CHANGING WINDS: RECONFIGURING THE LEGAL FRAMEWORK FOR RENEWABLE-ENERGY DEVELOPMENT IN INDIAN COUNTRY

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Renewable energy is undoubtedly one of today's "hot topics," often discussed hand-in-hand with climate change, environmental policy, and international affairs. Yet one aspect of renewable energy that frequently goes unnoticed is its role in the American Indian community. Tribal officials are increasingly focused on renewable-energy projects as a means of fostering economic development in Indian Country, and the proliferation of on-reservation projects attests to the growing importance of this field. However, native leaders, practitioners, and scholars face common struggles in bringing these projects to fruition—struggles rooted largely in the current state of federal law and policy. This Note examines the contours of these obstacles: first, renewable-energy tax credit non-transferability and second, tribal–state jurisdictional peculiarities, such as double taxation. Next, the Note illustrates these obstacles with examples from the Campo Kumeyaay Nation, the Confederated Tribes of the Warm Springs Reservation, and the Rosebud Sioux Tribe. The Note then analyzes a number of federal and non-federal solutions, ultimately concluding that Congress should make renewable-energy tax credits transferable and delineate tribal civil jurisdiction over energy-related activities. This conclusion is supported by numerous policy and practical considerations, not the least of which is Congress's legal and moral responsibility to enable native economic well-being.

INTRODUCTION

Modern Native American tribes are in a state of transition: in many ways moored to past grievances, discrimination, and disenfranchisement, yet also unmistakably moving with a forward momentum. Striving for change. Growth. Stability. Against a historical backdrop of pain and loss, tribes are working to

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rebuild their nations by providing schools, government services, court systems, and general economic opportunity. Congress, in its unique role as trustee for these native communities,[1] has encouraged tribal development through legislation designed to foster self-determination and self-sufficiency.[2]

While this sociopolitical transition quietly takes place within our country, there is another broader cultural shift occurring. This shift, rooted in the present and future dangers of global climate change, can be seen in the mindset and practices of people, corporations, and governments across the world.[3] One of the most prominent features of this shift is the recognition that society as a whole needs to fundamentally change the energy industry.[4] The era of reliance on exhaustible and environmentally-destructive energy sources is quickly retiring. In

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1. The "trust" terminology, as utilized in federal Indian law, consists of two related but distinct concepts. The more general trust concept—derived from antiquated notions of indigenous incompetency and naiveté—mandates federal responsibility for the welfare of American Indians and is analytically tied to the legal doctrine of congressional plenary power over Indian affairs. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831) ("[American Indian] relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."). In contrast, a more specific application of trusteeship exists in the context of Indian trust property, i.e., property held in trust for Indian owners that is managed and administered by federal agencies. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 225 (1983) (explicating that elaborate federal control over Indian property and monies necessarily gives rise to a fiduciary relationship akin to the common law trust).

2. *See* Indian Reorganization Act (Wheeler–Howard Act) of 1934, 25 U.S.C. §§ 461–479 (2006) (establishing mechanisms for tribes to organize their own governments, constitutions, and tribal corporations); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006) (delineating jurisdiction over Indian child custody proceedings in a way favorable to tribal interests in order to prevent the break-up of Indian families and communities); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721, 18 U.S.C. §§ 1166–1168 (2006) (creating a jurisdictional framework for Indian gaming operations in order to aid tribes in their development of this lucrative industry).

3. *See, e.g.*, BBC World Service, All Countries Need to Take Major Steps on Climate Change: Global Poll 1 (2007), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/25_09_07climatepoll.pdf (finding that the majority of 22,000 people polled in twenty-one countries believe that action must be taken to address climate change); *Copenhagen Climate Summit: 60 World Leaders to Attend*, BBC NEWS, Nov. 23, 2009, http://news.bbc.co.uk/2/hi/europe/8373551.stm (stating that 60 presidents and prime ministers, as well as delegations from 192 countries, planned to attend the climate change conference); Press Release, United Nations Environment Programme, Breaking Down the Barriers to a Green Economy: UNEP Launches Year Book 2008 at Its 10th Special Session of the Governing Council/Global Ministerial Environment Forum in Monaco 20–22 (Feb. 20, 2008), http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=528&ArticleID=5748&l=en (finding that "growing numbers of companies embrace environmental policies and investors pump hundreds of billions of dollars into cleaner and renewable energies").

4. *See supra* note 3; *see also 81% Say Finding New Energy Sources is Urgent National Need*, RASMUSSEN REPORTS (Aug. 7, 2008), http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/81_say_finding_new_energy_sources_is_urgent_national_need.

its stead, sustainable technology is being developed and implemented, bringing with it new industries and economic opportunity.[5]

This Note assesses the intersection of these movements: the potential for native economic growth through the development of commercial-scale renewable-energy generation on reservation land. Specifically, the Note examines the role of Congress in facilitating this development and provides recommendations for congressional solutions to current legal and financial roadblocks. Part I highlights the pressing need for alternative energy development in Indian Country, including the legal and moral imperatives for congressional action. Part II describes the steps Congress has already taken in this field, specifically looking at the Indian Tribal Energy Development and Self-Determination Act of 2005. Part III surveys the jurisdictional complexities and lack of economic incentive that continue to obstruct these efforts. To highlight these problems, Part IV includes case studies of tribes that have attempted—successfully and unsuccessfully—to initiate alternative energy projects. Finally, Part V evaluates the relative merits of a variety of legislative and non-legislative solutions, ultimately endorsing legislation that would make renewable-energy tax credits transferable and delineate tribal civil jurisdiction over energy-related activities.

I. WHY RENEWABLES, WHY INDIAN COUNTRY, AND WHY IT MATTERS

There are numerous reasons to support the development of renewable-energy generation on tribal lands. Most Americans recognize that the United States is in dire need of new energy sources.[6] The federal government adopts a similar position, as indicated by President Obama's remark that "each day brings further evidence that the ways we use energy strengthen our adversaries and threaten our planet"[7]—a powerful statement on the connection between energy use, global warming, and a dependency on Middle-Eastern oil.

Additionally, studies indicate that reservation land is particularly well-suited for many kinds of alternative energy projects. The potential for wind-powered generation on the Great Plains reservations is well-documented,[8] as is the

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5. *See, e.g., Investing in Green Technology as a Strategy for Economic Recovery: Hearing Before the S. Comm. on Env't & Pub. Works*, 111th Cong. (2009) (statement of John Doerr, Partner, Kleiner Perkins Caufield & Byers), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=df8869c6-c972-417b-b0a7-14b09d8c50bc (recognizing the potential for green technologies to solve several of the United States's current crises).

6. *See 81% Say Finding New Energy Sources is Urgent National Need*, *supra* note 4.

7. President Barack Obama, Inaugural Address (Jan. 21, 2009) (transcript) *available at* http://www.whitehouse.gov/blog/inaugural-address; *see also Energy & Environment*, THE WHITE HOUSE (June 15, 2010), http://www.whitehouse.gov/issues/energy-and-environment (stating the reasons for shifting to a renewable-energy economy and highlighting the progress that has already been made).

8. *See, e.g., The Richest Wind Regime*, NATIVE WIND, http://www.nativewind.org/html/wind_potential.html (last visited Nov. 15, 2009) (describing the Northern Plains reservations as the "Saudi Arabia of Wind"); *see also*

nearly unlimited supply of sunshine in the southwest region, home to many tribal communities.[9] High biomass potential has been found on over 100 reservations.[10] Furthermore, many parcels of Indian Country are already located in key transmission and transportation corridors throughout the country.[11] One expert has also suggested that tribal communities can act as laboratories in the field of renewable-energy development. She postulates that tribes, due to their sovereign status and available resources, are in a unique position to develop innovative approaches to renewable-energy infrastructure and regulation from which other industry players—such as state governments—can learn.[12]

Although the general public's benefit from increased renewable-energy production is important, even more significant are the positive effects these on-reservation projects could have on the local tribal community. The statistics on American Indian poverty are staggering.[13] Many reservations lack adequate health care,[14] housing,[15] and law enforcement services.[16] Unemployment is rampant.[17]

OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, WIND POWER TODAY: FEDERAL WIND PROGRAM HIGHLIGHTS 18 (2005), *available at* http://www1.eere.energy.gov/windandhydro/pdfs/37147.pdf (discussing the excellent wind resources available to many tribes across the United States that could be commercially developed).

9. *See, e.g.*, BRACKEN HENDRICKS, CTR. FOR AM. PROGRESS, WIRED FOR PROGRESS: BUILDING A NATIONAL CLEAN-ENERGY SMART GRID 9, 10 (2009), *available at* http://www.americanprogress.org/issues/2009/02/pdf/electricity_grid.pdf (highlighting the wealth of solar power in the Southwest within its discussion of the national grid infrastructure).

10. HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 162 (2008) [hereinafter HARVARD PROJECT].

11. *See* Tracey A. LeBeau, *The Green Road Ahead: Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right Through Indian Country*, FED. LAW., Mar.–Apr. 2009, at 38, 43 [hereinafter LeBeau, *The Green Road Ahead*]; Tracy A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 STAN. L. & POL'Y REV. 237, 238 (2001) [hereinafter LeBeau, *Reclaiming Reservation Infrastructure*].

12. *See* LeBeau, *Reclaiming Reservation Infrastructure*, *supra* note 11, at 239 (discussing the potential of tribes to provide a legacy of leadership and change in the energy industry).

13. *See* Press Release, U.S. Census Bureau, Dep't of Commerce, Income Climbs, Poverty Stabilizes, Uninsured Rate Increases (Aug. 29, 2006), *available at* http://www.census.gov/newsroom/releases/archives/income_wealth/cb06-136.html (stating that the three-year average poverty rate for American Indians and Alaskan Natives was over 25%, higher than any other ethnic group and a stark contrast to the national poverty rate of 12.6%).

14. *See* Mary Clare Jalonick, *Indian Health Care's Broken Promises*, REZNETNEWS (June 15, 2009), http://www.reznetnews.org/article/indian-health-cares-broken-promises-35270 (highlighting the lack of available healthcare and disproportionately high rates of health problems on reservations).

15. *See Indian Housing Fact Sheet*, NAT'L AM. INDIAN HOUS. COUNCIL, http://web.archive.org/web/20080402052019/http://www.naihc.net/news/index.asp?bid=6316 (accessed by searching for www.naihc.net in the Internet Archive index) (reporting dire statistics on the substandard living conditions and lack of housing in tribal areas).

Additionally, on-reservation energy needs are rarely met and, even where they are, tribal members tend to pay disproportionately high rates for energy services.[18] Viewed collectively, these statistics indicate a pressing need for on-reservation infrastructure and economic growth.

Improving tribal ability to develop renewable energy would not only alleviate some of these economic pressures, but would also resonate with many tribes' traditional values regarding sustainable use of the Earth's resources. The Navajo Nation Code itself pronounces the "duty and responsibility of the Diné [the Navajo people] to protect and preserve the beauty of the natural world for future generations."[19] Technologies such as wind- and solar-based energy generation comport readily with this ethic and stand in stark contrast to the historic exploitation of Indian natural resources through coal mining and hydroelectric dams—uses that left permanent scars on the landscape.[20]

Not only do practical and moral considerations support the development of tribal alternative energy projects, but Congress also has a legal imperative to do so. This imperative stems from the federal government's long-standing trust responsibility for American Indians.[21] Congress, embracing this responsibility without qualification, has stated that it is the "principal goal of Federal Indian policy . . . to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[22] For the last several decades, federal Indian policy has been firmly anchored in the concept of self-determination. This concept

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16. *See* DEP'T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS 1–3 (1997), *available at* http://www.justice.gov/otj/icredact.htm#A (describing the public safety crises in Indian Country and attributing it in large part to inadequate resources).

17. *See* D. Bambi Kraus, *Wealth, Success and Poverty in Indian Country*, POVERTY & RACE, May–June 2001, at 3, 3–4, *available at* http://www.prrac.org/newsletters/mayjun2001.pdf (comparing high unemployment rates on various reservations with consistently lower unemployment rates in their proximal states).

18. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ENERGY CONSUMPTION AND RENEWABLE ENERGY DEVELOPMENT POTENTIAL ON INDIAN LANDS, at ix (2000), *available at* http://tonto.eia.doe.gov/FTPROOT/service/neaf0001.pdf (finding that 14.2% of Indian households on reservations have no access to electricity, compared to only 1.4% of all U.S. households); *see also* LeBeau, *Reclaiming Reservation Infrastructure*, *supra* note 11, at 240.

19. NAVAJO NATION CODE ANN. tit. 1, § 205(G) (2005); *see also* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 279, 281 (1996) (comparing indigenous peoples' relational land ethic, based on a concept of rights and duties, with Euro-American hierarchical land ethic, perceiving land as a commodity).

20. *See* Bob Gough, *Panel V: Revitalizing Economies, Preserving Cultures & Protecting the Environment: Striking the Balance in South Dakota & Indian Country*, 7 GREAT PLAINS NAT. RESOURCES J. 67 (2002) (discussing the negative repercussions of hydroelectric projects placed on Indian land and waters in the northern Great Plains); LeBeau, *The Green Road Ahead*, *supra* note 11, at 44–45 (contrasting the historical exploitation of tribal resources with the tribal ethic of sustainability).

21. One of the fundamental tenets of federal Indian law is the federal government's trust or fiduciary relationship with American Indian tribes. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.04(4)(a) (Nell Jessup Newton ed., 2005).

22. Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) (2006).

encompasses notions of tribal growth and self-sufficiency as directed by each tribe itself, representing a distinct shift away from federal control and management of tribal resources and services.[23] The role envisioned for the federal government is on the sidelines, working to assist tribes in their path to self-determination.[24] However, while the effect of this policy can be seen in the growth and development of tribal governments, courts, and business enterprises, the reality is that most tribes are still far from embodying self-determination to the fullest.[25]

A number of points argue strongly for the development of renewable energy in Indian Country, including evolving energy policy, the existence of tribal resources, and the urgent need for economic stimuli on reservations. As trustee for native communities and the central policymaker for America's energy industry, Congress is in the optimal position to spearhead this development.

II. CONGRESSIONAL EFFORTS THUS FAR: THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT OF 2005

Congress has recognized the need for development by enacting the Indian Tribal Energy Development and Self-Determination Act in 2005.[26] The Act explicitly confirms the federal government's role in assisting tribes with the development of their energy resources to further the twin goals of self-determination and tribal economic growth.[27] To meet these objectives, the Act (1)

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23. *See* Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970) (containing a policy statement from President Nixon stating that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions"). Congress itself has perhaps stated it best:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450(a)(1) (2006).

24. *See, e.g.*, Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108 (2006) (elevating tribes into the primary role for negotiating mineral leasing agreements, subject to approval by the Secretary of the Interior).

25. *See supra* text accompanying notes 13–18.

26. Title XXVI of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 763 (codified at 42 U.S.C. §§ 16001, 7144e, and 25 U.S.C. §§ 3501–3506 (2006)) ("the Act"). The Act succeeds the Energy Policy Act of 1992, which contained limited provisions on Indian energy. *See* Title XXVI of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (previously codified at 25 U.S.C §§ 3501–3506) (providing a demonstration program, low interest loans, and grant money for the development of tribal energy regulations).

27. *See, e.g.*, 25 U.S.C. § 3502(a)(1) (2006) (requiring the Secretary of the Department of the Interior to establish a program to "assist Indian tribes in the development of energy resources and further the goal of Indian self-determination"); 42 U.S.C. §

creates the Office of Indian Energy Policy and Programs in the Department of Energy (DOE);[28] and (2) establishes an Indian energy resource development program in the Department of the Interior (DOI).[29] Additionally, although the Act is geared towards all types of tribal energy development, the vast majority of projects have been related to renewable energy.[30]

Under the Act, the DOE is mandated to provide both financial and technical assistance to tribes attempting to develop their energy resources.[31] Financial assistance takes the form of grants, loans, and loan guarantees used for a variety of activities, including planning and development of energy generation and transmission.[32] Qualifying projects may also receive technical assistance in the form of technical support staff from the DOE, renewable-energy technology information, and training.[33]

The DOI program similarly provides financial assistance for activities such as integration projects, environmental programs, and employee training.[34] Additionally, the DOI must provide available scientific and technical information and expertise at a tribe's request.[35] Perhaps even more importantly, the Act establishes a procedure within the DOI for tribes to apply for primary responsibility in negotiating and executing energy contracts with non-tribal businesses.[36] This is significant because it means that tribal–private business relationships can form without the bureaucratic headache of receiving Secretarial approval.[37] The end-product of this DOI process is the formation of Tribal Energy Resource Agreements (TERAs).[38]

TERAs are an important step towards tribal primacy in the control and management of energy resources on the reservation. After forming a TERA with the DOI, a tribe is free to enter into agreements through its own negotiations with outside businesses of its choosing. Furthermore, the reduction of federal

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7144e(b)(1), (3) (2006) (creating an Office of Tribal Energy Policy and Programs in the Department of Energy and listing the Office Director's duties as "promot[ing] Indian tribal energy development" and "enhanc[ing] and strengthen[ing] tribal energy and economic infrastructure").

28. 42 U.S.C. § 7144e(a).

29. 25 U.S.C. § 3502(a)(1).

30. *See Tribal Energy Program: Projects by Type of Technology*, U.S. DEP'T OF ENERGY, http://apps1.eere.energy.gov/tribalenergy/projects_technology.cfm (last updated Mar. 27, 2007) (demonstrating that the vast majority of the projects have directly or indirectly related to renewable energy).

31. 25 U.S.C. § 3502(b), (c).

32. *Id.*

33. *Tribal Energy Program: How to Apply for Technical Assistance*, U.S. DEP'T OF ENERGY, http://apps1.eere.energy.gov/tribalenergy/tech_assistance.cfm (last updated Mar. 25, 2009).

34. 25 U.S.C. § 3502(a)(2).

35. *Id.* § 3503(c)(1).

36. *Id.* § 3504; *see also* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 25 C.F.R. § 224 (2008) (providing for the creation, implementation, and enforcement of Tribal Energy Resource Agreements).

37. *See* 25 U.S.C. § 3504(a)(2).

38. *See id.* § 3504.

supervision and the subsequent freedom from mandatory National Environmental Policy Act (NEPA) procedures[39] decreases the time and cost historically associated with entering into energy agreements with tribes.[40] In theory, this should act as an incentive for outside businesses to contract with tribes for energy partnerships.[41]

The Act has had measured success in attaining its dual goals of tribal energy development and tribal self-determination. The DOE, under the mandates of both the 2005 Act and its 1992 predecessor, distributed a total of $16.5 million dollars in grant money to fund ninety-three tribal energy projects from 2002 to 2008.[42] Of these projects, the vast majority pertain to renewable-energy development.[43] Yet the grant money, typically ranging from $100,000 to $300,000, often funds feasibility studies rather than the actual construction and development of these renewable resources.[44] Of thirty-one DOE-funded wind projects, only three of the grants went towards actual construction of wind turbines; the remaining grants funded feasibility studies, preconstruction activities, and demonstration projects.[45]

The DOI's Office of Indian Energy and Economic Development (IEED) boasts current involvement with more than fifty tribal projects relating to renewable-energy generation.[46] However, its role in these projects appears largely grounded in providing information and technical expertise.[47] Additionally, while the IEED does provide loan guarantees specifically for energy projects,[48] the total appropriations for the DOI's entire Indian loan-guarantee program in 2008 were

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39. Although TERA tribes are no longer subject to NEPA requirements, tribes must implement their own environmental review process under the Act's requirements for attaining TERA status. *See id.* § 3504(e)(2)(C).

40. *See generally* Judith Royster, *Indian Natural Resources Development: Tribal Energy Resource Agreements Under the Energy Policy Act of 2005*, ABA TRENDS, May–June 2006, at 8, 8–9 (explaining the structure and policy behind TERAs).

41. *See* Andrea S. Miles, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities*, 30 AM. INDIAN L. REV. 461, 463–64 (2005–2006) (describing the purported benefits of TERAs to tribes and businesses).

42. *Tribal Energy Program: Funding History*, U.S. DEP'T OF ENERGY, http://apps1.eere.energy.gov/tribalenergy/funding_history.cfm (last updated Sept. 11, 2008).

43. *Tribal Energy Program: Projects by Type of Technology*, *supra* note 30.

44. *Tribal Energy Program: Projects by Type of Award*, U.S. DEP'T OF ENERGY, http://apps1.eere.energy.gov/tribalenergy/projects_type.cfm (last updated Mar. 27, 2007).

45. *Id.*

46. OFFICE OF INDIAN ENERGY AND ECON. DEV., U.S. DEP'T OF THE INTERIOR, ENERGY AND MINERAL DEVELOPMENT 3, *available at* http://www.bia.gov/idc/groups/xieed/documents/text/idc008227.pdf (last visited Aug. 28, 2010).

47. *Id.* at 2 (describing the duties of the IEED's Division of Energy and Mineral Development as "provid[ing] the best technical and economic advice and services").

48. *See generally* OFFICE OF INDIAN ENERGY AND ECON. DEV., U.S. DEP'T OF THE INTERIOR, CAPITAL INVESTMENT: HELPING GUARANTEE THE ECONOMIC FUTURE OF INDIAN COUNTRY (2008), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001933.pdf.

only slightly over $6 million.[49] This is a modest amount considering that these appropriations must fund *all* types of projects in Indian Country, leaving only a small portion available for renewable-energy development. Such funding levels are inadequate when examined against the backdrop of the actual costs of renewable-energy development. In 2007, most commercial-scale wind turbines (averaging a capacity of two megawatts) cost roughly $3.5 million dollars *each* to install.[50] Solar installation costs vary; one company installing a 1.1 megawatt solar field array estimates initial costs of approximately $5 million,[51] while a much larger proposed project of 17.1 megawatts has forecasted installation costs of $60 million.[52] Commercial-scale biomass projects are also hugely expensive, with installation costs adding up to tens of millions of dollars.[53] While there is much cost variability among and within renewable-energy technologies, it is clear that the amount of investment capital needed far exceeds the federal grant money available.

Unfortunately, the IEED's TERA program has produced unsatisfactory results. Not a single tribe, as of present, has successfully attained a TERA.[54] This may partially be a consequence of the multi-step TERA application requirements, including: submission of documentation demonstrating a tribe's financial and personnel capacity to administer energy agreements and programs, establishment of a tribal environmental review process, and consultative meetings with the Director of the Indian Energy and Economic Development Office.[55] Perhaps more problematic are conflicting sentiments within tribes over distancing tribal energy development from federal government protection, an issue strongly debated among Indian law practitioners and scholars.[56] So, although tribes could arguably benefit

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49. OFFICE OF BUDGET, U.S. DEP'T OF THE INTERIOR, 2006, 2007, 2008 BY ACCOUNT 2 (Mar. 20, 2007), http://www.doi.gov/budget/2008/data/pdf/DOIAccounts.pdf.

50. *How Much Do Wind Turbines Cost?*, WINDUSTRY, http://www.windustry.org/how-much-do-wind-turbines-cost (last visited Jan. 6, 2010).

51. *See Dayton Power and Light Announces 9,000 Solar Panel Farm in Ohio*, SOLARPOWER.ORG (Dec. 21, 2009), http://www.solarpower.org/News/12210901-dayton-power-and-light-announces-9,000-solar-panel-farm-in-ohio.aspx.

52. *See Constellation Energy to Build 17.1-Megawatt Solar Power Farm*, SOLARPOWER.ORG (Dec. 15, 2009), http://www.solarpower.org/News/12150901-constellation-energy-to-build-17.1-megawatt-solar-power-farm.aspx.

53. *See, e.g.*, Erin McCarty, *Update: New Biomass Project Will Power Homes and Warm Springs Forest Products Enterprise*, OREGONIAN (May 31, 2007, 2:10 PM), http://blog.oregonlive.com/business/2007/05/new_biomass_project_will_power.html (discussing a 15.8 megawatt biomass plant projected to cost $46 million).

54. Telephone Interview with Ashley Stockdale, Program Specialist, IEED, in Washington, D.C. (June 21, 2010).

55. *See* 25 C.F.R. § 224.53, 58, 63(c) (2009).

56. *Compare* Miles, *supra* note 41, at 463 (discussing TERA proponents' argument that TERAs allow tribes to achieve greater self-sufficiency and provide tribes with the ability to make energy decisions based on what they believe is best for their people), *with id.* at 463–64 (explaining TERA opponents' concern over the lack of federal oversight and the potential impact on federal trust responsibilities towards tribes). *See also* Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008) (evaluating the trade-offs that come with the increased sovereignty conferred by TERAs);

from the decreased federal oversight that TERAs would provide, it appears that this mechanism, on its own, is insufficient to truly stimulate renewable development.

In summary, the Act has provided for federal programs that encourage the development of tribal renewable resources, yet its policy goals of tribal economic and energy development and tribal self-determination have not yet been met. In part, this may be a function of inadequate appropriations for the Act's provisions.[57] An alternative explanation, however, is that the Act fails to address substantial obstacles to tribal renewable-energy development. The most significant obstacles can be generally divided into two categories: (1) tribal inability to take advantage of federal tax incentives in the renewable-energy industry and (2) unfavorable case law concerning tribal civil jurisdiction.

III. LEVELING THE PLAYING FIELD: TRIBES' INSTITUTIONAL DISADVANTAGE IN THE RENEWABLE-ENERGY INDUSTRY

While some tribes are fortunate enough to have investment capital readily available, most tribes are not capable of financing large-scale renewable-energy projects on their own.[58] Furthermore, most tribes do not have the requisite expertise and experience in the field of renewable energy to complete these projects independently.[59] For these reasons, it is imperative for tribes to have the ability to form mutually beneficial partnerships with outside business interests.[60] Unfortunately, the existing legal framework in which these partnerships arise fails to properly incentivize non-tribal businesses to work with tribes. One specific problem area is the inability of tribes to utilize or transfer federal tax credits for

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Telephone Interview with Ashley Stockdale, *supra* note 54 (citing hesitation on the tribes' side as the main reason why TERA applications falter).

57. *See* LeBeau, *The Green Road Ahead*, *supra* note 11, at 43.

58. *See, e.g.*, HARVARD PROJECT, *supra* note 10, at 130–31 (explaining the problem of limited capital in Indian country, particularly due to tribes' inability to collateralize trust land assets and the minimal existence of on-reservation banking facilities); 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, 454 (2009) (discussing the need for private investors in tribal wind generation, primarily because they provide the necessary capital); Mark Shahinian, *The Tax Man Cometh Not: How the Non-Transferability of Tax Credits Harms Indian Tribes*, 32 AM. INDIAN L. REV. 267, 291 (2007–2008) (stating that "Indian Country suffers from a $50 billion shortfall in capital investment").

59. *See, e.g.*, Garry et al., *supra* note 58, at 454 (emphasizing that, while not always desirable, private investors are necessary in order to provide valuable expertise); *see also* HARVARD PROJECT, *supra* note 10, at 159 (highlighting tribal difficulties in developing and managing large natural resource projects due to both lack of capital and expertise).

60. While some of these obstacles may be overcome by simply leasing tribal land to outside business interests, tribal governments have compelling reasons for desiring an ownership stake in all reservation projects. *See, e.g.*, Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, NAT. RESOURCES & ENV'T, Summer 2008, at 25, 26 (reasons include the development of positions for tribal professional staff, creation of a management team with a long-term stake in the community, and increased profitability of the business to the tribe).

renewable energy. Additionally, inconsistent and unfavorable case law concerning state versus tribal jurisdiction creates further challenges, particularly where this case law provides for double taxation of non-Indian activities on the reservation. Although these obstacles have not entirely foreclosed tribal–non-tribal partnerships, they foster partnership agreements disadvantageous to tribal interests since tribes must compensate for these shortcomings.

A. Tribes Are Unable to Take Advantage of Federal Incentives in the Renewable Industry

Recent federal policy has expressly encouraged the development of alternative energy by providing industry participants with tax-related incentives. One of these incentives is the federal production tax credit (PTC), which provides renewable-energy generators with set tax credits for each kilowatt-hour of energy produced.[61] The PTC has been a driving force behind the growth of the wind energy industry and has also played an important role in the development of other renewable technologies.[62] Additional types of federal incentives include investment tax credits (ITC) and accelerated depreciation rates (ADR). The ITC has been used in the solar industry to provide purchasers of solar equipment with a tax credit for 30% of the up-front investment costs.[63] In contrast, ADR functions to allow earlier depreciation deductions, providing favorable tax treatment based on the time-value of money.[64] Collectively, these various forms of federal incentives have had a major impact on the growth of the renewable-energy sector.

Unfortunately for tribes, these tax credits put them at a competitive disadvantage with other industry players since tribal governments and tribal corporations are insulated from federal taxation.[65] Therefore, tribes are unable to utilize renewable-energy credits that would otherwise be available. This has major implications because in many of these industries, the tax incentives are central to a project's profitability.[66] Although it may seem counterintuitive that a non-taxpaying entity would be competitively disadvantaged compared to a taxpaying entity, examinations of the issue have repeatedly demonstrated this fact.[67] This is

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61. *See Production Tax Credits for Renewable Energy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/solutions/big_picture_solutions/production-tax-credit-for.html (last updated Apr. 22, 2009).

62. *See id.*; *see also Policy, Transmission & Regulation: Production Tax Credit*, AM. WIND ENERGY ASS'N, http://www.awea.org/policy/ptc.html (last visited Aug. 31, 2010) (emphasizing the central importance of the PTC for incentivizing wind power development).

63. *See Production Tax Credits for Renewable Energy*, *supra* note 61.

64. *See* NORTH CAROLINA SOLAR CENTER, TAX INCENTIVES: COMMERCIAL SOLAR 3 (2009), *available at* http://www.ncsc.ncsu.edu/admin/include/_upload/media/docs/factsheets/Incentives_Commercial_Solar_2.pdf (explaining the federal Modified Accelerated Cost-Recovery System for businesses employing solar, wind, and geothermal technologies).

65. *See* Rev. Rul. 67-284, 1967-2 C.B. 55.

66. *See supra* text accompanying notes 61–64.

67. *See* Garry et al., *supra* note 58, at 455–56 (highlighting the importance of PTCs in allowing wind power to compete with less expensive coal production); KEN HAUKAAS, OWL FEATHER WAR BONNET WIND FARM: FINAL REPORT 5 (2007), *available at*

primarily because the tax credits available to a tax-paying entity often exceed the actual taxes paid on a renewable-energy project. Any residual tax credit can then be applied to an entity's broader tax liability. Consequently, tribal alternative energy endeavors are less competitive than their private counterparts *solely* on the basis of these tax credits.[68]

This creates particular problems when negotiating partnership agreements with outside businesses. Tribes generally prefer an ownership interest in renewable-energy projects to a nominal or land–lessor interest.[69] Yet it is difficult to negotiate for a high level of tribal control when every percentage of tribal ownership means a proportionate reduction in the amount of available tax credits for the business partner.[70] Alternatively, if these credits were transferable both parties could benefit: the tribe could leverage its transferable tax credits in order to receive a greater ownership interest and/or a higher percentage of the annual revenue, while the private partner could utilize all the potential tax credits for the project, reducing its broader tax liability.[71] Unfortunately, at this time, such tax credits are non-transferable.

Solutions to this problem have developed on the federal and individual level, yet have largely fallen short. The federal government attempted to level the playing field for governments (including tribes) by enacting Clean Renewable-Energy bonds (CREBs), which function as a type of interest-free loan for financing certain types of energy projects.[72] However, inadequate appropriations for these bonds have weakened the effectiveness of this measure.[73] Individual parties, meaning tribes and their potential business partners, have also formulated their own solution to this problem, primarily through "flip-agreements." This arrangement provides the business partner with almost complete ownership of the project for a set initial term (coinciding with tax credit availability) and then flips to majority ownership by the tribe for the remainder of the project.[74] The

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http://apps1.eere.energy.gov/tribalenergy/pdfs/rosebud03final.pdf ("[T]he economics of building a wind farm and the cost to produce a kilowatt of energy this way, without using the Production Tax Credit, is liken to throwing one[']s money down a deep hole, without any of it coming back to you."); Shahinian, *supra* note 58, at 275–78 (examining this phenomenon and highlighting some of the critical factors).

68. *See* Shahinian, *supra* note 58, at 275–78.

69. *See, e.g.*, *supra* note 60.

70. *See infra* Part IV.A (discussing this problem in the context of the Campo Kumeyaay Nation's wind energy development).

71. For additional analysis, see *infra* Part V.A.

72. *See generally* NAT'L RURAL ELECTRIC COOP. ASS'N, CLEAN RENEWABLE ENERGY BONDS: COMPARABLE RENEWABLE GENERATION INCENTIVES (2006), *available at* http://www.nreca.org/Documents/PublicPolicy/FFCleanRenewableEnergyBond.pdf (describing how CREBs work and comparing them with the PTC); LeBeau, *The Green Road Ahead*, *supra* note 11, at 40–41 (evaluating the efficacy of CREBs in counteracting the comparative disadvantage created by renewable-energy tax credits, and ultimately finding this solution unsatisfactory).

73. *See* Connolly, *supra* note 60, at 27 (describing the blatant inadequacy of funding for the CREB program); LeBeau, *The Green Road Ahead*, *supra* note 11, at 41.

74. *See* Connolly, *supra* note 60, at 27. Connolly sets out example parameters for a "flip" agreement where the non-tribal business initially owns 95% of the project for the

advantage of this arrangement is that it allows the non-tribal business partner to utilize federal tax credits while these credits are still available.[75] Yet it seriously limits the ability of the tribe to control and profit from the project for a substantial length of time.

Overall, neither of these approaches rectify the tax incentive disparity in an effective and long-term manner.[76] Even if Congress provided sufficient appropriations for the Clean Renewable-Energy bonds—and that is a big if—multiple problems persist. First, if tribal energy projects are funded largely or entirely by federal monies, it would result in increased costs and delays. This is due to the added bureaucracy of channeling funds through various federal offices before they finally reach a tribe. Additionally, utilizing federal funds in this manner would undoubtedly invoke NEPA[77] compliance requirements, such as environmental impact studies that span years and often consume hundreds of thousands of dollars before completion.[78] Yet another issue with relying solely on Clean Renewable-Energy bonds is that it forecloses the opportunity for tribes to work with non-tribal private business partners, an essential mechanism for the transfer of industry knowledge and expertise as well as for enabling tribes to expand their financial resources beyond the federal government. While these problems are addressed by the alternative of flip-agreements, these agreements essentially relegate tribes to the sidelines for the first decade or so of the project, leaving tribal governments with little control over the decisions, management, and future of their on-reservation projects.[79]

B. Court Decisions Have Consistently Worked Against Tribal Jurisdictional Interests

Another major roadblock in the path to tribal energy partnerships is the jurisdictional rigmarole created by the United States Supreme Court—a direct result of nonexistent federal statutory guidance. The civil jurisdiction that tribes have over non-members on the reservation is determined by a series of judicially-created tests with outcomes more reflective of the Justices' personal views of tribal sovereignty than of any underlying, coherent legal doctrine.[80] Virtually anyone

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first ten years in order to take advantage of PTC and ADR incentives and the tribe only holds 5%. After the ten-year mark, 95% ownership flips to the tribe, and 5% to the non-tribal business, for the duration of a twenty-year agreement. *Id.*

75. *See id.*

76. *See, e.g.*, *id.* at 27–28; LeBeau, *The Green Road Ahead*, *supra* note 11, at 41; Shahinian, *supra* note 58, at 279–82.

77. National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2006).

78. *See* Dean B. Suagee, *The Application of the Natural* [sic] *Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377, 387 (1991) (highlighting the BIA's initial hesitancy to apply NEPA because of the administrative costs and delays associated with environmental impact statements).

79. *See supra* text accompanying notes 74–75.

80. *See generally* Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999). Frickey, who explores modern tribal sovereignty, concludes that in cases concerning tribal jurisdiction, "outcomes turn on judicial presumptions, rather than legislative resolutions, concerning the question whether tribes are sovereigns or merely

who has dealt with Indian civil jurisdiction law can attest to its notorious complexity and amorphous set of "rules."[81] Furthermore, this judicial labyrinth must be successfully navigated regardless of whether a tribe is attempting to exert its regulatory authority or exercise civil adjudicatory jurisdiction over non-members.[82] Perhaps more troublesome are the clearer aspects of civil jurisdiction in Indian Country; primarily, the Court's sanctioning of state and local government taxing authority over the same non-members for the same activities on the reservation as tribes may tax.[83] For reasons discussed below, this legal framework creates formidable obstacles in the eyes of many tribes and potential business partners.

The case law concerning tribes' ability to tax and regulate non-members acting within reservation boundaries has converged over time into a single set of rules, commonly known as the *Montana* test.[84] This test, based on categorical distinctions of race and land status, asserts that tribes may not ordinarily exercise civil jurisdiction over non-Indians acting on fee simple lands within the reservation.[85] There are two exceptions to this rule: (1) where non-Indians have entered into consensual relations with the tribe or its members; and (2) where the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[86]

It was formerly understood that tribes have presumptive civil authority over non-members acting on Indian trust land or Indian-owned allotted lands.[87]

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membership organizations. Thus, it is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty." *Id.* at 7; *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1574 (1996) (arguing that the Supreme Court has begun to "abandon[] entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests").

81. *See, e.g.*, Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 783–85 (1996) (delineating the complicated issues in determining tribal jurisdiction over non-members); Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 334 (1989) (describing the difficulty of determining civil jurisdiction in Indian Country where this area of law is governed by unprincipled case law, rather than federal statute).

82. *See* Strate v. A-1 Contractors, 520 U.S. 438, 439–40 (1997). *Strate* equates the scope of tribal civil adjudicatory jurisdiction with the scope of its regulatory jurisdiction. *Id.* The practical effect is when the court finds that a tribe lacks regulatory jurisdiction over a person or activity, the tribe then automatically loses civil adjudicatory jurisdiction over that person or activity. *See id.*

83. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

84. Montana v. United States, 450 U.S. 544 (1981). *Montana* addressed the issue of whether tribes have inherent sovereign authority to regulate non-Indian hunting and fishing on reservation land owned in fee simple by non-members of the tribe. *Id.* at 557. The court found that tribes presumptively lack this authority. *Id.* at 566–67.

85. *See generally Montana*, 450 U.S. 544.

86. *Id.* at 565–66.

87. *See, e.g.*, *Strate*, 520 U.S. at 454 ("[I]n accord with *Montana* . . . tribes retain considerable control over nonmember conduct on tribal land."); New Mexico v. Mescalero

Under that viewpoint, the *Montana* test only applies in circumstances where non-members act on *non-Indian owned land held in fee simple* within the reservation boundaries.[88] Accordingly, a tribe would not doubt its authority over the often substantial portion of its reservation that qualifies as trust or Indian-held land. But recent Supreme Court decisions have cast doubt upon that understanding. It is now possible that *Montana* could apply whenever a tribe asserts civil jurisdiction over a non-member on the reservation, regardless of the ownership status of the land.[89] The practical result of such a legal reality would be that any time a tribe attempted to exert civil authority over a non-Indian—whether in order to enforce environmental regulations, recoup tribal taxes, or exercise civil adjudicatory jurisdiction—the tribe's authority would be vulnerable to a case-by-case determination by the federal courts.[90] This, in turn, would cast enormous doubt on the legitimacy of tribal authority and could lead to severe limitation—or, in the worst case scenario—utter paralysis of tribal governmental functions.

At present, most practitioners assume that the categorical rule by which tribes may regulate non-Indians acting on tribally-held land remains intact. However, the shift in presumptions and rationales underlying Supreme Court tribal jurisdiction cases—such as the degradation of the understanding that tribes have sovereign authority over all people, Indian and non-Indian, acting on tribal land—illustrates the unpredictability of this field of law and the recent trend of

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Apache Tribe, 462 U.S. 324, 330–31 (1983) (emphasizing that *Montana* left intact tribes' ability to regulate hunting and fishing "as to 'lands belonging to the Tribe or held by the United States in trust for the Tribe'"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (affirming tribal authority to tax non-Indian oil and gas lessees operating on tribal trust land).

88. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653–54 (2001) (holding that the tribe's authority to tax nonmembers "reaches no further than tribal land," unless the tribe is able to prove a *Montana* exception).

89. *See* Nevada v. Hicks, 533 U.S. 353 (2001) (holding that the tribe lacked civil adjudicatory jurisdiction over state police officers even though the conduct at issue occurred on tribal land). While this case marks a distinct shift from prior case law which found land-ownership status dispositive of tribal jurisdiction, it is possible that the holding is limited to situations involving state officials. *See id.* at 396 (O'Connor, J., concurring in part) (framing the majority's holding as a per se rule prohibiting tribal jurisdiction over non-members on tribal land whenever the non-members are state officials); *see also* Judith V. Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631 (2006) (criticizing the Supreme Court's dramatic shift towards making tribal jurisdiction over non-members on tribal lands a case-by-case determination).

90. Such a hypothetical is not merely alarmist conjecture. The Supreme Court's growing discomfort with upholding tribal jurisdiction over non-Indians is extensively documented. *See, e.g.*, Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 380 (2003) (attributing the Court's discomfort with tribal authority over non-Indians as the driving force behind the Court's opinions dealing with diminishment of reservation boundaries and lack of tribal jurisdiction); *see also supra* note 80. Furthermore, the Court's recent language provides a striking—and likely irreconcilable—contrast with long-held case law. *Compare* cases cited *supra* note 87, *with* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2718 (2008) ("[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders.").

unfavorable decisions toward Indian sovereign interests.[91] In the mind of a potential business partner, this situation can cultivate uncertainty as to which regulatory and adjudicative rules will apply. Such uncertainty seriously discourages the formation of tribal energy partnerships with private actors.[92]

Perhaps even more problematic than this legal uncertainty is Supreme Court case law that grants states tax authority over many business entities operating on reservation land. The Supreme Court has held that states may tax any non-Indian operating in Indian country unless the federal government has preempted the tax.[93] This often results in the scenario of double taxation: concurrent tribal and state taxation of the same activity.[94] Double taxation is vexatious for tribal governments because it not only deters potential outsiders from conducting business on reservations, but it serves to undermine tribal sovereignty by limiting tribes' implementation of their own taxes.[95] Furthermore, it is a problem that arises in many areas of the tribal economy—retail sold in on-reservation malls, minerals extracted from on-reservation leaseholds, cigarettes purchased from on-reservation gas stations, and so on.[96]

While the ability of states to tax on-reservation activities is ostensibly checked by a unique type of preemption balancing test, weighted toward tribal–federal interests, this check appears to have been watered down by the Court over time. Originally, Indian preemption cases balanced federal–tribal interests against state interests by focusing on whether there was extensive federal regulation of the taxed activity[97] and whether the taxed revenue was derived from value generated

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91. *See generally* LeBeau, *Reclaiming Reservation Infrastructure*, *supra* note 11 (criticizing the judicially-created regulatory structure in Indian Country as a hindrance to energy development).

92. *See id.* at 250–51 (describing how regulatory uncertainty discourages growth); *see also* HARVARD PROJECT, *supra* note 10, at 101–03 (discussing how jurisdictional complexity on reservations hampers investment).

93. *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (holding that a state may tax non-Indians operating in Indian country unless the federal government has preempted the tax).

94. *See generally* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITTSBURGH TAX REV. 93, Part II.F (discussing the frequency of double taxation in Indian country and its associated problems). The double taxation imposed by tribes and states is in addition to standard federal taxes imposed on all U.S. citizens. *See also infra* Part IV.A (demonstrating the problem of double taxation in the case of the Campo Kumeyaay Nation).

95. *See* Anna-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL'Y 349, 351–52 (2004) ("Overlapping state taxes reduce the revenue potential of tribal taxes, frustrate tribal regulatory intentions, and generally impede the tribes' exercise of their inherent sovereign power to tax.").

96. *See* Cowan, *supra* note 94, at 119, 121, 131.

97. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148 (1980) (finding the federal regulatory scheme sufficiently pervasive to preclude the additional burdens a state tax would impose).

on the reservation.[98] If one or both of these criteria were sufficiently satisfied, the state tax was preempted. *Cotton Petroleum Corp. v. New Mexico*[99] changed the nature of the game. There, the state of New Mexico imposed oil and gas production taxes over a non-tribal business operating on reservation land.[100] The Indian Mineral Leasing Act of 1938 already governed this activity, as did existing tribal severance taxes on gas and oil production.[101] Furthermore, the tribal tax revenues clearly derived from value generated on the reservation, i.e., on-reservation oil and gas wells. Nonetheless, the Court upheld New Mexico's tax, much to the bewilderment of the dissent, which found the factual record "more than adequate to demonstrate the pre-emptive force of federal and tribal interests."[102]

The consequences of double taxation in tribal renewable-energy development are multifold.[103] The ability to bring in non-tribal business partners is often an essential component of renewable-energy projects,[104] but the threat of double taxation discourages investment in reservation business ventures.[105] In order to compensate for their partners' tax-related hardship, tribes often enter into

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98. *See, e.g.*, *Colville*, 447 U.S. at 156–57 (1980) (emphasizing that a tribe's interest is strongest when the tax revenues are derived from value generated on the reservation).

99. 490 U.S. 163 (1989).

100. *Id.* at 168–69.

101. *Id.* at 167.

102. *Id.* at 193 (Blackmun, J., dissenting). The majority's reasoning emphasized that (1) the Indian Mineral Leasing Act does not expressly preempt state taxation and (2) the federal policy of promoting Indian mineral development to provide tribes with badly needed revenue did not indicate a Congressional intention to remove all profit barriers from this activity. *Id.* at 177–80 (majority opinion). This rationale is flawed and incongruous with results from prior Indian preemption cases. *See id.* at 195–96 (Blackmun, J., dissenting) (explaining that where Congress is silent, the Court has historically employed a canon of construction that requires statutes to be construed liberally in favor of Indians); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (similar fact situation but with the Court finding the state tax preempted); *see also* Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 74 (2008) (describing the aftermath of *Cotton Petroleum* and its reputation as the "death of preemption"); Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, MICH. ST. L. REV., Winter 2007, at 841, 870–71 (describing *Cotton Petroleum*'s abandonment of the traditional preemption analysis—which focused on the existence of a persuasive federal presence through statutes, regulations, and federal activity—in favor of explicit statutory exemption of state taxes).

103. Interestingly, the majority in *Cotton Petroleum* even admitted that the co-existence of state and tribal taxes may have an "effect on the demand for on-reservation leases, the value to [tribes] of those leases, and the ability of [tribes] to increase [their] tax rates." 490 U.S. at 186–87.

104. *See* Cowan, *supra* note 94, at 121–22 (describing how double taxation frequently comes into play when tribes want to exploit their natural resources and need the expertise and funding of outside businesses); *see also* Garry et al., *supra* note 58, at 454.

105. Cowan, *supra* note 94, at 95 & n.9. The deterrent effect of double taxation, in conjunction with other reservation-specific factors, on outside investment is so palpable that some tribal members have labeled it the "Indian differential." *Id.* at 95.

agreements that are unfavorable to tribal interests.[106] Furthermore, tribes are put in an untenable position with regard to their own taxation rights. If a tribe imposes its own taxes over on-reservation businesses, it creates much needed revenue for government services. Yet it incurs the risk of discouraging outside business from operating on the reservation.[107] Alternatively, a tribe could forgo its own taxes in order to draw in non-tribal businesses; however this would only exacerbate the funding deficits that plague tribal governmental services.[108] In other words, tribes face a catch-22 that forces them to choose between pursuing tribal sovereignty and pursuing reservation economic development—a situation much at odds with the purported goals of the Indian Tribal Energy Development and Self-Determination Act.[109]

IV. OBSERVING THESE LEGAL IMPEDIMENTS IN ACTION: CASE STUDIES OF TRIBAL RENEWABLE-ENERGY DEVELOPMENT

The difficulties highlighted in the previous sections are not theoretical quagmires posed by distant academics; they are the very real obstacles that tribes and their leaders face constantly in their efforts to provide for the economic and environmental well-being of their peoples. To demonstrate these issues in play, this Note will discuss three recent examples of tribal renewable-energy efforts: the Campo Kumeyaay Nation in southern California, the Confederated Tribes of the Warm Springs Reservation in central Oregon, and the Rosebud Sioux Tribe in South Dakota. These case studies illustrate how non-transferability of federal tax incentives and double taxation affect tribal efforts to promote wind and biomass energy development.

A. The Campo Kumeyaay Nation—Wind Energy

In San Diego County, the Campo Kumeyaay Nation resides on a twenty-five square mile reservation.[110] Historically, the Campo Tribe has encountered many obstacles in its pursuit of economic stability.[111] In the early 1990s, however, non-tribal entities began conducting research into the reservation's wind power potential.[112] Serious efforts to transform this preliminary data into concrete wind energy facilities did not arise until a decade later, when a renewable-energy company initiated negotiations with the Tribe.[113]

While the Campo people were eager to actualize their wind energy potential, they were confronted with the difficult question of how the Tribe could and should be involved in the project.[114] According to Michael Connolly, former treasurer for the Campo Nation, the Tribe pursues an ownership stake in all

106. *Id.* at 121–22.
107. *Id.* at 99 ("One of the tenets of sovereignty and self-government is the ability to raise revenue.").
108. *See id.*
109. *See supra* note 27.
110. Connolly, *supra* note 60, at 25.
111. *Id.*
112. *Id.*
113. *Id.* at 25–26.
114. *Id.* at 26.

reservation projects as a matter of policy.[115] In this case, however, that goal was countered by financial realities—particularly the central importance of utilizing federal tax incentives—and the Tribe eventually agreed to the less desirable position of land lessor.[116]

In 2005, the Tribe's business partner completed construction on twenty-five two-megawatt wind turbines.[117] Although the Tribe enjoys an attractive lease rate due to its site-specific advantages, this revenue pales in comparison with the large amount of county tax revenue generated by the project.[118] The tribal government provides virtually all services, including fire, road maintenance, water, and environmental protection, for every Indian and non-Indian on the reservation.[119] Yet current legal precedent allows the County of San Diego to receive a half-million dollars in annual tax revenue from the on-reservation project, without any revenue-sharing agreement with the Tribe, and in spite of the fact that the County does not contribute any of its own on-reservation services.[120]

The Campo Kumeyaay Nation aspires to further develop its wind resources under the full or partial ownership of the Tribe.[121] But in order to so, it has identified formidable (and familiar) roadblocks that must be overcome, namely non-transferability of tax credits and double taxation.[122] The Tribe specifically recommends an amendment to the tax rules allowing governments, including tribal governments, to transfer their tax credits.[123] Transferability would make it much more financially feasible for the Tribe to enter into partnership agreements that allow it to maintain an ownership interest in the project.[124] It would also help alleviate the second problem of double taxation, because the greater the tribal ownership stake, the less state and local governments are able to tax the project.[125]

B. The Confederated Tribes of Warm Springs—Biomass Energy

The Confederated Tribes of the Warm Springs Reservation, located in central Oregon, consist of 4000 members from the Warm Springs, Wasco, and Paiute tribes.[126] In recent years, the tribal economy has centered on its natural resources, as evidenced by its successful forest products and hydropower

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115. *Id.*

116. *Id.* at 25–26. Connolly explains that over 50% of the profitability of a wind energy project can be directly tied to federal tax incentives, a major factor in the Tribe's decision to simply lease the project land. *Id.* at 25.

117. *Id.* at 27.

118. *Id.* at 25–26.

119. *Id.* at 28.

120. *Id.* at 25, 28.

121. *Id.* at 27.

122. *Id.*

123. *Id.*

124. *Id.* Connolly proposes that under this type of legal scheme, the Tribe could transfer the PTC and ADR tax incentives to its partner in return for a higher share of the sale revenue. *Id.*

125. *Id.* at 28.

126. *Tribal Community*, CONFEDERATED TRIBES OF WARM SPRINGS, http://www.warmsprings.com/warmsprings/Tribal_Community/ (last visited Jan. 13, 2010).

businesses.[127] Its newest endeavor is a proposed biomass energy plant with the capacity to generate 15.8 megawatts of power.[128] The Confederated Tribes have touted the various benefits of their project: on-reservation economic development, particularly through the creation of jobs; improved forest and environmental health; and an electricity supply for 15,000 homes.[129]

Although any project of this nature and scale is likely to face multiple obstacles, the availability of investment capital has played a key role in the Warm Springs project. Recent projections place the biomass facility's cost in excess of $40 million.[130] Because tax incentives are crucial to overcoming these investment costs, the Confederated Tribes have made it a priority to partner with a non-governmental entity that *can* use these incentives.[131] In 2007, the Confederated Tribes were successful in bringing in some outside investment, including a $5 million dollar investment by the non-profit Energy Trust of Oregon.[132] They also entered into a business partnership[133]—apparently following the "flip-agreement" ownership structure[134]—with an investment firm, which allowed the project to apply for essential federal tax credits.[135] Unfortunately, this arrangement collapsed following the economic recession.[136] The project is currently stalled, although the

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127. *Id.*; *Tribal Investments*, CONFEDERATED TRIBES OF WARM SPRINGS, http://www.warmsprings.com/warmsprings/Tribal_Community/Tribal_Investments/ (last visited Jan. 13, 2010).

128. *See* WARM SPRINGS BIOMASS PROJECT LLC, WARM SPRINGS BIOMASS TO ELECTRICITY PROJECT 2 (2007), *available at* http://www.oregonapem.org/pdf/Cal_Mukumoto_WarmSprings_Biomass_Final.pdf.

129. *See id.* at 2, 17–21.

130. *See id.* at 37.

131. *See id.* at 39; LARRY POTTS, DEVELOPMENT OF A BIOMASS CO-GENERATION FACILITY AT WARM SPRINGS FOREST PRODUCTS 17–18 (2006), http://www.forestprod.org/smallwood06potts.pdf (discussing the importance of federal production tax credit); *see also CEO of Bend, Ore.-Area Forest-Products Firm Plans to Build Biomass Power Plant*, THE ELECTRICITY FORUM (May 2005), http://www.electricityforum.com/news/may05/Bendbiomassplant.html (explaining that if the tribally-owned company could locate a business partner, it could then be able to qualify for business energy tax credits that would cover up to 35% of the biomass plant's costs).

132. *See* McCarty, *supra* note 53 (discussing a 15.8 megawatt biomass plant that is projected to cost $46 million).

133. *See id.* (explaining that the project is to be developed and owned by both the Confederated Tribes and the financial partner Aequitas Capital Management of Lake Oswego).

134. *See* CAL MUKUMOTO, WARM SPRINGS FOREST PRODUCTS INDUSTRIES, A CASE STUDY: WARM SPRINGS 48–51 (2006) http://apps1.eere.energy.gov/tribalenergy/pdfs/0610review_10mukumoto.pdf (describing the proposed ownership structure).

135. Jim Manion, *Change Agents: Warm Springs, Wasco and Paiute Tribes: Leaving a Legacy for Future Generations*, 2 LIVEBETTER MAG., no. 2, 2008 at 8, *available at* http://livebettermagazine.com/eng/magazine/article_detail.lasso?id=64 (describing the project's permitting as nearly complete, with the Tribe awaiting federal PTC reauthorization).

136. *See* Kate Ramsayer, *Green Projects May Get Green Light in Stimulus*, BEND BULL., Feb. 12, 2009 (quoting Calvin Mukuomoto, project manager, as lamenting that "[w]e were so close" before the financing of the project fell through).

Confederated Tribes are hopeful that investors' interest will rise as biomass generation garners attention in the national energy-policy debate.[137]

C. The Rosebud Sioux Tribe—Wind Energy

One of the poorest tribal populations in the United States, the Rosebud Sioux Tribe in South Dakota, has been pursuing renewable-energy development through its Owl Feather War Bonnet wind energy project.[138] The Tribe's express goal for this project is to stimulate the tribal economy while exporting electricity to meet the United States' enormous demand.[139] The proposed wind farm is large in scale: a thirty megawatt facility capable of generating enough electricity to support 7500 homes.[140]

While this project is still in its beginning phases, the Tribe has already begun to identify and address many of the financial and tax-related issues that burden other tribes attempting to develop renewable-energy projects.[141] Like the Campo Kumeyaay Nation, the Rosebud Sioux Tribe is cognizant of its need to bring in private investors. This need arises from the fact that the Tribe lacks the necessary capital and specialized expertise to conduct this sort of project on its own.[142] Likewise, the determinative role of the federal PTC in making wind energy economically feasible means that the Tribe must bring in private entities.[143] This reality has encountered resistance within the Tribal Council and among tribal members, who often fear "another developer coming to the Tribe and taking it for a ride."[144] Even so, the Tribe has arrived at a plan modeled after the "flip-agreement" described in Part III.A.[145] Under this structure, the private investor will hold the ownership interest and receive all profits from electricity sales during the first ten years of the project.[146] After this period—during which the PTC will have been exhausted—the Tribe will assume ownership.[147] This arrangement is certainly not ideal for the Rosebud Sioux, who would prefer greater ownership and control for the duration of the project, but it is a necessary consequence of present financial realities.[148]

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137. *See id.*; *see also* Keith Chu, *Shift in Congress on Biomass: Legislation Would Allow More Use of Biomass to Create Energy*, BEND BULL., May 25, 2010 (remarking that problems financing the project have held up the Warm Springs biomass proposal).

138. *See* Garry et al., *supra* note 58, at 448–49; *see also* HARVARD PROJECT, *supra* note 10, at 118 (showing that the Rosebud Sioux is third among the ten tribes with lowest per capita income).

139. Garry et al., *supra* note 58, at 449.

140. *Id.*

141. *See generally id.*

142. *Id.* at 454.

143. *See id.* at 455–56; *see also* HAUKAAS, *supra* note 67, at 4.

144. *See* Garry et al., *supra* note 58, at 454; HAUKAAS, *supra* note 67, at 4.

145. *See supra* notes 74–75; *see also* Garry et al., *supra* note 58, at 455.

146. *See* Garry et al., *supra* note 58, at 455.

147. *See id.*

148. *See id.* at 454–55; HAUKAAS, *supra* note 67, at 5.

Although the Rosebud Sioux have finally located a business partner,[149] construction and completion of the project is still in the distant future. Therefore, the Tribe has not yet wholly encountered the myriad difficulties of tribal versus state jurisdiction, particularly in regard to double taxation. Nevertheless, studies of the Owl Feather War Bonnet project have highlighted the obstacles it will likely face from the current jurisdictional system, particularly the system's deterrent effect on the willingness of outside businesses to work with tribes.[150] The uncertainty of tribal civil jurisdiction will undoubtedly affect both the Tribe and any potential private investors as they attempt to move forward with this project.[151]

D. Summary of Case Studies

The Campo Kumeyaay Nation, Warm Springs Confederated Tribes, and Rosebud Sioux Tribe all illustrate the recurring difficulties with developing renewable energy in Indian Country. Although different in their location, energy program, and financial capacity, each tribe has encountered one or more of the legal problems described in Part III. These case studies emphasize the central importance of investment capital and the corresponding role federal tax incentives play in lifting these projects off the ground. The Campo Kumeyaay Nation and Rosebud Sioux Tribe particularly demonstrate the frustration tribes face over their inability to take strong ownership positions in light of economic realities. Campo Kumeyaay Nation also provides a striking example of how jurisdictional realities can give rise to double taxation and lead to inequitable results.

V. RECOMMENDATIONS FOR CHANGE: ENHANCING THE EFFICACY OF THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT

Tribal nations have been persistent and creative in dealing with legal obstacles. The fact that some tribes have experienced limited success in their renewable projects, however, does not seem to fulfill the Act's goal of "promot[ing] Indian tribal energy development" and "enhanc[ing] and strengthen[ing] tribal energy and economic infrastructure."[152] In order to truly fulfill the Act's vision of tribal economic growth, energy development, and self-determination, additional measures could and should be taken. The federal government, in its legislative capacity, is best suited to address some of the major obstacles, including jurisdictional issues and tax credit non-transferability. The following Section will evaluate the various actions Congress could take to alleviate these problems.

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149. *See* Garry et al., *supra* note 58, at 454.

150. *See id.* at 454–55.

151. *See id.* at 458 ("Private investors must be prepared for [the] unique issues that arise from conducting business in Indian country.").

152. *See* 42 U.S.C. § 7144e(b) (2006).

A. Change the Status of Renewable-Energy Tax Credits—Transferability is Key

The utilization of federal tax credits is a key factor in the profitability of renewable-energy projects.[153] Tribes' inability to use these credits or transfer them to a taxable business partner has significantly disadvantaged tribes relative to their competitors.[154] This problem could easily be overcome by altering the status of renewable-energy tax credits, making these credits transferable from non-taxable entities to taxable entities.[155] One author to examine this idea suggests adding the following language to the Internal Revenue Code, section 45(d):

> § 45 . . . Special rules
>
> In the case of a qualified facility described in subparagraph [d] –
>
> (i) In the case of a facility built in Indian Country and jointly owned by a non-taxable unit or subunit of an Indian tribe, and a taxable partner, the *tribe shall be able to trade the tax credits it gains from the project to its non-taxable partner in exchange for any consideration so that that taxable partner may use those tax credits as if the taxable partner had earned them itself.*[156]

Following this approach, a tribe could assign the amount of tax credits it would have received but for its tribal status to any private business partner with tax liabilities. In exchange, the private partner would provide the tribe with some form of consideration, such as an ownership interest in the project or investment capital.[157] This approach benefits all the parties involved. It provides tribes with an asset they can offer to draw in business partners and which they can use as negotiation leverage in forming partnership agreements.[158] Additionally, it reduces the uneven playing field between tribal and non-tribal players in the renewable-energy sector.[159] Private businesses would enjoy the greater economic opportunity to partner with tribes who have profitable renewable resources available.[160] Lastly, the federal government could kill two birds with one stone: it would further its policy of improving renewable-energy sources in the United States while simultaneously furthering its policy of tribal self-determination and economic

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153. *See generally supra* Part III.A.

154. *See generally supra* Part III.A.

155. For a thorough discussion of this idea, see Shahinian, *supra* note 58, at 282–90.

156. *Id.* at 283–84 (emphasis added) (all proposed language). Subsequent to Shahinian's article, Congress amended section 45 of the Internal Revenue Code. The current version uses different enumeration than the version referred to by Shahinian; however, his suggested language remains applicable and could be inserted under subparagraph (e).

157. *See id.* at 282.

158. *Id.* at 283.

159. *See supra* Part III.A.

160. *See supra* Part I.

development.[161] And all of this could be accomplished without increasing federal spending.[162]

This approach appears to be gaining traction. Many parties already advocate for the transferability of these tax credits, including the Western Governors' Association and the Intertribal Council on Utility Policy.[163] In the past few years, congressional leaders have introduced legislation that would allow tribes to transfer their share of production tax credits to their taxable business partners; unfortunately, these bills did not materialize into law.[164] Some states have also taken the reins by enacting their own transferable renewable-energy tax credits.[165]

B. Create New Financial Incentives

Aside from reforming the existing tax credit system, the federal government could also create new tax credits aimed at private businesses engaged in renewable-energy projects on reservations.[166] One possible financial incentive would be a special employment tax credit. Under this type of approach, employers receive a credit for wages paid to qualified employees, i.e., employees who are members of the tribe or otherwise classify as Indian.[167] Not only would this incentivize outside businesses to operate on the reservation, it would also encourage them to hire locally. This has the dual benefits of contributing to the tribal economy and increasing tribal involvement with renewable-energy projects. In joint-ownership arrangements, this type of tax credit would give tribes

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161. Shahinian, *supra* note 58, at 283, 285.

162. One could argue that the federal government will "lose" tax revenue as a result of transferability. If the tax credits remain non-transferable, however, tribes and outside business entities will likely structure their business relationship so that they may utilize the credits—such as through flip-agreements—or the outside business will move its project off-reservation. In either scenario, the credits are still used and the impact on federal tax revenue is the same as it would be with tax-credit transferability.

163. Shahinian, *supra* note 58, at 283–84; *see also* INTERTRIBAL COUP, TRIBAL JOINT VENTURE PRODUCTION TAX CREDIT: AN INTERTRIBAL COUP BACKGROUND POLICY PAPER FOR A COMPARABLE AND APPROPRIATE TRIBAL ENERGY PRODUCTION INCENTIVE 8–9 (2006), *available at* http://www.intertribalcoup.org/pdfs/Production_Tax_Credit.pdf (including as one of its key policy recommendations the implementation of more flexible rules regarding PTCs so that they may be used by taxable, non-tribal partners in tribal joint ventures to promote sustainable economic development).

164. *See* Connolly, *supra* note 60, at 27 (discussing the bills proposed by Representative Raul Grijalva and Senator Tim Johnson, respectively); *see also Overview of H.R. 1954*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h110-1954 (last visited Feb. 18, 2010) (showing that H.R. 1954 never passed committee); *Overview of S. 2520*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s110-2520 (last visited Feb. 18, 2010) (similarly demonstrating how S. 2520 died in committee).

165. Shahinian, *supra* note 58, at 283 (explaining that Oregon already has a tax credit that owners of renewable-energy generation can trade with taxable entities).

166. *See* Cowan, *supra* note 94, at 137–38. Cowan focuses on the federal incentives provided through the Omnibus Budget Reconciliation Act of 1993, which targeted private businesses operating on reservations in an effort to close up the "Indian differential." *Id.* at 137–40.

167. *Id.* at 138–39.

substantial leverage in demanding that a certain percentage of the project's employees be tribe members. The disadvantage with this approach is that it fails to get to the heart of the problem. It only indirectly attempts to level the tax-credit-based disparity and it is questionable, at best, whether the benefits of new tax credits would be proportional to the benefits of existing renewable tax credits.

Another approach would be to increase the grant money available to tribally owned or jointly owned renewable-energy projects. Under this plan, rather than allocating several hundred thousand dollars to each tribal project for preliminary studies, the DOE and/or DOI would provide the bulk of necessary investment funding.[168] Since the construction and installation costs of renewable-energy generation from wind turbines, solar panels, and other renewable technologies are quite costly, this could require a budget of hundreds of millions of dollars.[169] Considering the current economic climate and constraints on federal spending, a proposal such as this is unlikely to get far in Congress.

There are a number of ways the federal government can address financial obstacles and differentials in developing tribal energy, yet it appears that the simplest, fairest, and most effective solution is to simply make the applicable tax credits transferable.

C. Statutorily Delineate Tribal Civil Jurisdiction

Another substantial measure that Congress could take is to explicitly define tribal civil jurisdiction over on-reservation renewable-energy projects to the exclusion of state jurisdiction. This type of statutory provision may be inserted naturally within the Indian Tribal Energy Development and Self-Determination Act. In formulating the substance and boundaries of tribal civil jurisdiction, Congress must consider both tribal and state interests, and it must seriously evaluate the practical implications of such a provision.

The first matter for consideration is whether states should be strictly preempted from exercising civil jurisdiction or whether a lighter brand of preemption—otherwise known as presumptive preemption—is the most appropriate choice.[170] Using the former approach, states would be uniformly barred from taxing or regulating non-Indian businesses engaged in renewable-energy generation on the reservation.[171] There are several advantages to this flat bar, the first being that the threat of state versus tribal litigation would likely be reduced. Furthermore, the certainty associated with statutory jurisdictional boundaries would benefit both states and tribes in their policy-making actions. This certainty would also solidify investors' expectations, making private parties

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168. This approach differs from the agencies' practices of last decade and the focus on funding preliminary or feasibility studies. *See supra* Part II.

169. *See, e.g.*, *supra* text accompanying notes 50–53.

170. *See* Cowan, *supra* note 94, at 143–49.

171. *Id.* at 143–44. One commentator on the subject further suggested that a flat bar on state taxes over tribal natural resources is best in terms of economic efficiency. *See* Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis*, 27 N.M. L. REV. 387, 391 (1997).

more likely to invest in on-reservation renewable energy.[172] Perhaps most importantly, by foreclosing the potential for double taxation, Congress would assure tribal governments that they do not have to choose between encouraging investment and raising revenue for better governmental services.[173]

Unfortunately, there are serious disadvantages to a flat bar on state jurisdiction. The backlash from states could be substantial, particularly if they interpret the act as an unconstitutional encroachment on their Tenth Amendment rights.[174] It may also worsen already strained relationships between tribes and states, which could result in the revocation of state services previously provided on the reservation.[175] Additionally, this type of legislation could render moot existing agreements or compacts between tribes and states regarding their respective jurisdictional authority.[176]

An attractive alternative to this approach is what Mark Cowan dubs "preemption light."[177] Using this type of preemption, the federal government would not flatly reject state civil jurisdiction over on-reservation activities. Rather, it would enact a preemptive mechanism that favors exclusive tribal jurisdiction but provides opportunities for states to overcome this presumption.[178] One suggestion is for Congress to codify the "value generated on the reservation" test[179] presently used by judiciaries to determine whether states are preempted from taxing on-reservation activities.[180] Under this approach, a state would be preempted from taxing an activity or product that appreciates value on the reservation, as opposed

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172. *See* Cowan, *supra* note 94, at 121–22.

173. *See id.* at 94–95.

174. The Tenth Amendment provides that powers not delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved to the states. U.S. CONST. amend. X. Therefore, states retain a number of unenumerated sovereign powers, such as the right to tax their own populations. *See, e.g.*, Int'l Harvester Co. v. Wis. Dep't of Taxation, 322 U.S. 435, 444 (1944) (finding that the power to tax is an incident of sovereignty). A federal effort to severely restrict this right to tax may be interpreted as a violation of states' Tenth Amendment protections. *See* Cowan, *supra* note 94, at 146–47 (describing states' growing anger over federal intrusion into their sphere of taxation and predicting states' resentment if flatly preempted from taxing in Indian Country); *see also* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1034–35 (2008) (discussing states' invocation of the Tenth Amendment in various cases where state regulatory interests were pitted against tribal–federal regulatory interests).

175. *See* Cowan, *supra* note 94, at 144–45.

176. *Id.* A compact is an agreement between a tribe and state that resolves ambiguities and conflict with overlapping jurisdictional authority, particularly regarding taxation. *See id.* at 133. This often results in a single tax, the revenues of which are apportioned between the tribe and state. *Id.* at 133–34. Due to states' greater political and economic power, however, tax compacts are often weighted in the state's favor. *Id.* at 135.

177. *See id.* at 148–49.

178. *Id.* at 148.

179. *See supra* Part III.B.

180. Cowan, *supra* note 94, at 148–49; *see also* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156–57 (1980) (emphasizing that the argument for exclusive tribal tax authority is strongest when the revenues are "derived from value generated on the reservation").

to a product that is simply brought onto the reservation and sold there in order to take advantage of more favorable sales taxes.[181] This would fit into renewable-energy generation seamlessly, because placing these projects on reservation land would appear to easily satisfy the "value generated" criteria for preemption.

In addition to the "value generated" criteria, the Author would go even further and require that a state desiring to enact on-reservation taxes must demonstrate that it provides services that directly affect the taxed entity or activity.[182] A state could do this in a variety of ways, such as by showing that it had, within a preceding number of years, maintained tribal roads, provided police coverage, or arranged for waste disposal. Of course, providing nominal or infrequent services just to qualify for jurisdiction would not be sufficient. States would have to overcome a high bar presuming exclusive tribal authority.

Congress could frame the language of such a rule in a number of ways. One possible articulation is as follows:

> Unless otherwise challenged, tribes maintain sovereign authority to implement tribal regulations and taxes over all energy-related activities conducted within reservation borders. This authority is to the exclusion of the state(s) and is not contingent upon the identity of the regulatee or ownership status of the land in question. A state may assert concurrent jurisdiction only if it demonstrates, by clear and convincing evidence, that it has a compelling interest in the specific activity.

The advantages of this approach are manifold. Like strict preemption, the risk of litigation is substantially reduced. But by not completely foreclosing their ability to tax on-reservation entities, states will be less likely to perceive this legislative rule as an affront to their sovereign rights. Furthermore, while states can still contest the presumption, they might be less inclined to do so under the authority of a strongly worded statute favoring tribal jurisdiction. This would, in turn, encourage states to enter into compacts with tribes, thereby facilitating communication and collaboration between two types of sovereigns that are frequently at odds.[183] Not only would compacting increase, but the marked disparity in bargaining power between states and tribes would decrease.[184] Because tribes would presumptively have sole jurisdiction, states would need to offer valuable consideration in exchange for taxation rights. Ideally, this consideration would be in the form of governmental services that benefit reservation residents. In the context of tax compacts over renewable-energy generation, these services could include transmission line maintenance, access to state water supplies, or

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181. *See Colville*, 447 U.S. at 134.

182. This approach contrasts with the present situation on the Campo Kumeyaay Reservation, where San Diego County currently taxes the non-tribal wind energy business even though the County provides virtually no services on the reservation. Connolly, *supra* note 60, at 25, 28. It also provides a check against courts that are ostensibly unwilling to use the "value generated" test appropriately. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

183. *See* Cowan, *supra* note 94, at 148–49 (describing how this type of preemption could be used to facilitate compacting between tribes and states).

184. *Id.* at 149.

entry into the state grid. Alternatively, the state could enter into an agreement to purchase tribal energy at a set quantity for a specified duration.

An additional benefit is that investors' fears regarding jurisdictional uncertainty and double taxation would be assuaged by the fact that, generally speaking, tribes will have exclusive civil jurisdiction.[185] Similarly, tribes will feel comfortable implementing their own taxes over non-Indian businesses without fearing that the threat or reality of double taxation will drive investors away.[186] By raising revenue for government services and exercising exclusive sovereignty, tribes will be fulfilling the federal policies of Indian self-determination and economic development.

Although this analysis of codified preemption focuses primarily on its effect on taxation, it would have similar consequences for other types of civil jurisdiction, such as tribal regulation. As tribes increasingly engage in commercial-scale energy generation, either independently or with outside business partners, the question of who has regulatory authority over utilities will come to the forefront.[187] Courts have been hesitant to award jurisdiction to tribes for utility regulation and other forms of regulation, particularly where the regulatee is non-Indian.[188] Statutory solutions for jurisdictional barriers will preemptively halt the uncertainty and ensuing litigation associated with this issue.

D. Non-Congressional Solutions

There are a variety of measures tribes can take on a contractual or local governmental level if Congress continues to fail to act in this field. Though not ideal solutions, some of these options have allowed tribes to partially avoid current legal obstacles. These measures include entering lease arrangements or flip-agreements in order to utilize tax credits,[189] negotiating intergovernmental agreements or compacts with states to deal with double taxation,[190] and restructuring tribal–private partnerships so that private parties are no longer in a taxable position.

One way that tribes have maneuvered around non-transferability of renewable-energy tax credits is by simply leasing out their land to private entities.[191] Under this approach, the private party can make full use of the credits, which are critical for the profitability of these projects.[192] But tribes lose out in

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185. *See supra* Part III.B.

186. This is a much needed alternative to the status quo, which traps tribes between "a Supreme Court that allows states to tax within their borders and a federal policy that tells them they are independent and must raise their own revenue." Cowan, *supra* note 94, at 149.

187. *See generally* LeBeau, *Reclaiming Reservation Infrastructure*, *supra* note 11 (exploring the future of utility regulation in Indian Country).

188. *See supra* Part III.B; *see also* LeBeau, *Reclaiming Reservation Infrastructure*, *supra* note 11.

189. *See supra* text accompanying notes 74–75 (describing flip-agreements).

190. *See supra* note 176 (explaining state–tribal tax compacts).

191. *See, e.g.*, Connolly, *supra* note 60, at 26.

192. *See supra* text accompanying notes 60–68.

many ways with this approach. They have limited control as leaseholders and therefore are not very involved in the management of the project.[193] Furthermore, while lease revenues are a stable source of income, tribes are missing out on the most profitable aspect of these projects: the generation and sale of renewable energy.[194] This lack of profitability is further compounded by state taxation of these activities, which may cause many tribes to withhold implementing their own tax.

As discussed above, tribes can enter into flip-agreements with private partners. This is preferable to a lease arrangement because tribes entering flip-agreements maintain at least a minimal ownership interest in the project which increases after the tax credit expires.[195] Many tribes, however, would like to play a substantial role in their on-reservation renewable-energy projects from day one. That way they can influence whether the project employs tribal members, as well as ensure that the project's goals comport with the tribe's long-term plan for growth and development.[196] Under a flip-agreement, tribes must wait a long time, even ten years, before they can have that level of control.[197] Tribes could potentially try to negotiate for greater authority during the initial period when their ownership interest is minimal. But in reality, most tribes' bargaining power is meager in that they often have little capital of their own to offer, and they must compensate for other disadvantages, such as double taxation.[198]

In order to reduce the problem of double taxation, many tribes have entered into special agreements with states called tax compacts.[199] Although the content of these compacts differ, they often involve a tribe and state agreeing to implement a single tax over an activity, the revenue of which they allocate between themselves.[200] The benefit of this approach is that it clarifies each sovereign's rights, making litigation unnecessary. Additionally, it prevents non-Indian actors on the reservation from being taxed twice for the same activity, decreasing the deterrent effect on investors. But states generally have much greater political and economic power than tribes and are able to leverage agreements in their own favor.[201] As a result, tribes ultimately give away substantial chunks of their tax revenue to the state to avoid conflict and litigation.[202]

Lastly, tribes may purposefully structure their tribal–private partnerships so that the state tax at issue no longer falls on the private partner.[203] Instead, it would land on the tribe itself; since tribes cannot be taxed by the state, the state tax

193. *See* Connolly, *supra* note 60, at 26 (discussing how the Campo Tribe wants an ownership interest in its wind project for these very reasons).

194. *See id.*

195. *See id.* at 27; *supra* notes 74–75.

196. *See* Connolly, *supra* note 60, at 26.

197. *See id.* at 27.

198. *See supra* notes 48–49, 84.

199. *See* Cowan, *supra* note 94, at 133–35.

200. *See id.* at 133–34.

201. *See id.* at 135.

202. *See id.* (stating that many agreements have been unfavorable to tribes).

203. Lance Morgan, CEO, Ho-Chunk Inc., Lecture for Law, Policy, & Economic Development in Indian Country Seminar (Jan. 11, 2010).

is effectively avoided.[204] In the renewable-energy generation sector, this would likely require the tribe to technically be the sole owner of the project, while the private partner would be cast as an "independent contractor" of the tribe. Although this provides an end-run around the state tax, it brings another problem to the forefront: non-transferability of renewable-energy tax credits. If the tribe is technically the only owner of the project, none of the federal tax credits may be utilized, which in turn makes the project financially unfeasible.[205]

None of these solutions truly frees tribes to pursue renewable-energy development on their reservations. Coping with one legal issue often must be done at the expense of another legal issue, and tribes ultimately end up sacrificing control over the project, the bulk of its profits, or both. The problems associated with these non-legislative alternatives emphasize even more clearly the need for Congressional action.

CONCLUSION

The reasons for expanding renewable-energy operations on tribal land are numerous and compelling. The United States has time and again stated its commitment to developing renewable energy. Many tribes have the logistical advantages for capturing these sources of energy and the political will to get projects off the ground. Furthermore, Congress is uniquely responsible for the well-being of Indian communities. Development in the renewable-energy sector could provide a much needed boon to tribal economies.

Congressional efforts thus far have resulted in limited success. Additional measures must be taken to overcome the intractable problems of tax credit non-transferability and jurisdictional peculiarities such as double taxation. Congress would be well-advised to amend both the Internal Revenue Code and the Indian Tribal Energy Development and Self-Determination Act to include provisions for renewable-energy tax-credit transferability and presumptive tribal jurisdiction over energy-related activities. This direct approach holds the greatest promise for stimulating renewable-energy development in Indian Country.

Only after taking these measures can Congress genuinely begin to fulfill its trust responsibility to tribal people and its goal of enabling these people to provide for and manage themselves. It is not simply a matter of historic obligation. Tribal communities are starving for new sources of development and hope—just as the nation is starving for new sources of energy that promote a sustainable future. Congress can and should start putting these pieces together.

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204. *Id.*

205. *See supra* text accompanying notes 65–68.