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AMENDING THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF DETERMINATION ACT OF 2005, AND FOR OTHER PURPOSES

MAY 24, 2017.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 245]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 245) to amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 245 is to amend certain provisions of the *Energy Policy Act of 2005*¹ to further enhance the ability of Indian tribes to exercise self-determination over the development of energy resources located on tribal lands; to establish tribal biomass demonstration projects; to improve, facilitate, and make more effective the implementation of the program in Indian Country under section 413(d) of the *Energy Conservation and Production Act*²; and to otherwise facilitate Indian tribal governments in their goals to develop both renewable and non-renewable energy resources for the benefit of current and future generations of Indian people.

¹Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered sections of Title 25 U.S.C., 26 U.S.C., and 42 U.S.C.).

²Pub. L. No. 94-385, § 413(d) (codified at 42 U.S.C. § 6863(d)).

NEED FOR LEGISLATION

For several years the Committee has received concerns from Indian tribes that the many Federal laws governing the development of tribal energy resources are complex and often lead to significant cost, delay and uncertainty for all parties of tribal energy transactions. These costs, delays, and uncertainties tend to discourage development of tribal trust energy resources and drive development investments to private or non-tribal lands that are not subject to these same Federal laws.

Title V of the *Energy Policy Act of 2005*³ was intended to address these concerns by removing much of the bureaucracy and shifting the approval requirements for these transactions from the Secretary of the Interior to Indian tribes. However, the implementation of Title V was more burdensome than Congress intended.

Generally, this bill is intended to provide direction and clarity in implementing Title V as well as other purposes. The bill would remove some of the disincentives to developing tribal trust energy resources and assist Indian tribes interested in pursuing the development of these resources consistent with the policy of Indian self-determination.

BACKGROUND

Global energy demand is expected to increase by 37% by 2040, with demand increasing for several energy resources such as oil, coal, natural gas, and renewables.⁴ In recent years, energy supply increased to correspond with increases in demand. Most notably, there had been a spectacular growth in “light tight oil” production from low permeable shale formations.⁵

The primary location for light tight oil production in the United States has been the Bakken Formation in North Dakota, which is the largest known continuous oil accumulation in the United States.⁶ In the heart of the Bakken formation lies the Fort Berthold Indian Reservation, home to the Mandan, Hidatsa, and Arikara tribes.

Many other Indian reservations hold an untapped potential wealth of energy resources.⁷ In a 2015 report, the Government Accountability Office (GAO) indicated that, despite this potential, energy development on Indian lands has not been as robust as it has been on non-Indian lands.⁸

When tasked with examining the barriers to energy development on Indian lands, the GAO confirmed tribal concerns in finding that such development is subject to a complex regulatory framework and poor management by the governing Federal agencies.⁹ These barriers have led to significant delays in review and approvals of required agreements such as leases, business agreements, or rights-of-ways.

³ Indian Tribal Energy Development and Self-Determination Act, Title V of the Energy Policy Act of 2005, Pub. L. No. 109–58, §§ 501–506, 119 Stat. 763 (codified at 25 U.S.C. §§ 3501–3506).

⁴ International Energy Agency, *World Energy Outlook 2014*, Executive Summary, November 2014 at 1–2.

⁵ International Energy Agency, *World Energy Outlook 2013*, November 2013 at 424.

⁶ International Energy Agency, *World Energy Outlook 2013*, November 2013 at 475.

⁷ U.S. Gov’t Accountability Office, GAO–15–502, Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands 1 (2015).

⁸ *Id.* at 2.

⁹ *Id.*

In turn, the delays in leasing and permitting for new energy production sites were especially costly to Indian tribes. Indian tribes lost the opportunity to participate in energy development and revenues from the potential project. According to the GAO, one tribe estimated that more than \$95 million in possible fees, severance taxes, and royalties were lost during one eight-year delay.¹⁰

These impediments increase the need for improvements to the tribal energy leasing process so that Indian tribes can compete in the energy market. This bill, S. 245, would help level the playing field for Indian tribes that can participate, if they so choose, in the energy market in the United States. If S. 245 were enacted, Indian tribes would be able to lease and develop their trust energy resources in a timely, responsible, and profitable way.

Overview of Indian Energy Development—Leases and agreements under the IMLA and IMDA

Historically, most energy development on Indian lands has been carried out under the authority of the Indian Mineral Leasing Act of 1938¹¹ (IMLA) and its implementing regulations¹² or the Indian Mineral Development Act of 1982¹³ (IMDA) and its implementing regulations.¹⁴ Prior to the enactment of the IMLA, minerals on Indian lands were developed under a number of Federal statutes dating back to 1891.¹⁵

The IMLA authorizes only mineral leases, whereas the IMDA authorizes a “joint venture, operating, production sharing, service, managerial, lease or other agreement.”¹⁶ The IMDA was specifically intended to provide Indian tribes both with a greater role and with more flexibility in the mineral development process than is possible under the IMLA, by allowing the Indian tribes themselves to negotiate and structure mineral agreements. The IMDA was a significant policy step in furtherance of the broader Federal policy of Indian self-determination.¹⁷

Despite the greater flexibility and increased tribal involvement provided in the IMDA, the Secretary of the Interior (Secretary) retains considerable control over the process of finalizing any IMDA agreement. Most notably, the IMDA requires the Secretary to review a proposed IMDA agreement between the Indian tribe and a third party and determine whether it is in the best interest of the Indian tribe in light of several economic and non-economic factors.¹⁸ If the Secretary is not satisfied that the proposed agreement meets the statutory test, the Secretary may disapprove it.¹⁹

The IMDA’s implementing regulations also authorize the Secretary to cancel agreements for a range of violations by an oper-

¹⁰ *Id.*

¹¹ Act of May 11, 1938, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g).

¹² 25 C.F.R. pt. 211.

¹³ Indian Mineral Development Act of 1982, Pub. L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–2108).

¹⁴ 25 C.F.R. pt. 225.

¹⁵ See, e.g., Act of February 28, 1891, 26 Stat. 795 (codified at 25 U.S.C. § 397); Act of June 30, 1919, 41 Stat. 31 (codified at 25 U.S.C. § 399); Act of September 20, 1922, ch. 347, 42 Stat. 857 (codified at 25 U.S.C. § 400).

¹⁶ 25 U.S.C. § 2102(a).

¹⁷ See S. Rep. No. 97–472, at 2 (1982). See generally Cohen’s Handbook of Federal Indian Law § 17.03[2][a]–[b], at 1123–30 (Nell Jessup Newton et al. eds., LexisNexis 2012) (1941).

¹⁸ 25 U.S.C. § 2103(b).

¹⁹ *Id.* § 2103(a)–(b).

ator²⁰ and to impose a penalty of up to \$1000 for each day that a violation or non-compliance “continues beyond the time limits prescribed for corrective action.”²¹ Neither the statute nor the regulations require the Secretary to consult with the Indian tribe or obtain its consent before taking these actions against an operator. In fact, it would appear that the Secretary has the authority to cancel the agreement and fine an operator even if the Indian tribe were to oppose these measures.

Curiously, under the IMDA, the Secretary decides whether to approve, disapprove, or cancel an agreement, and determines whether an operator has violated an agreement and whether to impose stiff penalties for doing so. Yet, the IMDA nevertheless expressly exempts the United States from liability “for losses sustained by a tribe or individual Indian under such agreement” as long as the Secretary approved the agreement in accordance with the Act and other applicable law.²² Therefore, the IMDA provides the Secretary with the ultimate control over mineral development decisions, but at the same time appears to provide that the United States cannot be held accountable financially for those decisions as long as the Secretary followed the law.

Costly delays due to burdensome Federal processes for energy development on tribal lands

Approval of leases or agreements involving Indian lands by the Secretary is an act of a Federal official that triggers the environmental review process under the National Environmental Policy Act (NEPA).²³ The time needed for the Department of the Interior to comply with Federal statutes and regulations that apply specifically to Indian lands, such as the IMLA and the IMDA and the implementing regulations, combined with the time needed to comply with the NEPA often leads to extraordinary delays in the approval of mineral leases and agreements.

The past legislative history of this bill is replete with examples of delays due to the agency bureaucracy. Most notably, at the Committee’s legislative hearing on a prior bill, S. 2132, held on April 30, 2014, Chairman Howell of the Ute Indian tribe of the Uintah and Ouray Reservation submitted written testimony about the hindrances of Federal oversight and regulations. In his testimony, Chairman Howell stated:

The Tribe takes an active role in the development of its resources, however, despite our progress, the Tribe’s ability to fully benefit from its resources is limited by the federal agencies overseeing oil and gas development on the Reservation. For example, we need 10 times as many permits to be approved. Currently, about 48 Applications for Permits to Drill (APD) are approved each year for oil and

²⁰ 25 C.F.R. § 225.36.

²¹ 25 C.F.R. § 225.37(a).

²² 25 U.S.C. § 2103(e). Note, however, the second proviso at the end of this subsection: “[N]othing in this Act shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.”

²³ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 et seq.). See *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (approval of long term surface lease of Tesuque Pueblo’s land requires review under NEPA); *Manygoats v. Kleppe*, 558 F.2d 556, 561 (10th Cir. 1977) (approval of an IMLA lease of tribal lands for uranium mining purposes requires review under NEPA).

gas operations on the Reservation. We estimate that 450 APDs will be needed each year as we expand operations. As the oil and gas companies who operate on the Tribe's Reservation often tell the Tribe, the federal oil and gas permitting process is the single biggest risk factor to operations on the Reservation. In order for the Tribe to continue to grow and expand our economy the federal permitting process needs to be streamlined and improved.²⁴

More egregious results of bureaucratic delays were raised at the same legislative hearing. Chairman Olguin of the Southern Ute Tribe testified about a letter written to the Regional Director of the Bureau of Indian Affairs in 2009 explaining the impacts of the bureaucratic delays. He stated in his written testimony (quoting the letter) the following:

[A]pproximately 24 Applications for Permit to Drill (APDs) await BIA concurrence. Additionally, approximately 81 pipeline [Rights-of-way] await issuance by the BIA. Of the 81 pending ROWs, 11 were approved in Tribal Council resolutions adopted in 2006, 44 were approved in Tribal Council resolutions adopted in 2007, 22 were approved in Tribal Council resolutions adopted in 2008, and 4 were approved in Tribal Council resolutions adopted in 2009. . . . We estimate that lost revenue attributable to severance taxes and royalties alone exceeds \$94,813,739. Significantly, during the period of delay, prices for natural gas rose to an historic high, but have now declined to approximately one-third of that market value. Thus, much of this money will never be recovered by the Tribe.²⁵

The Government Accountability Office Report

On June 8, 2015, the GAO issued its Report in response to a request by Senator Barrasso in January, 2014.²⁶ This Report examined the barriers to energy development on Indian lands and highlighted several barriers including poor management by the Department of the Interior, Bureau of Indian Affairs. Most notably, the GAO found that the BIA does not have the data needed to verify ownership of natural resources or identify where leases are in effect, nor does it have an adequate system to track review and response times in approving leases or other development-related transactions.²⁷

These deficiencies add to the other barriers identified by the GAO (and echoed by tribal leaders over the past few years) such as the complex regulatory framework. Taken together, these barriers severely diminish, if not eliminate, the ability of tribes to develop their resources. In fact, the GAO noted that one private de-

²⁴ *Legislative Hearing, to receive testimony on the following bill: S. 2132, to amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes*, Before the S. Comm. on Indian Affairs, 113th Cong. (2014) (testimony submitted from Gordon Howell, Chairman, Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation).

²⁵ *Id.* (testimony by James Olguin, Acting Chairman, Southern Ute Indian tribe).

²⁶ U.S. Gov't Accountability Office, GAO-15-502, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands* (2015).

²⁷ *Id.* at 18, 21.

veloper indicated it was nearly 65 percent more costly to develop on Indian lands than non-Indian lands.²⁸

The TERA process in both the ITEDSDA and (as amended) in this bill, S. 245, would serve to reduce much of the bureaucratic delays. While it is encouraging that the BIA generally agreed with most of the recommendations in the GAO Report and has taken some steps to address the issues, the Committee remains concerned that a fully developed plan of action is not available to continue addressing the issues identified in the Report.

The Committee is indeed troubled that tribes (and individual tribal members) are missing opportunities to develop resources or receive revenues from these resources. The Committee intends to continue working with the Administration to determine whether additional legislative action is needed to assist in addressing these issues.

Title V of the Energy Policy Act of 2005

Title V of the Energy Policy Act of 2005, the Indian Tribal Energy Development and Self-Determination Act²⁹ (ITEDSDA), created a new, alternative process for Indian tribes to negotiate and approve energy-related agreements and rights-of-way on tribal trust and restricted lands.³⁰ Commonly referred to as the “TERA process,” section 3504 of the ITEDSDA authorizes “tribal energy resource agreements” (TERA or TERAs) between an Indian tribe and the Secretary of the Interior.³¹ When operating under a TERA, an Indian tribe can enter into leases, business agreements, and rights-of-way without any further approval of the Secretary.

Legislative history of the TERA

Past Committee Reports provide an extensive legislative history of predecessor bills and elaborate on the development of and debate on those predecessor bills which have led to this bill.³² There are particular provisions of the ITEDSDA discussed in those Reports that are of notable significance for this bill, S. 245.

The ITEDSDA was enacted in the 109th Congress, but was largely developed during the 108th, having originated from two separate Indian energy bills. One of these bills, S. 522, was introduced by Senator Ben Nighthorse Campbell (then Chairman of the Committee), and the other, S. 424, by Senator Jeff Bingaman (then ranking member of the Committee on Energy and Natural Resources). The Committee held a hearing on the two bills on March 19, 2003.³³

While there were a number of significant differences between the two bills, there were also key similarities in both bills relating to Secretarial approvals of energy-related transactions and rights-of-ways and to waivers of liability. Both bills would have authorized Indian tribes to grant rights-of-way to third parties to serve energy-related facilities located on tribal lands without Secretarial

²⁸ *Id.* at 25.

²⁹ Indian Tribal Energy Development and Self-Determination Act, Title V of the Energy Policy Act of 2005, Pub. L. No. 109–58, §§ 501–506, 119 Stat. 763 (codified at 25 U.S.C. §§ 3501–3506).

³⁰ 25 U.S.C. § 3504.

³¹ 25 U.S.C. § 3504(e).

³² S. 2132, 113th Cong (2014).

³³ *Tribal Energy Self-Sufficiency Act and the Native American Energy and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Comm. on Indian Affairs, 108th Cong. (2003).*

approval if done pursuant to tribal regulations approved by the Secretary.

Both bills included provisions that would authorize energy-related transactions between Indian tribes and third parties without approval by the Secretary of the Interior if the transactions were carried out in accordance with tribal regulations that had been previously approved by the Secretary.³⁴ Secretarial approval for these types of transactions would have been otherwise required under the IMLA, IMDA, or, in cases of energy-related surface uses (for example, wind or solar energy projects), 25 U.S.C. § 415.

Both S. 424 and S. 522 included liability waiver clauses that would protect the United States from claims arising from losses sustained as a result of leases entered into pursuant to the authority under the bills. Although worded somewhat differently, the waivers in the two bills were fairly broad in scope and similar in effect.³⁵

The Committee staff eventually produced a revised version of S. 522 that combined many provisions from that bill with provisions in S. 424, including the provisions that allowed Indian tribes to enter into energy-related leases, agreements, and rights-of-way without the Secretary's approval. These provisions were modified in several respects—in particular by authorizing a “tribal energy resource agreement” (TERA) between the Indian tribe and the Secretary in lieu of “tribal regulations” approved by the Secretary, so that leases, agreements, and rights-of-way would not require Secretarial approval if entered into pursuant to an approved TERA.³⁶

This revised version of the two bills was ultimately included as Title III of S. 1005, the Energy Policy Act of 2003, as reported by the Committee on Energy and Natural Resources during the 108th Congress.³⁷ None of the Senate or House bills addressing comprehensive energy policy were enacted into law in the 108th Congress, including S. 1005.³⁸

In the 109th Congress, the Energy Policy Act of 2005 was signed into law on August 8, 2005. The Act included, with some modifications, the Indian energy title and the TERA process that was part of S. 1005 from the previous Congress.³⁹

³⁴Section 103(b) of S. 424 would allow 30-year leases of tribal land for siting “electrical generation, transmission, or distribution” facilities (such as coal-fired power plants) or facilities that “refine or otherwise process renewable or non-renewable resources” (such as oil refineries) developed on tribal land. S. 522 would allow 30-year leases of tribal land for similar purposes as those authorized in S. 424 but also for “exploration for, extraction of, processing of, or other development of energy resources” (i.e., oil, gas, or coal development and production). The model for this feature of S. 424 and S. 522—authorizing leases of tribal land without Secretarial approval if done pursuant to tribal regulations that had been approved by the Secretary—was the Navajo Nation Trust Land Leasing Act of 2000, which was enacted as part of the Omnibus Indian Advancement Act. *See* Title XII of Pub. L. No. 106–568, 114 Stat. 2933 (2000).

³⁵The liability waiver clauses in S. 424 and S. 522 are similar to the liability waiver provision in the IMDA, 25 U.S.C. § 2103(e). *See supra* note 21 and accompanying text.

³⁶*See* note 56, *infra*, regarding the third-party petitioning process for some of the reasons a Secretary-Tribal agreement (i.e., the TERA) was used in lieu of tribal regulations.

³⁷*See* S. Rep. No. 108–43, at 29–36.

³⁸*See also* S. 14; H.R. 6; H.R. 238; H.R. 1531; H.R. 1644.

³⁹*See* Energy Policy Act of 2005, Pub. L. No. 109–58, Title V, 119 Stat. 594 (2005). On March 10, 2008, the Department adopted regulations implementing the TERA provisions of the Energy Policy Act of 2005. *See* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12821 (Mar. 10, 2008) (codified at 25 C.F.R. pt. 224).

Key provisions of the TERA process under current law

The following is a summary of the key provisions of the TERA process in the ITEDSDA.⁴⁰

Tribal trust lands. The TERA provisions of the ITEDSDA only apply to “tribal land” as defined in 25 U.S.C. §3501(12). Tribal land means trust or restricted land of an Indian tribe (i.e., not individual Indian trust or restricted land or tribal fee land). While the term “Indian tribe” includes Alaska Native corporations for many purposes of the ITEDSDA, “Indian tribe” does not include those corporations for purposes of the TERA provisions of section 3504.

Tribal discretion. The TERA process does not automatically apply to the tribal land of an Indian tribe. Whether to pursue a TERA is a decision that the Indian tribe makes in its own discretion.

Kinds of agreements authorized. Once a TERA has been approved by the Secretary, the Indian tribe may, without further approval of the Secretary, enter into energy leases, business agreements, and, for certain energy-related purposes, rights-of-way.⁴¹

Scope of TERA. A TERA may, at the Indian tribe’s option, address “all or a part” of its energy resources, whether renewable or nonrenewable.⁴² Conceivably, an Indian tribe would also be free to include language in the TERA that would limit its application to certain designated geographic areas within its tribal lands.

Approval of the TERA by the Secretary. The tribal authority to approve leases, business agreements, and rights-of-way without Secretarial approval requires that the Indian tribe have a TERA in place that has been approved by the Secretary.⁴³

Process for obtaining an approved TERA. The following are the key steps in the process for obtaining an approved TERA under current law.⁴⁴

- (i) The tribe must submit a proposed TERA to the Secretary.⁴⁵
- (ii) The Secretary has 270 days after receiving a TERA within which to approve or disapprove the proposed TERA.⁴⁶
- (iii) The Secretary must provide notice and opportunity for public comment on the proposed TERA. However, the environmental review of the proposed TERA “shall be limited to activities specified in the provisions of the TERA.”⁴⁷
- (iv) The Secretary “shall approve”⁴⁸ a proposed TERA if (1) the Indian tribe has demonstrated its capacity to regulate energy development; (2) the TERA includes provisions requiring a periodic review and evaluation of the tribe’s performance

⁴⁰ The TERA process of the ITEDSDA is set forth in 25 U.S.C. 3504 but uses some terms defined in §3501.

⁴¹ 25 U.S.C. §3504(a)–(b) imposes limitations on the duration of the term (30 years for most leases and business agreements and for rights-of-way and, in the case of oil and gas leases, “10 years and as long thereafter as oil or gas is produced in paying quantities”). However, Indian tribes may renew leases, business agreements, and rights-of-way under §3504(c).

⁴² See 25 C.F.R. §224.30 (defining “Energy Resources” as “including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrologic resources”). 25 U.S.C. §3504(a) itself expressly mentions “energy mineral resources,” “electric generation, transmission, or distribution” facilities, and oil and gas resources.

⁴³ 25 U.S.C. §3504(d).

⁴⁴ The regulations at 25 C.F.R. §224.50–224.68 establish the process in considerably more detail than the statute.

⁴⁵ 25 U.S.C. §3504(e)(1).

⁴⁶ 25 U.S.C. §3504(e)(2)(A).

⁴⁷ 25 U.S.C. §3504(e)(3); 25 C.F.R. §224.70.

⁴⁸ 25 U.S.C. §3504(e)(2)(B).

under the TERA and, if the Secretary finds “imminent jeopardy” to a physical trust asset, allowing the Secretary to take protective measures, including reassumption; and (3) the TERA includes the 16 mandatory clauses or provisions itemized in section 3504(e)(2)(B)(iii)⁴⁹, one of which is the environmental review process required under section 3504(e)(2)(C).

(v) The Secretary must notify the Indian tribe in writing of a disapproval decision within 10 days of the decision, stating the basis for disapproval and identifying the changes or other actions that are required to address the Secretary’s concerns and providing the Indian tribe with an opportunity to revise and re-submit the TERA.⁵⁰

(vi) The Secretary “shall approve” the revised TERA if it meets the same 3 criteria set forth in paragraph (iv), above, applicable to the original version of the TERA.⁵¹ The Secretary has only 60 days within which to approve or disapprove a revised TERA.⁵²

Post-approval/TERA implementation matters. There are a number of tasks, issues, and considerations addressed in section 3504 that arise after a TERA has been approved. The following are among the more significant:

(i) The Secretary must conduct a periodic review and evaluation of the Indian tribe’s performance under an approved TERA. (See paragraph 7(iv)(2) above.) The review must be conducted annually unless, after the third annual review, the Indian tribe and the Secretary agree to amend the TERA to allow biannual reviews.⁵³

(ii) A copy of each lease, business agreement or right-of-way executed by the Indian tribe pursuant to its TERA must be delivered to the Secretary; the lease, agreement or right-of-way is not effective until that occurs.⁵⁴ If the TERA authorizes “direct payment” leases and agreements, the Indian tribe must furnish the Secretary with sufficient information to discharge the Secretary’s trust responsibility to enforce the terms of the lease or agreement and protect the rights of the tribe.⁵⁵

(iii) The ITEDSDA allows third parties with standing to petition the Secretary if they believe the Indian tribe is not complying with its own TERA. To have standing to invoke this process, the third party must be an “interested person . . . [who] has demonstrated that an interest of the person has sustained, or will sustain, an adverse environmental impact *as a result of the failure of the Indian tribe to comply*” with its TERA.⁵⁶

⁴⁹ See also 25 C.F.R. § 224.63.

⁵⁰ 25 U.S.C. § 3504(e)(4); 25 C.F.R. § 224.75. Under the regulations, the Indian tribe has 45 days (or such longer time as the tribe and the Secretary may agree) after receiving a notice of disapproval to resubmit a revised TERA. 25 C.F.R. § 224.76.

⁵¹ 25 U.S.C. § 3504(e)(2).

⁵² *Id.*; 25 C.F.R. § 224.76. Under the regulations, a disapproval of a *revised* TERA is a “final agency action” and subject to judicial review. 25 C.F.R. § 224.77. Under the regulations, only the Indian tribe has standing to seek judicial review of a decision to *disapprove* a TERA or a *revised* TERA. 25 C.F.R. § 224.77.

⁵³ 25 U.S.C. § 3504(e)(2)(D)–(E).

⁵⁴ 25 U.S.C. § 3504(e)(2)(B)(iii)(XIII)–(5)(A); 25 C.F.R. § 224.83(b).

⁵⁵ 25 U.S.C. § 3504(e)(5)(B); 25 C.F.R. § 224.63(k).

⁵⁶ 25 U.S.C. § 3504(e)(7)(A)–(B); 25 C.F.R. § 224.100–224.101 (emphasis added). As discussed *supra* at note 34 and in the accompanying text, the ITEDSDA used TERAs in lieu of tribal regulations approved by the Secretary, as in the case of the Navajo Nation Trust Land Leasing Act

Accordingly, the petitioning process is not available as an avenue for persons to air generalized grievances over the Indian tribe's activities under the TERA. Further, before a petition may be filed with the Secretary, the "interested person" must first exhaust all applicable tribal remedies, if any.⁵⁷ The regulations set forth the petitioning process in detail and provide the Indian tribe with significant opportunities to deny, address, or otherwise resolve the allegations. If, in the end, the Secretary determines that the tribe is in violation of the TERA, the Secretary must take "such action as the Secretary determines to be necessary to ensure compliance" with the TERA, including suspending activities under a lease, agreement, or right-of-way or rescinding approval of all or part of the TERA.⁵⁸

(iv) An Indian tribe with an approved TERA may rescind it in its own discretion.⁵⁹

(v) Like the IMDA, the Navajo Nation Trust Land Leasing Act, and, the HEARTH Act, the TERA provisions of the ITEDSDA include a liability waiver clause⁶⁰ that protects the United States. However, the liability waiver provision in ITEDSDA is intended to be narrower than the corresponding clauses in those other three acts. The ITEDSDA waiver protects the United States only from liability for those matters over which the Secretary has no control—namely, from losses resulting from the "negotiated terms" of leases, business agreements, and rights-of-way.⁶¹ "Negotiated term" is defined for purposes of this clause as "any term or provision that is negotiated by an Indian tribe and any other party to a lease, business agreement, or right-of-way entered into pursuant to an approved" TERA.⁶² The clause would not protect the United States from losses resulting from the Secretary's own failure to carry out obligations imposed on the Secretary under the ITEDSDA—for example, from failure to conduct a periodic review and evaluation or from a failure to protect the tribe's interests as a result of a breach of a lease or business agreement.⁶³

of 2000 (25 U.S.C. § 415(e)) and the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (Pub. L. No. 112-151, 126 Stat. 1150 [hereinafter HEARTH Act]), providing similar authority for all Indian tribes to enter into surface leases without the Secretary's approval if done pursuant to tribal regulations that had been approved by the Secretary. Under the TERA process, a third-party petitioner must complain that the Indian tribe has violated an *agreement* (i.e., a TERA) entered into between the United States and the Indian tribe. See 25 U.S.C. § 3504(e)(7)(A)–(B); 25 C.F.R. § 224.100–224.101. The Indian canons of construction dictate that treaties and agreements between the United States and Indian tribes must be liberally construed in favor of the tribe; therefore, TERAs should be construed in favor of the tribe when the Secretary is entertaining a third-party petition. See *Worcester v. Georgia*, 31 U.S. 515, 552–53, 582 (1832); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 147 (1985). Further, § 3504(e)(6) requires the Secretary to carry out the section "in good faith and in the best interests of the Indian tribes." See also 25 C.F.R. § 224.40.

⁵⁷ 25 U.S.C. § 3504(e)(7)(B); 25 C.F.R. § 224.100.

⁵⁸ 25 U.S.C. § 3504(e)(7)(D)(iii); 25 C.F.R. § 224.120.

⁵⁹ 25 U.S.C. § 3504(e)(8)(B); 25 C.F.R. § 224.170–224.175.

⁶⁰ 25 U.S.C. § 3504(e)(6)(D)(ii).

⁶¹ 25 U.S.C. § 3504(e)(6)(D)(i).

⁶² 25 U.S.C. § 3504(e)(6)(D)(ii).

⁶³ Nor would the clause protect the United States from liability for losses resulting from a lease, agreement, or right-of-way that was entered into by the Indian tribe and a third party but that was *not* authorized under the terms of the tribe's TERA. For instance, as noted above, the TERA might only authorize development of a specific kind of energy resource, such as wind energy. If the Indian tribe proceeds to enter into a solar project agreement or an oil and gas or coal lease, and provides a copy of the lease to the Secretary pursuant to 25 C.F.R. § 224.83(b),

Tribal concerns with the TERA process under current law. During the listening sessions before the introduction of prior bills and subsequently, tribal representatives expressed concerns about certain aspects of the TERA process under current law. These concerns were, by and large, the same concerns discussed in two law review articles about the ITEDSDA, one by Professor Judith V. Royster⁶⁴ and the other by Benjamin J. Fosland.⁶⁵

In her article on the ITEDSDA, Professor Royster identifies and discusses four areas of concern raised by tribal representatives regarding the TERA process.⁶⁶ In his article, Benjamin J. Fosland addresses the same basic areas of concern but in three broad categories:

- (1) many Indian tribes “lack the resources to make the resource agreement system feasible”;
- (2) the requirement of public comment in the tribe’s decision-making is anathema to tribal sovereignty and self-government; and
- (3) the Federal government is relieved of the trust responsibility after a tribe enters into a TERA.⁶⁷

He concludes that all three criticisms of the ITEDSDA “are largely unwarranted.” These concerns and the professors’ analyses are discussed in significant detail in prior Committee Reports.⁶⁸ However, certain key points are reiterated herein.

Broad tribal support⁶⁹ for the HEARTH Act⁷⁰ passed in 2012 suggests that, whatever the concerns over a statutory requirement of public input in a tribe’s energy development process may have been when the ITEDSDA was adopted in the 109th Congress, those

it seems unlikely the United States could argue successfully that any losses resulted from the “negotiated terms” of a lease entered into “pursuant to an approved tribal energy resource agreement.”

⁶⁴ Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065 (2008).

⁶⁵ Benjamin J. Fosland, *A Case of Not-So-Fatal Flaws: Re-Evaluating the Indian Tribal Energy and Self-Determination Act*, 48 Idaho L. Rev. 447 (2012).

⁶⁶ These are (1) not all tribal trust resources are covered by the TERA provisions of the ITEDSDA, including non-energy minerals like clay, sand and gravel; (2) lack of access to financial, technical, and scientific resources to carry out the TERA; (3) the prospect of public involvement in tribal decision-making (including during the Secretary’s review of a proposed TERA, the tribal environmental review process required to be covered by a TERA under the ITEDSDA, and the process of “interested party” petitions); and (4) implications for the Federal trust responsibility. See Royster, *supra* note 64 at 1087–1101. Some of these concerns were echoed by tribal representatives to Committee staff prior to and after the introduction of the bill. The comment most often heard was that the ITEDSDA does not include financial assistance for Indian tribes that enter into TERA. The trust responsibility concern was mentioned but less prominently, perhaps reflecting a growing awareness among Indian tribes that the liability waiver in the ITEDSDA is narrower than that in the IMDA and that the ITEDSDA requires considerable involvement of the Secretary in protecting the tribal interest notwithstanding the approval of a TERA.

⁶⁷ Fosland, *supra* note 65 at 449.

⁶⁸ S. Rep. No. 113–224 (2014); S. Rep. No. 112–263 (2012).

⁶⁹ See S. 703, *the Helping Expedite and Advance Responsible Tribal Homeownership Act* of 2011, Hearing Before S. Comm. on Indian Affairs, 112th Cong. 64 (2011) (statement of Cheryl A. Causley, Chairwoman, National American Indian Housing Council); H.R. 205, *the HEARTH Act* of 2011: Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm., 112th Cong. 20–21 (2011) (statement of Floyd Tortalita, Vice-Chairman, National American Indian Housing Council); S. 703, *the Helping Expedite and Advance Responsible Tribal Homeownership Act* of 2011: Hearing Before S. Comm. on Indian Affairs, 112th Cong. 59 (2011) (statement of Robert Tippeconnie, Southern Plains Area Vice President, National Congress of American Indians).

⁷⁰ Pub. L. No. 112–151, 126 Stat. 1150. Section 2 of the HEARTH Act amends 25 U.S.C. § 415 by adding at the end a new subsection (h), authorizing tribal leasing of surface tribal trust lands without approval of the Secretary if done pursuant to tribal regulations that have been approved by the Secretary. The HEARTH Act is essentially the same authority as provided in the Navajo Nation Trust Land Leasing Act of 2000 (which is set forth in subsection (e) of section 415), except that it is available for all Indian tribes with tribal trust lands.

concerns appear to have diminished somewhat in the intervening years in light of the fact that the HEARTH Act has similar requirements for public involvement.⁷¹ The same applies to concerns over the “interested party” challenges authorized in the ITEDSDA. The HEARTH Act, which is similar to the TERA process, authorizes interested parties to petition the Secretary and complain that an Indian tribe is violating its own leasing regulations.⁷²

In regard to concerns over the ITEDSDA and the trust responsibility, Professor Royster points out that “one significant difference between the IMDA and the ITEDSDA . . . [is that] under the IMDA, the Secretary approves or disapproves each specific agreement for mineral development . . . [and] is bound not only by the vague best interest of the Indian tribe’ standard, but is instructed to consider such factors as potential economic return, financial effects on the tribe, marketability of the minerals, and environmental, social, and cultural effects on the tribe.”⁷³

She concludes that, while “failure to consider or adequately account for specified factors might subject the government to damages for breach of trust,” relying on “the good faith of the government can be a dangerous thing” given the outcome of *United States v. Navajo Nation*⁷⁴ and that “tribal trust in the government may, and should be, a thing of the past. . . . Tribes need, as a practical matter if nothing else, to look out for their own interests.”⁷⁵ Again, despite the fact that the recently enacted HEARTH Act has a very explicit and more expansive direct liability waiver clause,⁷⁶ the Indian tribes vigorously supported the adoption of the Act in 2012, suggesting that many tribes have reached some level of comfort with the implications of these clauses.

At the legislative hearing held by the Committee on S. 2132 during the 113th Congress, the Administration expressed concerns about the waiver of liability provisions in the bill and recommended replacing the waiver of liability provisions that apply to tribal energy resource agreements with the waiver of liability provision in the HEARTH Act.⁷⁷ The Administration testified the waiver of liability under a TERA and under the HEARTH Act is “slightly different language to reach the same basic meaning” and that it “doesn’t accomplish much difference.”⁷⁸

The Committee strongly disagrees. The HEARTH Act has a liability waiver that is broader than the TERA liability waiver. The HEARTH Act absolves the United States of liability “for losses sustained by any party to a lease executed pursuant to tribal regulations” approved by the Secretary under the HEARTH Act.⁷⁹ In contrast, for TERAs, under both the ITEDSDA and this bill, the United States is only absolved of liability “for any negotiated term

⁷¹ *Id.*

⁷² *Id.*

⁷³ Royster, *supra* note 64 at 1099–1100.

⁷⁴ 537 U.S. 488 (2003).

⁷⁵ Royster, *supra* note 64 at 1100–1101. However, to impose liability on the government, a court would have to find a way around the express waiver in 25 U.S.C. § 2103(e).

⁷⁶ “The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1).” HEARTH Act § 2.

⁷⁷ *Legislative Hearing, to receive testimony on the following bill: S. 2132, to amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes*, Before the S. Comm. on Indian Affairs, 113th Cong. (2014) (testimony by Kevin Washburn, Assistant Secretary-Indian Affairs, Bureau of Indian Affairs, U.S. Department of the Interior).

⁷⁸ *Id.*

⁷⁹ Pub. L. No. 112–151, 126 Stat. 1150 (codified at 25 U.S.C. § 415(h)(7)(A)).

of a lease, business agreement, or right-of-way executed pursuant . . . to a tribal energy resource agreement.”⁸⁰

When an Indian tribe is operating under a TERA, the United States is still liable for any actions or losses that are not a negotiated term, whereas when a tribe is operating under regulations approved by the Secretary under the HEARTH Act the liability of the United States is much more limited.⁸¹ The Committee is concerned that adopting the waiver of liability in the HEARTH Act could compromise the waiver of liability applicable to TERAs that was carefully examined, negotiated and enacted in Title V of the Energy Policy Act of 2005.⁸² For these reasons, the Committee will maintain the liability language contained in ITEDSDA and as clarified in S. 245 (and S. 2132 from the 113th Congress).

KEY AMENDMENTS TO THE ITEDSDA

This bill, S.245, is identical to language in approved in S. 209 during the 114th Congress. The following is a description of the key provisions of the bill S. 245.

Amendments to the TERA process of the ITEDSDA

Section 103 of the bill would make a number of amendments to the TERA process of the ITEDSDA that are intended to address tribal and agency concerns, including the concerns discussed in the previous sections of this Report. The most significant amendments to the ITEDSDA are summarized below.

Manner of TERA taking effect. The bill would amend the ITEDSDA to change the manner in which a TERA goes into effect. Under current law, the Secretary must approve or disapprove a proposed TERA within 270 days of its receipt by the Secretary.⁸³ Under the bill, a TERA would go into effect automatically on the 271st day after its delivery to the Secretary unless the Secretary acts first to disapprove the TERA for one of the reasons stated in the ITEDSDA. A revised TERA will go into effect on the 91st day unless it is disapproved by the Secretary for one of the reasons stated in the ITEDSDA.

Reasons for disapproving a TERA. Upon enactment, there would be only four reasons for disapproving a proposed TERA (three of which are in current law): (1) the Indian tribe fails to demonstrate capacity; (2) a provision of the TERA would violate applicable Federal law;⁸⁴ (3) the TERA does not include the required periodic review and evaluation provisions;⁸⁵ and (4) the TERA does not include any of the required enumerated provisions.⁸⁶

⁸⁰ 25 U.S.C. § 3504(e)(6)(D).

⁸¹ “Negotiated term is defined as “any term or provision that is negotiated by an Indian tribe and any other party to a lease, business agreement, or right-of-way entered into pursuant to an approved tribal energy resource agreement.” 25 U.S.C. § 3504(e)(6)(D)(i).

⁸² Energy Policy Act of 2005, Pub. L. No. 109–58, Title V, 119 Stat. 594 (2005).

⁸³ 25 U.S.C. § 3504(e)(2)(A).

⁸⁴ This reason is new. It is added because under the bill, a TERA goes into effect automatically if the Secretary does not disapprove it on the basis of one of the other 3 statutory reasons before the 271st day.

⁸⁵ 25 U.S.C. § 3504(e)(2)(D).

⁸⁶ 25 U.S.C. § 3504(e)(2)(B)(iii).

Categorical exclusions. The bill would amend section 3504(e) of the ITEDSDA⁸⁷ to clarify that a tribe may identify actions that are categorically excluded from the review process.

Scope of authorized development on tribal land under a TERA. The bill would amend section 3504(e)(a)(1) by (1) clarifying that the authorized electrical generation facilities include those that produce energy from renewable resources; (2) clarifying that the energy resources that may be processed or refined under a TERA may include resources produced from non-tribal lands, as long as “at least a portion” of the resources have been developed or produced from tribal land; and (3) authorizing agreements under a TERA for pooling, unitizing or communitizing a tribe’s energy mineral resources on tribal land with any other energy mineral resources, whether in trust or restricted or unrestricted fee status. The other energy resources may be owned by a tribe, individual Indian or any other person or entity, if consent is obtained from the owner.

Capacity determination. Under current law, the 270-day period for approving or disapproving a TERA also governs the time within which the Secretary determines a tribe’s capacity to regulate energy development on its tribal lands. The bill would require that a preliminary capacity determination be made within 120 days of the date the TERA is submitted to the Secretary.

Deeming of tribal capacity. The bill would add a new provision that would consider an Indian tribe to have sufficient capacity if the Secretary finds that the tribe has carried out, for three consecutive years without material audit exceptions, a contract or compact under the Indian Self-Determination and Education Assistance Act⁸⁸ that includes activities related to the management of the environment, tribal land, realty, or natural resources, or if the Indian tribe has carried out approval of surface leases under the HEARTH Act without a finding of a compliance violation within the previous calendar year.

Statement of reasons for disapproval. Current law requires the Secretary to “notify the Indian tribe in writing of the basis for the disapproval [of a proposed TERA]; . . . identify what changes or other actions are required to address the concerns of the Secretary; and . . . provide the Indian tribe with an opportunity to revise and resubmit” the TERA.⁸⁹ The bill would clarify this notice by requiring a detailed written explanation of each reason for disapproval and the revisions or changes to the TERA necessary to address each reason.

Trust responsibility. The bill would clarify the liability waiver clause in section 3504(e)(6) principally by (1) including language indicating that the obligations of the Secretary under section 3504 are part of the trust obligation of the United States, and (2) adding a clause at the end to the effect that the waiver clause does not absolve, limit, or otherwise affect “the liability, if any, of the United States” for terms that are not “negotiated terms” or for “losses that are not the result of a negotiated term, including losses resulting from the failure of the Secretary to perform an obligation of the Secretary under this section.”

⁸⁷ Specifically, 25 U.S.C. § 3504(e)(2)(B)(iii).

⁸⁸ 25 U.S.C. §§ 450 *et seq.*

⁸⁹ 25 U.S.C. § 3504(e)(4).

These changes are not intended to affect the substance of section 3504(e)(6) in current law, but to clarify that the liability waiver clause reaches only losses resulting from “negotiated terms” and that it is not a blanket waiver covering all losses.

Interested party petitions. The bill would make clarifying amendments to section 3504(e)(7) relating to petitions to the Secretary by “interested parties.” The bill would clarify that the petitioner must demonstrate his or her status as an interested party with “substantial evidence” (current law is silent on what kind of showing must be made). The bill would also clarify that the Secretary must determine interested party status before proceeding to the question of whether the Indian tribe is or is not out of compliance with the TERA. Finally, the bill would require the Secretary to dismiss the petition if the Indian tribe and the interested party agree to resolve the issues in the petition between themselves.

Financial assistance. The bill would add a new subsection (g) to section 3504, “Financial Assistance in Lieu of Activities by the Secretary.” This provision, which is modeled after a provision in the Indian Self-Determination and Education Assistance Act,⁹⁰ would require the Secretary to make available to the Indian tribe any amounts that the Secretary saves as a result of the tribe carrying out a TERA. Accordingly, to the extent that the Secretary no longer has to perform a function or activity because the tribe is performing the function or activity itself, and as a result realizes a savings, the funds saved must be provided to the tribe to carry out the TERA. The bill would require the Secretary to develop a regulatory methodology for calculating any savings for purposes of this provision.

Authorizing amendments to approved TERAs. The bill would allow an Indian tribe to amend an approved TERA to assume authority for approving leases, business agreements, and rights-of-way for development of another energy resource by negotiating with the Secretary an amendment to an approved TERA.

Other Amendments to the ITEDSDA

The bill would make other amendments to the ITEDSDA, both technical and substantive in nature, which are unrelated to the TERA process. The following is a summary of the more substantive amendments.

Tribal energy development organization. The bill would amend the definition section of the ITEDSDA (section 3501(11)) to provide that “tribal energy development organization” includes corporations organized under section 17 of the Indian Reorganization Act of 1934⁹¹ and section 3 of the Oklahoma Indian Welfare Act⁹² for purposes of the ITEDSDA.

Well spacing; technical assistance. The bill would amend the ITEDSDA section establishing the Department of the Interior Indian Energy Program⁹³ to require the Secretary (1) to consult with an Indian tribe before adopting or approving well-spacing plans affecting its energy resources and (2) to provide technical assistance to Indian tribes in planning energy resource development.

⁹⁰ 25 U.S.C. § 450j–1(n).

⁹¹ 25 U.S.C. § 477.

⁹² 25 U.S.C. § 503.

⁹³ 25 U.S.C. § 3502(a).

Energy development agreements and rights-of-way between the tribe and a tribal organization. Section 103 of the bill would amend section 3504(a)(2) to allow energy development agreements and rights-of-way with terms that do not exceed 30 years (or in the case of an oil and gas lease, years and so long thereafter as oil or gas are produced in paying quantities) between the Indian tribe and a tribal energy development organization that is majority owned and controlled by the tribe—and has been certified as such by the Secretary—without approval by the Secretary.⁹⁴ Such a lease or business agreement with a “certified” tribal energy development organization would be authorized without Secretarial approval even in the absence of a TERA. In effect, this amendment contemplates that an agreement with a certified tribal energy development organization should be treated as an agreement with the Indian tribe itself or with an agency or instrumentality of the tribe for purposes of energy resource development on its tribal land.⁹⁵ Under current law, a decision by the Indian tribe to develop its own resources (i.e., without relying on a lease or agreement with a third, non-tribal party) on its own tribal land does not require approval by the Secretary.

Appraisals. The bill would add a new section at the end of the ITEDSDA authorizing appraisals of fair market value of energy resources held in trust for an Indian tribe or by the tribe subject to Federal restrictions against alienation, for purposes of any transaction that requires approval of the Secretary, to be prepared by (1) the Secretary, (2) the affected tribe, or (3) a certified, third-party appraiser pursuant to a contract with the tribe. The Secretary would have 45 days within which to approve an appraisal prepared by the Indian tribe or its contractor or, if disapproved, written notice of each reason for the disapproval and how the appraisal should be corrected. The Secretary is required to publish regulations for implementing the section.

Other amendments to Federal laws

Amendment to Federal Power Act. Section 201 of the bill would amend section 7(a) of the Federal Power Act⁹⁶ to make the provisions of that section applicable to Indian tribes (along with States and municipalities). However, this section of the bill also provides that it does not affect preliminary permits or original licenses issued before the enactment date of the bill or any application for an original license if the Commission has issued a notice of accepting the application for filing before the enactment date of the bill. The Committee notes that to receive a preference for a preliminary permit application, the proposed project must be located in the vicinity of the Indian tribe’s lands.

Amendments to Federal Weatherization Program. Section 203 of the bill would amend the Energy Conservation and Production

⁹⁴ 25 U.S.C. § 3504(h). The certification by the Secretary is intended to provide any minority investor in the organization with the certainty that the organization may enter into leases, agreements, and rights-of-way with the Indian tribe without Secretarial approval.

⁹⁵ This tribal agency or instrumentality status is assured by the certification process under section 3504(h), as added by section 103 of the bill. This new subsection would require the Secretary to determine that (1) the organization is organized under the laws of the Indian tribe and subject to its jurisdiction and authority; (2) the organization is majority owned and controlled by the tribe; and (3) the organizing document of the organization requires that the tribe own and control a majority interest in the organization at all times.

⁹⁶ 16 U.S.C. § 800(a).

Act⁹⁷ to facilitate direct funding of Indian tribes to carry out the weatherization program. The amendment leaves intact the amount authorized to be reserved from State funding under current law but authorizes direct funding (1) if requested by the tribal organization and (2) the Secretary of Energy determines that the low-income members of the Indian tribe will be equally or better served by direct funding rather than through the State. The bill would also create a presumption that a tribally designated housing entity in good standing under the Native American Housing Assistance and Self-Determination Act of 1996⁹⁸ would presumptively qualify as equally or better serving the low-income tribal members.

Biomass demonstration projects. Section 202 of the bill would amend the Tribal Forest Protection Act of 2004⁹⁹ (TFPA) to add a new section at the end of that Act authorizing a biomass demonstration project for Indian tribes. This section would also authorize a similar demonstration project for Alaska Native corporations (but not as part of the amendment to the TFPA). With respect to the demonstration projects under the TFPA, the bill would require that at least four new demonstration projects be carried out from 2017 to 2021, with Indian tribes to be selected based on several enumerated criteria. The bill would allow participating tribes to enter into stewardship contracts with the Secretary of Agriculture or of the Interior that include Federal lands for terms not to exceed 20 years and a renewal term not to exceed 10 years, as opposed to the 10-year limitation on those contracts under current law.

Amendments to Long-Term Leasing Act for the Navajo Nation. Section 205 of the bill would amend subsection (e) of the Long-Term Leasing Act,¹⁰⁰ which regards the Navajo Nation, to remove a limitation in that subsection on the exploration, development, or extraction of mineral resources. With this limitation in current law, subsection (e) authorizes only surface leases without approval of the Secretary. The bill would amend the subsection so that it would also authorize mineral leasing with a term not to exceed 25 years or, in the case of oil and gas, for 10 years plus any additional time that “the Navajo Nation determines to be appropriate where oil or gas is produced in a paying quantity.”

Extension of tribal lease period for the Crow Tribe of Montana. Section 206 of the bill would add the Crow Tribe to the list of Indian tribes that are authorized under 25 U.S.C. § 415(a) to enter into public, religious, educational, recreational, residential, or business leases for terms up to 99 years, with the approval of the Secretary.

Trust status of lease payments. Section 207 of the bill would require the Secretary, upon request of the Indian tribe or individual Indian, to hold in trust any advance payments, bid deposits, or other earnest money received by the Secretary of the Interior, in connection with the review and Secretarial approval of a sale, lease, or permit. Upon approval or disapproval of the conveyance instrument, the funds and the interest would be disbursed to the appropriate party.

⁹⁷ 42 U.S.C. § 6863(d).

⁹⁸ 25 U.S.C. § 4101, *et. seq.*

⁹⁹ Pub. L. No. 108–278, 118 Stat. 868 (2004).

¹⁰⁰ 25 U.S.C. § 415(e).

LEGISLATIVE HISTORY

Previous Congressional Action. In the 110th Congress on May 1, 2008, the Committee held an oversight hearing on *Indian Energy Development*.¹⁰¹ In the 111th Congress on October 22, 2009, the Committee held a hearing on *Indian Energy and Energy Efficiency* as a follow up to the May 1, 2008 hearing.¹⁰² On April 22, 2010, during the 111th Congress, the Committee held a hearing on a discussion draft of the *Indian Energy Promotion and Parity Act of 2010*.¹⁰³

The Committee held a listening session during the 112th Congress on a *Tribal Energy Draft Bill* on May 19, 2011. The discussion was to consider an Indian energy bill to be introduced by Senator Barrasso, where it was “meant to encourage comments, suggestions, and ideas from stakeholders for a bill that would facilitate the development of tribal energy resources.”¹⁰⁴

On February 16, 2012, during the 112th Congress, the Committee held an oversight hearing on *Energy Development in Indian Country*.¹⁰⁵ On April 19, 2012, the Committee held a legislative hearing on S. 1684, *Indian Tribal Energy Development and Self-Determination Act Amendments of 2011*, a bill introduced by Senator Barrasso during the 112th Congress.¹⁰⁶ The Committee also held a roundtable on *Energy Development in Indian Country* on June 5, 2013.

During the 113th Congress, Senator Barrasso introduced S. 2132 on March 13, 2014. The bill had ten bi-partisan co-sponsors. The Committee held a legislative hearing on S. 2132 on April 30, 2014.¹⁰⁷ On May 21, 2014, the Committee held a business meeting to consider S. 2132 at which five amendments to the bill were offered and adopted,¹⁰⁸ and the Committee ordered the bill, as amended, favorably reported.

In the 114th Congress, Senator Barrasso introduced S. 209, along with Senators Enzi, Fischer, Hoeven, McCain, Moran, and Tester, on January 21, 2015. Senators Bennet, Gardner, and Murkowski were later added as co-sponsors.

The bill was referred to the Committee on Indian Affairs. The Committee held a business meeting on February 4, 2015 to consider S. 209, along with other bills. By voice vote, the Committee ordered the bill favorably reported, without amendment.

In the 115th Congress, Senator Hoeven introduced S. 245, along with Senators Barrasso, Heitkamp, Lankford, McCain, and Moran, on January 30, 2017. Senators Enzi and Gardner were later added as cosponsors. The bill was referred to the Committee on Indian Af-

¹⁰¹*Indian Energy Development*, Before the S. Comm. on Indian Affairs, 110th Cong. (May 1, 2008).

¹⁰²*Indian Energy and Energy Efficiency*, Before the S. Comm. on Indian Affairs, 111th Cong. (2009).

¹⁰³*Legislative Hearing on a Discussion Draft of the Indian Energy Promotion and Parity Act of 2010*, Before the S. Comm. on Indian Affairs, 111th Cong. (2010).

¹⁰⁴*Indian Tribal Energy Development and Self-Determination Act Amendments of 2011—Staff Draft—For Discussion Only*, S. Comm. on Indian Affairs, at 1 (Apr. 12, 2011).

¹⁰⁵*Energy Development in Indian Country* Before the S. Comm. on Indian Affairs, 112th Cong. (2012).

¹⁰⁶*Legislative Hearing on S.1684, Indian Tribal Energy Development and Self-Determination Act Amendments of 2011* Before the S. Comm. on Indian Affairs, 112th Cong. (2012).

¹⁰⁷*Legislative Hearing, to receive testimony on the following bill: S. 2132, to amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes: Hearing* Before the S. Comm. on Indian Affairs, 113th Cong. (2014).

¹⁰⁸These amendments were discussed at length in S. Rep. No. 113–224 (2014).

fairs. The Committee held a business meeting on February 8, 2017 to consider S. 245, along with other bills. By voice vote, the Committee ordered the bill favorably reported, without amendment.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 sets forth the short title, the “Indian Tribal Energy Development and Self-Determination Act Amendments of 2017” (hereinafter, the “Act”).

Section 2. Table of contents

Section 2 sets forth the table of contents.

Section 101. Indian tribal energy resource development

Section 101(a) of the Act amends section 2602(a) of the Energy Policy Act of 1992 by (1) adding a requirement that the Secretary of the Interior consult with Indian tribes before approving well-spacing programs that affect their energy resources; (2) adding a new paragraph that requires that Secretary to provide technical assistance to Indian tribes interested in developing plans for electrification, permitting of oil and gas operations and renewable facilities, energy efficiency programs, electrical generation and other activities related to energy, plans for protecting natural, cultural and other resources, and any other plans that would assist an Indian tribe in the development or use of energy resources; and (3) requiring the Secretary to carry out the program under section 2602 of the Energy Policy Act of 1992 in cooperation with the Department of Energy Office of Indian Energy Policy and Programs.

Section 101(b) of the Act amends section 2602(b)(2) of the Energy Policy Act of 1992 to add “intertribal organizations” to the eligible grantees that can participate in the loan guarantee program under that section (in addition to Indian tribes and tribal energy resource development organizations), and to add, as an authorized use of grant funds, “activities to increase capacity of Indian tribes to manage energy development and efficiency programs.”

Section 101(c) of the Act amends section 2602(c) of the Energy Policy Act of 1992 to include tribal energy development organizations to participate in the loan guarantee program under that section. This section also requires the Secretary of Energy to adopt regulations to carry out the subsection not later than 1 year after the date of enactment of these amendments.

Section 102. Indian tribal energy resource regulation

Section 102 of the Act amends section 2603(c) of the Energy Policy Act of 1992 to require the Secretary of the Interior to provide assistance, information and expertise to a tribal energy development organization (i.e., in addition to an Indian tribe) when issuing energy resource development grants under that title.

Section 103. Tribal energy resource agreements

Section 103 of the Act makes several amendments to section 2604 of the Energy Policy Act of 1992, relating to tribal energy resource agreements (“TERAs”).

Section 103(a)(1) clarifies that the applicable lease or business agreement may also include facilities that produce electricity from renewable resources and facilities to process or refine energy resources that “at least a portion of which have been developed on or produced from tribal land.” This section also allows leases and business agreements to include provisions for the voluntary pooling, unitization or communization of the Indian tribe’s energy resources with the energy resources of other parties.

This section provides that a lease or business agreement between the Indian tribe and a tribal energy development organization, majority owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed) does not require review and approval of the Secretary under 25 U.S.C. §81 if the lease or business agreement is for a term not to exceed 30 years or, in the case of an oil and gas lease, 10 years and so long thereafter as oil and gas is produced in paying quantities.

Section 103(a)(2) clarifies that the applicable right-of-way may also include facilities that produce electricity from renewable resources. This section also provides that a right-of-way between the Indian tribe and a tribal energy development organization, majority owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed) does not require review and approval of the Secretary under 25 U.S.C. §81 if the lease or business agreement is for a term not to exceed 30 years.

Section 103(a)(2) also clarifies that the right-of-way may serve “the purposes, or facilitate in carrying out the purposes, of any lease or agreement entered into for energy resource development on tribal land.”

Section 103(a)(3) makes conforming amendments to section 2604(d) of the Energy Policy Act of 1992 to clarify when a lease, business agreement, or right-of-way is valid under a TERA.

Section 103(a)(4) streamlines the TERA approval process. Under current law, the Secretary must either approve or disapprove a TERA within 270 days of the date on which an Indian tribe submits the TERA. Section 103(a)(4) provides that a TERA would automatically take effect 271 days after it is submitted by an Indian tribe unless the Secretary disapproves it before then. A revised TERA automatically takes effect 91 days after it is submitted to the Secretary unless disapproved.

Under this section, the Secretary is required to disapprove the TERA only if the Secretary finds that (1) the Indian tribe has failed to demonstrate capacity; (2) the TERA would “violate applicable Federal law or a treaty of the Indian tribe; or (3) the TERA fails to include any of the provisions mandated for TERAs under section 2604(e), such as establishing an environmental review process or allowing for periodic review by the Secretary.

This section also clarifies and expedites the process for determining tribal capacity for a TERA. Current law requires the Secretary to determine within 270 days whether an Indian tribe has demonstrated sufficient capacity to regulate the development of energy resources.

Section 103(a) changes these requirements. First, this section requires the Secretary to determine whether “the Indian tribe has

not demonstrated . . . sufficient capacity to regulate the development of the specific 1 or more energy resources identified for development under the [TERA].” Second, the Secretary is required to make a preliminary determination within 120 days of the date on which the Indian tribe submits a TERA unless the Secretary and the tribe agree to extend that time period. Third, section 103(a)(4) provides that an Indian tribe will be deemed to have demonstrated sufficient capacity if (1) the tribe has a record of managing programs relating to the environment, tribal land, realty, or natural resources under the Indian Self-Determination and Education Assistance Act in a fiscally responsible manner for three consecutive years; (2) the tribe has successfully carried out approval of surface leases under the HEARTH Act for the previous year without a finding of a compliance violation; or (3) the Secretary fails to make the capacity determination within the applicable time period.

This section clarifies that the mitigation measures required for a TERA are to be determined in the tribe’s discretion and adds a provision allowing the Indian tribe to identify categorical exclusions from the environmental review process.

This section clarifies that, if the Secretary disapproves a TERA, the disapproval must include a detailed, written explanation of the reasons for the disapproval. This section clarifies that the provisions of this section do not absolve the United States from liability arising from terms that are not negotiated terms between the Indian tribe and a third party or losses that are not the result of the negotiated terms.

This section clarifies that an interested party who is eligible to challenge a tribe’s compliance of a TERA must demonstrate with substantial evidence that the party would sustain an adverse environmental impact. This section further clarifies the process for reviewing a petition by an interested party by requiring the Secretary to first determine whether the petitioner is an “interested party” and then whether the Indian tribe is in compliance with the TERA. This section also adds a provision requiring the Secretary to dismiss the petition if the petitioner and the Indian tribe have agreed to a resolution of the issues in the petition.

This section authorizes an Indian tribe to amend an approved TERA to assume authority over another energy resource that is not included in an approved tribal energy resource agreement, and requires the Secretary to promulgate regulations implementing the process and requirements for such an amendment.

This section prohibits the Secretary from denying a TERA or any amendment to a TERA, and from limiting the effect or implementation of this section due to lack of promulgated regulations.

Section 103(a)(5) makes a technical amendment to renumber a paragraph.

Section 103(a)(6) requires the Secretary to provide funding to the Indian tribe in an amount equal to any savings that the United States will realize as a result of the Indian tribe carrying out a TERA. The funding would be made available under a separate funding agreement. The methodology for determining the funding would be developed through regulations.

This section also sets forth the requirements for certification by the Secretary as a tribal energy development organization. The Secretary shall approve a tribal application for certification if (1)

the tribe has carried out contracts or compacts relating to tribal land under the Indian Self-Determination and Education Assistance Act for three years without material audit exceptions; (2) the entity is organized under the laws of the Indian tribe and subject to its jurisdiction and authority; (3) the majority interest in the entity is owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes the tribal land of which is being developed); and (4) the majority interest ownership and control is required under the organizing documents of the organization.

If the Secretary approves an application for certification, the Secretary is required to issue a certification, deliver a copy of the certification to the Indian tribe, and publish the certification in the Federal Register. This section clarifies that the TERA provisions do not waive tribal sovereign immunity.

Section 103(b) of the Act requires the Secretary to adopt regulations governing the amendments to the TERA process made in this section.

Section 104. Technical assistance for Indian tribal governments

Section 104 amends section 2602(b) of the Energy Policy Act of 1992 to require the Secretary to collaborate with the Directors of the National Laboratories in making the full array of technical and scientific resources of the Department of Energy available for tribal energy activities and projects.

Section 105. Conforming amendments

Section 105 sets forth a number of conforming amendments intended to make other provisions of the Energy Policy Act of 1992 consistent with the amendments contained in sections 101, 102, and 103 of this bill. In addition, section 105 expands Title V's definition of "tribal energy development organization" to include any enterprise, partnership, consortium, corporation, or other type of business organization that is engaged in the development of energy resources and is wholly owned by an Indian tribe, including organizations incorporated pursuant to section 17 of the Indian Reorganization Act of 1934 or section 3 of the Oklahoma Indian Welfare Act.

Section 201. Issuance of preliminary permits and licenses

Section 201 amends section 7(a) of the Federal Power Act. Under current law, the Federal Energy Regulatory Commission (FERC) is authorized to give States and municipalities preference when issuing preliminary permits or original licenses (where no preliminary permit has been issued) for hydroelectric projects. Section 201(a) authorizes FERC to give the same preference to Indian tribes. This section, however, does not affect the authority of the FERC to address or determine sites or locations of any projects or other decisions affecting permits or licenses and to receive a preference for a preliminary permit application, the proposed project must be located in the vicinity of the Indian tribe's lands.

Section 201(b) states that the tribal preference for hydroelectric projects would not affect any preliminary permit or original license (where no preliminary permit has been issued) issued before the date of enactment of the bill. It also states that this preference would have no effect on applications for original licenses (where no

preliminary permit has been issued) deemed complete by FERC before the date of enactment of the bill.

Section 201(c) defines “Indian tribe” for section 7(a) of the Federal Power Act to have the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act.

Section 202. Tribal biomass demonstration project

Section 202 of the Act establishes a biomass demonstration project for Indian tribes and Alaska Native corporations to promote biomass energy production.

Section 202(b) amends the Tribal Forest Protection Act of 2004 to promote biomass energy production on Indian forest land and in nearby communities. This subsection requires the Secretary of the Interior (or, where applicable, the Secretary of Agriculture) to enter into stewardship contracts or similar agreements for a term of up to 20 years, and a renewal term of up to 10 years, with Indian tribes to harvest woody biomass from Federal land. During each year, beginning fiscal year 2017, at least four demonstration projects shall be carried out under these contracts or agreements.

This subsection requires the Secretary of the Interior and the Secretary of Agriculture to take into consideration a number of factors when considering a proposed demonstration project, such as whether a project would improve the forest health or watersheds of Federal land or Indian forest land or rangeland. The amendment excludes from the demonstration projects any merchantable logs that have been identified by the Secretary for commercial sale.

In carrying out the contracts under this subsection, the Secretary shall incorporate management plans in effect on Indian forest land or rangeland of the respective Indian tribe into the agreement. The Secretary would be required to submit to Congress a report that describes each individual application received and each contract and agreement entered into under this subsection.

Section 202(c) requires the Secretary to enter into a stewardship contract or similar agreement with 1 or more tribes (as defined by Section 4 of the Indian Self-Determination and Education Assistance Act) in Alaska for each of fiscal years 2017 through 2021. This subsection requires the Secretary to enter into a stewardship contract or similar agreement, for a term of up to 20 years.

It also authorizes a renewal term of up to 10 years to carry out a demonstration project to promote biomass energy production on certain forest lands and in nearby communities providing reliable supplies of woody biomass from Federal land. Under subsection (c), the Secretary shall take into consideration a number of factors when considering a proposed demonstration project, such as whether a project would improve the forest health or watersheds of Federal land or Indian forest land or rangeland.

The section excludes from the demonstration projects any merchantable logs that have been identified by the Secretary for commercial sale. The Secretary shall also submit to Congress a report that describes each individual application received and each contract and agreement entered into under this subsection.

Section 203. Weatherization program

Section 203 of the bill amends the Energy Conservation and Production Act to facilitate direct funding of Indian tribes to carry out

the weatherization program. The amendment leaves intact the amount authorized to be reserved from State funding under current law but authorizes direct funding (1) if requested by the tribal organization and (2) the Secretary of Energy determines that the low-income members of the tribe will be equally or better served by direct funding rather than through the State.

This section also creates a presumption that a tribally designated housing entity under section 4 of the Native American Housing Assistance and Self-Determination Act of 1996 that has operated without material audit exceptions would equally or better serve the low-income members of the applicable Indian tribe.

Section 204. Appraisals

Section 204 amends Title XXVI of the Energy Policy Act of 1992 to require appraisals relating to the fair market value of tribal mineral or energy resources prepared by an Indian tribe or a certified third-party appraiser pursuant to a contract with the Indian tribe to be reviewed and accepted by the Secretary not later than 45 days unless the Secretary determines that the appraisal fails to meet standards created by the Secretary under this section. If the Secretary disapproves an appraisal, the Secretary is required to give written notice of the disapproval to the Indian tribe and a description of each reason for the disapproval and how the appraisal should be corrected.

Section 205. Leases of restricted lands for Navajo Nation

Section 205 amends subsection (e)(1) of the first section of the Long-Term Leasing Act to allow the Navajo Nation to enter into a lease for the exploration, development, or extraction of any mineral resources without the approval of the Secretary, if the lease is executed under tribal regulations, approved by the Secretary and that meets certain term limits. This section further amends the Long-Term Leasing Act by extending the maximum authorized term for a business or agricultural lease from 25 years to 99 years for the Navajo Nation. Finally, this section requires the GAO to report within five years of enactment on the progress made in carrying out the amendment made by this subsection.

Section 206. Extension of tribal lease period for the Crow Tribe of Montana

Section 206 adds the Crow Tribe to the list of Indian tribes that are authorized under 25 U.S.C. 415(a) to enter into public, religious, educational, recreational, residential, or business leases for terms up to 99 years, with the approval of the Secretary.

Section 207. Trust status of lease payments

Section 207 requires the Secretary, upon the request of the tribe, to hold in trust any advance payments, bid deposits, or other earnest money received by the Secretary, in connection with the review and Secretarial approval of a sale, lease, permit, or any other conveyance of any interest in any trust or restricted land of any Indian tribe or individual Indian. If the advance payment bid deposit or other earnest money received results from competitive bidding, only the funds of the successful bidder are to be held in trust, and only upon selection of the successful bidder. Upon Secretarial ap-

proval or disapproval of the contract or instrument, the amounts and interest would be disbursed to the Indian tribe or otherwise identified party. This section only applies to advance payments, bid deposits, or other earnest moneys received on or after the date of enactment of this Act.

COST AND BUDGETARY CONSIDERATIONS

MAY 3, 2017.

Hon. JOHN HOEVEN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 245, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Aurora Swanson.

Sincerely,

KEITH HALL.

Enclosure.

S. 245—Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

S. 245 would make various amendments to existing federal energy programs on tribal lands. Under current law, a tribe may enter into a tribal energy resource agreement (TERA) with the federal government to allow the tribe to complete and manage business agreements with third parties for such purposes as rights-of-way for energy projects and oil and gas leases. Under a TERA a tribe manages activities that would otherwise be carried out by the Department of the Interior (DOI). S. 245 would allow that under most circumstances a TERA application would automatically be approved 270 days after submission to DOI. Under the bill, DOI also would be required to pay a tribe operating under a TERA agreement for carrying out management activities. CBO estimates that implementing that provision would have no net effect on the federal budget because any amounts paid to tribes would have been spent by DOI to conduct the same work.

Under the bill, the Department of Energy would collaborate with the national laboratories to provide technical assistance to tribal governments. The bill would establish a pilot program for tribes to use nonmarketable timber from neighboring federal lands for energy development. Based on information from the department, CBO estimates that implementing those provisions would cost \$1 million; such spending would be subject to the availability of appropriations.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 245 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 245 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Tribes would

benefit from greater flexibility and assistance authorized by the bill for energy development. Any costs to tribes would be incurred voluntarily as a condition of assistance or of participating in a voluntary federal program.

The CBO staff contact for this estimate is Aurora Swanson (for federal costs) and Rachel Austin (for intergovernmental mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 245 would have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has not received any formal communication on S. 245 from the Administration.

CHANGES IN EXISTING LAW

In accordance with Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

