

Calendar No. 954

106TH CONGRESS }
2d Session }

SENATE

{ REPORT
106-511

TO ESTABLISH A STREAMLINED PROCESS TO ENABLE THE NAVAJO NATION TO LEASE TRUST LANDS WITHOUT HAVING TO OBTAIN THE APPROVAL OF THE SECRETARY OF THE INTERIOR OF INDIVIDUAL LEASES, EXCEPT LEASES FOR EXPLORATION, DEVELOPMENT, OR EXTRACTION OF ANY MINERAL RESOURCES

OCTOBER 31 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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

REPORT

[To accompany S. 2665]

The Committee on Indian Affairs, to which was referred the bill S. 2665, to establish a streamlined process to enable the Navajo Nation to lease trust lands without having to obtain the approval of the Secretary of the Interior of individual leases, except leases for exploration, development, or extraction of any mineral resources, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended, do pass.

PURPOSE

The purpose of S. 2665 is to expedite the leasing of Navajo Nation (Nation) lands by eliminating duplicative and overlapping federal and tribal procedures for the leasing of Nation lands.

BACKGROUND

Under present law, the Secretary of Interior may approve a lease of lands that are held in trust by the United States for the Navajo for a term of up to 99 years.¹ Like other Indian tribes, the Nation has an administrative process for determining whether it should approve the leases held in trust for its benefit by the United States. Federal law also requires the Secretary of Interior to determine that a lease is in the best interest of a tribe before approving

¹ 25 U.S.C. § 415(a).

a lease of trust lands. In most instances, the Bureau of Indian Affairs (BIA) is responsible for reviewing a proposed lease to make this determination. The BIA approves leases of tribal land to ensure consistency with Federal law, including the Federal government's trust obligation. The process and standards employed by the BIA are very similar to the process the Nation employs before it approves the lease of lands held in trust for its benefit. Because the BIA only needs to approve leases of tribal land which are approved by the Nation and submitted for Federal approval, the Nation and BIA lease approval processes generally run consecutively. This results in serious and often needless delays as the applicant for a lease of tribal land must obtain seriatim and often identical reviews from two different entities.

Under the proposed substitute amendment approved by the Committee, the Secretary may approve the Nation's regulations for the leases of tribal lands, except for leases involving the exploration or development of mineral resources. After the Secretary approves these regulations, leases of Nation trust lands will no longer require Secretarial approval if they are approved by the Nation pursuant to the regulations. Such leases may not exceed the time frames specified in the bill.

The Nation's current regulations include a process for reviewing the environmental impact of proposed leases. The Nation informs the Committee that the tribal regulations submitted for approval to the Secretary will include such provisions. Because the BIA's current leasing regulations contain requirements for environmental review, the Secretary can only approve tribal regulations if they included such a requirement. Nevertheless, in its October 2, 2000 letter to Chairman Campbell, Assistant Secretary-Indian Affairs Kevin Gover requested two amendments to the text of the substitute amendment approved by the Committee. Mr. Gover's letter requests with respect to the National Environmental Policy Act (NEPA) to require a clause to ensure that any regulations approved by the Secretary contain an environmental review process similar to NEPA. The nature of environmental review required for Secretarial approval of the leasing of trust and restricted lands has been a subject of controversy since the Federal appellate court ruling in 1972, *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). The 1972 decision has been criticized for its result, reasoning, and premises. It has been suggested that Congress should review the application of NEPA to Indian tribes, especially with respect to the Federal government's approval of the lease of land held in trust for Indian tribes. For example, one legal scholar points out, subordinating the best interest of an Indian tribe in favor of national or public interests may constitute a breach of the Federal government's trust obligation to Indian tribes.² A breach of trust may occur because there is a tension between NEPA, a Federal statute that directs agencies to consider the broad national interests when making decisions, and the Federal government's trust obligation to Indian tribes and their members, which is directed at each Indian tribe's objectives, whether they are consistent with broad national or public goals or not.³ Because the Nation does not object to including NEPA-based

² Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D.L. Rev. 327 (1995).

³ *Ibid.*

environmental review of its proposed leases, there is no need at this time, for the Committee to undertake the review suggested.

The Administration's second requested change in the Committee's amendment involves the Federal government's liability. The Department proposes striking the text of § 415(e)(5)(B), as reported by the Committee. This provision in the amendment approved by the Committee is savings provision concerning the Federal government's trust obligation. At the Nation's request, this provision was included in the introduced version of the bill to eliminate any possibility of interpreting the bill as altering the Federal government's trust obligation to the tribe. Because the Federal government's trust obligation exists even where the United States may not have any legal liability, there is no need to explicitly state that the Federal government's trust obligation is not affected by a provision which defines that liability in greater detail. Neither the Committee nor the Nation believe that the Federal government's trust obligation is affected by whether this provision is explicit or not.

In many respects, the approach taken in the amendment approved by the Committee is similar to other recent Federal statutes. These statutes include the American Indian Trust Fund Management Reform Act, P.L. 103-412 and the American Indian Agricultural Resources Management Act, P.L. 103-177. In each of these statutes, tribal governments may receive some of the Federal government's authority with respect to the management of their resources, often with a corresponding reduction in the Federal government's liability with respect to tribal decisions that are no longer within Federal control. By crafting a careful balance on these issues, Congress can eliminate burdensome Federal oversight on those Indian tribes that are not in need of direct oversight, while leaving this review in place for those tribes that do not wish to take such steps.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Section 1. Short title

Section 1 cites the short title of the bill as the Navajo Nation Trust Land Leasing Act of 2000.

Section 2. Congressional findings and declaration of purposes

Subsection (a) provides seven Findings that address the context for the bill. As these Findings demonstrate, the Federal government has assumed the responsibility to review and approve the leasing of lands held in trust for Indian tribes. In some instances, however, the full exercise of the government's authority may be inconsistent with other Federal objectives.

Subsection (b) defines the bill's objectives and purposes. These include, the streamlining of the process for approving the lease of lands held in trust for the Navajo Nation.

Section 3. Lease of restricted lands for the Navajo Nation

Section 3 adds six definitions to the Long Term Leasing Act, 25 U.S.C. § 415, for the following terms: "individually owned Navajo Nation allotted land," "interested party," "Navajo Nation," "petition," "Secretary," and "tribal regulations."

Section 4 also provision amends the Long Term Leasing Act by providing that Secretarial review of a lease is not required if the Nation ratifies the lease pursuant to tribal regulations approved by the Secretary under § 415(e). The Secretary is to approve the Nation's leasing regulations if they are consistent with the regulations promulgated by the Department pursuant to 25 U.S.C. § 415(a).

In determining whether the regulations to be promulgated by the Navajo Nation meet the requirements of 25 U.S.C. § 415(e)(3) the Secretary is to consider the following factors to ensure that the Navajo Nation regulations are consistent with the BIA's leasing regulations:

1. The Nation regulations should protect and preserve the Nation's trust assets from loss, damage, unlawful alienation, waste and depletion;
2. The regulation should promote the interest of the Nation and support the Nation's intended use of the trust asset;
3. The regulations must provide for the enforcement of all leases or other agreements that provide for the use of trust assets and address a remedy for trespass on tribal trust lands;
4. The regulations should promote Nation control and self-determination over tribal trust lands and resources;
5. The regulations should protect and prudently manage Nation trust assets;
6. The regulations should provide oversight and review of the trust assets, the asset management system, the operational and information system;
7. The regulations should account for and timely identify, collect, deposit and distribute income from the trust assets to the Nation;
8. The regulations should provide a verifiable system of records that is capable of identifying:
 - A. The location of the trust asset
 - B. The user of the trust asset;
 - C. The rents or other monies paid to the Nation;
 - D. The value of the trust asset;
 - E. The dates of collection of rental payments and disbursement;
 - F. Any documents pertaining to actions taken to prevent or compensate for any diminishment in value of the trust asset;
 - G. Any documents that evidence actions taken regarding the management and disposition of Nation trust assets.

Any regulations promulgated by the Nation that address the above in a manner consistent with, though not necessarily congruent with, 25 CFR Part 162, as amended, shall satisfy the requirement that the Nation's regulations be "consistent with" the BIA leasing regulations

The Committee has included these factors to demonstrate that the Nation's regulations need not be identical to the BIA regulations to be consistent with those regulations. Rather, the Nation's regulations may be devised to respond to the unique and special needs of the Nation.

Within 120 days, the Secretary is to review the regulations submitted by the Nation and issue a decision indicating his approval or disapproval. If the Secretary disapproves the regulations, this

decision is to be accompanied by a written explanation of the basis for this decision.

To assist the Secretary in carrying out his continuing responsibilities with respect to the use of tribal lands, the amendment approved by the Department requires the Nation to provide the Secretary with copies of all approved leases and information concerning any direct lease payments.

With respect to Federal liability, the approved amendment also clarifies that the United States is not responsible for any losses resulting from a lease approved under the procedures authorized by S. 2665. To eliminate any ambiguity with respect to the effect of the provision limiting liability, § 415(e)(5)(A) and (B) state that the limit on liability should be construed to diminish the Secretary's authority to protect the rights of the Nation or to absolve the United States from its trust obligation to the tribe.

Under § 415(e)(6), interested parties may petition the Secretary to review compliance with the Nation's compliance with the regulations approved by the Secretary. The Secretary is authorized to take appropriate action to remedy any violation. This may include the rescinding of the Secretary's approval of the regulations approved under this subsection. This would result in the Secretary having to reassume responsibility for the approval of land held in trust for the Nation. Before seeking to remedy such a violation, the Secretary is to provide the Nation with a written determination concerning which regulation is alleged to have been violated. The Nation is to be given an opportunity to cure the possible violation. Also, if the Nation wishes to have a hearing on the record, it is to be afforded such an opportunity.

LEGISLATIVE HISTORY

S. 2665 was introduced on May 25, 2000, by Senator Jon Kyl, and referred to the Committee on Indian Affairs. At an open business meeting on September 27, 2000, Senator Campbell proposed an amendment to S. 2665 in the nature of a substitute. Senators Pete Domenici and Jeff Bingaman were joined as co-sponsors of the proposed amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on September 27, 2000, the Committee on Indian Affairs, by a voice vote, adopted the amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 2665 as reported.

SECTION-BY-SECTION ANALYSIS OF THE SUBSTITUTE AMENDMENT

Section 1 of the bill provides a short title.

Section 2 of the bill provides Findings and Purposes.

Section 3 of the bill makes the following amendments to 25 U.S.C. 415, commonly known as the "Long Term Leasing Act":

(1) Definitions for the following terms: "Individually owned Navajo Indian allotted land," "interested party," "Navajo Nation," "petition," "Secretary," and "tribal regulations."

(2) The Nation is authorized to approve business and agricultural leases for an initial lease period of 25 years, with options

to renew a lease for up to two additional 25 year periods if the lease is executed pursuant to approved regulations. The tribal regulations may also provide for lease terms of 75 years for the following purposes: public, educational, recreational, or residential purposes.

(3) The Secretary is to review the proposed tribal leasing regulations within 120 days. If they are not approved, the Secretary must explain the basis for that decision in writing.

(4) The Nation is to provide the Secretary with appropriate documents needed to carry out remaining Federal obligations.

(5) The United States is not liable for losses to parties to leases approved under the tribal regulations. However, this does not diminish the government's trust obligation.

(6) Interested parties may submit timely petitions to the Secretary to review the Nation's compliance with the approved regulations. The Secretary may find that a lease was approved in a manner inconsistent with the proposed regulations and take necessary action to remedy the violation. However, the Secretary must first notify the tribe and provide it with an opportunity to address any violation.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 2665, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 2, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
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. 2665, the Navajo Nation Trust Land Leasing Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 2665—Navajo Nation Trust Land Leasing Act of 2000

S. 2665 would authorize tribes in the Navajo Nation to lease lands in trust for certain purposes. Under current law, the tribes must seek the approval of the Secretary of the Interior before leasing lands in trust. Based on information from the Bureau of Indian Affairs, CBO estimates that implementing this legislation would not significantly affect the federal budget. Implementing S. 2665 would not affect direct spending or receipts, because any income resulting from leasing agreements entered into under this legislation would be paid directly to the appropriate tribal government. Hence, pay-as-you-go procedures would not apply to the bill.

S. 2665 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. Enactment of this legislation would benefit the Navajo Nation by streamlining the process of leasing tribal lands.

The CBO staff contacts for this estimate are Lanette J. Keith (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2665 will have de minimis regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received a letter in support of S. 2665 from the Department of Interior on October 2, 2000, which letter is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, October 2, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Department of the Interior has reviewed S. 2665, the "Navajo Nation Trust Leasing Act," as amended. We would like to express our views on this legislation.

Staff from the Bureau of Indian Affairs have worked closely with the Navajo Nation, the Committee staff and Senator Kyl's staff in the development of this amended version of the legislation. We appreciate the thoughtful deliberation and cooperative effort that went into drafting the language within S. 2665.

The purpose of this legislation is to establish a streamlined process for the leasing of certain Navajo Nation trust lands and we believe S. 2665 will accomplish this goal. Furthermore, this legislation, by authorizing the Navajo Nation to lease tribal trust land, pursuant to approved tribal regulations, without Secretarial approval, will further the Administration's policies supporting Indian self-government and economic development. The Department requests the following two text changes to S. 2665 as marked out of the Senate Indian Affairs Committee September 27, 2000.

Sec. 3. page 7, line 3, insert "and provide for an environmental review process" following "amendments thereto".

Sec. 3. page 7, line 22, strike paragraph (5)(A) and (B) and replace with the following (5) "the United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1), including the Navajo Nation. Nothing in this paragraph shall be construed to diminish the Secretary's authority to take appropriate actions, including canceling a

lease, in furtherance of its trust obligations to the Navajo Nation.”

With the addition of these amendments, we have no objection to the legislation, and fully support its passage. In addition, the Department requests the accompanying report language to Sec. 3. page 7, line 3, to read “The environmental review process established by the Navajo Nation shall be compatible with the process established by the National Environmental Policy Act.”

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration’s program to the presentation of this report.

Sincerely,

KEVIN GOVER,
Assistant Secretary—Indian Affairs.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter printed in *italic*):

25 U.S.C. 415(c)

Leases involving the Hopi Tribe and the Hopi partitioned lands accommodation agreement.

Notwithstanding subsection (a) of this section, a lease of land by the Hopi Tribe to Navajo Indians on the Hopi Partitioned Lands may be for a term of 75 years, and may be extended at the conclusion of the term of the lease.

* * * * *

25 U.S.C. 415(d)

DEFINITIONS

For purposes of this section—

(1) the term “Hopi Partitioned Lands” means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on October 11, 1996); **[and]**

(2) the term “Navajo Indians” means members of the Navajo Tribe**[.]**;

(3) *the term “individually owned Navajo Indian allotted lands” means Navajo Indian allotted land that is owned by 1 or more individuals located within the Navajo Nation;*

(4) *the term “Navajo Nation” means the Navajo Nation government that is in existence on the date of enactment of this Act;*

(5) *the term “Secretary” means the Secretary of the Interior;*
and

(6) *the term “tribal regulations” means the Navajo Nation regulations as enacted by the Navajo Nation Council or its standing committees and approved by the Secretary.*

* * * * *

25 U.S.C. 415(e)

* * * * *

(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the term of the lease does not exceed 75 years (including options to renew), and the lease is executed under tribal regulations that are approved by the Secretary under this subsection.

(2) Paragraph (1) shall not apply to individually owned Navajo Indian allotted land located within the Navajo Nation.

(3) The Secretary shall have the authority to approve or disapprove tribal regulations required under paragraph (1). The Secretary shall not have approval authority over individual leases of Navajo trust lands, except for the exploration, development, or extraction of any mineral resources. The Secretary shall perform the duties of the Secretary under this subsection in the best interest of the Navajo Nation.

(4) If the Navajo Nation has executed a lease pursuant to tribal regulations under paragraph (1), the United States shall not be liable for losses sustained by any party to such lease, including the Navajo Nation, except that—

(A) the Secretary shall continue to have a trust obligation to ensure that the rights of the Navajo Nation are protected in the event of a violation of the terms of any lease by any other party to such lease, including the right to cancel the lease if requested by the Navajo Nation; and

(B) nothing in this subsection shall be construed to absolve the United States from any responsibility to the Navajo Nation, including responsibilities that derive from the trust relationship and from any treaties, Executive Orders, or agreements between the United States and the Navajo Nation, except as otherwise specifically provided in this subsection.

* * * * *