

Before the  
US House of Representatives  
Committee on Oversight and Government Reform  
Subcommittee on the Interior, Energy, and Environment

Tribal Energy Resources: Reducing Barriers to Opportunity  
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Statement of  
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I would like to take a moment to thank Chairman Gianforte, Ranking Minority Member Plaskett, Members of the Committee, and the Committee's staff for asking me to come down today and speak to you in beautiful Washington, DC. My name is Eric Henson, and I am an Executive Vice President at Compass Lexecon, which is an economic consulting firm. My firm has offices located around the world, but I primarily work out of the Compass Lexecon office in Boston, MA. My economic consulting work has included numerous projects involving oil and gas development, coal production, electric utilities, and the energy marketplace more broadly. A number of my consulting engagements have involved working with Native American tribes such as the Navajo Nation and the Crow Nation, both of which have substantial energy resources of the types we will be discussing here. I also serve as a Research Affiliate with the Harvard Project on American Indian Economic Development,<sup>1</sup> and in that position I am engaged in an ongoing effort to understand what makes tribal economies work best.<sup>2</sup> My academic work at Harvard includes serving as a Visiting Senior Scholar at the Harvard University Native

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<sup>1</sup> Referred to herein as "HPAIED" or "Harvard Project." The Harvard Project is based at Harvard's John F. Kennedy School of Government in Cambridge, MA. We partner with the Native Nations Institute, which is located at the University of Arizona in Tucson, AZ. The Native Nations Institute provides executive education and leadership programs, uniquely tailored to senior executives and managers within Native communities.

<sup>2</sup> See, e.g., The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under US Policies of Self-Determination*, New York: Oxford University Press, 2008.

American Program, and in that capacity I assisted in teaching a course entitled *Native Americans in the 21<sup>st</sup> Century* during the Spring 2018 semester. I am a citizen of the Chickasaw Nation, and I grew up in one of the country's great oil producing regions, the Permian Basin of West Texas.<sup>3</sup>

I have a Master's Degree in Public Policy from the John F. Kennedy School of Government at Harvard University, an MA in Economics from Southern Methodist University, and a BBA in Business Economics from the University of Texas at San Antonio. I attended Harvard as the Kennedy School's Christian Johnson Native American Fellow, finishing my studies at Harvard in 1998. I have been engaged in Indian affairs since graduate school; my Master's thesis at Harvard examined the importance of a uniform commercial code for economic development on the Crow Reservation. I have had the great privilege of visiting many of the tribal lands we will be discussing today.

### **THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT**

Since its inception in 1987, the Harvard Project has collaborated with Native Nations to understand how and why tribal economies, social institutions, and political systems either succeed or fail. At the Harvard Project, my colleagues and I undertake research and teaching specifically tailored to meet the needs of tribal communities and tribal leadership.

One of the major questions the Harvard Project has been grappling with is: How is it that, despite widely-cited poverty and social distress, which is prevalent across numerous American Indian reservations, more and more tribes have been able to cast off the bonds of external economic dependence? We have seen an increasing number of tribes taking part in what we have often referred to as an "Indian Renaissance," where dynamic self-sustaining economies are created by tribal actions. These economies are built upon, and supported by, vibrant political and social institutions. The success stories are wide-ranging, from the property development and management of the Tulalip Tribes in Washington State, to sustained energy-based projects at Southern Ute, to the diverse array of professional and construction services offered by Ho Chunk, Inc. in Nebraska. Many tribes have begun actively challenging century-long economic paradigms and demonstrating effective self-determination and governance. It is curious that, contemporaneously, a number of other tribes experience continued economic hardship, high unemployment, rampant social and physical health challenges, and the like. What might be the causes of the striking economic and social divergences within Indian Country?

In the first years of HPAIED, the founding researchers recognized that what was needed in Indian Country was not additional unsolicited interference from outsiders, but culturally-

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<sup>3</sup> I appear today not as a representative of Compass Lexecon or Harvard University; the opinions herein are my own.

specific educational programs and research, developed for tribes, and undertaken hand-in-hand with tribal governments. The results of these studies are channeled back to those who must deal with the daily challenges of improving the economies and social conditions in Native communities (i.e., Indian people working in Indian Country).

In accordance with the above-mentioned approach, graduate students at the Kennedy School of Government, the Harvard University Native American Program, and at the Native Nations Institute (working in close coordination with tribes) have completed several hundred projects and field research reports, many of which were on matters specifically requested by the tribes. These field projects have ranged from welfare reform at the Navajo Nation to bison ranching at Cheyenne River, and from judicial reform at Hualapai to ski resort management for the White Mountain Apache. As part of our organization's mission, many of these reports are available to the public.<sup>4</sup>

Another important facet of the Harvard Project's work is our *Honoring Nations* program. *Honoring Nations* is a competitive awards program that identifies, celebrates, and shares outstanding success stories in tribal governance. We honor tribes that exemplify successful tribal governance; to date the Harvard Project has recognized tribal governmental programs ranging from the Eastern Band of Cherokee for their Tribal Sanitation Program (in 1999), to the Effective Law Enforcement Program of the Gila River Police Department (in 2003), to the Seniors Skilled Nursing Facility at the Tohono O'odham Hospice (in 2008), to the Tribal Fisheries Department at Nez Perce (in 2015). Since 1999, we have honored about 130 tribal governmental initiatives.<sup>5</sup> HPAIED remains committed to empowering Native Nations through identifying the common characteristics of tribes that are successfully charting a course towards a socially, culturally, politically, and economically healthy future.

The findings of the Harvard Project are widely disseminated and are generally well known by those with an interest in Indian affairs, so I will not belabor the research here. Instead, I provide a brief summary. Prior to the 1980s, there was a notable lack of research pertaining to economic development in Indian Country. The small amount that was available contained at least two consistent themes. First, the overriding focus was on what the federal government could do to create jobs, raise income, and increase household wealth. This helped contribute to the unbalanced relationship between the Bureau of Indian Affairs ("BIA"), other federal programs, and the tribes, which often became dependent on federal funding and expertise. Second, the federal policies and programs that did exist within Indian Country constituted what we refer to as a "Planner's Approach" to economic and community development. The Planner's

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<sup>4</sup> See, e.g., the Harvard Project website at <http://www.hpaied.org/>.

<sup>5</sup> For more recent examples, see "Celebrating Excellence in Tribal Governance, Honoring Nations 2016 Awardees," The Harvard Project on American Indian Economic Development, on the Harvard Project website at <https://hpaied.org/sites/default/files/documents/HN%202016%20Final%20Report%5B1%5D.pdf>.

Approach was simplistic in treating economic development as a fundamental question of resources and expertise, as opposed to one of incentives and institutions.

A fundamental flaw of the Planner's Approach was the erroneous assumption that a nation's economic development is a mechanical process that can be achieved by imposing a predetermined blueprint. While it is advisable and even advantageous to plan ahead, it is an exercise in hubris to think that one can "plan" an economy, in the sense of expecting tribal councils, national legislatures, or federal planners to correctly select a portfolio of businesses, projects, and activities that will not only survive, but meet the needs of tribal citizens, and thrive over time.<sup>6</sup>

The discussion above raises one obvious question: If one cannot "plan" an economy to arrive at productive and sustainable development, what is the alternative? While there is no predetermined blueprint for success, there are some general tenets for effective, long-term economic development, and these tenets are now being demonstrated by a large number of tribes in Indian Country. We have found that these tenets of sustainable development are applicable to developing nations the world over, and are being acted upon by many successful tribes in Indian Country. The tenets that matter can be summarized as institutions, culture, and sovereignty.

**Institutions Matter:** The nature of a society's institutions, whether social, cultural, and/or governmental, determines the incentives around productive or unproductive activity. Research has demonstrated that successful economic development turns on a tribe's institutions operating under: (i) a rule of law (i.e., a respect for tribal law and the establishment of legitimate means for dispute resolution); (ii) a separation of politics from day-to-day administration and business affairs (i.e., enterprises and economic transactions are free from societal politics and power struggles); and (iii) an efficient bureaucracy (i.e., clarity of procedures, good record-keeping, efficient administration processes, reliable computer networks, and the like).

**Culture Matters:** Given the importance of institutions within a society, the social norms and worldview of the citizens that interact with those institutions also matter.<sup>7</sup> For governing institutions to provide the foundation upon which sustained economic development can take

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<sup>6</sup> Consider the natural experiment of the German economies after World War II. The parts of former Germany subjected to market forces (i.e., West Germany) became a powerhouse of development in post-war Europe. The parts of former Germany subjected to centralized planning (i.e., East Germany) stagnated and the citizenry had to be forcefully restrained from leaving for better opportunities elsewhere. For a discussion in the context of Indian Country, see the US Senate, Senate Committee on Indian Affairs, *Forum on Establishing a Tribally Owned Development Corporation*, September 20, 2004, Statement of Joseph Kalt, noting that "Economic development is an organic process. In an environment in which opportunities are subject to the vicissitudes of competition and continually changing marketplace conditions, economic development occurs as the sum of small, adaptive decisions of myriad individuals who by luck or preparation are in the right place at the right time to take advantage of unplanned prospects. Economic development is much more analogous to tenacious plants looking for places to pop up and take root, than to an engineered system."

<sup>7</sup> See, e.g., Miriam Jorgensen, *Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development*, Doctoral Dissertation, May 2000, at page 129.

place, there first should be a “cultural match.” One can think of cultural match as the consonance between the structure of a society’s formal institutions of governance (and its economic development initiatives) and its underlying norms of political power and authority. In order to function effectively, a society’s institutions and corresponding economic development must be consistent with underlying cultural, political, and organizational norms. Simply put, they must be seen as legitimate in the eyes of the society’s citizenry.

**Sovereignty Matters:** Self-determination is critical in Indian Country and its importance to economic development cannot be overlooked. There are at least four inseparable issues connecting sovereignty and self-determination to economic and community development that must be kept in mind: (i) without self-determination, it is impractical (and perhaps impossible) to change institutions so that they more closely match those of Native Nations and their unique economic needs; (ii) absent a strong sense of ownership, it is unquestionably difficult to get a local community involved and interested in the payoff from tribal economic investments; (iii) accountability is critical, as those making the investments and program decisions need to be held accountable for how all tribal resources are used; and (iv) leadership matters in all political settings, including tribal (an increasing number of astute, capable, and highly experienced leaders are emerging within Indian Country).

After years of research, it has become clear that tribes must have autonomy in order to foster institutions that are a cultural match for their societies. Successful tribal governments all exhibit this pairing of institutions and a cultural match. This is why policies of sovereignty and self-determination have been the only strategy that has shown any prospect of breaking the patterns of poverty and dependence that became so familiar on reservations from the late 1800s until at least the 1990s. It is only logical that it requires self-rule for a culture to put in place institutions that are a cultural match. Thus, we can restate the uniform qualities that have marked successful economic development in Indian Country as aggressive assertions of sovereignty, resulting in self-governed institutions that are characterized by a cultural match. It has repeatedly been shown that, when a tribe takes control of its institutions and runs them in congruence with its own cultural norms, the result is a set of economic, social, and political systems that work for its citizens.<sup>8</sup> Continued dependence on the federal government removes accountability for tribal leadership and undermines the processes necessary for stable and lasting economic development. The negative results of such dependence should not be surprising.

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<sup>8</sup> Stephen Cornell and Joseph Kalt, “Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations,” *Joint Occasional Papers on Native Affairs*, 2003, No. 2003-02.

## ENERGY DEVELOPMENT ON NATIVE AMERICAN LANDS

Energy development is an important goal for a number of tribes, and granting them the ability to capitalize on their own resources without federal impediments will go a long way toward improving socioeconomic conditions for tribal governments and many individual Indians. This is evidenced by the significant gains in wealth for those tribes who have been able to develop and operate their own energy projects and by the significant losses for those tribes whose efforts have been stymied by the current federal system's failure to properly oversee these important energy initiatives. Streamlining energy development and minimizing inefficient federal oversight will empower tribes to control their own lands in a more effective and beneficial manner. At the same time, it is important to proceed with regulatory reform or new legislation in a way that maintains the trust responsibility held by the US government toward the tribes. The goal is not to upend the balance of responsibility but to create a more optimal business environment for the tribes that want to develop energy projects and to help them benefit from the resources located on or beneath their own lands.

I last provided testimony in the House of Representatives on energy development issues in October of 2016.<sup>9</sup> In that testimony, I addressed the importance of furthering Native American economic development and reducing federal dependence by looking at the socioeconomic conditions of Native American tribes. I have updated some of the data presented in that hearing, and these analyses are attached hereto. As shown in Figures 1 and 2, the annual per-capita and median household incomes of Native Americans have been consistently and significantly lower than the US average. In the period ending 2016, Native Americans had an average real per-capita income of \$18,239, compared to the national average of \$30,366 (see Figure 1). At that same time, real median household income for Native Americans was 30% below the US average. Family poverty levels reflect this same shortfall in socioeconomic conditions: the percentage of Native American families living below the poverty line has consistently been more than double the US average (this holds for the recent time periods for which data are available, i.e., from the late 1990s through 2016 (see Figure 3)). A likely contributing factor to these disparities is that the employment rates for many tribes, including some of the energy-producing tribes, lag behind the national average. As of 2015, the select tribes presented had, on average, employment rates at only 83% of the rate observed in the United States as a whole (see Figure 4). Poor socioeconomic outcomes such as these persist across energy-producing tribes. Consider, for example, the Blackfeet tribe, the Tohono O'odham tribe, the Navajo Nation, and the Crow Nation; all are endowed with substantial natural resources. Unemployment rates for these tribes are consistently much higher than the national average across the United States (unemployment data from 2009 to 2016 are shown in Figure 5).

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<sup>9</sup> Statement of Eric Conrad Henson, *Tribal Prosperity and Self-Determination through Energy Development, Before the US House of Representatives, Committee on Natural Resources, Subcommittee on Indian, Insular, and Alaska Native Affairs*, October 4, 2016 (see also the data figures presented with the testimony).

In 2014-2016, the unemployment rate gap was the highest shown (at 13%); in 2009 the divergence in unemployment rates was “merely” 8%.

It is striking that these socioeconomic conditions were (and are) present on these reservations, despite the tribes’ abundance of valuable and accessible natural resources. The wealth of available resources available to select tribes is detailed in Figure 6. Data for all tribes indicate that Indian lands hold almost 30% of the nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and natural gas reserves.<sup>10</sup> These resources are estimated to be worth approximately \$1.5 trillion.<sup>11</sup>

In addition to coal, uranium, oil, and gas, tribal lands also hold large potential renewable energy resources. Wind, solar, geothermal and hydroelectric energy are all accessible in many tribal areas, but relatively few examples exist to demonstrate successful development of renewable energy supplies. For example, the US Department of Energy notes that “Overall, the analysis shows that the technical potential on tribal lands is about 6% of the total national technical generation potential. This is disproportionately larger than the 2% tribal lands in the United States, indicating an increased potential density for renewable energy development on tribal lands.”<sup>12</sup> The potential that tribal energy development represents is largely untapped; the Department of the Interior indicates that only 2.1 million acres of Indian lands are being developed for their energy resources, while an additional 15 million acres with energy potential remain undeveloped. In other words, 88% of Indian surface lands have resources that could provide tremendous economic and social benefits to a number of tribes, but have yet to be developed.<sup>13</sup>

Our meeting today is focused on potential actions that could reduce barriers to energy developments on tribal lands. This is an important topic because, by any measure, the potential resource base found on tribal lands is substantial, and there is a long history of tribes pointing out that federal regulations often impede development efforts. Untapped energy assets offer significant and unique prospects for individual Indians, as well as entire tribal communities, to generate important revenue streams and achieve higher socioeconomic standards. If tribes choose to pursue energy development, they can see benefits from energy development such as well-paying jobs and substantial royalty and tax revenues flowing to tribal coffers. These royalty and tax revenues can then be used to ensure greater access to critical healthcare services, upgrade the often deplorable housing stock found on tribal lands, and expand a host of other important

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<sup>10</sup> Shawn Regan and Terry L. Anderson, “Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development,” Property and Environment Research Center, February 2014 (hereinafter referred to as “PERC Report”) at page 4.

<sup>11</sup> PERC Report at page 4.

<sup>12</sup> E. Doris, A. Lopez and D. Beckley, “Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands,” US Department of Energy, February 2013, at pages 1-2.

<sup>13</sup> PERC Report at page 8.

social services. If these resources remain effectively inaccessible to tribes, then what is already a set of complex and difficult socioeconomic challenges facing the most economically disadvantaged people in the country could easily degrade further.<sup>14</sup>

In my review of recent actions relating to tribal energy development, a common set of challenges consistently comes to light. These challenges are noted in a GAO report from February 2017 aiming to improve the federal management of tribal programs.<sup>15</sup> The GAO finds that federal agencies such as the BIA have mismanaged and hindered the development of Indian energy resources in at least the following key areas: inadequate oversight of federal activities such as the BIA's review process for energy leases and appraisals, ineffective collaboration and communication, limited workforce planning, outdated technology and infrastructure, and incomplete and/or inaccurate data/data systems.<sup>16</sup>

Energy development on Indian lands has frequently been hindered by federal requirements that call for BIA review and approval of energy projects. Much of this stems from the lengthy and opaque nature of the review process that is employed by the BIA. For example, the GAO found that the BIA did not have a documented process or the data required to track its review and response times for energy leases and appraisals. As a result, several tribes have missed energy development opportunities and their associated revenue streams. Consider just a couple of examples.

- In 2011, the Rosebud Sioux Tribe reported that they had been prepared to move forward with a shovel-ready wind project since 2008, but due to the BIA taking 18 months to review the necessary lease, the project had been unduly delayed and had lost its pre-arranged interconnection agreement with the local utility.<sup>17</sup>
- In April of 2014, the Southern Ute reported that of 81 pipeline right-of-way agreements up for renewal, 11 had been under review by the BIA for eight years, and the rest had been under review for at least five years, resulting in approximately \$95 million of lost revenue to the Tribe.<sup>18</sup>

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<sup>14</sup> Maura Grogan, Rebecca Morse and April Youpee-Roll, "Native American Lands and Natural Resource Development," Revenue Watch Institute, 2011, at pages 6-7.

<sup>15</sup> *High Risk Series, Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, United States Government Accountability Office, February 2017 ("GAO High Risk Series").

<sup>16</sup> GAO High Risk Series at pages 214-217.

<sup>17</sup> *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, United States Government Accountability Office, June 8, 2015 (hereinafter referred to as "GAO June 2015 Report") at pages 21-22; Testimony of Rodney M. Bordeaux, *Hearing on Regulatory Barriers to American Indian Job Creation*, 112th Congress, April 7, 2011.

<sup>18</sup> Statement of Frank Rusco, United States Government Accountability Office, *Federal Management Challenges Related to Indian Energy Resources, Before the Subcommittee on the Interior, Energy, and Environment, Committee on Oversight and Government Reform, House of Representatives*, February 15, 2017 at page 5.



One of the major hurdles to approval of energy leases and appraisals has been the BIA's antiquated Trust Asset and Accounting Management System ("TAAMS").<sup>19</sup> The GAO has issued several reports containing recommendations for improved tracking and monitoring of the BIA's review and response times,<sup>20</sup> and the BIA has initiated data-tracking enhancements to TAAMS. My understanding is that these improvements are currently under development.<sup>21</sup> It is critical that the BIA ensures timely completion of these improvements, as it is not feasible to increase the efficiency of the review process without reliable and complete data on such fundamental matters as (i) the dates documents are received, (ii) the dates of completion of the review process, and (iii) the dates applications receive approval or denial.<sup>22</sup>

Another issue contributing to stymied Indian energy development is the BIA's lack of workforce planning and the skill gaps that result from insufficient human resources. The dire staffing situation is illustrated by the fact that the BIA estimates a gap of 33 to 50 engineers, engineering technicians, and environmental scientists working in a trust capacity. Of the current professionals in this capacity, 59% are eligible for retirement within the next five years.<sup>23</sup> Due to staffing shortages in the Southern Ute Agency, the Southern Ute Tribe has had to enter into contractual agreements to provide tribal staff (paid with tribal funds) to support federal functions undertaken by the regional office.<sup>24</sup> While the BIA has undertaken steps to identify its workforce issues and is purportedly working towards a workforce plan,<sup>25</sup> the organization likely does not have the capacity and resources to address its staffing needs.<sup>26</sup> In addition to lacking sufficient staff proficient in energy-related matters, there have also been high levels of turnover in leadership positions among a number of the agencies that oversee energy projects on Indian lands. Examples of staffing shortages that affect Indian energy activities are the lack of a

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<sup>19</sup> Prepared Statement of Honorable Tyson Thompson, *Examining Federal Programs that Serve Tribes and Their Members, Before the Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy, and Environment, United States House of Representatives*, February 15, 2017 (hereinafter referred to as "Thompson Testimony") at page 3.

<sup>20</sup> *Indian Energy Development: Additional Actions by Federal Agencies are Needed to Overcome Factors Hindering Development*, United States Government Accountability Office, November 10, 2016; *Indian Energy Development: Interior Could Do More to Improve Its Process for Approving Revenue-Sharing Agreements*, United States Government Accountability Office, June 13, 2016; GAO June 2015 Report.

<sup>21</sup> Testimony of Darryl LaCounte, *Before the Committee of Indian Affairs, US Senate*, June 13, 2018 (hereinafter referred to as "LaCounte Testimony") at page 2.

<sup>22</sup> GAO High Risk Series at page 214.

<sup>23</sup> LaCounte Testimony at page 6.

<sup>24</sup> Thompson Testimony at page 8.

<sup>25</sup> LaCounte Testimony at page 6.

<sup>26</sup> Statement of Frank Rusco, United States Government Accountability Office, *Agencies Need to Continue Efforts to Address Management Weaknesses of Federal Programs Serving Indian Tribes, Before the Committee on Indian Affairs, US Senate*, June 13, 2018 (hereinafter referred to as "Rusco 2018 Testimony") at page 10.

permanent Director at the BIA and the lack of a permanent Director or Deputy Director at the Office of Trust Service.<sup>27</sup> Without stable leadership and qualified staff, the BIA will continue to contribute to delays for energy projects on tribal lands; if there are insufficient numbers of professional personnel equipped to review and approve the projects in question, the barriers we are discussing today will not be overcome.

The GAO also identified data limitations and outdated technology as some of the BIA's management weaknesses relating to tribal energy development. Until August 2017, the BIA did not have integrated geographic information system ("GIS") mapping technology critical to identifying the owners and users of resources (this included insufficient information on who held energy leases).<sup>28</sup> Additionally, the federal cadastral surveys that define, divide, trace, and record land have periodically been missing or outdated. These surveys, in combination with the GIS data, are critical to determining ownership, which is a basic requirement before the BIA can approve leases or other energy-related applications.<sup>29</sup> In the past, tribes have been hindered by these issues, or have had to put up substantial resources of their own to work around them. For example, the Crow Nation has reported that BIA's records for surface and mineral ownership are repeatedly missing or out-of-date.<sup>30</sup> The Southern Ute have also reported gross mishandling of historical trust and realty records at the Southern Ute Agency; this has led the Tribe to spend more than \$1 million of tribal funds to scan and index the BIA's archival files. These data were then imported into the Tribe's own proprietary GIS software.<sup>31</sup> Within the last year, the BIA claims it has made significant progress towards improving these data and technology issues. The BIA integrated GIS map-viewing technology, established a database along with the BLM to identify ownership, and developed a mechanism for new survey requests. While this all sounds promising, it remains to be seen if these improvements will be sufficient to resolve the BIA's data issues and technological inefficiencies.

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<sup>27</sup> Rusco 2018 Testimony at page 8.

<sup>28</sup> LaCounte Testimony at page 1.

<sup>29</sup> GAO High Risk Series at page 217.

<sup>30</sup> See, e.g., *On Improving Tribal-Corporate Relation in the Mining Sector: A White Paper on Strategies for Both Sides of the Table*, HPAIED, April 2014, at <https://hpaied.org/sites/default/files/documents/miningrelations.pdf>, at page 91.

<sup>31</sup> Thompson Testimony at page 7.

## RECOMMENDATIONS AND CONCLUSION

As of early 2017, the GAO recommended improvements to enhance energy developments on tribal lands in a number of broad areas. Streamlining the review and approval process and addressing workforce/staffing needs should go a long way towards promoting energy development on tribal lands and would likely address many of the broad areas GAO has highlighted for improvement.

- One of the more promising reforms enacted by Congress relating to energy initiatives in Indian Country is the *Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012* (“HEARTH”). HEARTH provides a model which is helping tribes accelerate the leasing of tribal surface lands.<sup>32</sup> My understanding is that HEARTH has as its foundation ideas that were articulated in earlier limited legislation authorizing tribes such as the Navajo Nation to independently lease surface lands without Secretarial approval for each individual lease; HEARTH extended these rights to all tribes.<sup>33</sup> However, HEARTH does have its limitations. In the context of energy development, HEARTH allows for projects that lease only surface land and does not extend tribal leasing authority over subsurface extraction or exploration. Energy projects on surface lands are often renewable energy projects, such as utility-scale solar or wind farms. It is promising that under HEARTH tribes can implement their own regulations governing the leasing of Indian lands. This includes for renewable energy development, but such projects have yet to be widely adopted. For example, as of March 2015 only one utility-scale wind facility was in operation on tribal land, with one more such facility and one utility-scale solar facility under construction at that time.<sup>34</sup> This is in stark contrast with the significant developments in utility-scale wind and solar capacity in the United States. Data indicate that in the decade between 2004 and 2013, 686 utility-scale wind projects and 778 utility-scale solar projects were constructed nationally.<sup>35</sup> This difference between renewable capacity added nationally and on tribal lands illustrates the need to create further provisions for tribes to develop their energy resources.

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<sup>32</sup> HEARTH does not cover subsurface leasing or the ability to grant rights-of-way (Code of Federal Regulations, Title 25 – Indians, at §162.006(b)(1)).

<sup>33</sup> Monte Mills, “New Approaches to Energy Development in Indian Country,” *The Federal Lawyer*, April 2016 (“Mills 2016”) at page 53. Under HEARTH, the Pueblo of Sandia was the second tribe (after the Federated Indians of Graton Rancheria) to be approved for tribal regulations on their land (US Department of the Interior, “Secretary Salazar Signs Historic Agreement in New Mexico to Help Spur Economic Development in Indian Country,” March 14, 2013). The Governor of the Pueblo, Victor Montoya, said at the time he expected HEARTH to aid with elimination of red tape and quicker negotiations with companies looking to lease land. With the help of HEARTH, the Pueblo has been working to develop its airport and improve its retail center (*Albuquerque Journal*, “A ‘historic day’ at pueblo,” March 15, 2013).

<sup>34</sup> GAO June 2015 Report at page 2.

<sup>35</sup> GAO June 2015 Report at page 3.

- Another proposed measure aimed at facilitating energy development on Indian lands is the *Native American Energy Act* (HR 210). This pending legislation sets out to reduce the time required for the approval process for leases and provides tribes with the option to waive appraisals. For example, imposing binding time limits on the appraisal and approval processes could significantly speed up the time taken to greenlight a project and prevent bureaucratic delays.<sup>36</sup> As the examples provided above indicate, tribal energy development projects that have been stymied in the past have caused significant economic damages to tribes, and have led non-tribal industry participants to develop increased skepticism when considering tribal development initiatives in the energy sector. Streamlining the federal appraisal process (or forgoing it altogether, as contemplated by HR 210) would make it easier for tribes to undertake energy development in pursuit of tribally-driven economic development and determination.<sup>37</sup>
- Other options to alleviate the congestion at the BIA include the possibility of administering block grants for tribes to take over their own appraisals, regulation enforcement, and energy administration, including for lands held in trust by the federal government. In discussions I have with tribes engaged in energy development, the idea of block grants, or funding being turned over directly to certain tribes to carry out functions typically performed by the BIA, is largely well-received as a potential way to improve efficiency in tribal leasing for energy development. These types of grants could provide a given tribe with a fixed amount of funding for the tribe to hire third-party appraisers, to hire experts to assist in negotiating agreements with outside investors and developers, and to review royalty rate provisions and distribute royalty payments.<sup>38</sup> Consider the bottleneck that the appraisal process has often become. By giving tribes funding to cover appraisal costs themselves, the BIA's backlog in reviewing lease and appraisal applications, and the financial burden of increasing its own staffing, could be alleviated.

In addition to streamlining the review and approval process, there are steps that can be taken to help improve BIA's workforce issues. These include:

- First, the resources available for staffing the BIA should be dramatically increased. The US Government, through its appropriations process, should fund the BIA and all other federal departments responsible for development of tribal

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<sup>36</sup> It is important to note that arbitrary time limits without sufficient funding to take on BIA's resource shortcomings is not a solution that best balances tribal needs for economic development with the ongoing trust responsibilities of the United States.

<sup>37</sup> Mills 2016 at page 57; National Congress of American Indians, "Policy Update, 2016 Mid-Year Conference," 2016, at pages 13-14.

<sup>38</sup> US Department of the Interior, "Tribal Grant Program to Assess, Evaluate and Promote Development of Tribal Energy and Mineral Resources."

energy assets to the fullest.<sup>39</sup> The BIA is not always able to aid tribal energy development to the best of its capabilities, but the Bureau is extremely important for the administration and management of tribal lands held in trust by the federal government, and its smooth and timely functioning is essential for tribes with energy resources. An understaffed and overburdened BIA impedes tribes from capitalizing on their own resources. In discussions I periodically have with those working on the ground in energy development for tribes, I hear differing views on the BIA's role. I have found a number of instances where a lack of funding, staffing, and expertise at the BIA acts as a roadblock to the timely energy development that tribes seek; but I have also been told that there are instances where tribes look to the BIA for its built-in expertise and assistance in leasing oil and gas properties, and that area BIA offices work well.<sup>40</sup> As tribal experiences with the BIA are not positive across the board, it is important to reduce inefficiencies and streamline the BIA's approval and appraisal process. This can be accomplished by using federal appropriations to provide the BIA with more of the funding it needs to increase its staff and expertise and by providing incentives for quick and timely action by existing BIA offices.<sup>41</sup>

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<sup>39</sup> Consider the staffing available for the US State Department relative to that of the BIA. As is well known, the State Department is tasked with liaising with approximately 200 foreign nations. To do so, the State Department employs more than 76,000 people (US Department of State, Bureau of Human Resources, "HR Fact Sheet," March 3, 2018) and has an annual budget on the order of \$40 billion (US Department of State, "Congressional Budget Justification, Fiscal Year 2019," February 12, 2018, at page i). The BIA is also in charge of important inter-governmental relationships. In the case of the BIA, the Bureau is tasked with interfacing with nearly 600 Indian nations, and is expected to do so with a staff of about 4,500 individuals (US Department of the Interior, Indian Affairs, "Shutdown Contingency Plan," January 2018, at page 3). The BIA has an annual budget of about \$2.5 billion (US Department of the Interior, "Fiscal Year 2018, The Interior Budget in Brief," May 2017, at page BH-77). Of course, the BIA is part of the Department of the Interior, and so is not strictly comparable to the State Department. Nonetheless, as these data indicate, the US State Department has staffing and funding resources greatly in excess of what is available to the BIA.

<sup>40</sup> Note that the positive BIA feedback I have heard over the past couple of years involves energy leases on tribal lands that are not reservation lands. However, this does not invalidate the important point that tribes and their situations are extremely diverse, and blanket solutions have seldom proven useful in Indian Country. As one legal scholar points out: "The basis of Federal Indian energy policy should be a recognition that each tribe can propose how best to oversee and regulate or restrict development and then, with appropriate federal support, build or enhance the governmental institutions necessary for doing so. In negotiating the details of each such proposal, then, the federal government could work with the tribe to identify how tribal property and interests will be best protected, but importantly, neither the tribal nor the federal government should be bound to a specific regulatory scheme. Instead, with federal support, assistance, and, potentially, co-management, tribal governments will be able to develop their own energy policies, laws, rules and regulations as they see fit." (Monte Mills, "Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy," *American Indian Law Journal*, Volume 6, Issue 1, December 15, 2017 (hereinafter referred to as "Mills 2017") at pages 87-88, especially 88.)

<sup>41</sup> Legal scholar Monte Mills notes (Mills 2017 at page 79) that the federal government's responsibilities to the tribes are substantial and should supersede politics: "Indian policy ... demands consideration in a non-partisan manner. The federal government's trust responsibility to Indian Country is not the product of a liberal or conservative agenda; rather, it is rooted in the foundation of the constitution and federal law." Over the course of its history, the US has rightfully been proud of its commitment to meeting its contractual obligations. As this quote illustrates, the treaty and trust responsibilities of the federal government are more substantial than

- Second, additional measures that could alleviate the BIA’s staffing shortage consist of advertising local office positions locally, providing cost-of-living adjustments for staff that must move from one locale to another to take on a position with the Bureau, and creating programs to train new employees.<sup>42</sup> Local advertising helps generate candidates for positions, cost-of-living adjustments for local positions in expensive areas will help attract critical energy-related staff to vacant positions, and training programs will contribute to increased efficiency and staff retention. These are very common sense steps that should be made part of the BIA’s human resource initiatives.
- Third, the block grants discussed above should be part of the tools available to the BIA to foster tribal energy development. To the extent tribes are willing and able to use such funds to undertake components of energy development that currently fall to the federal government, these grants can only help to ameliorate some of the burdens currently falling on BIA staff. If tribes are given funding to carry out tasks that are typically under the BIA, such as appraisals, there will be a reduced backlog and reduced demand on constrained BIA personnel and resources.<sup>43</sup> The Southern Ute’s work on indexing the BIA’s trust and realty records into their own GIS software (albeit undertaken with tribal funds) is an example of how empowering tribes to take on tasks that are typically carried out by the BIA can be successful and efficient.

For many involved in energy development on tribal lands, efforts that look to streamline energy development on tribal lands by decreasing federal oversight and regulation are welcome. Lessening the need for inefficient or redundant regulation and oversight promotes tribal autonomy and self-governance, and as the Harvard Project research indicates, successful tribal development depends crucially on enhanced tribal decision-making authority over governmental

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contractual obligations; the roles and duties assumed by the United States were freely taken on by the federal government and are owed to the tribes.

<sup>42</sup> Thompson Testimony at page 8.

<sup>43</sup> A measure recently undertaken by the Department of the Interior to assist with energy development was to establish the Indian Energy Service Center (“IESC”), which was designed to speed up energy leasing, permitting, and reporting (see, e.g., Testimony of Mary L. Kendall, *Before the US House of Representatives, Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy, and the Environment*, February 15, 2017 (hereinafter referred to as “Kendall Testimony”) at page 4). The IESC was intended to increase coordination and management across numerous federal regulatory agencies, and to implement streamlined processes, standard procedures, and best practices, which would also help alleviate staffing burdens faced by federal employees working on tribal energy development (Kendall Testimony at page 4; GAO High Risk Series at page 214). It is unclear if the IESC will meet its goals; such “one-stop shops” might prove to be beneficial, but there are also potential drawbacks to consider. If not executed properly, these shops might exacerbate existing bottlenecks to energy development by simply consolidating them into one location, such as Denver. Offices of this type may also draw experienced technical advisers away from field offices where those personnel might have made a greater impact working more directly with the tribes located nearer the area offices. However, if the IESC can establish itself as the single point and lead agency of contact throughout the regulatory process by including agencies such as Fish and Wildlife and the US Army Corps of Engineers it has the potential to lessen impediments to tribal energy development (see, e.g., LaCount Testimony at page 4).

and economic policies that affect tribal lands and resources.<sup>44</sup> Promoting opportunities for tribal self-determination and governance is something the federal government has tried to do over the last several decades, but has largely fallen short of in regard to energy development.<sup>45</sup> The efforts I have described here can help promote the development of Native American energy resources, resulting in benefits to Native Nations and individual tribal citizens, through both enhanced economic development opportunities and more efficient exploitation of the energy resources we are all collectively fortunate to have within the boundaries of the United States. Clearly, this is an issue that is worthy of serious consideration by the US Congress, and I thank you for allowing me to take part in this important discussion.

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<sup>44</sup> Stephen Cornell and Joseph P. Kalt, “Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn’t,” *Joint Occasional Papers on Native Affairs* No. 2005-02, 2006, at pages 14-15.

<sup>45</sup> The story of the Southern Ute tribe seizing control of its own energy development is well known and provides a useful example of how allowing tribes to develop and control their own resources can be tremendously successful. Through its Red Willow Production Company, which is owned and operated by the Southern Ute tribe in Colorado, the tribe engages in oil extraction in a number of geographic areas and produces throughout the Western US and offshore in the Gulf of Mexico. Red Willow is but one of five energy companies operated by the Southern Ute tribe, and the success of the tribe’s energy endeavors has allowed it to create a growth fund worth billions of dollars, and to provide sizeable dividends to the tribe’s citizens over a number of years (see, e.g., PERC Report at pages 17-18).