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## A New TERA: Why It's Time to Revisit Tribal Energy Resource Agreements

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# A New TERA: Why It’s Time to Revisit Tribal Energy Resource Agreements

*Ben Reiter\**

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“Black Elk mourned that a dream died in the snow at Wounded Knee. It is up to us to do the next thing: to dream a new one . . . . It is not about the heart that was buried in the cold ground of South Dakota but rather about the heart that beats on—among the Dakota, to be sure, but also among the Diné, Comanche, Ojibwe, Seminole, Miwok, Blackfeet, and the other tribes around the

country.”<sup>1</sup>

When the coronavirus pandemic swept across the country, it hit communities of color disproportionately hard.<sup>2</sup> American Indians<sup>3</sup> were no exception.<sup>4</sup> According to the U.S. Centers for Disease Control and Prevention, Covid-19 infected American Indians and Alaskan Natives at a rate 3.5 times that of their Caucasian counterparts.<sup>5</sup> These communities

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1. DAVID TREUER, *THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT* 452–53 (2019).

2. See Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like by State?*, NPR (May 30, 2020, 6:00 AM), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state> [<https://perma.cc/9SHH-GZ55>].

3. This Article generally uses the U.S.-census-defined term “American Indian” as is consistent with the usage by the Native American Rights Fund, National Congress of American Indians, and National Museum of the American Indian. *Mission & History*, NAT’L CONG. AM. INDIANS, <https://www.ncai.org/about-ncai/mission-history> [<https://perma.cc/34LQ-58ZT>] (last visited Oct. 31, 2021); *Frequently Asked Questions*, NATIVE AM. RIGHTS FUND, <https://www.narf.org/frequently-asked-questions/> [<https://perma.cc/7UVY-3K52>] (last visited Oct. 31, 2021); *FAQ: Teaching & Learning About Native Americans*, NAT’L MUSEUM AM. INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know> [<https://perma.cc/9LAC-4B57>] (last visited Oct. 31, 2021). However, the Article occasionally uses terms such as “Native American” or “Indian” when such use would be consistent with the way individuals or tribes refer to themselves or when such use would be consistent with statutory or regulatory text.

4. Lizzie Wade, *COVID-19 Data on Native Americans Is ‘a National Disgrace.’ This Scientist Is Fighting to be Counted*, SCIENCE (Sept. 24, 2020), <https://www.sciencemag.org/news/2020/09/covid-19-data-native-americans-national-disgrace-scientist-fighting-be-counted> [<https://perma.cc/CR9T-BJHN>] (“The virus has taken a disproportionate toll on many Indigenous communities in the United States.”).

5. Jacqueline Howard, *Covid-19 Incidence More Than Triple Among Native Americans, New CDC Report Says*, CNN (Aug. 21, 2020, 11:00 AM), <https://www.cnn.com/2020/08/21/health/covid-19-native-americans-cdc-study-wellness/index.html> [<https://perma.cc/5WF2-JCW2>].

were also four times more likely to be hospitalized and 2.6 times more likely to die from Covid-19.<sup>6</sup> At an early point in the pandemic—May 18, 2020—the Navajo Nation had the highest per capita infection rate in the country.<sup>7</sup> By that same date, American Indians living in Wyoming accounted for more than 30% of the state’s positive Covid-19 tests and over half of the Covid-19 related deaths, despite making up only 3% of the state’s population.<sup>8</sup> In New Mexico, although constituting only 9% of the population, American Indians accounted for 60% of the state’s Covid-19 cases.<sup>9</sup> In fact, early in the pandemic, “[i]f Native American tribes were counted as states, the five most infected states in the country would all be native tribes.”<sup>10</sup>

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6. *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/PE95-HL2R>] (last updated Mar. 25, 2022).

7. Hollie Silverman et al., *Navajo Nation Surpasses New York State for the Highest Covid-19 Infection Rate in the US*, CNN (May 18, 2020, 5:55 PM), <https://www.cnn.com/2020/05/18/us/navajo-nation-infection-rate-trnd/index.html> [<https://perma.cc/D39B-D9YL>].

8. Savannah Maher, *Northern Arapaho Tribe Loses Fifth Member to COVID-19*, WYO. PUB. MEDIA (May 18, 2020, 4:28 PM), <https://www.wyomingpublicmedia.org/post/northern-arapaho-tribe-loses-fifth-member-covid-19> [<https://perma.cc/L86Q-AL34>].

9. Godoy & Wood, *supra* note 2.

10. Nicholas Kristof, *The Top U.S. Coronavirus Hot Spots Are All Indian Lands*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/sunday/coronavirus-native-americans.html> [<https://perma.cc/AV9S-Q7GY>]. The pandemic has also compounded existing economic problems on Indian reservations as tribes have been forced to shutter key revenue generators such as casinos, festivals, business incubators, and other attractions. Liz Mineo, *For Native Americans, COVID-19 Is ‘The Worst of Both Worlds at the Same Time’*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> [<https://perma.cc/H54E-5NAR>]; Simon Romero & Jack Healy, *Tribal Nations Face Most Severe Crisis in Decades as the Coronavirus Closes Casinos*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/11/us/coronavirus-native-americans-indian-country.html> [<https://perma.cc/LQR5-WVN9>]. As a result, according to Joseph Kalt, co-director of the Harvard Project on American Indian Economic Development at the Kennedy School’s Ash Center for Democratic Governance and Innovation, “Native American tribes’ tax base have been cut literally to zero, and tribal governments don’t have money to run the health clinic or child protection services.” Mineo, *supra* note 10.

While there are numerous and complex reasons that contributed to the disproportionate initial impact of Covid-19 on American Indian communities, public health experts have consistently identified one issue as significantly exacerbating the problem. The United States (“U.S.”) government has chronically failed to provide adequate healthcare to American Indian communities.<sup>11</sup> Despite treaty obligations requiring the U.S. government to provide healthcare to American Indians,<sup>12</sup> it has consistently failed to meet those obligations.<sup>13</sup> For example, according to a 2018 report from the U.S. Commission on Civil Rights, “[i]n 2016, IHS

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11. See, e.g., Arnav Shah et al., *The Challenge of COVID-19 and American Indian Health*, COMMONWEALTH FUND (Aug. 12, 2020), <https://www.commonwealthfund.org/blog/2020/challenge-covid-19-and-american-indian-health> [<https://perma.cc/2ZD6-P4F9>] (“The impact of COVID-19 on American Indian communities is amplified by crowded housing, understaffed hospitals, lack of running water, and limited internet access. These problems date back to the U.S. government’s failure to comply with historical treaty obligations to fund basic services in exchange for tribal land. American Indians have worse access to care and experience poorer health status compared with the general U.S. population.”); Mark Walker, *Pandemic Highlights Deep-Rooted Problems in Indian Health Service*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html> [<https://perma.cc/87CS-YQDW>]; Nora Mabie, *Native American Tribes Have Been Hit Harder by COVID-19. Here’s Why.*, GREAT FALL TRIB. (Aug. 5, 2020, 6:00 AM), <https://www.greatfalltribune.com/story/news/2020/08/05/why-native-americans-impacted-harder-covid-19-montana-united-states/5573737002/> [<https://perma.cc/8XYH-C98Q>] (“Rather, they are a product of long-term disinvestment, the consequences of which transcend generations.”).

12. See *Basis for Health Services*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/> [<https://perma.cc/GEA4-FD6L>] (last visited Oct. 31, 2021) (“Treaties between the United States Government and Indian Tribes frequently call for the provision of medical services, the services of physicians, or the provision of hospitals for the care of Indian people.”).

13. See U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* (2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/TD26-WBUT>] (“In exchange for the surrender and reduction of tribal lands and removal and resettlement of approximately one-fifth of Native American tribes from their original lands, the United States signed 375 treaties, passed laws, and instituted policies that shape and define the special government-to-government relationship between federal and tribal governments. Yet the U.S. government forced many Native Americans to give up their culture and, throughout the history of this relationship, has not provided adequate assistance to support Native American interconnected infrastructure, self-governance, housing, education, health, and economic development needs.”).

health care expenditures per person were only \$2,834, compared to \$9,990 per person for federal health care spending nationwide.”<sup>14</sup> As of the 2016 fiscal year, existing American Indian health and sanitation facilities, including safe drinking water and waste disposal facilities, had an average age of 47 years and required an excess of \$2.1 billion in upgrades.<sup>15</sup> “In 2017, IHS health care expenditures per person were \$3,332, compared to \$9,207 for federal health care spending nationwide.”<sup>16</sup>

Unfortunately, the government’s failure to meet its basic obligation to provide healthcare to American Indian communities only continued with the onset of the Covid-19 pandemic. The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), signed into law on March 27, 2020, allocated \$8 billion in relief funds to Tribal governments.<sup>17</sup> While the \$70 billion sent to non-Tribal hospitals and healthcare providers were dispersed almost immediately in early April, Tribes did not begin to receive their respective funds until May.<sup>18</sup> Even when the CARES Act funds finally arrived, Covid-19 testing kits and personal protective equipment (“PPE”) were often not included.<sup>19</sup> In one particularly dark

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14. *Id.* at 66.

15. *Id.* at 86. The \$2.1 billion has never been appropriated. *See id.*

16. *Id.* at 66–67.

17. Shah et al., *supra* note 11.

18. *Id.*; Sahir Doshi et al., *The COVID-19 Response in Indian Country*, CTR. FOR AM. PROGRESS (June 18, 2020, 9:08 AM), <https://www.americanprogress.org/issues/green/reports/2020/06/18/486480/covid-19-response-indian-country/> [<https://perma.cc/Q4NS-K6HA>] (“For example, bureaucratic holdups at the Treasury Department have denied tribes access to the full \$8 billion promised to them in the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The Treasury, with little experience with tribes and underfunded and dysfunctional tribal relations infrastructure, did not disburse any federal dollars until well after Congress’ deadline. The allocation formula was flawed and ignored the forms it had previously forced tribes to submit in April—to disburse only \$4.8 billion. Data leaks, legal challenges, and inexcusable delays have marred the entire process, forcing tribes to spend money that they don’t have to run basic services.”).

19. Doshi et al., *supra* note 18 (“Federal assistance during the pandemic has not been forthcoming; the Sault Ste. Marie Tribe of Chippewa Indians, for example, received only two test kits for a tribe of 44,000 people. The Oyate Health Center, a major health provider in Rapid City, South Dakota, which transitioned into tribal management in 2019, received almost no tests, PPE, or cleaning supplies.”).

example, the Seattle Indian Health Board received only body bags after appealing for medical supplies.<sup>20</sup>

Although the U.S. government's failure to live up to its healthcare treaty obligations has had stark effects on the lives of American Indians during the pandemic, this failure is unfortunately not limited to the government's healthcare obligations. Historically, the U.S. government has also failed to fulfill its treaty obligations in other aspects, such as providing education<sup>21</sup> and housing<sup>22</sup> and investigating and preventing the continuous waves of missing American Indian women.<sup>23</sup> Further, the federal government has also presided over a generally disastrous

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20. Erik Ortiz, *Native American Health Center Asked for COVID-19 Supplies. It Got Body Bags Instead.*, NBC NEWS (May 6, 2020, 7:21 AM), <https://www.nbcnews.com/news/us-news/native-american-health-center-asked-covid-19-supplies-they-got-n1200246> [https://perma.cc/7R32-YLPW].

21. Denise Juneau, *The Bureau of Indian Education Is Broken*, EDUCATIONWEEK (Feb. 6, 2018), <https://www.edweek.org/leadership/opinion-the-bureau-of-indian-education-is-broken/2018/02> [https://perma.cc/GXC8-4P NV] (“For over a century, the federal government has proven that attempting to control and oversee a nationwide network of schools leads to an ineffective and disheartening system of education that fails to address the cultural, linguistic, and overall learning needs of American Indian children. If the BIE’s record of failure reflected on any other group of students, there would be a national outcry.”); NAT’L COUNCIL ON INDIAN EDUC., ANNUAL REPORT TO CONGRESS 3 (2016), <https://www2.ed.gov/about/offices/list/oese/oie/nacieannrpt2016.pdf> [https://perma.cc/GCT2-RGAG] (“The historical underfunding of Title VI has hindered the quantity and quality of culturally responsive services that can be provided to Native students and has limited the achievement gains that can be realized.”).

22. U.S. DEP’T HOUS. & URB. DEV., FISCAL YEAR 2017: CONGRESSIONAL JUSTIFICATIONS 11-2 (2017), [https://www.hud.gov/sites/documents/FY\\_2017\\_CJS\\_COMBINED.PDF](https://www.hud.gov/sites/documents/FY_2017_CJS_COMBINED.PDF) [https://perma.cc/F5EK-DVHN] (“The lack of housing and infrastructure in Indian Country is severe and widespread, and far exceeds the funding currently provided to tribes.”).

23. Acee Agoyo, *Trump Administration Faulted for Efforts to Address ‘Epidemic’ of Missing and Murdered in Indian Country*, INDIANZ.COM (Feb. 10, 2020), <https://www.indianz.com/News/2020/02/10/trump-administration-faulted-for-efforts.asp> [https://perma.cc/GF64-6MLC]; SIHB Staff, *Savanna’s Act and the Not Invisible Act: Addressing the Epidemic of Missing and Murdered Indigenous People*, SEATTLE INDIAN HEALTH BD. (Oct. 13, 2020), <https://www.sihb.org/2020/10/savannas-act-and-the-not-invisible-act-addressing-the-epidemic-of-missing-and-murdered-indigenous-people/> [https://perma.cc/98FV-V APH] (“Centuries of institutional and structural racism, systemic oppression, and the chronic underfunding of trust and treaty obligations have all allowed for the exacerbation of the MMIP crisis.”).

development of energy resources located on tribal land<sup>24</sup>—the focus of this Article.<sup>25</sup>

The U.S. government holds approximately 56.2 million acres of land in trust<sup>26</sup> for American Indians and their Tribes.<sup>27</sup> This property—although only representing a sliver of the land possessed by American Indians prior to the 1800s<sup>28</sup>—is extraordinarily rich with traditional natural resources such as coal, oil, and gas.<sup>29</sup> Indian reservations contain 30% of the nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and gas reserves.<sup>30</sup> Yet, of the 56.2 million acres, only 2.1 million have been developed as an energy resource<sup>31</sup>—most often by non-American-Indian entities—leaving 86% of Tribal land with energy resources undeveloped.<sup>32</sup>

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24. Consistent with the Indian Tribal Energy Development and Self-Determination Act, when referring to “tribal land,” this Article references “any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under laws of the United States.” 25 U.S.C § 3501(13).

25. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 2 (2015) [hereinafter 2015 GAO REPORT], <https://www.gao.gov/assets/680/670701.pdf> [<https://perma.cc/BMY9-JXWZ>] (“However, even with considerable energy resources, according to a 2014 Interior document, Indian energy resources are underdeveloped relative to surrounding non-Indian resources.”).

26. “The federal Indian trust responsibility is a legal obligation under which the United States ‘has charged itself with moral obligations of the highest responsibility and trust’ toward Indian tribes (*Seminole Nation v. United States*, 1942).” *Frequently Asked Questions*, U.S. DEP’T INTERIOR, INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/E56G-7PTZ>] (last visited Nov. 1, 2021).

27. *Id.*; OFF. INDIAN ENERGY, U.S. DEP’T ENERGY, DOE INDIAN ENERGY PROGRAM OVERVIEW 6 (2018) [hereinafter INDIAN ENERGY PROGRAM], <https://www.energy.gov/sites/prod/files/2018/12/f58/1-indian-energy-overview.pdf> [<https://perma.cc/K9MN-L4VJ>].

28. Rebecca Onion & Claudio Saunt, *Interactive Time-Lapse Map Shows How the U.S. Took More Than 1.5 Billion Acres from Native Americans*, SLATE (June 17, 2014), [http://www.slate.com/blogs/the\\_vault/2014/06/17/interactive\\_map\\_loss\\_of\\_indian\\_land.html](http://www.slate.com/blogs/the_vault/2014/06/17/interactive_map_loss_of_indian_land.html) [<https://perma.cc/M3KM-UEDF>].

29. See INDIAN ENERGY PROGRAM, *supra* note 27, at 6.

30. *Id.*; Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LSU J. ENERGY L. & RESOURCES 195, 196 (2014).

31. INDIAN ENERGY PROGRAM, *supra* note 27, at 6.

32. *Id.*

Development of these resources has often led to environmental damage or unfunded clean-up obligations—the sort that often accompany traditional extractive industries.<sup>33</sup> For example, a shut-in oil well owned by Anadarko Minerals, Inc. leaked 600 barrels of crude oil and 90,000 barrels of brine onto the Fort Peck Indian reservation in April 2017.<sup>34</sup> In 2013, a pipeline owned by Phillips 66 broke open for the third time, spilling approximately 25,000 gallons of gasoline onto Crow Tribal members' property.<sup>35</sup> The Zortman-Landusky hardrock mine—located just south of the Fort Belknap Indian reservation in northern Montana—killed off trout in nearby streams, and the company responsible for the nearly \$100 million cleanup has long since ceased to exist.<sup>36</sup> The now bankrupt Cloud Peak Energy, Inc. attempted to solicit the consent of a Crow Tribal family for excavating an open-pit coal mine on property that had been in the family for 150 years.<sup>37</sup>

Given these environmental issues, it is understandable—perhaps even reasonable—to oppose energy development on Tribal lands. However, not

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33. See, e.g., TREUER, *supra* note 1, at 436 (“The construction of the dam at the confluence of the Cannonball and Missouri rivers that created Lake Oahe in 1962 completely submerged historical Mandan and Hidatsa sites, for example. Uranium and coal mining on the Navajo lands has had crushing environmental impacts in the Southwest. Northern Minnesota reservations were completely deforested in the early 1900s to feed the needs of growing urban centers like Minneapolis and Chicago.”); Johnnye Lewis et al., *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENV'T HEALTH REPS. 130, 132 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5429369/> [<https://perma.cc/43VT-HATP>] (“The location of abandoned mines within tribal watersheds and the lack of environmental protections in the 1872 Mining Law has left a legacy for exposure not only through direct contamination of tribal lands, but through continuing drainage of contaminated mine water.”).

34. Brett French, *Oil Spill Blackens Portion of Fort Peck Reservation*, BILLINGS GAZETTE (May 4, 2018), [https://billingsgazette.com/news/state-and-regional/montana/oil-spill-blackens-portion-of-fort-peck-reservation/article\\_f7a3daa1-7b8c-5099-85d2-a3251053c1c7.html](https://billingsgazette.com/news/state-and-regional/montana/oil-spill-blackens-portion-of-fort-peck-reservation/article_f7a3daa1-7b8c-5099-85d2-a3251053c1c7.html) [<https://perma.cc/BG9N-5545>].

35. *Shifting Land Blamed in Crow Reservation Gas Spill*, BILLINGS GAZETTE (July 12, 2013), [https://billingsgazette.com/news/state-and-regional/montana/shifting-land-blamed-in-crow-reservation-gas-spill/article\\_c2830178-86b3-548b-9f0b-b82a621d0ad9.html](https://billingsgazette.com/news/state-and-regional/montana/shifting-land-blamed-in-crow-reservation-gas-spill/article_c2830178-86b3-548b-9f0b-b82a621d0ad9.html) [<https://perma.cc/D82B-QUAR>].

36. Mark Olalde, *Mining Companies Pollute Waterways. Citizens Pay.*, HIGH COUNTRY NEWS (Mar. 18, 2019), <https://www.hcn.org/articles/climate-desk-mining-companies-pollute-western-waters-citizen-pay-for-the-clean-up> [<https://perma.cc/47B2-HJL2>].

37. Andrew Graham, *A Coal Fight in Indian Country Turns Ugly*, WYOFIELD (Oct. 2, 2018), <https://www.wyofile.com/a-coal-fight-in-indian-country-turns-ugly/> [<https://perma.cc/7ECM-CQYN>].

all energy development involves the environmental degradation that often accompanies oil, gas, coal, uranium, and other extractive fuel sources.

Renewable energy projects like solar and wind—while having some environmental impacts—are substantially less damaging to the environment and communities they impact.<sup>38</sup> Further, Indian Country is also rich in renewable energy potential.<sup>39</sup> In the lower 48 states, Tribal lands contain 17.6 Terawatt-hours (“TWh”) of solar capacity<sup>40</sup> and 2.4 TWh of wind capacity.<sup>41</sup> The U.S. Department of Energy (DOE) estimates these resources constitute 6.5% of the total utility-scale renewable energy technical potential in the U.S., and the Bureau of Indian Affairs (BIA) believes Tribal lands have the potential to supply up to 10% of the country’s energy supply.<sup>42</sup> Given that some studies estimate in order to achieve net zero emissions by 2050 the country would need to build enough solar and wind arrays to cover both Wyoming and Colorado,<sup>43</sup> renewable resources located on the 56.2 million acres of Tribal trust lands are a vital and untapped asset in the transition to renewable energy.

Despite the availability of these resources and the country’s increasing reliance on renewable energy,<sup>44</sup> only a handful of wind and solar projects have been developed on Tribal lands.<sup>45</sup> While numerous reasons are cited

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38. *Environmental Impacts of Renewable Energy Technologies*, UNION CONCERNED SCIS. (Mar. 5, 2013), <https://www.ucsusa.org/resources/environmental-impacts-renewable-energy-technologies> [<https://perma.cc/3X5C-3F7V>].

39. See INDIAN ENERGY PROGRAM, *supra* note 27, at 7.

40. Silvio Marcacci, *Could This New Approach Unlock Gigawatts of Native American Solar Energy Potential?*, FORBES (July 24, 2019, 7:30 AM), <https://www.forbes.com/sites/energyinnovation/2019/06/24/could-this-new-approach-unlock-gigawatts-of-native-american-solar-energy-potential/#301d5ea62509> [<https://perma.cc/7FF4-JPKU>].

41. INDIAN ENERGY PROGRAM, *supra* note 27, at 7.

42. *Id.*

43. Brad Plumer, *To Cut Emission to Zero, U.S. Needs to Make Big Changes in Next 10 Years*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2020/12/15/climate/america-next-decade-climate.html> [<https://perma.cc/A666-52X2>] (“The Princeton study used detailed mapping to see where all those new solar arrays and wind farms might be located. In one central scenario, they could take up land area roughly as large as Wyoming and Colorado combined.”).

44. Brad Plumer, *In a First, Renewable Energy Is Poised to Eclipse Coal in U.S.*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2020/05/13/climate/coronavirus-coal-electricity-renewables.html> [<https://perma.cc/YUW9-9GKT>].

45. *Native American Tribes Pushing into Renewable Energy Development Across the U.S.*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Aug. 29, 2019), <https://ieefa.org/native-american-tribes-pushing-into-renewable-energy-development-across-the-u-s/> [<https://perma.cc/46JJ-5R4M>].

for this lack of development, the federal government is a main contributing factor. For example, the BIA—which holds the primary authority for managing energy development on Tribal lands—frequently lacks the ownership and land use records necessary to approve leases and other project siting documents.<sup>46</sup> This is despite the fact that the BIA’s own internal order mandates maintenance of these records.<sup>47</sup> The BIA also does not track the time taken to review energy-related agreements<sup>48</sup> and its delayed review times have resulted in the failure of wind projects to ever come online.<sup>49</sup> The Government Accountability Office (GAO) has also concluded that many BIA offices simply “do not have staff with the skills needed to effectively evaluate energy-related documents or adequate staff resources.”<sup>50</sup> As Wahleah Johns, a member of the Navajo Nation, founder of Native Renewables, and now Senior Advisor to DOE’s Office of Indian Energy Policy and Programs, succinctly put it, “treaties and federal policies dictate how we live and have created red tape that makes it hard to get things done.”<sup>51</sup>

However, the U.S. government’s failure to develop these renewable energy resources should not—and this Article will argue does not—mean Tribal lands must sit idle while the rest of the country benefits from renewable energy projects on lands the U.S. government has taken for

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46. *Id.*

47. See 2015 GAO REPORT, *supra* note 25, at 18 (“In addition, Interior’s Secretarial Order 3215 calls for BIA to maintain a system of records that identifies the location and value of Indian resources and allows for resource owners to obtain information regarding their assets in a timely manner.”).

48. *Id.* at 21–23.

49. See *id.* at 21–22 (“[I]n 2011, the President for the Rosebud Sioux Tribe in South Dakota, reported that it took 18 months for BIA to review a wind lease. According to the developer of the project, the review time caused the project to be delayed and resulted in the project losing an interconnection agreement with the local utility. Without this agreement, the project has not been able to move forward, resulting in a loss of revenue for the tribe.”).

50. *Id.* at 23.

51. Wahleah Johns, *A Life on and Off the Navajo Nation*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/opinion/sunday/navajo-nation-coronavirus.html> [<https://perma.cc/E9T4-HSRB>]; see also Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1042 (2013) (“At least one scholar has concluded that many of the obstacles inherent in the process related to energy development in Indian country are a direct result of the federal government’s involvement.”).

itself.<sup>52</sup> The Covid-19 pandemic, in fact, demonstrates that when the federal government fails to uphold its obligations to American Indians, they are capable of stepping up to the plate and taking the steps necessary to protect their communities.

When the pandemic first hit the U.S., Tribes across the country—the Blackfeet Nation,<sup>53</sup> Cheyenne River Sioux,<sup>54</sup> Mandan Hidatsa and Akira Nation,<sup>55</sup> Cherokees,<sup>56</sup> Eastern Shoshone and Northern Arapahoe,<sup>57</sup> as well as Navajo<sup>58</sup>—to name just a few—imposed stay-at-home orders, set up roadblocks, established curfews, and instituted mask mandates.<sup>59</sup> In a few instances, they were forced to defend against state attempts to infringe

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52. 2015 GAO REPORT, *supra* note 25, at 2 (“However, even with considerable energy resources, according to a 2014 Interior document, Indian energy resources are underdeveloped relative to surrounding non-Indian resources. For example, as of March 2015, the Kumeyaay Wind Facility in California is the only operating utility-scale wind facility on Indian lands—another utility-scale wind project is under construction on Indian lands, and one utility-scale solar project is under construction on Indian lands, according to Interior officials. In contrast, there has been significant utility-scale wind and solar generating capacity developed in the United States in the last decade.”).

53. Myers Reece, *Blackfeet Tribal Business Council Extends Stay-at-Home Order*, FLATHEAD BEACON (Oct. 13, 2020), <https://flatheadbeacon.com/2020/10/13/blackfeet-tribal-business-council-extends-stay-home-order/> [<https://perma.cc/8TQQ-URFK>].

54. Kalen Goodluck, *Tribes Defend Themselves Against a Pandemic and South Dakota’s State Government*, HIGH COUNTRY NEWS (Oct. 2, 2020), <https://www.hcn.org/articles/indigenous-affairs-covid19-tribes-defend-themselves-against-a-pandemic-and-south-dakotas-state-government> [<https://perma.cc/6BPG-MCNS>].

55. Joe Skurzewski, *Three Affiliated Tribes Approves Mask Mandate*, KFYR (Oct. 27, 2020, 10:55 PM), <https://www.kfyrtv.com/2020/10/28/three-affiliated-tribes-approves-mask-mandate/>.

56. Rex Hodge, *Cherokee Tribal Council Unanimously Passes Mask Mandate*, WLOS (Nov. 2, 2020), <https://wlos.com/news/local/cherokee-tribal-council-crafts-mask-mandate-resolution> [<https://perma.cc/AD5U-3FDA>].

57. Savannah Maher, *Wind River Reservation Leaders Ease Some Restrictions, Implement Mask Mandate*, WYO. PUB. MEDIA (Aug. 6, 2020, 3:39 PM), <https://www.wyomingpublicmedia.org/post/wind-river-reservation-leaders-ease-some-restrictions-implement-mask-mandate#stream/0> [<https://perma.cc/8PVL-RKWG>].

58. Simon Romero, *Checkpoints, Curfews, Airlifts: Virus Rips Through Navajo Nation*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/09/us/coronavirus-navajo-nation.html> [<https://perma.cc/E8LH-QWLS>].

59. See *supra* notes 53–58.

on their sovereign right to take these essential actions.<sup>60</sup> Public health experts studying Tribal responses to the pandemic have concluded:

Indigenous nations have reacted quickly and effectively to the pandemic. In our analysis, tribal nations have implemented guidelines and policies that appear to be far more effective than those used by the states they are in. These responses include locking down roads and implementing guidelines earlier and more carefully than others and developing relevant modes of delivery of supplies. Their response shows that Indigenous nations and communities know what they need; they are the directors of their own protective measures.<sup>61</sup>

After successfully managing their way through the worst of the pandemic, Tribes were an early leader in Covid-19 vaccine distribution.<sup>62</sup> American Indians now have the highest Covid-19 vaccination rate in the country.<sup>63</sup>

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60. Nick Martin, *Kristi Noem's War on Tribal Sovereignty Is Going to Get People Killed*, NEW REPUBLIC (Nov. 17, 2020), <https://newrepublic.com/article/160198/kristi-noems-war-tribal-sovereignty-going-get-people-killed> [https://perma.cc/B3AS-UFCR] (“As Noem was bragging about getting to breathe on Trump and throwing her support behind a superspreader event in July, Frazier and the Cheyenne River Sioux Tribe government established checkpoints along roads entering the tribe’s reservation to check incoming vehicles to slow the spread of the virus. The stops were noninvasive and quick-moving, the kind of screening people face when walking into some restaurants and other shops across the country. But Noem fought the checkpoints, claiming that the CRST did not have the jurisdiction to stop traffic.”).

61. Lisa Hardy et al., *Tribes Mount Organized Responses to COVID-19, in Contrast to State and Federal Governments*, THE CONVERSATION (Dec. 2, 2020, 8:28 AM), <https://theconversation.com/tribes-mount-organized-responses-to-covid-19-in-contrast-to-state-and-federal-governments-150627> [https://perma.cc/Z3AY-CL42] (“[I]n the case of Indigenous nations, the story of inequity is imbued with dispossession of lands and is met with organizing from the inside: two crucial points for untangling and responding to COVID-19.”).

62. Joaquin Estus, *Tribes Are Racing Ahead of Vaccination Curve*, INDIAN COUNTRY TODAY (Feb. 16, 2021), <https://indiancountrytoday.com/news/tribes-are-racing-ahead-of-vaccination-curve-1dw7tULGrE293nE62-rKOg> [https://perma.cc/JDX3-222C] (“How is the Indian health system doing on vaccine distribution? ‘We’re doing better than most states and counties in the country,’ said Abigail Echo-Hawk, director of the Urban Indian Health Institute in Seattle.”).

63. Sukee Bennett, *American Indians Have the Highest Covid Vaccination Rate in the US*, PBS (July 6, 2021), <https://www.pbs.org/wgbh/nova/article/native-americans-highest-covid-vaccination-rate-us/> [https://perma.cc/3V7J-J4E7].

In short, Tribal authorities and their citizens responded to the pandemic in a significantly more effective manner than the federal and state governments.

A similar story can be told with respect to the development of renewable energy resources on Tribal lands. Mariah Gladstone, a member of the Blackfeet and Cherokee tribes, has argued generally, in light of the pandemic, for the long term: “I think it is essential that [tribal nations] recognize our own sovereignty and our own ability to assert that sovereignty.”<sup>64</sup> Wahleah Johns has, with respect to clean energy, more specifically argued: “Today we don’t need handouts from the U.S. government. We need investment in building a restorative economy that is aligned with our traditional values and our relationship with nature.”<sup>65</sup>

While there are many impediments to Tribal development of their own renewable energy resources, the U.S. government’s functional control of those resources and the accompanying bureaucratic red tape poses perhaps the largest obstacle. Some Tribes have minimized the federal government’s role in energy development on their lands by adopting their own leasing regulations and having them approved by the Department of Interior (DOI) under the Helping Expedite and Advance Responsible Tribal Home Ownership Act (the “HEARTH Act”).<sup>66</sup> However, the HEARTH Act is limited to allowing Tribes to adopt regulations “consistent with” those the federal government has already adopted.<sup>67</sup> It is also limited to surface leasing authority and cannot ensure that easements and rights-of-way necessary to connect renewable resources to the grid will be granted.<sup>68</sup> Further, many of the regulations approved to date do not

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64. Clarise Elise Thompson, *Why Racial Justice is Climate Justice*, FIX SOLS. LAB (June 4, 2020) <https://grist.org/fix/combating-climate-change-covid-19-and-systemic-injustice-on-the-same-front/> [<https://perma.cc/7S9M-6KXQ>].

65. Johns, *supra* note 51.

66. 25 U.S.C. § 415(h); *Hearth Act of 2012*, U.S. DEP’T INTERIOR, INDIAN AFFAIRS, <https://www.bia.gov/bia/ots/hearth> [<https://perma.cc/YD5W-BRYK>] (last visited Nov. 2, 2021); Stacy Bosshardt et al., *Tips for Energy Developers Seeking to Lease Tribal Lands*, LAW360 (May 25, 2021, 6:15 PM), <https://www.law360.com/articles/1387702?scroll=1&related=1> [<https://perma.cc/45DC-43PP>].

67. 25 U.S.C. § 415(e)(3).

68. Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. INDIAN L.J. 35, 70 (2017) (“Beyond these limitations, the HEARTH Act does not provide a tribe with comprehensive authority to pursue energy development, as it addresses only surface leasing authority and does not allow tribes to approve rights-of-way that might be necessary and incidental to such surface development.”).

explicitly allow for wind or solar project leases.<sup>69</sup> In short, the HEARTH Act simply does not provide an adequate pathway for Tribes' comprehensive management of their own energy resources.

There is, however, another existing law that, if fully utilized, would provide Tribes with a more comprehensive authority over the development of their resources, which in turn would allow them to reclaim sovereignty and spur renewable energy development for the benefit of their communities.<sup>70</sup> The Indian Tribal Energy Development and Self-Determination Act ("ITEDSDA") was initially enacted in 2005 with the intention of allowing Tribes to bypass the federal government (and its time and resource consuming processes) and enter into agreements to develop the tribe's energy resources on its own terms.<sup>71</sup> As one scholar stated, "ITEDSDA represents a large step toward the ultimate goal of modern federal Indian policy: tribal self-determination."<sup>72</sup> To take full advantage of ITEDSDA, Tribes must first adopt a Tribal Energy Resource Agreement ("TERA") outlining the Tribe's own requirements and processes for entering into energy development agreements like leases, business agreements, and rights-of-way.<sup>73</sup>

No Tribe has chosen to adopt a TERA, however.<sup>74</sup> In explanation of the decision to reject a TERA's adoption, Tribes have cited the following reasons: uncertainty regarding the TERA regulations themselves, the complexity of TERA approval, and the potential costs associated with assuming the role of the federal government in tribal energy resource development.<sup>75</sup> However, in December 2018, amendments to ITEDSDA aimed at reducing TERA requirements and streamlining the TERA

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69. *Id.* at 69 ("Of these tribes, however, as of early 2017, only a few had regulations approved for wind and solar or solar resource leases.").

70. Nicholas M. Ravotti, *Access to Energy in Indian Country: The Difficulties of Self-Determination in Renewable Energy Development*, 41 AM. INDIAN L. REV. 279, 308 (2017) ("One reason why TERAs are an ideal solution is that TERAs apply to all energy resource development, whereas previous energy development statutes are ambiguous as to whether or not they include development of renewable energy resources.").

71. Sara C. Bronin, *The Promise and Perils of Renewable Energy on Tribal Lands*, 26 TUL. ENVTL. L.J. 221, 231 (2013).

72. Benjamin J. Fosland, *A Case of Not-So-Fatal Flaws: Re-Evaluating the Indian Tribal Energy and Self-Determination Act*, 48 IDAHO L. REV. 447, 448 (2012).

73. 25 U.S.C. § 3504.

74. *See, e.g.*, 2015 GAO REPORT, *supra* note 25, at 5.

75. *Id.* at 32–36.

application process were adopted (the “2018 Amendments”).<sup>76</sup> The DOI’s final rule implementing the 2018 Amendments was published in December 2019.<sup>77</sup> While ITEDSDA remains flawed, the recent revisions, rapid growth of renewable energy development in the U.S.,<sup>78</sup> and the Tribes’ demonstrated independence in managing the Covid-19 pandemic all render the present as the ideal time for Tribes to reconsider adopting a TERA.

This Article will address the lack of renewable energy development on Tribal lands and analyze how Tribes can take advantage of the recent amendments to ITEDSDA by entering into TERAs to assert sovereignty over the development of renewable energy resources on their lands. Part I of this Article will provide a general legal background of the federal government’s role in the development (or restriction of development) of energy resources on tribal lands. Part II will discuss ITEDSDA’s statutory framework, its implementing regulations, and TERA requirements. Part III will analyze the 2018 Amendments and highlight how they reduce the burdens of a TERA, providing the best opportunity for Tribes to comprehensively manage energy resource development on their lands. Finally, Part IV will argue that (i) the 2018 Amendments, (ii) the lack of alternative legal options allowing Tribes to comprehensively manage energy development on their lands, and (iii) Tribes’ demonstrated ability to address severe challenges as exhibited through their handling of the Covid-19 pandemic all make the time ripe for Tribes to reconsider taking control of the development of their own energy resources through the adoption of a TERA.

## I. FEDERAL OVERSIGHT OF TRIBAL LANDS

Since 1790, the U.S. government has, in one way or another, limited the alienability of Tribal lands,<sup>79</sup> although the degree of that restriction on American Indians’ development of their lands has varied over time. The

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76. Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115-325, 132 Stat. 4445.

77. Tribal Energy Resource Agreements, 84 Fed. Reg. 69,602 (Dec. 18, 2019).

78. See *U.S. Renewable Energy Consumption Surpasses Coal for the First Time in Over 130 Years*, U.S. ENERGY INFO. ADMIN. (May 28, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=43895#:~:text=Total%20renewable%20energy%20consumption%20in,in%20the%20electric%20power%20sector> [https://perma.cc/F4HS-JZPN].

79. Act of July 22, 1790, § 4, 1 Stat. 137, 138 (confirmed by *Johnson v. McIntosh*, 21 U.S. 543, 568–69 (1823)); 25 U.S.C. § 177.

earliest limitation was introduced in the 1790 Trade and Intercourse Act, which prohibited the “purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians” unless orchestrated by the U.S. government.<sup>80</sup> The Trade and Intercourse Act was affirmed in the early 1800s by the U.S. Supreme Court in a series of decisions—*Johnson v. M’Intosh*,<sup>81</sup> *Cherokee Nation v. Georgia*,<sup>82</sup> and *Worcester v. Georgia*.<sup>83</sup> Those same decisions also laid the groundwork for the notion that the U.S. government holds Tribal lands in trust for the benefit of the Tribes.<sup>84</sup> More specifically, the Court classified Tribes as “domestic dependent nations” with a relationship to the U.S. that “resemble that of a ward to his guardian.”<sup>85</sup> The Indian Removal Act of 1830 enhanced the U.S.’ authority over Tribal lands and, in turn, the trust relationship by directing the President to negotiate the removal of American Indians from the southeastern part of the country, create reservations west of the Mississippi river, and renegotiate treaties to provide American Indians with smaller tracts of lands.<sup>86</sup>

In 1887, U.S. policy shifted towards assimilation and gradually retreated from its trust responsibility when Congress passed the Dawes General Allotment Act (the “Dawes Act”).<sup>87</sup> The Dawes Act divided up western Tribal lands into 80- or 160-acre parcels and allotted those parcels to individual Tribal members.<sup>88</sup> American Indians, however, were not able to transfer the land until 25 years had passed and after receiving a “competent” determination by the Secretary of DOI (the “Secretary”).<sup>89</sup> Although the Indian Reorganization Act (or Wheeler-Howard Act) of 1934 extended “the existing periods of trust placed upon any Indian lands and any restriction on alienation,” at the same time it encouraged Tribes to adopt constitutions and appoint Tribal councils aimed at furthering Tribal sovereignty.<sup>90</sup> In one of the most significant steps toward promoting Tribal sovereignty and limiting federal oversight, Congress declared

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80. 25 U.S.C. § 177; *see also* Mills, *supra* note 68, at 45.

81. 21 U.S. 543.

82. 30 U.S. 1 (1831).

83. 31 U.S. 515 (1832).

84. Mills, *supra* note 68, at 46.

85. *Cherokee Nation*, 30 U.S. at 2.

86. Act of May 28, 1830, 4 Stat. 411; *see also* TANA FITZPATRICK, CONG. RSCH. SERV., R46647, TRIBAL LAND OWNERSHIP STATUSES: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 5 (2021).

87. *See* Act of February 8, 1887, ch. 119, 24 Stat. 388.

88. *Id.*

89. *Id.*

90. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

certain specific Tribes would be “freed from Federal supervision and control” in 1953.<sup>91</sup>

Thus, by the mid-1900s, the policy of federal control over Tribal lands appeared to be in retreat, although the retreat was generally strategic and “tracked broader federal interests (i.e., protection of minerals for national benefit, opening lands to non-Indian settlement) without significant consideration of tribal objectives, including environmental or cultural concerns.”<sup>92</sup> As David Treuer chronicled in his book, *The Heartbeat of Wounded Knee*:

From the beginning, reservations were staffed and administered by non-Indian agents whose degree of graft and greed was almost unparalleled in government operations. They gobbled up leases and sold them to friends and benefactors. They withheld annuity payments of cloth and food in order to get tribes—nominally sovereign—to vote the way the government wanted them to vote. Even in the best cases, the BIA exerted a paternalistic kind of care over Indian affairs. They acted as though Indians were too feeble to administer their own affairs effectively. Their Tribes were too small, too big, lacked infrastructure. They had not enough education, too much dysfunction. They were unstable, emotional, unreasonable. And so on.<sup>93</sup>

The non-Indian agents were slowly replaced with Tribal officials, and the U.S. attempted to “reestablish the federal-tribal trust relationship” and “reinstated federal recognition for some tribes and, in some cases, reestablished their reservation boundaries or took land into trust for the tribe” in the 1970s.<sup>94</sup> Instead of promoting outright Tribal sovereignty, the federal government encouraged a more cooperative federal-tribal relationship based on the recognition of “a special government-to-government relationship with Indian Tribes, including the right of the Indian Tribes to self-governance.”<sup>95</sup> For example, Congress passed the Indian Self-Determination and Education Assistance Act of 1975,

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91. H.R. 108, 83d Cong. (1953).

92. Mills, *supra* note 68, at 50.

93. TREUER, *supra* note 1, at 396–97.

94. TANA FITZPATRICK, CONG. RSCH. SERV, R46647, TRIBAL LAND OWNERSHIP STATUSES: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 8 (2021) (citing Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770; Siletz Indian Tribe Restoration Act of 1977, Pub. L. No. 95-195, 91 Stat. 1415; Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980)).

95. 42 C.F.R. § 137.2(a)(2) (2021).

allowing Tribes to enter into “self-determination” contracts with federal, state, and other institutions for services generally performed by DOI such as managing health care facilities and constructing irrigation systems.<sup>96</sup> This change in approach stemmed from the realization that “the Federal Bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.”<sup>97</sup>

In 2005, Congress passed a law similarly aimed at granting Tribes more sovereign control by allowing for the development of energy resources on Tribal land with minimal oversight from the federal government: ITEDSDA.<sup>98</sup> ITEDSDA was passed as part of Title V of the Energy Policy Act of 2005<sup>99</sup> and was intended to address tribes’ concerns regarding the role federal laws, regulations, and agencies were playing in discouraging the development of energy resources on Tribal lands.<sup>100</sup> ITEDSDA aims to accomplish this by establishing programs to assist Tribes in developing their energy resources, issuing loan guarantees related to energy development on Tribal lands, and providing a streamlined process for site lease agreements and rights-of-way for the development of energy resources on Tribal lands.<sup>101</sup>

Additionally, and most significantly, ITEDSDA authorizes Tribes to enter into TERAs and take comprehensive control over the development of energy resources on Tribal lands.<sup>102</sup> TERAs essentially remove the federal government’s role as a “middleman” in energy development on Tribal lands.<sup>103</sup> Unlike other statutes, ITEDSDA “authorized a shift of the federal government’s role in the development of tribal energy resources away from overseeing, reviewing, perhaps second-guessing, and approving a tribe’s business judgment and negotiating skill represented in an individual transaction.”<sup>104</sup>

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96. 25 U.S.C. § 5321.

97. 42 C.F.R. § 137.2(a)(3).

98. Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. No. 109-58, tit. V, §§ 501–506, 119 Stat. 763 (codified as 25 U.S.C. §§ 3501–3506).

99. H.R. REP. NO. 115-1057, pt. 1, at 9–31 (2018).

100. See 2015 GAO REPORT, *supra* note 25, at 4.

101. 25 U.S.C. §§ 3502–3506.

102. *Id.* § 3504.

103. Kathleen R. Unger, *Change Is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L.A. L. REV. 329, 352 (2009).

104. Mills, *supra* note 68, at 65.

## II. ITEDSDA AND TERA FRAMEWORK

Importantly, ITEDSDA and its implementing regulations make clear that neither ITEDSDA nor entering into a TERA “absolves the Secretary of responsibilities to Indian Tribes under the trust relationship, treaties, statutes, regulations, Executive Orders, agreements or other Federal law.”<sup>105</sup> ITEDSDA also affirmatively commits the Secretary to fulfill the U.S. government’s trust responsibilities if a developer breaches a development agreement entered into pursuant to a TERA or if any such agreement violates a TERA.<sup>106</sup> ITEDSDA excuses the U.S. government from liability but only to the extent such liability arises from a TERA or a development agreement entered into pursuant to a TERA which results from a term “negotiated by an Indian tribe and any other party to a lease, business agreement, or right-of-way entered into pursuant to a tribal energy resource agreement.”<sup>107</sup> Thus, the trust relationship between the federal government and the Tribes is largely maintained.

While the trust relationship is largely maintained, a TERA allows Tribes to take energy resource development on their lands into their own hands, rather than having to submit (and wait) for DOI to review and approve every potential energy project on Tribal lands.<sup>108</sup> As Professor Monte Mills describes: “Far more than just transaction-specific or resource-specific terms, a TERA would instead delineate a tribe’s authority to enter and approve their own ‘lease or business agreement for the purpose of energy resource development on tribal land,’ subject to certain conditions,” which would “thereby obviate the need for federal approval of each such lease or agreement.”<sup>109</sup>

A TERA can be submitted by any “qualified Indian tribe”<sup>110</sup> to the Secretary of the Interior for purposes of allowing the Tribe to enter into any “leases, business agreements, and rights-of-way” for the development of energy resources on its land without the Secretary’s review or approval.<sup>111</sup> TERA approval takes approximately nine months.<sup>112</sup> Within 60 days of receiving a TERA, the Secretary must notify the submitting Tribe whether the TERA has been completed and identify what financial

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105. 25 C.F.R. § 224.40(b) (2021).

106. 25 U.S.C. § 3504(e)(6)(C).

107. *Id.* § 3504(e)(6)(D).

108. *See id.* § 3504.

109. Mills, *supra* note 68, at 64.

110. 25 U.S.C. § 3504(e).

111. *Id.*

112. *See id.* § 3504(e)(2)(A)(i).

assistance, if any, is available to the Tribe in implementing its TERA.<sup>113</sup> The Secretary then has 271 days from the date of receipt of the TERA to disapprove it.<sup>114</sup> If no action is taken, the TERA becomes effective.<sup>115</sup>

A TERA must contain “provisions to ensure compliance with, an environmental review process.”<sup>116</sup> This is likely the most significant aspect of a TERA—both in terms of what it requires a Tribe to provide and the National Environmental Policy Act (“NEPA”) process it is intended to supplant. Four different requirements must be implemented in the environmental review process.<sup>117</sup> The first two are entirely procedural and essentially redundant:

- (I) the public is informed of, and has reasonable opportunity to comment on, any significant environmental impacts of the proposed action; and
- (II) the Indian tribe provides responses to relevant and substantive public comments on any impacts described in subclause (I) before the Indian tribe approves the lease, business agreement, or right-of-way;<sup>118</sup>

And:

- (I) the public is informed of, and has an opportunity to comment on, the environmental impacts of the proposed action; and
- (II) responses to relevant and substantive comments are provided, before tribal approval of the lease, business agreement, or right-of-way.<sup>119</sup>

The sole difference between the first set of requirements and the second is that only the first applies to “significant environmental impacts” and explicitly requires the “Indian tribe”<sup>120</sup> to respond to relevant and substantive public comments—whereas the second requirement speaks in terms of just “environmental impacts” and is less clear about who has the

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113. *Id.* § 3504(e)(1)(B)(i)–(iii).

114. *Id.* § 3504(e)(2)(A)(i).

115. *Id.*

116. *Id.* § 3504(e)(2)(C).

117. *See id.* § 3504(e)(2)(C)(i)–(iv).

118. *Id.* § 3504(e)(2)(C)(i)(I)–(II).

119. *Id.*

120. It is unclear who else would be responding to the comments, but under the plain language of the second requirement, it is at least theoretically possible that a developer or third-party consultant could be the party responding.

responsibility of responding to comments.<sup>121</sup> If a Tribe's environmental review process satisfies the first subset of requirements, it will almost certainly satisfy the second subset. The third and fourth requirements of the environmental review process are substantive in that they require the Tribe to have "sufficient administrative and technical capability to carry out the environmental review process"<sup>122</sup> and to maintain environmental oversight of third parties' energy development activities.<sup>123</sup>

Although TERAs are designed to allow Tribes to independently develop their energy resources, the federal government still holds a minimal role via oversight.<sup>124</sup> Specifically, each TERA must include a provision requiring the Secretary of DOI to perform a periodic review of the Tribe's energy resource development performance.<sup>125</sup> However, the actions the Secretary may take subsequent to that review are fairly limited. The Secretary, in performing the periodic review, must determine if 1) a TERA or an energy development agreement entered into pursuant to a TERA has been breached and 2) if the breach puts a physical trust asset in "imminent jeopardy" before any action is taken to limit a Tribe's energy development rights.<sup>126</sup> The action taken by the Secretary must be limited to protection of the asset in "imminent jeopardy" and only for so long as the violation and associated conditions causing the harm remain uncorrected.<sup>127</sup> For the first three years of a TERA, the periodic review is an annual review.<sup>128</sup> After three years, the Secretary and the Tribe can stipulate that the review shall only be conducted every other year.<sup>129</sup>

In addition to the periodic review requirement, a Tribe has certain reporting requirements under a TERA.<sup>130</sup> These requirements, however, are also quite limited. A Tribe must simply submit a copy of any development agreement entered into pursuant to the TERA and provide documentation of any payments made in accordance with such agreement to the Secretary.<sup>131</sup> Once submitted, the Secretary must provide notice and

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121. Compare 25 U.S.C. § 3504(e)(2)(C)(i), with 25 U.S.C. § 3504(e)(2)(C)(i)(ii).

122. 25 U.S.C. § 3504(e)(2)(C)(iii).

123. *Id.* § 3504(e)(2)(C)(iv).

124. *Id.* § 3504(e)(2)(D).

125. *Id.* § 3504(e)(2)(D)(i).

126. *Id.* § 3504(e)(2)(D)(ii).

127. *Id.*

128. 25 U.S.C. § 3504(e)(2)(E).

129. *Id.*

130. *Id.* § 3504(e)(5).

131. *Id.* § 3504(e)(5)(A)–(B).

an opportunity for public comment.<sup>132</sup> Scholars analyzing this notice provision have construed it—consistent with environmental statutes like NEPA—to mean that any member of the public and not just members of the specified Tribe may comment on the proposed TERA.<sup>133</sup> The Secretary’s review of a TERA is designed to be limited to the development activities identified in the TERA,<sup>134</sup> and ITEDSDA only allows the Secretary to disapprove of a TERA on three specified grounds.<sup>135</sup> First, the Secretary can disapprove a TERA or a provision thereof if it violates federal law or an applicable treaty.<sup>136</sup> Second, the Secretary can issue a disapproval if the TERA does not include a provision providing for periodic review and evaluation by the Secretary.<sup>137</sup> Third, the TERA can be disapproved if it fails to address one of 13 requirements,<sup>138</sup> including amendments and renewals,<sup>139</sup> economic return,<sup>140</sup> an environmental review process,<sup>141</sup> public notification requirements,<sup>142</sup> certain certifications,<sup>143</sup> and citations to relevant Tribal laws and regulations.<sup>144</sup>

If the Secretary does decide—based on one of the above specified grounds—to disapprove a TERA, she must, within ten days of such disapproval, provide a detailed written explanation identifying every reason for the disapproval and the revisions necessary to address the reasons for the disapproval.<sup>145</sup> The Secretary must also provide the Tribe an opportunity to revise and resubmit the TERA.<sup>146</sup> ITEDSDA’s implementing regulations provide that a Tribe may appeal under the

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132. *Id.* § 3504(e)(3).

133. Warner, *supra* note 51, at 1055 (“Although the legislative history related to the HEARTH Act does not appear to specify who is included in the ‘public,’ the legislative history related to an almost identical clause in the Tribal Energy Resource Agreement (‘TERA’) provisions of the Energy Policy Act of 2005 explains that the “public” includes both tribal and nontribal citizens.”).

134. 25 U.S.C. § 3504(e)(3).

135. *Id.* § 3504(e)(2)(B).

136. *Id.* § 3504(e)(2)(B)(i).

137. *Id.* § 3504(e)(2)(B)(ii).

138. *Id.* § 3504(e)(2)(B)(iii).

139. *Id.* § 3504(e)(2)(B)(iii)(I).

140. *Id.* § 3504(e)(2)(B)(iii)(II).

141. *Id.* § 3504(e)(2)(B)(iii)(III).

142. *Id.* § 3504(e)(2)(B)(iii)(V).

143. *Id.* § 3504(e)(2)(B)(iii)(XII).

144. *Id.* § 3504(e)(2)(B)(iii)(X).

145. *Id.* § 3504(e)(4)(A)(i)–(ii).

146. *Id.* § 3504(e)(4)(B).

Administrative Procedure Act,<sup>147</sup> either an initial disapproval or a revised disapproval by the Secretary.<sup>148</sup>

In addition to the Secretary's periodic review of a Tribe's compliance with its TERA, the other manner in which the federal government may remain involved in a Tribe's energy resource development under a TERA is through the petition process. ITEDSDA allows an "interested party" to petition the Secretary regarding a Tribe's failure to comply with the terms of its TERA.<sup>149</sup> However, this process is rather limited. An "interested party" eligible to submit such a petition is a party that "has demonstrated with substantial evidence that an interest of the person has sustained, or will sustain, an adverse environmental impact" as a result of a Tribe's failure to comply with its TERA.<sup>150</sup> Thus, not only must there be "substantial evidence" showing interest, but also that a Tribe has not complied with its TERA obligations. Petitions simply disagreeing with a Tribe's decision to, for example, enter into a lease for a solar project on the Tribe's lands would not properly be before the Secretary. Additionally, to submit such a petition, the "interested party" must first exhaust all remedies provided under the Tribe's laws.<sup>151</sup> Given that Tribes are generally free to set up their own administrative remedies, a Tribe could ensure that any petitions are well vetted and thoroughly responded to prior to the petitions reaching the Secretary. Even when such a petition reaches the Secretary, the Secretary must consult with the Tribe regarding the allegations.<sup>152</sup>

After a TERA takes effect, it is effective for so long as it remains consistent with federal law,<sup>153</sup> it is rescinded after receipt of a petition from a party demonstrating substantial interest and the Secretary determines a Tribe is noncompliant with the terms of the TERA,<sup>154</sup> or it is voluntarily rescinded by the Tribe in a manner consistent with applicable regulations.<sup>155</sup>

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147. 5 U.S.C. §§ 551–559.

148. 25 C.F.R. § 224.77 (2021).

149. 25 U.S.C. § 3504(e)(7).

150. *Id.* § 3504(e)(7)(A).

151. *Id.* § 3504(e)(7)(B).

152. *Id.* § 3504(e)(7)(C)(II).

153. *Id.* § 3504(e)(2)(F).

154. *Id.* § 3504(e)(2)(F)(i).

155. *Id.* § 3504(e)(2)(F)(ii).

### III. 2018 ITEDSDA AMENDMENTS AND ASSOCIATED REGULATORY DEVELOPMENTS

Although the option of taking energy resource development into their own hands by adopting a TERA would on its face seem like an appealing prospect to Tribes, no Tribe has yet adopted a TERA. There are likely a number of reasons for this. Prior to recent years, energy development on Tribal lands was primarily related to oil and gas drilling which could be accomplished without significant federal interference through the Indian Mineral Development Act.<sup>156</sup> However, the red tape associated with TERAs themselves was cited by Tribes in a 2015 GAO report as two of the three primary deterrents to the adoption of a TERA.<sup>157</sup> Specifically, Tribes cited both the uncertainty regarding the TERA implementing regulations and the complexity associated with the TERA approval process as primary deterrents.<sup>158</sup> Tribes also cited concerns about whether they would have the resources and expertise necessary to assume energy development tasks currently carried out by the federal government.<sup>159</sup>

In 2018, in response to both the fact that no Tribe had adopted a TERA and the Tribal concerns identified in the 2015 GAO report,<sup>160</sup> Congress passed the ITEDSDA Amendments of 2017 (the “2018 Amendments”).<sup>161</sup> The 2018 Amendments were aimed at facilitating “a tribe’s application for and the Secretary of the Interior’s approval of [TERAs]” and removing “other federal disincentives to developing tribal trust energy resources and assist Indian tribes interested in pursuing the development of these

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156. See Wyatt Swinford, *Lessons Learned: Avoiding the Hardships of Tribal Mineral Leasing in the Development of Oklahoma Tribal Wind Energy*, 40 AM. INDIAN L. REV. 99, 105 (2016) (“These changes to federal Indian leasing policy created substantially more flexibility for tribes, as well as producers. They leave the actual terms of the agreement to the contracting parties, specifically the tribes. The only restriction on IMDA leases is a determination by the Secretary that the agreement be in the best interest of the tribe or Indian.”).

157. 2015 GAO REPORT, *supra* note 25, at 32.

158. *Id.*

159. *Id.* at 33.

160. H.R. REP. NO. 115-1057, pt. 1, at 3 (2017) (“More than a decade after the passage of the Energy Policy Act of 2005, no tribe has successfully applied for and a [sic] received a TERA. GAO cited a few reasons for this result, some of which include uncertainty surrounding TERA regulations promulgated by the Department of the Interior, limited tribal capacity and the costs of taking on activities currently controlled by federal agencies, and a complex application process.”).

161. Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115-325, 132 Stat. 4445.

resources consistent with the federal policy of promoting Indian self-determination.”<sup>162</sup> The 2018 Amendments also directed the Secretary to establish new regulations to implement regulatory changes resulting from the ITEDSDA amendments.<sup>163</sup>

Under the 2018 Amendments, the substantive TERA requirements and the process for approval of a TERA changed in numerous ways to address some of the significant issues that previously deterred Tribes from entering into a TERA.<sup>164</sup> These changes included: (a) a revision of the definition of what qualified Tribes could enter into a TERA, thereby removing the Secretary’s discretion and, in turn, providing that most Tribes were de facto qualified; (b) a shift of the burden for seeking TERA approval from the Tribes to requiring the Secretary affirmatively disapprove a TERA; (c) a provision allowing Tribes to preemptively address the “inherently Federal functions”<sup>165</sup> language contained in DOI’s implementing regulations; (d) reduction of ITEDSDA’s NEPA-like environmental review requirements and granted Tribes flexibility to administer their own environmental review processes; (e) a streamlined TERA approval (and amendment) process; (f) potentially limited funding assistance; and (g) institution of the Tribal Energy Development Organizations.<sup>166</sup>

#### *A. Revised Definition of What Qualifies Tribes to Adopt a TERA*

The 2018 Amendments included reducing a Tribe’s qualification requirements to enter into a TERA. Prior to the 2018 Amendments, ITEDSDA allowed the Secretary to determine whether a Tribe was qualified to enter into a TERA based on a determination that “the Indian tribe has demonstrated that the Indian tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe.”<sup>167</sup> “Sufficient capacity” was left undefined, thereby providing the Secretary with considerable discretion in determining whether a Tribe was qualified to enter into a TERA. ITEDSDA’s pre-2018 Amendment “tribal capacity requirements pose[d] a significant hurdle to TERA eligibility.”<sup>168</sup>

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162. H.R. REP. NO. 115-1057, pt. 1, at 2. The 2018 Amendments, although identified in the Act title as being from 2017, were not passed until December of 2018—hence the designation as 2018 Amendments. *See id.* at 1.

163. *Id.* at 9.

164. *See* 25 C.F.R. § 224.52 (2021); *see also id.* § 224.53(c)(2).

165. 25 C.F.R. §§ 224.52(c), 224.53(c)(2).

166. 25 C.F.R. § 224.201.

167. 25 U.S.C. § 2604(e)(2)(B)(i), *amended by* 25 U.S.C. § 3504(e)(2)(B)(i).

168. Mills, *supra* note 68, at 87.

The 2018 Amendments minimize Secretarial discretion by outright defining “qualified Indian tribe” to mean an Indian tribe that:

- (A) carried out a contract or compact under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*) for a period of not less than 3 consecutive years ending on the date on which the Indian tribe submits the application without material audit exception (or without any material audit exceptions that were not corrected within the 3-year period) relating to the management of tribal land or natural resources; or
- (B) substantial experience in the administration, review, or evaluation of energy resource leases or agreements or has otherwise substantially participated in the administration, management, or development of energy resources located on the tribal land of the Indian tribe.<sup>169</sup>

The definition provides both an entirely objective—i.e., the Tribe carried out an Indian Self-Determination and Education Assistance Act contract for three years without issue—and a more subjective—i.e., substantial energy resource development experience—way for Tribes to meet the statutory requirements. Most Tribes will satisfy the objective aspect of the definition.<sup>170</sup> However, if they do not, they can demonstrate their energy resource development acumen rather than rely on the Secretary’s determination of whether they have “sufficient capacity.” This revision removes considerable uncertainty from the TERA application process.

### *B. Burden Shifting for TERA Approval/Disapproval*

In another substantive change, the 2018 Amendments shifted the burden of approval from the qualified Indian Tribe to the Secretary.<sup>171</sup> Prior to the 2018 Amendments, ITEDSDA provided that the Secretary would approve a TERA if the Tribe met the statutory requirements.<sup>172</sup> The 2018 Amendments, however, reversed this language. Rather than have the Secretary approve a TERA if statutory requirements are met, ITEDSDA now provides that the Secretary must disapprove of a TERA but “only if”

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169. H.R. REP. NO. 115-1057, pt. 1, at 10–11 (2017).

170. *Division of Self-Determination Services*, U.S. DEP’T INTERIOR, INDIAN AFFS., <https://www.bia.gov/bia/ois/dsd> (last visited Aug. 22, 2021).

171. 25 U.S.C. § 3504(e)(2)(B).

172. *Id.* § 2604(e)(2)(B), amended by 25 U.S.C. § 3504(e)(2)(B).

the TERA violates applicable federal law, does not provide for periodic review by the Secretary, or fails to include certain specific provisions within the TERA.<sup>173</sup> Moreover, and as discussed in more detail below, if the Secretary takes no action within 270 days of receiving the TERA, the TERA is automatically deemed approved and becomes effective.<sup>174</sup> While this may appear to be a slight change in wording, the Amendment has the effect of affirmatively placing the burden on the Secretary to disapprove a TERA under a limited subset of reasons rather than placing the burden on the Tribe to obtain approval.

Additionally, if the Secretary affirmatively acts to disapprove a TERA, she now must provide a “detailed, written explanation” including the reason for the disapproval and the revisions necessary to ensure TERA approval.<sup>175</sup> The pre-2018 version of ITEDSDA only required the Secretary to “notify the Indian tribe in writing of the basis for the disapproval” and identify what changes would address the Secretary’s “concerns.”<sup>176</sup> These revisions should help alleviate Tribal concerns that, after fully developing a TERA, it could be disapproved based on vague or entirely unspecified reasons. The 2018 Amendments require the Secretary to fully articulate the reasons for any disapproval and to act to affirmatively disapprove a TERA.

### *C. Option to Preemptively Address “Inherently Federal Function” Language*

The ITEDSDA implementing regulations (both before and after the 2018 Amendments and associated rulemakings) contain two unfortunate references to “inherently Federal functions,” which have been the source of confusion and consternation for Tribes considering the adoption of a TERA.<sup>177</sup> The regulations state that a TERA may include, in addition to other provisions related to the development of energy resources, an “assumption by the Tribe of certain activities normally carried out by the Department, except for inherently Federal functions.”<sup>178</sup> The regulations also require a TERA to include a statement on the scope of administrative activities a Tribe intends to carry out under its TERA, but provides that such scope “may not include the responsibilities of the Federal

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173. *Id.* § 3504(e)(2)(B).

174. *Id.* § 3504(e)(2)(A)(i).

175. *Id.* § 3504(e)(4)(A).

176. *Id.* § 2604(e)(4)(A)–(B), amended by 25 U.S.C. § 3504(e)(4).

177. See 25 C.F.R. §§ 224.52(c), 224.53(c)(2) (2021).

178. 25 C.F.R. § 224.52(c).

Government under the Endangered Species Act or other inherently Federal functions.”<sup>179</sup>

Tribes specifically cited the following language in the 2015 GAO Report as a deterrent to entering into TERAs.<sup>180</sup> The report stated that:

According to officials from one tribe we interviewed, the tribe has repeatedly asked Interior for additional guidance on the activities that would be considered inherently federal functions under the regulations. Interior officials told us that the agency has not determined what activities would be considered inherently federal because doing so could have far-reaching implications throughout the federal government. According to the tribal officials, without additional guidance on inherently federal functions, tribes considering a TERA do not know what activities the tribe would be assuming or what efforts may be necessary to build the capacity needed to assume those activities. Additional guidance could include a provision of examples of activities that are not inherently federal in the energy development context, which could assist tribes in identifying capacity building efforts that may be needed.<sup>181</sup>

At the 2019 Annual Session for the National Congress of American Indians (NCAI), the NCAI adopted a resolution calling on DOI to remove the “inherently federal functions” language from its regulations.<sup>182</sup> The resolution explained that “during consultations with tribal nations, DOI indicated that they had not decided whether the regulations would provide tribal nations with the authority to govern permitting procedures, such as applications for permits to drill, stating that such authority may be deemed an inherently federal function.”<sup>183</sup> The language has left Tribes confused as to what development activities they might actually undertake pursuant to a TERA.

While the 2018 Amendments do not remove the “inherently Federal functions” language from the regulations and the resulting rulemaking, the

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179. 25 C.F.R. § 224.53(c)(2).

180. See 2015 GAO REPORT, *supra* note 25, at 32.

181. *Id.*

182. See *Calling on the Department of Interior to Adopt Tribal Energy Resource Agreement Regulations that Respect Tribal Sovereignty and Self-Determination*, NAT'L CONG. AM. INDIANS, <https://www.ncai.org/resources/resolutions/calling-on-the-department-of-interior-to-adopt-tribal-energy-resource-agreement-regulations-that-respect-tribal-sovereignty-and-self-determination> [https://perma.cc/YLP9-SQE6] (last visited Aug. 22, 2021).

183. *Id.*

2018 Amendments provide an option for Tribes to clarify the definition of “inherently Federal functions” and their respective rights and responsibilities.<sup>184</sup> The 2018 Amendments allow Tribes, at their option, to “identify which functions, if any, authorizing any operational or development activities pursuant to a lease, right-of-way, or business agreement approved by the Indian tribe, that the Indian tribe intends to conduct.”<sup>185</sup>

This new provision provides a Tribe with the option to describe and, in turn, make clear that the activities the Tribe is conducting pursuant to its TERA do not include “inherently Federal functions.”<sup>186</sup> A Tribe might do this by simply expanding the operational functions it plans to perform in connection with energy development. One could also imagine a Tribe being more explicit by not only identifying the functions but identifying them as functions that are not “inherently Federal.” A Tribe may receive pushback from the DOI on such a provision, but it is unclear whether the Secretary would actually have authority to disapprove of a TERA on this ground alone, given it is not specified in any of the three reasons for disapproval under the 2018 Amendments.<sup>187</sup> At a minimum, the Secretary’s reaction to such provision would provide useful guidance as to what an “inherently Federal function” is. Even if the Secretary issued a disapproval, the Tribe could still revise the TERA to, at a minimum, specify the operational functions it plans to carry out and upon receiving approval, it would be clear that such functions were not “inherently Federal.”

#### *D. Reduction of NEPA-like Environmental Review Requirements*

A major impediment to energy development on Tribal lands has been that every development—because of the requirement for federal

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184. 25 C.F.R. § 224.52(c).

185. H.R. REP. NO. 115-1057, pt. 1, at 21 (2017) (codified at 25 U.S.C. § 3504(e)(2)(B)(iii)(XIII)).

186. 25 C.F.R. § 224.52(c).

187. 25 U.S.C. § 3504(e)(2)(B). DOI might argue that the Secretary is authorized to disapprove of the TERA on the grounds that it violates applicable federal regulations. *See* 25 U.S.C. § 2604(e)(2)(B), *amended by* 25 U.S.C. § 3504(e)(2)(B). But ITEDSDA itself does not contain the term “inherent Federal functions,” and DOI’s decision to reserve this authority to the Secretary is not established in the statute. It may thus be that DOI’s regulation is ultimately in violation of federal law.

approval—must undergo a NEPA analysis.<sup>188</sup> A full NEPA analysis currently takes an average of 4.5 years to complete.<sup>189</sup> The delay can stifle energy development projects already facing tight financing timelines and supply chain issues. A massive benefit of adopting a TERA is that individual energy projects on Tribal land no longer require federal approval or the accompanying arduous NEPA process.<sup>190</sup>

ITEDSDA does still require TERAs to “include provisions to ensure compliance with, an environmental review process.”<sup>191</sup> Prior to the 2018 Amendments, ITEDSDA’s “environmental review process” required “the identification and evaluation of all significant environmental effects (as compared to a no-action alternative),” and “the identification of proposed mitigation measures, if any, and incorporation of appropriate mitigation measures into the lease, business agreement, or right-of-way.”<sup>192</sup> NEPA similarly requires identification of the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action.<sup>193</sup> NEPA’s implementing regulations also require considering “appropriate mitigation measures not already included in the proposed action or alternatives”<sup>194</sup> and any “[m]eans to mitigate adverse environmental impacts.”<sup>195</sup> Thus, the pre-2018 version of ITEDSDA although not requiring a NEPA analysis conducted by the federal government nevertheless required that Tribes perform a similar analysis of their own.

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188. See Michael Maruca, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation in Indian Country*, 43 WM. & MARY ENVTL. L. & POL’Y REV. 391, 424 (2019) (“For example, in the realm of renewable projects, federal action approving a lease triggers the NEPA requirements, which may be lengthy.”).

189. Eli Dourado, *We Need to Build Our Way Out of This Mess*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/08/11/opinion/politics/we-need-to-build-our-way-out-of-this-mess.html> [<https://perma.cc/BL7Y-F6H2>] (“To protect against community opposition, environmental impact statements under NEPA have ballooned over the years and now take an average of four and a half years to complete. One that was finalized in 2019 took almost 16 years.”).

190. See 25 U.S.C. § 3504(a)(2).

191. *Id.* § 3504(e)(2)(C).

192. *Id.* § 2604(e)(2)(C)(i)–(ii), amended by 25 U.S.C. § 3504(e)(2)(C).

193. See 42 U.S.C. § 4332(C)(i)–(iii).

194. 40 C.F.R. § 1502.14(e) (2021).

195. *Id.* § 1502.16(a)(9).

The 2018 Amendments do not—and rightfully should not—entirely negate the environmental review process requirement for TERAs.<sup>196</sup> However, the 2018 Amendments do depart, at least in some respects, from the NEPA-like process previously required and recognize that Tribes require flexibility in determining how to conduct their environmental review.<sup>197</sup> Specifically, under the 2018 Amendments, the requirement that Tribes identify and evaluate “all significant environmental effects” is replaced with the more feasible, non-binding requirement that “the public is informed of, and has reasonable opportunity to comment on, any significant environmental impacts of the proposed action.”<sup>198</sup> The revised requirement lessens the burden on Tribes to affirmatively identify “all significant environmental effects” and instead creates a process by which the public becomes informed of significant effects and has the opportunity to comment on them.<sup>199</sup> ITEDSDA’s burdensome requirement that Tribes identify proposed mitigation measures has similarly been removed.<sup>200</sup> Under the 2018 Amendments, the Tribe is now only required to respond to “relevant and substantive comments” it receives during the TERA application process.<sup>201</sup> This too is a step back from NEPA, which requires an agency to consider any “substantive comments timely submitted during the public comment period.”<sup>202</sup>

These revisions collectively provide Tribes with much more authority and flexibility to develop their own environmental review processes and leave the prior NEPA-like requirements to federal decision makers on non-Tribal lands. Tribes can now craft their own environmental review process that at least one scholar has argued “will enhance a tribe’s ability to make

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196. Environmental review processes are slow, resource intensive, and often do not result in better environmental outcomes. For example, the American Petroleum Institute has recently used NEPA to argue that a pause on oil and gas leasing on federal land violates the statute because the Bureau of Land Management failed to undertake a NEPA review when it instituted the pause. Complaint at 4, *Am. Petrol. Inst. v. U.S. Dep’t of Interior*, No. 21-cv-02506 (W.D. La. Aug. 16, 2021). Environmental reviews on Tribal lands include important evaluations like the identification of cultural resources that any responsible energy development must consider, and thus, it is proper for them to remain (albeit in a way that provides Tribes flexibility) as an aspect of Tribal energy development.

197. 25 U.S.C. § 3504(e)(2)(C).

198. H.R. REP. NO. 115-1057, pt. 1, at 21 (2017) (codified as 25 U.S.C. § 3504(e)(2)(C)(i)(I)).

199. 25 U.S.C. § 3504(e)(2)(C).

200. *Id.* § 2604(e)(2)(C)(ii), amended by 25 U.S.C. § 3504(e)(2)(C)(ii).

201. H.R. REP. NO. 115-1057, pt. 1, at 21 (2017) (codified at 25 U.S.C. § 3504(e)(2)(C)(i)(II)).

202. 40 C.F.R. § 1503.4(a) (2021).

the best choices concerning energy development and to continue to serve as responsible stewards of their own lands.”<sup>203</sup>

#### *E. Streamlined TERA Approval Process*

Prior to enactment of the 2018 Amendments, once the Secretary received a TERA, she had a general duty to approve or disapprove of the TERA within 270 days.<sup>204</sup> ITEDSDA, however, did not specify what result would follow if the Secretary simply failed to act on the application and the implementing regulations were similarly silent. Thus, in theory, a TERA submitted under the pre-2018 Amendments could sit on the Secretary’s desk indefinitely. This uncertainty combined with other regulatory procedures contributed to an unduly “complex, confusing, and time consuming” TERA application process.<sup>205</sup>

The 2018 Amendments address this discrepancy by expressly requiring the Secretary to disapprove of the TERA within 270 days.<sup>206</sup> If the Secretary does not disapprove of the TERA within 270 days, the TERA automatically goes into effect.<sup>207</sup> In the event the Secretary requires a Tribe to revise its TERA, the Secretary must act within 90 days to disapprove the revised TERA, or it too goes into effect.<sup>208</sup> Tribes will also know whether their application is complete within 60 days of submission or whether more information is required.<sup>209</sup> The 2018 Amendments clarify that a TERA shall remain in effect until voluntarily rescinded by the Tribe or, after receiving a Petition from a substantially interested party<sup>210</sup> and providing the Tribe an opportunity for a hearing, the Secretary rescinds the TERA.<sup>211</sup> Importantly, the 2018 Amendments also allow for TERAs to be amended without requiring a Tribe to undergo the entire TERA application process again.<sup>212</sup>

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203. Fosland, *supra* note 72, at 461.

204. 25 U.S.C. § 2604(e)(2)(A), amended by 25 U.S.C. § 3504(e)(2)(A).

205. 2015 GAO REPORT, *supra* note 25, at 33.

206. H.R. REP. NO. 115-1057, pt. 1, at 8 (2017) (codified at 25 U.S.C. § 3504(e)(2)(A)(i)).

207. *Id.*

208. 25 U.S.C. § 3504(e)(2)(A)(ii).

209. *Id.* § 3504(e)(1)(B).

210. As discussed in Part II, under the 2018 Amendments, the “interested party” must have demonstrated as much to the Secretary with substantial evidence under 25 U.S.C. § 3504(e)(7)(A). See discussion *supra* Part II.

211. 25 U.S.C. § 3504(e)(2)(F).

212. *Id.* § 3504(e)(8)(A)(iii).

*F. New TERA Administration Funding Assistance*

According to the 2015 GAO Report, a major reason why Tribes were hesitant to adopt TERAs was the lack of funding associated with administering energy development on Tribal lands, particularly since such development is currently administered by the federal government at no cost to the Tribe.<sup>213</sup> The 2015 GAO Report indicated that “[s]everal tribal officials we interviewed told us that the tribe does not have the resources to assume additional responsibility and liability from the federal government without some associated support from the federal government to cover expenses for taking over activities currently conducted by federal agencies.”<sup>214</sup> Although the 2018 Amendments do not fully address a Tribe’s costs associated with administering a TERA, they do provide an opportunity for Tribes to receive some degree of federal financial assistance. The 2018 Amendments provide that:

Any amounts that the Secretary would otherwise expend to operate or carry out any program, function, service, or activity (or any portion of a program, function, service, or activity) of the Department that, as a result of an Indian tribe carrying out activities under a tribal energy resource agreement, the Secretary does not expend, the Secretary shall, at the request of the Indian tribe, make available to the Indian tribe in accordance with this subsection.<sup>215</sup>

To have access to these funds, the Tribe must enter into a funding agreement with DOI.<sup>216</sup> The funding agreement, however, is separate from the TERA, and any issues arising from the agreement will not affect the TERA’s validity.<sup>217</sup> ITEDSDA also specifies that the delays associated with the funding agreement (or regulation related thereto) cannot delay the processing or effective date of a TERA.<sup>218</sup>

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213. 2015 GAO REPORT, *supra* note 25, at 33.

214. *Id.*

215. H.R. REP. NO. 115-1057, pt. 1, at 27 (2017) (codified at 25 U.S.C. § 3504(g)(1)).

216. 25 U.S.C. § 3504(g)(2).

217. *Id.*

218. *Id.* § 3504(g)(3)(B).

### G. Creation of Tribal Energy Development Organizations

One noteworthy revision contained in the 2018 Amendments was the creation of Tribal Energy Development Organizations (“TEDO”).<sup>219</sup> Although the Secretary has yet to certify a TEDO, Tribes could use the TEDO structure to enter into public-private partnerships with entities that have expertise in specific areas of energy development—such as a partnership with a solar or wind developer.

A TEDO is defined as either a single organization engaged in the development of energy resources wholly owned by a Tribe or an organization composed of two or more entities, at least one of which is a Tribe, that has consent of all participating Tribes to enter into an energy resource development agreement under ITEDSDA.<sup>220</sup> A TEDO must further be certified as such by the Secretary.<sup>221</sup> To obtain certification, the Tribal entity within the TEDO must have carried out a contract pursuant to the Indian Self-Determination and Education Assistance Act<sup>222</sup> that included programs relating to the management of Tribal land without uncorrected audit exceptions within the last three years.<sup>223</sup> The TEDO must be organized under the laws of the Tribe, and several requirements are in place to ensure the Tribe maintains significant control over the TEDO.<sup>224</sup> Specifically, the Tribe must hold a majority interest in the TEDO, the TEDO’s organizing documents must specify that the Tribe whose land is being developed has a controlling interest at all times, and the TEDO must be subject to the jurisdiction, laws, and authority of the Tribe.<sup>225</sup> Once a proposed certification is submitted, the Secretary has 90 days to approve or disapprove the TEDO application<sup>226</sup> and, if approved, must issue a certification within ten days.<sup>227</sup>

## IV. THE TIME IS NOW FOR ADOPTING A TERA

As of the time of this writing, no Tribe has taken advantage of the 2018 Amendments or entered into a TERA. Taking back control of energy

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219. See H.R. REP. NO. 115-1057, pt. 1, at 27–28 (2017) (codified at 25 U.S.C. § 3504(h)).

220. 25 U.S.C. § 3501(12).

221. *Id.* § 3504(h)(1).

222. See discussion *supra* Parts I, II.

223. 25 U.S.C. § 3504(h)(2)(A).

224. *Id.* § 3504(h)(2)(B)(i).

225. *Id.* § 3504(h)(2)(B).

226. *Id.* § 3504(h)(1).

227. *Id.* § 3504(h)(3).

resources is undoubtedly a sizable task, and the process of adopting a TERA alone is significant. The decision to adopt a TERA is one that Tribes cannot take lightly, but “TERAs should be seen for what they are: the best option for tribes who want to maximize their control over the development of tribal energy resources.”<sup>228</sup> Given the 2018 Amendments and the Tribes’ demonstrated capacity to effectively manage the worst pandemic in a century, there is no merit to an argument that Tribes do not possess the capability to adopt and implement a TERA.

#### *A. Significance of the 2018 Amendments*

Although the 2018 Amendments do not entirely remove the barriers to TERA adoption and do still impose an array of difficult requirements on Tribes, the Amendments allow for significant improvements to the TERA application process and substantive requirements that cannot be dismissed. Tribes no longer hold any reasonable uncertainty regarding whether the Secretary will find “sufficient capacity” to enter into a TERA.<sup>229</sup> If a Tribe has carried out an Indian Self-Determination and Education Assistance Act contract—which most have<sup>230</sup>—the Tribe will be eligible to enter into a TERA.<sup>231</sup> Even if a Tribe does not have an Indian Self-Determination and Education Assistance Act contract (or does have one but has had uncorrected material audit exceptions to it), the Tribe can still enter into a TERA if it can demonstrate substantial energy resource experience.<sup>232</sup> Not every Tribe will be a “qualified Indian tribe,” but most will. When Tribes submit their TERAs to the Secretary, they now know the burden is on the Secretary to disapprove of the TERA within 270 days if the TERA violates applicable federal law, fails to provide for periodic review by the Secretary, or does not include certain requisite provisions within the TERA.<sup>233</sup>

The 2018 Amendments also provide Tribes with considerable flexibility in several important respects. Tribes can now preemptively address the confusing “inherently Federal functions” language contained in DOI’s implementing regulations.<sup>234</sup> Rather than having to implement an environmental review process mirroring NEPA, Tribes can now set up a process tailored to their members that is focused on ensuring the public is

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228. Fosland, *supra* note 72, at 454.

229. 25 U.S.C. § 2604(e)(2)(B)(i), amended by 25 U.S.C. § 3504(e)(2)(B).

230. See *Division of Self-Determination Services*, *supra* note 170.

231. 25 U.S.C. § 3501(9)(A).

232. *Id.* § 3501(9)(B).

233. *Id.* § 2604(e)(2)(B).

234. See *id.* § 2604(e)(2)(B)(iii)(XIII).

informed and has an opportunity to comment on significant environmental impacts.<sup>235</sup> Further, the TERA approval process is now clear: DOI must adhere to a 270-day timeline,<sup>236</sup> and it must update the Tribe within 60 days regarding the application's status.<sup>237</sup> The 2018 Amendments and implementing TERA regulations certainly do not address all of the hurdles to renewable energy development on Tribal lands, but they do pave the way towards empowering Tribes to more independently develop their renewable energy resources.

Finally, the 2018 Amendments create new funding mechanisms and vehicles Tribes can use to implement their own energy resource management<sup>238</sup> and develop the resources themselves.<sup>239</sup> If fully utilized with other federal programs, a Tribe could take advantage of these provisions to transition from not only being a leaseholder of major renewable energy developments, but also a developer of such projects. The 2018 Amendments provide that a Tribe can receive the funds associated with the federal government carrying out energy resource development on the Tribe's lands.<sup>240</sup> Other federal programs—such as the \$2 billion in available funds under the Tribal Energy Loan Guarantee Program that provides for up to 90% of an energy development project occurring on Tribal land<sup>241</sup>—could be further leveraged to provide Tribes with the funding to develop their own renewable energy projects. Additionally, if Congress moves forward with the “direct pay” renewable energy tax credit options currently included in many of the major infrastructure bills, Tribes

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235. *See id.* § 3504(e)(2)(C)(i)(I).

236. *Id.* § 3504(e)(2)(A)(i).

237. *Id.* § 3504(e)(1)(B).

238. *Id.* § 3504(g)(1).

239. *Id.* § 3504(h).

240. *Id.* § 3504(g).

241. Michelle Lewis, *The US Energy Department Wants to Loan \$43B for EV and Clean Energy Projects*, ELECTREK (Mar. 26, 2021, 11:15 AM), <https://electrek.co/2021/03/26/us-energy-department-43-billion-loan-programs-office/> [<https://perma.cc/8S5P-CM5Q>] (explaining that the Department of Energy's Loan Program Office Director has said the Office is evaluating changes to its process including (i) deferring fees until a loan closes; (ii) streamlining the application process; (iii) reducing time and costs associated with smaller projects; and (iv) reexamining how the program defines eligible borrowers and projects); *LPO Director Jigar Shah Delivers Remarks at Reservation Economic Summit 2021*, ENERGY.GOV (July 20, 2021), <https://www.energy.gov/lpo/articles/lpo-director-jigar-shah-delivers-remarks-reservation-economic-summit-2021> [<https://perma.cc/8CFM-RP72>].

could partner with private developers in a TEDO to directly share in the benefits from energy development on their lands.<sup>242</sup>

*B. Other Federal Frameworks Fail to Provide for Comprehensive Tribal Management of Renewable Energy Resources*

Renewable energy development on Tribal land currently occurs either by the developer entering into an agreement with the Tribe and then having that agreement approved by DOI<sup>243</sup> or pursuant to Tribal regulations “consistent with” DOI’s regulations under the HEARTH Act.<sup>244</sup> As detailed in the Introduction of this Article, the problem with developing renewable projects pursuant to DOI’s approval is it often takes DOI far too long to issue an approval,<sup>245</sup> rendering Tribal energy resources less attractive than those located on non-Tribal lands. As one scholar has noted: “This instrument-by-instrument approval process introduces both delay and potential federal override of tribal decisions.”<sup>246</sup> Such approval also triggers a NEPA review<sup>247</sup> which, in turn, typically results in

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242. Hannah Hawkins et al., *KPMG Report: Outlook for What’s Ahead for Energy Tax Incentives (Updated)*, KPMG (May 3, 2021), <https://home.kpmg/us/en/home/insights/2021/05/tnf-kpmg-report-outlook-whats-head-energy-tax-incentives-updated.html> [<https://perma.cc/BZR6-LBTB>]. Tribes are currently unable to take advantage of renewable energy tax credits because “tribal governments are sovereign entities, they are not subject to federal taxation, and therefore do not qualify for federal tax breaks. Thus, any renewable energy project owned by the tribal government does not qualify for either the PTC or the ITC.” Ravotti, *supra* note 70, at 303.

243. See, e.g., *Interior Department Advances Two Solar Energy Projects on Tribal Lands*, U.S. DEP’T INTERIOR (July 16, 2021), <https://www.doi.gov/press-releases/interior-department-advances-two-solar-energy-projects-tribal-lands> [<https://perma.cc/HXJ9-B3ZK>].

244. 25 U.S.C. § 415(h); see also *About the SEIS*, ARROW CANYON SOLAR PROJECT SUPPLEMENTAL ENV’T IMPACT STATEMENT, <https://www.arrowcanyonsolareis.com/about-the-seis.html> [<https://perma.cc/CWT9-WS9E>] (last visited Aug. 22, 2021) (“The proposed Federal action, taken under 25 U.S.C. § 415, is BIA’s approval of the expansion of an approved 850-acre solar energy ground lease to 2,200 acres entered into by the Moapa Band with Arrow Canyon Solar, LLC (Applicant), a subsidiary of EDF Renewables (EDFR).”).

245. See 2015 GAO REPORT, *supra* note 25, at 22 (“In another example, in 2014, the Acting Chairman for the Southern Ute Indian Tribe reported that BIA’s review of some of its energy-related documents took as long as 8 years.”).

246. Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 113 (2012).

247. Bosshardt et al., *supra* note 66 (“The House Natural Resources Committee report on the legislation reflects impatience with the National

environmental impact statements that “are notoriously time-consuming and expensive to assemble and often fail to result in any substantive changes to the action under review.”<sup>248</sup>

The HEARTH Act presents an increasingly popular alternative to administration of Tribal energy resources by DOI. As of the writing of this Article, 55 out of the 574 federally recognized Tribes had their own regulations approved by DOI allowing them to govern—albeit to varying extents—the development of their own energy resources.<sup>249</sup> Under these regulations, NEPA is generally not triggered, resulting in a more streamlined process.<sup>250</sup> Nevertheless, because the “HEARTH Act requires tribes interested in renewable energy development to potentially incorporate aspects of federal environmental law,” including provisions consistent with NEPA, it “undermines tribal sovereignty.”<sup>251</sup>

The HEARTH Act’s framework has other significant drawbacks. Chief among them is the requirement that the regulations adopted by a Tribe be “consistent with any regulations issued by the Secretary . . . (including any amendments to the subsection or regulations).”<sup>252</sup> Although it is beyond the scope of this Article to survey those regulations, they are voluminous<sup>253</sup> and certainly far more extensive than the requirements for adopting a TERA.<sup>254</sup> The Tribal regulations also do not remove the need for environmental review; rather, a Tribe’s regulations must include “an environmental review process that includes . . . the identification and evaluation of any significant effects of the proposed action on the environment” and ensure that “the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action.”<sup>255</sup>

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Environmental Policy Act in particular, noting that if secretarial approval triggers NEPA, “then a full environmental impact statement under [NEPA] must first occur, along with the usual delays and the opportunity for any group to file a lawsuit over the sufficiency of the environmental review.”).

248. Bronin, *supra* note 71, at 231.

249. *HEARTH Act of 2012*, *supra* note 66.

250. Bosshardt et al., *supra* note 66 (“The primary advantage of working with a tribe with a HEARTH Act approved leasing regulation is the streamlined approval process. Other federal, state and local authorizations may still be required, with attendant environmental reviews, but what otherwise would be a key permitting step—BIA approval of the lease—will not be required.”).

251. Warner, *supra* note 51, at 1053.

252. 25 U.S.C. § 415(h)(3)(B)(i).

253. *See generally* 25 C.F.R. pt. 162 (2021).

254. *Compare* 25 C.F.R. pt. 162, *with* 25 C.F.R. § 224.53.

255. 25 U.S.C. § 415(h)(3)(B).

Apart from these issues, the overarching problem with the HEARTH Act's approach to Tribal energy development is that it does not truly provide Tribes the sovereign right to develop their energy resources in the manner most appropriate for them. While a Tribe can approve certain energy lease agreements under the HEARTH Act, it is limited to agreements DOI's regulations actually address, and therefore "off-lease components, such as transmission lines, and the overall time to secure all necessary authorizations may ultimately depend on other regulatory requirements, including state and local approvals subject to state environmental review requirements."<sup>256</sup> In short, the HEARTH Act is "*not* comprehensive authority to pursue an energy development project or approve rights of way, which are often necessary for transmission and distribution wires."<sup>257</sup>

Similarly troubling is the fact that a Tribe's regulations must remain consistent with DOI's regulations—including any amendments—and thus, if the Secretary revises DOI's leasing regulations, a Tribe may need to expend resources to amend its HEARTH Act regulations and resubmit them for DOI approval. A Tribe could also have its regulations and ability to approve energy development on its lands rescinded by the Secretary,<sup>258</sup> and no funding is available like that under ITEDSDA.<sup>259</sup>

### *C. Tribes Are Prepared to Develop Their Own Energy Resources*

Despite historic inequities and a lack of federal resources, Tribes have remarkably battled the worst pandemic in a century.<sup>260</sup> The Cherokee Nation, with the help of mask mandates, free drive-through Covid-19 testing, and other measures, had just 4,000 cases and 33 Covid-19 related

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256. Bosshardt et al., *supra* note 66.

257. Maruca, *supra* note 188, at 480–81.

258. 25 U.S.C. § 415(h)(8)(B); 25 C.F.R. § 162.022; Bosshardt et al., *supra* note 66 ("The secretary may take 'any action the Secretary determines to be necessary to remedy the violation' of the tribe's HEARTH Act regulations, including rescinding approval of the regulations and reassuming responsibility for approving leases.").

259. 25 U.S.C. § 3504(g).

260. See Kelsey Piper, *Here's How Covid-19 Ranks Among the Worst Plagues in History*, VOX (Jan. 11, 2021, 2:30 PM), <https://www.vox.com/future-perfect/21539483/covid-19-black-death-plagues-in-history> ("Covid-19, of course, has now been certified as the cause of death for 1.94 million people in the space of one year. That makes it worse in absolute terms than most influenza pandemics in history, except 1918's . . .").

deaths of nearly 140,000 citizens nine months into the pandemic.<sup>261</sup> The Northern Cheyenne Tribe undertook testing of half of its 4,000 members in July and “quickly quarantined the handful who tested positive, creating shelters for those who couldn’t do so in their homes.”<sup>262</sup> Tribes on the Fort Belknap reservation have overseen the vaccination of 67% of Tribal members, compared to the neighboring county where the rate hangs around just 40%.<sup>263</sup> The Navajo Nation—which by April 2021 had given at least one Covid-19 dose to 87.8% of its eligible population<sup>264</sup>—had succeeded in vaccinating 4,000 to 5,000 homebound citizens “by collaborating with public health workers to reach those residents in rural communities.”<sup>265</sup>

In her review of the Tribal response to the Covid-19 pandemic, Professor Katherine Foley, identified three qualities that characterized strong Tribal responses: “Most of these tribes acted quickly, embraced expertise while tailoring measures to specific community qualities and needs, and engaged in necessary innovation.”<sup>266</sup> With respect to their quick action, she explained: “Tribes were early adopters of curfews, stay-at-home orders, and mask mandates—adopting such policies often well

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261. Usha Lee McFarling, *‘They’ve Been Following the Science’: How the Covid-19 Pandemic Has Been Curtailed in Cherokee Nation*, STAT (Nov. 17, 2020), <https://www.statnews.com/2020/11/17/how-covid19-has-been-curtailed-in-chokeee-nation/> [<https://perma.cc/5AD7-493A>].

262. Martha Hostetter & Sarah Klein, *Learning from Pandemic Responses Across Indian Country*, COMMONWEALTH FUND (Sept. 30, 2020), <https://www.commonwealthfund.org/publications/2020/sep/learning-pandemic-responses-across-indian-country> [<https://perma.cc/9DJ6-6UJX>].

263. Richard Read, *Despite Obstacles, Native Americans Have the Nation’s Highest COVID-19 Vaccination Rate*, L.A. TIMES (Aug. 12, 2021, 3:00 AM), <https://www.latimes.com/world-nation/story/2021-08-12/native-american-covid-19-vaccination>.

264. Rachel Treisman, *Outpacing The U.S., Hard-Hit Navajo Nation Has Vaccinated More Than Half of Adults*, NPR (Apr. 26, 2021, 2:51 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/04/26/990884991/outpacing-the-u-s-hard-hit-navajo-nation-has-vaccinated-more-than-half-of-adults> [<https://perma.cc/RTH7-452D>].

265. Latoya Hill & Samantha Artiga, *COVID-19 Vaccination Among American Indian and Alaska Native People*, KFF (Apr. 9, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-vaccination-american-indian-alaska-native-people/> [<https://perma.cc/4DZY-DPY8>].

266. Katherine Florey, *The Tribal COVID-19 Response*, REGUL. REV. (Mar. 17, 2021), <https://www.theregreview.org/2021/03/17/florey-tribal-covid-19-response/> [<https://perma.cc/F522-JZSG>].

before the states in which they were located took similar actions.”<sup>267</sup> Tribes utilized expert health advice by, for example, “including a system of color-coded window signs that a tribal public health agency in Maine devised to allow elders to seek help without leaving home.”<sup>268</sup> Further, Tribes maintained innovation throughout the pandemic, introducing Covid-19 testing checkpoints upon entry to their reservations, deploying “charter planes, sleds, and a water taxi” to get Tribal members vaccinated and toggling between federal and state partnerships to obtain vaccine supplies quicker.<sup>269</sup>

Tribes can similarly employ these three attributes to more effectively develop their own energy resources by adopting a TERA. Tribes are currently prevented by the federal government and the labyrinth of associated processes from swiftly moving to develop their energy resources. A TERA, however, would allow Tribes to develop energy resources at a much quicker and more efficient pace. Developers and financing parties will often have multiple site locations and projects from which they can choose to invest their time and energy. If a Tribe can offer them an expedited process they cannot get—say on adjacent federal or state land—they will be more likely to choose the project on Tribal land, and the benefits associated with the project will flow to the Tribe. On the other hand, if a Tribe elects to take a more drawn-out approach to developing their energy resources, a TERA will allow for that as well.

A TERA will also allow Tribes to take in (or develop their own) energy expertise and adapt it to meet energy development goals specific to that Tribe. To begin with, there are already American-Indian-led organizations like Grid Alternatives<sup>270</sup> (which helps Tribal communities meet their renewable energy goals) or Native Renewables<sup>271</sup> (founded by Wahleah Johns and aimed at providing off grid photovoltaic systems to homes on the Navajo and Hopi reservations) that have energy development expertise that can be called upon to assist Tribes in developing their own energy resources under a TERA. Even if Tribes rely on non-American-Indian energy expertise, a TERA will allow them to adapt that expertise to meet their Tribe’s energy development goals.

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267. *Id.*

268. *Id.*

269. *Id.*

270. *See Tribal Program*, GRID ALTS., <https://gridalternatives.org/what-we-do/tribal-program> [<https://perma.cc/5KFU-3MB2>] (last visited Oct. 31, 2021).

271. *Empowering Native Communities*, NATIVE RENEWABLES, <https://www.nativerenewables.org/> [<https://perma.cc/BMY7-GC6Q>] (last visited Oct. 31, 2021).

Whether this is requiring that solar developments be pollinator friendly,<sup>272</sup> that wind projects employ bird safe technologies,<sup>273</sup> or something else entirely, will be almost entirely up to Tribes under their TERA.

Finally, as the energy landscape in the world shifts to accommodate climate change, continuing innovation both on and off Tribal lands will play a vital role. During the pandemic, Tribes have “pioneered novel measures to combat COVID-19, developing new and creative solutions to urgent problems, including some of the few successful border control programs in the United States.”<sup>274</sup> Responsible renewable energy development will present different challenges than navigating a pandemic. However, by adopting a TERA, Tribes will be in a position to innovate how energy is developed on their lands in the same manner they innovated to protect their communities from the Covid-19 pandemic. TERAs thus offer the opportunity to dream a new dream of sovereign renewable energy development on Tribal lands.

#### CONCLUSION

Tribes throughout the country have demonstrated that when the federal government left them stranded without proper resources to respond to the Covid-19 pandemic,<sup>275</sup> they could and did take the steps necessary to protect their members.<sup>276</sup> The federal government has similarly failed to take the steps necessary to help Tribes develop their renewable energy resources,<sup>277</sup> and the federal government’s role in developing fossil fuel resources has, as Wahleah Johns writes, created “a system in which corporations could make billions pillaging our homelands for uranium,

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272. Abby Neal & Uma Atre, *Pollinator-Friendly Solar Installations Benefit Wildlife, Farmers, Climate*, ENV’T & ENERGY STUDY INST. (Mar. 16, 2020), <https://www.eesi.org/articles/view/pollinator-friendly-solar-installations-benefit-wildlife-farmers-climate> [<https://perma.cc/48JQ-VWKZ>].

273. Molly Bennet, *How New Technology Is Making Wind Farms Safer for Birds*, AUDUBON (2018), <https://www.audubon.org/magazine/spring-2018/how-new-technology-making-wind-farms-safer-birds> [<https://perma.cc/9GLD-NSDQ>].

274. Florey, *supra* note 266.

275. Mark Walker & Emily Cochrane, *Native American Tribes Sue Treasury Over Stimulus Aid as They Feud Over Funding*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2020/05/01/us/politics/coronavirus-native-american-tribes-treasury-stimulus.html> [<https://perma.cc/9SP6-8D2M>].

276. Bart Pfankuch, *How a S.D. Native American Tribe Is Protecting Its People from COVID-19*, ARGUS LEADER (May 20, 2020, 4:52 PM), <https://www.argusleader.com/story/news/2020/05/20/how-s-d-native-american-tribe-protecting-its-people-covid-19/5232458002/> [<https://perma.cc/GV5N-4VWV>].

277. See 2015 GAO REPORT, *supra* note 25.

coal, oil and gas deposits, leaving our groundwater contaminated and our people sickened with uranium radiation exposure, lung disease, asthma and cancer.”<sup>278</sup> Given the U.S. government’s past record, now is the time for Tribes to develop their own renewable energy resources. A productive first step would be to take back control over those resources by adopting a TERA.

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278. Johns, *supra* note 51.