

Committee on Natural Resources

Rob Bishop, Chairman

Markup Memorandum

September 29, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff,
Subcommittee on Indian, Insular and Alaska Native Affairs (x6-9725)

Mark-Up: **H.R. 210 (Rep. Don Young)**, To facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands, and for other purposes.

October 3 & 4, 2017; 1334 Longworth House Office Building

H.R. 210 (Rep. Don Young), “Native American Energy Act”

Summary of the Bill

H.R. 210 was introduced by Rep. Don Young on January 3, 2017 and has been referred to the Subcommittee on Indian, Insular and Alaska Native Affairs. The bill promotes energy development by Indian tribes and Alaska Native Corporations (“ANCs”) by reducing bureaucratic burdens; expediting, streamlining, and standardizing the process for obtaining appraisals and permits; deterring frivolous lawsuits which reduce the competitiveness of Indian tribes and Alaska Native Corporation energy development; lowering the cost of federal permitting on tribal trust lands; increasing the opportunity for tribes to govern more aspects of energy development on their lands.

Background

Obstacles to Indian Energy Development

Tribes and individual Indian landowners regularly encounter obstacles not encountered on leases of private and state lands. In general, federal law requires the approval of the Interior Department before a lease entered into by a tribe with an energy developer is valid. For example, Under the Indian Land Mineral Leasing Act of 1982¹, a tribe or individual Indian may only lease their trust lands for mineral development “*subject to the approval of the Secretary.*” Pursuant to this authority, the Department developed sprawling rules for the approval of leases of Indian lands. The rules often trigger National Environmental Policy Act (“NEPA”) reviews, lengthy appraisals, expensive applications for permits to drill, and numerous other layers of dilatory bureaucratic review often involving multiple agencies. Each layer of review gives a federal or private special interest an opportunity to meddle, interfere, delay, appeal, or sue to slow or stop permitting of development on Indian lands.

¹ 25 U.S.C. 2101 et seq.

The current federal regulatory scheme obstructs historically impoverished tribes from fully realizing the huge economic potential of developing their natural resources. Because tribes with large energy resources tend to be located in rural areas, development of these resources offers one of the few non-government means available for them to create jobs and a revenue stream to meet member demands for tribal services or activities, investment in the local community, and new energy supply to meet consumer demand.

In June of 2015, the Government Accountability Office (“GAO”) released a report titled **“INDIAN ENERGY DEVELOPMENT: Poor Management by BIA Has Hindered Energy Development on Indian Lands.”**² In its report, the GAO documented and described serious shortcomings in the Department’s administration of energy development on Indian lands, shortcomings that “can increase costs and project development times, resulting in missed development opportunities, lost revenue, and jeopardized viability of projects.”

For example, the GAO described how one tribe estimated it had lost more than \$95 million in revenues it could have earned due to delays. Further, as the report states, “According to Interior officials, while the potential for oil and gas development can be identical regardless of the type of land ownership --- such as state, private or Indian --- the added complexity of the federal process stops many developers from pursuing Indian oil and gas resources for development.”

Despite the 2015 report from the GAO and work with federal agencies responsible for fulfilling the management of the development of Indian energy resources, the GAO listed Indian Energy on its biennial “high risk” list for waste, fraud and abuse in March 2017. The GAO stated: *BIA has in recent years continued to mismanage Indian energy resources held in trust, thereby limiting opportunities for tribes and their members to use those resources to create economic benefits and improve their communities.*³

Recent Changes in Federal Indian Law Concerning Energy

The Energy Policy Act of 2005⁴ authorized tribes to enter into Tribal Energy Resource Agreements (“TERA”) with the Secretary of the Interior. Under a TERA, a tribe would develop energy leasing rules that, after review and approval by the Secretary of the Interior, would govern the tribe’s leasing of its lands for energy development purposes. Under a TERA approved by the Secretary, a tribe could execute energy leases on its lands without review and approval by the BIA and without day-to-day supervision of the lease by the government except for certain duties for the Secretary to monitor the tribe’s compliance with the TERA.

After a decade since passage, no tribe has successfully entered into a TERA with the Secretary. The GAO cited a few reasons, which include: (1) uncertainty about TERA regulations, (2) limited tribal capacity and costs associated with assuming activities currently conducted by federal agencies, and (3) a complex application process.⁵

² <http://www.gao.gov/products/GAO-15-502>.

³ http://www.gao.gov/highrisk/improving_federal_management_serve_tribes/why_did_study

⁴ 25 U.S.C. §3501 et seq.

⁵ See GAO Report GAO-15-502 at 32.

Energy Resources on Indian Lands

The Department of the Interior holds 56 million acres of land in trust or restricted status for the benefit of American Indian tribes and individual Indians. In Alaska, Alaska Native Corporations own 44 million acres of fee land (not under the jurisdiction of the Department of the Interior). The Corporations obtained these lands in settlement of their aboriginal land claims under the Alaska Native Claims Settlement Act of 1971.⁶

Several Indian reservations contain large accumulations of known and prospective mineral resources. In 2015, over 418,881 ownership certification transactions formed the basis for monetary distributions in the amount of \$1.1 billion in mineral royalty payment and \$210 million in surface lease and related payments.⁷

In Alaska, several ANCs are actively engaged in leasing their fee lands for mineral development, and in operating or servicing oil and gas facilities on State lands and in the National Petroleum Reserve-Alaska. Kaktovik Inupiat Corporation, which owns fee lands in the 1002 Area (coastal plain) of the Arctic National Wildlife Refuge (“ANWR”), seeks to develop its prospective oil and gas resources; however, it is prohibited from doing so until Congress lifts the current federal restriction on leasing in the coastal plain of ANWR.

Breakthroughs in the use of hydraulic fracturing to produce oil and gas from large hydrocarbon-bearing shale formations have given several historically impoverished tribes a major economic opportunity.

There are high wind and solar prospects in several Indian reservations. In 2013, the Department issued a final rule⁸ revising surface (non-mineral) leasing of Indian trust lands, including streamlining for approval of wind and solar projects. Also, wind and solar industries have been heavily subsidized by the government. Despite these efforts, only one significant wind project is generating power on tribal lands.⁹ As noted previously in this memorandum, the GAO report cited that in 2011, the Rosebud Sioux Tribe reported that it took 18 months for the BIA to review a wind lease.

Hydraulic Fracturing

One of the major threats to oil and gas development on Indian lands in recent years was the Bureau of Land Management (“BLM”) 2015 rule to regulate hydraulic fracturing (“HF”) on public lands. The final 2015 BLM rule deemed public lands to include land held in trust for Indians and Indian tribes. While title to Indian trust lands is owned by the federal government in a technical legal sense, the beneficial interest in such lands is vested *exclusively* in the Indian beneficiaries. In other words, the public does not have a legal right to the use of Indian trust lands. The BLM’s rule turns this fundamental tenet of federal Indian policy on its head.

⁶ 43 U.S.C. §1617 et seq.

⁷ FY 2018 Budget Justification. Bureau of Indian Affairs at IA-RES-10.

⁸ 25 C.F.R. Part 162.

⁹ <https://www.hcn.org/articles/federal-agency-shortcomings-stalling-solar-wind-tribal-winds>

In an April 19, 2012, Subcommittee on Indian and Alaska Native Affairs oversight hearing, tribal leaders testified that the then proposed HF rule could drive oil and gas operators from Indian lands and deprive historically impoverished tribes of a needed source of private investment, tribal royalty revenues, and high-wage jobs. Tribes opposed to the proposed rule lodged three basic objections: (1) the Department wrongly considers land it holds in trust for Indians to be “public lands” for the purpose of the draft rule; (2) the BLM did not adequately consult with tribes in violation of Administration policy and a Secretarial Order; (3) the rule will result in new delays and paperwork burdens and will thus drive industry away from leasing Indian lands. As one tribal witness explained, “BLM’s proposed rule to address public outcry for activities on public lands overreaches its goal and infringes on tribal sovereign authority to make decisions concerning development on reservation lands.”¹⁰

Moreover, the BLM HF rule would reduce the competitiveness of Indian tribes in energy markets. On reservations where Indian trust lands and non-Indian fee lands are intermixed in a “checker board” pattern, an oil and gas operator would have no incentive to produce oil on an Indian lease if he could simply move his operation a few feet away to the non-Indian fee land, where more reasonable State rules govern.

On July 15, 2015, the Natural Resources Committee, Subcommittee on Energy and Mineral Resources, held an oversight hearing to contemplate the impacts of BLM’s final rule¹¹ regulating hydraulic fracturing on Federal lands.¹² In the hearing, a tribal leader testified that the final rule wrongly fails to separate tribal lands from public lands.

June 21, 2016 the U.S. District Court for Wyoming struck down the 2015 BLM rule holding that the BLM lacked Congressional authority to promulgate the regulation, blocking the implementation of the rule.

On March 29, 2017, Secretary Zinke directed the BLM to review the 2015 HF rule. On July 25, 2017, BLM issued a proposed rule to rescind the 2015 HF rule and it will be open for public comment until September 25, 2017.

Previous Committee Actions on Indian Energy

In the 112th Congress, the Subcommittee on Indian and Alaska Native Affairs held five¹³ Indian energy-related hearings. In the 113th Congress, the Natural Resources Committee reported H.R. 1548, and included an amended version as part of a larger energy packages which passed the House.¹⁴ In the 114th Congress, the House Committee on Natural Resources held a markup where H.R. 538, an identical bill to H.R. 210, was reported favorably to the House. On

¹⁰ <http://naturalresources.house.gov/uploadedfiles/showtestimony04.19.12.pdf>

¹¹ 80 Fed. Reg. 16128.

¹² <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398963>

¹³ <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=229900>

<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=278663>

<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=286987>

<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=289030>

¹⁴ See H.R. 2, the American Energy Solutions for Lower Costs and More American Jobs Act, 113th Congress (2014), and H.R. 1965, Federal Lands Jobs and Energy Security Act of 2013 (2013).

October 8, 2015, H.R. 538 passed the House with bipartisan support and was then referred to the Senate Committee on Indian Affairs. H.R. 538 was also included in the House passed amendment to S. 2012, the North American Energy Security and Infrastructure Act of 2016. No further action occurred in the conference to S. 2012 before the end of the 114th Congress.

Analysis of H.R. 210

The Native American Energy Act addresses concerns various Native American leaders brought to the attention of the Subcommittee in previous hearings and consultations. The bill helps tribes and Alaska Natives expedite and streamline the leasing and development of energy and other natural resources in cases where federal laws or policies are a hindrance to them. A section-by-section analysis of the H.R. 210 can be found below.

Section 1. Short Title. “Native American Energy Act.”

Section 2. Appraisals. Allows an appraisal of Indian land, at the option of a tribe, to be conducted by the Secretary of the Interior, the tribe, or a certified third-party appraiser.

Section 3. Standardization. Directs the Secretary of the Interior to standardize the way the seven bureaus of the Department of Interior track oil and gas activities on Indian lands.

Section 4. Environmental Reviews of Major Federal Actions on Indian Lands. Amends Section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) to provide that for any environmental impact statement required for a major federal action on a tribe’s lands, such statement shall be available for public review and comment only by members of the Indian tribe and by any other individual residing within the affected area. Under Sec. 4, the Chairman of the Council on Environmental Quality shall develop regulations to implement this section. This amendment addresses complaints from tribes that certain federal laws – including NEPA – treat Indian-owned lands as public lands.

Section 5. Judicial Review. Section 5 would deter the filing of a frivolous lawsuit intended to slow or stop federal permitting, licensing, or other federal permission relating to Indian or Alaska Native energy development. In this context, a frivolous lawsuit is one whose purpose is not to prevail on the merits but to use the time delays and high costs inherent in a federal lawsuit process to stymie federal agency permission or approvals for an Indian tribe or Alaska Native Corporation (ANC) to develop energy resources.

Section 5 expedites the time of filing and resolving lawsuits against Indian or ANC-related development, and provides that such lawsuits must be brought in the U.S. District Court for the District of Columbia Circuit. Under this section, no taxpayer funds may be used to reimburse fees or expenses for plaintiffs filing these frivolous lawsuits, and the plaintiffs must pay fees and expenses to a defendant (other than the United States) unless they ultimately prevail, or unless the court finds the position of the plaintiff was substantially justified or special circumstances make an award unjust.

Section 6. Tribal Biomass Demonstration Project. Amends the Tribal Forest Protection Act of 2004 to create a demonstration project for Indian tribes to promote biomass energy production on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land.

Section 7. Tribal Resource Management Plans. Treats a tribe's forest practices to be "sustainable" for all federal purposes if the tribe's land is managed under a tribal resource management plan or an integrated resource management plan. This addresses a problem in which third-party groups charge an entity substantial, recurring fees to claim a certification that the entity's forest plan is "sustainable."

Section 8. Leases of Restricted Lands for the Navajo Nation. Enhances Navajo Nation leasing authority. The Indian Long-Term Leasing Act¹⁵ requires separate review and approval for each non-mineral lease of a tribe's land, triggering a lengthy, detailed review by the federal bureaucracy, and the potential preparation of an environmental review under the National Environmental Policy Act. In the 112th Congress, the HEARTH Act¹⁶ was enacted to allow any tribe to develop non-mineral leasing rules, and when such rules are approved by the Secretary, the tribe may then execute leases without further Departmental involvement.

Section 8 of H.R. 210 allows the Navajo Nation to execute mineral and geothermal leases in a manner similar to the HEARTH Act.¹⁷ The terms of such leases may be for 25 years with an option to renew for one term of up to 25 years.

Section 8 also amends 25 U.S.C. 415(e) to permit the Navajo to execute 99-year leases for business or agricultural purposes.

Section 9. Nonapplicability of Certain Rules. Provides that no rule promulgated by the Department of the Interior regarding hydraulic fracturing used in the development or production of oil or gas resources shall have any effect on any Indian trust land except with the express consent of the Indian owner.

Administration Position

Unknown.

Cost

In the 114th Congress, the CBO estimated that an identical bill, H.R. 538, would have no significant impact on the federal budget.

Anticipated Amendment

A technical amendment has been filed to address a redundant word and to clarify and thereby providing that an ANC may comment on a project if in the affected area.

Effect on Current Law (Ramseyer)

¹⁵ 25 U.S.C. §415.

¹⁶ See P.L. 112-151, the *Helping Expedite and Advance Responsible Tribal Homeownership Act* (2012).

¹⁷ *Id.*