

**THE LAW OF WIND**  
**—Tribal Energy: Wind Energy Projects on Tribal Land—**

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Many Indian tribes own extensive blocks of land with significant wind resources. Tribal land provides wind developers an opportunity to work with a single land owner to enter into a Wind Energy Land Agreement securing all site control and related easements necessary to conduct a wind resource assessment and other studies and to construct, own, operate, and maintain a wind energy project.

Indian reservations are unique jurisdictional enclaves in which federal and tribal laws apply. Federal and tribal laws govern leases, easements, and other agreements for use of tribal land within Indian reservations. In addition, as governments, Indian tribes exercise significant regulatory control over use of tribal land and Indian reservation land generally. Federal laws of general application, such as federal environmental, energy, and tax laws, and some state laws also apply to wind energy project developers on tribal land. This chapter provides a brief overview of issues affecting wind energy project development on tribal land.

**I. Wind Energy Land Agreements on Tribal Land.** Land ownership, which varies from reservation to reservation, may include a matrix of land owned by the United States in trust for tribes (“tribal land”) and individual Indians and land owned in fee by tribes, individual Indians, and non-Indians. This section focuses on tribal land. Even with tribal consent, tribal land can be sold, leased, encumbered by an easement, or used as security for financing only as authorized by federal Indian law and applicable tribal law.

Under 25 U.S.C. § 415, an Indian tribe, as lessor, can lease tribal land for 25 years and may agree to an option extending the lease for an additional 25 years. Specific tribes listed in section 415 can also lease tribal land for 99 years. Most section 415 leases must be approved by the Bureau of Indian Affairs (“BIA”). Currently, section 415 authorizes two tribes, the Navajo Nation and the Tulalip Tribes of Washington, to lease tribal land for up to 75 years without BIA approval.

Key federal environmental laws the BIA must comply with before approving leases of tribal land and taking other action include the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and the Endangered Species Act (“ESA”). Under NEPA, the BIA must prepare an environmental impact statement before approving a lease of tribal land or taking other action, unless a categorical exclusion applies because the BIA’s action is of a type that will not have significant environmental impact, individually or cumulatively, or the BIA concludes after preparing an environmental assessment that its action will not have a significant impact on the environment. Under section 106 of the NHPA, the BIA must take into account impacts of its actions on any property, including traditional cultural properties, listed on or eligible for listing on the National Register of Historic Places and consult with tribes and other interested parties on measures to avoid, minimize, and mitigate any adverse impacts of its action on such properties. Section 7 of the ESA requires the BIA to consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, and in some cases both, if its action may affect species or designated critical habitat of species listed as threatened or endangered under the ESA. Other federal laws apply if human remains, funerary objects, sacred objects, or archaeological resources are encountered before or during project development on tribal land. Compliance with these and other federal environmental laws can delay project development and result in measures to avoid, minimize, and mitigate project impacts. Federal laws of general application, such as the Clean Water Act and Clean Air Act, generally apply on tribal land.

Tribal government corporations operating under charters issued by the Secretary of the Interior under 25 U.S.C. § 477 can lease tribal land for 25-year-maximum terms without BIA approval. Leases authorized by section 477 cannot include an option extending the 25-year base term.

For purposes of protecting project wind flow from development on other tribal land, it may be appropriate to combine a section lease of tribal land with an “encumbrance” on other tribal land under 25 U.S.C. § 81. A section 81 encumbrance of tribal land for seven years or more must be approved by the Indian tribe and BIA.

Wind project developers may determine that a right-of-way is necessary for project-related transmission lines, roads, or other project activities. Traditionally, the BIA grants rights-of-way across tribal land with tribal consent. Before issuing a right-of-way, however, the BIA must comply with federal laws governing federal agency actions affecting the environment. In response to a 1997 U.S. Supreme Court case limiting tribal jurisdiction within a BIA-issued right-of-way, some tribes refuse to consent to BIA-issued rights-of-way. These tribes have preferred to approve rights-of-way in the form of “linear leases” under section 415, discussed above. Generally, tribes exercise greater regulatory control over activities conducted on tribal land under a lease.

The Energy Policy Act of 2005 directed the Secretary of the Interior to issue regulations for Tribal Energy Resource Agreements (“TERAs”). Final regulations governing TERAs were issued March 10, 2008. Once an Indian tribe and the BIA enter a TERA covering wind energy development, the tribe can enter into wind energy leases and other business agreements and issue rights-of-way easements for projects on tribal land for 30 years, renewable for another 30 years by the tribe, all without further BIA approval.

## **II. Key Considerations.**

**A. Taxation and Regulatory Authority.** In addition to being landowners, Indian tribes are governments that may exercise significant tax and regulatory authority over activities on tribal and other reservation land. A tribe does not waive its governmental regulatory authority by entering contracts for development of tribal land and resources. A developer should carefully review tribal laws to determine the effect of tribal laws and regulations on a wind energy project. When appropriate, a developer can request a tribe to adopt new tribal laws or amend existing tribal laws to facilitate financing and other aspects of a wind energy project on tribal land.

Non-tribal project developers may be subject to applicable state and tribal taxes. Careful review should be conducted to determine whether a Wind Energy Land Agreement or other agreements can be designed to avoid or minimize the risk of double taxation. In some cases, Indian tribes are willing to abate tribal taxes to the extent necessary to avoid or minimize the economic impact of double state-tribal tax.

Federal law affords accelerated depreciation for certain investments on tribal land. Some states grant credits against state taxes or abate state leasehold and certain other state taxes for projects on tribal land.

Although federal and tribal laws play a dominant role in energy development on tribal land, state laws may also impact these projects. For example, if access to a state highway is needed, that must be obtained in the manner provided under state law. Non-tribal developers and their non-tribal employees, contractors, and suppliers may be subject to a variety of state laws.

**B. Dispute Resolution.** As governments, Indian tribes have sovereign immunity. This means an Indian tribe cannot be sued in any court without the express consent of Congress or the tribe itself by appropriate tribal government action. Most tribes are willing to waive tribal sovereign immunity on a limited basis to promote significant tribal economic development projects.

A dispute resolution clause in an agreement with an Indian tribe typically includes a clause designating the court or courts authorized to exercise jurisdiction over a dispute with the tribe. These clauses should be carefully

reviewed as federal and state courts often will not have jurisdiction over a dispute with an Indian tribe, despite a forum selection clause. Developers are often reluctant to agree to have such disputes heard in a tribe's tribal court.

To address this dilemma, many Indian tribes will agree to a dispute resolution clause designating binding arbitration as the exclusive means of resolving disputes. Although a binding arbitration clause leaves questions regarding which court can enforce the promise to arbitrate and to enforce, modify, or vacate an arbitration award, well-drafted agreements to resolve disputes by binding arbitration and well-drafted sovereign immunity waivers resolve some of the most challenging dispute resolution issues in tribal wind energy development agreements.