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

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

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Article Abstract:

Today, despite political acrimony on many domestic issues, both political parties and the majority of the American public seem to agree that the country should find new, domestic sources of energy. When looking for potential domestic energy resources, Indian country stands out as ideal territory for various types of energy development, as “[t]he 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.” In addition to traditional energy resources, Indian country also has substantial potential to provide alternative energy resources. Recognizing the potential key role that tribes will play in the development of the country’s domestic energy resources, Congress and federal agencies recognize that tribes should be included in future plans to develop energy resources. Moreover, many tribes are also interested in energy development to potentially promote tribal sovereignty and self-determination when it can be done in a manner that is consistent with tribal customs and traditions.

Recognizing the many potential benefits of increased energy development in Indian country, the Energy Policy Act of 2005 includes a provision designed to spur energy development in Indian country, Tribal Energy Resource Agreements (TERAs). Assuming a federally-recognized tribe can meet the numerous established criteria, the tribe may enter into a TERA with the Secretary of Interior. Once a TERA exists, the tribe is responsible for managing energy development within its territory. Additionally, TERAs allow tribes to avoid some federal requirements, such as project compliance with the National Environmental Policy Act (although the tribe must put an environmental assessment program into place before a TERA will be approved). Despite these incentives, no tribe to date has entered into a TERA.

The article explores the reasons for the lack of tribal interest in TERAs. In particular, the article focuses on the provision that waives federal liability once a tribe has entered into a TERA. The article concludes that this waiver of federal liability is a significant contributor to the lack of tribal interest in TERA provisions. Because the article assumes that energy development in Indian country is beneficial to both tribal governments and the federal government and the

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2 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 appreciate the helpful revisions and comments from Professor Chris Kulander, Mrs. Charles-Newton and Connor Warner.
TERA provisions should, therefore, be reformed to spur tribal interest, the article proposes potential solutions or TERA reforms that would likely lead to increased tribal interest. The proposed reforms include re-establishing federal liability under TERA agreements, or, in the alternative, removing all federal requirements placed upon the tribes through the TERA provisions in order to allow tribes to exercise true sovereignty. The article ultimately concludes that either of the proposed revisions should spur tribal interest in the TERA provisions.

Article:

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. These same citizens also believe that the United States is failing to adequately develop its domestic energy resources. President Obama has made statements on numerous occasions indicating his strong support for the development of new energy sources, especially alternative energy sources. The GOP also supports energy independence. Such widespread

4 Rasmussen Reports, 81% Say Finding New Energy Sources is Urgent National Need (August 7, 2008), http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/81_say_finding_new_energy_sources_is_urgent_national_need (“Americans overwhelmingly believe there is an urgent national need to find new sources of energy, and this need is more important that [sic] reducing current energy usage … With energy issues taking center stage in the presidential campaign, 81% of Americans see development of new energy sources as an urgent priority. Only 9% disagree.”).

5 Rasmussen Reports, 75% Say U.S. Not Doing Enough to Develop Its Gas and Oil Resources (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 (“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.”).

6 President Barack Obama’s Inaugural Address (January 21, 2009), http://www.whitehouse.gov/blog/inaugural-address (“… and each day bring 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.”; Rasmussen Reports, 81% Say Finding New Energy Sources is Urgent National Need (August 7, 2008), http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/81_say_finding_new_energy_sources_is_urgent_national_need (“‘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 Barrack Obama said … Obama champions the development of renewable energy sources like wind and solar …’”); Tracey A. LeBeau, Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right through Indian Country; 56-APR Fed. Law 38, 40 (March/April 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.”).

7 GOP, Issues: Energy; http://www.gop.com/index.php/issues/issues/ (accessed August 19, 2011) (“We [GOP] 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.”).
support for the development of domestic energy resources may exist, because the issue relates to national security. As the foreign regions that the United States has typically relied upon for fossil fuels become increasingly unstable, domestic energy resources must continue to be 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. “As David Rothkopf, a Carnegie Endowment 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.’”

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 likely to increasingly 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

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8 Tracey A. LeBeau, *Energy Security and Increasing North American Oil and Gas Production*, 16-WTR Nat. Resources & Env’t 193 (Winter 2002) (“To increase energy self-sufficiency, strategies to move away from foreign imports and toward increased domestic oil and gas exploration and production are under active consideration.”).

9 Tracey A. LeBeau, *Energy Security and Increasing North American Oil and Gas Production*, 16-WTR Nat. Resources & Env’t 193 (Winter 2002) (“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.”).

10 The CNA Corporation, *National Security and the Threat of Climate Change*, 6 (2007) (“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.”).

11 Tracey A. LeBeau, *Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right through Indian Country*, 56-APR Fed. Law 38, 39 (March/April 2009) (“Last year witnessed record growth, retraction, and gyrations in investment and financing activity in the renewable energy sectors. 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 megawatts. According to some estimates, the solar industry will have nearly double installations of solar photovoltaic modules that same year.”) (citations omitted); 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).

country stands out, as such lands did during the 1970s energy crisis. 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 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.

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.” With regard to traditional energy sources, “Native

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14 Tracey A. LeBeau, Energy Security and Increasing North American Oil and Gas Production, 16-WTR Nat. Resources & Env’t 193, 199 (Winter 2002) (“In the continental U.S., Congress and the Bush administration are also seeking to encourage new exploration and development of oil and gas by leasing, regulatory reviews, and tax incentives – echoing an era of calls for increased oil and gas development from Indian lands during the energy crisis of the 1970s.”).
16 Douglas C. MacCourt, Renewable Energy Development in Indian Country: A Handbook for Tribes (June 2010) (citing DOE Office of Energy Efficiency and Renewable Energy (EERE), DOE’s Tribal Energy Program, PowerPoint Presentation prepared by Lizana K. Pierce available at http://apps1.eere.energy.gov/tribalenergy/); 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, 1066-1067 (Winter 2008) (“The tribal mineral resource base is extensive. Nearly two million acres of Indian lands are subject to mineral leases administered by the Department of the Interior, and the Bureau of Indian Affairs estimates that approximately 15 million additional acres of energy resources lie undeveloped. … Production of energy resources on Indian lands represents more than ten percent of the total of federal on-shore energy production.”) (citations omitted); see also Energy Policy Act of 2003,
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.\textsuperscript{17} In addition to traditional energy resources, Indian country also has substantial potential related to the development of alternative energy resources. In particular, there is huge potential for wind\textsuperscript{18} and solar\textsuperscript{19} 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.”\textsuperscript{20}

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.
moving forward.\textsuperscript{21} 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.”\textsuperscript{22}

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

Perhaps more importantly, tribes are beginning to perceive renewable energy development in a positive light, as something 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.\textsuperscript{23}

Accordingly, energy development in Indian country is attractive to the federal government, as it advances federal interests discussed above, and to some tribes as 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:

Given the extent of the economic deprivation in Indian country and the vast potential wealth residing in energy resources which could ameliorate this deprivation, it has long been a puzzle why these resources have not been more fully developed.

\begin{itemize}
\item \textsuperscript{21} Debbie Leonard, \textit{Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development}, 50 Nat. Resources J. 611, 638 (Fall 2010) ("In its report to Congress, DOE identified the need for regionally integrated water and energy planning to ensure that sustainable supplies of both resources continue into the future. As emphasized in the 2009 Senate energy bill, Indian tribes should participate in the ongoing dialogue regarding future transmission siting and production capacity to meet growing national needs.") (citations omitted).
\item \textsuperscript{23} Donald M. Clary, \textit{Commercial-Scale Renewable Energy Projects on Tribal Lands}, 25-SPG Nat. Resources & Env’t 19, 23 (Spring 2011).
\end{itemize}
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.

Hence, the framework that was originally designed to protect tribes has become an obstacle to development of Tribal resources, in that the bureaucratic impediments of trust administration are now a disincentive to outside investors.24

Recognizing the importance of energy development in Indian country and the need to promote such development, Congress passed the Indian Tribal Energy Development and Self-Determination Act of 2005 as part of the Energy Policy Act of 2005.25 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.26 In order to qualify, a tribe must enter into a Tribal Energy Resource Agreement (TERA) with the Secretary of the Interior.27 The Secretary must approve the TERA if the tribe meets several

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26 Id. at § 2604(a).
27 Id. at § 2604(b).
requirements. One of these requirements is of particular importance to this article. Tribes are required to “establish requirements for environmental review,” which must include elements mirroring requirements of the National Environmental Policy Act (NEPA). In addition to the required elements that must be included in the TERA, the Indian Tribal Energy Development and Self-Determination Act of 2005 also expounds upon the federal government’s trust responsibility to tribes as related to TERAs. Specifically, the Act states that nothing 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.

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 ….” The Act’s mandated environmental review requirements, statement on the federal government’s trust responsibility and general waiver of

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28 Id. at § 2604(e).
29 Id. at § 2604(e)(2)(B)(VI).
30 Id. at § 2604(e)(2)(C). 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.”
31 Id. at § 2604(e)(6)(B).
32 Id. at §2604(e)(6)(D)(ii).
the federal government’s liability will all be discussed in much greater detail below as they potentially relate to the reason why tribes may not be taking advantage of the Act’s TERA provisions.

From the text of the Act, 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) may therefore be inferred. 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. This section [proposed TERA provisions] authorizes the Indian tribes of this country to enter into agreements with the Secretary of the Interior to develop their energy resources. Once agreements between the Indian people and the Secretary of the Interior are entered into, the tribe can then enter into leases or production on their tribal lands with the same rights as if they were private landowners.

In the end … the 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 redtape and bureaucracy of Indian lands being subject to the Federal Government’s fiduciary relationships.

Furthermore, in comments submitted to the Senate Committee on Indian Affairs, Joe Shirley, Jr, Office of the President and Vice President of the Navajo Nation, explained generally the advantages of streamlining the process through the TERA provisions:

In general, any mechanism that puts tribes in the drivers seat of their own destiny by reducing the involvement of the federal government in tribal decisions is a good thing. A legislative mechanism that relieves tribal transactions of the burden of Secretarial involvement, so long as those transactions comply with

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pre-approved tribal regulations, is conceptually a very good idea. Such streamlining promotes efficiency, accountability, and self-determination.34

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.”35

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

34 Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 104 (March 19, 2003) (statement of Joe Shirley, Jr., Office of the President and Vice-President of the Navajo Nation); Letter from Joe Shirley, Jr., President of the Navajo Nation, to Senator Ben Nighthorse Campbell (April 8, 2003), Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 108 (March 19, 2003) (“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.”).

35 Scot W. Anderson, The Indian Tribal Energy Development and Self-Determination Act of 2005: Opportunities for Cooperative Ventures, Rocky Mountain Mineral Law Institute, Special Institute: Natural Resource Development in Indian Country, 3 (November 10 & 11, 2005). Mr. Anderson went on to explain why this is the case later, 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.
Section II 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 both have the capacity and economic interest in developing their energy resources. Given the foregoing, Section III theorizes that tribes have failed to enter into TERA agreements due to the concerns represented in the related legislative history. As a result, Section IV 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 over the status quo. Ultimately, this article concludes that adoption of either of the proposed reforms of TERA will spur tribal promulgation of TERAs with the Secretary of Interior.

I. 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. Generally, legislative history is limited in that it does not reflect the understanding of all members of Congress. Legislative history is a helpful tool, however, in understanding the issues raised in Congress as related to the TERA provisions. Moreover, 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 TERA provisions into the Energy Policy Act of 2005. A review of the relevant legislative history shows that the majority of congressional discussion occurred during 2003. The following subsections extensively explore this discussion. As an initial starting point, bills submitted by both Senators Bingaman and Campbell in 2002 apparently served as the basis for the TERA
provisions,\textsuperscript{36} as these bills were apparently 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.\textsuperscript{37} On February 14, 2003, Senator Bingaman introduced S. 424, “To Establish, Reauthorize, and Improve Energy Programs Relating to Indian Tribes.”\textsuperscript{38} 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.”\textsuperscript{39}

As an initial, general starting point, in addition to wanting to promote domestic energy production, Congress seemingly also wanted to promote tribal sovereignty and self-determination by enacting the Indian Tribal Energy Development and Self-Determination Act of 2005, as even the title reflects Congress’ intent to promote tribal self-determination through the provisions contained therein.\textsuperscript{40} Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs within the Department of Interior, explained that “[w]e [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.”\textsuperscript{41} Moreover, in an effort to help promote tribal self-determination and to make energy development in Indian country

\begin{thebibliography}{9}
\bibitem{41} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108th Con. 76 (March 19, 2003) (statement of Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department of the Interior).
\end{thebibliography}
easier and more efficient, Congress adopted the Act to help streamline the process of energy development within Indian country.

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.

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, and 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. In order to understand the legal context of these questions, one must understand the federal trust responsibility to tribes.

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42 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, 352 (Fall 2009) (“Congress and the DOI have stated that one goal of the TERA legislation and regulations is to make energy resource development easier and more efficient. Enhancing tribal self-determination is another often-mentioned goal.”) (citations omitted).


44 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 in the text, Cherokee Nation, Worcester, Kagama and Lone Wolf, may be used as the
1. Historical Development of the Federal Trust Responsibility to Tribes

Because the federal trust responsibility formed the basis of many of the comments explored below related to the legislative history of the TERA provisions understanding the nuances of the responsibility to federally-recognized tribes is important. To understand the genesis of the modern federal trust responsibility to federally-recognized tribes, one must understand three foundational cases of federal Indian law, also known as the Marshall Trilogy. Two of 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 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 (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. 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. Because the Act did not place any affirmative management duties on the federal government, the Court held in favor of the Secretary. 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 (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. 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.” Mitchell II, 463 U.S. 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. 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.

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. Energy Policy Act of 2003, Cong. Rec. S7687-88 (June 11, 2001) (“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 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.”).

The “Marshall Trilogy” is a reference to Chief Justice Marshall of the U.S. Supreme Court.
three cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, are particularly important in regards to the development of the federal trust responsibility. *Cherokee Nation* recognized the separate sovereignty of tribal nations. At the same time, however, Chief Justice Marshall recognized that in many respects tribal nations had given up aspects of their external sovereignty to the federal government. *Worcester* held that the laws of states generally do not apply in Indian country. 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 U.S. Supreme Court was relatively silent on the issue of federal Indian law following its decision in *Worcester*, until Congress passed the Major Crimes Act approximately 50 years later. The Court determined that Congress had the authority to enact the Major Crimes Act in *United States v. Kagama*. In reaching this decision, the Court determined that the United States owes Indian tribes a “duty of protection” and, therefore, the federal government has

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47 The first of these cases, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), 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. 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. As a result, American Indians only retained a right of occupancy in the land. *See also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

48 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 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.*

49 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 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. *Id.*


51 *Id.*


54 118 U.S. 375 (1886); *See also Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
plenary authority over Indian country. Since this time, the federal government has exercised substantial authority in Indian country.

Three cases demonstrate modern application of the federal trust responsibility to tribes: *United States v. White Mountain Apache*, *United States v. Navajo Nation*, and *United States v. Jicarilla Apache Nation*. In *United States v. White Mountain Apache*, the Supreme Court considered a claim brought by a federally-recognized tribe alleging that the federal government failed to adequately manage Fort Apache for the benefit of the tribe. The statute at issue required that the federal government 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.” As a result of these two facts, 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.

In *United States v. Navajo Nation*, the Court did not find in favor of the tribe. Here, the Navajo Nation alleged that the Secretary of the Interior acted inappropriately in his role in the negotiation of mineral leases on the Navajo Nation. Ultimately, although the Court acknowledged the unprofessional behavior of the Secretary of the Interior, the Court held that the

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55 118 U.S. at 385.
60 Id. at 474.
61 Id.
63 Id. 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 “[t]ribal 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.” Energy Policy Act of 2003, Cong. Rec. S7684 (June 11, 2003) (statement of Senator Bingaman).
Navajo Nation had failed to establish a full trust. 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.

In both White Mountain Apache and Navajo Nation, the Court seemed to focus its analysis on the amount of control by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, 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 leases, 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. 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 Supreme Court was 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. In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances. Furthermore, 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

64 Id.
65 Id.
66 131 S.Ct. 2313. At issue in the underlying litigation is 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. Id.
67 Id.
68 Id.
the Indians a ‘trust,’ see, e.g., 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law.\footnote{69} Ultimately, the Court concluded that while common law principles may “inform our interpretation of statutes and to 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.’\footnote{70} Based on the foregoing, the Court reversed and remanded to the Court of Appeals, leaving the Court of Appeals to determine whether the Court’s decision met the standards for granting the federal government’s writ of mandamus.

Ultimately, 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. As explained by Reid Payton Chambers:

> Whether the trust responsibility is compatible with tribal self-determination chiefly depends on which conception of the trust responsibility one refers to. … there are two basic alternative conceptions of the trust responsibility. The conception articulated in the Cherokee cases as having the purpose of protecting tribes as distinct political societies and limiting the power of federal and state government to infringe on tribal self-governments seems generally if not entirely consistent with tribal self-determination. On the other hand, a conception of the trust responsibility premised on dependency of tribes and having objectives such as sustaining federal power and control over tribal affairs or protecting supposedly dependent tribes from improvident transactions,

\footnote{69}Id. at 2323.  
\footnote{70}Id. at 2325 (citing Mitchell II). 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 information regarding the trust. The Court concluded that the present case lacked both factors. First, the Court determined that the Jicarilla Apache Nation was not a real client of the federal government’s attorneys as the Nation did not pay the attorneys. Additionally, the federal government sought advice from its attorneys in its role as a sovereign and not as a fiduciary for the Nation. Moreover, the Court determined that the federal government has an interest in its capacity as a sovereign in the administration of the Indian trust accounts separate from the interests of the beneficiaries. \textit{Id.} at 2327. With regard to the second feature that must exist for the fiduciary exception to apply, the Court rejected the Nation’s argument that the federal government had a duty to disclose under the applicable statutes, finding instead that “[w]hatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. … Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.” \textit{Id.} at 2330.
represented by the *Kagama*-Lone Wolf line of cases, does appear incompatible with tribal self-determination.\(^7\)

Both of these perspectives of the federal trust responsibility are represented in comments made related to 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.

2. **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, however, apparently the Department of Interior and former Senator Campbell did not view the TERA provisions to negatively impact the federal trust responsibility. On March 19, 2003, Senator Inouye and Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department of Interior, discussed the status of the federal government’s trust responsibility following passage of the then-pending TERA provisions:

**Senator INOYUE:** In your opinion, or the opinion of your Department, would these provisions [TERA provisions] have an impact upon what we call the trust relationship between Indian country and the Government of the United States?

**Ms. ROSIER:** The Government would have a trust responsibility and the Secretary would approve these leases and rights-of-way in the initial review of the tribal regulations. After that, it would follow the recent Supreme Court Case, *United States v. Navajo*.\(^7\)

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There is a limited trust responsibility as defined by the language in the bills.\textsuperscript{72}

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.\textsuperscript{73,74}

The majority of the comments related to the pending legislation’s impact on the federal trust responsibility, however, seemed to suggest that the legislation would have a negative impact. Some who testified to 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, testified in front of the Senate Committee on Indian Affairs that:

\begin{quote}
[a]s 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 asymmetrical nature of the negotiations is removed and we have a level playing field.\textsuperscript{75}
\end{quote}

\textsuperscript{72} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 77 (March 19, 2003) (statements of Senator Inouye, member of the Senate Committee on Indian Affairs, and Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department of Interior).

\textsuperscript{73} Energy Policy Act of 2003, Cong. Rec. S7460 (June 5, 2003) (statement of Senator 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.”).

\textsuperscript{74} 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 U.S. Supreme Court decided \textit{United States v. Jicarilla Apache Nation} in 2011, 131 S.Ct. 2313. Also, as explained above, the Court explained in \textit{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. \textit{Id.} Accordingly, the language of the TERA provisions becomes increasingly important in light of the Court’s decision in \textit{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 provisions. 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 \textit{Jicarilla Apache Nation}.

\textsuperscript{75} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 88 (March 19, 2003) (statement of David Lester, Executive Director, Council for Energy Resource Tribes, Denver, CO).
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. Perhaps Rebecca L. Adamson, in an e-mail to Senator Campbell, summed these concerns up 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 ….” Ms. Adamson went on to explain that:

In a perfect world, where Native Americans have fully achieved their rightful sovereign status and possess full capacity to realize the benefits of their resources, these provisions might be welcome – but the world is not perfect, and many Native communities are far and away the most disadvantaged people in the country. The trust responsibility of the United States government is an obligation to protect tribal lands, assets, and resources, and has been defined by the U.S. Supreme Court as “moral obligations of the highest responsibility and trust” (Seminole Nation v. U.S., 1942). Abolishing this responsibility with a small provision in the energy bill is one of the more egregious acts – in a long litany of such acts – that could be taken by the federal government.

Moreover, as exemplified by the May 6, 2003 statement of Senator Bingaman included in the introduction to this Section above, at least one U.S. Senator was concerned that the proposed TERA provisions represented a departure from the federal government’s historic trust

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76 Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 118-120 (March 19, 2003) (statement of Vernon Hill, Chairman of the Eastern Shoshone Business Council of the Wind River Indian Reservation) (“Moreover, this approach essentially removes the federal government from exercising its trust responsibilities over energy resource development. … From our experience, our Tribes cannot, at this point in time, support an approach that would release these federal agencies from their responsibilities in the valuation, leasing, accounting and distribution of royalties and other payments with respect to oil and gas production on the Wind River Reservation.”).


responsibility to tribes. Accordingly, 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.

B. 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 concerns regarding the mandatory environmental review provisions included in the then-pending Act. In testimony in front of the Senate Committee on Indian Affairs, Arvin Trujillo, Director of Navajo Natural Resources, highlighted the point that federal control of tribal affairs, such as mandating environmental review in Indian country, is at odds with Indian self-determination. 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

80 Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 81 (March 19, 2003) (statement of Arvin Trujillo, Director of Navajo Natural Resources) (“The second piece is looking at the recent decision by the Supreme Court and begin to address trust responsibilities and how to define this in terms that support self-determination. In the opinion of the Supreme Court there is one statement in there that states: ‘The ideal of Indian self-determination is directly at odds with Secretarial control.’”).
the responsibility for their mistakes as well as for their goods decisions.\textsuperscript{81}

Joe Shirley, Jr. from the Navajo Nation shared these concerns related to potential infringement on tribal sovereignty in comments he submitted to the Senate Committee on Indian Affairs.\textsuperscript{82} 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.\textsuperscript{83}

\textsuperscript{81} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 84 (March 19, 2003) (statement of Frank E. Maynes, Tribal Attorney for the Southern Ute Indian Tribal Chairman, Howard D. Richards, Sr., Durango, CO).

\textsuperscript{82} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 105 (March 19, 2003) (statement of Joe Shirley, Jr., Office of President and Vice-President of the Navajo Nation) (“\textit{Both bills authorize infringement of tribal sovereignty by subjecting internal tribal regulations to the public notice and comment process through the federal register.”}).

\textsuperscript{83} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 118 (March 19, 2003) (statement of A. David Lester, Executive Director of the Council of Energy Resource Tribes); see also \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 159 (March 19, 2003) (statement of Maynes, Bradford, Shipps & Sheftel, LLP attorneys for the Southern Ute Indian Tribe) (“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.”).
Moreover, 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. Such mandatory regulations require tribes to comply with environmental regulations not applicable to the states. Joe Shirley, Jr. of the Office of President and Vice-President of the Navajo Nation explained that such regulations were unnecessary as they were largely duplicative of existing federal environmental requirements already applicable in Indian country. One commentator, after reviewing the applicable legislative history, concluded that

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\text{[t]he environmental review requirements imposed under a TERA are, if anything, more intrusive on the government prerogatives of Indian tribes than justified by the government-to-government relationship between the United States and Indian Tribes. This requirement is arguably contrary to the twin-goals of fostering tribal self-determination and promoting the efficient development of tribal minerals.}
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\[84\] \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 84 (March 19, 2003)} \text{(statement of Frank E. Maynes, Tribal attorney for the Southern Ute Indian Tribal Chairman, Howard D. Richards, Sr.) ("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 \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 155 (March 19, 2003)} \text{(statement of Howard D. Richards, Sr., Chairman of the Southern Ute Indian Tribal Council)} ("Tribal land is not public land. Although we recognize that substantive federal environmental laws should generally apply to tribal activities to the same extent that such laws apply to other citizens, we do not understand why a federally-mandated environmental impact statement is required in order for a tribe to lease its lands, when no such statement is required of a private landowner who may be our neighbor. Congress should resist efforts designed to change tribal decision-making into public decision-making.").

\[85\] \textit{Letter from Joe Shirley, Jr., President of the Navajo Nation, to Senator Ben Nighthorse Campbell (April 8, 2003), Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 109 (March 19, 2003)} ("Thus, the regulatory requirement in S. 522 as now drafted, since it would apply \textit{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.").

\[86\] \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 105 (March 19, 2003) \text{(statement of Joe Shirley, Jr., Office of President and Vice-President of the Navajo Nation)} ("[T]he tribal regulatory requirements, which are identical in each bills, create a menu of criteria that are duplicative of existing federal regulations and therefore unnecessary and burdensome. Under current energy law, tribes may promulgate regulations that are more stringent than federal regulations, but not less. Tribal regulatory requirements promulgated in legislation should have a purpose that is not otherwise currently being met.").

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.88 Furthermore, Senator Bingaman described the extent of the desire to apply mandatory environmental review provisions to tribes entering into TERAs:

    Obviously, eliminating NEPA is a concern to many national and local environmental groups and also to some Native American organizations that have weighed in with strong letters on the issue. It is also of concern to the counties around the country. In a letter dated May 14 of this year, the National Association of Counties is calling for section 2604 to be modified so that a NEPA analysis is completed for each new energy project that goes forward on Indian lands. There is a bipartisan group of attorneys general representing the States of Arizona, New Mexico, Nevada, North Dakota, Utah, Wyoming, and Connecticut that have also expressed strong concerns about the diminishment of environmental review for tribal energy resource development projects. … 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.89

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.90

88 Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 150-151 (March 19, 2003) (statement of Sharon Buccino, Senior Attorney with Natural Resources Defense Council). Ms. Buccino actually went so far as to request that the Committee add additional NEPA-like requirements added to the then-proposed TERA provisions. Id. at 151.
90 Id.
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.” Senator Domenici shared Senator Campbell’s concerns regarding the mandatory provisions in Senator Bingaman’s proposed amendment, adding that:

In the nutshell, the Bingaman amendment is not good for the Indians in the United States. If we are crafting a bill here that says we want them to develop their energy resources, 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.

As one commentator concluded: “The relationship between tribal approvals under a TERA and NEPA was a consistent theme in Congressional debates during the development of Title V. Consequently, Congress added a tribal environmental review process to the TERA.”

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 concerns may explain in part tribes’ ongoing reluctance to enter into TERAs.

C. Waiver of Federal Government’s Liability

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91 Id. at S7686 (statement of Senator Campbell).
92 Id.
As identified above, another concern of several commentators on the then-pending TERA provisions related to the provision generally waiving the federal government’s liability to a third party or tribes related to matters arising after approval of a TERA. On June 5, 2003, Senator Campbell explained the purpose for the liability waiver in the then-pending TERA provisions:

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.  

Despite Senator Campbell’s sentiments, concerns regarding this provision pervaded the legislative history. Senator Bingaman acknowledged that the TERA provision waiving the federal government’s liability was controversial, as he stated 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.”

Vernon Hill, Chairman of the Eastern Shoshone Business Council, shared this concern, explaining,

[a]s a policy matter, we are concerned about releasing the Federal Government from the responsibilities over energy resource development. The current Federal regulatory regime for oil and gas leasing places the responsibilities on the BIA, BLM, and MMS. Until we gain a better understanding of the streamlining process and its impact on oil and gas leasing, we are not prepared to release these Federal agencies from their responsibilities.

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Joe Shirley, Jr., Office of the President and Vice-President of the Navajo Nation, in comments submitted to the Senate Committee on Indian Affairs, shared and expounded upon the concerns raised by Chairman Hill. Specifically, President Shirley explained that:

Both bills [bills submitted by Senator Bingaman and Senator Campbell each] stipulate a waiver of federal liability, regardless of the degree of managerial control exercised by the federal government in Indian energy development. In U.S. v. Navajo the Supreme Court said that when Congress enacts a law that aims to enhance self-determination, giving the federal government instead of tribes the lead role in negotiation is directly at odds with self-determination.

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 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.\(^{97}\)

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 Vernon Hill further explained that the then-proposed TERA regulations would disadvantage tribes that were not in the financial position to assume greater liability.\(^{98}\) Conversely, the TERA

\(^{97}\) Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 107 (March 19, 2003) (statement of Joe Shirley, Jr., Office of President and Vice-President of the Navajo Nation).

\(^{98}\) Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 118 (March 19, 2003) (statement of Vernon Hill, Chairman of the Eastern Shoshone Business 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.”).
provisions promote continued inequality between tribes, as those that were in an economic position to take on greater liability would then be treated differently by the federal government.\textsuperscript{99}

In a letter from Jacqueline Johnson, Executive Director of the National Congress of American Indians (NCAI),\textsuperscript{100} to Senator Campbell, NCAI expressed concern 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’s liability and release the Secretary of Interior from any accountability to Indian tribes for actions that she is required to undertake pursuant to the legislation.”\textsuperscript{101}

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, Chairman Campbell and Theresa Rosier both seemingly supported such a waiver, as exemplified by their dialogue:

\begin{quote}
The CHAIRMAN:  If the tribe has managerial control over its resources and it makes the decisions, shouldn’t the tribe and not the United States retain the liability over those decisions, too?

Ms. ROSIER:  Yes; the Department of the Interior would. It is similar to the language of these bills. We would support those tenents.\textsuperscript{102}
\end{quote}

\textsuperscript{99} Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 155 (March 19, 2003) (statement of Howard D. Richards, Sr., Chairman of the Southern 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.”).


\textsuperscript{101} Energy Policy Act of 2003, Cong. Rec. S7461 (June 5, 2003). The NCAI letter went on to explain that “we were not satisfied with provisions pertaining to environmental review …” as well. Id.

\textsuperscript{102} Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 79 (March 19, 2003) (statements of Senator Ben Night-Horse Campbell, Chairman of the Senate Committee on Indian Affairs and Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department of Interior).
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.  

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:

[w]ith respect to trust responsibility, the amendment deletes language that would prevent the tribes from asserting claims against the Secretary of the Interior related to the Secretary’s approval of tribal energy resource agreements. It also eliminates a broad waiver that limits the liability of the United States for any losses associated with the leases or with agreements or the rights-of-way.

Senator Campbell reacted strongly 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 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.

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 other two issues previously examined, likely contributed to tribes’ unwillingness to enter into a TERA.

D. Insights Gained from Legislative History

Legislative history provides insight into the issues considered by policy makers and the legislative history behind adoption of the TERA provisions is no different. The above discussion sheds light on several interesting points. Generally, 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 several federal mandates; and 3) concerns related to the general waiver of the federal government’s liability.

The legislative history discussed above also aids in understanding the underlying perspectives that contributed to the TERA provisions. The 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 had a responsibility to ensure that federal law 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 of liability 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 on 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. Section IV revisits these themes below.

II. Tribes are Well-Positioned to Take the Lead in Energy Development

Section I 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 tribes.106 As explained more fully below, many tribes

106 Douglas C. MacCourt, Renewable Energy Development in Indian Country: A Handbook for Tribes (June 2010) (“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.
are currently 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 some Indian communities. “[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.” Recently, tribes have looked to diversify their economies in order to generate revenue and create jobs. Energy development, either through natural resource extraction or 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.”

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107 Tracey A. LeBeau, *Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right through Indian Country*, 56-APR Fed. Law 38, 42-43 (March/April 2009) (“Tribal communities on most reservations have been growing at a dramatic rate and continue to do so. Thus, while development of the significant amount of renewable energy potential in Indian Country can have a dramatic impact on large regions in the West, tribal communities also need energy supply and infrastructure to serve their own members and as well as their commercial sectors.”); Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 Stan. L. & Pol’y Rev. 237, 238 (Spring 2001) (citations omitted) (“Reservation infrastructures, including basic services such as water, electricity, gas, and telecommunications, are currently incapable of supporting tribal populations. The Census Bureau in November 200 reported that native populations will nearly double in the next fifty years and might reach 4.4 million. The fastest growing segment of tribal populations is under thirty years of age; this population segment is likely to need more complex services; such as internet, cellular, and high-speed telecommunications. Meanwhile, many tribal communities are struggling with utility infrastructures that have long been neglected and have fallen into disrepair, raising utility costs for a customer class that already spends a disproportionate amount of its household income on energy.”).


energy generation, may play an important role in tribal economies as many tribes move toward economic diversification.\textsuperscript{111} Energy development may, therefore, be an attractive option for tribes interested in economic diversification.

In addition to promoting economic diversification within tribes, energy development, and, specifically, energy generation may benefit tribal communities by providing much needed energy to people living on the reservation.\textsuperscript{112} As Senator Bingaman explained, “[a]lthough 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 development of the resources and help to ensure that the benefits of that development inures to the actual tribal members.”\textsuperscript{113} Energy development in Indian country will lead to more jobs for many people living within

\textsuperscript{111} Debbie Leonard, \textit{Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development}, 50 Nat. Resources J. 611, 630 (Fall 2010) (“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., \textit{The Next Wave: Tribal Economic Diversification}, \textit{Indian Gaming} (March 2007) (“For the past twenty years, Indian gaming has been the touchstone for economic development in Indian Country. We are now entering the third wave of tribal economic development – tribal economic diversification.”); Discussion of the appropriate business structure of such energy development is beyond the scope of this paper. 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, please see Mary Emery, Milan Wall, Corry Bregendahl, and Cornelia Flora, \textit{Economic Development in Indian Country: Redefining Success}, in \textit{The Online Journal of Rural Research and Policy} (August 30, 2006).

\textsuperscript{112} Tribal Government Gaming, \textit{http://tribalgovernmentgaming.com/issue/tribal-government-gaming-2011/article/financial} (accessed August 22, 2011) (“I have seen many tribes take the approach to first seek opportunities to reduce costs by supplying their own energy.”) (citing Eric Trevan, president and CEO, National Center for American Indian Enterprise Development).

\textsuperscript{113} \textit{Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act}, 108\textsuperscript{th} Con. 75 (March 19, 2003) (statement of Senator Jeff Bingaman, U.S. Senator from New Mexico).
Indian country. Indian communities, many residents of which are poor, will therefore benefit from the increased availability of energy and jobs.

Many tribes are engaged in some form of energy development. A long history of energy development and natural resource extraction exists in Indian country. Within the past decade, tribes are increasingly testing their ability to branch out from their historical role of providing access to energy resources through leases to third parties to self-development and management of energy resources. Moreover, those outside of Indian country are increasingly expressing a

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114 Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 71 (March 19, 2003) (statement of Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs, Department 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.”).

115 Stephen Cornell and Joseph P. Kalt, Pathways from Poverty: Development and Institution-Building on American Indian Reservations, 3-5 (May 1989) (“As is well known, by most indicators of economic well-being, American Indian reservations are extremely poor. The 1980 census showed that 14 percent of Indian reservation households – three times the proportion in the United States as a whole – has [sic] annual incomes under $2,500. Nearly 45 percent of reservation Indians lived in households with incomes below the poverty level. A quarter of Indian reservation households were on food stamps. Significant household wealth is almost entirely absent from most Indian reservations. … Poverty on American Indian reservations is closely tied to employment conditions. Reservation unemployment rates are often extraordinarily high.”) (citations omitted); Stephen Cornell and Joseph P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today, American Indian Culture and Research Journal, 189 (2003) (“Across Indian country, we find astonishingly high unemployment rates, average household incomes well below the poverty level, extensive dependency on welfare and other transfer payments, and high indices of ill health and other indicators of poverty.”); see also Energy Policy Act of 2003, Cong. Rec. S7459 (June 5, 2003) (statement of Senator Campbell) (“Despite what we may read in the Washington Post of 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.”).

116 Tracey A. LeBeau, Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development, 12 Stan. L. & Pol’y Rev. 237, 239 (Spring 2001) (citation omitted) (“Indian tribes are moving towards vertical integration, encouraged by statute through tribal-specific amendments to the Energy Policy Act, better known as Title XXVI. Tribes are acquiring their own natural gas production, availing themselves of the Indian Mineral Development Act, acquiring gas gathering and processing facilities, owning equity in gas transmission pipelines or owning them outright, and providing distribution and retail gas services to their members and other businesses on reservations.”).

need for and interest in energy development within Indian country.\textsuperscript{118} The list of existing and proposed tribal energy projects extends from the proposed Navajo-owned wind farm project in Arizona\textsuperscript{119} to the proposed coal-to-liquids and biomass-to-liquids Many Stars Project on the Crow Reservation in Montana.\textsuperscript{120} 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 any further environmental degradation.\textsuperscript{121}

Ultimately, energy development in Indian country is attractive to many tribes because of the potential benefits to the tribal community, as well as the ability to help the entire nation meet its energy goals.\textsuperscript{122} Yet, despite the potential benefits and the demonstrated ability to engage in energy development, not a single Indian tribe has yet to take advantage of the “streamlining”

\textsuperscript{118} Debbie Leonard, \textit{Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development}, 50 Nat. Resources J. 611, 630-631 (Fall 2010) (“A number of recent legislative and regulatory developments at the state, regional, and federal levels exemplify the push toward renewable energy sources. Many states have development renewable portfolio standards that require retail electricity providers to obtain a certain percentage of their portfolio from renewable sources. Renewable projects have therefore started to make economic sense, creating a market demand for wind, solar, geothermal, biomass, and other renewable energy sources.”).


\textsuperscript{121} Tracey A. LeBeau, \textit{Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right through Indian Country}, 56-APR Fed. Law 38, 44 (March/April 2009) (“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.”); Tracey A. LeBeau, \textit{Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development}, 12 Stan. L. & Pol’y Rev. 237, 239 (Spring 2001) (citation omitted) (“Indian tribes have the ability to move swiftly to pursue development in a sustainable manner. This affinity for sustainable development is due partly to cultural sensibilities and partly to a degree of financial conservatism that financial institutions have demanded of Indian tribes. The growing interest in sustainable development and the global embrace of the principles embedded in the Kyoto Protocol (though not yet fully accepted in the United States) will help advance tribal regulatory and business agendas in tandem. Tribes can thus make significant contributions to the industry as leaders in sustainable development strategies and technologies.”).

\textsuperscript{122} Debbie Leonard, \textit{Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development}, 50 Nat. Resources J. 611, 636 (Fall 2010) (“Development of renewable energy projects on these Indian reservations can serve the multiple purposes of reducing energy costs for tribal residents, providing tribes with a means of economic diversification, and helping the nation as a whole to achieve energy independence. The ideal location of reservations to tap into these renewable resources puts tribes in an excellent position to be at the forefront of renewable energy development.”).
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, 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.”

III. 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 seemingly not taken advantage of this opportunity is perplexing. The fact that tribes apparently requested streamlined procedures from the federal government, but yet have generally failed to take advantage of the streamlined provisions of TERAs compounds the oddness of this turn of events. According to the Department of the

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123 Stephen Cornell and Joseph P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today, American Indian Culture and Research Journal, 188 (2003) (“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 Stephen Cornell and Joseph P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today, American Indian Culture and Research Journal (2003). Furthermore, for a discussion of how the promotion of tribal sovereignty is key to natural resource development in Indian country, see Judith V. Royster, Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act, 12 Lewis & Clark L. Rev. 1065 (Winter 2008).

124 Donald M. Clary, Commercial-Scale Renewable Energy Projects on Tribal Lands, 25-SPG Nat. Resources & Env’t 19, 23 (Spring 2011).

125 Tracey A. LeBeau, Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right Through Indian Country, 56 APR Fed. Law 38, 44 (March/April 2009) (“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.”).

126 It may be that some tribes are interested in pursuing TERAs. Andrea S. Miles, Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal
Interior, “several tribes have expressed interest in obtaining information about Tribal Energy Resource Agreements (TERAs) and the TERA regulatory process, but that as of the date of your [the author’s] request [December 1, 2010], no tribes had submitted a request to the Department to enter into a TERA.”

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, but yet it has failed to do so. As exemplified by the legislative history discussion above, it appears that tribes may have declined to enter into TERAs to date because of concerns associated with the federally-mandated environmental review program contained within the TERA provisions and the potential impact of the waiver of federal government liability under the TERA provisions, which in turn may have implications related to the federal trust relationship.

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129 The author certainly 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. 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, 359 (Fall 2009) (“Some experts suggest that the process of securing a TERA may be so burdensome that many tribes will choose not to seek a TERA. Indeed, the long, multistep application process can be a hurdle for tribes that want to move forward quickly with development plans.”). Another potential 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 (Fall 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. Such concerns would be heightened by the issues raised in the legislative history, as discussed above, and also, perhaps, by the less than stellar historical relationship between tribes and the federal government. 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.
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.”\textsuperscript{130} The Act provides that nothing contained within it “shall absolve the United States from any responsibility to Indians or Indian tribes.”\textsuperscript{131} 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.\textsuperscript{132} 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 TERA provisions are inconsistent with the federal trust responsibility, exemplifying the connection between the general waiver of the federal government’s liability and the federal trust responsibility. As he stated during a hearing on the proposed legislation, “[t]his 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.”\textsuperscript{133}

Furthermore, under the existing TERA provisions, tribes are increasingly seeing the cost of energy development being shifted to the tribes themselves.\textsuperscript{134} This concern also dovetails into

\textsuperscript{134} Judith V. Royster, \textit{Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act}, 12 Lewis & Clark L. Rev. 1065, 1099 (Winter 2008) (“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 TERSA, 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.”).
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 provisions 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 as discussed above. The potential options for reform may be reflective of the perspectives articulated by Senators Bingaman and Campbell as one option represents a vision that encompasses a stronger role for the federal government in Indian country (arguably Senator Bingaman’s vision as discussed above) and the other option represents a vision that encompasses a stronger opportunity for tribes to express their sovereignty and self-determination. Both of these options are discussed below.

IV. 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 was generally open to hearing previous calls for reform from Indian country. As the Introduction explained, 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 provisions, for the reasons articulated above. As a result, reform is needed.

135 Tracey A. LeBeau, Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right through Indian Country, 56 APR Fed. Law. 38, 44 (March/April 2009) (“Throughout the new administration’s transition and afterwards, tribes and tribal leaders have been making recommendations to make current Indian programs more effective and responsive to the needs of tribal governments and communities.”).

136 Letter from Joe Shirley, Jr., President of the Navajo Nation, to Senator Ben Nighthorse Campbell (April 8, 2003), Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 110 (March 19, 2003) (“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
The discussion below offers two suggestions for reform. These options are somewhat contradictory, although this author contends that either proposed reform would improve upon the existing TERA regulations. Whether one finds one proposal 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.” 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 in Indian country. Alternatively, the second proposal for reform, as discussed below, adopts a “federal” or “paternalistic” perspective of the federal trust responsibility: the federal government should protect tribal sovereignty 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.

138 For a general discussion of needed reform to spur energy development in Indian country, see Bethany C. Sullivan, Changing Winds: Reconfiguring the Legal Framework for Renewable-Energy Development in Indian Country, 52 Ariz. L. Rev. 823 (Fall 2010).

presents two options for reform partially 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-determination and the trust duties of the federal government.”

Interestingly, the Navajo Nation made similar recommendations to the Senate Committee on Indian Affairs in comments submitted in 2003. Specifically, Joe Shirley, Jr. suggested the following in his written comments to the Committee:

The Navajo Nation recommends two alternative solutions to rectify this inequity: (1) preserve the federal waiver of liability and remove all legislative language regarding tribal regulation requirements, public notice and comment regarding tribal regulations, public appeals to tribal regulations, and term limits on tribal leases, business agreements and rights of way; or (2) comply with U.S. v. Navajo by spelling out the explicit trust responsibility of each of the Secretaries, at each stage of federal involvement; a criteria to determine a breach of the federal government’s trust duties; and the express remedy for damages resulting from such breach.

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

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within tribes over distancing tribal energy development from federal government protection, as issue strongly debated among Indian law practitioners and scholars.”) (citation omitted).

140 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 “trade off” acceptable to tribes 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 and the Native American Energy Development and Self-Determination Act, 108th Con. 107 (March 19, 2003) (statement of Joe Shirley, Jr., Office of President and Vice-President of the Navajo Nation); see also Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 118 (March 19, 2003) (statement of Vernon Hill, Chairman of the Eastern Shoshone Business 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.”).
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. But, 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. 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 then also bear the liability for the tribal decision-making. This means that federal mandates, such as the mandates listed in the existing TERA provisions related to environmental review, should be removed.\textsuperscript{142} 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.”\textsuperscript{143} Previously, “[s]ome tribal representatives objected to the environmental review process either on the basis of inadequate tribal financial resources to carry out

\textsuperscript{142} Some may oppose a reform of the TERA provisions that would remove the federally-mandated environmental review process. See Andrea S. Miles, \textit{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, 472 (2005-2006) (“Because of the ongoing concern that TERA tribes could ignore NEPA, Congress added a tribal environmental review process to the TERA. The environmental review process must provide for the identification and evaluation of all significant environmental effects, including effects on cultural resources, identify proposed mitigation measures, and incorporate these measures into the TERA agreement. In addition, the Tribe must ensure that the public is informed of and has the opportunity to comment on the environmental impacts of the proposed action, provide responses to relevant and substantive comments before tribal approval of the TERA agreement, provide sufficient administrative support and technical capability to carry out the environmental review process and allow Tribal oversight of energy development activities by any other party under any TERA agreement to determine whether the activities are in compliance with the TERA and applicable federal environmental law.”) (citations omitted). 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 Judith V. Royster, \textit{Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act}, 12 Lewis & Clark 1065, 1093-1094 (Winter 2008). Moreover, although this article argues for removal a 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.

environmental reviews, or on the ground that the federal government should not mandate what tribal governments choose to do.”

Such reform of the TERA provisions empowers tribes to become the true decision-makers with regard to energy development under the TERA provisions. The proposed reform offers several benefits. First, “[t]ribes exercising actual decision-making powers ‘consistently out-perform outside decision-makers.’” Tribes acting as decision makers are exercising their sovereignty, which as previously 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 take a reduced role in making decisions affecting development within Indian country. 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.’”

Moreover, tribes who have undertaken increased decision making roles have a demonstrated record of success, as exemplified by tribal forest management under Public Law 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

145 Judith V. Royster, Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act, 12 Lewis & Clark 1065, 1068-1069 (Winter 2008) (citation omitted). Professor Royster goes even further in her article to point out 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.
146 Judith V. Royster, Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act, 12 Lewis & Clark 1065, 1068-1069 (Winter 2008) (“Practical sovereignty, no less than political sovereignty, requires reducing the role of the federal government.”).
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 PL 638 results in significantly better timber management.’ When tribes took complete management over their forest resources under 638, output rose as much as forty percent with no increase in the number of workers, and the tribes received prices as much as six percent higher than they had when the forest resources were managed by the Bureau of Indian Affairs.148

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.”149 By eliminating the 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 the utilization of 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.150 Although some tribes may not be in a position to take an increased role in decision-making within their respective territories, those that are in the position should be

148 Judith V. Royster, Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act, 12 Lewis & Clark 1065, 1070 (Winter 2008) (citations omitted). Professor Royster goes on to hypothecate 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.


150 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. 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 … ”).
encouraged to take an increasing active role, thereby empowering the appropriate tribes to self-determinate.\textsuperscript{151} 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.”\textsuperscript{152} Furthermore, “though ownership of most tribal lands is held by the federal government, the exclusive beneficiary of that ownership is intended to be the applicable tribe.”\textsuperscript{153}

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.\textsuperscript{154} In fact, the environmental review requirements placed on tribes under the TERA provisions likely go beyond the requirements placed even on the federal government.\textsuperscript{155} The need to subject tribes to a requirement more rigorous than the one applicable to the federal government and one that is not placed at all on state and local governments (by the federal government) is dubious at best. Moreover, concerns regarding federal conflicts of interest exist within Indian country. “[A]

\textsuperscript{151} Increased decision making authority leads to increased tribal economic independence and stronger tribal governments. Kathleen R. Unger, \textit{Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements}, 43 Loy. L.A. L. Rev. 329, 337 (Fall 2009) (“The doctrine of self-determination, which has guided much of federal policy toward American Indians over the past decades, acknowledges that giving tribes control over how their resources are developed is the best way to improve economic self-sufficiency and to strengthen tribal governmental and economic structures.”) (citation omitted).


\textsuperscript{154} Kathleen R. Unger, \textit{Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements}, 43 Loy. L.A. L. Rev. 329, 353 (Fall 2009) (“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).

\textsuperscript{155} Kathleen R. Unger, \textit{Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements}, 43 Loy. L.A. L. Rev. 329, 354 (Fall 2009) (“The Secretary has acknowledged that the TERA environmental review provisions go beyond what NEPA requires of the federal government. In the Federal Register preamble … to the final TERA regulations, the DOI tied the TERA environmental review regulations to the mandate articulated in the 2005 Act and claimed that the Secretary bore responsibility for ensuring that tribal environmental review processes were sufficient to identify and address foreseeable environmental impacts.”).
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.”

For example, in *Navajo Nation*, the Navajo Nation brought suit against the federal government alleging that the federal government had failed to protect the interests of the Nation in part because of conflicting obligations. In addition to the deficiencies of federal oversight, as demonstrated by the *Navajo Nation* case, the federal government has generally failed to provide adequate oversight and resources to effectively manage resource development within Indian country.

Yet, despite these points, some may find this suggested reform removing the mandated environmental review objectionable on the basis that tribal environmental review would no longer necessarily be required should the proposed reform be adopted. However, the federal government would still be required to complete an environmental review under the NEPA before a tribal TERA may be approved. As a result, any proposed TERA would be subjected to

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158 Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, 22 Nat. Resources & Env’t 55, 56 (2007-2008) (“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.”).


160 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, 466 (2005-2006) (“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 leases between Indians and private parties that are subject to approval by the federal government. … One year after
federal environmental review before being adopted, which should allay some concerns related to individual tribal environmental review. Moreover, a TERA would 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 period of years. If following periodic federal 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 same tribe.

In sum, this proposal for reform would keep the existing general waiver of federal liability in the TERA revisions, but remove 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 the 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 would represent an improvement over the existing TERA provisions.


Should the above suggestion prove distasteful, a second recommendation for reforming the existing TERA provisions calls for reinstating federal liability so as to hopefully 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

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.’”) (citations omitted).
government’s trust responsibility to tribes. This is because the language that removes the federal government from liability under the TERA provisions “‘undercuts the federal trust responsibility to Tribes by providing a waiver for the federal government of all liability from energy development.’”\textsuperscript{161} As such, “the ability to hold the federal government liable for breach is at the heart of its trust obligation toward tribes.”\textsuperscript{162} The waiver of federal governmental liability would, therefore, seem to be inconsistent with the federal trust obligation to tribes. Removing such a waiver would also allay the fears of some that “private entities such as energy companies will exploit tribal resources and take unfair advantage of tribes.”\textsuperscript{163} 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 a federal viewpoint, such as the one expressed by Senator Bingaman as discussed above, 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” and “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.”

In addition to apparent consistency with the federal trust responsibility, federal liability under the TERA provisions is appropriate given 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 maintains “inherently Federal functions.” 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 that tribes must incorporate into TERAs. This 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 Interior. “According to the Preamble, the inclusion was attributable partly to the trust responsibility toward tribes and trust assets and partly to the DOI’s responsibilities, as spelled out in the Indian Energy Act, to determine a tribe’s capacity to carry out TERA activities and to undertake periodic reviews of a tribe’s TERA activities.” Given the federal government maintains a substantial oversight role under the TERA provisions (which it views as being 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 tribal “reviewer”. Under the TERA provisions, the federal

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government must review the tribe’s performance under the TERA on a regular basis.\textsuperscript{167} 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 remains 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, at the same time, reinstates the federal government’s liability. Based on the legislative history discussed above, reinstatement of the federal government’s liability would likely go a long way toward addressing many of the concerns raised by tribes in relation to the existing TERA provisions. In this way, this second proposal would also constitute an improvement over the status quo.

Conclusion

For a variety of reasons, America needs to increase energy production from domestic sources. Tribes may prove the perfect partners for the federal government to achieve its goal of increased domestic production of energy. Tribes have the experience and available natural resources to make them excellent partners. Increased energy production within Indian country would serve federal interests and tribal interests, as such endeavors could increase tribal

sovereignty and self-determination while promoting economic diversification within Indian country. Congress recognized the potential 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 for energy production within Indian country, as tribes that have entered 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 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 explored the legislative history associated with the TERA provisions. A review of the legislative history showed that concerns related to the then-pending TERA provisions generally fall 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 arguably represents a tribal sovereignty perspective. This is the case because the first proposal argues that the tribes should be liable (i.e. maintains a waiver of federal government liability) only if tribes are the true decision-makers. In this regard, the first proposal argues for the removal of federal mandates, such as the mandated 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 proposed a potential option for reform that maintains the federal mandates, or oversight role of the federal
government, but reinstates the federal government’s liability under the TERA provisions. Such a reinstitution of federal liability is seemingly consistent with the federal government’s trust responsibility to tribes. Although the two proposals are contradictory, both represent an improvement over the existing status quo and, should either be adopted by Congress, would hopefully spur 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 partnering together. Yet, the TERA provisions in their current configuration fail to induce such a beneficial partnership. By adopting one of the proposed reforms, Congress would take a significant step toward building a productive relationship with Indian country.