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Chapter 5A
MINERAL AND ENERGY DEVELOPMENT ON NATIVE AMERICAN LANDS: STRATEGIES FOR ADDRESSING SOVEREIGNTY, REGULATION, RIGHTS, AND CULTURE

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Synopsis

§ 5A.01 Introduction*[1]

Energy and mineral production on Native American lands is substantial, representing over 5% of domestic oil production, 8% of gas, 2% of coal, and substantial renewable energy production.[2] Recent Bakken shale development on the Fort Berthold Reservation in North Dakota shows industry recognizes this potential.[3] According to the most recent national estimates, Indian lands contain up to 5.3 billion barrels of yet undeveloped oil reserves, 25 billion cubic feet of undeveloped gas reserves, 53.7 billion tons of undeveloped coal reserves, and prime target acreage for wind, geothermal, solar, and other renewable energy resources.[3.1]

Several factors favor Indian country development. Tribes offer large, contiguous landholdings, held by a single owner that may have a substantial voice in the regulatory environment. Indian resources have been studied by federal agencies that make available information and expertise to support development efforts,[4] and federal financial support and tax benefits may be available.

This chapter posits that the legal concerns that have led some developers to bypass Indian lands can be addressed. It aims to provide a practical guide to assessing the unique risks and requirements facing energy and mineral development in Indian country and to developing documents and securing approvals and permitting that optimize realization of the parties' goals while providing efficient operations and reasonable indicia of enforceability.[5]

*Cite as Lynn H. Slade, "Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights, and Culture," 56 *Rocky Mt. Min. L. Inst.* 5A-1 (2010).

[1]The author gratefully acknowledges the assistance of Joan D. Marsan of Brownstein Hyatt Farber Shreck, LLP, Albuquerque, for her contributions to this chapter.

[2]*See* http://www.mrm.mms.gov/MRMWebStats/Home.aspx; http://www.eia.doe.gov.

[3]*See* "American Indian Reservation Reaping Oil Benefits," *Indian Country Today*, Mar. 5, 2010, *available at* http:/www.indiancountrytoday.com/business/86650957.html.

[3.1]*See* email from Stephen Manydeeds, Chief, Division of Energy and Mineral Development, Office of Indian Energy and Economic Development, May 21, 2010 (citing USGS, 1995 National Assessment of U.S. Oil and Gas Resources; BIA, Atlas of Oil and Gas Plays on American Indian Lands; IHS Energy Data," *available at* DOE Tribal Energy Program, http://apps1.eere.energy.gov/tribalenergy and the Geothermal Energy Association, http://www.geoenergy.org).

[4]*See, e.g.*, http://www1.eere.energy.gov/tribalenergy/guide/fossil_fuel_resources.html (U.S. Dep't of Energy data on fossil fuel resources by state and reservation).

[5]This chapter follows earlier, excellent treatments of the subject, including among others cited below Michael E. Webster, "Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls," 39 *Rocky Mt. Min. L. Inst.* 2-1 (1993).

§ 5A.02 Are We in "Indian Country" Yet?

"Indian country" presents a legal, geographic, and cultural landscape. There are 564 federally recognized Indian tribes in the United States.[6] Federal law makes no general distinction between classes of tribes; however, specific treaties, statutes, or presidents' executive orders may define specific legal attributes of tribes or tribal or individually owned Indian lands. Energy and mineral development may be affected by principles of Indian law because the transaction or development involves a tribe, Indians, or occurs within "Indian country," lands and mineral or energy resources the legal characteristics of which may be affected by federal Indian law or tribal law.[7]

Since 1948, the term "Indian country" has been defined for most legal purposes by the federal criminal code.[8] Although the statute, by its very terms, provides a definition for use within the criminal code alone, its "Indian country" definition has been said to apply in other contexts.[9] Section 1151 provides that "Indian country" means (1) all land within the limits of any Indian reservation, notwithstanding the issuance of any patent, including rights-of-way running through the reservation, (2) all "dependent Indian communities," and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through them.

This chapter does not address specifically Native American lands in Alaska or aboriginal or First Nations lands in Canada. Alaskan native lands have a unique history and status and are subject to special provisions of the Alaska

[6]*See* http://www.bia.gov. In this chapter, the term "Indian" refers to members of federally recognized Native American tribes, tribal or native nations, bands, or New Mexico Pueblos; the term "tribes" also refers generally to tribes, tribal or native nations, bands, or New Mexico Pueblos.

[7]*See* Fred Ragsdale, Jr., "The Deception of Geography," *in American Indian Policy in the Twentieth Century* (Vine DeLoria, Jr., ed., 1985) ("Indian country is an incredibly complex jurisdiction issue disguised in a colorful phrase.").

[8]*See* 18 U.S.C. § 1151 (elec. 2010). Note that some statutes that employ the term provide a different, statute-specific definition. *See Cohen's Handbook of Federal Indian Law* § 3.04[2][c] (Nell Jessup Newton et al. eds., 3d ed. 2005) (*Cohen 2005*).

[9]*See, e.g.*, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) ("Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here.").

Native Claims Settlement Act (ANCSA)[10] and other statutes.[11] Canadian First Nations aboriginal lands present a very different set of issues addressed separately in these *Proceedings*.[12]

[1] Reservations

Under 18 U.S.C. § 1151(a), all lands within the limits of an "Indian reservation" are Indian country. Although that may seem a simple inquiry, reservation status or boundaries may be difficult to ascertain. Reservations are typically lands that were reserved from settlement for use by Indian tribes, whether by treaty, Act of Congress, or Executive Order,[13] but those official actions may have been amended by further Acts of Congress that diminished the size of or completely disestablished the reservation.[14] The land's subsequent treatment may also have contributed to its loss of reservation status.[15] While determining whether specific lands lie within reservation boundaries may entail detailed research, the most efficient approach for initially assessing whether lands fall within a reservation may be to consult with the Department of the Interior.[16]

[2] Dependent Indian Communities

In *Alaska v. Native Village of Venetie Tribal Government*,[17] the U.S. Supreme Court defined "dependent Indian communities" under 18 U.S.C. § 1151(b) as lands that are neither reservations nor allotments but (1) have been set aside by the federal government for the use of Indians as Indian land, and (2) are under federal superintendence. The "federal set-aside"

[10] 43 U.S.C. §§ 1601–1629h (elec. 2010).

[11] *See* Stephen F. Sorensen, "Mineral Development on Native Lands: The Alaska Perspective," *Natural Resources Development and Environmental Regulation in Indian Country* 3-1 (Rocky Mt. Min. L. Fdn. 1999) (concerning ANCSA lands); *but see* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 530 (1998), *discussed infra* § 5A.02[2].

[12] See Caroline Findlay, "Canadian Aboriginal Rights and Mineral and Energy Development: Risks and Related Strategies," 56 *Rocky Mt. Min. L. Inst.* 5B-1 (2010).

[13] *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[14] *See* Hagen v. Utah, 510 U.S. 399, 404 (1994) (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903)).

[15] *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) ("Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished.").

[16] The Supreme Court has stated that lands held in trust for a tribe within non-reservation areas in Oklahoma are "informal reservations," and, therefore, "Indian country." *See* Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993).

[17] 522 U.S. 520, 530 (1998).

requirement contemplates a specific federal action regarding the lands in question which places the lands in trust or imposes restrictions on alienation.[18] The federal superintendence requirement "guarantees that that Indian community is sufficiently 'dependent' on the Federal Government that the Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land."[19]

By virtue of a recent Tenth Circuit opinion, *Hydro Resources, Inc. v. U.S. EPA (HRI II)*,[20] the circuits are in apparent accord in requiring each of the two *Venetie* prongs to be satisfied with respect to the specific "lands in question."[21] In the significant *HRI II* opinion on *en banc* rehearing, the Tenth Circuit rejected its earlier approach in *Pittsburg & Midway Coal Mining Co. v. Watchman*,[22] which employed a two-step, multi-factored "community of reference" test to assess a broader area surrounding the specific lands in issue, rather than focusing specifically on the lands in issue. By narrowing the focus to the lands in question, *HRI II* should simplify predicting whether specific lands are "Indian country" within Tenth Circuit states.

[3] Allotments

Under 28 U.S.C. § 1151(c), Indian allotments fall within the definition of Indian country. "The term 'Indian allotment' has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation."[23] Lands that are "Indian country" by virtue of allotment status

[18] *Id.* at 531 n.6 ("The federal set-aside requirement also reflects the fact that because Congress has plenary power over Indian affairs, . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country.").

[19] *Id.* at 521.

[20] No. 07-9506, 2010 WL 2376163 (10th Cir. June 15, 2010), *vacating* 562 F.3d 1249 (10th Cir. 2009).

[21] *See, e.g.*, Blunk v. Arizona Dep't of Trans., 177 F.3d 879, 884 (9th Cir. 1999) (applying *Venetie*; land the Navajo Nation acquired in fee "does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation").

[22] 52 F.3d 1531, 1543 (10th Cir. 1995).

[23] *Cohen 2005*, *supra* note 8, § 3.04[2][c]. Thousands of allotments on numerous reservations were "allotted" under the Indian General Allotment Act, Act of Feb. 8, 1887, ch. 119, also called the Dawes Act (formerly codified at 25 U.S.C. §§ 334-381). In addition, numerous specific allotment acts were enacted for specific tribes or reservations. See *Cohen 2005, supra* note 8, § 16.05[2][b]. The Indian Reorganization Act of 1934 (Wheeler-Howard Act) repealed the Dawes Act provisions authorizing allotment of tribal lands. 25 U.S.C. §§ 461-479 (elec. 2010).

generally are located in areas where once there was a reservation, with most allotments having been carved out of tribal lands formerly held in common, but distributed to members of a tribe, and through them to their heirs, during a period when Congress aimed to supplant tribal ownership with private ownership.[24] While most allotments are held in trust by the United States for the individual owners, called "allottees," some were created as fee transfers, though expressly made subject to federal restraints on alienation prohibiting transfer without approval of the Secretary of the Interior (Secretary).[25] Most allotment statutes provided time periods, generally in 25-year increments, or procedures or milestones, such as the allottee's "literacy," when trust protections or restrictions on alienation would be lifted and the lands become subject to taxation and alienation.[26] Unless it lies within a reservation, an allotment generally will not be deemed "Indian country" unless the lands remain in trust or subject to federal restrictions on alienation.[27]

[4] Effect of Indian Country Status

Indian country status may have significant implications for projects and developers. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."[28] Although the Indian country statute was enacted to define federal versus state jurisdiction over certain crimes, the Supreme Court has said it may apply also to civil jurisdiction.[29] Indian country status may be argued to enhance tribal, or limit state, regulatory and taxing authority, as well as court jurisdiction.[30] However, the Supreme Court has discounted the significance of Indian country status in considering a tribe's power to tax nonmember business.[31] Consequently, projects

[24] *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 650 n.1 (1976).

[25] *See, e.g.*, Osage Division Act, Act of June 28, 1906, ch. 3572, 34 Stat. 539, § 2.

[26] *See Cohen 2005, supra* note 8, § 16.05[2][b].

[27] *But see* Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951, 967 (8th Cir. 2009), *modified by* 606 F.3d 994 (8th Cir. 2010) (holding that allotted lands, after removal of restrictions, remain Indian country, because they are treated as reservation lands under 18 U.S.C. § 1151(a)).

[28] *Venetie*, 522 U.S. at 527 n.1.

[29] *Id.* at 527.

[30] *See, e.g.*, Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125-26 (1993) (state taxing power turns on whether tribal member lives and works in "Indian country").

[31] *See* Atkinson Trading v. Shirley, 532 U.S. 645, 653 n.5 (2001) ("Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.").

located in Indian country within a state may be subject to a different set of laws from projects located within the same state but outside of Indian country.[32]

§ 5A.03 Why Energy and Mineral Development Is Different in Indian Country

The legal environment in Indian country is simply different: different laws and regulations may control how development rights must be acquired, and the legal standards applicable to performance under agreements and their enforcement and transfer may not be the same. Even reaching an agreement may require the parties to deal effectively with each other's unfamiliar cultural patterns and expectations. Two fundamental legal principles define the legal landscape in which transactions occur: the federal trust doctrine and the doctrine of retained tribal sovereignty. Effective development must be grounded in planning and agreements that address both doctrines.

[1] Development and Effect of the Federal Trust Doctrine

The U.S. Constitution refers to Indian tribes only twice, referring to "Indians not taxed,"[33] and reserving to the federal government the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes."[34] Accordingly it was left to Congress and the courts to define the relationship among tribes, Indians, and the federal and state governments.

[a] Development of the Federal Trust Doctrine

The very first Congress acted to impose federal power over tribes' ability to deal with their lands.[35] Chief Justice Marshall subsequently established the doctrinal basis for federal control over alienation, canvassing colonial and international law to conclude that tribes had legally enforceable rights to possession of their lands, but the United States owned the "fee."[36] Hence,

[32] *See* 42 U.S.C. § 300j-11(b)(2) (elec. 2010) (underground injection well regulation); 42 U.S.C. § 7601(d)(2)(B) (air quality regulation); *see also infra* § 5A.04[6][b] (regarding Clean Air Act jurisdiction).

[33] U.S. Const. art. I, § 2, cl. 3.

[34] U.S. Const. art. I, § 8, cl. 3.

[35] Act of July 22, 1790, 1 Stat. 137, § 4. The Trade and Intercourse Act of 1790 was reenacted repeatedly through 1834 and, as a limitation on tribal land transfers, remains codified as 25 U.S.C. § 177: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[36] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

transfers of Indian lands without federal approval were invalid.[37] The Non-Intercourse Act's requirement of a treaty or convention was superseded by Congress' statutory termination of treaty-making[38] and the enactment of a series of statutes authorizing specific forms of transactions, to be implemented by corresponding sets of regulations.[39] It is debatable whether federal trust review of transactions still yields a net benefit to tribes, in light of expense, delay, and public participation in tribal initiatives, and Congress recently has allowed tribes to opt out of certain federal reviews.[40]

The corollary of federal control of tribal land was recognition that federal actions with respect to tribal property are subject to trust duties and standards of care premised on concepts of guardian and ward. The scope and standard of care applicable to federal duties are determined by applicable statutes, treaties, and other federal law.[41]

[b] Effect of the Federal Trust on Energy and Mineral Development

The federal trust responsibility overlies every stage of the development process. Agreements that grant rights to operate on tribal or allotted lands must be authorized by a specific statute and approved by duly authorized federal officials, usually of the Bureau of Indian Affairs (BIA),[42] who must, in turn, satisfy requirements for federal environmental and cultural resource review similar to those applicable on federal public lands.[43] Operations will then be subject to supervision and often to prior approval by federal officials, usually BIA or the Bureau of Land Management (BLM) with the Office of Natural Resources Revenue (ONRR)[43.1] reviewing the

[37] *Id.* at 588-89. *See generally* Lynn H. Slade, "Federal Trust Responsibility and Tribal-Private Natural Resource Development," *Natural Resources Development in Indian Country* 13B-1 (Rocky Mt. Min. L. Fdn. 2005).

[38] *See* Act of Mar. 3, 1871, § 1, 16 Stat. 544.

[39] *See infra* § 5A.04[1].

[40] *See infra* §§ 5A.04[1][d] (TERAs), 5A.04[1][g][iii] (Navajo business leasing).

[41] *Compare* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) (federal trust duty compensable in money damages based on statutory directives); *with* United States v. Navajo Nation, 537 U.S. 488, 493 (2003) (no compensable trust where statutes did not impose trust-like duties); United States v. Navajo Nation, 129 S. Ct. 1547 (2009) (same).

[42] *See infra* § 5A.04[1].

[43] *See infra* § 5A.04[4].

[43.1] Functions of the former Minerals Management Service were delegated to ONRR in the wake of the Deepwater Horizon oil spill. *See* Secretarial Order No. 3306 (Sept. 30, 2010), *available at* http://www.mrm.boemre.gov. *See also* Reorganization of Title 30, 75 Fed. Reg. 61,051 (Oct. 4, 2010) (direct final rule eff. Oct. 1, 2010).

adequacy of royalty payments.[44] Securing required approvals can be time-consuming and expensive, but the consequences of failure to secure proper approvals can be severe.

Rosebud Sioux Tribe v. McDivitt[45] illustrates the importance of careful compliance with requirements for a valid approval. After the tribe and developer signed a business lease for a major hog farm facility and BIA officials approved the lease, environmental groups objected to the approval. The Assistant Secretary of the Interior for Indian Affairs then determined the approval violated the National Environmental Policy Act (NEPA)[46] and voided the lease. After tribal elections installed new leadership, the tribe joined environmental groups in opposing the project. The developer's federal court action to set aside Interior's invalidation of the lease was dismissed on grounds that the developer lacked standing under the applicable Indian leasing and environmental statutes to challenge the cancellation of its agreement. While *McDivitt* is controversial and perhaps not settled law, it reflects the risk that even an approved lease subsequently may be invalidated for failure to comply with requirements for a valid federal approval, and the developer may face difficult hurdles in challenging the invalidation.

[2] Effect of Sovereignty on Contracting and Development

Although recognizing federal power over tribes, Indians, and their lands, the Supreme Court also has recognized that, in their incorporation into the United States, tribes retained a measure of their precolonial "tribal sovereignty." The doctrine was grounded again in Chief Justice Marshall's early cases, which held tribes, their members, and nonmembers within tribal lands subject broadly to federal and tribal, not state, law.[47] The Supreme Court's subsequent cases recognized "plenary" congressional power over tribes and their lands[48] and developed a judge-made federal common

[44] *See* § 5A.04[6][a].

[45] 286 F.3d 1031, 1036-1040 (8th Cir. 2002); *see also* Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp., 2010 WL 1687877 (W.D. Wis. 2010) (voiding approximately $50 million bond issuance for failure to secure required federal approval of gaming-related indenture).

[46] 42 U.S.C. § 4332(C) (elec. 2010); *see also infra* § 5A.04[4][b] (regarding NEPA requirements).

[47] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[48] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903); United States v. Lara, 541 U.S. 193, 202-03 (2004) (Congress defines "the metes and bounds of tribal sovereignty").

law that established a sphere of tribal primacy over matters occurring on reservations.[49] More recently, the Court limited the scope of tribes' primacy as to nonmembers in criminal[50] and then civil[51] matters based, it has been suggested, on the Court majority's view of the proper scope of tribal powers.[52] The Court has, however, continued to recognize that tribes have retained tribal sovereign immunity from suits to which they have not consented,[53] but that tribes may waive that immunity.[54]

§ 5A.04 Acquiring the Necessary Property and Development Rights

Energy and mineral development require rights (1) to explore for and extract or use needed natural resources and real property, (2) for ingress and egress for personnel or products, and, often, (3) to use other lands for processing or administration.[55] The following statutes and regulations may apply to secure these rights in Indian country.

[1] Acquiring Energy and Mineral Development Rights

The three statutes most commonly used to authorize conventional fossil fuel energy and mineral development of Indian lands are the Indian Mineral Development Act of 1982 (IMDA),[56] the Indian Mineral Leasing Act of 1938 (IMLA),[57] and the Allotted Lands Mineral Leasing Act of March 3, 1909.[58] In addition, Title V of the Energy Policy Act of 2005[59] allows tribes to assume federal officials' review and approval roles under these statutes.[60]

[49] *See* Williams v. Lee, 358 U.S. 217, 223 (1959).

[50] *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (tribes' "incorporation into the United States" has implicitly divested tribes of power to criminally prosecute non-Indians).

[51] See discussion and cases cited *infra* § 5A.04[6][d].

[52] *See* Phillip P. Frickey, "A Common Law for Our Age of Colonialism," 109 *Yale L. J.* 1, 73-82 (1999).

[53] *See* Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe, 498 U.S. 505, 509-11 (1991).

[54] *See* C & L Enterprises, Inc. v. Citizen Band Potawatomie Indian Tribe, 532 U.S. 411, 418 (2001). Immunity from suit and related issues is addressed *infra* § 5A.04[5].

[55] *See generally* Tim Vollmann, "Exploration and Development Agreements on Indian Lands," 50 *Rocky Mt. Min. L. Inst.* 12-1 (2004).

[56] 25 U.S.C. §§ 2101–2108 (elec. 2010).

[57] 25 U.S.C. §§ 396a–396f (elec. 2010).

[58] 25 U.S.C. § 396 (elec. 2010).

[59] 25 U.S.C. §§ 3501–3504 (elec. 2010).

[a] The Indian Mineral Leasing Act

While now less frequently used than the IMDA, the IMLA and related statutes for specific tribes, and applicable regulations,[61] were for many years the primary authority for mineral leasing of tribal lands. The IMLA provided for leasing by competitive bidding or on negotiated terms using BIA standard form agreements. Enacted following the passage of the Indian Reorganization Act of 1934 (IRA), the IMLA was intended to provide a uniform template for minerals leasing on tribal lands, to bring mineral leasing into harmony with the IRA's policies to enhance tribal autonomy, and to "ensure that Indians receive 'the greatest return from their property.'"[62] The IMLA authorizes leases for a primary term not to exceed 10 years[62.1] and calls for leasing "at public auction or on sealed bids."[63] BIA regulations under the IMLA authorize leases for metalliferous and nonmetalliferous minerals, all hydrocarbons, coal and lignite, geothermal resources, sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or "any other energy or non-energy mineral"[64] and for subsurface storage of oil or gas.[65] IMLA leases typically are executed on standard BIA forms that have changed little since the 1930s.

The IMLA regulations specify lessees' bonding requirements, impose acreage limitations on the size of leases,[66] and set forth procedures governing the BIA's approval of a lease.[67] The 25 C.F.R. part 211 (part 211)

[60] For a detailed analysis of the statutes and applicable history and policies, see Michael P. O'Connell, "Basics of Successful Natural Resource Development Projects in Indian Country," *Natural Resources Development in Indian Country* 1-1, 1-3 to 1-14 (Rocky Mt. Min. L. Fdn. 2005).

[61] *See* 25 C.F.R. pt. 211 (elec. 2010) (IMLA regulation of leasing on tribal lands).

[62] Montana v. Blackfeet Tribe, 471 U.S. 759, 767 n.5 (1985).

[62.1] 25 U.S.C. § 396a (elec. 2010).

[63] *Id.* § 396b. The IMLA does not apply to certain lands of the Crow (Montana), Shoshone (Wyoming), and Osage (Oklahoma) Tribes or to coal and asphalt land of the Choctaw and Chickasaw Tribes (Oklahoma). *Id.* § 396f.

[64] 25 C.F.R. § 211.3 (elec. 2010).

[65] 25 C.F.R. § 211.22 (elec. 2010).

[66] 25 C.F.R. § 211.25 (elec. 2010).

[67] 25 C.F.R. §§ 211.20–211.27 (elec. 2010); *see also* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1331-33 (10th Cir. 1982) (compliance with regulations governing manner of publication of lease sales is mandatory).

regulations specify roles for the BLM (approval for technical operations and facility inspections for oil and gas),[68] the Office of Surface Mining Reclamation and Enforcement (OSM) (operational approvals for coal surface mining),[69] and the ONRR (production reporting, royalty accounting, and financial auditing).[70] The IMLA regulations also require that "all environmental studies are prepared," as required by the National Environmental Policy Act, and that cultural resources are addressed, as required by the National Historic Preservation Act and related statutes.[71]

[b] Allotted Lands Leasing Act of 1909

The IMLA did not address leasing of allotted lands. Consequently, allotted lands remain subject to the provisions of 25 U.S.C. § 396. Allotted lands leasing and right-of-way acquisition are often complicated by large numbers of owners of individual allotments, generally the descendants of the allottee to whom the allotment was issued perhaps a hundred or more years ago. Fortunately, the 1909 Act gives the Secretary authority to transfer with the consent of less than all allotted landowners.[72] Amendments to the Indian Lands Consolidation Act (ILCA) in 2000 provide the Secretary with additional authority to execute "any lease or agreement," except for coal or uranium leases, with the consent of the owners of certain specified percentages of the allotment owners.[73] BIA allotted lands mineral leasing regulations in 25 C.F.R. part 212 generally incorporate by reference the comparable IMLA tribal lands regulation in part 211.

[c] Indian Mineral Development Act

As tribes became more actively involved in the development of tribal minerals, they desired more flexibility regarding the structure and provisions of agreements, as well as a greater role in the negotiation of agreements. The IMDA was enacted to further those goals.[74] The IMDA allows

[68] 25 C.F.R. § 211.4 (elec. 2010) (referencing the BLM's regulations in 43 C.F.R. parts 3160, 3180 (onshore oil and gas), 3280 (geothermal), 3480 (coal), and 3590 (solid minerals—other than coal)).

[69] 25 C.F.R. § 211.5 (elec. 2010) (referencing coal surface mining regulations in 30 C.F.R. part 760).

[70] Formerly MMS; *see* 25 C.F.R. § 211.6 (elec. 2010).

[71] 25 C.F.R. § 211.7 (elec. 2010). See also *infra* § 5A.04[4][c] for a detailed discussion of the statutes referenced and applicable requirements.

[72] BIA regulations implement this authority. 25 C.F.R. § 212.21(b) (elec. 2010).

[73] 25 U.S.C. § 2218(b) (elec. 2010); *see also* O'Connell, *supra* note 60, at 1-5 to 1-6. The ILCA amendments have not yet been added to the Part 212 regulations.

[74] 25 U.S.C. §§ 2101–2108 (elec. 2010). The IMDA regulations are in 25 C.F.R. pt. 225 (elec. 2010); *see generally* Michael E. Webster, "Negotiating and Drafting Indian Mineral Development Act Agreements," *Natural Resources Development and Environmental Regulation in Indian Country* 6-1 (Rocky Mt. Min. L. Fdn. 1999).

tribes and developers to use any form of agreement, including a mineral lease, joint venture or joint operating agreement, or a service or operating agreement.[75] A "Minerals Agreement" under the IMDA may provide for "exploration for, or extraction, processing or other development of oil, gas, uranium, coal, geothermal, or other energy resources or non-energy mineral resources," defined collectively as "mineral resources," or for the "sale or other disposition of the production or products of such mineral resources."[76] A minerals agreement may include allotted minerals, but only if included with tribal resources.[77] Because of its flexibility, the IMDA is the preferred vehicle for tribal energy and mineral development agreements.

BIA regulations provide a detailed list of the provisions that must be included in an IMDA agreement and the procedures the Secretary must follow in approval. The minerals agreement must include provisions addressing 21 required subjects, including the duration or term of the agreement, indemnification of the tribe and the United States from claims of third parties, payment obligations, accounting and mineral valuation procedures, bond and insurance requirements, and dispute resolutions procedures.[78] The tribe "may" consult with the Secretary during the negotiation process.[79]

When a fully negotiated and executed minerals agreement is presented to the Secretary, the Department of the Interior (DOI) is required to prepare both a written economic assessment of the agreement[80] and environmental and cultural resource reviews under NEPA and related statutes.[81] The Secretary may (1) make recommendations to the Indian mineral owners for changes to the agreement, (2) disapprove the agreement, or (3) approve the minerals agreement if DOI finds, based on its reviews, that the agreement is in "the best interest of the Indian mineral owner."[82] The Secretary

[75] 25 U.S.C. § 2102(a) (elec. 2010).

[76] *Id.*

[77] 25 U.S.C. § 2102(b) (elec. 2010).

[78] 25 C.F.R. § 225.21(b) (elec. 2010).

[79] 25 C.F.R. § 225.21(a) (elec. 2010).

[80] 25 C.F.R. § 225.23 (elec. 2010).

[81] 25 C.F.R. § 225.24 (elec. 2010).

[82] 25 C.F.R. § 225.22 (elec. 2010). Although approval authority may be, and usually is, delegated to regional BIA officials, only the Secretary may disapprove a minerals agreement. 25 C.F.R. § 225.22(f) (elec. 2010).

must put his or her findings in writing and may not approve a minerals agreement until 30 days after the written findings "are received" by the Indian mineral owners.[82.1] Significantly, the tribe and included allotted minerals owners may withdraw their agreement to the minerals agreement at any time before final secretarial approval.[83]

[d] Tribal Energy Resource Agreements

Responding to demand for still greater flexibility and tribal autonomy, the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA)[84] authorizes tribes to develop economic and environmental review capacities and secure secretarial approval to review and approve certain agreements, eliminating BIA approval.[85] ITEDSA § 3504 authorizes tribes and the Secretary to enter into Tribal Energy Resource Agreements (TERAs) pursuant to which a tribal agency may review, approve, and regulate energy resource development without BIA approval.[86] Section 3504 authorizes TERAs covering

> a lease or business agreement for—
>
> (A) exploration for, extraction of, processing of, or other development of energy mineral resources of the Indian tribe located on tribal land; or
>
> (B) construction or operation of—
>
> (i) an electric generation, transmission, or distribution facility located on tribal land; or
>
> (ii) a facility to process or refine energy resources developed on tribal land.[87]

An approved TERA may also authorize a tribe to grant rights-of-way, but the authorization for rights-of-way extends only to pipelines and electric transmission or distribution lines, and only if "the pipeline or electric transmission line serves . . . an electric generation, transmission, or distribution facility, or [an energy resource processing or refining] facility located on tribal land."[88] The statute does not authorize rights-of-way for roads or other non-pipeline, non-transmission access or facilities often necessary for energy development. Because a BIA-granted right-of-way may be necessary for non-pipeline or non-transmission access, for many projects, a TERA may not obviate the need for BIA environmental review and processing, thus defeating the intention of section 3504 to allow tribes to bypass BIA environmental reviews and expedite approvals.[89]

It appears that no tribe has filed a TERA application yet.[90] Title V provided no funding to support tribal TERA programs, and tribes may have concerns over the substantial administrative structures likely necessary to discharge TERA duties, impacts on tribal budgets, and the effect of injecting public participation into tribal deliberations.

[e] Exploration Phase: Pre-Lease Geological and Geophysical Permits

Specific regulations govern permits to conduct geological and geophysical operations and related agreements. IMLA regulations provide for permits that do not conflict with extant mineral leases, subject to approval of the Secretary and the consent of the Indian mineral owner.[91] The prospector is required to provide copies of all data derived in the exploration to the Secretary and the Indian mineral owner.[92] The allotted lands regulations generally parrot the IMLA regulations but contain specific provisions authorizing the Secretary to grant geological and geophysical permits with the consent of less than all of the allotted mineral owners and require the consent of surface owners if the mineral owner does not own the surface rights.[93]

[82.1] 25 C.F.R. § 225.22(b)(3) (elec. 2010).

[83] 25 C.F.R. § 225.22 (elec. 2010); *see also* Quantum Exploration, Inc. v. Clark, 780 F.2d 1457 (10th Cir. 1986).

[84] 42 U.S.C. §§ 7144e & 16001 (elec. 2010) (Title V of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594).

[85] *See generally* Scot W. Anderson, "The Indian Tribal Energy Development and Self-Determination Act of 2005: Opportunities for Cooperative Ventures," *Natural Resources Development in Indian Country* 8-1 (Rocky Mt. Min. L. Fdn. 2005).

[86] 25 U.S.C. § 3504 (elec. 2010) (with regulations compiled at 25 C.F.R. pt. 224 (elec. 2010)).

[87] 25 U.S.C. § 3504(a)(1) (elec. 2010). The regulation clarifies that the authorization to cover extraction activities includes, but is not limited to, "marketing or distribution." 25 C.F.R. § 224.85(a) (elec. 2010).

[88] 25 U.S.C. § 3504(b) (elec. 2010). The regulation does not broaden the statutory authorization. In response to a comment that the proposed regulation contained too many limitations on a tribe's ability to grant a right-of-way, BIA stated: "the limitations in the regulations regarding rights-of-way are fully consistent with the Act." 73 Fed. Reg. 12,808, 12,815 (Mar. 10, 2008).

[89] Under a "small handles" analysis, see Comment, "Small-Handles, Big Impacts: When Should the National Environmental Policy Act Require an Environmental Impact Statement?," 23 *B.C. Envtl. Aff. L. Rev.* 437 (1996). If a federally granted right-of-way is necessary for the project, NEPA environmental review for the right-of-way may have to assess the impacts of the entire project, subjecting the project to both federal and tribal environmental review under the TERA.

[90] Telephone conference with Stephen Manydeeds, Division Chief, Office of Indian Energy and Economic Development, Department of the Interior, June 3, 2010.

[91] 25 C.F.R. § 211.56 (elec. 2010).

[92] 25 C.F.R. § 211.56(c) (elec. 2010).

[93] 25 C.F.R. § 212.56 (elec. 2010).

[f] Coal Leasing and Exploration

While coal may be developed pursuant to the IMLA and IMDA, specific regulations govern limited aspects of coal leasing and also cover surface operations for coal. 25 C.F.R. part 200 states that the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[94] applies to Indian lands. With respect to applications to lease or permits to explore for or mine coal, in addition to the review and procedure required under the IMLA or IMDA, the BIA surface mining regulations[95] require the "mining supervisor," a capacity discharged by the OSM, to participate in a "technical examination" of the prospective effects of the proposed exploration or surface mining operations and to formulate general requirements to be incorporated in any lease or permit. Prior to initiating exploration or mining, the operator must file and secure approval of proposed exploration and mining plans.[96]

[g] Non-Mineral, Non-Energy Development Rights

Energy or mineral development often requires real property rights not granted in an underlying lease or minerals agreement, including a surface lease or other agreements for office, shop, or communications facilities or rights-of-way for roads, pipelines, electric transmission, or other facilities.

[i] The Non-Intercourse Act

The Indian Non-Intercourse Act, as discussed above,[97] underlies all federal statutes authorizing tribes to transfer interests in lands. Absent valid federal approval, no transaction within its scope by any "Indian nation or tribe of Indians, shall be of any validity in law or equity."[98] As a result, in every transaction, it must be determined whether the transfer is subject to the Non-Intercourse Act and, if so, what statute authorizes the transfer. The statute unquestionably applies to all transfers of trust or restricted lands; the question of the statute's application occasionally arises, though,

[94] 30 U.S.C. §§ 1201–1328 (elec. 2010). 25 C.F.R. § 200.12 (elec. 2010) makes applicable the provisions of 30 C.F.R. pt. 750, which "provides for the regulation of surface coal mining and reclamation operations on Indian lands and constitutes the federal program for Indian lands." 30 C.F.R. § 750.1 (elec. 2010).

[95] 25 C.F.R. § 216.4 (elec. 2010).

[96] 25 C.F.R. §§ 216.6, 216.7 (elec. 2010); 30 C.F.R. §§ 750.5, 750.6 (elec. 2010). Although Congress has authorized tribes to regulate abandoned mines and provided grants to develop tribal capacity to implement SMCRA regulation of mining operations, see 30 U.S.C. § 1300(i), it has never authorized delegation of SMCRA regulatory authority over mining to tribes. *See Cohen 2005, supra* note 8, § 17.03[3].

[97] *See* discussion *supra* § 5A.03[1][a].

[98] 25 U.S.C. § 177 (elec. 2010). *See generally* Thomas H. Shipps, "The Non-Intercourse Act and Statutory Restrictions on Tribal Resource Development and Contracting," *Natural Resources Development in Indian Country* 2-1, 2-3 to 2-10 (Rocky Mt. Min. L. Fdn. 2005).

regarding transfers of lands tribes own in unrestricted fee. Recently, the United States has injected uncertainty into the applicability of the Act to lands a tribe acquires in fee by taking the "litigation position" that the Non-Intercourse Act applies to "all reservation lands held by a Tribe, including lands recently acquired in fee."[99] However, the great weight of authority is that lands tribes (or individual Indians) acquire in fee simple absolute are not subject to the Non-Intercourse Act.[100]

[ii] Approval of Contracts Under 25 U.S.C. § 81

Agreements pertaining to tribal lands that do not fall under the IMLA or IMDA may still require approval of the Secretary under the Indian Contracts Statute, known as "Section 81."[101] As enacted in 1871, Section 81 required a written agreement approved by the Secretary to validate any agreement with any tribe or individual Indian "relative to their lands." Under "old" Section 81, it was difficult to predict whether a contract was "relative to" tribal lands and, therefore, whether the approval requirement applied.[102] To enhance tribal economic development by affording greater legal predictability, Section 81 was amended in 2000 to require approval only for contracts that "encumber" tribal lands for seven years or more. "New" Section 81 also requires the contract to address enforceability of the contract up front, by providing an enforceable remedy, including a waiver of immunity from suit, or warning the non-tribal party of tribal immunity from suit.[103]

The 2000 amendments promise to facilitate greater comfort in transactions. At least one court has given teeth to the requirement of the 2000 amendments that the contract must, in some legal sense, "encumber" tribal lands.[104] The

[99] *See* Memorandum, Solicitor, Department of the Interior, to Secretary of the Interior, M-37023, "Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands," 6 (Jan. 18, 2009). The Memorandum, however, takes a clear position that *off-reservation* lands acquired in fee by a tribe are not automatically subject to the Act. *Id.*

[100] *See, e.g.*, Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993) (tribally acquired lands); Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 544-45 (1st Cir. 1997) (same).

[101] 25 U.S.C. § 81 (elec. 2010). For a detailed analysis of Section 81, see Shipps, *supra* note 98, at 2-11 to 2-16.

[102] The consequence of misjudging the requirement can be severe. *See* A. K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 789 (9th Cir. 1986) (voiding contract).

[103] 25 U.S.C. § 81(d)(2) (elec. 2010). The Section 81 regulations provide specific standards to implement this requirement. 25 C.F.R. § 84.006 (elec. 2010).

[104] *See* GasPlus, L.L.C. v. U.S. Dep't of the Interior, 510 F. Supp. 2d 18, 33 (D.D.C. 2007) (Section 81 not applicable because an agreement authorizing a company to manage a busi-

exclusion of contracts for terms shorter than seven years provides another possible safe haven for drafters of Indian country agreements.[105] In cases of uncertainty, the regulations allow submission of the contract to the Secretary, who will approve, disapprove, or state that the agreement does not require approval.[106]

[iii] Business Site Leasing

The Indian Long-Term Leasing Act of 1955,[107] also known as the Business Site Leasing Act, authorizes a lease for any purpose, and can provide authority for essentially any lease not covered under the IMLA or the IMDA, "including the development or utilization of natural resources in connection with operations under such leases."[108] The statute authorizes lease terms of 25 years, and provides that the parties may agree to one renewal term of 25 years.[109] The Business Site Leasing Act can be particularly important when collateral is necessary to financing a business on tribal lands.[110] Leases under section 415 are also used when a tribe leases tribal lands to a tribally owned entity, often organized under section 17 of the IRA, that, in turn, subleases to nonmember developers. A Business Site Leasing Act lease must be approved following compliance with NEPA, and a tribe may back out of the lease at any time before the BIA approves the lease based on NEPA compliance.[111]

Pursuant to Business Site Leasing Act amendments enacted in 2000,[112] the Navajo Nation has assumed review and approval of business site leases on Navajo Nation lands pursuant to the Navajo Nation Business Site

ness did not provide a "legal interest in land" that "encumbers" tribal lands.).

[105] There remains uncertainty whether contracts of tribal "Section 17 corporations" are subject to Section 81. *See* Shipps, *supra* note 98, at 2-13.

[106] 25 C.F.R. §§ 84.005–84.007 (elec. 2010).

[107] 25 U.S.C. §§ 415–415d (elec. 2010) (with implementing regulations at 25 C.F.R. pt. 162 (elec. 2010)).

[108] 25 U.S.C. § 415(a) (elec. 2010).

[109] *Id.* The statute authorizes longer terms for specifically designated tribes.

[110] 25 C.F.R. § 162.610(c) (elec. 2010); *see also* discussion of encumbrancing *infra* § 5A.05.

[111] *See* Sangre de Cristo Devel. Co. v. United States, 932 F.2d 891, 894-95 (10th Cir. 1991).

[112] 25 U.S.C. § 415(e) (elec. 2010).

Leasing Regulations of 2005 approved by BIA on July 10, 2006.[112.1] The Navajo-specific amendment has been proposed as a model for other tribes.[113]

[iv] Rights-of-Way and Access Rights

The General Right-of-Way Act of 1948[114] (1948 Act) authorizes the United States to grant rights-of-way or easements across tribal or allotted lands for any purpose necessary for energy and mineral development. The 1948 Act vests broad discretion in the Secretary. As to compensation, it provides only a broad, essentially procedural guideline that no rights-of-way shall be granted "without the payment of such compensation as the Secretary . . . shall determine to be just."[115] The statute did not impose specific limitations as to terms of rights-of-way.[116] Perhaps most significantly, the 1948 Act imposed new requirements for the consent of tribal and individual landowners.[117] Although section 324 only imposed the tribal consent requirement on lands of tribes organized under the IRA, the Department of the Interior's regulations implementing the 1948 Act soon broadened the requirement to apply to all tribes.[118]

There were several predecessor, special purpose statutes, enacted beginning in 1899, that authorized rights-of-way for specific uses, including roads, pipelines, railroads, and electric transmission.[119] As to the predecessor statutes, the 1948 Act provided that "existing statutory authority empowering the Secretary . . . to grant rights-of-way over Indian lands [shall

[112.1] *See* Navajo Nation's Business Site Lease Application Requirements and Procedures Check List, *available at* http://www.navajobusiness.com/pdf/DngBus/Leasing/Bus%20Site%20Lease.pdf.

[113] Legislation proposed in the 111th Congress would amend the Navajo-specific provisions of the 2000 amendments to section 415 to make them available to all tribes. *See* Helping Expedite and Advance Responsible Tribal Homeownership Act, H.R. 2523, 111th Cong. (2009).

[114] 25 U.S.C. §§ 323–328 (elec. 2010) (with regulations compiled at 25 C.F.R. pt. 169 (elec. 2010)).

[115] 25 U.S.C. § 325 (elec. 2010).

[116] 25 U.S.C. § 328 (elec. 2010).

[117] 25 U.S.C. § 324 (elec. 2010).

[118] 25 C.F.R. § 169.3 (elec. 2010).

[119] *See* 25 U.S.C. §§ 311–322a (elec. 2010). For a fuller description of these earlier statutes and their continuing applicability, see Colby L. Branch, "Accessing Indian Lands for Mineral Development," *Natural Resources Development in Indian Country* 3-1, 3-6 to 38, 3-12 to 3-14 (Rocky Mt. Min. L. Fdn. 2005).

not] be repealed."[120] In upholding BIA's extensions of the consent requirement of the 1948 Act to rights-of-way authorized by prior statutes, cases have interpreted the 1948 Act to modify but not repeal prior authorities.[121] The Department of the Interior has affirmed the consent requirement as applied to a non-IRA tribe, even as against an interstate pipeline holding federal eminent domain power under a certificate of public convenience and authority under the Natural Gas Act.[122]

Compensation payable to tribes is an increasingly contentious issue. Some tribes consider the consent requirement to give them considerable leverage in negotiating compensation, arguing that the value companies derive from energy rights-of-way, particularly at the time of renewal, supports charging amounts many times the value per acre of comparable land.[123] This position led to an ultimately inconclusive congressional report on compensation paid for rights-of-way for energy projects on tribal lands.[124]

Rights-of-way across allotted lands present different compensation considerations. The 1948 Act and regulations require the consent of allotted landowners holding a majority interest in each allotment the right-of-way crosses, with exceptions for undetermined heirs and unlocatable or non-competent allotted owners.[125] However, federal law also authorizes condemnation under state law procedures.[126] A recent challenge has focused attention on the procedures and valuation underlying allotted lands rights-of-way.[127] Applicants for rights-of-way should heed the part 169 regulations and agency guidance regarding appraisals.[128]

[120] 25 U.S.C. § 326 (elec. 2010). The applicable regulations retain specific provisions with specific requirements for uses authorized by the earlier statutes. *See, e.g.*, 25 C.F.R. § 169.23 (railroads), § 169.25 (oil & gas pipelines), § 169.26 (telephone and telegraph lines; communication facilities), § 169.27 (power projects), § 169.28 (public highways) (elec. 2010).

[121] *See, e.g.*, Southern Pacific Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1982) (interpreting 1899 railroad right-of-way statute "in light of intervening legislation" (the 1948 Act), to require the consent of non-IRA tribes to grants of rights-of-way).

[122] *See* Transwestern Pipeline Co. v. Acting Dep't Ass't Sec'y–Indian Affairs, 12 IBIA 49 (Oct. 28, 1983).

[123] Caselaw generally has rejected basing compensation on the value of the right-of-way for transporting energy. *See* Questar Southern Trails Pipeline v. 3.47 Acres of Land, No. Civ. 02-10 (D.N.M. July 31, 2003) (excluding evidence of "pipeline corridor" theory of value); Northwest Pipeline Corp. v. 95.02 Acres of Land, CV-01-628-E-BLW, 2003 WL 25768634 (D. Idaho 2003) (unreported) ("project enhancement" rule precludes evidence of value addition from condemnor's use of land).

[124] Pub. L. No. 109-58, § 13 (Aug. 8, 2005); *see also* "Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study, Report to Congress," vii-viii, 53-54 (May 2007), *available at* http://www.oe.energy.gov/EPAct_1813_Final.pdf.

[125] 25 C.F.R. § 169.3(c) (elec. 2010).

[126] *See* 25 U.S.C. § 357 (elec. 2010); *see also* Yellowfish v. City of Stillwater, 691 F.2d 926, 929-30 (10th Cir. 1982) (1948 Act does not manifest intent to repeal 25 U.S.C. § 357). However, when fractional interests in allotted lands are transferred to a tribe, the tribe's immunity from suit may prevent the condemnation from going forward. *See* Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 962 (8th Cir. 1983) (discussed in Branch, *supra* note 119, at 3-27).

The part 169 regulations provide that the terms of rights-of-way for oil and gas pipelines, roads, and electric transmission lines, among other described uses, may be perpetual.[129] However, some BIA personnel contend shorter terms are mandated under the still-extant regulations dating back to the pre-1948 statutes. That interpretation seems incorrect. Given the tension between the 1948 Act and earlier statutes regarding tribal consent,[130] a parallel interpretation counsels allowing the longer, generally available term, except in a case where authority for the grant must be premised exclusively on the predecessor statute.

After the decision in *Strate v. A-1 Contractors*,[131] some tribes recently have expressed concerns over whether issuance of a right-of-way, instead of a lease, will impair the tribe's sovereign powers over nonmember right-of-way holders. This concern has caused some tribes to propose employing a "linear lease" under the Business Site Leasing Act or a Minerals Agreement under the IMDA instead of a right-of-way. However, it is uncertain whether using a lease, as compared to a right-of-way, would change the federal courts' analysis regarding tribal jurisdiction.[132] The most effective

[127] *See* Begay v. PNM, No. CV 09-137-MV-RLP, *dismissed* (D.N.M. Apr. 6, 2009) (BIA appeal dismissed, June 4, 2010); further BIA appeals filed Sept. 24, 2010.

[128] The Office of Appraisal Services (OAS), a subagency of the Department of the Interior's Office of the Special Trustee for American Indians (OST), has adopted the federal appraisal standards from the *Uniform Standards of Professional Appraisal Practice* (USPAP) and the *Uniform Appraisal Standards for Federal Land Acquisitions* (the Yellowbook). *See* Branch, *supra* note 119.

[129] See 25 C.F.R. § 169.18 (elec. 2010), whereas rights-of-way for other listed purposes are limited to 50 years.

[130] *See, e.g.*, Southern Pacific Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1982) (interpreting 1899 railroad right-of-way statute "in light of intervening legislation" (the 1948 Act), to require the consent of non-IRA tribes to grants of rights-of-way).

[131] 520 U.S. 438, 455-56 (1997).

[132] *See* Nevada v. Hicks, 533 U.S. 353, 360 (2001) ("the ownership status of land . . . is only one factor" determining tribal jurisdiction over nonmembers).

way to ensure that an agreement provides the desired tribal role is for the parties to stipulate contractually regarding the tribe's jurisdiction.[133]

[v] Access Issues for Split Estate Surface and Minerals

Access to minerals underlying split estate lands, in which the surface and mineral estates are held by different owners, has been addressed judicially. The Court of Federal Claims, applying state law concepts, found an implied easement across severed tribal or allotted surface estate to access underlying federal minerals.[134] Because the *Del Rio* court's analysis is grounded in the familiar rationale that the mineral estate is dominant and the surface estate is burdened with a duty to allow access, it should apply whenever a split estate arises.[135]

[vi] Indian Trader Licensing

The Indian Trader Act of 1876[136] is another relic of a bygone era that remains in effect. It requires any person trading "with the Indians on any Indian reservation" to be licensed.[137] The Indian Trader Act regulations define "trading" broadly to encompass "buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services."[138] While seldom invoked, precedent exists to support a claim that agreements by unlicensed "traders" are unenforceable.[139]

[133] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2729 (2008) (Ginsburg, J., concurring and dissenting) (suggesting parties can control judicial jurisdiction by contractual stipulations); Montana v. United States, 450 U.S. 544, 565-66 (1981) (tribal jurisdiction can be premised on a "consensual relationship"). For a discussion of provisions addressing jurisdiction, see *infra* § 5A.04[6][d].

[134] *See* Del Rio Drilling Programs, Inc. v. United States, 35 Fed. Cl. 186 (1996) (implied easement across tribal lands), *withdrawn by* 37 Fed. Cl. 157 (1997), *withdrawal rev'd by* 146 F.3d 1358 (Fed. Cir. 1998), *reinstated by* 46 Fed. Cl. 683 (2000).

[135] Split estate issues are analyzed in detail in Branch, *supra* note 119, at 3-28 to 3-34; *see also* Phillip Wm. Lear & Stephanie Barber-Renteria, "Split Estates and Severed Minerals: Rights of Access and Surface Use After the Divorce (and Other Leasehold Access-Related Problems)," 50 *Rocky Mt. Min. L. Inst.* 10-1, § 10.02[2][a][i] (2004).

[136] *See* 25 U.S.C. §§ 261–264 (elec. 2010) (with regulations compiled at 25 C.F.R. pts. 140-141 (elec. 2010)).

[137] *See* 25 U.S.C. § 262 (elec. 2010).

[138] 25 C.F.R. § 140.5(a)(6) (elec. 2010).

[139] *See* the Tulalip Tribal Court decision in *United States ex rel. Tulalip Tribes v. First Choice Business Machines*, 28 *Ind. L. Reptr.* 6038 (2000) (voiding contract to sell gaming machines for vendor's failure to secure Indian trader license); *see also* United States v. Parton, 132 F.2d 886 (4th Cir. 1943) (injunction for failure to obtain license).

[h] Water Rights for Energy and Mineral Development

Water is likely an interest in land and, hence, subject to the Indian Non-Intercourse Act.[140] Consequently, a statutorily authorized writing approved by the Secretary is required for rights to use tribal water to be enforceable. However, no statute expressly authorizes tribes to transfer rights to use tribal water. The governing IMLA, IMDA, and Business Site Leasing Act regulations do not address the transfer of rights to use water, although leases and IMDA agreements often provide for the lessee or contracting party to use tribal water. It seems likely that the Business Site Leasing Act independently authorizes a lease of tribal water or water rights to third parties.[141]

[i] Ascertaining Title to Indian Lands and Minerals

The BIA Regional Land Titles and Records Offices (the BIA-LTROs) are the Bureau's official repositories for documents affecting title to or encumbering Indian lands.[142] By regulation, all title documents regarding transfers or issuance of leases, rights-of-way, or permits on trust or restricted Indian lands "shall be submitted" immediately upon BIA approval to the appropriate BIA-LTRO.[143] BIA-LTRO personnel are charged with responsibility to prepare land "title status reports," land status maps, and certification of land records and title documents.[144]

The regulations reflect the "policy of the [BIA] to allow access to land records and title documents" unless access would violate the Freedom of Information Act or other laws, or unless "there are strong policy grounds for denying access."[145] The BIA ordinarily will not disclose "monetary considerations" for leases of Indian lands, so compensation information is often redacted from documents provided to third parties.[146] Other records may be accessed at the local BIA offices with responsibility for particular

[140] 25 U.S.C. § 177 (elec. 2010). On the source and legal character of Indian water rights, see generally Scott B. McElroy, "Water Development in Indian Country: Current Issues Involving Indian Country Water Resources," *Natural Resources Development in Indian Country* 16-1 (Rocky Mt. Min. L. Fdn. 2005).

[141] *See* McElroy, *supra* note 140, at 16-19 to 16-22.

[142] *See* 25 C.F.R. pt. 150 (elec. 2010).

[143] 25 C.F.R. § 150.6 (elec. 2010).

[144] 25 C.F.R. §§ 150.8-150.10 (elec. 2010).

[145] 25 C.F.R. § 150.11(a) (elec. 2010) (citing 5 U.S.C. § 552a).

[146] *Id.* § 150.11(b). *See generally* Phillip Wm. Lear & Christopher D. Jones, "Access to Indian Land and Title Records: Freedom of Information, Privacy, and Related Issues," *Natural Resources Development and Environmental Regulation in Indian Country* 4-1 (Rocky Mt. Min. L. Fdn. 1999).

Indian lands, or at BLM offices, with respect to dispositions of title that require BLM action.[147]

Examination of title to lands subject to leases and rights-of-way requires review of BIA, state or county, and possibly tribal records.[148] While county real property repositories are not offices of record for trust or restricted lands, they may contain instruments that provide notice to junior interest owners and records of divorce or estate proceedings that do not appear in BIA records, and they become repositories of record when restrictions are removed.[149] Additionally, federal law may reference tribal or state law with respect to land title and encumbrance.[150] Further, some tribes have begun developing their own title records, including when a tribe assumes BIA's function by contract.[151] The examiner should confirm whether there are tribal records.

[2] Acquiring Renewable Energy Development Rights

"Renewable" is a broad and sometimes controversial term. Here it is used to denote energy development technologies or techniques that afford alternatives to fossil fuel energy sources, including wind, solar, geothermal, biomass, and hydroelectric power generation, or that mitigate carbon dioxide emissions from carbon energy sources, such as carbon sequestration.[152] There is tremendous interest in renewable energy development in Indian country,[153] but few

[147] *See* 43 C.F.R. § 1821.10 (elec. 2010). *See generally* Ken G. Hedge & Christopher Mangen, Jr., "Examination of Title to Indian Lands," *Mineral Title Examination: Fundamentals for Practice in the 21st Century* 13-1 (Rocky Mt. Min. L. Fdn. 2007).

[148] *See generally* Michael E. Webster, "Examination of Title to Indian Lands," *Natural Resources Development and Environmental Regulation in Indian Country* 5-1 (Rocky Mt. Min. L. Fdn. 1999).

[149] *See id.* at 5-33.

[150] *See, e.g.*, 25 U.S.C. § 483a (elec. 2010) (mortgages on individual Indian lands subject to foreclosure in accordance with tribal or, if the tribe has no foreclosure law, state law); *see also In re* Emerald Outdoor Advertising, LLC, 444 F.3d 1077, 1081-82 (9th Cir. 2006).

[151] Testimony of Arvin Trujillo, Executive Director, Navajo Nation Division of Natural Resources, before the Committee on Natural Resources concerning H.R. 2523, 111th Cong., October 21, 2009.

[152] See *infra* § 5A.05[1], regarding financial incentives for renewable development in Indian country.

[153] *See, e.g.*, Kevin L. Shaw & Richard C. Deutsch, "Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development on Indian Lands," *Natural Resources Development in Indian Country* 9-1 (Rocky Mt. Min. L. Fdn. 2005); Patrick M. Garry et al., "Wind Energy in Indian Country: A Study of the Challenges and Opportunities Facing South Dakota Tribes," 54 *S.D.L. Rev.* 448 (2009).

substantial projects have become operational.[154] Numerous smaller projects are in development.[155]

Acquiring real property development rights for renewable energy development likely will entail a business site lease under 25 U.S.C. § 415, a right-of-way under 25 U.S.C. § 323, or both. A business site lease may authorize any renewable development, except for geothermal projects or portions of them authorized under the IMDA, which expressly authorizes minerals agreements for geothermal development.[156] An IMDA agreement likely cannot cover a wind or solar development because the IMDA authorizes contracts for the "development of oil, gas, uranium, coal, geothermal, or other energy or non-energy *mineral* resources."[157]

In addition to the rights granted under leasing statutes or the IMDA, rights-of-way may be needed to provide access by road and for electric transmission, water or gas pipelines, and other ingress or egress. Neither formal guidance nor caselaw address whether a lease or IMDA agreement can supply the needed rights-of-way without a separate right-of-way.

[3] Doing the Deal: Documenting an Agreement for Energy and Mineral Development

Negotiating an agreement and securing federal approval of agreements requires knowledge, skills, and sensitivities unique to Indian country. A minerals or energy agreement often must bridge cultures and business styles. A tribe, tribal entity, and nonmember developer must learn the fundamental interests of the other participants in the transaction; for a developer, that may entail acquiring insight into the pertinent tribal history, culture, experience with similar transactions, and key tribal interests, such as employment for tribal members or environmental or social concerns. A frank discussion of the critical interests of all key parties may advance negotiations. The tribe's organization and approach to business transactions may dictate the parties to, and some terms of, the agreement. And the agreement must be structured and documented in a manner to facilitate

[154] The Campo Band of Mission Indians of the Kumeyaay Nation currently hosts the largest renewable energy facility on tribal land, a 50 MW wind turbine facility. It has recently executed agreements for a 160 MW facility on its lands. *See* "California Tribe, Invenergy, Sempra Sign Wind MOU," *Reuters*, June 11, 2009, *available at* http://www.reuters.com/article/idUSTRE55A75X20090611.

[155] See the Department of Energy's list of supported projects in development as of late 2009, *available at* http://apps1.eere.energy.gov/tribalenergy/prog_review_1109.cfm.

[156] 25 U.S.C. § 2102(a) (elec. 2010). The regulations define geothermal broadly: 25 C.F.R. § 225.3 (elec. 2010).

[157] 25 U.S.C. § 2102(a) (elec. 2010) (emphasis added).

the BIA's approval, minimize the delay and expense of required environmental and cultural resource reviews preparatory to federal approval, and secure an approval that will withstand challenge.

[a] Proper Parties: Tribes and Tribal Entities

Particularly under increasingly complex IMDA agreements, multiple parties may join in agreements. Tribal entities may take forms unfamiliar to non-tribal parties. While some traditional tribes may have no written foundational document, such as a tribal constitution, most tribes do have written constitutions or other documents that define the powers of tribal governments, branches, and officials.[158] Many tribes' constitutions are authorized under section 16 of the IRA,[159] and their constitutions and bylaws may be similar in structure to those of many corporations.

Like corporations, tribes often act through sub-entities, owned and to different degrees controlled by the tribe. Prominent among these are corporations organized under IRA § 17.[160] IRA § 17 corporations must be wholly owned by a tribe, though it need not be an IRA-organized tribe, and they share a tribe's immunity from certain forms of taxation and, unless waived, from suit without their consent. However, tribes may also operate through tribally or state chartered corporations, which present multiple considerations concerning whether they enjoy immunity from suit and their authority to contract or to waive any immunity.[161] The form of entity that a tribe may prefer, or that a partnering developer and the tribe may use to facilitate a transaction, requires an analysis of tax, control, and liability considerations. If a tribe acts through a subsidiary in a transaction, there often must be a transfer of real property interests to the subsidiary pursuant to the IMDA, or a leasing or right-of-way statute.

[b] Structuring the Deal: Tribal Equity versus Lease

The considerations affecting how Indian country energy and mineral development transactions are structured are as varied as those applying off-reservation. Because the IMDA imposes no limitations on how a deal may be formatted, the optimal structure is a function of the capital resources, including tribal land and mineral resources, and the economic needs, expertise, and business preferences of the participants. The IMDA

[158] A useful source of information at an early stage of a negotiation may be the BIA's Tribal Leaders Directory (Winter 2009). *See* http://www.bia.gov/idc/groups/public/documents/text/idc002652.pdf.

[159] 25 U.S.C. § 476 (elec. 2010).

[160] 25 U.S.C. § 477 (elec. 2010).

[161] *See infra* § 5A.04[5][a].

has become the default form of agreement for most tribal transactions, including those that result in a mineral lease. The Business Site Leasing Act is the default format for exclusive surface use and where minerals are not involved. The 1948 Act may apply for access needed across unleased areas. Often, more than one statutory form of agreement is involved. A memorandum of understanding or other umbrella agreement describing the broad agreement and structure, the interrelationship between the component agreements, and the key terms intended for all subsidiary agreements is common. Such umbrella agreements may not need to be separately approved if they are attached to and incorporated in other instruments that receive BIA approval.

To apportion control, facilitate financing, or maximize tax benefits or minimize tax burdens, tribes and developers often agree upon a tribal equity interest in a project. That may take several forms: (1) the tribe or tribal sub-entity may own the minerals or renewable project, with a nonmember developer contracting to serve as operator or manager; (2) the tribe or tribal sub-entity and developer may each own equity interests through a joint venture agreement, often joined with an operating agreement governing management, accounting, and related issues; or (3) there may be a lease/option agreement pursuant to which the tribe or tribal sub-entity may "back-in" to equity participation by contributions to capital during the term of the agreement.[162] Some tribes, considering risk, available expertise, and other factors, do not seek equity participation and prefer a lease or lease/option under the IMDA with terms addressing key tribal interests.

[4] Compliance with Requirement for Valid Federal Approvals

The cornerstone of any Indian country development is one or more agreements providing the necessary real property rights, including mineral rights, properly approved by duly authorized federal officials. The parties must agree upon the appropriate forms of agreement,[163] determine the delegated tribal and federal officials who must approve, and identify and comply with the requirements for their approvals. Generally, the Indian mineral owner must execute the agreement or, for a right-of-way, a consent to the grant, before the federal officials will finalize federal approval. A tribe and developer should consult as early as feasible with federal officials to inform them of the coming need for their approval and ensure the agreements are being developed in a manner that optimally anticipates

[162] See *infra* § 5A.04[7] regarding tax implications of alternative transaction structures.

[163] See *supra* § 5A.04[1] regarding the forms of agreement that may apply.

and addresses federal requirements and concerns. The generally applicable requirements are reviewed below.

[a] Leasing and Permitting Requirements

Each authorizing statute and its regulations contain specific requirements, and the failure of the developer or federal officials to satisfy those requirements may delay, prevent, or reverse final federal approval. The "government-to-government" relationship between tribes and federal agencies plays an important role in facilitating federal approval.[164] Careful and early review of statutes and regulations, coordination with federal officials, and thoughtful planning of inputs to the approval process are critical to timely and defensible approval. The federal requirements likely will include compliance with statutes addressing environmental and cultural resources.

[b] National Environmental Policy Act

Section 102(2)(C) of the National Environmental Policy Act (NEPA)[165] sets forth the requirement that an extensive, interdisciplinary analysis be prepared with respect to any "major Federal action significantly affecting the quality of the human environment." Under caselaw and regulations of the Council on Environmental Quality (CEQ),[166] the process generally requires preparation of an initial environmental assessment (EA),[167] which compiles information sufficient to address the magnitude of the environmental effects, to inform the decision whether the action is one that may "significantly" affect the quality of the human environment. If it does not, the agency may enter a finding of no significant impact (FONSI).[168] If the EA concludes the effects on the human environment may be "significant," the agency must undertake the rigorous and public process to prepare an environmental impact statement (EIS).

[164] *See* O'Connell, *supra* note 60, at 1-24.

[165] 42 U.S.C. § 4332(2)(C) (elec. 2010). *See generally* Dean B. Suagee, "Application of the National Environmental Policy Act to 'Development' in Indian Country," 16 *Am. Indian L. Rev.* 541 (1991).

[166] *See* 40 C.F.R. § 1508 (elec. 2010).

[167] 40 C.F.R. § 1508.9 (elec. 2010). The agency need not prepare an EA if the action falls within a categorical exclusion (CatEx), a category of actions defined by regulation for which the agency has concluded significant environmental effects cannot be predicted. *Id.* § 1508.4.

[168] 40 C.F.R. § 1508.13 (elec. 2010).

Guidance applicable to approvals for energy and mineral development may be found in the Department of the Interior[169] and BIA[170] manuals. The agencies' guidance addresses both actions normally requiring preparation of an EIS[171] and categorical exclusions from the EA requirement.[172] While it is beyond the scope of this chapter to detail the requirements of each part of the NEPA process,[173] the guidance addresses applicants' responsibilities, including to "prepare a milestone chart for BIA use at the earliest possible stage in order to coordinate the efforts of both parties,"[174] and, for externally initiated proposals, "such as approval of the lease of trust land . . . , [t]he applicant (tribe or third party) normally prepares the EA."[175] Consistent with the CEQ regulations, "[t]the Bureau shall, however, make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA."[176] A BIA NEPA document must consider and contemplate compliance with any applicable tribal environmental laws.[177]

Consultation with any potentially affected tribes is a key step in a project, critical for timely and effective compliance with NEPA[178] and other federal natural resource and cultural resource protective statutes.[179] Gener-

[169] *See* 516 DM 1.6, *available at* http://206.131.241.18/app_DM/act_getfiles.cfm?relnum=3846.

[170] The BIA's applicable guidance is in 516 DM 10, "Managing the NEPA Process-Bureau of Indian Affairs" (May 27, 2004), *available at* http://elips.doi.gov/elips/DM_word/3620.doc, and in the BIA's National Environmental Policy Act Handbook, 59 IAM 3-H (Apr. 2005), *available at* http://www.bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm (BIA NEPA Handbook). For background on the BIA's somewhat reluctant acceptance of NEPA duties, see Vollmann, *supra* note 55, at 12-22.

[171] See 516 DM 10.4, including certain proposed "mining contracts (other than oil and gas)," major water projects, and certain hazardous and solid waste facilities.

[172] See 516 DM 10.5, listing over 40 CatEx actions, including approvals relating to rights-of-way or mineral leases that will not entail substantial surface disturbance.

[173] See generally Joan E. Drake, "The NEPA Process: What Do We Need to Do and When?," *reprinted in* 43 *Rocky Mt. Min. L. Fdn. J.* 117 (2006), on the nuts and bolts of compliance with NEPA.

[174] 516 DM 10.3.A(1)(d).

[175] BIA NEPA Handbook, *supra* note 170, § 4.2.B. The applicant should submit the EA with, or soon after, the submittal of the application (agreement proposed for approval). *Id.*

[176] *Id.* (citing 40 C.F.R. § 1506.5(b)).

[177] BIA NEPA Handbook, *supra* note 170, § 2.5.C.

[178] *See* 40 C.F.R. §§ 1501.7(a)(1), 1501.2(d) (elec. 2010).

[179] *See* Walter E. Stern, "Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective)," *Energy Development:*

ally, consultation consists of notifying a tribe or tribal community of the project and possible effects and securing the input of tribal communities. There are specific consultation requirements for each of the statutes referenced below.[180] Beyond generally engaging potentially affected tribes, project proponents should take care to comply with the requirements of each potentially involved statute. Failure to consult adequately can result in litigation and, potentially, project delay.[181] Consultation is required not just with a tribe directly impacted by a development but also with other tribes that may be affected.

There must be adequate compliance with NEPA before a federal official enters a decision that authorizes surface-disturbing activities to take place on the ground or irretrievably commits resources.[182] Nonetheless some agreements to authorize studies or exploration activities may be approved prior to completion of the final EA or EIS based on NEPA categorical exclusions.

[c] Cultural Resource Protection Statutes and Regulations

Part and parcel of the NEPA process for a project will be review under the National Historic Preservation Act (NHPA),[183] the Native American Graves Protection and Repatriation Act (NAGPRA),[184] other federal statutes,[185] and, possibly, tribal laws and regulations.[186]

Access, Permitting, and Delivery on Public Lands 15A-1 (Rocky Mt. Min. L. Fdn. 2009).

[180] *See infra* § 5A.04[4][c] and Paul E. Frye, "Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Tribal Perspective)," *Energy Development: Access, Permitting, and Delivery on Public Lands* 15B-1 (Rocky Mt. Min. L. Fdn. 2009).

[181] Pueblo of Sandia v. United States, 50 F.3d 856, 860 (10th Cir. 1995) (discussed in Stern, *supra* note 179, at 15A-12 to 15A-14).

[182] *See* Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976); Stand Together Against Neighborhood Decay, Inc. v. Board of Estimate, 690 F. Supp. 1192, 1199–1200 (E.D.N.Y. 1988) (NEPA studies must be completed before authority to construct granted, not before acquisition of land).

[183] 16 U.S.C. §§ 470–470x-6 (elec. 2010) and regulations at 36 C.F.R. pt. 800 (elec. 2010).

[184] 25 U.S.C. §§ 3001–3013 (elec. 2010).

[185] *See, e.g.*, American Indian Religious Freedom Act, 42 U.S.C. § 1996 (elec. 2010) (discussed *infra* § 5A.04[4][c][iii]) and Archaeological Resource Protection Act (ARPA), 16 U.S.C. §§ 470aa–470mm (elec. 2010) (For a discussion of the legal aspects of ARPA, which governs permits for archaeological excavation and removal of, or damage to, archaeological resources, see chapter 14A of these *Proceedings*.).

[186] For a broad review of the legal requirements imposed by cultural property laws, see Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, *Cultural Property Law* (ABA 2004).

[i] National Historic Preservation Act § 106 Process

The NHPA was enacted in 1966 to require federal agencies to consult to identify historic properties, assess the adverse affects of federally funded or permitted undertakings on such historic properties, and attempt to mitigate any such adverse effects on the historic properties.[187] NHPA § 106[188] establishes the applicable procedural requirements, known as the "Section 106 process." Section 106 requires the federal agency proposing to fund or permit a project to consult with State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs). Most actions invoking NEPA compliance requirements will also invoke NHPA § 106 review. The NHPA regulations require the action agency to coordinate section 106 reviews with those under NEPA, NAGPRA, the American Indian Religious Freedom Act (AIRFA),[188.1] and ARPA.[189]

NHPA § 106 seeks to identify "historic properties," defined as "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]."[190] The National Park Service's NHPA regulations define "historic properties" to include places with a significant relationship to history or historic persons, that embody distinctive historic characteristics, exhibit high artistic value, or that may yield information important to understand history or prehistory.[191] In short, historic properties include sites and materials not uncommon in Indian country. Historic properties also may include traditional cultural properties (TCPs), which may include natural landmarks, landforms, or places with significant "association with cultural practices or beliefs of a living community."[192]

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[187] *See* Stan N. Harris & Carla Mattix, "Sacred Sites and Cultural Resource Protection: Implications for Mineral Development On—and Off—Indian Lands," *Natural Resources Development in Indian Country* 7-1, 7-2 (Rocky Mt. Min. L. Fdn. 2005).

[188] 16 U.S.C. § 470f (elec. 2010).

[188.1] 42 U.S.C. § 1996 (elec. 2010).

[189] 36 C.F.R. § 800.3(b) (elec. 2010).

[190] 16 U.S.C. § 470f (elec. 2010).

[191] 36 C.F.R. § 60.4 (elec. 2010).

[192] National Park Service Bulletin, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1, 6-14 (Rev. 1998), *available at* http://www.nps.gov/history/nr/publications/bulletins/pdfs/nrb38.pdf. The New Mexico Cultural Properties Review Committee recently granted tribes' application to list over 500,000 acres surrounding Mt. Taylor, New Mexico, as a TCP based on its religious or cultural significance to certain New Mexico and Arizona tribes. *See* http://www.nmhistoricpreservation.org/documents/cprc/cont15.pdf (application).

[ii] Native American Graves Protection and Repatriation Act

NAGPRA is focused more narrowly on Native American "cultural items," defined as human remains, funerary objects, sacred objects, and objects of cultural patrimony.[193] As relevant here, NAGPRA generally is triggered not by initial approval of leases, minerals agreements, or contracts, but by "inadvertent discovery" of cultural items on federal or tribal lands.[194] NAGPRA prescribes requirements for the suspension of operations to facilitate appropriate removal of the items and procedures for determining tribes or others entitled to the items, and for the return of the items.[195]

[iii] Religious Freedom Protection Statutes

Complementing protections under the Free Exercise Clause of the First Amendment, AIRFA may also figure in NEPA analysis. AIRFA states a "policy of the United States to protect and preserve for American Indians their inherent right to believe, express, and exercise . . . traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[196]

In response to concerns that the federal courts were not according sufficient protection to AIRFA and non-Indian Free Exercise Clause claims,[197] Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[198] RFRA provided that the federal government "shall not substantially burden a person's exercise of religion" unless the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering the interest.[199] In a significant interpretation of RFRA, the Ninth Circuit held that ski-run snowmaking on Arizona's San Francisco Peaks, an area deemed sacred to tribal plaintiffs, did not "substantially burden" Indians' religious practices within the meaning of RFRA.[200] Still, AIRFA and exercise of traditional Native American religion must be considered in NEPA analysis.

At a macro level,[201] these cultural resource statutes will require the agency, with substantial input from affected tribes, THPOs,[202] and federal and state agencies, to compile information regarding cultural resources; identify potentially impacted cultural resources, including sacred sites; address alternatives to reduce negative impacts to such sites; and make project revision or "go vs. no-go" decisions in light of that information.

[d] Endangered Species Act

The Endangered Species Act (ESA)[203] applies to federal decisions affecting Indians, tribes, and tribal lands.[204] ESA § 7, the statutory provision most likely to affect development in Indian country, prohibits a federal agency from taking, approving, or funding an action unless it finds that the action is "not likely to jeopardize the continued existence of any . . . species [listed as threatened or endangered] or result in the destruction or adverse modification of . . . [a designated critical habitat]."[205] An ESA § 7 determination generally must be incorporated into an EA or EIS for a project in Indian country. Federal agencies have recognized exceptional flexibility under the Endangered Species Act to take tribal self-determination into account.

In 1997, the Secretaries of the Interior and Commerce issued a Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal

[193] 25 U.S.C. § 3001(3) (elec. 2010). For definitions of those terms, see 43 C.F.R. § 10.2(d) (elec. 2010) and Harris & Mattix, *supra* note 187, at 7-14 to 7-15.

[194] *See* 25 U.S.C. § 3002(d) (elec. 2010); 43 C.F.R. § 10.4 (elec. 2010). NAGPRA defines "federal lands" at 25 U.S.C. 3001(5) (elec. 2010), and "tribal lands" at 25 U.S.C. § 3001(15) (elec. 2010).

[195] *See* Harris & Mattix, *supra* note 187, at 7-20 to 7-23 (tribal reluctance to disclose nonpublic tribal information concerning sacred sites can present difficulties in review processes). See Comment: "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?," 36 *Ecology L.Q.* 137 (2009).

[196] 42 U.S.C. § 1996 (elec. 2010).

[197] Illustrative of cases discussed in AIRFA's legislative history, see, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-50 (1988); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). *See generally* Harris & Mattix, *supra* note 187, at 7-23 to 7-29.

[198] 42 U.S.C. §§ 2000bb–2000bb-4 (elec. 2010).

[199] *Id.* § 2000bb-1. *See also* Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) (RFRA restrictions constitutional as applied to federal government, although not to states).

[200] *See* Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1078 (9th Cir. 2008), *cert. denied,* 129 S. Ct. 2763 (2009).

[201] For a detailed review of the requirements of these statutes, see Hutt, Blanco, Stern & Harris, *supra* note 186, and Harris & Mattix, *supra* note 187.

[202] For tribal perspectives on cultural resources, see Dean B. Suagee, "Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground," 21 *Vt. L. Rev.* 145, 147 (1996).

[203] 16 U.S.C. §§ 1631-1644 (elec. 2010).

[204] *See, e.g.*, United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987); *cf.* United States v. Dion, 476 U.S. 734, 745-46 (1986) (Bald Eagle Protection Act impliedly abrogates treaty rights).

[205] 16 U.S.C. § 1536(a)(2) (elec. 2010).

Trust Responsibilities, and the Endangered Species Act,"[206] recognizing a "government-to-government relationship" between tribes and the United States with respect to ESA. Secretarial Order No. 3206 states that the departments shall "respect the exercise of tribal sovereignty" over tribal lands and shall "give deference to tribal conservation and management plans for tribal trust resources."[207]

The Secretarial Order suggests an approach that minimizes the ESA's impact on tribal self-determination. In determining whether ESA § 7 requires species conservation restrictions to protect a species or its habitat as a condition of project approval,[208] the Secretarial Order requires that any such "restriction does not discriminate against Indian activities, either as stated or applied" and that the agency determine that "the conservation purpose of the restriction cannot be *achieved by reasonable regulation of non-Indian activities*."[209] The principle that wildlife-threatening non-Indian activities should be curtailed before tribal activity is restricted recognizes the tension between tribal self-determination and ESA enforcement and may be a factor, subject to tribal policies, favoring tribal lands development in areas potentially impacting threatened or endangered species.

[e] Pre-Approval Rights and Remedies

Prior to federal approval, a tribe's or allotted landowner's execution of a lease, minerals agreement, or right-of-way generally is of no force and effect, and either party may back out without penalty at any time.[210] Parties may seek agreements that afford some disincentives to renege on a signed agreement, particularly where cash bonuses may be paid upon signing or a party must make substantial investments during the period between execution of the agreement and BIA approval. Parties might agree to liquidated damage or expense reimbursement provisions in agreements with terms shorter than seven years, allowable under 25 U.S.C. § 81; such an agreement could provide for escrowing funds, payable to a party if the other terminates prior to secretarial approval. To the author's knowledge the enforceability of such agreements has not been tested judicially.

[206] Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.fws.gov/southwest/es/arizona/Documents/MiscDocs/Sec%200rd%20203206.pdf; *see also* Slade, *supra* note 37, at 13B-62 to -64.

[207] Secretarial Order No. 3206, Principle 3(B).

[208] 16 U.S.C. § 1536(a)(2) (elec. 2010).

[209] Secretarial Order No. 3206, Principle 3(C) (emphasis added).

[210] *See, e.g.*, 25 U.S.C. § 2102(a) (elec. 2010); Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1460 (9th Cir. 1986) (tribe may unilaterally rescind IMDA agreement prior to secretarial approval).

[f] Assigning Interests in Energy and Mineral Development Agreements

Energy and mineral development agreements often entail transfers of interests in existing agreements to an acquiring party. The parties should be alert to comply with requirements for the approval of assignments in applicable agreements and regulations. The regulations under the IMLA[211] and the IMDA[212] both require the approval of the Secretary to an assignment of "any interest" in a lease or minerals agreement, and only require the consent of the Indian mineral owner if the lease or mineral agreement so requires. Many tribal oil and gas leases specify that an operating agreement is an interest in a lease requiring BIA approval upon assignment; by contrast, assignments of overriding royalties or payments out of production do not require BIA approval.[213] Even when Indian mineral owner approval of a mineral lease assignment is not required, a sometimes overlooked provision requires BIA to notify the Indian mineral owner of the proposed assignment.[214] The Business Site Leasing Act regulations require the approval of the Secretary and the "written consent of all parties" to any assignment.[215]

The Navajo Nation[216] and the Jicarilla Apache Nation[217] have enacted laws or ordinances imposing conditions on assignments of oil and gas leases, without regard to whether the applicable regulations or the lease or minerals agreement requires tribal consent. The validity of these specific provisions has never been determined judicially.[218] However, the Tenth

[211] 25 C.F.R. § 211.53(a) (elec. 2010).

[212] 25 C.F.R. § 225.33 (elec. 2010).

[213] 25 C.F.R. § 211.53(d) (elec. 2010).

[214] 25 C.F.R. § 211.53(a) (elec. 2010).

[215] 25 C.F.R. § 162.610(a) (elec. 2010).

[216] 18 Navajo Nation Code (N.N.C.) § 1805(C) (West Supp. 2008) (requires seller to submit application to assign interest in oil and gas lease and grants Navajo Nation option to acquire the lease upon the terms agreed between the private parties).

[217] Jicarilla Apache Nation Code (J.A.N.C.) § 18-11-8 provides that an assignment of an oil and gas lease of tribal lands is of no validity, and that the assignee has no rights under such assignment, until it is approved by the Nation's Legislative Council. *See* http://media.jicarillaoga.com/documents/Title-18-All-Chapters.pdf.

[218] For support imposing its restriction the Jicarilla Apache Nation has relied on 25 C.F.R. § 211.29 (elec. 2010), which provides that the regulations in 25 C.F.R. part 211 may be "superseded by the provisions of any constitution, bylaw or charter" of a tribe organized under the Indian Reorganization Act (and other acts), or by any "ordinance, resolution, or other action" of a covered tribe.

Circuit has held unenforceable a prior Navajo Nation provision invalidating an unapproved assignment as applied to leases that require only secretarial approval.[219] Developers and tribal entities structuring and transferring energy and mineral development agreements should pay careful attention to provisions of federal and tribal law regarding assignments and consider express contractual authorization for classes of assignments.

[5] Addressing Enforceability and Dispute Resolution

It is widely recognized that agreements with tribes present special enforceability issues arising from the federal doctrine of tribal sovereign immunity.[220] Developing agreements that provide fair, efficient, and predictable dispute resolution, however, requires addressing not only a waiver of immunity from suit, but also forum selection and choice of law, and anticipating potential disputes about where enforceability provisions will be interpreted and enforced. To be enforceable as to lands or minerals, the clauses must be in a document validly approved by the Secretary or in a document attached to and incorporated into such a document.

[a] Sovereign Immunity

As a condition of agreement, most tribes are willing to provide a limited waiver of immunity from suit, appropriately tailored to address the interests at stake in an agreement. Sovereign immunity must be waived by "clear" language by Congress or the tribe,[221] but a waiver should be given a "real world" interpretation to effectuate the parties' intent; use of the specific words "sovereign immunity" is not required.[222] A waiver should be drafted to describe unambiguously the subject matter it addresses, the desired forums, including any alternative dispute resolution, and the available remedies, including forums for enforcement of the waiver and dispute resolution procedures.

Tribal foundational documents, such as constitutions or bylaws, may impose restrictions on the manner in which immunity may be waived, and

[219] Superior Oil Co. v. United States, 798 F.2d 1324, 1330 (10th Cir. 1986).

[220] *See* Neil G. Westesen, "Contracting with Indian Tribes and Resolving Disputes: Covering the Basics," *Natural Resources Development in Indian Country* 11A-1 (Rocky Mt. Min. L. Fdn. 2005); *see also* M. Brent Leonhard, *Tribal Contracting: Understanding and Drafting Business Contracts with American Indian Tribes* (ABA 2009).

[221] *See* Oklahoma Tax Comm'n v. Citizens Band Potawatomie Indian Tribe, 498 U.S. 505, 509 (1991).

[222] In *C & L Enterprises, Inc. v. Citizens Band Potawatomie Indian Tribe,* 532 U.S. 411, 419-22 (2001), the Court held a tribe's entry into a contract specifying arbitration under Oklahoma law and authorizing awards to be reduced to judgment "in any court having jurisdiction thereof" did waive immunity, not just to arbitrate, but also to a court action to enforce an arbitration award.

the effectiveness of the waiver may depend on compliance with such internal law.[223] Disputes may arise regarding whether the validity of the waiver should be interpreted by a tribal court rather than by a federal or state court or arbitration panel generally selected in the waiver documents.[224] The agreement should specify clearly where such enforceability disputes shall be resolved. Similarly, when a tribal wholly owned subsidiary or IRA § 17 corporation is party to an agreement, specific charter or tribal law provisions or the entity's relationship with the tribe may affect whether it enjoys sovereign immunity or how its immunity may be waived.[225] An opinion of counsel for the tribe or tribal entity, or both, often is required to address authorities to contract and to waive immunity.

[b] Forum Selection

Effective forum selection provisions should address the uncertainty regarding the court or courts that may have subject matter jurisdiction over an action. Consent or stipulation to suit in a specific forum does not vest subject matter jurisdiction in a federal or state court.[226] Federal courts are courts of limited jurisdiction. Federal courts' federal question jurisdiction may not extend to all cases arising between developers and tribes or Indians; simply because a tribe, tribal contract, or tribal law is involved does not mean a federal question is presented,[227] and tribes are not citizens of a state for purposes of the diversity jurisdiction statute.[228] While state

[223] *See* Winnebago Tribe v. Kline, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004) ("for a waiver of sovereign immunity to be effective, the waiver must be in compliance with the tribal law"); World Touch Gaming, Inc. v. Massena Management, Inc., 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) (same). *See also* Westesen, *supra* note 220, at 11A-2 to 11A-6, regarding verifying authority.

[224] *See* Meyer & Assocs., Inc. v. Coushatta Tribe, 992 So. 2d 446, 450-51 (La. 2008), *cert. denied,* 129 S. Ct. 1908 (2009) (state court rejected contention that waiver was unauthorized under tribal law).

[225] *See* O'Connell, *supra* note 60, at 1-31. On the immunity of tribal sub-entities, see William V. Vetter, "Doing Business with Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction," 36 *Ariz. L. Rev.* 169, 174-79 (1994).

[226] *See* Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 507 (11th Cir. 1993). However, consent may factor differently in the jurisdiction of tribal courts, where court jurisdiction may depend on the existence of a qualifying "consensual relationship" between the tribal court defendant and the tribe or tribal court plaintiff. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2724 (2008).

[227] *See* Peabody Coal Co. v. Navajo Nation, 373 F.3d 945, 949-950 (9th Cir. 2004), *cert. denied,* 543 U.S. 1054 (2005) (tribal court lease); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990) (claim involving tribal ordinance does not necessarily present federal question absent challenge to tribal power over nonmember); *see generally* Westesen, *supra* note 220, at 11A-13 to 11-17.

[228] *See* Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974).

courts are usually courts of general jurisdiction, the Supreme Court's early decision in *Williams v. Lee*[229] concluded that an Arizona state court lacked jurisdiction over a collection action by a non-Indian trader doing business on the Navajo reservation against a reservation resident who was a Navajo Nation member. Consequently, to cover all bases, a forum selection clause may need to provide a preferred jurisdiction, but also provide "fall back" resort to the other two jurisdictions or to a "court of competent jurisdiction," whether a tribal or non-tribal court.

Forum selection clauses also may specify arbitration or other alternative dispute resolution procedures as an exclusive or available remedy. "Tripartite" arbitration, in which each side selects one arbitrator, and the two so selected choose the third, is popular because it is perceived as affording a higher probability of a neutral forum. The dispute resolution provisions should provide specifically for enforcement of the arbitration agreement and any ensuing award and clarify which forum will enforce the arbitration agreement and award.[230]

[c] Exhaustion of Tribal Court Remedies

The dispute resolution provisions also should address the federal courts' doctrine of exhaustion of tribal court remedies. *National Farmers Union Insurance Cos. v. Crow Tribe*[231] was a watershed decision in two respects. First, it recognized that the question whether an Indian tribe lacks power to subject a nonmember to civil jurisdiction of a tribal court "is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331."[231.1] Second, the Court announced a "tribal exhaustion" doctrine, that a federal court should not ordinarily address a federal question challenge to tribal court jurisdiction "until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."[232] Two years later, the Court extended the *National Farmers Union* doctrine to a diversity jurisdiction

[229] 358 U.S. 217, 220-22 (1959).

[230] Technical rules may apply to determining the forum to enforce an arbitration agreement under the Federal Arbitration Act, 9 U.S.C. §§ 3, 4 (elec. 2010). *See* Rent-A-Center, West, Inc. v. Jackson, No. 09-497, 2010 WL 2471058, at *6-*9 (U.S. June 21, 2010).

[231] 471 U.S. 845, 852 (1985); *see also* Lynn H. Slade, "Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual and the Federal Abstention Doctrine," 71 *N.D. L. Rev.* 519 (1995).

[231.1] 471 U.S. at 852.

[232] 471 U.S. at 857 (citations omitted).

case that presented a similar challenge to tribal jurisdiction, again requiring exhaustion, including of tribal appellate remedies.[233]

Tribal court jurisdiction and the application of the exhaustion doctrine were clarified in *Strate v. A-1 Contractors*.[234] *Strate* held that tribal court jurisdiction over nonmembers was governed by the rule in *Montana v. United States*,[235] which established a presumption that a tribe lacks regulatory jurisdiction over nonmembers unless the proponent of tribal jurisdiction shows that one of two exceptions to the "*Montana* rule" apply.[236] *Strate* also created an exception to the exhaustion doctrine: When it is "plain" that neither *Montana* exception applies, "it will be equally evident that tribal courts lack adjudicatory authority," and exhaustion is not required because it "would serve no purpose other than delay."[237]

Despite the Supreme Court's narrowing of the exhaustion requirement, some federal courts continue to require exhaustion of tribal court remedies based on a "consensual relationship" when the action arises out of a contract to which the tribe or a member is a party.[238] Additionally, some courts have required exhaustion of tribal remedies even when the contract in issue specifies a non-tribal forum but does not address exhaustion of tribal court remedies.[239] Consequently, an effective forum selection clause should address specifically whether a party must exhaust tribal court remedies before pursuing remedies in the contract-specified forum.

[233] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987).

[234] 520 U.S. 438 (1997).

[235] 450 U.S. 544, 565-66 (1981).

[236] *Id.* at 564. The *Montana* rule is discussed *infra* § 5A.04[6][d].

[237] 520 U.S. at 459 n.14. The *Strate* holding was reinforced in *Nevada v. Hicks*, 533 U.S. 353, 367-69 (2001) and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2725 (2008).

[238] *See, e.g.*, Malaterre v. Amerind Risk Mgmt., 373 F. Supp. 2d 980, 982-84 (D.N.D. 2005) (tribe's "colorable claim" of qualifying consensual relationship supporting tribal court jurisdiction under *Montana* required exhaustion under *Strate*).

[239] *See, e.g.*, Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 846 (8th Cir. 2003) (tribal court should decide validity of underlying contract, of which the arbitration agreement is a part); *but see* Meyer & Assocs., Inc. v. Coushatta Tribe, 992 So. 2d 446, 450-51 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009) (forum selection clause: state court declined to order tribal court exhaustion and determined the validity of underlying contract under tribal law).

[6] Regulation of Energy and Mineral Development Operations

Energy and mineral development operations are regulated primarily under (1) federal law governing activities on Indian lands; (2) federal environmental laws governing emissions and the handling and storage of toxic or hazardous materials; potentially, (3) tribal law enacted pursuant to tribal inherent powers or delegated by federal agencies; and, to a lesser degree, (4) state law.

The allocation of federal, tribal, and state power over energy and mineral development in Indian country is fundamentally under federal control.[240] Congressional statutes prescribing regulatory schema for Indians and Indian lands often preempt state regulation.[241] The Supreme Court continues to recognize Congress' broad power over Indian affairs, although the Court's recent cases have narrowed the preemptive effect of implied federal power as against state law.[242] The federal statutes governing leasing and contracting for energy and mineral development are implemented by regulations that generally override inconsistent state or tribal law.[243]

[a] Federal Regulation of Exploration and Development

The responsibilities for direct supervision of leasing, operations, and royalty management for energy and mineral development leases and related contracts falls to the BIA (leasing, contracting, administration), BLM (field operations), and ONRR (royalty accounting).[244] This chapter does not seek to analyze in detail regulation under the various statutes and regulations in the different stages of production. However, with certain exceptions regarding coal, a consistent pattern emerges under the IMLA, IMDA, and Allotted Lands Leasing Act, which holds true within a narrower scope of functions as to the Business Site Leasing Act, the 1948 Act, the Indian Non-Intercourse Act, and Section 81.

BIA generally has initial responsibility for leasing and contracting functions, to assist and advise Indian landowners during the contracting process, and to process, prepare environmental studies for, and review and approve (or disapprove) agreements that have been executed or consented to by tribal landowners. BIA will also be responsible for approval of bonds and assignments. BLM has primary responsibility for regulating production activities and providing technical review of proposals for operations. ONRR is responsible for determining whether royalties have been properly accounted for and paid. With respect to coal, technical functions are performed by OSM.[245]

Department of the Interior agencies' regulations and standard-setting authority may alter developers' expectations based on off-reservation development. BLM regulates the location of wells,[246] displacing conventional state oil and gas conservation commission well-spacing rules unless BLM has entered into authorized agreements to delegate BLM's authority over well spacing to the state agency.[247] BIA, with the input of BLM, also has authority to approve or disapprove oil and gas communitization agreements[248] and to make other discretionary decisions. ONRR has authority to impose standards for accounting for royalties or other payments due under minerals leases,[249] and, authority suggests, when two or more rea-

[240] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903); United States v. Lara, 541 U.S. 193, 202-03 (2004) (Congress defines "the metes and bounds of tribal sovereignty").

[241] *See* United States v. Kagama, 118 U.S. 375, 384-385 (1886) (federal criminal jurisdiction over Indians forecloses state criminal prosecution); Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965) (Indian trader statutes preclude imposing state sales tax on non-Indian trader selling to Indians on reservation).

[242] *See* United States v. Lara, 541 U.S. 193, 202-03 (2004) (recognizing congressional primacy); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (declining to imply ouster of state taxation of tribal oil and gas in absence of legislation); *see generally Cohen 2005, supra* note 8, § 5.02.

[243] *See* Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583, 589 (10th Cir. 1992) ("There can be no question that 25 U.S.C. § 396d relegates control of oil and gas leases on Indian lands to the Secretary of the Interior.").

[244] See *supra* § 5A.03[1][b], regarding the responsibilities of Department of the Interior agencies. *See generally* Lynn H. Slade & Susan R. Stockstill, "Oil and Gas Development in Indian Lands: Shifting Sovereignties in the Oil Patch," *45th Inst. on Oil & Gas Law & Tax'n* 10-1 (Southwestern L. Fdn. 1994). Certain of these functions may be, and sometimes are, assumed by tribes pursuant to "638 Contracts" under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–458bbb-2 (elec. 2010).

[245] *See supra* § 5A.04[1][f].

[246] *See* BLM operating regulations, 43 C.F.R. pt. 3162, and Onshore Oil and Gas Order No. 1, *available at* http://www.blm.gov.

[247] *See* 43 C.F.R. § 3162.3-1(a) (elec. 2010); *see also* Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conserv., 792 F.2d 782, 795-96 (9th Cir. 1986); San Juan Citizens Alliance, 129 IBLA 1, 6-7, GFS(O&G) 9(1994). Reflecting how such jurisdiction issues may be addressed, see Memorandum of Agreement, Southern Ute Tribe, BIA, and BLM (Aug. 22, 1991), *available at* http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/Southern_Ute_Indian_Tribe_MOU.html.

[248] *See* 25 C.F.R. § 211.28 (elec. 2010); *see also* Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1041 (10th Cir. 1995) (*en banc*).

[249] ONRR, formerly MMS, has separate regulations governing valuation of Indian oil, gas, and coal. See *supra* note 43.1 for reorganization of Title 30. *See also* Alan R. Taradash, "Natural Resource Royalty Management and Accounting," *Natural Resources Development and Environmental Regulation in Indian Country* 8-1 (Rocky Mt. Min. L. Fdn. 1999).

sonable interpretations are available, MMS must choose the rule in "the best interests of the Indian tribe."[250]

The cases do not address whether BIA or a federal court may cancel mineral leases or agreements for violations of lease terms and applicable regulations; however, BIA regulations state that an IMLA lease[251] or IMDA minerals agreement[252] may be cancelled for failure to cure a violation of the lease or regulations following notice and an opportunity to cure. Of concern, a business site lessee has been held to lack standing to challenge administrative cancellation of a lease found to have been issued in violation of NEPA.[253]

Litigation has addressed the standards the Department of the Interior applies in discharging its supervisory responsibilities. Two strains of authority have emerged. One posits that the federal trust responsibility would require the federal government to realize the highest possible return for the Indian owners.[254] The other, reflected in the *Woods Petroleum* decision, recognizes that developers also have justifiable expectations, according certain weight to the developers' interest, and that tribes have long-term interests in fostering expectations that agency actions regarding energy and mineral development agreements will be fair.[255] The Supreme Court's recent cases addressing the federal government's liability for damages for breach of trust suggest the proper standard should be grounded in statutory language, not abstract principle.[256]

[250] Burlington Resources Oil & Gas Co. v. U.S. Dep't of the Interior, 21 F. Supp. 2d 1, 5 (D.D.C. 1998).

[251] 25 C.F.R. § 211.54 (elec. 2010).

[252] 25 C.F.R. § 225.36 (elec. 2010).

[253] *See* Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1036-40 (8th Cir. 2002) (developer lacked standing to challenge cancellation of business site lease) (discussed *supra* § 5A.03[1][b]).

[254] *See* Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984), (Seymour, J., concurring and dissenting), *concurring and dissenting opinion adopted as modified*, 782 F.2d 855 (10th Cir. 1986) (*en banc*), *modified*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986).

[255] *See* Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1039 (10th Cir. 1995) (BIA could not disapprove an oil and gas communitization agreement solely to force lease to lapse in order to allow Indian lessor to secure a windfall in re-leasing the mineral rights); *see also* Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983).

[256] *Compare* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) (federal trust duty compensable in money damages based on statutory directives); *with* United States v. Navajo Nation, 537 U.S. 488, 493 (2003) (no compensable trust where statutes did not impose trust-like duties); United States v. Navajo Nation, 129 S. Ct. 1547 (2009) (same).

[b] Environmental Regulation

Environmental regulation in Indian country is presumptively federal. The federal Environmental Protection Agency is the default agency for implementing regulation in Indian country under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, CERCLA, and other federal statutes.[257] Most federal environmental statutes did not single out tribes for special jurisdictional status until, at EPA's prompting, Congress began authorizing EPA to delegate functions to tribes under programs generally called "Treatment as State" or "Treatment in the same manner as State" programs (TAS).[258] Congress now has enacted TAS amendments to the Safe Drinking Water Act (SDWA),[259] the Clean Water Act,[260] and the Clean Air Act.[261] EPA also has promulgated programs authorizing lesser tribal roles under other statutes.[262] Each of the TAS programs fits a common mold: (1) the applicant tribe must have a governing body carrying out substantial duties and powers; (2) the tribe must be reasonably expected to be able to carry out the functions to be exercised in a manner consistent with the statute's intent; and (3) the functions to be exercised by the tribe must be performed within the tribe's jurisdiction.[263] To complicate matters, the applicable statutes have inconsistently defined Indian lands subject to

[257] *See* Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1469-70 (9th Cir. 1985) (EPA's refusal to approve Washington's RCRA program within Indian reservation upheld because "states are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it"); *see* William C. Scott, "Environmental Permitting, Tribal 'TAS' Status Under Federal Environmental Laws and Impacts on Mineral Development," *Natural Resources Development in Indian Country* 18-1, 18-6 (Rocky Mt. Min. L. Fdn. 2005).

[258] EPA adopted an Indian policy in 1984, reaffirmed by Administrator Jackson on July 22, 2009, designating tribal governments as the "appropriate non-Federal parties" to address reservation environments. *See* EPA Policy for the "Administration of Environmental Programs on Indian Reservations," *available at* http://www.epa.gov/tribal/pdf/indian-policy-84.pdf.

[259] Pub. L. No. 99-339, § 302(a), 100 Stat. 665 (1986) (codified at 42 U.S.C. § 300j-11 (elec. 2010)).

[260] Pub. L. No. 100-4, Title IV, § 506, 101 Stat. 76 (1987) (codified as amended at 33 U.S.C. § 1377 (elec. 2010)).

[261] Pub. L. No. 101-549, §§ 107(d), 108(i), 104 Stat. 2464, 2467 (1990) (codified at 42 U.S.C. §§ 7601(d) & 7410(o) (elec. 2010)).

[262] See http://www.epa.gov/tribalportal/laws/tas.htm for EPA's list of programs available to tribes.

[263] *See* Scott, *supra* note 257, at 18-6.

TAS delegation, creating the potential for differing jurisdictional patterns under the three statutes.[264]

Even if a tribe has not applied for or received TAS status under a statute, the TAS definitions may have effect.[265] State environmental agencies generally enforce the federal environmental laws by delegation from EPA. However, EPA uniformly takes the position that it, and not a state with statewide EPA-delegated authority, will implement federal environmental laws in the portions of a state eligible for TAS status under the applicable statutes or in "Indian country" under statutes that do not authorize a TAS delegation.[266] Of course, determining federal versus state environmental regulation does not end the inquiry: tribes may have inherent power to regulate the environment and may assert that power through regulatory programs.[267]

[c] Federal Statutes of General Applicability in Indian Country

Predicting regulation in Indian country is complicated by the doctrine that a federal statute that on its face applies to all persons may not apply to tribes or Indians in Indian country. The Supreme Court's 1958 pronouncement that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests"[268] has been qualified by more recent lower court decisions. In *Donovan v. Coeur d'Alene Tribal Farm*,[269] the Ninth Circuit found the Occupational Safety and Health Act (OSHA) applied to a tribal enterprise, applying a test that gives broad sweep to federal laws:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is

[264] *Id.* at 18-8 to 18-19.

[265] As a general matter, EPA is without authority to delegate program functions unless Congress has specifically authorized it to do so. *See* Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.D. Cir. 1996) (RCRA does not authorize delegation of program authority to tribes).

[266] *See, e.g.*, Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1469-70 (9th Cir. 1985).

[267] See *infra* § 5A.04 [6][d] for a discussion of tribal inherent power regulation.

[268] Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). *See generally* Alex Tallchief Skibine, "Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians," 25 *U.C. Davis L. Rev.* 85 (1991).

[269] 751 F.2d 1113 (9th Cir. 1985).

> proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. . . ."[269.1]

The Tenth Circuit has a different jurisprudence, concluding that application of OSHA to a Navajo tribal enterprise would infringe treaty rights[270] and affirming the right of a New Mexico Pueblo to enact a right-to-work law.[271] The Supreme Court has not addressed this difference between the circuit courts.

[d] Tribal Regulatory Power over Nonmembers

Tribes' inherent, nondelegated powers to regulate energy and mineral development in Indian country are defined by federal and tribal law. Chief Justice John Marshall early established that federal law protects tribes' power to regulate the activities of nonmembers within tribal lands.[272] Later opinions appeared to broaden the sphere of tribal primacy[273] and then, in the cases discussed below, gradually to limit the scope of tribal powers over non-consenting nonmembers.

The Supreme Court's recent cases suggest broad generalizations about tribal regulatory power; however, they also prescribe fact-dependent tests that make prediction in specific contexts difficult. The Court has drawn a bright line precluding tribal criminal jurisdiction over non-Indians,[274] but not nonmember Indians, if expressly authorized by federal statute.[275] As to civil jurisdiction, *Montana v. United States*[276] established a presumption that a tribe lacks jurisdiction over nonmembers unless the proponent of tribal jurisdiction shows either that (1) the nonmember entered a "consen-

[269.1] 751 F.2d at 1116 (quoting United States v. Farris, 624 F.2d 890 (9th Cir. 1980). *Accord* Menominee Tribal Enters. v. Solis, 601 F.3d 669, 673-74 (7th Cir. 2010). *See also* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (National Labor Relations Act did not "impinge enough" on tribe's sovereignty to render it inapplicable to tribe's gaming enterprise).

[270] Donovan v. Navajo Forest Products Indus., 692 F.2d 709, 712-14 (10th Cir. 1982).

[271] NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1189, 1199–1200 (10th Cir. 2002).

[272] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[273] *See* Williams v. Lee, 358 U.S. 217, 223 (1959); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[274] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978). Although the Court extended *Oliphant* also to preclude criminal jurisdiction over Indians not members of the prosecuting tribe, see *Duro v. Reina*, 495 U.S. 676, 693-94 (1990), where Congress legislatively reinstated that jurisdiction. *See also* 25 U.S.C. § 1301(1) (elec. 2010).

[275] *See* United States v. Lara, 541 U.S. 193, 202-03 (2004) (affirming Congress' authority to enact 25 U.S.C. § 1301(2)).

[276] 450 U.S. 544, 565-66 (1981).

sual relationship" with the tribe "through commercial dealing, contracts, leases or other arrangements," or (2) the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate v. A-1 Contractors*[277] extended the *Montana* rule to tribal court jurisdiction over nonmembers' activities on federally granted rights-of-way, and *Atkinson Trading Co. v. Shirley*[278] further extended the rule to tribal taxation of nonmembers on fee lands within a reservation. The Court next applied the *Montana* rule to limit tribal power over nonmember, state law enforcement personnel on tribal land, not just on fee or right-of-way lands.[279] Most recently, in rejecting tribal court jurisdiction over a bank's sale of assets that collateralized a loan, the Court focused narrowly on whether the bank could be deemed to have consented to jurisdiction over the specific conduct that was the focus of the tribal court proceeding.[280]

While the Court's cases impose burdens on tribes seeking to regulate nonmember conduct, the Court has recognized tribal power in specific circumstances. The Court has implied that express consent to tribal jurisdiction would establish *Montana*'s first exception, consensual relationship.[281] The Court also has reaffirmed that, in situations posing severe consequences to the tribe, jurisdiction may be premised on *Montana*'s second exception, "health and welfare."[282] In addition, the Court's *Brendale* decision,[283] while holding Yakima County had exclusive zoning power in areas "opened" to non-Indian settlement and predominately non-Indian in character, held the Yakima Tribes had exclusive zoning power over non-Indian lands in "closed" areas of the reservation, with little non-Indian presence.[284] Additionally, the federal courts have held that tribes may regulate employment practices of companies doing business within a reservation,[285] to protect tribal members' health and safety,[286] and through business licensing.[287] However, the Supreme Court has recognized that longstanding reliance interests may play a role in defining present tribal powers.[288]

The potential effect of tribal inherent power regulation is reflected in the recently enacted Navajo Nation Comprehensive Environmental Response, Compensation, and Liability Act (Navajo Nation CERCLA).[289] While patterned broadly after the federal "Superfund" Act, the Navajo Nation's CERCLA differs in significant ways from the federal model, perhaps most significantly in defining "hazardous substances" to include petroleum, natural gas, natural gas liquids, and other petroleum products[290] and imposing a tariff on "transporters of hazardous substances,"[291] which would include throughput of natural gas and petroleum product pipelines, to fund Navajo Nation CERCLA operations. An industry working group and the Navajo EPA are discussing possible amendments to address industry concerns. The statute reflects the importance of understanding present and proposed tribal regulation of energy and mineral development and working with a tribe to address concerns.

[e] Commercial Law in Indian Country

Commercial law in Indian country often is ill-defined. Many tribes have not enacted effective commercial laws or construed them judicially, and state law does not ordinarily apply. Although federal law will govern

[277] 520 U.S. 438 (1997). See discussion of *Strate, supra* § 5A.04[5][c].

[278] 532 U.S. 645, 652-53 (2001) (rejecting the argument that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1981), found a *per se* power of tribes to tax nonmembers within reservations).

[279] *See* Nevada v. Hicks, 533 U.S. 353, 367-69 (2001).

[280] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2714 (2008).

[281] *Id.*

[282] *Id.* at 2726 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.").

[283] Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 409 (1989).

[284] See the thorough analysis of *Brendale* and related cases in Kevin J. Worthen, "Federal Common-Law Limits on Tribal Civil Jurisdiction Over Non-Indians Involved in On-Reservation Resource Development Projects: Following the STRATE Path," *Natural Resources Development and Environmental Regulation in Indian Country* 15-1 (Rocky Mt. Min. L. Fdn. 1999).

[285] *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1315 (9th Cir. 1990) (a "consensual relationship" was premised on FMC's employment relationships with tribal members and mineral leases with the tribes).

[286] *See* Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir. 1982).

[287] *See* Cardin v. De La Cruz, 671 F.2d 363, 367 (9th Cir. 1982).

[288] *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 (2005) ("The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.").

[289] 4 N.N.C. (Navajo Nation Code) §§ 2101–2805 (Mar. 10, 2008).

[290] 4 N.N.C. § 2104(17); the Navajo Nation CERCLA does not include the "petroleum exclusion" of federal CERCLA §§ 101(14) and 104(a)(2) that exempts "petroleum, including crude oil or any fraction thereof . . . [and] natural gas, liquefied natural gas" from federal CERCLA regulation.

[291] 4 N.N.C. §§ 2701, 2704.

BIA-approved leases, minerals agreements, or contracts pertaining to real property, there is no generally applicable federal commercial law governing agreements in Indian country. Consequently, except regarding rights and duties under federally approved agreements, tribal law or law selected by the parties likely will supply any commercial law for the transaction.

The content and complexity of tribal commercial laws varies widely. Some tribes have adopted tribal versions of certain titles of the Uniform Commercial Code.[292] The National Conference of Commissioners on Uniform State Laws has developed a Model Tribal Secured Transactions Act[293] that has been adopted, with variations, by the Crow Tribe. At least one tribe has legislatively adopted state substantive law for transactions exceeding a certain amount.[294] The relatively undeveloped state of tribal commercial law underscores the need for effective, well thought out choice-of-law provisions in applicable agreements.

[7] Taxation

A few broad concepts provide a helpful overview of federal, tribal, and state taxation of energy and mineral development in Indian country. Tribes may tax severance of minerals under tribal leases.[295] States also may tax severance of minerals under tribal leases, even when the tribe imposes its own severance tax, creating "dual taxation" of the same activity.[296] Tribes and some tribally owned corporations generally do not pay federal income tax;[297] state income, *ad valorem* property, or severance taxes; or gross receipts or sales taxes on purchases they make within Indian country,[298] unless Congress has indicated the intent to allow the state taxation.[299] Tribes, generally, are taxable on activity outside of Indian country.[300] Importantly, the Supreme Court looks at the "legal incidence" of the tax, not the "economic reality" of its effect.[301]

These general rules are starting points in a taxation analysis. The law is not settled as to many of these generalizations and other distinctions exist as to certain taxes and taxpayers. For example, the Supreme Court has held that imposition of at least some tribal taxes on nonmembers must be supported by the showing of a "consensual relationship" or "health and welfare" impacts under *Montana v. United States*.[302] Similarly, the holding in *Cotton Petroleum*, premised on a record showing that "no economic burden falls on the tribe by virtue of the state taxes,"[303] may not govern a case where the state taxes significantly burden a tribe.[304]

Faced with the prospect of dual state and tribal taxation, development participants should consider alternatives to minimize overall tax burdens. First, existing law may afford tax credits or other incentives for energy and mineral development on tribal lands.[305] Second, the IMDA and Business Site Leasing Act allow flexibility for structures that facilitate tax planning. For example, a tribe's retained working interest in minerals likely defeats state severance taxation as to the tribe's equity interest in production. Similarly, a tribe's purchase of materials or equipment, or contracting to construct facilities, may defeat state gross receipts or sales tax. In a joint venture format, allocating depreciable assets to a taxable joint venturer may also reduce overall federal and state income taxation.

[292] *See, e.g.*, 5A N.N.C. chs. 1, 2, 3 (West Supp. 2008) (general provisions, sales, commercial paper); *see generally* Mark A. Jarboe, "Financing and Securing Indian Economic Development Projects," *Natural Resources Development and Environmental Regulation in Indian Country* 14-1 (Rocky Mt. Min. L. Fdn. 1999).

[293] *See* http://www.nccusl.org/Update/ActSearchResults.aspx.

[294] *See* Jarboe, *supra* note 292, at 14-10.

[295] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); *see generally* Charles G. Cole, "Tribal Taxation of Mineral Resource Development After Atkinson," *Natural Resources Development in Indian Country* 12-1 (Rocky Mt. Min. L. Fdn. 2005).

[296] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989).

[297] *See* Rev. Rul. 94-16, 1994-1 CB 19 (applying to tribes and corporations that a tribe organizes under section 17 of the Indian Reorganization Act). *See also* Michael P. O'Connell, "Tax Considerations in Natural Resource Development Projects on Indian Lands," *Natural Resources Development and Environmental Regulation in Indian Country* 7-1 (Rocky Mt. Min. L. Fdn. 1999).

[298] *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 764-65 (1985).

[299] *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113-14 (1998).

[300] *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158-159 (1973); *see also* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

[301] *See* O'Connell, *supra* note 297, at 7-30 to 7-33.

[302] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 652-53 (2001).

[303] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185 (1989).

[304] That was the holding of District Judge James A. Parker in *Ute Mtn. Ute Tribe v. Homans*, No. CIV 07-772 JP/WDS, Findings of Fact, Conclusions of Law, and Memorandum Opinion, Oct. 2, 2009 at 62 (D.N.M. Oct. 2, 2009), *on appeal*, Tenth Circuit No. 09-2276 (New Mexico severance taxes preempted as applied to oil and gas on Ute Mountain Ute Reservation, distinguishing *Cotton Petroleum*).

[305] *See, e.g.*, N.M. Stat. Ann. § 7-29C-1 (elec. 2010) (credits against New Mexico severance taxes for certain tribal severance taxes paid); Colo. Rev. Stat. § 24-61-102 (elec. 2010) (taxation compact between the Southern Ute Indian tribe, La Plata County, and the State of Colorado).

[8] Contractual Stipulations to Enhance Economic Stability

Recognition that tribes may have authority to regulate and tax energy and mineral development, and that developers need to reasonably predict costs, have led some tribes and developers to agree to contours of future regulation and taxation. "Stability provisions" intended to promote consistent legal requirements and costs for a project may take several forms: (1) some agreements stipulate tribal regulation or tax will not be more stringent or costly than current levels (including combined state and tribal tax levels) or than a referenced state or federal standard; (2) others identify applicable tribal law, including taxation (by citation or, if not readily verifiable by citation, attaching copies of applicable laws to the agreement), with agreed procedures addressing changes in tribal law; and (3) still others simply incorporate applicable state or federal law or taxation pursuant to tribal law.

To give teeth to "stability provisions," an agreement can provide a standard for the degree of economic impact that is acceptable, and provide the developer either injunctive relief preventing the imposition or a damage remedy, measured by the adverse economic impact of the changed regulation or taxes. The damage remedy may be effectuated by deductions from the developer's payments to the tribe or by a suit for damages. The dispute resolution provisions should provide clearly for effective enforcement of such provisions.

The more difficult question may be whether a tribal government's agreement to such commitments is binding on a later tribal government. The rule the Supreme Court applies to this defense when asserted by the United States[306] or by a tribe[307] requires a very specific promise and implies a limitation of remedy: "sovereign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms*."[308] The doctrine does not allow the contracting party to prohibit the government from exercising sovereign powers; rather, it provides the government "can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act."[309]

[306] *See* United States v. Winstar, 518 U.S. 839, 872 (1996).

[307] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

[308] *Id.* (emphasis added) (tribal oil and gas leases, although specifying royalty rates, did not contain "clear and unmistakable surrender of taxing power").

[309] *Winstar*, 518 U.S. at 882 (quoting Amino Bros. Co. v. United States, 372 F.2d 485, 491 (Ct. Cl. 1967)).

Tribes also may seek contractual stipulations to tribal regulatory or judicial jurisdiction, or to limit the effect of *Strate v. A-1 Contractors* and its progeny on tribal jurisdiction. The Navajo Nation, for example, employs standard terms and conditions with broad covenants to comply with tribal law and taxation and to submit to Navajo Nation court jurisdiction.

§ 5A.05 Financing the Deal

[1] Federal Financial Incentives

The good news regarding energy and mineral development in Indian country is that there may be available federal financial assistance. While detailed analysis of available options is beyond the scope of this chapter, options may include BIA loan guarantees for financing that a tribe secures for its participation in a project[310] and tax-exempt bond financing for certain tribal investments in energy development.[311] Additionally, Indian country projects have advantages in competing for federal agencies' renewable energy portfolio purchasing of electric energy.[312] The bad news is that federal support specifically tailored to Indian country development presently is limited. Several Internal Revenue Code incentives, including broader availability of tax exempt bond finance and accelerated depreciation on certain on-reservation investments,[313] expired as of December 31, 2009, or require issuance during 2010.[314]

There is also available federal financial support specifically applicable to renewable development in Indian country.[315] Although many federal

[310] *See* 25 U.S.C. § 1461 (elec. 2010) (implemented by regulations in 25 C.F.R. pt. 103 (elec. 2010)). BIA can guarantee up to 90% of certain loans to tribes. 25 C.F.R. § 103.6 (elec. 2010).

[311] Tribally issued bonds are subject to limitations to which states and municipalities are not, most notably that they be for an "essential government function." *See* Gavin Clarkson, "Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development," 85 *N.C. L. Rev.* 1009 (2007). However, Internal Revenue Service Private Letter Ruling PLR 2009 11001, § 7871, Indian Tribal Governments Treated as States for Certain Purposes, concludes a tribally owned entity's issuance of bonds for utility purposes to be for essential government functions, not commercial activity; hence tax exempt under IRC § 103. *See* http://www.nativelegalupdate.com/uploads/file/PLR%2020091101%20(Tribal).pdf.

[312] *See* 42 U.S.C. § 15852(c)(3) (elec. 2010).

[313] *See* 26 U.S.C. § 168(j) (elec. 2010).

[314] *See generally* Dep't of Energy, Tribal Energy Program, *available at* http://apps1.eere.energy.gov/tribalenergy. Short-lived incentives include tribal economic development bonds and clean renewable energy bonds under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[315] *See* Dep't of the Interior, Bureau of Indian Affairs, Division of Energy and Mineral Development, *available at* http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/index.htm.

inducements to develop renewable energy projects provide tax credits for project investments, tribes do not pay federal income tax and, accordingly, cannot take advantage of the credits.[316] Consequently, although the full range of federal incentives available to incentivize renewable development off-reservation are available in Indian country, they now favor privately financed renewable energy development.

[2] Collateralizing Indian Country Financing

Commercial financing of energy and mineral development in Indian country faces unique hurdles. The most significant is the difficulty of providing a lender with collateral that can be accessed in commercially reasonable fashion in the event of default. The only express authorization for securing financing with a BIA-approved lease or contract is contained in the Business Site Leasing Act regulations, which authorize BIA to approve a mortgage of the lease "for the purpose of borrowing capital for the development and improvement of the leased premises."[317] In the event of default, if the approved encumbrancer is the purchaser in a sale upon foreclosure, the encumbrancer may assign the leasehold without the further consent of the Secretary, provided the purchaser agrees to be bound by all terms of the lease.[318]

There is a paucity of caselaw addressing whether mortgages of IMLA leases or IMDA agreements may be made with (or without) the approval of the Secretary. The applicable regulations require the approval of assignments of the lease or minerals agreement "or any interest therein" by the Secretary in all cases and by the approval of the Indian mineral owner if required by the lease or agreement. Analogizing a mortgagee's interest to be "any interest" in a lease or minerals agreement suggests a mortgage could be validated by approval by the Secretary.[319] However, the Jicarilla Apache

[316] Legislation proposed in the 111th Congress would allow tribes to transfer to tax-paying entities (1) tax credits for renewable electricity generation (RECs), and (2) their basis in a renewable project applicable to the tribal ownership interests in a project for investment tax credits purposes. These would be effective incentives. *See* Senate Indian Affairs Committee, draft of proposed amendments to Energy Policy Act of 2005, Title III, *available at* http://www.indian.senate.gov/issues/upload/CoverLetterandIndianEnergyBillDiscussionDraft.pdf.

[317] 25 C.F.R. § 162.610(c) (elec. 2010).

[318] *Id.* If someone other than the encumbrancer is the purchaser at sale, the Secretary must approve any assignment. *Id.* An encumbrance not approved by the Secretary is unenforceable. *See In re Epic Capital Corp.*, 290 B.R. 514, 521 (Bankr. D. Del. 2003), *aff'd in part*, 307 B.R. 767 (D. Del. 2004).

[319] *See* Lynn P. Hendrix & Phillip R. Clark, "Perfecting and Enforcing Liens and Other Impediments to Lending in Indian Country," *Natural Resources Development in Indian Country* 4-1, 4-21 (Rocky Mt. Min. L. Fdn. 2005).

Nation recently took the litigation position that there was no statutory authority for any mortgage or security interest in an IMLA lease, and that "any attempt to grant a lien on, security interest in, mortgage or otherwise encumber an IMLA-governed lease is void."[320] In addition, the presumption that county real property records and standard Uniform Commercial Code recordation are adequate likely will not apply: specific requirements for recording and determining notice of encumbrances apply in Indian country.[321]

§ 5A.06 Conclusion

Energy and mineral development in Indian country present opportunity and challenge. Those effectively addressing the challenge of analyzing a unique legal environment and bridging cultural differences to ascertain mutually congruent interests may find opportunities for successful development. Careful analysis and thoughtful and proactive planning are critical to timely and effective development.

[320] Jicarilla Apache Nation v. Bank of Montreal, Objection by Jicarilla Apache Nation and Jicarilla Apache Utility Auth. to Proposed Disclosure Statement at 7, No. 09-03239, *jointly admin. under* Case No. 08-37922 (Bankr. S.D. Tex 2009), *dismissed*, Order Confirming Plan of Reorganization at 16, *In re* CDX Gas, LLC, No. 08-37922 (S.D. Tex. July 7, 2009).

[321] *See infra* § 5A.04[1][i]; *see also* Hendrix & Clark, *supra* note 319; *and In re* Emerald Outdoor Advertising, LLC, 444 F.3d 1077, 1081-82 (9th Cir. 2006).