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LESSONS LEARNED: AVOIDING THE HARDSHIPS OF TRIBAL MINERAL LEASING IN THE DEVELOPMENT OF OKLAHOMA TRIBAL WIND ENERGY

Wyatt Swinford*

I. Introduction & Abstract

“Fool me once, shame on you. Fool me twice, shame on me.” This old adage reflects the notion that a society’s intelligence is gauged by its ability to learn from the lessons of history and put them to good use.

While the U.S. government’s historical treatment of Indian tribes and the restrictions placed on Indian tribal lands are fairly characterized as mistake after mistake, Congress has gradually relinquished its stranglehold on Indian lands. With the rapid development of renewable energy, Indian tribes have a new opportunity to take control of their own destiny by crafting the terms that bind and bring prosperity to their lands. Wind energy, in particular, holds great potential for the tribes. It is in this field that the tribes may exercise their growing freedom to develop their own energy production agreements.

This article compares important oil and gas lease provisions to wind energy lease provisions, with the goal of illustrating the potential impact of including (and excluding) certain provisions from tribal wind energy leases. Although it is customary in the wind energy industry for the wind energy producers, or lessees, to draft and dominate negotiations of leases and agreements, this article strongly urges Indian tribes to play a more significant role in drafting these leases when they affect tribal lands; or, in the alternative, this article strongly urges Indian tribes to become more aggressive negotiators. Moreover, this article illustrates how tribes may draft wind lease provisions for use in Oklahoma.

Part I provides the overall theme of this article. Part II establishes federal Indian policy as it relates to tribal land conveyances and wind energy agreements. Part III of this article highlights specific provisions of wind leases and illustrates their potential impact on the wind energy industry by comparing it to oil and gas leasing law.

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II. Background

There is an old aphorism that states: give a man a fish and he will eat for a day; teach a man to fish, and he will eat for a lifetime. While modern Congresses have attempted to encourage the latter,¹ the application of tribal self-determination has not been so true to the sentiment. Perhaps modern Congresses heard a different version: teach a man to fish, but make sure you hold the fishing pole, bait the hook, and select the location. The modern federal statutory scheme serves as an obstacle to Indian tribal development of wind energy agreements that attempt to avoid the historic problems of tribal mineral development.

The leasing of tribal lands is subject to a myriad of federal and, in the case of Public Law 280, state statutes.² Thus, understanding the nature of tribal lands demands an understanding of federal and state leasing regulations alike, together with the history of tribal mineral leasing.

A. History of Tribal Mineral Leasing

Indian tribes' inability to transfer fee title of real property has a long history in the United States. The European perspective was that, due to their aboriginal possession, Indian tribes inherently owned their lands in fee title as the original inhabitants.³ After European colonization, the tribes were forced to share ownership—specifically the alienability of those lands—with the discovering European sovereign.⁴ European discovery and colonization of North America reverted the underlying fee title to the discovering sovereign, and the tribes merely retained a possessory right to use the lands.⁵ This was called the Doctrine of Discovery.⁶ Indian tribes

1. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779-81 (2006).

2. Tim Vollmann, *Federal Approval of Mineral Development on Indian Lands*, in NATURAL RESOURCES DEVELOPMENT AND ENVIRONMENTAL REGULATION IN INDIAN COUNTRY 9-1 (Rocky Mountain Mineral L. Found., May 1999), 103C RMMLF-INST 9, pt. IV (Westlaw).

3. *See, e.g.*, *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (noting original Indian title was based on aboriginal possession).

4. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 47-50 (1947).

5. Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 530-31 (1994).

6. *Id.*

could not transfer fee title of real property to anyone other than the discovering sovereign without the consent of that sovereign.⁷

The Doctrine of Discovery became clear by the twentieth century when the United States Supreme Court issued its first set of cases addressing Indian tribes' alienability of real property.⁸ The Court primarily based its decisions on the statutory framework established by the First Congress, which restricted the sale of lands by Indian tribes unless specifically authorized by the United States.⁹ This statute became known as the Trade and Intercourse Act of 1790; after several amendments, it still governs conveyances of real property by the tribes today.¹⁰

1. Trade and Intercourse Act

The original purpose of the Trade and Intercourse Act was to prohibit all transactions with Indian tribes in an effort to keep unfair dealings from stirring up controversy among the tribes through the improvident disposition of tribal lands.¹¹ This purpose embodies the sentiment of the Indian Trust Doctrine, which is a doctrine that imposes a fiduciary duty on the federal government to protect the tribes and their interests from exploitation by outsiders and, dogmatically, from themselves.¹² Since its enactment, the Trade and Intercourse Act has been the primary source of law used to justify the federal government's paternalistic control over Indian lands.¹³

The current language of the Trade and Intercourse Act provides, in pertinent part: "No purchase, grant, lease, or other conveyance of lands, or

7. Cohen, *supra* note 4, at 47-49 (discussing the holding in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), that transfer of Indian title to private parties was not against the sovereign absent approval by the sovereign).

8. *See generally id.* at 47-58.

9. Act of 1790, 25 U.S.C. § 177 (2012) (regulating trade and intercourse with the Indian tribes); *see also, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 548 (1832); Proclamation of 1783, 25 J. CONTINENTAL CONG. 602 (Sept. 22, 1783) (discussing limitations on dealings between whites and the tribes in place prior to the Non-Intercourse Act).

10. Vollmann, *supra* note 2, at pt. I.

11. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960); *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-47 (1941) (noting the U.S. government's interest in protecting aboriginal lands and the title thereto).

12. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1472, 1496.

13. Vollmann, *supra* note 2, at pt. I.

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.”¹⁴ The Trade and Intercourse Act remains binding law and, absent an exception created by Congress, it still applies to conveyances today.¹⁵ As such, any conveyance between a tribe and a non-tribal party requires the consent of the U.S. government.¹⁶ The Trade and Intercourse Act reflects the Indian Trust Doctrine, which is still pervasive in federal Indian policy and the government’s responsibility under that policy.¹⁷

2. *General Allotment Act of 1887 and the Indian Reorganization Act of 1934*

The next restriction on the alienability of Indian lands came when Congress enacted the General Allotment Act of 1887 (GAA).¹⁸ In addition to opening some Indian lands to non-Indians,¹⁹ the GAA granted “each Indian” up to 160 acres.²⁰ Congress allotted Indian lands to individual Indians but allotted lands were held in trust by the United States for a period of twenty-five years.²¹ Thereafter, the land was to become totally alienable and taxable fee interest in the hands of the Indian.²²

Because the GAA used broad language, it prevented any real property contracts during the trust period.²³ While the passage of the twenty-five-year period would have returned alienation rights to the Indian, administrative action often increased the trust period indefinitely.²⁴ Congress cemented the practice of leaving Indian alienability in

14. 25 U.S.C. § 177 (2012).

15. Thomas H. Shipps, *The Non-Intercourse Act and Statutory Restrictions on Tribal Resource Development and Contracting*, in NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY 2-1 (Rocky Mountain Mineral L. Found., Nov. 2005), 2005 No. 5 RMMLF-INST Paper No. 2 (Westlaw).

16. *See* 25 U.S.C. § 177.

17. Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 789-93 (2006).

18. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (2012)).

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

20. General Allotment Act § 1, 24 Stat. at 388.

21. *Id.* § 5, 24 Stat. at 389.

22. *See* County of Yakima v. Confed. Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 263-64 (1992).

23. Vollmann, *supra* note 2, at pt. I.

24. *Id.*

administrative purgatory with the passage of the Indian Reorganization Act of 1934 (IRA).²⁵

The IRA recognized the tribes as political entities within the American legal system.²⁶ Although the IRA ended allotment, it continued to constrain the alienation of Indian trust lands.²⁷ Under the IRA, alienation of restricted Indian lands required approval from the Secretary of the Interior.²⁸ The IRA's recognition of the tribes as political entities was sharply contradicted by the continuation of the alienation restrictions.²⁹ The alienation restrictions limited tribal sovereignty over their own territory, and it foreshadowed Congress' future revocation of recognition of tribal governments.³⁰

3. 1891 Leasing Act/Indian Appropriations Act of 1919

The first express statutory authorization for Indian tribal lands to be leased occurred with the passage of the 1891 Leasing Act.³¹ The Act provided that leases for mining could be granted for ten years with other terms and conditions, including approval from the Secretary of the Interior.³² Although this act is not often cited as support for mineral leasing, the plain language of the statute provides:

Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of

25. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

26. *See id.* §§ 16-17, 48 Stat. at 978-88; *see also* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 675 (2006).

27. 25 U.S.C. §§ 461-462 (2012); *see* Dennis W. Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 OKLA. CITY U. L. REV. 469, 498 n.150 (1987).

28. 25 U.S.C. § 464 (2012).

29. Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 320-21 (2009).

30. *Id.*

31. Ch. 383, 26 Stat. 794.

32. Vollmann, *supra* note 2, at pt. II.A.

such reservation may recommend, subject to the approval of the Secretary of the Interior.³³

The secretarial approval requirement continued with another express authorization for mining leases of allotted lands in the 1909 Indian Appropriations Act.³⁴ The 1909 Act, however, does not apply to the Five Civilized Tribes or the Osage Indians in Oklahoma.³⁵ In 1919, another Indian Appropriations Act specifically authorized the Secretary to approve twenty-year mining leases on unallotted lands in nine states.³⁶ Although these various enactments provided for some leasing activity on tribal lands, none provided clear or uniform policy for all Indian tribes.

4. Indian Mineral Leasing Act of 1938

Congress finally developed a consistent and uniform leasing policy through the Indian Mineral Leasing Act of 1938 (IMLA).³⁷ While mirroring the amended IRA's encouragement for tribal self-governance, the IMLA allowed the tribal council or spokesman of the freeholder Indian to make the initial authorization for mining leases.³⁸ The IMLA leases can have a primary term of ten years and may continue so long as "minerals are produced in paying quantities."³⁹

These leases were still subject to approval by the Secretary and had to be offered at a public auction under sealed bid, with proper notice as proscribed by the Secretary.⁴⁰ The Secretary had the authority to reject the highest bid and repeat the advertisement for bids.⁴¹ With the agreement of the tribe, the Secretary might also authorize a private agreement for leasing the minerals.⁴² Despite the fact that the tribes played an increased role in determining their own leasing future under the IMLA, they were still restricted to ten-year leases with the possibility of extension into perpetuity; it took Congress forty-four years to eliminate this obstacle to tribal independence.

33. 25 U.S.C. § 397 (2012) (emphasis added).

34. *Id.* § 396.

35. *Id.*

36. Ch. 4, § 26, 41 Stat. 3, 31-34 (codified as amended at 25 U.S.C. § 399).

37. 25 U.S.C. §§ 396a-396g (2012).

38. *Id.* § 396a.

39. *Id.*

40. *Id.* §§ 396a-396b.

41. *See id.* § 396b.

42. *Id.*

5. Indian Mineral Development Act

Although the IMLA was the primary leasing authority for almost half a century, Congress found the restrictions on mineral leases incompatible with the newfound policy of tribal self-determination during the 1970s and 1980s.⁴³ In 1982, Congress passed the Indian Mineral Development Act (IMDA) in an effort to expand tribal leasing capabilities.⁴⁴ The IMDA authorized tribes to enter into essentially any type of agreement, joint venture, or lease through private negotiation.⁴⁵ These agreements were still subject to secretarial approval, but there was a specific limitation of 180 days from submission of the agreement or within sixty days of compliance with 42 U.S.C. § 4332(2)(C) or any other federal law requirement for the Secretary to review and make a decision on the agreement.⁴⁶

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.⁴⁷ 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.⁴⁸ The “best interests” of the tribe or Indian are determined, in part, by the potential economic return, the environmental, social, and cultural effects, and whether the agreement contained provisions governing dispute resolution.⁴⁹ The Secretary also considers a list of factors set forth in the C.F.R. in evaluating these agreements.⁵⁰

43. Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 583-84 (1994).

44. 25 U.S.C. §§ 2101-2108 (2012); see H.R. REP. NO. 97-746 (1982).

45. 25 U.S.C. § 2102(a).

46. *Id.* § 2103(a).

47. Michael E. Webster, *Negotiating and Drafting Indian Mineral Development Act Agreements*, in NATURAL RESOURCES DEVELOPMENT AND ENVIRONMENTAL REGULATION IN INDIAN COUNTRY, *supra* note 2, at 6-1, 103C RMMLF-INST 6 (Westlaw).

48. 25 U.S.C. § 2103(b).

49. Webster, *supra* note 47, at pt. III (citing 25 U.S.C. § 2103(b)).

50. According to Michael Webster, the list of factors consists of the following:

- (1) identification of the parties to the agreement and the lands and/or formations subject to the agreement, as well as the purpose of the agreement;
- (2) the term (or duration) of the agreement;
- (3) indemnification provisions protecting the Indian owner and the United States from third party claims arising from or related to the agreement;
- (4) the respective obligations of the parties;
- (5) the manner intended for disposal or sale of mineral resources produced

Although the IMDA strengthened the tribes' independence in crafting their agreements, secretarial approval required compliance with the National Environmental Policy Act of 1969 (NEPA).⁵¹ While the IMDA left much to be desired in regard to complete tribal self-determination and Indian economic independence, NEPA created its own delays and increased expenses.⁵² Even so, the IMDA (and the IMLA) remained the primary authority for leasing tribal or Indian lands.⁵³

B. History Related to Wind Energy Leasing

1. Energy Policy Act of 1992

Congress passed the Energy Policy Act of 1992⁵⁴ with the primary goal of deregulating generation and transmission of energy during a period of economic and energy crisis.⁵⁵ Title XXVI of the Act was devoted to

pursuant to the agreement;

- (6) the payment obligations;
- (7) the valuation methodology and accounting procedures to be utilized;
- (8) operational and management procedures and responsibilities;
- (9) assignment rights and limitations (if any);
- (10) bonding obligations;
- (11) insurance obligations;
- (12) auditing procedures;
- (13) dispute resolution procedures;
- (14) force majeure provision;
- (15) suspension or termination provisions and procedures;
- (16) development timetable;
- (17) abandonment, reclamation and restoration obligations and procedures;
- (18) sharing of production and sales data;
- (19) unitization and communitization rights and procedures;
- (20) drainage and related takings protections;
- (21) record keeping obligations and procedures.

Webster, *supra* note 47, at pt. III (citing 25 C.F.R. § 225.21 (2014)).

51. 42 U.S.C. §§ 4321-4347 (2012).

52. Shipps, *supra* note 15.

53. Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 130-31 (2012).

54. Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 11, 15, 16, 25, 26, 30, 42, 43, 48 U.S.C.). The portions of the Act related to Indian energy resources were codified at 25 U.S.C. §§ 3501-3506 (2012).

55. Arturo Gandara, *United States-Mexico Electricity Transfers: Of Alien Electrons and the Migration of Undocumented Environmental Burdens*, 16 ENERGY L.J. 1, 17 (1995).

supporting Indian energy resources.⁵⁶ This title created a program within the Secretary of Energy's office to assist tribes in reaching energy self-sufficiency.⁵⁷ As part of the program, the Secretary of Energy provided grants and low interest loans to tribes to promote the development of energy resources—specifically, renewable sources such as wind and solar energy.⁵⁸ The Act also created a commission to handle Indian energy issues and promote development, and provided training for tribes to handle and adhere to regulatory restrictions.⁵⁹

Prior to the Act, tribes commonly lacked control over the implementation of the new energy programs and the development of resources.⁶⁰ The Secretary of Energy played the primary role in program implementation and resource development, restricting tribal input to consultation, and taking only recommendations from the newly formed committee.⁶¹ Although the Act expressed lofty goals for tribal independence in developing new sources of energy production, Congress' ideals of tribal control of energy development—regardless of sincerity—were not accomplished.⁶² With the passage of the Energy Policy Act of 2005, however, Congress revisited the subject by amending the statute and moved closer to tribal independence over energy resource development on tribal lands.⁶³

2. Energy Policy Act of 2005

Congress took action to encourage and promote the development of renewable energy resources with the passage of the Energy Policy Act of 2005 (2005 Act).⁶⁴ Portions of the 2005 Act placed requirements on the

56. Tracey A LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 STAN. L. & POL'Y REV. 237, 245 (2001).

57. Energy Policy Act of 1992, § 2603, 106 Stat. at 3114.

58. *Id.* § 2603(a)(1)-(b)(1), 106 Stat. at 3114.

59. *Id.* § 2604(c), 106 Stat. at 3114.

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

61. *See* Energy Policy Act of 1992, §§ 2602, 2605(k), 106 Stat. at 3113, 3115-18.

62. *See* Fosland, *supra* note 60, at 448.

63. *Id.* at 452-53.

64. Pub. L. No. 109-58, 119 Stat. 594 (codified at 25 U.S.C. §§ 3501-3506); *see* Kevin L. Shaw & Richard D. Deutsch, *Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development on Indian Lands*, in NATURAL RESOURCES

federal government to increase its use of renewable energy, specifically targeting wind energy.⁶⁵ Section 502 of the 2005 Act was devoted to Indian energy and amended Title XXVI of the 1992 Act.⁶⁶

Among other important changes to Title XXVI, the 2005 Act gave tribes nearly complete freedom to enter into any type of energy resource development lease or agreement.⁶⁷ Tribes were no longer required to seek secretarial approval of individual leases or agreements, provided that the tribe had a Tribal Energy Resource Agreement (TERA) in place with the Secretary.⁶⁸ The 2005 Act also specifically gave tribes authority over agreements or leases for the production of electricity.⁶⁹ The 2005 Act, however, placed a limit of thirty years for non-mineral agreements and leases.⁷⁰

Although the leases and agreements under the 2005 Act might be free from secretarial approval, securing a TERA was not a streamlined process. In addition to numerous requirements, the Secretary must be satisfied that the tribe had “sufficient capacity to regulate the development of energy resources.”⁷¹ TERAs had to include provisions to ensure compliance with environmental review processes, and were subject to periodic annual review by the Secretary, which could result in the suspension of the TERA if the tribe did not take action to address Secretarial concerns.⁷² Moreover, TERAs were subject to public comment and review.⁷³

The flexibility of leasing and agreement options under the 2005 Act was an optimistic approach to relinquishing some oversight over tribal lands. As of April 30, 2014, however, not a single Indian tribe has formally applied for a TERA.⁷⁴ The red tape surrounding the application process and

DEVELOPMENT IN INDIAN COUNTRY, *supra* note 15, at 9-1, 2005 No. 5 RMMLF-INST Paper No. 9 (Westlaw).

65. 2005 Act § 203(a)-(b)(2), 119 Stat. at 652 (codified at 42 U.S.C. § 15852).

66. *Id.* § 502(a), 119 Stat. at 763-64 (codified at 42 U.S.C. § 7144e).

67. *See* 25 U.S.C. § 3504(a) (2012).

68. *Id.* § 3504(e)(2)(B)-(D).

69. *Id.* § 3504(a)(1)(B).

70. *Id.* § 3504(a)(2)(B).

71. *Id.* § 3504(e)(2)(B)(i).

72. *Id.* § 3504(e)(2)(C)-(E), (e)(4).

73. *Id.* § 3504(e)(3).

74. *Indian Tribal Energy Development and Self-Determination Act Amendments of 2014: Hearing on S. 2132 Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014) (testimony of Kevin Washburn, Assistant Sec’y for Indian Affairs, Dept. of Interior)

subsequent constraints imposed by TERAs is partly responsible for the failure of the 2005 Act.⁷⁵ Congress introduced Senate Bill 2132 during the 113th Congress, but it has yet to be passed. Without the necessary reform to the 2005 Act, it is unlikely any tribes will take advantage of the potential flexibility under a TERA.

3. *Indian Long-Term Leasing Act*

Congress passed the Indian Long-Term Leasing Act (ILTLA)⁷⁶ in 1955 to allow Indian owners of restricted Indian lands to lease their lands. The ILTLA allowed an Indian or tribe to lease restricted land for any “business purpose.”⁷⁷ The ILTLA provides, in pertinent part:

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary.⁷⁸

ILTLA leases typically had a duration term of twenty-five years, except for the Cherokee Nation of Oklahoma, among others, which had a term of ninety-nine years.⁷⁹ The standard twenty-five-year term might be extended for an additional twenty-five years.⁸⁰ Leases under the ILTLA were subject to approval by the Secretary.⁸¹ The Secretary had to find that adequate consideration was given for the lease.⁸² The Secretary also had sole discretion to cancel any ILTLA lease that might have caused the United States to violate the trust obligation to that Indian or tribe.⁸³

[hereinafter Testimony of Washburn], <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg88821/html/CHRG-113shrg88821.htm>.

75. *Id.*

76. Act of Aug. 9, 1955, Pub. L. No. 84-255, 69 Stat. 539 (codified at 25 U.S.C. 415).

77. 25 U.S.C. § 415(a).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* § 415(h)(7).

Tribes have used ILTLA leases for a variety of energy related projects, including oil and gas production, gathering facilities, and advertising placement.⁸⁴ As such, the opportunity for entrepreneurial creativity to conflict with bureaucratic processes was high. The Department of the Interior issued extensive regulations that governed wind leasing, based in part on the restrictions of Section 415.⁸⁵ Regulations on wind energy indicate that secretarial review of a lease term only applied to individual Indians and not the tribes.⁸⁶ Furthermore, the regulatory requirements prohibited unlawful conduct outside of the lessor's control, if certain historical or social connections were present at the leased premises.⁸⁷ As illustrated by the ILTLA and the consistent and unfortunate prerogative of Congress, tribal independence over management and leasing of tribal lands only comes with sufferance of governmental oversight.

4. Section 81, Secretarial Approval of Contracts

Section 81 was another overreaching layer of federal regulation of Indian lands directed specifically at contracts encumbering Indian lands.⁸⁸ Section 81 provided, in pertinent part: "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of [seven] or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."⁸⁹ Subject to the Secretary's determination, the approval restriction of Section 81 did not apply to encumbrances not covered by other authority.⁹⁰ As such mineral leases and other surface leases were not within the scope of Section 81.⁹¹

Section 81 also likely applies to renewable energy projects that take the form of an easement.⁹² While leases may be the more common property right used to support wind energy projects, easements can also serve as a capable vehicle for wind project development.⁹³ Under Department of the Interior regulation and applicable case law, easements encumber Indian

84. Royster, *supra* note 53, at 103-04.

85. *See* 25 C.F.R. § 162.501(a)(2) (2015).

86. *Id.* § 162.540(b).

87. *Id.* § 162.542(c).

88. *See* 25 U.S.C. § 81 (2012).

89. *Id.* § 81(b).

90. *See id.* § 81(c); Royster, *supra* note 53, at 104.

91. Royster, *supra* note 53, at 104.

92. *Id.* at 104-05.

93. *Id.* at 105.

land for the purposes of Section 81 because an easement transfers a legal interest in the land.⁹⁴ Even exploratory agreements, such as a license to place meteorological towers (MET towers), may likely fall under the definition of an encumbrance of Indian land. The license may convey an enforceable interest in the property.

The applicability of Section 81 creates a significant issue as wind energy agreements necessitate terms longer than seven years, and thus, secretarial approval is required.⁹⁵ Similar to ILTLA, Section 81 contracts also require specific provisions, which can constrain a tribe's ability to independently develop the terms of their contracts.⁹⁶ As seen with the multiple leasing authorities, Section 81 might also stymie tribal wind energy development because of secretarial approval requirement and agreement restrictions.

III. Pitfalls to Avoid in Wind Leasing

The development of a wind energy project is primarily accomplished through long-term leases; however, the application of oil and gas leasing principles to wind energy production has created new issues, largely associated with and analogous to the competition between the surface and mineral estates of real property.⁹⁷ Confusion surrounding who owns the rights to wind production and how those rights are balanced against one another is the impetus for precautionary drafting of leases and agreements.⁹⁸ These questions regarding wind rights largely remain unanswered, and thus, present opportunities for future litigation, absent careful lease drafting.⁹⁹

Given the numerous restrictions on the alienation of Indian land, contracting around potential new issues in wind leasing can be a precarious undertaking. While the constant scrutiny of secretarial review is a sufficient constraint in itself, statutory and regulatory proscriptions as to specific provisions of Indian leases may prevent a tribe from developing an agreement designed to avoid conflict. The following section highlights (1)

94. *Id.*; see 25 C.F.R. § 84.002 (2015); *GasPlus, L.L.C. v. Dep't of the Interior*, 510 F. Supp. 2d 18, 29 (D.D.C. 2007).

95. Royster, *supra* note 53, at 106.

96. See 25 U.S.C. § 81(d)(2).

97. See Lisa Chavarria, *Wind Power: Prospective Issues*, 68 TEX. B.J. 832, 835 (2005).

98. Alan J. Alexander, *The Texas Wind Estate: Wind as a Natural Resource and Severable Property Interest*, 44 U. MICH. J.L. REFORM 429, 462 (2011).

99. Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 513 (2007).

specific goals and provisions of wind leases, (2) comparable common law problems from oil and gas leasing, and (3) how tribes can develop their own provisions in leases to avoid similar problems.

A. Purpose of the Lease

The essential purpose of an energy resource lease is to allow the lessee to explore and produce discovered resources.¹⁰⁰ Historically, energy production leases base compensation on a percentage, or royalty, of actual production.¹⁰¹ Production predominately guides the concerns and wants of both parties. Specifically, the lessor is concerned about the amount of compensation they will receive for the use of their land. If the lessor's restrictions upon the lessee do not allow the lessee to economically produce the available energy resources, then the lessor's compensation will go down or the lessee will not take the lease at all. In such a case, the lessor's other concerns suffocate the lease's ability to accomplish its purpose.

Likewise, if Indian wind leases remain so restrictive as to prevent economical production of electricity, then the tribe may never achieve its pecuniary interests in its wind resources. This is not to say that tribes should avoid tailoring their own agreements to avoid potential problems. On the contrary, tribes should just be aware of overburdening the leasehold estate with restrictions because Indian leases are already subject to numerous restrictions from federal law.

B. Features of the Lease

The most developed type of energy lease is the mineral lease.¹⁰² The mineral lease, specifically the oil and gas lease, has evolved over a period of nearly two centuries.¹⁰³ Each evolution of the oil and gas lease has been in response to issues caused by production or operations.¹⁰⁴ Thus, the evolution of the oil and gas lease and its provisions make it a functional comparison for tribal wind leases.

An oil and gas lease is essentially composed of four basic provisions: (1) the granting clause, (2) the habendum clause, (3) the drilling/delay rental

100. See, e.g., *Boatman v. Andre*, 12 P.2d 370, 376 (Wyo. 1932).

101. See EUGENE KUNTZ, *LAW OF OIL AND GAS*, § 1.32 (Anderson Publishing Co. ed., 1987) (reciting the first known oil and gas lease from 1853, which provided the lessor with a percentage of the proceeds from the oil produced).

102. See *id.* § 18.1.

103. See *id.* §§ 1.32, 18.1.

104. *Id.* § 18.1.

clause, and (4) a royalty clause,¹⁰⁵ With additional clauses crafted to alter the rights in these four basic provisions.¹⁰⁶ The granting clause provides the nature of the interest being granted.¹⁰⁷ The habendum clause describes the duration of the interest being granted.¹⁰⁸ The drilling clause, while tied to the function of the habendum clause, prescribes the rights and privileges of the lessor and lessee during the primary term of the lease.¹⁰⁹ Royalty provisions specify the marginal compensation to be provided to the lessor for the lessee's extraction of mineral resources.¹¹⁰

To understand the individual parts of an oil and gas lease, it is important to understand the rights flowing from the mineral estate. As explained by the Supreme Court of Texas, the mineral estate essentially contains five rights: (1) development, (2) authority to lease, (3) receipt of bonus payments, (4) receipt of delay rentals, and (5) receipt of royalty.¹¹¹ Development rights are the rights of ingress and egress.¹¹² The right to lease is the authority to confer the development rights upon another.¹¹³ The rights to receive bonus, delay rentals, and royalty payments are a trifurcation of the right of the lessor to realize the economic benefits of the mineral estate.¹¹⁴ The distinct characteristics of these rights are largely a development from the ability of the mineral estate to be severed from fee title.¹¹⁵

The wind estate carries similar rights of severability as the mineral estate.¹¹⁶ In Wyoming and Montana, for example, the respective legislatures have declared the wind estate to contain its own recognizable property rights.¹¹⁷ In these states, wind leases contain provisions similar to oil and gas leases because wind estates possess the same property rights as mineral

105. David E. Pierce, *Rethinking the Oil and Gas Lease*, 22 TULSA L.J. 445, 447 (1987).

106. *Id.* at 447-48.

107. KUNTZ, *supra* note 101, § 23.1[a].

108. *Id.* § 26.1.

109. *Id.* § 27.1.

110. *Id.* § 38.1[a].

111. *Altman v. Blake*, 712 S.W.2d 117, 118 (1986); *see* KUNTZ, *supra* note 101, § 15.2.

112. *Altman*, 712 S.W.2d at 118.

113. KUNTZ, *supra* note 101, § 15.2.

114. *See id.*

115. *See Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272, 278 (Ct. App. 1997) (recognizing the severable mineral estate necessarily carries distinct property rights).

116. *Id.*

117. WYO. STAT. ANN. § 34-27-103 (2015); MONT. CODE ANN. § 70-17-402(4) (2015).

estates.¹¹⁸ But variation is great among wind leases because of the infancy of wind estate law.¹¹⁹ Because wind leases have yet to take any standard form, they often contain provisions that differ significantly from lease to lease.¹²⁰

Wind lease provision variety creates a special problem for tribes in developing their agreements. Tribes must be cognizant of federal restrictions in the 2005 Act, ILTLA, and Section 81. Fortunately, the Bureau of Indian Affairs (BIA) has attempted to clarify federal restriction by providing a specific guide to permissible wind leases and agreements.¹²¹ Using the BIA regulations as a guideline, tribes can discern the limits on creative drafting.

1. Granting Clause

By delving deeper into the nature of the interests granted by oil and gas leases, the specifics of what a wind lease may grant and the type of transfer a tribe may make become more clear. Different jurisdictions classify and describe interests in various ways.¹²² Depending on the ownership theory used by a given jurisdiction, be it ownership-in-place or the rule of capture, an oil and gas lease may grant a fee simple determinable or a *profit a prendre*.¹²³ Regardless of the jurisdiction's description of the granted mineral leasehold interest, the broad language of the Trade and Intercourse Act (and subsequent acts) concerning all conveyances of real property trigger the Indian Trust Doctrine, along with the required Secretary approval.¹²⁴

Although the wind estate has not been defined in all jurisdictions, most wind leases appear to convey an interest in property as some form of tenancy for years.¹²⁵ It seems clear that wind leases which "lease and let" tribal lands constitute a lease under the Trade and Intercourse Act and its

118. Compare MONT. CODE ANN. § 70-17-405 with KUNTZ, *supra* note 101, § 22.2.

119. See Ernest E. Smith, *Renewable Energy – The Increasing Role of Wind Power: Incentives, Mandates, Siting, and Leasing*, 26 ENERGY & MIN. L. INST. 43, 62-63 (2005) (from section 2.04, "Elements of the Wind Lease").

120. *Id.*

121. See 25 C.F.R. § 162.501 (2013).

122. KUNTZ, *supra* note 101, § 23.2.

123. *Id.*

124. See 25 U.S.C. § 177 (2012); see also 25 U.S.C. § 396a (2012); 25 U.S.C. § 2102(a) (2012).

125. See Brown & Escobar, *supra* note 99, at 513.

progeny.¹²⁶ Wind energy agreements generally contain provisions that allow the producer to test wind flow, construct turbines, and produce electricity.¹²⁷ These provisions essentially function as some form of option, easement, or lease,¹²⁸ and therein, while not specifically denoted as a lease or conveyance, they function as a transfer of a portion of title to property and will be subject to federal government approval.¹²⁹ Thus, the granting clause triggers the Indian Trust Doctrine and brings the lease under secretarial review.¹³⁰

As to the actual uses granted, the oil and gas lease generally grants to the lessee the right to use as much of the surface as is “[r]easonably necessary to explore, develop, and transport the minerals.”¹³¹ This use is not an exclusive possessory right and the lessor’s interest in the mineral estate typically sets the geographic bounds.¹³² The vertical bounds, or the depth to which an oil and gas lessee is bound, is not restricted, unless the mineral estate has been severed by depth, and the lessor owns severed portions of the mineral estate.¹³³

In addition to the spatial uses granted by the oil and gas lease, the lease necessarily grants the right to the lessee to recover certain hydrocarbons.¹³⁴ This right includes the right of the lessee to drill or undertake operations to recover certain resources and, in most cases, prescribes the time in which action must be taken.¹³⁵ Some leases do not confer the ability to recover all substances from the mineral estate.¹³⁶ Case law generally permits the recovery of oil and different types of gas produced incidentally, but not substances such as coal, gypsum, limestone, rock, and gravel.¹³⁷ Whether a

126. See 25 U.S.C. § 177; see also 25 U.S.C. § 396a; 25 U.S.C. § 2102(a).

127. Shannon L. Ferrell & Rusty Rumley, *Understanding Wind Power Agreements*, in WIND ENERGY LEASING HANDBOOK 39, 40 (Okla. Coop. Extension Serv., Okla. State Univ. 2013).

128. *Id.* at 39.

129. See 25 U.S.C. § 177; see also 25 U.S.C. § 396a; 25 U.S.C. § 2102(a).

130. See 25 U.S.C. § 177; see also 25 U.S.C. § 396a; 25 U.S.C. § 2102(a).

131. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).

132. KUNTZ, *supra* note 101, § 23.2.

133. See generally Allen D. Cummings, *Rights, Obligations, and Problems of Depth-Severed Mineral and Leasehold Ownership*, 49 ROCKY MTN. MIN. L. INST. 26-1, 26-4 to 26-6 (2003) (section 26.02[1][b-c]).

134. KUNTZ, *supra* note 101, § 24.1.

135. See *id.* § 27.1.

136. *Id.* § 24.1.

137. *Id.*

substance is recoverable depends on whether the parties contemplated that type of substance being recovered in the instant lease.¹³⁸

Likewise, wind leases must grant producers the ability to enter the surface and undertake all reasonably necessary operations to produce the wind resource.¹³⁹ As illustrated in oil and gas leasing history, the wind lease likely carries the limitations of only using as much of the surface as actually is needed to produce the wind resource.¹⁴⁰ The absence of established case law interpreting the reasonable use of wind leases requires the inclusion of specific provisions that clearly demarcate those reasonable uses.¹⁴¹

Tribes must compare the specific provisions of the granting clause in wind leases with the provisions required by the BIA.¹⁴² It is important to note that wind developers typically need to assess the viability of wind flow¹⁴³ over a given parcel of land for a period of at least one to two years before a wind project can begin.¹⁴⁴ Therefore, wind lease drafters must view the lease as granting two distinct rights: the right to test and the right to produce. Regardless of whether these rights are granted in a single lease that provides an option for the right to produce, or in successive agreements, tribes must be cognizant of the federal requirements for each right.

The BIA requires two separate leases for the right to test and the right to produce: (1) the Wind Energy Evaluation Lease (WEEL), and (2) the Wind and Solar Resource Lease (WSR), respectively.¹⁴⁵ Specifically, an Indian tribe drafting a WSR must identify:

- (1) The tract or parcel of land being leased;
- (2) The purpose of the lease and authorized uses of the leased premises;

138. *Id.* § 24.1; *see also* *Praetorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698, 702 (Tex. Civ. App. 1929).

139. Alexander, *supra* note 98.

140. *See* *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).

141. *See, e.g.*, Hannah Wiseman, Lindsay Grisamer & E. Nichole Saunders, *Formulating A Law of Sustainable Energy: The Renewables Component*, 28 PACE ENVTL. L. REV. 827, 892 (2011); Chavarria, *supra* note 97, at 833.

142. *See* 25 C.F.R. § 162.542 (2015) (listing the various requirements of a lease regarding purpose and uses granted).

143. *See* Ferrell & Rumley, *supra* note 127, at 40 (discussing how wind flow is analyzed with meteorological towers ("MET Towers")).

144. *See id.*

145. *See* 25 C.F.R. § 162.501(a) (2015).

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities under § 162.543;

(6) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(7) Payment requirements and late payment charges, including interest;

(8) Due diligence requirements, under § 162.546;

(9) Insurance requirements, under § 162.562; and

(10) Bonding requirements under § 162.559. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.¹⁴⁶

A WEEL has virtually the same provision requirements as a WSR;¹⁴⁷ however, because of the lack of guidance on WEELs and WSRs, tribes must draft in extensive detail. For example, tribes should include provisions addressing access, construction, transmission, non-obstruction, overhang, and noise.¹⁴⁸ Access provisions should describe the producer's right to enter the surface, build roads, and construct, operate, and maintain production or testing equipment.¹⁴⁹ Moreover, it is often overlooked that before actual erection, wind projects require "lay down" areas for the equipment.¹⁵⁰ It is also important that tribes include provisions governing actual placement of the turbine.¹⁵¹ Provisions must address the placement of transmission lines

146. *Id.* § 162.542.

147. *Compare id.* § 162.513 with *id.* § 162.542.

148. Ferrell & Rumley, *supra* note 127, at 40.

149. *Id.*

150. *Id.*

151. *See id.* at 44-45.

and substations.¹⁵² Because unobstructed airflow is essential to wind energy production, tribes should ensure that the tribe's activity does not obstruct airflow.¹⁵³ Noise and overhang provisions will almost certainly be a concern of the producer and they should likewise be addressed by the tribe.

The provisions discussed above outline the basic relationship between a tribe and a wind energy producer, but this outline does not contemplate potential conflicts between estates. Although tribes may "own" fee title to a potential wind energy project site, the possessory rights of the mineral or surface estate may lie with non-tribal parties. This creates the potential for conflict between the estates and should be contemplated by a wind lease.

a) Conflicts Between the Estates

As discussed above, the wind estate must carry the right of reasonable use of the surface so far as it is necessary to produce wind resources. While the use of the surface may be reasonable within the interest of the wind estate, such use may be unreasonable from the perspective of the mineral or surface estate. For instance, even in jurisdictions where the wind estate is not severable from the surface estate, prior easements and surface leases, such as a grazing lease, may interfere with the production of the wind estate.

Oil and gas production necessarily determines whether the surface or mineral estate is dominant.¹⁵⁴ As such, the mineral estate must have reasonable use of the surface and the surface estate must yield to that use, generally even over the objection of the surface estate owner.¹⁵⁵ But, where the mineral estate's use is neither reasonable nor necessary, the mineral estate must yield to the surface estate's prior use and pursue a viable alternative for recovery of the minerals.¹⁵⁶ Courts typically call this the Accommodation Doctrine.¹⁵⁷ A wind estate's competition for dominance over the mineral estate does not necessarily depend on whether the jurisdiction recognizes the wind estate as a severable characteristic of the

152. *See id.* at 40.

153. *See id.*

154. *See* Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979).

155. *Id.*

156. *See* Fisher v. Continental Resources, Inc., 49 F. Supp. 3d 637, 641 (D.N.D. 2014).

157. KUNTZ, *supra* note 101, § 3.2(d)(2).

estate.¹⁵⁸ The same public policy considerations for the production of energy apply to both estates.¹⁵⁹

In Oklahoma, however, the legislature has preempted judicial determination of the wind estate's dominance.¹⁶⁰ It is well settled that the surface estate is servient to the mineral estate.¹⁶¹ Specifically, the Exploration Rights Act of 2011 provides that

[T]he lessee of a wind or solar energy agreement or the wind energy developer shall not unreasonably interfere with the mineral owner's right to make reasonable use of the surface estate, including the right of ingress and egress therefor, for the purpose of exploring, severing, capturing and producing the minerals.¹⁶²

Section 803(F) states

It is the intent of this act to confirm the mineral owner's historical right to make reasonable use of the surface estate, including the right of ingress and egress therefor, for the purpose of exploring, severing, capturing and producing the minerals, and nothing in this act is intended to expand or diminish those historical rights.¹⁶³

Although Oklahoma has foreclosed any attempts to sever the wind estate from the surface estate,¹⁶⁴ tribes are not prevented from drafting leases, whether mineral or wind, to address issues arising from the mineral estate's dominance over the wind/surface estate. Oklahoma's determination that the wind estate remains part of the surface estate can actually aid tribes by applying well-established statutes and case law. Tribes can tailor their granting clauses to ensure that granted wind production rights take subject to the mineral estate's dominance and foreclose tribal liability for such a conflict.

158. See Nicholas R. House, *Conflicting Property Rights Between Conservation Easements and Oil and Gas Leases in Ohio: Why Current Law Could Benefit Conservation Efforts*, 55 WM. & MARY L. REV. 1587, 1599 (2014).

159. *See id.*

160. *See* 52 OKLA. STAT. ANN. § 803 (West, Westlaw through 2015 Legis. Sess.).

161. *Dulaney v. Okla. State Dep't of Health*, 868 P.2d 676, 680 (Okla. 1993).

162. 52 OKLA. STAT. ANN. § 803(B).

163. *Id.*

164. *See* 60 OKLA. STAT. ANN. § 820.1(B) (West, Westlaw through 2015 Legis. Sess.).

b) Contracting to Avoid Surface Use Restrictions

Tribes often use their lands for many purposes aside from mineral development, including farming, ranching, recreation, and housing.¹⁶⁵ Wind project development and production can interfere with these activities, or vice versa, and tribes may attempt to address potential conflicts in their wind leases.¹⁶⁶ In addition, tribes may simply be concerned with the aesthetic effects of wind projects, which include both noise and visual impacts.¹⁶⁷

In the case of noise concerns, tribes may include provisions that detail specific setbacks of wind turbines from housing or recreation areas. Setback provisions permit the tribe to control the level of noise based upon the calculable noise at a given location from a wind turbine.¹⁶⁸ Visual impacts are more difficult to avoid given the size and height of today's wind turbines.¹⁶⁹ Additionally, case law precedent does not support a tribe's request to minimize visual impacts under common law theories, which highlights the need to address visual impact concerns in leases.¹⁷⁰

2. Duration

Tribes have several governing authorities that prescribe the allowable duration for a wind lease. For example, tribes who have executed a TERA are subject to a maximum lease term of thirty years.¹⁷¹ Alternatively, tribes may execute leases pursuant to the ILTLA and set an initial term of twenty-five years with a twenty-five-year renewal term.¹⁷² In Oklahoma, the Cherokees may execute leases under the ILTLA for up to ninety-nine years.¹⁷³ Absent the application of a TERA lease or ILTLA lease, tribes are likely subject to the seven-year maximum term under Section 81.¹⁷⁴

The term of a wind lease is typically twenty to forty-five years;¹⁷⁵ however, some wind leases have a total term of up to 150 years, if renewal

165. See *Hous. Auth. of Kiowa Tribe v. Ware*, 10 P.3d 226, 229-30 (Okla. 2000).

166. See *Ferrell & Rumley*, *supra* note 127, at 41.

167. *Id.*

168. *See id.*

169. *See id.*

170. See *Rankin v. FBL Energy, LLC*, 266 S.W.3d 506, 512-13 (Tex. Ct. App. 2008).

171. 25 U.S.C. § 3504(a)(2)(B)(i) (2012).

172. *Id.* § 415(a).

173. *Id.*

174. *Id.* § 81.

175. *Smith*, *supra* note 119, at 63.

options are elected.¹⁷⁶ Given the current expected lifespan of a turbine, the maximum opportunity for a producer to recoup its investment is twenty years.¹⁷⁷ As such, the reluctance of tribes to execute TERA agreements and the limitation of Section 81 indicates the most viable authority for wind lease terms is most likely to come from an ILTLA lease.¹⁷⁸

Tribes should also be cognizant of when the wind lease term begins. Because of the ability of a wind lease, like an oil and gas lease, to hold rights of production for an extensive period of time, tribes may look to the habendum clause of oil and gas leases for guidance as to commencement or continuation of the term of the wind lease.¹⁷⁹

Typically, wind energy projects go through a testing or option period, which allows a developer to determine whether viable wind flow exists to sustain production before the production term of a lease will begin.¹⁸⁰ Therefore, the habendum clause is not critical to the wind lease according to current practice. That being said, industry custom is subject to change. It is foreseeable that wind energy producers may wish to secure wind rights well ahead of any planned production, especially given the pace of technological advancements for wind-powered electricity production. With this in mind, tribes may look to the features of oil and gas habendum clauses to draft wind lease terms.

One of the original purposes of the habendum clause was to protect the lessor from speculation by lessees.¹⁸¹ Specifically, the habendum clause in oil and gas leases describes the term of the lease.¹⁸² Although ownership theories vary among jurisdictions, the habendum clause functions to allow the lessee the right to explore for minerals through a fixed period, primary term.¹⁸³ The lessee may choose to drill, explore, or pay delay rentals in lieu of exploration.¹⁸⁴ Upon the expiration of the primary term, if there is no production or commencement of drilling operations, the lease expires.¹⁸⁵ If

176. Ferrell & Rumley, *supra* note 127, at 42.

177. *Id.*

178. Testimony of Washburn, *supra* note 74.

179. Smith, *supra* note 119, at 63-64.

180. Ferrell & Rumley, *supra* note 127, at 40.

181. Joseph R. Plukas, Note, *Energy Law-Not Balancing Well Interests Well: How the Supreme Court of Pennsylvania Mismanaged Oil and Gas Lease Policy in T.W. Phillips Gas & Oil Co. v. Jedlicka*, 36 W. NEW ENG. L. REV. 68, 86 (2014).

182. KUNTZ, *supra* note 101, § 26.1.

183. *Id.* § 26.4.

184. *Id.*

185. *Id.* § 26.2.

production exists, the lease typically extends for so long as there is production.¹⁸⁶

The oil and gas habendum clause necessarily requires interpretation and definition of its terms. Courts have interpreted what constitutes production sufficient to extend the lease.¹⁸⁷ In Oklahoma, oil and gas wells need only to be capable of production in paying quantities.¹⁸⁸ Oklahoma courts have defined the capability of production in paying quantities to mean sufficient quantities to yield a return over the lifting costs of production.¹⁸⁹ As an alternative to production extending the oil and gas lease, a lessee may extend the lease by having commenced drilling or exploratory operations.¹⁹⁰ It is these protective features of the oil and gas habendum clause that could prove useful to tribal drafting of wind leases.

The necessary focus of a habendum clause for a tribal wind lease is to ensure that production will occur if testing of the site proves that sufficient wind resources are available. Typically, a wind lease's production phase begins after construction of roads and erection of the first turbine.¹⁹¹ Thus, a tribe's wind lease habendum clause would be most useful if it required the production phase to begin within a reasonable time after testing results have been collected and evaluated. Of course, the wind lease should specifically define reasonable because of the absence of any interpreting case law on the subject. If a wind lease habendum clause is realistic,¹⁹² the definition of a reasonable time for production must be based on a variety of factors, such as availability of construction and production equipment, financing, and other contractual necessities. Certainly, if the espoused wind lease habendum clause is to be effective, it must be coupled with a testing option term that is equally reasonable. In other words, a reasonable time must allow sufficient time to diligently test the wind resources.

Such wind lease habendum clauses are permissible under WEEL and WSR agreements. There appears to be no problem with a habendum clause that limits the term after testing because the BIA allows a WEEL to contain option provisions to allow the creation of a WSR upon expiration of the

186. *Id.*

187. *Id.* § 26.6.

188. *Pack v. Santa Fe Minerals*, 869 P.2d 323, 326 (Okla. 1994).

189. *Stewart v. Amerada Hess Corp.*, 604 P.2d 854, 857 (Okla. 1979).

190. KUNTZ, *supra* note 101, § 27.3.

191. Smith, *supra* note 119, at 64.

192. This is based on the actual realities of commencing and producing a wind energy project.

WEEL.¹⁹³ Therefore, so long as the habendum clause describes the term and defines the events that terminate the lease, the clause will pass secretarial review.¹⁹⁴

In Oklahoma, the legislature has statutorily defined necessary terms in the wind lease habendum clause. The potentially helpful terms include the following:

2. “Commencement of construction” means beginning excavation of wind turbine foundations or other actions relating to the actual erection and installation of commercial wind energy equipment. It shall not include erection of meteorological towers, environmental assessments, surveys, preliminary engineering or other activities associated with assessment of development of the wind resources on a given parcel of property.

3. “Commercial generation date” means the date on which the wind turbine in question first generates electrical energy in commercial quantities.¹⁹⁵

These terms may be used in the wind lease habendum clause to mark the point at which production begins. Additionally, the definition of commercial quantities may be used in a similar manner by ending the term of the wind lease when the wind project is no longer commercially viable.

Although a tribe’s wind lease is subject to similar term restrictions as Indian mineral leases, more flexibility exists in designing wind leases. Tribes should take advantage of this flexibility and attempt to avoid the historic litany of issues associated with oil and gas leases. Oklahoma tribes are in a unique position to craft leases using the supporting statutory provisions.

3. Royalty

There are three distinct types of economic considerations for tribes under a wind lease: lease bonus, installation payments, and royalty payments.¹⁹⁶ Other payments and methods of calculation exist, such as an annual payment per turbine.¹⁹⁷ Lease bonuses are monies paid upfront to the lessor

193. 25 C.F.R. § 162.522(a) (2013).

194. *See id.* § 162.512, .522, .540, .541 (2013).

195. 17 OKLA. STAT. ANN. § 160.13(2)-(3) (West, Westlaw through 2015 Legis. Sess.).

196. Smith, *supra* note 119, at 65.

197. *Id.*

as consideration for granting the lease.¹⁹⁸ The bonus may be based on total acreage—as is typical in oil and gas leasing—or on the projected number of turbines to be installed.¹⁹⁹ Installation payments are designed to compensate a lessor for damage to the surface, and they may be made in lieu of a lease bonus.²⁰⁰ Royalty payments are based on the revenue produced from wind production on the lease.²⁰¹ Some wind leases provide for a graduated schedule for royalty rates as a wind project begins to pay out.²⁰²

The Indian Trust Doctrine likely still requires fair and reasonable compensation for wind because of the federal government's duty to act as a fiduciary for Indian tribes.²⁰³ But it appears that the BIA will defer to the judgment of tribes as to reasonable compensation if the tribe submits an authorization expressly stating that: (1) the tribe negotiated satisfactory compensation, (2) the tribe waives right to valuation of the wind lease, and (3) the tribe states the value of compensation is in its best interest.²⁰⁴ An Indian tribe drafting a wind lease will therefore need to ensure the lease provisions provide fair and reasonable compensation and that proper authorization has been submitted to the BIA.

Because of the similarities in receiving portions of revenue from production, tribal wind leases will likely find oil and gas royalty issues instructive.²⁰⁵ One of the most contentious issues surrounding oil and gas royalties is the permissible deductions or expenses.²⁰⁶ Often, oil and gas lessees charge the lessors royalty interest with certain costs for expenses, such as capital, processing, treating, transporting, and marketing expenses.²⁰⁷ Courts commonly interpret the royalty language of oil and gas leases to govern what type of expenses are properly charged to the lessor's royalty.²⁰⁸

Thus, tribes should be explicit about royalty rates and any costs that may be charged against their royalty interest. In drafting royalty provisions for tribal wind leases, the tribe may create definite lists of permissible

198. KUNTZ, *supra* note 101, § 22.4.

199. *See id.*

200. *Id.*

201. *Id.* at 66.

202. Ferrell & Rumley, *supra* note 127, at 46.

203. *See*, 25 C.F.R. §§ 162.523, .549 (2013); 25 U.S.C. § 177 (2012)).

204. 25 C.F.R. § 162.549(a)(1)-(3) (2013).

205. *See* Smith, *supra* note 119, at 66.

206. *See* KUNTZ, *supra* note 101, § 42.2.

207. *Id.*

208. *See id.*

expenses. While these provisions may be necessary in a later interpretation of allowable costs, WEEL and WSR regulations indicate that tribes must describe compensation.²⁰⁹

Other lessons learned from oil and gas royalty disputes are tied to implied covenants to market. In the oil and gas industry, implied covenants to market impose a duty on the lessee to market production.²¹⁰ While the covenant to market has no direct effect on the calculation of royalty, the covenant can determine whether the lessee is ever required to make royalty payments.²¹¹ And although the covenant to market imposes a duty on the lessee, the best efforts of the lessee will often satisfy the covenant.²¹² No such implied covenant to market exists for wind leases.²¹³ Therefore, tribes should attempt to include provisions that create the duty of the implied covenant to market in wind leases.

Even so, drafting such a provision may be difficult due to the nature of wind production and electrical power. Wind flow is constantly shifting. This variability naturally causes fluctuations in electrical production from wind,²¹⁴ which is beyond the control of the producer. Therefore, a provision that demands the marketing of production that cannot be readily stored is not likely to be feasible. Instead, a marketing provision that requires the best efforts of the producer seems appropriate.

4. *Communitization and Pooling*

Wind energy production has special considerations as to the placement of turbines and the rights of adjoining surface owners to use or capture their own wind resources. The efficiency of a wind turbine to produce electricity is a function²¹⁵ of the wind flow.²¹⁶ Thus, turbulence caused by nearby obstructions, including other wind turbines, may greatly reduce the amount of electricity produced by a wind turbine.²¹⁷

209. 25 C.F.R. §§ 162.523, .549.

210. KUNTZ, *supra* note 101, § 39.4(b)

211. See John S. Lowe, *Interpreting the Royalty Obligation: The Role of the Implied Covenant to Market*, in PRIVATE OIL AND GAS ROYALTIES 6-1 (Rocky Mountain Mineral L. Found., Sept. 2003), 2003-1 RMMLF-INST 6 (Westlaw).

212. KUNTZ, *supra* note 101, § 39.4(b).

213. See generally Ferrell & Rumley, *supra* note 127, at 39-48.

214. See Shannon L. Ferrell, Steve Sadler & Rusty Rumley, *Understanding the Wind Power Industry*, in WIND ENERGY LEASING HANDBOOK, *supra* note 127, at 23, 33.

215. For the mathematically inclined, $P = \frac{1}{2} \rho v^3 \pi r^2$. *Id.* at 33.

216. See *id.* at 31-33.

217. *Id.* at 35-36.

This presents a problematic situation where, in the case of two surface owners having adjoining tracts of land suitable for wind production, one surface owner may not be able to place a wind turbine on their property because of potential turbulence caused by a neighboring turbine.²¹⁸ Alternatively, if each surface owner places a turbine on their property, neither may be able to recover the full amount of wind resources that would normally be available. It is with this problem in mind that a tribe might look to the legal resolution of similar issues in oil and gas in drafting a wind lease.

a) Oil and Gas Communitization and Pooling

A major concern of state regulation of oil and gas production, in addition to public welfare and safety, has been to maximize the total amount of recovery of mineral resources from producible formations.²¹⁹ Stated differently, states are concerned with preventing the waste of mineral resources and the protection of correlative rights, or the rights of mineral estate owners in recovering their due portion of oil and gas.²²⁰ Communitization and pooling of mineral interests are common features of regulation of oil and gas production.²²¹

To prevent waste, states pool the interests of various owners of mineral estates to compensate for the limitations on well spacing and density.²²² Oklahoma uses drilling and spacing units to control well spacing and density and apportion production among the mineral owners.²²³ Additionally, Oklahoma law allows voluntary and compulsory pooling of mineral interests.²²⁴ Both pooling and drilling and spacing units allocate production proceeds among the mineral interest owners, according to the ownership of each.²²⁵

The communitization of Indian mineral interests presents a special problem that may be instructive to communitizing wind rights. While

218. *Id.* at 36.

219. *See* KUNTZ, *supra* note 101, § 77.1.

220. *Id.*; *see also* Samson Res. Co. v. Okla. Corp. Comm'n, 702 P.2d 19, 22 (Okla. 1985) (discussing correlative rights).

221. *See* KUNTZ, *supra* note 101, § 70.3.

222. *See Id.* § 77.4(a).

223. Randolph L. Marsh, *Secretarial Discretion in Communitization of Indian Oil and Gas Leases: The Tenth Circuit Speaks with A Forked Tongue*, 32 TULSA L.J. 779, 782-83 (1997).

224. 52 OKLA. STAT. ANN. § 87.1(e) (West 2015).

225. *Id.* § 87.1.

Indian land may be voluntarily communitized with the approval of the Secretary, such lands may not be involuntarily pooled because of federal preemption over Indian lands.²²⁶ If an Indian tribe or the Secretary does not approve the pooling of a tribe's interests, the tribe's participation in the communitized unit will not occur.²²⁷ Ultimately, this can harm the economic interests of the tribe because it would prevent them from sharing in the electrical production of the communitized area and, in certain circumstances, development of wind projects on tribal lands could be prevented or discouraged due to turbulence created from the neighboring communitized wind project.²²⁸ Using the application of communitization to tribal oil and gas leases, a tribal wind lease drafter may safeguard against communitization issues with wind resources.

b) Future Communitization of Wind Energy Production

Research does not address the communitization of wind resource production. As illustrated above, oil and gas communitization may provide a useful framework for wind communitization development. The key to understanding how communitization may function for wind resources is the evolution of oil and gas communitization.

(1) Ad Coelum Doctrine

A foundational canon in the development of communitization of oil and gas interests is the *ad coelum* doctrine. The *ad coelum* doctrine holds that, in addition to the space above, the surface owner owns all of the space below the surface.²²⁹ While the doctrine played a primary role in determination of oil and gas ownership, the doctrine also supported the concept of sub-surface trespass.²³⁰ Ultimately, it only conferred ownership of the airspace actually occupied by the surface owner.²³¹

226. Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122, 1126 (10th Cir. 1982).

227. *Id.*

228. See discussion *supra* Section III.B.4 (discussing effects of turbulence on neighboring lands).

229. Derek Cook & Jennie K. Martin, *Oil and Gas Basics: Understanding the Sticks to Avoid Stones and Broken Bones*, 76 TEX. B.J. 319, 319 (2013).

230. KUNTZ, *supra* note 101, § 11.9.

231. United States v. Causby, 328 U.S. 256, 264 (1946).

The doctrine is a potential source of authority for the rights associated with the wind estate,²³² and may also serve as a source for the rights of adjacent wind estate owners to be free from interference.²³³ This right to be free from interference of adjacent estate owners may be the precursor to the communitization of wind rights.

(2) *Rule of Capture*

The rule of capture is a remedy for mineral owners, and holds that the mineral estate owner may capture as much oil and gas as is accessible from their mineral estate.²³⁴ The rule flows from the fugacious nature of underground hydrocarbons—once reduced to the owner's control, ownership of the hydrocarbons lies with that interest holder.²³⁵ Adjacent mineral estate owners have no legal remedy except to compete in the capture of the subsurface hydrocarbons.²³⁶

Because wind resources are ephemeral, wind energy production fits well within the rule of capture. Competing landowners, however, are likely to eliminate the possibility of full production because of the effects of turbulence created by adjacent, competing turbines.²³⁷

(3) *Correlative Rights*

A third possible doctrine, one that fits well with the spirit of communitization, is the doctrine of correlative rights. The theory of correlative rights recognizes the inter-relationship between estate holders' ability to produce their resources and attempts to maximize the overall recovery through grouping of interests and sharing of benefits.²³⁸ The holders of correlative rights must recognize the rights of others and refrain from infringing upon those rights, while still pursuing their own interests.²³⁹

A correlative rights approach for wind leasing necessarily contemplates the communitization of rights because of the effects that adjacent surface owners may have on each other's production capabilities. The systematic

232. Troy Rule, *A Downwind View of the Cathedral: Using Rule Four to Allocate Wind Rights*, 46 SAN DIEGO L. REV. 207, 222 (2009).

233. *Id.*

234. KUNTZ, *supra* note 101, § 4.1.

235. *Id.*

236. *Id.*

237. Rule, *supra* note 232, at 224.

238. KUNTZ, *supra* note 101, § 4.3.

239. *Id.*

production of wind resources may prove the most efficient and beneficial for all parties. But, restrictions upon the severance of the wind estate may make production strategies difficult without willing surface owners. This presents a special problem for tribes because of the required secretarial approval of communitization of property rights.

c) Contracting Around Future Doctrines

The doctrines mentioned above highlight just a few paths that wind resource law may follow, and emphasize the difficulty of creating a one-size-fits-all provision for a tribal wind lease. What is clear is that the secretarial approval requirement must be satisfied for a tribe to take part in a communitization wind project. Therefore, drafters can include provisions to assist in including pooled wind resource projects and tribes can develop procedures for approving potential communitizations of their leases.

IV. Conclusion

Indian tribes have substantially more freedom to contract and develop wind leases than their predecessors did in mineral leases. By learning from the challenges faced by the tribes in their mineral leasing past, today's tribes can attempt to avoid future issues in developing the emerging frontier of wind energy. Reflecting on that past, tribes may use the doctrines and features of oil and gas leasing to help craft wind leases that produce the resources from the newfound wind estate.

The tribes of Oklahoma sit in a special position to take advantage of the state's attempts to promote wind energy in the same manner that the state promoted oil and gas development. By taking charge of their own wind leasing agreements, tribes can fulfill the aspirations of the age of self-determination in a manner more dynamic than any Congress could have envisioned.