, as discussed above. Tribal governments’ lack of interest in the TERA provisions of the Energy Policy Act of 2005 is perplexing. The ability of tribal governments to exercise their sovereignty in a meaningful and stable manner increases the likelihood of tribal economic development,<sup>119</sup> something that is crucial to tribal governments. Moreover, “TERAs offer the potential to significantly improve investor confidence and enhance the development of renewable energy projects on tribal lands.”<sup>120</sup>

#### IV. A THEORY: THREE FACTORS DISCOURAGE TRIBAL ADOPTION OF TERAS

Given the potential benefits to Indian country available to tribes through utilization of the TERA provisions, the fact that tribes have not taken advantage of this opportunity is perplexing.

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118. See *Tribes Hope to Model Southern Ute’s Successful Energy Development*, INDIAN COUNTRY TODAY (Apr. 2, 2012), <http://indiancountrytodaymedianetwork.com/2012/04/02/tribes-hope-to-model-southern-utes-successful-energy-development-106044>; see also Leonard, *supra* note 18, at 636.

119. Cornell & Kalt, *Sovereignty and Nation-Building*, *supra* note 111, at 188-89, providing that:

But shaping those futures will require not simply the assertion of sovereignty – a claim to rights and powers – it will require the effective exercise of that sovereignty. The task tribes face is to use the power they have to build viable nations before the opportunity slips away. This is the major challenge facing Indian country today. It also is the key to solving the seemingly intractable problem of reservation poverty. Sovereignty, nation-building, and economic development go hand in hand. Without sovereignty and nation-building, economic development is likely to remain a frustratingly elusive dream.

A discussion of why tribal sovereignty is key to economic development in Indian country is beyond the scope of this article. For a complete discussion, see generally *id.* Furthermore, for a discussion of how the promotion of tribal sovereignty is critical to natural resource development in Indian country, see Royster, *supra* note 13.

120. Clary, *supra* note 15, at 23.

The fact that tribes apparently requested streamlined procedures from the federal government,<sup>121</sup> but yet have failed to take advantage of the streamlined provisions of TERAs<sup>122</sup> compounds the oddness of this turn of events. According to the Department of the Interior, “several tribes have expressed interest in obtaining information about Tribal Energy Resource Agreements (TERAs) and the TERA regulatory process, but that as of [December 1, 2010], no tribes had submitted a request to the Department to enter into a TERA.”<sup>123</sup> On May 7, 2012, a representative of the Bureau of Indian Affairs confirmed that “[t]o date the Secretary has received no TERA applications and no TERAs have been approved.”<sup>124</sup> Moreover, the stated purpose of Title V of the Energy Policy Act, which contains the TERA provisions, was to attract energy development to Indian country,<sup>125</sup> but it has failed to do so. As exemplified by the

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121. LeBeau, *supra* note 5, at 44 (“Streamlining regulatory approvals related to leasing and/or joint development of energy projects on tribal lands has also become a pressing issue, because most projects involving renewable energy resources that are sited on Indian lands usually require approval by the Department of the Interior’s Bureau of Indian Affairs, a process that necessitates contingent National Environmental Policy Act reviews and approvals.”).

122. It may be that some tribes are interested in pursuing TERAs. Royster, *supra* note 112, at 119. For example, the Sac and Fox Nation may be interested in pursuing a TERA in order to aid in the construction of a refinery. Miles, *supra* note 8, at 475. However, as of May 7, 2012, no tribe had submitted an application to enter into a TERA with the Department of Interior. *See infra* note 124 and accompanying text; Royster, *supra* note 112, at 119 (citing 157 CONG. REC. S6463 (daily ed. Oct. 12, 2011) (statement of Sen. Barrasso); *Discussion Draft of the Indian Energy Promotion and Parity Act of 2010, Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 10 (2010), at 19-20 (statement of Hon. Matthew J. Box, Chairman, Southern Ute Indian Tribe) (noting that although the tribe was a “vigorous supporter” of ITEDSA, neither it nor any other tribe has entered into a TERA because of the difficulties and uncertainties involved); Ryan David Dreveskracht, *Economic Development, Native Nations, and Solar Projects*, 34 J. ENERGY & DEV. 141, 150 (2011); Letter from Stephen Manydeeds, Acting Dir., Office of Indian Energy & Econ. Dev., Dep’t of Interior, to author (Dec. 1, 2010) (on file with author).

123. Letter from Stephen Manydeeds to author, *supra* note 122.

124. E-mail from Catherine Freels, Bureau of Indian Affairs, to author (May 7, 2012) (on file with author).

125. Miles, *supra* note 8, at 474 (citing Scot W. Anderson, Remarks at the Rocky Mountain Mineral Law Inst., *Special Inst. on Natural Res. Dev. in Indian Country: The Indian Tribal Energy Development and Self-Determination Act of*

legislative history detailed above, it appears that tribes may have declined to enter into TERAs because of concerns associated with the federally-mandated environmental review program and the potential impact of the waiver of federal government liability,<sup>126</sup> which in turn may have implications related to the federal trust relationship.

The waiver of federal liability is itself somewhat of a conundrum, as the Secretary is directed to “act in accordance with the trust responsibility” and “act in good faith and in the best interests of the Indian tribes.”<sup>127</sup> The Act provides that nothing contained within it “shall absolve the United States from any responsibility to Indians or Indian tribes.”<sup>128</sup> Yet, at the same time, the provisions state 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 an agreement entered into under the tribe’s TERA.<sup>129</sup> Although perhaps not directly contradictory, these provisions are not entirely consistent with one another, as demonstrated by many of the comments highlighted above. As was explained by President Joe Shirley, Jr. of the Navajo Nation, the general waiver provisions of TERA are inconsistent with the federal trust responsibility and “is an abdication of the federal trust responsibility that is patently unfair to tribes.”<sup>130</sup>

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2005: *Opportunities for Cooperative Ventures* (Nov. 10, 2005) (transcript on file with the Rocky Mountain Mineral Law Inst.).

126. The author recognizes that the waiver of federal liability may be only one of the reasons tribes have failed to take advantage of the TERA provisions, as exemplified by the above discussion. Another potential reason for the lack of tribal participation may be the cumbersome application process. Unger, *supra* note 15, at 359. Another reason that tribes have declined to enter into TERAs may be because of a lack of adequate funding. Bethany C. Sullivan, *Changing Winds: Reconfiguring the Legal Framework for Renewable-Energy Development in Indian Country*, 52 ARIZ. L. REV. 823, 832 (2010). Finally, tribes may have failed to date to take advantage of the TERA provisions because of concerns associated with being the first to do so. However, because the comments included in the applicable legislative history seemingly focused on the three categories discussed above, those categories are the focus of this article.

127. 25 U.S.C. § 3504(e)(6)(A) (2006).

128. *Id.* § 3504(e)(6)(B)

129. *Id.* § 3504(e)(6)(D)(ii).

130. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 107 (statement of Joe Shirley, Jr., President, Navajo Nation).

Furthermore, under the existing TERA provisions, tribes are increasingly seeing the cost of energy development being shifted to themselves.<sup>131</sup> This issue dovetails into concerns associated with the federally mandated environmental review provision, which places additional regulatory burdens on tribes without providing financial resources.

Accordingly, given that the above aspects of the TERA likely serve as impediments to tribes entering into TERAs, reform is necessary to address these concerns. In considering potential revisions to the TERA provisions, one should keep in mind the perspectives of Senators Bingaman and Campbell discussed above. The options for reform may be reflective of the perspectives articulated by Senators Bingaman and Campbell, one of which represents a vision that encompasses a stronger role for the federal government in Indian country and the other which represents a vision that encompasses a stronger opportunity for tribes to express their sovereignty and self-determination. Both of these options are discussed below.

## V. PROPOSED SOLUTIONS TO SPUR TRIBAL ENERGY DEVELOPMENT UNDER TERAS

Notably, the Obama Administration may be receptive to potential options to reform the TERA provisions. The current Administration has generally been open to hearing previous calls for reform from Indian country.<sup>132</sup> As explained in Section II of this paper, America needs to diversify its energy portfolio, and Indian country will likely play a role in increased domestic production of energy. However, as President Joe Shirley, Jr. explained, tribes are unlikely to “opt in” to the existing TERA

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131. See Royster, *supra* note 112, at 1099 (explaining that:

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 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 it can. But inevitably tribes will bear substantial costs.)

132. Dreveskracht, *supra* note 122, at 141-42; LeBeau, *supra* note 3, at 44.

provisions, for the reasons articulated above.<sup>133</sup> Even Congress seems to recognize the necessity of reform. In 2009, Senator Bryon Dorgan (D-ND), Chairman of the Senate Committee on Indian Affairs, and Senator John Barrasso (R-WY), Vice Chairman of the Committee, released a concept paper on energy development and efficiency within Indian country.<sup>134</sup> In recognizing the need for reform, the concept paper identified “outdated laws and cumbersome regulations for tribal energy development and programs” as one of the three areas where reform was necessary.<sup>135</sup> Ultimately, following the release of the concept paper and numerous follow-up hearings, legislation was proposed to amend the TERA provisions; however, none of this legislation was enacted.<sup>136</sup> As a result, reform is still very much needed.<sup>137</sup>

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133. Letter from Joe Shirley, Jr., President, Navajo Nation, to Sen. Ben Nighthorse Campbell (Apr. 8, 2003); *see also Tribal Energy Self-Sufficiency Act Hearing, supra* note 12, at 110 (statement of Joe Shirley, Jr., President, Navajo Nation).

This waiver could actually undermine the concept of tribal self-determination by making it clear to non-Indian developers that the United States would no longer be held responsible for energy deals gone bad. . . . Furthermore, there is no rationale for the federal liability waiver if the ultimate responsibility for the final regulatory framework controlling the development project still remains with the Secretary, as provided for in Section 2605(e). Such a scheme could perpetuate the lose-lose paradigm in which tribes have been trapped for too long. Accordingly, why would any tribe want to “opt in”?

*Tribal Energy Self-Sufficiency Act Hearing, supra* note 12, at 110 (statement of Joe Shirley, Jr., President, Navajo Nation).

134. Press Release, United States Senate Committee on Indian Affairs, Dorgan and Barrasso Release Concept Paper on Indian Energy and Energy Efficiency (Sept. 10, 2009), *available at* <http://www.indian.senate.gov/news/pressreleases/2009-09-10.cfm>.

135. *Id.*

136. *See* Royster, *supra* note 112, at 120-21, explaining that:

The Committee held a follow-up hearing in 2009, and from that emerged the proposed Indian Energy Parity Act (IEPA) of 2010, which contained amendments to the TERA process. The IEPA was referred to the Committee on Indian Affairs, which took no action on the bill before the end of the session. In October 2011, Senator Barrasso introduced the Indian Tribal Energy Development and Self-Determination Act Amendments of 2011. In addition, the proposed HEARTH Act, which would amend the surface leasing process to include a TERA-like process, was introduced in 2010 and referred to the Senate Committee on Indian Affairs. Although the

The discussion below offers two suggestions for reform. These options, though somewhat contradictory, would both improve upon the existing TERA regulations. Whether one proposal is found more persuasive than the other may turn “partly on how one conceptualizes the trust doctrine. It can be seen as a federal duty to protect tribes’ right of self-governance and autonomy, or as a way to justify federal power and control over tribal affairs.”<sup>138</sup> Senators Bingaman’s and Campbell’s comments on the then-pending TERA provisions exemplify this difference of viewpoint on the federal government’s trust responsibility to federally-recognized tribes.

The first proposal approaches the federal trust responsibility from the perspective of promoting tribal sovereignty and self-determination: the TERA regulations maintain federal decision-making authority over energy development in Indian country, which is unnecessary and perhaps even detrimental to the overarching goal of tribal self-determination and energy development. Alternatively, the second proposal for reform adopts a “federal” or “paternalistic” perspective of the federal trust responsibility: the federal government maintains a significant role in energy development in Indian country and therefore should be liable for decisions made under TERA (presumably to protect the economic stability of tribal governments). In considering these proposals, one must be mindful of the fact that the role of the federal government in tribal decision-making is a hotly contested issue.<sup>139</sup> Moreover, these two options for reform are presented in recognition of the existing trade-offs between the tribal trust responsibility and full tribal sovereignty. As Professor Ezra Rosser explained, “[t]he challenge for Indian scholars and leaders alike is recognizing that the future of tribal progress will involve a trade-off between self-

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Committee approved the bill, the Senate did not act on it before the end of session. (citations omitted).

137. Scholars and commentators have also called for reform of the TERA provisions. For example, Professor Judith Royster proposes reforms focused on the Secretarial approval process. Royster, *supra* note 112, at 127-37. For a discussion of the reforms needed to spur energy development in Indian country, see generally Sullivan, *supra* note 126.

138. Unger, *supra* note 15, at 340-41.

139. Sullivan, *supra* note 126, at 831.



determination and the trust duties of the federal government.”<sup>140</sup> Interestingly, the Navajo Nation made similar recommendations to the Senate Committee on Indian Affairs in comments submitted in 2003.<sup>141</sup>

**A. One Potential Avenue for Effective Reform:  
Empower Tribal Governments to Make Decisions  
Regarding Energy Development Without  
Intervention from the Federal Government**

If Congress truly wishes the federal government to be free from liability with regard to certain types of energy development within Indian country, the TERA provision waiving federal government liability may remain. However, to maximize energy development within Indian country and truly promote tribal self-determination as is the stated goal of the Act, the federal government should remove some or all federal “conditions” on such development.<sup>142</sup> This is consistent with the viewpoint expressed by Senator Campbell and discussed above; if tribes are to be sovereign, they must have control over regulation within their territories and also bear the liability for tribal decision-making.<sup>143</sup> This means that federal mandates, such as the

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140. Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 295 (2005). Notably, it may be the case that the level of acceptable “trade off” will differ between individual tribes, as some tribes are in the position to take increased responsibility, which may come with the “trade off” of decreased federal responsibility.

141. *Tribal Energy Self-Sufficiency Act Hearing*, *supra* note 12, at 107 (statement of Joe Shirley, Jr., President, Navajo Nation); *see also id.* at 120 (statement of Vernon Hill, Chairman, E. Shoshone Bus. Council of the Wind River Indian Reservation) (“The bills should be amended to provide Indian tribes adequate resources to assume these comprehensive federal responsibilities. Providing these resources is consistent with the federal trust responsibility and comports with the longstanding policies supporting and promoting tribal self-determination and tribal energy self-sufficiency.”).

142. This proposal is also somewhat consistent with legislation that has been previously proposed, as discussed above. This is because the previously proposed legislation would have modified the existing environmental review process. *See Royster*, *supra* note 112, at 125-27.

143. This also addresses the concern that decreased interest in energy or mineral development under any of the existing applicable statutes in Indian country is likely due in part to the fact that Indian tribes cannot generally play

mandates listed in the existing TERA provisions related to environmental review, should be removed.<sup>144</sup> Moreover, under the current provisions, “the government’s significant involvement in the approval process could be interpreted as an infringement on tribal self-sufficiency and sovereignty.”<sup>145</sup> As previously discussed, many tribes and tribal representatives expressed strong concerns about federally-mandated environmental review provisions that would potentially disrupt tribal governance and subject tribal governments to standards not applicable to the states.<sup>146</sup> Such reform would empower tribes to become the true decision-makers with regard to energy development under the TERA provisions. The proposed reform offers several benefits. First, tribes empowered as true decision-makers tend to perform better.<sup>147</sup> Acting as decision-makers allows tribes to exercise their sovereignty, which as discussed above is tied to the overall likelihood of tribal economic success. In order for a tribe to exercise its sovereignty as a “true” decision-maker, the federal government must play a lesser role in making decisions affecting

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an active role in such development. *Id.* at 114-15. By decreasing the role of the federal government, the first option for reform therefore increases the likelihood that Indian tribes will take an increased role in energy development, which as explained herein increases the likelihood of a successful project.

144. As previously discussed, some may oppose reform of the TERA provisions that would remove the federally-mandated environmental review process. *See e.g.*, Miles, *supra* note 8, at 472.

It is important to note, however, that several tribes have elected to adopt NEPA-like Tribal Environmental Policy Acts in order to review tribal actions. *See* Royster, *supra* note 13, at 1093-94. Moreover, although this article argues for removal of the federally-mandated environmental review process as an aspect of this particular reformation of the TERA provisions, the federal government through the Secretary of Interior would still have an opportunity to review and approve a TERA before it is put in place. Accordingly, should concerns arise regarding a particular tribe’s environmental record, such concerns could be aired and addressed during the notice-and-comment process associated with approval of the tribe’s TERA application.

145. Miles, *supra* note 8, at 467.

146. *Id.* at 1068-90 (citation omitted); *see generally supra* Section III.B.

147. Royster, *supra* note 13, at 1068-69 (citation omitted). Professor Royster points out that successful tribal economic development without meaningful practical sovereignty (i.e., the ability to act as a sovereign within one’s territory) is rare. *Id.* at 1069.

development within Indian country.<sup>148</sup> In fact, scholars have deduced that “federal control over economic decision-making is ‘the core problem in the standard approach to development and a primary hindrance to reservation prosperity.’”<sup>149</sup>

Tribes that have undertaken increased decision-making roles have a demonstrated record of success, as exemplified by tribal forest management under Public Law No. 638. Under P.L. 638, tribes may enter into contracts and self-governance compacts to assume administration of federal Indian programs, 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. The study concluded that “tribal control of forestry under P.L. 638 results in significantly better timber management.”<sup>150</sup> 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.<sup>151</sup> Empirical proof exists that, at least in the context of forest management (which is analogous to energy development given both involve the development of natural resources), tribes have demonstrated the ability to excel when allowed to exercise increased decision-making authority. As Professor Royster concludes, “[t]ribal control of federal programs is thus better than federal control, but a clear second-best to tribal choices of what programs and development opportunities.”<sup>152</sup> By eliminating the

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148. *Id.* (“Practical sovereignty, no less than political sovereignty, requires reducing the role of the federal government.”).

149. *Id.* at 1069 (citing Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 18 (Joint Occasional Papers on Native Affairs, No. 2005-02, 2006), available at [http://www.jopna.net/pubs/jopna\\_2005-02\\_Approaches.pdf](http://www.jopna.net/pubs/jopna_2005-02_Approaches.pdf)).

150. *Id.* at 1070 (citations omitted).

151. *Id.* Professor Royster hypothesizes that the general lack of litigation surrounding mineral leases under the Indian Mineral Development Act suggests that tribes are doing a good job of managing mineral resources under this Act, which gives tribes increased access to practical sovereignty as well. *Id.* at 1077.

152. *Id.* at 1070.

requirement that tribes entering into a TERA come into compliance with a federally-mandated environmental review process, tribes would, therefore, have increased decision-making authority, which in turn increases practical sovereignty that has been shown to increase the likelihood of success of a project.

Furthermore, reduction of the federal government's role in energy development within Indian country correlates with the federal government's goal to promote tribal self-determination.<sup>153</sup> Although some tribes may not be in a position to take an increased role in decision-making within their territories, those that are in the position should be encouraged to take an increasingly active role, thereby empowering the appropriate tribes to be self-determining.<sup>154</sup> The failure of the federal government to recognize that many tribes are capable of independent decision-making would see tribal nations "frozen in a perpetual state of tutelage."<sup>155</sup>

Also, the additional environmental requirements heaped on tribes through the TERA provisions are more extensive than those required of state governments. State and local governments are not required to comply with NEPA nor with a NEPA-like requirement, and therefore placing such a requirement on tribal governments would be odd.<sup>156</sup> In fact, the environmental review requirements placed on tribes under the TERA provisions likely go beyond the requirements placed on the

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153. The federal government has arguably had a policy in place to promote tribal self-determination since President Nixon first issued a statement to Congress addressing tribal self-determination. See Special Message to Congress on Indian Affairs, PUB. PAPERS 564 (July 8, 1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions . . .").

154. Increased decision-making authority leads to increased tribal economic independence and stronger tribal governance. Unger, *supra* note 15, at 337.

155. Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, NAT. RESOURCES & ENV'T, Summer 2007, at 55-56.

156. Unger, *supra* note 15, at 353 ("After the Indian Energy Act was passed, one commentator notes that state and local governments are not subject to NEPA review requirements and argued that the TERA environmental review requirement is 'more intrusive on the government prerogatives of Indian tribes than justified.'") (citations omitted).

federal government.<sup>157</sup> The need to subject tribes to a requirement more rigorous than that applicable to the federal government – and one that is not placed at all on state and local governments – is dubious at best.

Moreover, concerns regarding federal conflicts of interest exist within Indian country. “[A] question arises concerning whether the Secretary is acting in the tribe’s interest or the United States’ interest when reviewing an EIS and approving or disapproving a development lease.”<sup>158</sup> For example, in *Navajo Nation*, the Navajo Nation brought suit, alleging that the federal government had failed to protect the interests of the Nation in part because of conflicting obligations.<sup>159</sup> The federal government has generally failed to provide adequate oversight to effectively manage resource development in Indian country.<sup>160</sup>

Some may find this suggested reform – removing the mandated environmental review – objectionable, on the basis that tribal environmental review would no longer be required should the proposed reform be adopted.<sup>161</sup> However, the federal government would still be required to complete an environmental review under NEPA before a tribal TERA may be approved, which should allay some concerns.<sup>162</sup> Moreover, a TERA would

157. *Id.* at 354 (“The Secretary has acknowledged that the TERA environmental review provisions go beyond what NEPA requires of the federal government.”).

158. Miles, *supra* note 8, at 467.

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

160. *See Shipps*, *supra* note 154, at 56 (providing that:

Putting philosophy aside, based on past practices, Congress will never commit the resources needed to provide comprehensive, timely, and high-quality expertise to tribes as they evaluate and undertake mineral development. The fragmentation of federal oversight institutionalized in the discrete functions performed by the BIA, the Bureau of Land Management, and the Minerals Management Service, and the Environmental Protection Agency dilutes consistent and efficient resource management.).

161. *See supra* notes 84 and 85; Miles, *supra* note 8, at 463-64.

162. Miles, *supra* note 8, at 466.

The Secretary’s authority, however, to require an EIS under NEPA rests on the trustee relationship, not on federal ownership of the land, unlike traditional NEPA mandates. Neither Indians nor Indian land is mentioned in the text of NEPA or in its legislative history. . . . The courts, however, have held that NEPA applies to

only be approved for a period of years, allowing the federal government to evaluate the environmental impact of projects undertaken by tribes under TERAs after the expiration of the approval period. If, following federal re-review, it is determined that the tribe has acted in an environmentally risky manner, the federal government may decline to enter into a subsequent TERA with the tribe.

In sum, this proposal for reform would keep the existing general waiver of federal liability in the TERA revisions, but remove the federal mandates placed on tribes – notably, the federally-mandated environmental review and administrative provisions. This proposal is preferable to the existing scheme in that it would empower tribes to be true decision-makers as to matters affecting their territory. As seen above, tribes have a demonstrated record of success when serving as primary decision-makers. Moreover, the proposed reform would promote tribal sovereignty and self-determination, which is a stated goal of the Act. For these reasons, the proposed reform represents an improvement over the existing TERA provisions.

### **B. An Alternative Possibility for Reform: Reinstate Federal Liability under the TERA Provisions**

As an alternative, a second recommendation for reforming the existing TERA provisions would call for reinstatement of federal liability so as to increase tribal participation in TERAs. This second proposal is also an improvement over the status quo in that it will (with any luck) alleviate tribal concerns related to the federal government's responsibility to tribes. Such a revision would arguably be consistent with the federal government's trust responsibility to tribes. As "the ability to hold the federal government liable for breach is at the heart of its trust obligation toward tribes,"<sup>163</sup> the waiver of federal governmental liability

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leases between Indians and private parties that are subject to approval by the federal government. . . . One year after NEPA was enacted, Congress clarified that when approving Indian leases, the Secretary must consider 'the effect on the environment for the uses to which the leased lands will be subject.'

*Id.* (citations omitted).

163. Unger, *supra* note 15, at 342.

seems to be inconsistent with this federal trust obligation. Removing the waiver would also allay fears that “private entities such as energy companies will exploit tribal resources and take unfair advantage of tribes.”<sup>164</sup> This is because the federal government would likely maintain a more active role in energy development under TERAs. Moreover, this proposal would likely be consistent with the federal viewpoint, such as the one expressed by Senator Bingaman, which envisions the federal government maintaining a significant role in Indian country.

Congress apparently intended the TERA provisions to be consistent with the federal government’s trust responsibility to tribes. For example, one subsection of the TERA provisions refers specifically to the federal trust responsibility, affirming that the trust responsibility remains in effect. This provision mandates that the Secretary “act in accordance with the trust responsibility of the United States relating to mineral and other trust resources . . . in good faith and in the best interests of the Indian tribes.” It also notes that with the exception of the waiver of Secretarial approval allowed through the TERA framework, the Indian Energy Act does not “absolve the United States from any responsibility to Indians or Indian tribes, including . . . those which derive from the trust relationship.”<sup>165</sup>

In addition to apparent consistency with the federal trust responsibility, federal liability under the TERA provisions is appropriate given that the federal government maintains a significant role in the development of energy within Indian country even under the TERA agreements. For example, under the TERA provisions, the federal government retains “inherently Federal functions.”<sup>166</sup> Moreover, as discussed above, the federal government maintains a significant oversight role through the existing TERA provisions because it has a mandatory environmental review process which tribes must incorporate into TERAs. The failure to relinquish oversight to tribes ensures that the federal government will maintain a strong management role, even after a tribe enters into a TERA with the Secretary of the

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164. *Id.* at 354.

165. *Id.* at 350 (citations omitted).

166. *Id.* at 356.

Interior. Given that the federal government maintains a substantial oversight role under the TERA provisions (which it views as consistent with its federal trust responsibility), the federal government should remain liable for decisions made under TERAs. In addition to the strong administrative role that the federal government would still play under approved TERAs, it also maintains an important role as a tribal “reviewer.” Under the TERA provisions, the federal government must review the tribe’s performance under the TERA on a regular basis.<sup>167</sup> Although the existing TERA provisions certainly mark an increased opportunity for tribes to participate in decision-making related to energy development within Indian country, the federal government’s role should remain significant. The proposal to reinstate federal liability under the TERA provisions, therefore, recognizes the significant role that the federal government still plays under the existing TERA provisions.

If Senator Bingaman’s viewpoint is any indication, Congress may be unwilling to relinquish federal oversight over energy development within Indian country. As a result, the first proposal for reform discussed above may prove to be unacceptable to Congress. Assuming this is the case, this second proposal allows the federal government to maintain an oversight role in Indian country and reinstates the federal government’s liability. Based on the legislative history detailed above, reinstatement of the federal government’s liability would likely address many of the concerns raised by tribes regarding the existing TERA provisions. In this way, this second proposal would also constitute an improvement over the status quo.

## VI. CONCLUSION

For a variety of reasons, America needs to increase energy production from domestic sources. Indian tribes may prove the perfect partners for the federal government to achieve its goal of increased domestic production of energy. These tribes have the available natural resources, and experience managing these resources, to make them excellent partners. Increased energy

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167. 25 C.F.R. § 224, subpart F (2012).



production within Indian country would serve federal interests and tribal interests, as such endeavors would increase tribal sovereignty and self-determination while promoting economic diversification within Indian country. Congress recognized this potentially beneficial relationship with tribes when it passed the TERA provisions of the Energy Policy Act of 2005. The existing TERA provisions arguably “streamline” the process of energy production within Indian country. Under these provisions, tribes that enter into a TERA with the Secretary of Interior may be relieved of Secretarial oversight in certain regards. Despite the benefits of such “streamlining,” at the time of this writing, no tribe has entered into a TERA agreement with the Secretary of Interior.

In an effort to understand the potential reasons for lack of tribal engagement with TERA, this article has explored the legislative history associated with the TERA provisions. A review of the legislative history has illustrated that concerns related to the then-pending TERA provisions generally fell into three categories: (1) concerns associated with the federal government’s trust responsibility to tribes; (2) concerns associated with federally-mandated environmental review provisions; and (3) concerns associated with the general waiver of federal liability.

Based on the review of applicable legislative history and the concerns expressed therein, this article proposes reform of the TERA provisions. In particular, this article proposes two potential reforms. The first represents a tribal sovereignty perspective. Under the first proposal, the tribes should be liable (i.e., a waiver of federal government liability should be maintained) only if tribes are the true decision-makers. In this regard, the first proposal argues for the removal of federal mandates, such as the conditions of environmental review and administrative oversight. The reform would allow tribes to truly make decisions regarding energy development within their territories.

Because Congress may not accept this proposal, the article also proposes an option for reform that maintains the federal mandates and oversight role of the federal government, but reinstates the federal government’s liability under the TERA provisions. Such a reinstatement of federal liability is consistent

with the federal government's trust responsibility to tribes. Although the two proposals are contradictory, both represent improvements over the status quo and, should either be adopted by Congress, would encourage tribes to enter into TERAs with the Secretary of Interior.

The historical relationship between the federal government and tribes is replete with examples of abuse and exploitation. The TERA provisions represent a rare opportunity for both the federal government and tribes to benefit from one another. Yet, the TERA provisions in their current configuration fail to induce such a partnership. By adopting one of the proposed reforms, Congress would take a significant step toward building a productive relationship with Indian tribes.