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The Road to Alternative Energy in Indian Country: Is it a Dead End?

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Greetings from the WSBA Indian Law Section Chair

By Christina Parker

Greetings! The WSBA Indian Law Section has had a busy winter and spring. As we now enter the summer months, the section is as active as ever, with roughly 80% of the Section utilizing the listserv. I encourage you to utilize the listserv for posting upcoming Indian Law and Tribal Law events.

The WSBA has recently revamped section websites, and the Indian Law Section is now easy to navigate, and a great resource for staying updated regarding section activity.

It’s hard to believe that we needed coats so recently, as the Pacific Northwest summer heats up, but it’s important to recognize the Section’s amazing response to the Holiday Coat Drive, co-sponsored with Foster Pepper. I hope the Section can continue to give back to our community – even outside the holiday season.

In other news, our membership has increased and we continue to provide greater access to legal education and the bar exam (check out the website http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section for more information on Bar Exam Stipends and the Indian Legal Scholars Program). The Section hosted a successful edition of the Annual Indian Law CLE last month.

To top it all off, in February, WSBA Board of Governors voted to retain Indian Law on the bar exam. As always, the Section is what you make of it. If you would like to become more involved, or volunteer for Section work, please don’t hesitate to contact me, or any of the officers or Trustees.

In dIa n La w y e r s In t h e ne w s

Governor Christine Gregoire appointed Raquel Montoya-Lewis, Associate Professor of Law at Fairhaven College of Interdisciplinary Studies, to serve on the Washington Partnership Council for Juvenile Justice.

Rob Roy Smith was made a shareholder of Ater Wynne LLP. Rob Roy advises Indian tribal clients and others regarding doing business in Indian Country.

Patricia Paul is once again working with Brazilian anthropologist Adolfo de Oliveria, PhD, as co-conveners of a symposium for the International Congress of the Americanists (ICA) regarding transformative cultures.

Amy Pivetta Hoffman has opened a practice focusing on business law and estate planning. She was also recently named Rising Star of 2011 by the Pierce County Democrats.

U.S. Attorney General Eric Holder appointed Brent Leonhard, Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation, to the Violence Against Women Federal and Tribal Prosecution Task Force. Within the first year, the task force will produce a trial practice manual on the federal prosecution of violence against women offenses in Indian country. Brent’s article, The Adam Walsh Act and Tribes: One Lawyer’s Perspective, was published in the April/May 2011 issue of the Sex Offender Law Report (Vol. 12, No. 3).

Lisa Atkinson, Gabe Galanda, Chris Masse and Rob Roy Smith were named Rising Stars in the area of Native American Law, by Super Lawyer magazine.

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The Road to Alternative Energy in Indian Country: Is It a Dead End?

By Ryan Dreveskracht

Using solar and wind alone, Indian country has the capacity to produce more than four times the amount of electricity generated annually in the United States. At the same time, states are passing renewable energy portfolio standards with fervor – without the capacity to meet these targets on their own. The economic benefits of tribal energy development are painfully obvious – in FY2010, clean energy investments grew by 30 percent, to $243 billion. An estimated $1 trillion in revenue is possible were Indian country to fully develop its energy resources. With tribes already feeling the brunt of global warming, the environmental benefits of using alternative energies to support the next generation are increasingly being explored. Where unemployment levels are disproportionately high in Indian country, perhaps equally important is that alternative energies are job-creating hothouses.

Yet, as of February 2011, only one commercial scale renewable energy project is operating in Indian country. What gives?

On April 1, 2011, the U.S. House of Representatives, Committee on Natural Resources, set out to find the answer. In his opening statement, Committee Chairman Don Young set the tone for testimony to follow: “[B]ecause of outdated or duplicative federal regulations and laws, tribes often feel that the federal government is treating them unfairly…. These rules and policies often slow energy development and discourage businesses to invest on tribal lands.”

Tribal officials identified the following impediments:

- Erroneous Bureau of Indian Affairs (BIA) records, which cause significant delay in the preparation of environmental documents and overall land records necessary for the approval of business transactions.
- A lack of BIA staffing necessary to review and approve the required instrumentalities within a timely fashion.
- The inability to enter into long-term fixed price contracts necessary to underpin the commercial framework needed for long-term projects.
- A lack of standardization and coordination between Department of the Interior (DOI) offices.
- A lack of DOI communication with state and local governments – with tribes bearing the brunt of the cost via legal attacks on their sovereignty.
- General apprehension to issue National Environmental Protection Act (NEPA) compliance decisions at the Environmental Protection Agency, likely due to fear of litigation.
- The practical inability to tax non-Indian energy developments on leased lands due to state and local governments in many instances already taxing the project.
- Tribes’ inability to take advantage of the production/investment tax credits and accelerated depreciation incentives available to non-Indian project investors.

Stripped down, many of the hindrances referred to in Hearing testimony are a direct result of the federal approval process. Pursuant to 25 U.S.C. § 415, transactions involving the transfer of an interest in Indian trust land must be approved by the BIA. But even where the tribe structures the project without leasing its land, 25 U.S.C. § 81 requires that the BIA approve contracts that could “encumber” Indian lands for a period of seven or more years. Secretarial approval is also necessary for rights-of-way on Indian lands.

In these instances the BIA approval process constitutes a “federal action,” which triggers a slew of federal laws that the BIA must comply with. This includes NEPA, the National Historic Preservation Act, and the Endangered Species Act, among others. Compliance with NEPA alone can take over 12 years to complete and can generate millions of dollars in additional costs – not to mention the inevitable litigation that will ensue. Although there has been some headway in removal of the outdated tribal energy regime, according to recent congressional testimony there is much work to be done.

The Road to Nowhere

Congress began to address the development of renewables in Indian country in the early nineties. Such legislation included the EPAct of 1992, which authorized the Department of Energy (DOE) to provide grants and loans to tribes wishing to develop solar and wind energy; the Indian Energy Resource Development Program, which awarded development grants, federally-backed loans, and purchasing preferences to Indian tribes pursuing energy development projects; culminating in the Indian Energy...
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Act of 2005 (IEA), the most comprehensive Indian-specific energy legislation to date.

Until 2005, much of the federal push for energy development had focused on creating incentives for investment rather than a restructuring of the antiquated legal structures involved. Much of the IEA, however, was devoted to the creation of a new framework for the management and oversight of energy development in Indian country – the Tribal Energy Resource Agreement (TERA). This section of the IEA allowed a tribe to enter into a master agreement (the TERA) with the Secretary of the Interior, granting the tribe the ability to enter into leases and other business agreements and to grant rights of way across tribal lands without Secretarial approval.

To date, however, no tribe has entered into a TERA. For many tribes, the cost simply outweighs the benefits – TERAs allow tribes the leeway to skip secretarial approval for specific projects, “but only on terms dictated by the federal government rather than on the tribes’ own terms.” First, in applying for the TERA, the tribe must consult with the director of the DOI before submitting the application. The director must hold a public comment period on the proposed TERA application and may conduct a NEPA review of the activities proposed. Thereafter, the DOI has 270 days to approve the TERA. Second, the TERA requires that tribes create a NEPA-like environmental review process. This “tribal NEPA” must have a procedure for public comment and for “consultation with affected States regarding off-reservation impacts” of the project. Third, the TERA must include a clause guaranteeing that the tribe and its partner will comply “with all applicable environmental laws.” In so doing, tribes must allow the Secretary to review the tribe’s performance under the TERA – annually for the first three years and biannually thereafter. If in the course of such a review the Secretary finds “imminent jeopardy to a physical trust asset,” the Secretary is allowed to take any action necessary to protect the asset, including assuming responsibility over the project. Fourth, the TERA must address public availability of information and record keeping by designating “a person … authorized by the tribe to maintain and disseminate to requesting members of the public current copies of tribal laws, regulations or procedures that establish or describe tribal remedies that petitioning parties must exhaust before instituting appeals.” Finally, agreements for developing alternative energy projects are subject to a 30-year limit, renewable only once for another 30-year term.

Roadblocks

Commentators have noted that the TERA imposes more stringent environmental standards upon tribes than non-Indian developers elsewhere. But even where a tribe is compelled to go through the burdensome TERA process – which may still be a good idea – many tribes simply do not have the resources necessary to fulfill the TERA requirements. The regulations impose an extremely heavy burden on tribal governments to demonstrate that they have the requisite expertise, experience, laws, and administrative structures in place to assume the responsibility of a TERA. “Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts, or the financial wherewithal to hire or train them,” in order to provide the tribe with the capacity necessary to obtain secretarial approval under the TERA regulations.

The irony is that those tribes with TERA capacity are likely in a position to skip the approval process altogether by implementing alternative energy projects on their own, which do not require secretarial approval. Where no lease, contract, or right-of-way is involved, the approval process – and the insurmountable burdens of federal law that come along with it – is not necessary. The majority of tribes, however – tribes that are most in need of economic development and would most benefit from the implementation of an alternative energy project – have to seek an outside partner, which puts them “at a terrific disadvantage for developing their own resources.”

The Road Ahead

The doctrine of self-determination acknowledges that tribal control over development is the best way to strengthen tribal governance and improve economic self-sufficiency. According to much of the testimony offered at the recent Hearing before the Subcommittee on Indian and Alaska Native Affairs, self-determination must also include freedom from the yoke of federal energy oversight and regulation.

On May 4-5, 2011, the U.S. Department of Energy (DOE) held its first Tribal Summit. The goal of the Summit, much like that of the most recent Hearing, is to identify and “break down bureaucratic barriers that have prevented tribal nations from developing clean energy with the ultimate goal of prosperity and energy security for both Indian country and the nation as a whole.” For many, the Summit reflects the nation’s “continued commitment to partnering with Native Americans to support the development of clean energy projects on tribal lands …” But will it be enough?

Having identified “unnecessary laws and regulations” hindering alternative energy development in Indian country, it is now time for Congress to write necessary legislation to allow tribes to pursue energy self-determination. If the words of Doc Hastings, Chairman of the House Committee on Natural Resources, hold any bearing, the current regulation of energy resources in Indian country...
may soon be upset: “Tribes know best how to meet their own land management objectives.”52 This axiom should not be lost. Indeed, in order to effectively realize the twin goals of promoting tribal self-determination and encouraging the efficient development of tribal energy resources, it will be necessary to emphasize the former to bring about the latter.


2 These laws require utility companies to purchase a mandated amount of their energy from renewable sources. California’s recently passed Senate Bill X1-2, for example, increases the California renewable portfolio standard to a 33 percent target by 2020. In his most recent State of the Union address, President Obama proposed a Clean Energy Standard to require that 80 percent of the nation’s electricity come from renewable resources by 2035. President Barack Obama, State of the Union Address (Jan. 25, 2011), available at http://www.whitehouse.gov/state-of-the-union-2011.


6 See Carol Berry, Future Resources Are Key to Planning for Ute Tribes, INDIAN COUNTRY TODAY, May 3, 2011 (noting the installation of a 230 kilovolt transmission line in order to facilitate the future expansion of solar energy).


11 Id. (statement of Rep. Young).

12 Id. (statement of Scott Russell, Secretary, Crow Nation’s Executive Branch).

13 Id.

14 Id; see also id. (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

15 Id. (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation).

16 Id; see also id. (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

17 Id. (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation).

18 Id. (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).


20 Energy Hearing, supra note 10 (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.).

21 Some tribes, however, such as the Tulalip Tribes of Washington, are permitted to lease tribal land for up to 75 years without BIA approval, 25 U.S.C. § 415(b).


24 Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).


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36 25 C.F.R. § 224.51.
37 25 C.F.R. § 224.67.
38 25 C.F.R. § 224.74.
39 25 C.F.R. § 224.63(c)(1). Some tribes have already implemented this requirement independent of a TERA. See Oglala Sioux Tribal Environmental Review Code (2002).
41 25 C.F.R. § 224.63(d)(6) & (7).
44 25 C.F.R. § 224.63(g).
45 25 C.F.R. § 224.86(a)(1).
46 See e.g. Tribal Energy Resource Agreements under the Indian Tribal Energy Development and Self-Determination Act: Final Rule, 73 Fed. Reg. 12,808, 12,814 (Mar. 10, 2008); Unger, supra note 35, at 38 ("[T]he TERA framework as changed the federal role in tribal resource development without necessarily reducing it or shifting true control to tribes.").
48 Id. at 1083.
50 Id.
54 Id.
57 Questions From the Tribal Business Journal for Incoming HCNR Chairman Doc Hastings, TRIBAL BUSINESS JOURNAL, Winter, 2011, at 3. “(A) new federal paradigm ought to be explored to give tribes and individual Indian landowners the option – at their discretion – of enjoying the freedom, risk, responsibility, and reward of managing their lands without obtrusive BIA involvement.” Id.