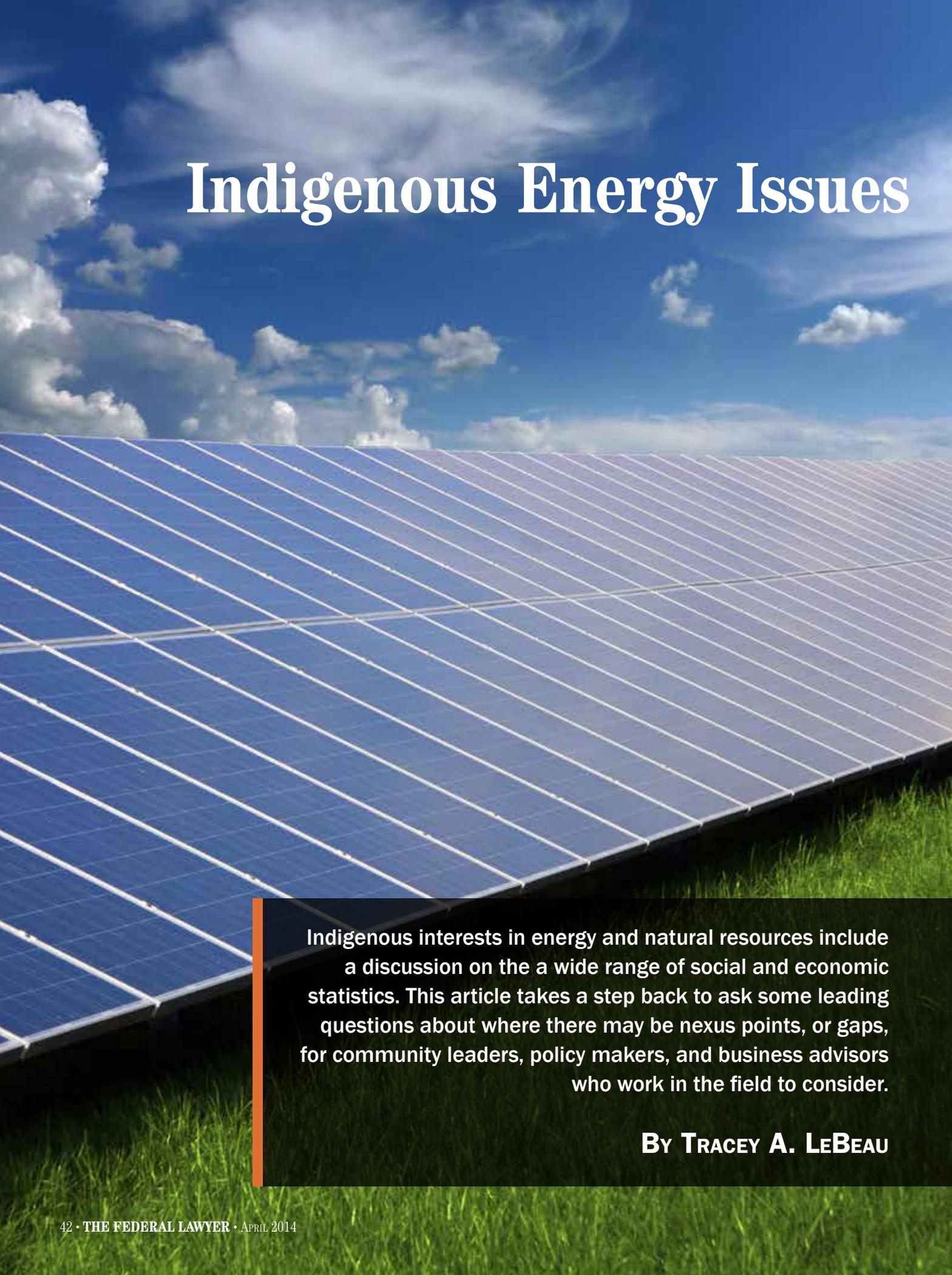


Indigenous Energy Issues

A large field of solar panels stretches across the foreground, receding into the distance. The panels are blue with white grid lines. Above the panels, a bright blue sky is filled with scattered white clouds. The overall scene is bright and clear, suggesting a sunny day.

Indigenous interests in energy and natural resources include a discussion on the a wide range of social and economic statistics. This article takes a step back to ask some leading questions about where there may be nexus points, or gaps, for community leaders, policy makers, and business advisors who work in the field to consider.

BY TRACEY A. LEBEAU

on an International Grid

Even a cursory review of indigenous interests in energy and natural resources, and current production statistics, is dramatic and thought-provoking. Additional factors which could lend more dramatic effect, to any indigenous energy discussion, include such factors as: the demographic and infrastructure trends in indigenous communities, the impressive potential of clean energy development, the reality of a dramatically growing young indigenous population, and the rates of poverty in indigenous territories and communities (the hopeful insinuation being that, in general, there is ample room for potential growth).

The purpose of the following discussion is to provoke those thoughts and provide some practical perspectives that seek to further inform the discussion. The disclaimer here being that the typical in-depth analysis of the current state of indigenous natural resources legal challenges, and court decisions, is being left to that impressive cadre of international legal scholars whom admirably do so. The discussion here that follows takes a step back to ask some leading questions about where there may be nexus points, or gaps, for community leaders, policy makers and business advisors whom work in the field to consider.

To provide some high-level context on the magnitude of the topic at hand, indigenous energy more specifically, the following are a smattering of facts and estimates regarding a few of the most prolific energy-producing countries where indigenous peoples are implicated in some manner or are seeking to develop energy themselves:

- In Canada, it has been estimated that over the next decade, more than 600 major resource projects are planned, representing more than \$650 billion in investments. Every oil and gas project proposed in western Canada implicates at least one First Nations community.¹
- Also, in Canada, author Chris Henderson in his 2013 book *Aboriginal Power*, summarizes that as of January 2010, aboriginal communities owned a portion of 15 operating hydroelectric, wind, and biomass facilities. By the end of 2012, an additional 24 aboriginal clean-energy projects had committed power purchase agreements, with dozens more moving through various stages of feasibility.
- In 2013, the U.S. Department of Energy's Office of Indian Energy released updated data that estimates that although Indian lands comprise approximately 2 percent of the lands in the United States, they contain an estimated 5 percent of all renewable energy resources, with utility scale rural solar comprising more than 5.1 percent of the total U.S. energy generation potential.²
- In the western United States, the advent of shale oil and gas development has made it difficult to keep up with current oil and gas production on Indian lands across the country, as it is so fast moving, but it is fair to say that it is substantial and growing. On the Fort Berthold Indian Reservation alone, there is an estimated 640 wellheads, which could peak at 3,000, and an estimated 150,000 barrels produced on the reservation per day.³
- In Australia, it is estimated that more than 20 percent of the country's land mass is held under a variety of statutory titles by aboriginal and Torres Strait Islander people.⁴ The most dramatic escalation of mining in Australia's history is currently underway in the west and in areas where approximately 60 percent of these mineral operations neighbor aboriginal communities.⁵

The following observations about the trends, and potential, are observations from a very high altitude, which can only really

serve as a snapshot. But occasionally, snapshots are useful tools to get a sense of movement, focus, urgency, breadth, depth, and even of what may be lurking around a corner. And the conjecturing about what those corners are is timely. Given the increasing maturation (and even occasional judicial nods) to provisions embedded in a variety of international instruments, some of those corners may include opportunities and challenges in the energy sector that are a bit more commercially substantive than consultation. Although consultation has rightly been a focus, for a variety of good and important reasons, budding discussions are moving into practice. These emerging practices are maturing in some good and important ways that warrant what may be a next logical step in the evolution.

This article will explore a few emerging practices in the energy sector by also placing them into a market context. Some best practices are developing, and we will recognize some recent good work in the area, providing practical tools for business and indigenous communities. Lastly, while this is certainly by no means an exhaustive review of the topic or subject area, we shall also take the opportunity to posit a few matters for contemplation, by looking here at North America to ponder whether emerging best practices in the international realm might perhaps serve as a starting point on a concomitant guiding path to new ways to frame indigenous communities' interest in energy security in their own communities.

Demographics and Resources: Indigenous Communities, Lands, and Energy Production and Potential

In aggregate, the numbers of indigenous people living around the world is quite impressive in terms of populations to serve and plan for in addition to populations that have inhabited their territories for centuries. The UN estimates there are more than 370 million indigenous people in more than 90 countries.⁶ Claudia Sobrevila of the World Bank has estimated that indigenous people occupy nearly 20 percent of the world's land surface and are stewards of 80 percent of the planet's biodiversity.⁷ These are powerful statistics, regardless of how countries and states throughout the world recognize or categorize the rights of indigenous governments and people in relation to land tenure, ownership, and related mineral and natural resource rights.

It would be too difficult to summarize here, in metric tons or megawatts, the aggregate potential or current production across indigenous territories worldwide. One need only look at land and territories footprint of indigenous nations and the specter of growing economies in many of those countries. It represents an impressive current status quo and potential opportunity, particularly in those countries that have active energy development and some semblance of recognition of tribal sovereignty and/or indigenous rights (e.g., Canada, United States, New Zealand, Ecuador, and others). Then think about the rest of the world where indigenous people live.

In terms of indigenous energy and natural resources, the historical irony has been that in significant cases where indigenous communities have been relocated to areas much smaller than their original homelands, these new territories are some of the windiest, most sunny, and most prolific in conventional energy resources, or at least geographically situated nearby. It has usually been the case that much of the energy resource and energy infrastructure activity has affected indigenous communities in one of two ways: 1) the seeking of energy resources on or in tribal lands for development or, 2) heretofore more often than not, the seeking of energy resource

development through or within ancestral or aboriginal territories.⁸ The latter anecdotally accounts for much of the energy extraction and infrastructure development activity that thus far seems to be putting the theoretical into practice. As indigenous communities and governments—and the nontribal energy sector—take international indigenous rights concepts “out for a spin,” there is an opportunity to reflect on whether any emerging best practices can help elucidate a path for community development. Or to put it another way, can the emerging practices of respecting international indigenous rights be leveraged to benefit tribal communities' post-consultation?

UN Declaration on the Rights of Indigenous Peoples Natural Resource Sections and Common Law Considerations for Consultation and Accommodation

Reflecting the complexity and interdependency of factors in indigenous communities, the UN Declaration on the Rights of Indigenous Peoples⁹ contains numerous direct and indirect provisions related to natural resource matters. However, it specifically highlights those roles and responsibilities related to natural resources. Articles 26–28 set out broad rights related to lands and resources and provide a process of redress for lands taken without consent. Specifically, Article 26 sets forth that indigenous people have the right to own, use, develop, and control the lands, territories, and resources they have traditionally owned, occupied, used, or acquired or possess by any reason of traditional ownership. It also requires states to affirmatively recognize and protect these lands, territories, and resources consistent with indigenous people's use of, and relationship with, the lands and resources.

These outlined rights and responsibilities, along with other articles that recognize and support indigenous people's interest and rights to participate in decision-making have all provided a useful framework for both indigenous communities and those sector players who seek to do business with them. While some in the energy sector and among the recognized states do still cling to the least restrictive and lowest-common-denominator consultation policies in those states, there is a growing number of exceptions.¹⁰ The energy sector and government agencies alike are increasingly looking to these international norms and for international best practices as a starting place to base consultation policies and/or interact positively with indigenous communities as they contemplate development agreements involving either indigenous resources or passing through indigenous or aboriginal territories (set aside or ancestral). For example, one can look north to Canada and follow recent accounts of how these strategies are working themselves out, or not working out so well in some cases.

In some cases, domestic courts in countries such as Belize and New Zealand have begun to refer to the declaration.¹¹ While many countries do not yet refer to it in their judicial decisions, the point here is that indigenous governments and people, and the energy sector, are using the declaration as a touchstone in practice for a variety of reasons. While the legal and policy development related to it continue to be fine-tuned, and next-stage issues involving legal redress and the like continue to advance, it would be interesting to track whether or how practice affects policy and vice versa. One wonders about the effect of social license on legal license in this evolving area. Or put another way, whether consultation and other commercial or development agreements that emanate from that process are helping to inform the specific decisions and policies framing matters beyond consultation.

Further Defining of Consultation and Emerging Accommodation Norms in Practice

To support a theme of this discussion by looking at practical application, it can be helpful to review indicative instances of when consultation could begin to inform and perhaps initiate further extension of the rights of First Nations. In First Nations territories across Canada, the requirement and practice of consultation, and then in some of those cases, further accommodation, are playing out on a daily basis.

This year marks the 30th anniversary of a case, which ultimately ended up in the Canadian Supreme Court, that served as an important turning point for First Nations land and resource rights and procedural requirements for consultation. *Delgamuukw v. British Columbia*¹² confirmed that aboriginal title in British Columbia existed and went beyond hunting, gathering, and fishing

From the documented best practices, one could potentially draw the conclusion that in addition to any legal or policy pressures on business to follow and promote human rights, it is good business to do good in business. Social license is not just trendy.

rights and clarified that when dealing with federal (Crown) lands, the government must consult with, and may have to compensate, affected First Nations whom at the time did not have defined treaty rights. It was a turning point in treaty negotiations with numerous First Nations and also the beginning of the acceptance that First Nations had recognized rights beyond the lands they inhabited. In practice, that decision and subsequent ones paved the way for the increased level of consultation with First Nations whose rights are likely to be affected by activities on Crown lands, including their traditional aboriginal territories.

Although that decision and later decisions further established the Crown's duties of consultation, the practical application was that the Crown and First Nations began to explore in terms of the when, how, and to what extent. Likewise, those who seek license or permits on Crown lands began to explore the legal and practical contours of consultation requirements, which continues to be an ongoing subject of clarification in the courts and in policy-making realms.

The interesting takeaway is not the consultation requirement itself, but how it has spawned the need for further definition of matters and questions such as, Where does consultation end and accommodation (benefits sharing and the like) legally begin? When does consultation end and accommodation begin so as to lead to more effective practical outcomes? How much benefits sharing is standard or enough? When is accommodation more appropriately inclusive of monitoring, and when is it more appropriately inclusive of revenue sharing? How much authority can the Crown delegate in its consultation duties to third parties, either private or other governmental entities?

Canada is an interesting example, not only because it is a country whose legal and business requirements seem to be educating one another, but also because other indigenous communities with evolving consultation and accommodation policies look to our northern neighbor as a guide. Canadian First Nations and aboriginal organizations, for example, often host indigenous delegations from South America to discuss best practices in oil and gas agreements and

energy infrastructure negotiations. It is also interesting to watch (the Idle No More Movement being a good example) how First Nations community members are challenging the concept of consultation on a community level, not a government-to-government level.

Moving Past Consultation and Accommodation: Public-Private Partnerships and Sustainable Infrastructure Development in a Modern Era

In December 2013, the UN Global Compact published a business reference guide on the declaration. A very thorough and updated compendium of policy and legal touchstones, including international finance and labor convention provisions, the guide also offers some best practices by sector. It is helpful to understand how businesses are putting the aspirational policy and legal realm into practice. Such practices range from mining companies promoting the use

of indigenous businesses in operations, to manufacturers pledging sustainable practices in keeping with negotiated indigenous preferences, to gas pipeline companies seeking innovative benefits-sharing agreements that provide cleaner fuels for use in village communities to lower greenhouse gas emissions and heating costs for residents.¹³

From the documented best practices, one could potentially draw the conclusion that in addition to any legal or policy pressures on business to follow and promote human rights, it is good business to do good in business. Social license is not just trendy. It is becoming a smart way to guide business decisions, which is also attractive to shareholders and customers. It is also plainly practical, as interests can often align if both parties are willing.

In South Africa, a different tact of blending the need to promote social equities with the need to address legal requirements has given rise to a trend toward models of private and public law governance and public-private partnerships. In that country, local communities and the private sector negotiate agreements involving land, which can include equity arrangements with resource companies wherein the community receives shares in lieu of royalty payments.¹⁴ In Australia, aboriginal land, resources, and title discussions and consultations have begun to incorporate attendant discussions regarding economic and social benefits for aboriginal people.¹⁵ One commentator has also posited that the "law provides an important means of formalising relationships that have been forged at an economic and policy level, but also as an instrument that defines what those relationships are, and how they are to be managed to achieve goals of economic empowerment and development."¹⁶

In North America, it has rarely been a tough sell for renewable energy developers to commit to tribal member training and hiring requirements for operations and maintenance jobs. Particularly in rural communities, it is preferable to have trained professionals who are already committed to the communities and to maintaining energy systems that benefit the community. On the ownership side, the same might be said for the power of community commitment wherein innovative partnerships are emerging, for example, between

U.S. tribal and public power entities that share a commitment to a particular region or territory.

Another prism with which to view how consultation may have opened the window of opportunity and informed further social and economic accommodation could be the trend of globalization. Specifically, whether globalization—economic and technological—has affected the way in which we are beginning to accept as a frame for interjurisdictional relations and made easier to accept that what benefits an indigenous community could benefit the larger region or nation. The economic interconnectedness of the economy is growing. Thus, the economic impact of activities, particularly those of the large extractive energy sector, can reach far beyond the confines of an Indian reservation or an indigenous community. The fact that macroenergy markets are global, or at least regional in many cases, can be reflected in core aspects of development (e.g., pipelines, transmission lines, transportation infrastructure) and likewise involve complex, interjurisdictional considerations. So it is less surprising that accommodation and benefits sharing is becoming a practical solution in some cases and helping to further support the declaration's consultation and economic support provisions.

The other question posited here is how and whether these accommodation and benefits-sharing activities, and the maturation of them, can be leveraged to help indigenous communities sustainably develop their own energy infrastructure and support their own energy security concerns. That may well be the next level of maturation in this policy and practice area. Was it an intended consequence for the declaration to provide a framework for natural resource consultation and accommodation, which could in turn be used to provide an alternative framework for tribal or indigenous community development? The tools indigenous communities are learning, through the crafting of complex partnerships resulting from consultation and accommodation activities, can be put to use as they seek to drive investment and leverage resources for their own infrastructure development.

A cogent argument can be made that indigenous communities and governments certainly do not require an international policy to address their own development policies and practices. But in an era of a growing acceptance and reliance on public-private partnerships as a key strategy for many countries to build their own energy infrastructure and ensure energy security, can that translate itself into indigenous communities supporting their own energy infrastructure development? For indigenous communities, might benefits-sharing and consultation frameworks be an interesting prism through which to view one vision of 21st century tribal energy development?

The need for an updated indigenous energy strategy is clear. There is no doubt that indigenous communities are generally growing by every metric—population, energy use, land base. The need for infrastructure to host a growing population and attend to economic development needs is critical. Developing energy-secure and resilient systems to serve indigenous communities can help prevent the drain of indigenous people from their communities in addition to addressing another pressing issues, such as climate change.

A missing piece of the puzzle to supporting such a new strategy is a mechanism or organizational entity by which indigenous communities and governments can share with one another technical, governance, and commercial information. Access to relevant and organized data, analytics, independent advisory, and assistance is paramount, but at this time, the larger indigenous community lacks

robust organizational options to support this need. There has been consistent and articulated interest for a tribally or indigenous-led effort to gather and share best practices, vet potential partners, analyze corporate entities working in and around indigenous communities, and provide unbiased commercial energy analysis and advice. It is helpful to note that this missing piece is still a piece of the puzzle, but one that can be solved.

In this expanding universe of examples of how indigenous communities are moving toward innovative partnerships as a strategy to address natural resource development issues on their lands and within their territories, it is an ideal time to document and support any expanding, practical extension of consultation into indigenous-led partnerships and community-focused energy development efforts. While the 20th century largely witnessed energy resource development on indigenous lands and within indigenous territories as an export proposition, the hope is that the 21st century will bear witness to sustainable energy development wherein indigenous communities not only profit in revenue generation, but also infrastructure growth to sustain their own vibrant populations. ☉



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expressed herein do not necessarily state or reflect those of the U.S. Government or any agency thereof.

Endnotes

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³Jessica Holdman, *Three Affiliated Tribes Planning Natural Gas Plant*, THE BISMARCK TRIBUNE (Nov. 25, 2013, 3:46PM), bismarcktribune.com/bakken/three-affiliated-tribes-planning-natural-gas-plant/article_0f1ace66-561b-11e3-a197-001a4bcf887a.html.

⁴See National Native Title Tribunal website, www.nntt.gov.au, for maps and further information.

⁵AUSTRALIA'S DEPARTMENT OF INDUSTRY, TOURISM, AND RESOURCES, *Working with Indigenous Communities: Leading Practice Sustainable Development Program for the Mining Industry* (2007).

⁶UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, DIVISION FOR SOCIAL POLICY AND DEVELOPMENT, SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES, *State of the World's Indigenous Peoples*, ST/ESA/328 (2009), www.un.org/esa/socdev/unpfi/documents/SOWIP_web.pdf.

⁷SOBREVILA, CLAUDIA, *The Role of Indigenous Peoples in Diversity*

beyond the scope of these regulations”).

⁶⁷*Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

⁶⁸15 U.S.C. § 1125(a)(1); *see also* 15 U.S.C. § 1052(a) (prohibiting registration of trademarks that “falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols ...”).

⁶⁹The Connecticut Supreme Court refused to foreclose an unrecognized tribal entity from using the name of a federally recognized Indian tribe, which it held consisted solely of a generic term. *Mohegan Tribe of Indians of Conn.*, 769 A.2d at 43-45. The court reasoned that the recognition of one group as “a Mohegan Tribe” did not foreclose another group from obtaining acknowledgement as “a Mohegan Tribe.” *Id.* at 45. As the Connecticut Supreme Court concluded the name at issue was a generic term inherently incapable of trademark protection, the court’s reasoning does not foreclose trademark rights arising by virtue of federal recognition under a distinctive tribal name. *Id.* at 43-45.

⁷⁰*In re Julie White*, 73 U.S.P.Q.2d (BNA) 1713 (Trademark Tr. & App. Bd. 2004).

⁷¹*In re White*, 80 U.S.P.Q.2d (BNA) 1654 (Trademark Tr. & App. Bd. 2006) (refusing to register “MOHAWK as a [trade]mark for cigarettes because use of the name of the federally recognized St. Regis Band of Mohawk Indians of New York would falsely suggest a connection between applicant and the Mohawk tribe.”).

⁷²*Shingle Springs Band of Miwok Indians v. Caballero*, No. 2:08-CV-03133-JAM-DAD, slip op. at 2 (E.D. Cal. May 20, 2009) (order dismissing counterclaims).

⁷³15 U.S.C. § 1125(a)(1).

⁷⁴Remarks by the President at the White House Tribal Nations Conference, December 16, 2010, available at www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference (last accessed Jan. 12, 2014).

⁷⁵*United Nations Declaration on the Rights of Indigenous Peoples*, March 2008, available at www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed Jan. 12, 2014).

⁷⁶*Id.* (emphasis added).

⁷⁷Frequently Asked Questions, Declaration on the Rights of Indigenous Peoples at 2, available at www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (last accessed Jan. 11, 2014).

⁷⁸15 U.S.C. § 1115(a).

⁷⁹15 U.S.C. §§ 1051(b), 1057(b).

⁸⁰15 U.S.C. § 1058(a).

⁸¹15 U.S.C. §§ 1065, 1115(b).

⁸²*Book Craft, Inc. v. Bookcrafters USA, Inc.*, 222 U.S.P.Q. (BNA) 724, 727 (Trademark Trial & App. Bd. 1984).

⁸³Angela R. Riley, “*Straight Stealing*”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 87 (citing Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT’L & COMP. L. 519, 529 (2003)) [hereinafter “Riley, ‘*Straight Stealing*’”].

⁸⁴Yocha Dehe Wintun Nation Press Release, “Native Voice, Native Vision: Rumsey Band of Wintun Indians Honor Their Ancestral Roots with Name Change,” Sept. 8, 2009, available at yochadehe.org/sites/default/files/YDH%20Name%20Change%20Release.pdf (last accessed Jan. 12, 2014).

⁸⁵Riley, “*Straight Stealing*,” *supra* note 83, at 74.

⁸⁶*United States v. Wheeler*, 435 U.S. 313, 323-24 (1978).

⁸⁷*See Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁸⁸Riley, “*Straight Stealing*,” *supra* note 83, at 87-89.

⁸⁹*Montana v. United States*, 450 U.S. 544, 566 (1981).

⁹⁰*See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 457-58 (1997) (refusing to recognize tribal jurisdiction arising out of accident on state highway running through reservation even though “those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members”).

⁹¹Riley, “*Straight Stealing*,” *supra* note 83, at 87-89.

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Conservation (2008).

⁸Tribal lands generally refer to those that are set aside specifically for tribes to reside on, often through legislation, negotiated treaties, or federal fiat. Tribal, aboriginal, or ancestral territories generally refer to those lands that the tribe, indigenous people, or other organized aboriginal entities may have resided or had, or continue to have, a presence or interest in that may or may not be inclusive of their set-aside tribal lands.

⁹GA Res. 61/295 (Annex), UN GAOR, 61st Sess., No. 49, Vol. III, UN Doc. A/61/49(2008) 15. The declaration was adopted by the UN General Assembly on Sept. 13, 2007. It specifically recognizes indigenous people’s rights and sets out the minimum necessary to meet international human rights standards. It does not create new or special rights for indigenous people, and it addresses the right of indigenous people to own, develop, control, and use the lands and territories that they have traditionally owned and otherwise occupied or used.

¹⁰The right to consultation is included in many international instruments and has been accepted as a standard practice and requirement in many countries. As one example, the International

Labour Organization Convention 169 requires that indigenous and tribal peoples are consulted on issues that affect them. It also requires that these people are able to engage in free, prior, and informed participation in policy and development processes that affect them.

¹¹UN GLOBAL COMPACT, *A Business Reference Guide: UN Declaration on the Rights of Indigenous Peoples*, 5 (2013) www.unglobalcompact.org/docs/issues_doc/human_rights/Business_Reference_Guide.pdf.

¹²3 S.C.R. 1010 (1997)

¹³*Id.*, at 21.

¹⁴Lee Godden, Marcia Langton, Odette Mazel, and Maureen Tehan, *Accommodating Interests in Resource Extraction*, 26 J. ENERGY & NAT. RESOURCES L. 1, 14 (2008)

¹⁵*Id.*, at 25.

¹⁶*Id.*, at 25.