

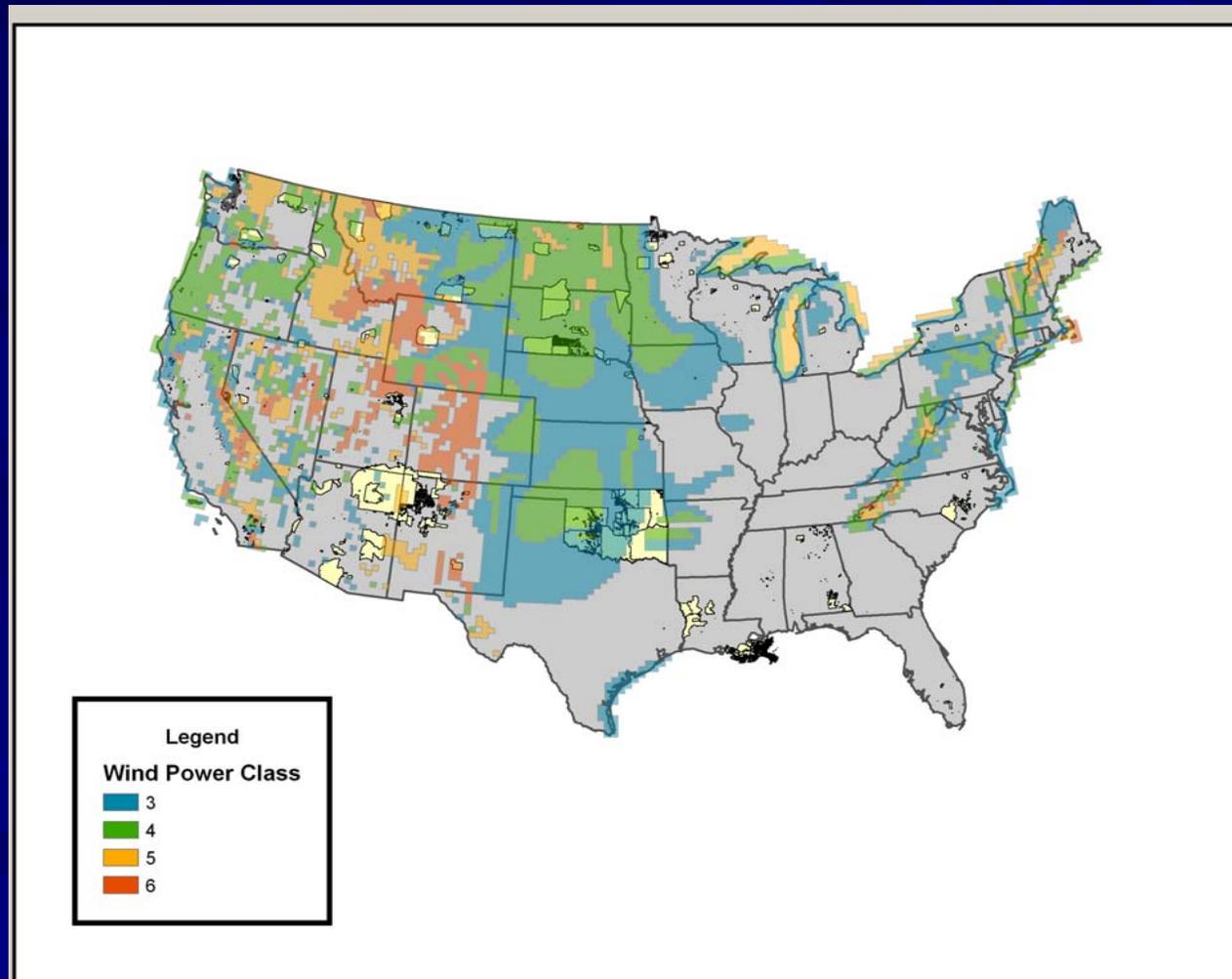
# Wind Energy Development on Indian Land

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# What is Indian Land?

- 580 Federally-recognized tribes (355 in lower 48 and 225 Alaska Native entities) as of November 2007
- 34 different States
- Over 280 land areas recognized as reservations
- Largest—Navajo (16 million acres)
- Smallest—several just a few acres

# Is there potential for wind energy from Indian land?



# What is Indian Land (cont'd)?

- There are three general types of Indian land ownership:
  - Tribal trust land
  - Individual restricted land
  - Tribal fee land

# What is the relationship of Indian tribes to the US?

- “Domestic dependent nations”
- Indian Nations are sovereign governments
- Government-to-government relationship
- United States is trustee for tribes and individual Indians

# What is the trust responsibility?

- As trustee, the United States is charged with “moral obligations of the highest responsibility and trust” and is judged by “the most exacting fiduciary standards”
- When acting as trustee (rather than regulator) and faced more than one "reasonable" choice, must choose the alternative that is in the best interests of the Indian beneficiary
- The United States does not have to go beyond statutes and regulations, and must balance trust responsibility with other obligations
- Compliance with generally applicable environmental statutes fulfills the trust responsibility

# How is Indian land developed for wind energy?

- Tribal trust land
  - Tribe on its own
  - Lease or contract
  - Tribal Energy Resource Agreement
- Individual restricted land
  - Individual on his or her own
  - Lease
- Tribal fee land
  - May be the same as private land

# May a tribe or an individual Indian develop without Federal approval?

- If not conveying an interest in the trust or restricted land, Secretarial approval is not necessary
- NEPA and NHPA do not apply
- Other Federal environmental laws (e.g., ESA, MBTA) still apply

# How would Indian land be developed by a third party?

- A tribe or individual Indian can lease trust or restricted land under the 1955 Indian Long-Term Leasing Act (25 U.S.C. 415)
- A tribe can enter into a contract under the 2000 Indian Tribal Economic Development and Contract Encouragement Act (25 U.S.C. 81)
- Secretarial approval is required

# How would Indian land be developed by a third party (cont'd)?

## ■ Business lease

- More involvement of the Secretary
- Fair Market Value
- Insurance, bonding, enforcement

## ■ Section 81 contract

- Maximum flexibility for landowner
- No “best interest” determination
- No enforcement by United States

# What is in the best interest of the Indian lessor?

- For negotiated leases, defer to the landowners, to the maximum extent possible
- For leases granted on the landowners' behalf, obtain a fair market rental and attempt to ensure that the use of the land is consistent with the landowners' wishes
- Recognize the rights of Indian landowners to use their own land, so long as their Indian co-owners are in agreement and the value of the land is preserved
- Recognize the governing authority of the tribe having jurisdiction over the land to be leased
- Promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction

# What environmental laws apply to leases and contracts?

- Because leases and contracts require Secretarial approval, NEPA and NHPA apply
- Other Federal environmental law (e.g., ESA, MBTA) also applies

# What is a Tribal Energy Resource Agreement (TERA)?

- Under the Energy Policy Act of 2005 (25 U.S.C. 3504), the Secretary may enter into a TERA with a tribe
- The TERA will be for specific type(s) of energy resource development on tribal land
- The Secretary will prepare a NEPA review based on the scope of the TERA

# Can any tribe get a TERA?

- Any federally-recognized tribe, but not Alaska Native Corporations
- The Secretary must find that the tribe has demonstrated sufficient capacity to:
  - Make prudent decisions in negotiating, approving, or disapproving proposals for leases, business agreements, and rights-of-way affecting tribal land; and
  - Monitor and regulate activities of third parties under leases, business agreements, and rights-of-way

# What can a tribe do under a TERA?

- The tribe can then
  - Enter into leases and business agreements and
  - Grant rights-of-way
    - For energy resource development on tribal land
    - Without Secretarial approval
- The tribe can also assume other responsibilities of the Secretary
  - Not inherently Federal
  - Specifically not ESA

# What happens to the trust responsibility?

- The Act provides that the United States is not liable to any party, including a tribe, for any negotiated term of, or any losses resulting from, any lease, business agreement, or right-of-way under a TERA
- The Act otherwise preserves the United States trust responsibility, including obligations for enforcement of leases, business agreements, and rights-of-way

# What environmental review is there for projects under a TERA?

- Because no Secretarial approval, NEPA and NHPA do not apply
- The tribe must
  - Establish an environmental review process for leases, business agreements, and rights-of-way (similar to NEPA)
  - Provide for public comment on the environmental impacts of the lease, business agreement, or right-of-way

# What about other environmental laws?

- The Act specifically says that any development under a TERA is still subject to all Federal environmental law, e.g., ESA and MBTA