

**A CASE OF NOT-SO-FATAL FLAWS:  
RE-EVALUATING THE INDIAN TRIBAL  
ENERGY DEVELOPMENT AND  
SELF-DETERMINATION ACT**

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# A CASE OF NOT-SO-FATAL FLAWS: RE-EVALUATING THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT

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## I. INTRODUCTION

The importance of tribal energy resources can hardly be overstated. Indian reservations in the United States hold vast mineral reserves, making the tribes (collectively) one of the largest owners of mineral resources in the United States.<sup>1</sup> As it currently stands, “Indian lands are estimated to contain three percent of the nation’s known oil and gas reserves, 30 percent of the coal west of the Mississippi, and up to a third or more of the country’s uranium, as well as smaller quantities of a host of other mineral resources.”<sup>2</sup> This translates into the possibility of “up to 5.3 billion barrels of yet undeveloped oil reserves, 25 billion cubic feet of undeveloped gas reserves, [and] 53.7 billion tons of undeveloped coal

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1. Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 542–43 (1994).

2. *Id.* at 543.

reserves.”<sup>3</sup> And reservation resources are not limited to traditional energy production. Reservations also contain “prime target acreage for wind, geothermal, solar and other renewable energy resources.”<sup>4</sup> These resources often serve an important function by providing economic development opportunities for the Indian tribes living on reservations.<sup>5</sup> Given the size of the yet undeveloped resources, there is vast potential for future expansion of energy resource development on Indian lands.

Despite the potential gains, the ability of tribes to develop their energy resources has often been severely curtailed due to either legal or practical limitations.<sup>6</sup> Even if a tribe managed to develop its reservation resources to some degree, the statutes governing the energy development often deprived the tribe of a majority of the benefits of such development.<sup>7</sup> Some progress has been made over time, although changes have been slow in coming. The number of obstacles facing tribes in their energy development efforts has been slowly reduced over the last hundred years by a series of federal statutes governing resource development on Indian reservations.<sup>8</sup>

The newest in this series of statutes is the Indian Tribal Energy Development and Self-Determination Act (ITEDSA).<sup>9</sup> Passed in 2005, ITEDSA represents a large step toward the ultimate goal of modern federal Indian policy: tribal self-determination.<sup>10</sup> Unlike prior statutes that required federal approval for development projects,<sup>11</sup> ITEDSA gives tribes an opportunity to exercise greater control over their own resources. It allows them to negotiate their own development agreements and to take on the responsibilities associated with those agreements.<sup>12</sup> Taking advantage of the statute is optional; a tribe is not required to enter into resource agreements with the Secretary of the Interior, but may do so if it meets the requirements.<sup>13</sup> In spite of the unprecedented opportunities ITEDSA presents, there have been critics of the new statute.

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3. Lynn H. Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights, and Culture*, 56 ROCKY MTN. MIN. L. INST. § 5A.01 (2010).

4. *Id.*

5. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1066 (2008) (“One of the primary means of economic development for many Indian tribes is development of the reservation’s natural resources.”).

6. *See generally* Royster, *supra* note 1 (providing an extensive historical examination of the advantages and disadvantages of different statutory schemes for tribal energy development).

7. *See id.*

8. *See id.*

9. 25 U.S.C. §§ 3501–06 (2006).

10. *See id.* § 3502(a)(1).

11. Energy Policy Act of 1992, Pub. L. No. 102-486, § 2602, 106 Stat. 2776, 3113.

12. *Id.*

13. *Id.* § 3504(e)(2)(B) (stating that the Secretary “shall” approve the resource agreement submitted if the requirements are met).

The criticism of ITEDSA has been focused on three general points: (1) that most tribes lack the resources to make the resource agreement system feasible; (2) that requiring tribes to incorporate a public-comment period into the development decision process destroys any chance of true sovereignty and tribal self-governance; and, (3) that the federal government has effectively abandoned its trust responsibility after a tribe has entered into a resource agreement.<sup>14</sup> These criticisms are largely unwarranted. Far from containing flaws that will prevent tribes from taking control of their resources, the resource agreement system is an advantageous and viable option for many tribes seeking to develop their energy resources.

This Article presents a three-part defense of ITEDSA. Section II provides an overview of the past statutes governing energy development on Indian reservations, and explains the current system that governs the process today. An understanding of the current framework for mineral development on Indian reservations is the foundation for understanding the benefits of—and challenges posed by—ITEDSA and the resource agreement system. Section III examines the provisions of ITEDSA itself and addresses each of the major criticisms against the statute. Section IV concludes that the criticisms leveled against ITEDSA are unwarranted, and in reality will pose little threat to the statute's widespread use.

## II. HISTORY AND BACKGROUND

### A. Federal Law Before the Indian Tribal Energy Development and Self-Determination Act

Although federal authority was imposed on tribes' ultimate control of their lands beginning with the first Congress,<sup>15</sup> mineral leasing and energy development on Indian reservations first became common during what is known as the "Allotment" period from 1871 to 1934.<sup>16</sup> It was during this period that the federal government "adopted a program aimed at terminating the reservation system"<sup>17</sup> by allotting parcels of collectively owned tribal land to individual tribal members.<sup>18</sup> At the same time, the federal government greatly increased opportunities for development of Indian mineral resources by non-Indians through a series of statutes. Each successive statute also brought with it its own dis-

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14. See Royster, *supra* note 5, at 1082–1101.

15. Act of July 22, 1790, § 4, 1 Stat. 137 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution."); Slade, *supra* note 3, at § 5A.03(1)(a) n.35.

16. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

17. Jane E. Scott, Note, *Controlling Land Use on the Checkerboard: The Zoning Powers of Indian Tribes After Montana v. United States*, 9 COLUM. J. ENVTL. L. 267, 268 (1983–1984).

18. See *id.* at 268–69.

tinct requirements, however.<sup>19</sup> For example, a statute passed in 1891 limited mining leases to a ten-year term.<sup>20</sup> Another, passed in 1919, extended primary terms to twenty years with options for ten-year renewals on all mining leases, except oil and gas.<sup>21</sup> But this statute applied only to reservations in nine western states;<sup>22</sup> the rest of the country presumably continued under the previous statute. Yet another statute, passed in 1924, allowed oil and gas leases for terms of ten years “and as much longer as oil or gas shall be found in paying quantities.”<sup>23</sup> Despite this substantial incongruence in the leasing and development process, all the Allotment statutes had a common thread: the federal government had complete control once a development agreement was in place.<sup>24</sup> As one scholar noted, the overall effect of this legislation was that “[i]n most cases, tribes could consent to non-Indian development, but had little control otherwise over the management and development of their natural resources.”<sup>25</sup>

The allotment period ended when the Indian Reorganization Act (IRA) was passed in 1934.<sup>26</sup> The IRA authorized constitutional governments to be created by the tribes,<sup>27</sup> who would then receive charters of incorporation from the federal government.<sup>28</sup> With these charters of incorporation, tribes were authorized to enter into leases for energy development with terms of ten years or less without getting the approval of the Secretary of the Interior.<sup>29</sup> This statutory scheme was relatively short-lived, however, and followed the previous statutes into relative disuse after more advantageous options became available to the tribes.

Congress changed direction from the IRA in 1938 when it passed the Indian Mineral Leasing Act (IMLA).<sup>30</sup> The statute made the leasing process more efficient by providing a uniform set of leasing procedures and served as “the primary authority for mineral leasing” on reservations for years.<sup>31</sup> The federal government still made most of the deci-

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19. Royster, *supra* note 5, at 1072.

20. Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795 (codified as amended at 25 U.S.C. § 397 (2006)).

21. 25 U.S.C. § 399 (“Leases under this section shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods.”).

22. *Id.* (authorizing the Secretary to lease “any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming”).

23. *Id.* § 398.

24. Royster, *supra* note 5, at 1072.

25. *Id.*

26. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 464–79); Royster, *supra* note 5, at 1073.

27. 25 U.S.C. § 476 (“Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto . . .”).

28. *Id.* § 477; *see also* Royster, *supra* note 5, at 1073.

29. 25 U.S.C. § 477.

30. *Id.* §§ 396a–g.

31. Slade, *supra* note 3, at § 5A.04(1)(a).

sions about tribal resource development, despite changes geared toward “the revitalization of tribal governments.”<sup>32</sup> A ten-year maximum on a lease’s primary term “curtailed any real utility for mineral development,”<sup>33</sup> and all leases were again subject to the approval of the Secretary of the Interior.<sup>34</sup> In addition, lease terms could not be changed once minerals were produced in paying quantities, which limited the ability of tribes to renegotiate lease terms in response to changing circumstances.<sup>35</sup> Thus, the system as it existed under the IRA and IMLA did not give tribes control in practice because “political sovereignty was minimal and the federal government retained most of the practical decision making about Indian natural resources development and use.”<sup>36</sup>

### B. Current System for Indian Reservation Energy Development

The current system for tribal energy leasing was created in 1982 when Congress passed the Indian Mineral Development Act (IMDA).<sup>37</sup> The statute was intended to enhance self-determination as well as “maximize the financial return tribes can expect for their valuable mineral resources.”<sup>38</sup> Under the Act, tribes were allowed to enter into a variety of agreements regarding any mineral resources in which they owned “a beneficial or restricted interest,” provided the agreement was approved by the Secretary of the Interior and the tribe.<sup>39</sup> The statute also required the Secretary to provide information and assistance to the tribes upon their request during the negotiations of a mineral agreement.<sup>40</sup> This duty to provide information was later found to extend not only to the negotiation stage of an agreement, but throughout the duration of such an agreement.<sup>41</sup>

IMDA agreements offer “increased control over, and potentially increased revenue from, mineral development on Indian lands.”<sup>42</sup> Every type of mineral agreement a tribe can enter into under the IMDA offers more control than leases under prior statutes.<sup>43</sup> The statute is flexible as well, allowing varying degrees of risk and control to be included in the

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32. Royster, *supra* note 5, at 1074.

33. *Id.*

34. 25 U.S.C. § 396a.

35. Royster, *supra* note 5, at 1074.

36. *Id.*

37. 25 U.S.C. §§ 2101–08.

38. S. REP. NO. 97-472, at 2 (1982); *see also* Royster, *supra* note 1, at 584.

39. 25 U.S.C. § 2102(a).

40. *Id.* § 2106.

41. *See* Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1461 (9th Cir. 1986) (“[The] duty to provide advice and assistance runs for the life of the agreement without interruption: the Secretary of the Interior has an obligation to assist tribes from the very inception of agreements and his responsibility to protect their interests will continue for the duration of the agreement.”) (quoting 128 Cong. Rec. S14196 (daily ed. Dec. 8, 1982) (statement of Sen. Melcher)).

42. Royster, *supra* note 1, at 585.

43. *Id.* at 586.

agreements.<sup>44</sup> In addition to the standard mineral lease, tribes may enter into agreements as partners in a joint venture and share in the costs and profits of development.<sup>45</sup> Tribes can also choose to enter into a service contract, in which the tribe “hires an operator to carry out the mining activities, but maintains total control, pays all costs, and takes all the risks of loss.”<sup>46</sup> And the tribe is not limited to entering into only one type of agreement. Rather, a tribe may enter “into any mineral development arrangement agreeable to the parties and approved by the Secretary.”<sup>47</sup> It is precisely this flexibility, combined with an opportunity for increased control over mineral development, that has led to widespread use of IMDA agreements by Indian tribes.<sup>48</sup>

But the IMDA’s widespread use does not mean that the statute lacks practical limitations. Tribes interested in energy development often find that they “can afford [n]either the capital [n]or the risk attendant” upon many of the more beneficial development agreements.<sup>49</sup> In addition, tribes new to mineral development in some cases lack the expertise and information necessary to negotiate an energy agreement.<sup>50</sup> These challenges are in some respects identical to the challenges faced by tribes under the most recent statute, ITEDSA, and will be discussed more in depth below. In the end, however, and despite IMDA’s shortcomings, “mineral agreements, with their greater flexibility and opportunity for tribal control, remain[] the preferred route for tribes undertaking mineral development activities.”<sup>51</sup>

### III. DISCUSSION

#### A. ITEDSA: What Is It and How Does It Work?

Congress passed ITEDSA in 2005 as part of the larger Energy Policy Act.<sup>52</sup> The new statute departs significantly from previous tribal energy development legislation, and arguably takes the biggest step toward the goal of self-determination seen in the past hundred years. What makes ITEDSA so special? The statute gives Indian tribes the ability to approve their own energy leases almost completely without interference from the federal government.<sup>53</sup> This new freedom removes a

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44. *See id.* at 586–88.

45. *Id.* at 586.

46. *Id.* at 587.

47. *Id.*

48. *See id.* at 588; *see also* Slade, *supra* note 3, at § 5.04(1)(c) (“Because of its flexibility, the IMDA is the preferred vehicle for tribal energy and mineral development agreements.”).

49. Royster, *supra* note 1, at 587.

50. *Id.* at 588.

51. *Id.*

52. Royster, *supra* note 5, at 1080; *see also* 25 U.S.C. §§ 3501–06 (2006); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 764–68.

53. *Compare* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2602, 106 Stat. 2776, 3113 *with* 25 U.S.C. §§ 3504(a) (requiring consultation between the Secretary of Energy and the Tribes in 1992, but then removing this requirement in the current version).

multitude of barriers and potential problems associated with energy development on reservations.<sup>54</sup>

ITEDSA authorizes a tribe to enter into a tribal energy resource agreement with the Department of the Interior.<sup>55</sup> If the resource agreement is approved, it becomes the governing instrument between the Secretary of the Interior and the tribe. With the agreement in place, a tribe may then conduct all of its own leasing in regard to energy development, eliminating the requirement of secretarial approval in the leasing process.<sup>56</sup> This framework was adopted in order to promote “both tribal self-determination and economic development” through “increased and efficient energy development and production in an environmentally sound manner.”<sup>57</sup>

Of course, a proposed resource agreement must meet certain requirements before it will be approved by the Secretary of the Interior.<sup>58</sup> First, the Secretary must find that the tribe has “sufficient capacity to regulate the development of energy resources of the Indian tribe.”<sup>59</sup> Second, the agreement itself must provide for periodic review of the tribe’s compliance with the agreement’s terms by the Secretary.<sup>60</sup> Third, the proposed resource agreement must contain provisions authorizing the Secretary to take necessary action to protect trust assets that are in “imminent jeopardy” as a result of violation of the resource agreement or other applicable federal law.<sup>61</sup> And finally, the agreement must contain certain provisions with respect to the leases, business agreements, or rights-of-way that will be entered into under the resource agreement.<sup>62</sup> If all these requirements are met, the Secretary must approve the resource agreement and allow the tribes to assert control over the leasing of their reservation resources.<sup>63</sup>

#### B. Critical Evaluation of Anticipated Challenges Associated with ITEDSA

There have been many different criticisms leveled at ITEDSA and the tribal energy resource agreement system. Perceived challenges facing the resource agreement system include: (1) the lack of financial,

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54. See AMERICAN LAW OF MINING § 67.07 (Rocky Mountain Min. L. Found., 2d ed. 1984).

55. 25 U.S.C. § 3504(e)(1).

56. *Id.* § 3504(a).

57. Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Committee on Indian Affairs, 108th Cong. 70–79 (2003) [*hereinafter* Senate Committee Hearing] (prepared statement of Theresa Rosier, Counselor to the Assistant Secretary, Indian Affairs, Department of the Interior).

58. See 25 U.S.C. § 3504(e)(2)(B).

59. *Id.* § 3504(e)(2)(B)(i).

60. See *id.* § 3504(e)(2)(B)(ii).

61. *Id.* § 3504(e)(2)(D)(iii).

62. *Id.* § 3504(e)(2)(B)(iii).

63. *Id.* § 3504(e)(2)(B). (“The Secretary *shall* approve a tribal energy resource agreement” if the submission meets the statutory requirements) (emphasis added).

technical, and scientific resources available to tribes; (2) the effects of public input requirements on tribal decision making; and, (3) the uncertain state of the federal government's trust responsibility in regard to tribes that enter into tribal energy resource agreements (TERAs).<sup>64</sup> On close examination, however, the notion that the new statute's flaws will prevent tribes from taking advantage of the system lacks merit. Many of the challenges outlined above are by no means insurmountable. As such, 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.

### 1. Lack of Financial, Technical, and Scientific Resources

There has been no shortage of claims that Indian tribes will be unable to take advantage of ITEDSA and enter into resource agreements because they do not have sufficient money or expertise.<sup>65</sup> The statute itself, however, specifically directs the Secretary of the Interior to "provide development grants to Indian tribes . . . for use in developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land."<sup>66</sup> Furthermore, Congress mandated that the Secretary ensure that Indian tribes have "scientific and technical information and expertise, for use in the regulation, development, and management of energy resources" to the "maximum extent practicable and to the extent of available resources."<sup>67</sup> The tribes will therefore have some assistance in developing their capacity to regulate resource development on their own lands.

The extent of the Secretary's assistance remains to be seen.<sup>68</sup> Some have posited that secretarial assistance may not be enough to really affect some tribes' capacity to enter into a resource agreement.<sup>69</sup> This skepticism is not unjustified, especially when one considers past performance by the federal government in regard to Indian tribes. Congress's track record of funding tribal programs is certainly cause for concern.<sup>70</sup> One commentator has stated: "[B]ased on past practices, Congress will never commit the resources needed to provide comprehensive, timely, and high-quality expertise to tribes as they evaluate and undertake mineral development."<sup>71</sup> It seems as though this prediction is being

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64. See Royster, *supra* note 5, at 1082–1101.

65. See *id.* at 1083; Slade, *supra* note 3, at § 5A.04(1)(d) ("[T]ribes may have concerns over the substantial administrative structures likely necessary to discharge TERA duties, impacts on tribal budgets, and the effect of injecting public participation into tribal deliberations.").

66. 25 U.S.C. § 3502(a)(2)(A).

67. *Id.* § 3503(c).

68. See Slade, *supra* note 3, at § 5A.04(1)(d) (stating that the Act itself "provided no funding to support tribal TERA programs").

69. See Royster, *supra* note 5, at 1084–85.

70. See Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, NAT. RES. & ENV'T, Summer 2007, at 55, 56.

71. *Id.*

borne out to some extent. At least one program created as part of ITEDSA, the Indian Energy Loan Guarantee Program, has never been fully funded,<sup>72</sup> even though simply funding the program fully “would go a long way toward creating the necessary incentives to adequately promote alternative energy development in Indian country.”<sup>73</sup>

On the other hand, it is unlikely that all tribes will attempt to engage in serious energy development simultaneously. And as tribes become better able to regulate their own energy development, the need for funding and technical expertise provided by the Secretary will decrease. Moreover, in some cases financial and technical assistance from the Secretary may not even be necessary: some tribes likely already possess the substantial financial and technical resources required to enter into a resource agreement. The Southern Ute Tribe of Colorado, for example, is worth around four billion dollars, and is the thirteenth largest privately held energy producer in the United States.<sup>74</sup> The tribe’s energy division “has interests in more than 1,000 oil and gas wells,” and more than 450 of those the tribe operates itself.<sup>75</sup> In addition, the tribe’s energy division owns 3,000 miles of pipeline, using the pipeline to process and deliver natural gas to transmission pipelines and other locations.<sup>76</sup> As a tribe that “employs scores of highly trained geologists, petroleum engineers, accountants, field operators, and environmental compliance personnel,”<sup>77</sup> the Southern Ute Tribe already regulates much of its own development operations, and as such demonstrates that a lack of government assistance is not a complete bar to the resource agreement system.

Clearly, not all tribes are in the same situation as the Southern Ute Tribe. But even the tribes that currently lack sufficient capacity will be able to work toward acquiring it with help from the federal government.<sup>78</sup> In smaller-scale renewable energy projects, tribes have already taken steps toward building the requisite capacity to develop their own energy resources. For example, the Blackfeet Nation in Montana began an alternative energy development project in 1995, building a wind turbine to test the viability of wind power in the area.<sup>79</sup> Using money from a Department of Energy award and additional contributions from the tribe and others, a single turbine went online in 1996, which not only almost completely offset the energy needs of a tribal college, but also

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72. Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 469 (2010).

73. *Id.*

74. Susan Moran, *Indian Tribe Becomes Force in West’s Energy Boom*, N.Y. TIMES (July 24, 2007), available at <http://www.nytimes.com/2007/07/24/business/24tribe.html?page-wanted=1&sq=Moran Southern Ute&st=cse&scp=1>.

75. *Id.*

76. *Id.*

77. Shipps, *supra* note 70, at 56. Also note that the Southern Ute Indian Tribe’s “oil and gas operating company produces natural gas from hundreds of self-operated wells on the Southern Ute Indian Reservation.” *Id.*

78. 25 U.S.C. § 3503(c) (2006).

79. Kronk, *supra* note 72, at 466.

provided jobs for people on the reservation.<sup>80</sup> Ten years later, the Blackfeet Tribe completed another project that built upon the first.<sup>81</sup> Funded again in part through the Department of Energy, the tribe created an energy development organization, Blackfeet Renewable Energy, Inc., a semi-autonomous tribal development corporation “capable of forming power purchase and distribution agreements including all necessary elements required to obtain status and financing from various funding and investment sources.”<sup>82</sup> Once the organization was formed, a new wind-monitoring program was started to gather data and support new development opportunities.<sup>83</sup> In addition, the organization “is currently developing a community scale wind project for the Blackfeet Nation that will eventually be wholly owned by the Blackfeet Tribal Membership.”<sup>84</sup> The project’s final report in 2008 stated that the Nation’s next step would be “to develop a Tribal Energy Resource Agreement for this community wind project,” in order to “promote Blackfeet Tribal oversight and management of energy and mineral resource development . . . and further the goal of Indian Self-Determination.”<sup>85</sup>

Similar small-scale development with an eye toward building the requisite capacity to enter into a resource agreement is possible. ITEDSA only requires a minimum capacity on the part of the tribe.<sup>86</sup> Regulations promulgated by the Secretary confirm this.<sup>87</sup> In addition to other considerations, the Secretary is required to account for “[t]he specific energy resource development the tribe proposes to regulate”<sup>88</sup> and “the scope of the administrative or regulatory activities the tribe seeks to assume.”<sup>89</sup> Tribes should therefore be able to limit the scope of their resource development and minimize the demands of the subsequent regulation. After tribes reach the threshold capacity and begin small-scale development, the profits from that energy development will allow tribes to improve and expand their technical expertise. This in turn will further enhance the tribes’ capacity to regulate, and enable the tribes to expand the scope of their resource agreements.

That energy development will allow for increased tribal regulation and control over reservation resources is hardly a controversial proposition. Energy development, especially in the realm of mineral resources, can bring large profits to tribes.<sup>90</sup> Even under the current system that

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80. *Id.* at 466–67.

81. See BLACKFEET RENEWABLE ENERGY DEP’T, ENERGY ORGANIZATION DEVELOPMENT PROJECT FINAL REPORT (2008), available at <http://apps1.eere.energy.gov/tribalenergy/pdfs/blackfeet06final.pdf>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 25 U.S.C. § 3504(e)(2)(B)(i) (2006).

87. 25 C.F.R. § 224.72 (2011).

88. *Id.* § 224.72(a).

89. *Id.* § 224.72(b).

90. See *Three Affiliated Tribes Oil & Gas Report for August 2010*, MANDAN, HIDATSA & ARIKARA NATION ENERGY DEP’T, <http://mhaenergy.com/news/general/three->

requires secretarial approval for all oil and gas leases on tribal lands, millions of dollars in royalties and taxes are being paid to the tribes as well as to individual allottees on the reservations.<sup>91</sup> Under ITEDSA, the decision to put some of these revenues into expansion and improvement of regulation, in order to remain in compliance with a specific tribe's resource agreement, will be in the sole discretion of the tribe. It is not difficult to imagine a tribe would want to preserve and expand this source of revenue.

At least one scholar has also pointed out that the Secretary has a duty not only to assist the tribes, but also to help ensure that energy companies do not gain information from the Secretary that is not provided to the tribes.<sup>92</sup> The proposition follows the Supreme Court's decision in *United States v. Navajo Nation*, which dealt with the Navajo Tribe's right to substantial royalties in connection with energy development on the tribe's reservation.<sup>93</sup> In that case, an energy company and the Navajo tribe sought to negotiate new terms regarding coal royalties for a lease covered by IMLA.<sup>94</sup> The tribe asked the Secretary of the Interior "to exercise his contractually conferred authority" and adjust the royalty rate under the lease.<sup>95</sup> The Secretary did so, and the energy company filed an administrative appeal of the Secretary's decision.<sup>96</sup> After receiving information in regard to the appeal, the energy company and the tribe both felt that an announcement in favor of the tribe was imminent.<sup>97</sup>

It was at this point in the negotiations that representatives of the energy company met privately with the Secretary, giving no notice of the meeting to the Navajo tribe.<sup>98</sup> Afterward, the Secretary sent a memorandum to an undersecretary that suggested that the undersecretary "inform the involved parties that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion."<sup>99</sup> The information in the memorandum was never provided to the tribe, however; the tribe learned only that "'someone from Washington' had urged a return to the bargaining table."<sup>100</sup> As a result, "[t]he coal company then used th[e] information in negotiating a new royalty rate on coal leases, a royalty rate that ultimately cost the

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affiliated-tribes-oil-gas-report-for-august-2010/1 (last visited Jan. 23, 2012) (reporting an aggregate of over \$11.43 million in oil and gas tax and royalty revenue received by the Three Affiliated Tribes—Mandan, Hidatsa, and Arikara—in North Dakota for the seven-month period from January 2010 to July 2010).

91. *See id.*

92. *See Royster, supra* note 5, at 1085.

93. *See United States v. Navajo Nation*, 537 U.S. 488 (2003).

94. *Id.* at 495–96.

95. *Id.* at 496.

96. *Id.*

97. *Id.*

98. *Id.* at 497.

99. *Id.* (alteration in original); *see also* Royster, *supra* note 5, at 1085.

100. *Navajo Nation*, 537 U.S. at 498.

tribe some \$600 million in lost revenues.”<sup>101</sup> And even though lower courts found a clear breach of the Secretary’s general fiduciary duties,<sup>102</sup> the Supreme Court held that the Secretary’s action was not a breach of its trust obligations.<sup>103</sup> In essence, even though the Secretary’s actions favored a third party over the Navajo tribe, the Court found they had “no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages.”<sup>104</sup>

Despite the egregious facts of the Navajo case, a similar situation would be unlikely under ITEDSA. It contains a mandate that the Secretary provide information and expertise “to the maximum extent practicable . . .”<sup>105</sup> It is difficult to imagine a situation where it would be impracticable to provide Indian tribes with the same information that the Secretary is able to furnish to third-party energy companies. And given the clear mandate to the Secretary, if a tribe were to sue under ITEDSA for breach of the trust responsibility, the suit may well have a different outcome. Moreover, as development of reservation resources progresses, tribes would likely be able to afford to do more of their own technical evaluations, reducing the chances that a breach of duty by the Secretary would result in significant damage to tribal interests.

In any event, the most advantageous options offered under the current IMDA system are hardly ideal for most tribes.<sup>106</sup> The possible agreements and roles from which the tribe stands to profit most are unattainable because most tribes can neither afford “the capital [n]or the risk attendant” in retaining control over the mineral development on their lands.<sup>107</sup> ITEDSA gives a direct mandate to the Secretary to aid tribes in attaining the capacity to control and regulate their own mineral development<sup>108</sup> and further directs how that aid is to be distributed.<sup>109</sup> This mandate presents tribal energy resource agreements not only as an attractive option, but a near requirement for maximizing tribal control and tribal profits in the development of energy resources on tribal lands.

## 2. Effects of Public Input Requirements on Tribal Decision Making

The required incorporation of public “notice-and-comment” periods into the structure of a resource agreement has also given some analysts cause for concern.<sup>110</sup> These public-input requirements obligate the Secre-

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101. *Id.* at 500.

102. *Id.* at 501.

103. *Id.* at 514.

104. *Id.*

105. 25 U.S.C. § 3503(c) (2006).

106. *See Royster, supra* note 1, at 587.

107. *See id.*

108. *See* 25 U.S.C. § 3503(c)(1).

109. *See id.* § 3502(a)(2).

110. Royster, *supra* note 5, at 1086 (“A substantial concern expressed in the legislative history is that ITEDSA provides multiple points for public input into tribal decision making concerning energy development.”); Senate Committee Hearing, *supra* note 57, at 159

tary to receive comments on the proposed resource agreement itself,<sup>111</sup> as well as the Department of Interior's decision regarding approval of the resource agreement.<sup>112</sup> The tribes must incorporate processes to allow for public comment before final tribal approval of leases, rights-of-way, and any other development instruments,<sup>113</sup> and also must incorporate these comment periods as a part of the environmental review process tribes must establish under a resource agreement.<sup>114</sup> Finally, interested parties have the ability under ITEDSA to petition the Secretary to review a tribe's compliance with a resource agreement after the parties have exhausted tribal remedies.<sup>115</sup> The argument has been made that these public-input requirements "conflict sharply with tribal self-governance" and will prevent many tribes from taking advantage of the resource agreement system.<sup>116</sup> But the requirements are unlikely to have the decisive effect predicted by some of ITEDSA's critics.

The incorporation of public input into the decision making process is not in conflict with tribal self-governance because comments received cannot dictate the final decision. In regard to the Secretary's obligation, input from tribal and non-tribal sources is not determinative of whether the Secretary ultimately approves a resource agreement.<sup>117</sup> Similarly, public input in regard to the final approval of development instruments or environmental effects cannot dictate tribal decisions.<sup>118</sup> So, the belief that public "notice-and-comment" periods will effectively usurp decision-making authority from the tribe is incorrect.

The purpose of these "notice-and-comment" periods is to gather information, not to dictate a substantive outcome.<sup>119</sup> The process requirements of tribal environmental review under ITEDSA were created to track the requirements of the National Environmental Policy Act (NEPA).<sup>120</sup> This was at least in part because NEPA no longer applies

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(statement of Maynes, Bradford, Shipp & Sheffel, LLP, Attorneys for the Southern Ute Indian Tribe).

111. 25 U.S.C. § 3504(e)(3).

112. 25 C.F.R. § 224.68 (2011).

113. 25 U.S.C. § 3504(e)(2)(B)(iii)(IX).

114. *Id.* § 3504(e)(2)(B)(iii)(X), (C)(iii).

115. *Id.* § 3504(e)(7).

116. Royster, *supra* note 5, at 1086.

117. *See* 25 C.F.R. § 224.20 (2011); Royster, *supra* note 5, at 1089 (noting that provisions of ITEDSA "obligate the Secretary, in considering the approval of a TERA, to place tribal self-determination at the core of the decision. Although the Secretary will consider and respond to relevant public comments on a proposed TERA, the Secretary should do so in light of the policies and regulations promoting tribal self-determination and energy development.").

118. *See* 25 U.S.C. § 3504(e)(2)(C)(iii) (requiring only that "responses to relevant and substantive [public] comments" be provided); Royster, *supra* note 5 at 1091.

119. *See* 25 C.F.R. § 224.68(a) (2011) ("The Secretary will review and *consider* public comments in deciding to approve or disapprove the final proposed TERA.") (emphasis added); Royster, *supra* note 5, at 1090–91.

120. *See* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,808, 12,814 (Mar. 10, 2008); Royster, *supra* note 5, at 1090–91.

once the Secretary of the Interior approves a resource agreement.<sup>121</sup> One of NEPA's core principles, as Professor Royster has observed, is that more information leads to better decision making.<sup>122</sup> It focuses on process, not on achieving a substantive outcome.<sup>123</sup> The tribes' environmental review process will similarly focus not on a substantive outcome, but rather on creating decisions that are "made in light of full environmental information."<sup>124</sup> Furthermore, a tribe with a resource agreement in place will be responsible for final approval of development instruments and the environmental review process.<sup>125</sup> This means that public comments "will be reviewed in light of tribal values, priorities, and decisions, rather than filtered through a federal lens."<sup>126</sup>

Even if one assumed the public input requirements imposed by ITEDSA somehow conflicted with tribal self-governance, energy development on Indian reservations is already subject to NEPA under the current system.<sup>127</sup> The tribal comment processes created under ITEDSA will not, therefore, create opportunities for public input other than those that exist under the current system.<sup>128</sup> And even assuming the public input requirements provide no benefit to the tribes, the requirements themselves do not change the status quo. Thus, the argument that tribes will not take advantage of ITEDSA due to the required "notice-and-comment" periods is unconvincing.

The provisions of ITEDSA that allow interested parties to petition the Secretary to review a tribe's compliance with a resource agreement seemingly pose a different threat. Although there is some confusion as to the regulations governing these challenges,<sup>129</sup> it is clear that they have the potential to "inject considerable delay and expense into tribal resource development."<sup>130</sup> While this may be true, outside petitions would not truly conflict with self-governance because the challenges can be mounted only in regard to tribal compliance with a resource agreement.<sup>131</sup> The substantive decision of whether or not to approve a particular development instrument will be protected as long as the tribe complies with the terms of its resource agreement—an agreement that, im-

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121. Senate Committee Hearing, *supra* note 57, at 77 (statement of Theresa Rosier, Counselor to the Assistant Secretary, Indian Affairs, Department of the Interior); Royster, *supra* note 5, at 1091.

122. Royster, *supra* note 5, at 1090–91 ("The intent, as with NEPA, is that more information leads to more informed, and therefore 'better,' decision making.").

123. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); Royster, *supra* note 5, at 1091.

124. Royster, *supra* note 5, at 1091.

125. Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12808, 12810 (March 10, 2008).

126. Royster, *supra* note 5, at 1092.

127. See *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); Royster, *supra* note 5, at 1091.

128. Royster, *supra* note 5, at 1091–92.

129. See *id.* at 1096.

130. *Id.*

131. 25 U.S.C. § 3504(e)(7)(A) (2006).

portantly, the tribe is responsible for entering into. As discussed above, the terms of a resource agreement lay out a process; they do not dictate an outcome. So while challenges (even frivolous ones) may cause delay, as long as the procedures are properly followed, the tribe retains ultimate control over development decisions.

It is also notable, in regard to possible challenges, that the “notice-and-comment” procedures incorporated into ITEDSA may actually serve to reduce the chances of “nuisance suits by disgruntled neighbors.”<sup>132</sup> By incorporating a process through which people and organizations affected by the proposed development can voice their concerns, a tribe may satisfy many of those affected by its decisions. The comment process would “allow those who oppose or fear tribal actions generally to make their misgivings part of the record.”<sup>133</sup> This process could, in many cases, make decisions made by the tribe that much easier to swallow for those adversely affected by development and reduce the number of challenges and amount of litigation associated with tribal resource development.

In sum, fears that the public will hijack tribal energy development are unfounded given the focus on the process of decision making. Substantive decisions about development under a resource agreement system will be made with more complete information due to the public input. At the same time, the end result of the process remains in the hands of each individual tribe. With this in mind, arguments that public input is irreconcilable with tribal self-governance and self-determination are unpersuasive. In truth, public notice and comment on proposed tribal actions will enhance a tribe’s ability to make the best choices concerning energy development and to continue to serve as responsible stewards of their own lands.

### 3. ITEDSA, Resource Agreements, and the Trust Responsibility

Prior to ITEDSA’s passage, some tribes expressed concern that the statute “absolves the federal government of its trust responsibilities for energy resources without removing ultimate federal control over resource development.”<sup>134</sup> The statutory language responsible for this concern provides: “[T]he United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way” created pursuant to an approved tribal energy resource agreement.<sup>135</sup> And although the statute does give the federal government ultimate control in some instances,<sup>136</sup> upon closer examination of the stat-

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132. See Royster, *supra* note 5, at 1096.

133. *Id.* at 1093.

134. Senate Committee Hearing, *supra* note 57, at 101; Royster, *supra* note 5, at 1098.

135. 25 U.S.C. § 3504(e)(6)(D)(ii).

136. See Kathleen R. Unger, Note, *Change is in the Wind: Self-determination and Wind Power Through Tribal Energy Resource Agreements*, 43 LOY. L.A. L. REV. 329, 355–56

ute, the provisions of ITEDSA do not “absolve” the government of its trust responsibilities to the tribes.<sup>137</sup> They do, however, substantially change the relationship between the federal government and the tribes in the realm of energy development and the way in which the government carries out its trust responsibility. This change is necessary to reflect the new balance of decision-making authority between the Secretary and the tribes that comes about through approval of resource agreements.

It is expressly stated in ITEDSA that the federal government retains its trust responsibility in relation to the tribes.<sup>138</sup> The statute states that “nothing in [ITEDSA] shall absolve the United States from any responsibility to Indians or Indian tribes, including, but not limited to, those which derive from the trust relationship.”<sup>139</sup> Furthermore, the statute instructs the Secretary to “act in accordance with the trust responsibility of the United States relating to mineral and other trust resources” and to “act in good faith and in the best interests of the Indian tribes.”<sup>140</sup> The statutory language does not stand alone; the regulations promulgated pursuant to ITEDSA include similar statements reaffirming the government’s obligations to the tribes.<sup>141</sup> The regulations clearly state that neither the Act nor the regulations “absolve[] the Secretary of responsibilities to Indian tribes under the trust relationship, treaties, statutes, regulations, Executive Orders, agreements or other federal law.”<sup>142</sup> It is clear from these provisions that the trust responsibility remains. And although the federal government retains its trust responsibility to the tribes, the practical effect of that responsibility will inevitably change under the new resource agreement system.

The federal government’s trust responsibility must evolve to reflect the new balance of decision making authority and regulatory responsibility between the Secretary and the tribes that comes about through approval of resource agreements. Naturally, then, the ways in which the government will adhere to its trust responsibility will change along with the government’s relationship to the tribe. For example, ITEDSA’s regulations require that the Secretary continue to carry out certain administrative and record-keeping tasks associated with tribal energy development after a resource agreement is in place.<sup>143</sup> This is specifically due to

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(discussing the Department of the Interior’s decision to retain control over complaint settlements due to “residual trust responsibility”).

137. 25 U.S.C. § 3504(e)(6)(A).

138. *Id.* § 3504(e)(6)(B).

139. *Id.*

140. *Id.* § 3504(e)(6)(A)(i)–(ii).

141. 25 C.F.R. § 224.40(a)–(b) (2011) (“The Act . . . preserves the Secretary’s trust responsibilities relating to mineral and other trust resources and requires the Secretary to act in good faith and in the best interest of Indian tribes. . . . Neither the Act nor this part absolves the Secretary of responsibilities to Indian tribes under the trust relationship, treaties, statutes, regulations, Executive Orders, agreements or other Federal law.”).

142. *Id.* § 224.40(b).

143. Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,819 (March 10, 2008) (“For tribes, one

“the Department’s residual trust responsibility.”<sup>144</sup> In the event a tribe decides to rescind its resource agreement or is unable to carry out its duties, the agency has a responsibility to “regain effective regulatory and management control over any energy development projects on tribal trust land.”<sup>145</sup> In this fashion, the government apparently views its trust responsibility as a kind of “safety net” in the context of ITEDSA. The tribes are free to take control of their energy development, but, in the event of rescission or noncompliance with a resource agreement, the federal government’s continuing trust responsibility requires it to prevent any further damage to tribal interests. This seems entirely proper considering ITEDSA’s language strongly emphasizes that the trust responsibility has not gone away.<sup>146</sup> Indeed, the trust responsibility seems alive and well, albeit in the background now instead of center stage.

Even though the government’s trust responsibility remains under ITEDSA, the statute’s language also plainly states that government liability is limited so as to benefit the bargains Indian tribes may enter into under a resource agreement.<sup>147</sup> This limitation makes sense given that the federal government is relinquishing control of energy development to the tribes. It is fitting that the tribes take on the responsibilities associated with increased autonomy in the energy field.<sup>148</sup> The provision is not a sign of the federal government “washing its hands” of responsibility for possible tribal improvidence. Instead, it is merely recognition of a greatly increased power of self-determination and energy development in the hands of the tribe. It would be unrealistic to argue the federal government should be expected to hand over control of energy development to the tribes and still remain liable for damages resulting from the subsequent bargains that the government had no part in negotiating.

Other scholars have similarly concluded that concerns about the federal government abandoning its trust responsibility are largely unfounded.<sup>149</sup> The government will remain ready to reassume management of energy projects if tribes fail to adhere to the terms of their respective resource agreements or if they are unwilling or unable to do so. This background role, while necessarily less pronounced, is proof that the government’s trust responsibility remains. Tribes taking advantage of

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factor that could increase their administrative costs would be, in some cases, an increased need for creating, maintaining and preserving records of their technical and financial arrangements with industry. These record-keeping requirements now largely are the responsibility of the Department. These recordkeeping requirements are necessary because of the Department’s residual trust responsibility under the Act. In the case of a reassumption by the Department or a voluntary rescission by a tribe of authority that is granted through a TERA the Department must be able to regain effective regulatory and management control over any energy development projects on tribal trust land.”)

144. *Id.*

145. *Id.*

146. 25 U.S.C. § 3504(e)(6)(B) (2006).

147. *Id.* § 3504(e)(6)(D)(ii).

148. *See Unger, supra* note 136, at 368–69.

149. *See Royster, supra* note 5, at 1100; *see also Unger, supra* note 135, at 367.

the resource agreement system would nevertheless do well to avoid placing too much trust in either companies that are offering development, or the federal government.<sup>150</sup> In short, while the government may be there as the “safety net,” the “[t]ribes need, as a practical matter if nothing else, to look out for their own interests.”<sup>151</sup>

#### IV. CONCLUSION

The system created by ITEDSA can lead to a substantial and beneficial expansion of tribal control over energy development on Indian reservations. First, it is true, for some tribes, that entering into resource agreements may not be the most advantageous or viable option due to lack of expertise and infrastructure. Nevertheless, Congress mandated that the Secretary provide assistance to the tribes in achieving the requisite capacity for development and regulation.<sup>152</sup> More importantly, because tribes can tailor the scope of the resource agreement to their individual circumstances, there will be less need for the Secretary’s funding and technical expertise. And, once a tribe begins seeing profits from small-scale energy development, it can reinvest those profits in its own ability to regulate, leading to larger development projects while lessening dependence on outside assistance even further.

Second, the public-input requirements incorporated into ITEDSA are not in conflict with tribal self-governance. The public comments received by the Secretary, or the tribe, in regard to resource agreement approval or development decisions, cannot dictate substantive outcomes in either of those processes. Nor can the comments received in the environmental review process dictate a substantive outcome. The focus of these notice-and-comment periods is to gain information, which leads to more informed and better decisions. Similarly, allowing for public challenges of violations of a resource agreement serves merely to ensure the parties to the agreement are held to the terms of their bargain. Far from subverting tribal self-governance, opportunities for public input will instead lead to better management of tribal resources.

Finally, the belief that the federal government has somehow abandoned its trust responsibility when a tribe enters into a resource agreement is misplaced. ITEDSA expressly states that the federal government retains its trust responsibility.<sup>153</sup> But the relationship will necessarily change to reflect the new balance of power after a tribe enters into a resource agreement. The federal government’s role will change from one of active participant to observer. And given this new situation, the limitation of government liability for tribal decisions is entirely proper. When one considers this, as well as the fact that the Secretary of the Interior must remain ready to reassume its duties if the tribe is unable

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150. Royster, *supra* note 5, at 1101 (“[T]he clear lesson . . . for tribes is that overreliance on the good faith of the government can be a dangerous thing.”).

151. *Id.*

152. *See* 25 U.S.C. § 3504(a)(2)(C), (e)(2)(D)(i).

153. *Id.* § 3504(e)(6)(B).

or unwilling to continue under a resource agreement, it is apparent that the government's trust responsibility has a continued, yet subtler, presence.

In sum, the criticism ITEDSA has received has been exaggerated at the very least. The statute represents a substantial step toward practical and effective tribal control over reservation resources. Some scholars and others have pointed to parts of the statute that they claim will prevent many tribes from taking advantage of the resource agreement system. But the criticisms are flawed, and thus tribes should not be discouraged from seeking approval of their own resource agreements. ITEDSA and the resource agreement system will be accessible and advantageous to many tribes in the future, presenting the most significant opportunity yet for tribes to gain real, practical control of their reservation resources.