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TRIBAL POLICY:

Give tribes more authority over their natural resources

— *by Terry L. Anderson and Shawn Regan*

Although the federal government often pays lip service to tribal sovereignty and self-determination, Native Americans still lack the same rights and freedoms as other Americans. It's time for that to change.

Tribes and individual Indians, for instance, generally cannot own their land on reservations. Instead, reservations are managed in trust by the federal government in a manner that Chief Justice John Marshall famously described in 1831 as resembling “that of a ward to his guardian.”²⁷ As a result, nearly every aspect of Native American land use is still controlled by federal agencies.

Even the most basic land-use decisions in Indian Country require review and approval by the Bureau of Indian Affairs (BIA). But by all accounts, the federal government has not been a good manager of Native American assets. A 2015 report by the Government Accountability Office found that poor management and bureaucratic delays by the BIA hinder energy development on tribal lands, resulting in “missed development opportunities, lost revenue, and jeopardized viability of projects.”²⁸

The consequence is that the majority of tribal natural resources remain undeveloped, even when tribes want to develop them for the benefit of their families and their communities. In one case, it took eight years for the BIA to review energy proposals from the Southern Ute tribe in Colorado, costing the tribe \$95 million in lost revenues.²⁹ In another, the BIA took 18 months to review a single proposal to develop wind energy on the Rosebud Indian Reservation in South Dakota, causing a deal with the developer and the local utility to fall through.³⁰

Regulatory obstacles are often so burdensome that many potential non-tribal development partners simply look elsewhere. On Indian lands, companies must go through as many as 49 steps and at least four federal agencies just to acquire a permit for energy development, compared to as few as four steps for projects not on reservations.³¹ Tasks that should be straightforward, such as completing title search requests, often result in significant delays. Not surprisingly, these barriers raise the cost of doing business with tribes or individual Indians.

Tribes have demonstrated time and again that they can succeed when the federal government grants them authority over their natural resources.³² Consider, for example, what has happened when tribes such as the Confederated Salish and Kootenai Tribes in Montana have gained control over forestry management on their reservation. A 2009 study by PERC found that the tribes managed their timber far better than the federal government managed the neighboring national forest, in terms of both economic and environmental performance.³³

Much more should be done to give Native Americans the same rights and freedoms that other Americans have to manage their natural resources. This could involve a variety of policy reforms that give tribes more authority to manage their own affairs, govern themselves, and control their land and resources.

Tribes should not have to develop their natural resources if they choose not to. But if they do desire it, the federal government should not make it overly costly or burdensome to do so. It's time to give tribes the dignity they deserve by allowing them to make their own decisions about the land and resources in Indian Country.

Policy Reforms:

- Give tribes and individual Indians the option to exert broad authority over the use of their land and natural resources. For those wishing to exercise such authority, clarify and grant jurisdiction over all natural resources within reservation boundaries.
- Allow tribes and individual Indians to enter into long-term leases, such as 99-year leases, without BIA approval.
- Make it easier for willing tribes to reduce BIA oversight over natural resource management by developing their own management policies and procedures for tribal property and assets.
- Expand policies aimed at streamlining federal approval of certain tribal affairs, such as the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012. The HEARTH Act currently allows tribes to create their own surface-land leasing regulations for certain limited purposes. Once a tribe's plan is approved by the Secretary of the Interior, the act allows tribes to enter into leases without further approval. The act should be expanded to apply to subsurface energy leasing as well.
- Streamline the approval process for tribes to enter into Tribal Energy Resource Agreements (TERAs), which would give tribes the authority to make energy development plans without requiring BIA approval for each leasing decision. The current TERA process, established in 2008, is so costly and complex that no tribe has yet entered into such an agreement.

Further Reading:

- “Two Forests Under the Big Sky: Tribal v. Federal Management,” by Alison Berry. *PERC Policy Series* No. 45 (2009).
- “Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development,” by Shawn Regan. *PERC Policy Perspective* 1 (February 2014).
- *Unlocking the Wealth of Indian Nations*, by Terry L. Anderson (ed). Lexington Press (2016).