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

DECEMBER 21, 2012.—Ordered to be printed

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

R E P O R T

[To accompany S. 1684]

The Committee on Indian Affairs, to which was referred the bill, S. 1684, to amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes, having considered the same, reports favorably thereon with amendments, and recommends that the bill, as amended, do pass.

NEED FOR LEGISLATION

In recent years the Committee has heard concerns and complaints from Indian tribes and industry that the many Federal laws that govern the development of tribal energy resources are complex and often lead to significant cost, delay and uncertainty for all parties to proposed 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. Generally, this bill is intended to remove some of the disincentives to developing tribal trust energy resources and assist tribes interested in pursuing the development of these resources consistent with the policy of Indian self-determination.

PURPOSE

The purpose of the bill, S. 1684, 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 a tribal biomass demonstration project 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 good of present and future generations of Indian people.

BACKGROUND

Oil and gas production in the United States is experiencing an extraordinary boom, largely driven by advances in technologies that allow oil and gas producers to recover resources trapped in tight shale formations once thought inaccessible.[3] Oil and natural gas production from unconventional resources has been on the rise over the past decade, especially within the last five years.[4] The ability to develop these resources has been called a "game changer" that will "revolutionize" the global energy markets.[5] The International Energy Agency predicts in its World Energy Outlook 2012 that the United States will overtake Saudi Arabia and Russia to become the largest global oil producer by 2020 and will be 97% self-sufficient in net terms of energy needs by 2035.[6]

The World Energy Outlook 2012 specifically mentions the spectacular increase in production from the Bakken formation in North Dakota,[7] the heart of which lies beneath the Fort Berthold Indian Reservation. However, many of the laws and regulations that apply to Indian country are complex and cumbersome, increasing development costs and causing delays and uncertainty to the development of mineral resources on the reservation. On the other hand, nearby lands off the reservation are not subject to these laws, making them more attractive for oil and gas development than comparable reservation lands. The bill, S. 1684, would help level the playing field for Indian tribes that, if they so choose, they can participate in the expanding energy market in the United States. S. 1684 is a bill that would assist tribes in leasing and developing their trust energy resources in a timely, responsible, and profitable way.

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

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

[3] Carol Freedenthal, *New Oil, Gas Production Technologies Do More Than Affect Production,* Pipeline and Gas J., May 2011, at 40.

[4] Natural gas production from shale gas formations increased almost 65% from 2007 to 2008. Susan L. Sakmar, *The Global Shale Gas Initiative: Will the United States be the Role Model for the Development of Shale Gas Around the World?,* 33 Hous. J. Int'l L. 369, 380 (2011) (citations omitted).

[5] *Id.* at 371 (citing Tom Fowler, *Energy Game Changer?,* Hous. Chron., Nov. 1, 2009, at A1).

[6] International Energy Agency, *World Energy Outlook 2012,* November 13, 2012 at 75, 81.

[7] *Id.* at 108.

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 1938[8] (IMLA) and its implementing regulations[9] or the Indian Mineral Development Act of 1982[10] (IMDA) and its implementing regulations.[11] Prior to the enactment of the IMLA, minerals on Indian lands were developed under a number of Federal statutes dating back to 1891.[12]

The IMLA authorizes only mineral leases, whereas the IMDA authorizes a "joint venture, operating, production sharing, service, managerial, lease or other agreement."[13] 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 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.[14]

Despite the greater flexibility and increased tribal involvement in negotiations that the IMDA provides to Indian tribes, 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 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.[15] If the Secretary is not satisfied that the proposed agreement meets the statutory test, the Secretary may disapprove it.[16] The IMDA's implementing regulations also authorize the Secretary to cancel agreements for a range of violations by an operator[17] 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."[18] 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, even though the Secretary decides whether to approve, disapprove, or cancel an agreement, and to determine whether an operator has violated an agreement and whether to impose stiff penalties for doing so, the IMDA nevertheless expressly exempts the United States from liability "for losses sustained by a tribe or individual Indian under such agreement" as

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[8] Act of May 11, 1938, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g).
[9] 25 C.F.R. pt. 211.
[10] Indian Mineral Development Act of 1982, Pub. L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–2108).
[11] 25 C.F.R. pt. 225.
[12] *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).
[13] 25 U.S.C. § 2102(a).
[14] *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).
[15] 25 U.S.C. § 2103(b).
[16] *Id.* § 2103(a)–(b).
[17] 25 C.F.R. § 225.36.
[18] 25 C.F.R. § 225.37(a).

long as the Secretary approved the agreement in accordance with the Act and other applicable law.[19] 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.

The National Environmental Policy Act

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).[20] Apart from the question of whether having NEPA apply to decisions of the Secretary regarding transactions for the development of the trust resources of an Indian tribe provides a net benefit to the tribe, what is clear is that compliance with NEPA often has the effect of delaying the Secretary's decision and of creating uncertainty for all parties (including the tribe) to a proposed agreement to develop a tribe's energy resources. 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 NEPA often leads to extraordinary delays in the approval of mineral leases and agreements.

As Chairman Tex Hall of the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation testified at a hearing in 2011 before the House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs:

> In order to comply with the many Federal laws and regulations that apply to Indian mineral activities, the Interior Department has developed a 49-step process for obtaining Federal approvals involving oil and gas exploration. This 49-step process can take as long as two (2) years to complete. In contrast, the process for approving oil and gas exploration activities on non-Indian lands in North Dakota takes just 4 steps. Oil and gas leases [on these non-Indian lands] don't need governmental approval and, according to the North Dakota Industrial Commission, it only takes about a week and a half to process an application for a permit to drill. I believe we must find a way to streamline the process for federal review and approval of individual Indian and tribal mineral leases and agreements and make it less complicated and more efficient.[21]

At a hearing before this Committee in 2012, Chairman Hall stated:

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[19] 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."

[20] 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).

[21] Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands: Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm., 112th Cong. 18–19 (2011) (statement of Tex G. Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation).

> The application of NEPA and other Federal public land laws and policies on our lands displaces the authority of [Mandan, Hidatsa and Arikara] Nation to manage and regulate its own resources. *The MHA Nation should have the right to make its own decisions on how our resources are used and developed*.
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> *Indian lands should, at the election of a Tribe, be specifically excluded from the public application of NEPA*.[22]

Similar testimony at another hearing in 2012 before this Committee was provided by Vice President Rex Lee Jim of Navajo Nation:

> Perhaps the greatest hurdle to energy development in Indian Country generally is the applicability of the National Environmental Policy Act (NEPA) to the use of tribal lands and resources.
>
> There is only one way out of the trap of poverty and federal dependence, to allow and encourage Tribes to stand on their own and develop their own sustainable economies. In times of decreasing federal budgets this imperative is even more pronounced. *The only way to accomplish this objective is to get the federal government out of the way and allow tribes to make their own decisions*. The Navajo Nation is ready. Give us the opportunity.[23]

Another witness who testified before the Committee at that same hearing, Thomas Anketell, a member of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation in North Dakota, stated that—

> The Fort Peck Agency's long delays in processing mineral leases and other critical energy development paperwork often frustrate our energy development plans and serve only to push oil, gas and other types of energy and mineral development off the Reservation. . . . Time is money to energy producers. . . .
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> If the costs of "on-reservation" energy production is much higher than the cost of "off-reservation" energy production, energy producers will naturally locate where it is less expensive to operate."[24]

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[22] Impacts of Environmental Changes on Treaty Rights, Traditional Lifestyles, and Tribal Homelands: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 5 (2012) (statement of Tex G. Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation) (emphasis added).

[23] Energy Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 7 (2012) (statement of Rex Lee Jim, Vice President, Navajo Nation) (emphasis added).

[24] Energy Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 3 (2012) (statement of Thomas Anketell, member of the Tribal Executive Board, Assiniboine and Sioux Tribes of the Fort Peck Reservation). In the months prior to the introduction of S. 1684, Committee staff engaged in extensive outreach to receive information and ideas for the bill from Indian tribes and energy industry stakeholders. Staff frequently heard complaints about delays and uncertainty associated with the processes under the IMLA and the IMDA and with compliance with NEPA. Some commentators noted that developers will avoid bidding on leases of Indian lands if nearby non-Indian lands are available for development.

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 Act[25] (ITEDSDA), created Indian energy programs within the Department of the Interior and the Department of Energy;[26] established energy-related grant and technical assistance programs for Indian tribes and Alaska Native corporations;[27] encouraged the Bonneville and Western Power Administrations to facilitate the development of tribal energy resources;[28] and authorized a feasibility study for developing tribal wind and hydropower demonstration projects on the Missouri River.[29]

The ITEDSDA also 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]

a. Legislative history of the TERA

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.[32]

While there were a number of significant differences between the two bills, both included provisions that would authorize energy-related transactions between Indian tribes and third parties without approval by the Secretary of the Interior—which would otherwise be 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—if the transactions were carried out in accordance with tribal regulations that previously had been approved by the Secretary.[33] Both bills also would have authorized tribes to grant rights-of-way to third parties to serve energy-related facilities located on tribal lands without secretarial approval if done pursuant to tribal regulations approved by the Secretary.

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[25] 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).
[26] 25 U.S.C. § 3502(a)–(c).
[27] 25 U.S.C. § 3503.
[28] 25 U.S.C. § 3505.
[29] 25 U.S.C. § 3506.
[30] 25 U.S.C. § 3504.
[31] 25 U.S.C. § 3504(e).
[32] 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).
[33] Section 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).

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.[34]

Senator Bingaman testified at the hearing on S. 424 and S. 522 and observed that the provision in his bill that would have allowed siting facilities on tribal land without secretarial approval was "consistent with the sovereign authority of the tribes" but noted that concerns had been raised about the liability provision in his bill. He stated that "We are glad to work with you, Mr. Chairman, to be sure those concerns are addressed. We think there is a way to do that."[35] At the close of the hearing, Chairman Campbell stated that there was "some good in each of these bills and maybe some not so good" but that he intended to use "the best of both."[36]

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 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.[37] 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.[38]

While none of the Senate or House bills addressing comprehensive energy policy were enacted into law in the 108th Congress, including S. 1005[39] 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.[40]

b. Key provisions of the TERA process under current law

The following is summary of the key provisions of the TERA process in the ITEDSDA.[41]

1. *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 indi-

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[34] The 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 19 and accompanying text.

[35] 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. 75 (2003) (statement of Sen. Jeff Bingaman, United States Sen. from New Mexico).

[36] *Id.* at 88.

[37] *See* note 58, *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.

[38] *See* S. Rep. No. 108–43, at 29–36.

[39] *See also* S. 14; H.R. 6; H.R. 238; H.R. 1531; H.R. 1644.

[40] *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 CFR pt. 224).

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

vidual 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.

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

3. *Not exclusive of other mineral or energy development authority.* Nothing in the ITEDSDA states that an Indian tribe with a TERA may not, at the same time, choose to pursue energy development under the IMLA, IMDA, or any other authority under Federal law.[42]

4. *Kinds of agreements authorized.* Once a TERA has been approved by the Secretary, the tribe may, without further approval of the Secretary, enter into energy leases, business agreements, and, for certain energy-related purposes, rights-of-way.[43]

5. *Scope of TERA.* A TERA may, at the tribe's option, address "all or a part" of its energy resources, whether renewable or nonrenewable.[44] Conceivably, a tribe would be free to include language in the TERA that would limit its application to certain designated geographic areas within its tribal lands.

6. *Approval of the TERA by the Secretary.* The authority to approve leases, business agreements and rights-of-way without secretarial approval requires that the Tribe have a TERA in place that has been approved by the Secretary.[45]

7. *Process for obtaining an approved TERA.* The following are the key steps in the process for obtaining an approved TERA under current law.[46]

(i) The tribe must submit a proposed TERA to the Secretary.[47]

(ii) The Secretary has 270 days after receiving a TERA within which to approve or disapprove the proposed TERA.[48]

(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."[49]

(iv) The Secretary "shall approve"[50] 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 under the TERA and, if the Secretary finds "imminent jeopardy" to a physical trust

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[42] The TERA regulations do not directly address this question but do indicate that the tribe is free to choose to include "all or a part" of its energy resources as well as different "types" of energy resources in a TERA. *See* 25 CFR § 224.52(a)–(b).

[43] 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, tribes may renew leases, business agreements and rights-of-way under § 3504(c).

[44] *See supra* note 42; *see also* 25 CFR 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.

[45] 25 U.S.C. § 3504(d).

[46] The regulations at 25 CFR §§ 224.50–224.68 establish the process in considerably more detail than the statute itself.

[47] 25 U.S.C. § 3504(e)(1).

[48] 25 U.S.C. § 3504(e)(2)(A).

[49] 25 U.S.C. § 3504(e)(3); 25 CFR § 224.70.

[50] 25 U.S.C. § 3504(e)(2)(B).

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),[51] one of which is the environmental review process required under section 3504(e)(2)(C).

(v) The Secretary must notify the 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.[52]

(vi) The Secretary "shall approve" the revised TERA if it meets the same 3 criteria set forth in paragraph d., above, applicable to the original version of the TERA.[53] The Secretary has only 60 days within which to approve or disapprove a revised TERA.[54]

8. *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.d.(2) above.) The review must be conducted annually unless, after the third annual review, the tribe and the Secretary agree to amend the TERA to allow biannual reviews.[55]

(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.[56] If the TERA authorizes "direct payment" leases and agreements, the 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.[57]

(iii) ITEDSDA allows third parties with standing to petition the Secretary to complain that the 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.[58] Accordingly, the petitioning process is

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[51] *See also* 25 C.F.R. § 224.63.

[52] 25 U.S.C. § 3504(e)(4); 25 C.F.R. § 224.75. Under the regulations, the 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.

[53] 25 U.S.C. § 3504(e)(2).

[54] *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 tribe has standing to seek judicial review of a decision to disapprove a TERA or a revised TERA. 25 C.F.R. § 224.77.

[55] 25 U.S.C. § 3504(e)(2)(D)–(E).

[56] 25 U.S.C. § 3504(e)(2)(B)(iii)(XIII)–(5)(A); 25 C.F.R. § 224.83(b).

[57] 25 U.S.C. § 3504(e)(5)(B); 25 C.F.R. § 224.63(k).

[58] 25 U.S.C. § 3504(e)(7)(A)–(B); 25 C.F.R. §§ 224.100–224.101 (emphasis added). As discussed *supra* at note 31 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 of 2000 (25 U.S.C. § 415(e)) and the recently enacted 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

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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.[59] The regulations set forth the petitioning process in detail and provide the 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.[60]

(iv) A tribe with an approved TERA may rescind the TERA in its own discretion.[61]

(v) Like the IMDA, the Navajo Nation Trust Land Leasing Act, and, most recently, the HEARTH Act, the TERA provisions of the ITEDSDA include a liability waiver clause[62] 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.[63] "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.[64] 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.[65]

c. Tribal concerns with the TERA process under current law

During the consultation process before the introduction of the bill 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

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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.

[59] 25 U.S.C. § 3504(e)(7)(B); 25 C.F.R. § 224.100.

[60] 25 U.S.C. § 3504(e)(7)(D)(iii); 25 C.F.R. § 224.120.

[61] 25 U.S.C. § 3504(e)(8)(B); 25 C.F.R. §§ 224.170–224.175.

[62] 25 U.S.C. § 3504(e)(6)(D)(ii).

[63] 25 U.S.C. § 3504(e)(6)(D)(i).

[64] 25 U.S.C. § 3504(e)(6)(D)(ii).

[65] 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 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 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), 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."

review articles about the ITEDSDA, one by Professor Judith V. Royster[66] and the other by Benjamin J. Fosland.[67]

In her article on the ITEDSDA, Professor Royster identifies and discusses four areas of concern raised by tribal representatives regarding the TERA process.[68] In his article, Benjamin J. Fosland addresses 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.[69] He concludes that all three criticisms of the ITEDSDA "are largely unwarranted."[70]

With regard to funding, Fosland notes that, although grant funding and other support authorized under the ITEDSDA may not be sufficient to fully fund the needs of all tribes that might be interested in pursuing the TERA process—[71]

> it is unlikely that all tribes will attempt to engage in serious energy development simultaneously. And as tribes become better able to regulate their own energy development, the need for funding and technical expertise provided by the Secretary will decrease.[72]

Moreover, this same lack-of-funding criticism can be leveled equally at the IMDA. While the Secretary must review and approve all IMDA agreements, what is perhaps the most difficult part of the process—preparing for and engaging in negotiations and structuring agreements with third parties—must be carried out by the tribe itself. The provision of the IMDA requiring the Secretary to provide "advice, assistance, and information during the negotiation of a Minerals Agreement" is expressly conditioned upon "the extent of [the Secretary's] available resources."[73]

It is true that the ITEDSDA requires some public involvement both in the process of TERA approval by the Secretary and in energy development activities by the Indian tribe after the TERA has been approved. However, as Professor Royster points out in regard to the Secretary's TERA approval process, provisions in the ITEDSDA and its implementing regulations limiting the scope of the Secretary's review of a proposed TERA, requiring the Secretary

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

[67] 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).

[68] 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 66 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 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.

[69] Fosland, *supra* note 67 at 449.

[70] *Id.*

[71] *Id.* at 454–55.

[72] *Id.* at 455.

[73] 25 U.S.C. § 2106.

to "act in accordance with the trust responsibility," to act "in good faith and in the best interests of the Indian tribes," and to "liberally construe" the ITEDSDA and its implementing regulations for the benefit of the tribes to implement the Federal policy of self-determination—

> obligate the Secretary, in considering the approval of a TERA, to place tribal self-determination at the core of the decision. Although the Secretary will consider and respond to relevant public comments on a proposed TERA, the Secretary should do so in light of the policies and regulations promoting tribal self-determination and energy development.[74]

As for the concern about public involvement in the tribe's environmental review process, Professor Royster observes that this process, which she notes is intended to "mirror" provisions in NEPA, "will be costly, and . . . have the potential to delay implementation of tribal resource decisions," but that "the environmental review provisions are not necessarily incompatible with practical sovereignty."[75] Benjamin J. Fosland reaches a similar conclusion in his article on the TERA process.[76] Moreover, the broad tribal support[77] for the recently adopted HEARTH Act[78] 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 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.[79] The same applies to concerns over the "interested party" challenges authorized in the ITEDSDA—the HEARTH Act, similar to the TERA process, authorizes interested parties to petition the Secretary and complain that a tribe is violating its own leasing regulations.[80]

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 environ-

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[74] Royster, *supra* note 66 at 1089.
[75] *Id.* at 1090 (citations omitted).
[76] Fosland, *supra* note 67 at 459.
[77] *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).
[78] 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 tribes with tribal trust lands.
[79] HEARTH Act § 2.
[80] *Id.*

mental, social, and cultural effects on the tribe."[81] 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*[82] 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."[83] Again, despite the fact that the recently enacted HEARTH Act has a very explicit and direct liability waiver clause,[84] the tribes vigorously supported the adoption of that act in 2012, suggesting that many tribes have reached some level of comfort with the implications of these clauses.

KEY PROVISIONS OF THE BILL AS ORDERED REPORTED

At the business meeting convened on September 13, 2012, the Committee approved a number of amendments to the bill (offered by Vice Chairman Barrasso and Senators Murkowski and Udall) and ordered the bill, as amended, to be reported favorably. The following is a description of the key provisions of the bill as ordered by the Committee to be reported.

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 concerns raised in the outreach regarding the bill, including the concerns discussed above. The most significant amendments to the ITEDSDA are summarized below.

a. 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.[85] 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. If the Secretary does not act to disapprove the TERA before the 271st day, the TERA goes into effect. 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.

b. Reasons for disapproving a TERA

Under S.1684, there are only 4 reasons for disapproving a proposed TERA (3 of which are in current law): (1) the Indian tribe fails to demonstrate capacity; (2) a provision of the TERA would

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[81] Royster, *supra* note 66 at 1099–1100.
[82] 537 U.S. 488 (2003).
[83] Royster, *supra* note 66 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).
[84] "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.
[85] 25 U.S.C. § 3504(e)(2)(A).

violate applicable Federal law;[86] (3) the TERA does not include the required periodic review and evaluation provisions;[87] and (4) the TERA does not include any of the required enumerated provisions.[88]

c. Categorical exclusions

The bill would amend section 3504(e) of the ITEDSDA[89] to clarify that a tribe may identify actions that are categorically excluded from the review process.

d. 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 and regardless of whether the other resources are owned by a tribe, individual Indian or any other person or entity.

e. 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 amend that to require that the determination be made within 120 days of the date the TERA is submitted to the Secretary. This change would give the tribe notice of any capacity concerns earlier in the process, so that it does not have to wait out the full 270 days only to learn that the Secretary has these concerns.

f. Self-Determination Act tribes and capacity

The bill would add a new provision in effect deeming a tribe to have capacity if the Secretary finds that the tribe has carried out, for 3 consecutive years without material audit exceptions, a contract or compact under the Indian Self-Determination and Education Assistance Act[90] that includes land management activities.

g. 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

[86] 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.
[87] 25 U.S.C. § 3504(e)(2)(D).
[88] 25 U.S.C. § 3504(e)(2)(B)(iii).
[89] Specifically, 25 U.S.C. § 3504(e)(2)(B)(iii).
[90] 25 U.S.C. §§ 450 *et seq.*

an opportunity to revise and resubmit" the TERA.[91] The bill would only clarify this, calling for "a detailed written explanation of each reason for disapproval; and the revisions or changes to [the TERA] necessary to address each . . . reason."

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

i. 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 tribe is or is not out of compliance with the TERA. Finally, the bill would require the Secretary to dismiss the petition if the tribe and the interested party agree to resolve the issues in the petition between themselves.

j. 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,[92] 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.

Other amendments to the ITEDSDA

The bill would make other amendments to the ITEDSDA unrelated to the TERA process, both technical and substantive in na-

[91] 25 U.S.C. § 3504(e)(4).
[92] 25 U.S.C. § 450j–1(n).

ture. The following is a summary of the more substantive amendments.

a. 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 1934[93] and section 3 of the Oklahoma Indian Welfare Act[94] for purposes of the ITEDSDA.

b. Well spacing; technical assistance

The bill would amend the ITEDSDA section establishing the Department of the Interior Indian Energy Program[95] 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 tribes in planning energy resource development.

c. 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, 10 years and so long thereafter as oil or gas are produced in paying quantities) between the 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[96]—without approval by the Secretary. 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 tribe itself or with an agency or instrumentality of the tribe for purposes of energy resource development on its tribal land.[97] Under current law, a decision by the 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.

d. 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 Sec-

[93] 25 U.S.C. § 477.
[94] 25 U.S.C. § 503.
[95] 25 U.S.C. § 3502(a).
[96] 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 tribe without secretarial approval.
[97] 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 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.

retary, (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 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

a. Amendment to Federal Power Act

Section 201 of the bill would amend section 7(a) of the Federal Power Act[98] 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.

b. Amendments to Energy Efficiency Act

Section 105 of the bill would amend Part D of Title III of the Energy Policy and Conservation Act[99] by adding a new section at the end authorizing grants to Indian tribes to carry out a tribal energy efficiency program as described in the new section. The funding would be taken from funding appropriated pursuant to section 365(f) of Title III of the Energy Policy and Conservation Act. Of those funds, "not less than 2.5%" must be allocated for the tribal program.

c. Amendments to Federal weatherization program

Section 203 of the bill would amend the Energy Conservation and Production Act[100] 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 Indian tribe and (2) the Secretary of Energy determines that the low-income members of the tribe will be equally or better served by direct funding to the tribe rather than through the State.

d. Biomass demonstration projects

Section 202 of the bill would amend the Tribal Forest Protection Act of 2004[101] (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 4 new demonstration projects be carried out from 2013 to 2017, with tribes to be selected based on several enumerated criteria. The bill would allow participating

[98] 16 U.S.C. § 800(a).
[99] Energy Policy and Conservation Act of 1975, Pub. L. No. 94–163, 89 Stat. 871 (codified at 42 U.S.C. §§ 6201 *et seq.*).
[100] 42 U.S.C. § 6863(d).
[101] Pub. L. No. 108–278, 118 Stat. 868 (2004).

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.[102] A longer term is authorized under the bill to provide sufficient time to recover the investment that is necessary to carry out a biomass operation.

Section 202 would authorize similar demonstration projects with Alaska Native corporations (as defined in section 3 of the Alaska Native Claims Settlement Act[103]) with terms not to exceed 20 years and a renewal term of up to 10 years.

e. Amendments to Long-Term Leasing Act

Section 205 of the bill would amend subsection (e) of the Long-Term Leasing Act[104] 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."

LEGISLATIVE HISTORY

On October 12, 2011, Senator Barrasso introduced S. 1684, along with Senators Akaka, Hoeven, and McCain. A legislative hearing on the bill was held on April 19, 2012. Senators Enzi and Thune were later added as co-sponsors. At a business meeting held on September 13, 2012, the Committee on Indian Affairs ordered the bill reported with amendments favorably.

SUMMARY OF THE AMENDMENTS APPROVED BY COMMITTEE

At the business meeting held on September 13, 2012, the Committee approved a number of amendments to the bill described below.

The Committee approved an amendment from Senator Barrasso that would allow Indian tribes to prepare their own appraisal process for transactions that require the Department of Energy's approval.

The Committee also approved an amendment from Senator Udall that would direct the Energy Department to collaborate with national laboratories to make technical and scientific assistance available to American Indian energy production and projects.

The Committee approved another amendment from Senator Udall that would extend the Energy Department's State Energy Program to Indian tribes to allow grants to tribes seeking to reduce their fossil fuel emissions and increase energy efficiency in transportation, building or other sectors. The Committee approved a second degree amendment by Senator Udall to this amendment that would reduce the minimum amount of funding that the Energy De-

[102] *See* 16 U.S.C. § 2104(c)(2) note.
[103] 43 U.S.C. § 1602(m).
[104] 25 U.S.C. § 415(e).

partment's State Energy Program would be required to set aside for tribal conservation programs from 5 percent to 2.5 percent.

The Committee approved an amendment from Senator Murkowski that would include Alaska Native corporations in the bill's expansion of federal biomass demonstration projects, thus giving such Alaskan corporations the option of applying the projects that promote biomass energy production such as biofuels, heat and electricity generation.

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 2012" (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 (1992 EPA) by adding (1) a requirement that the Secretary of the Interior consult with Indian tribes before approving well-spacing programs that affect their energy resources, and (2) 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.

Section 101(a) would also require the Secretary to carry out the program under section 2602 of the 1992 EPA 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 1992 EPA 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 "activities to increase capacity of Indian tribes to manage" energy development and efficiency programs to the purposes of the grants under that section.

Section 101(c) of the Act amends section 2602(c) of the 1992 EPA to include tribal energy development organizations to participate in the loan guarantee program under that section. This section also amends section 2602(c) to require 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 of the 1992 EPA to require the Secretary of the Interior to provide the assistance, information and expertise to a tribal energy development organization (i.e., in addition to an Indian tribe).

Section 103. Tribal energy resource agreements

Section 103 of the Act makes several amendments to section 2604 of the 1992 EPA, which relates to tribal energy resource agreements (TERAs).

Section 103(a)(1) makes technical amendments to section 2604(a)(1)(B) of the 1992 EPA; clarifies that the applicable lease or business agreement may be for facilities that produce "electricity from renewable resources" and that "at least a portion" of the resources that may be refined at an applicable facility must be developed on "or produced from" tribal land; adds at the end of section 2604(a)(1) a new subparagraph (C) that states that the business agreement may include provisions for the voluntary pooling, unitization or communization of the Indian tribe's energy resources with the energy resources of other parties.

Section 103(a)(1) amends section 2604(a)(2) to state that, besides leases and business agreements executed pursuant to a TERA, a lease or business agreement between the Indian tribe and a tribal energy development organization that is majority owned and controlled by that Indian tribe—and that has been certified as such by the Secretary—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 that does not 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) amends section 2604(b) of the 1992 EPA with regard to energy rights-of-way in the same ways that it amends section 2604(a) with regard to leases and agreements (see amendments described above). 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 1992 EPA.

Section 103(a)(4) of the Act amends section 2604(e)(2) of the 1992 EPA to change 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. The Secretary would be required to disapprove the TERA 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 provisions mandated for TERAs under section 2604(e).

Section 103(a)(4) of the draft bill would also clarify and expedite the process by which the Secretary determines whether an Indian tribe has demonstrated sufficient capacity to enter into a TERA. Current law requires the Secretary to determine whether "the Indian tribe has demonstrated . . . sufficient capacity to regulate the development of energy resources" within 270 days of the date on which the tribe submits a TERA.

Section 103(a)(4) requires the Secretary to make the determination of 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]." The Secretary would be required to make such a determination within 120 days of the date on which the tribe submits a TERA unless the Secretary and the tribe agree to extend the time period for making the determination. Section 103(a)(4) would also provide that a tribe will be deemed to have demonstrated sufficient capacity if: (1) the tribe has a record of managing land-related programs under the Indian Self-Determination and Education Assistance Act in a fiscally responsible manner for three consecutive years; or (2) the Secretary fails to make the capacity determination within the applicable time period.

Section 103(a)(4) amends section 2604(e)(2) to clarify the mitigation term required for a TERA (that mitigation measures are to be determined in the tribe's discretion) and adds a provision allowing the tribe to identify categorical exclusions.

Section 103(a)(4) also clarifies that if the Secretary disapproves a TERA the disapproval must include "a detailed, written explanation" of the reasons for the disapproval.

Section 103(a)(4) makes a number of clarifying amendments to section 2604(e)(5) and (6) of the 1992 EPA, the liability provisions of ITEDSDA. In particular, a paragraph is added to clarify that these provisions do not absolve the United States from liability arising from terms that are not "negotiated terms" or losses that are not the result of "negotiated terms."

Section 103(a)(4) amends section 2604(e)(7) of the 1992 EPA to clarify the definition of "interested party" and the process for reviewing a petition under this paragraph by an interested party—by requiring the Secretary to first determine whether the petitioner is an "interested party" and then whether the tribe is not in compliance with the TERA. This section also adds a provision requiring the Secretary to dismiss the petition if the petitioner and the tribe have agreed to a resolution of the issues in the petition.

Section 103(a)(5) makes a conforming amendment.

Section 103(a)(6) adds a new subsection (g) to section 2604 of the 1992 EPA to provide for funding a tribe's activities under that section. Generally, the amendment would require 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.

Section 103(a)(6) also adds a new subsection (h), setting forth the requirements for the Secretary to certify that a tribal energy development organizations (i.e., that 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; that the entity is organized under the laws of the Indian tribe and subject to its jurisdiction and authority; that the majority interest in the entity is owned and controlled by the Indian tribe; and that this majority interest ownership and control is required under the entity's organizing documents).

Section 103(b) of the Act requires the Secretary to adopt regulations to implement the amendments made by section 103.

Section 104. Technical assistance for Indian tribal governments

Section 104 would amend 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. Indian energy efficiency

Section 105 would add to Part D of Title III of the Energy Policy and Conservation Act an Indian Energy Efficiency Program. The Indian Energy Efficiency Program would provide grants to assist Indian tribes in implementing strategies to reduce fossil fuel emissions and to increase energy efficiency.

Section 105 would require the Secretary to allocate not less than 2.5 percent of the funds authorized to be appropriated for each fiscal year under section 265(f) to be distributed to Indian tribes in accordance with subsection (d).

Section 105 would create guidelines under subsection (d) that specify how the grants are to be distributed. The Secretary is required to establish a competitive process for providing grants that gives priority to projects that (1) increase energy efficiency and energy conservation rather than new energy generation projects; (2) integrate cost-effective renewable energy with energy efficiency; (3) move beyond the planning stage and are ready for implementation; (4) clearly articulate and demonstrate the ability to achieve measurable goals; (5) have the potential to make an impact in the government buildings, infrastructure, communities, and land of an Indian tribe; and (6) maximize the creation or retention of jobs on Indian land.

This section would also authorize Indian tribes to use grants to achieve the purposes of the Energy Efficiency Program. The bill enumerates what potential uses for the grants may include. To apply for a grant under this section, an Indian tribe would submit to the Secretary a proposed energy efficiency and conservation strategy. The proposed strategy would include a description of the goals of the Indian tribe for increased energy efficiency and conservation in the jurisdiction of the Indian tribe and the manner in which the proposed strategy complies with the restrictions in the use of the grants and the manner in which a grant will allow the Indian tribe to fulfill the goals of the proposed strategy.

Section 105 would require the Secretary to approve or disapprove a proposed conservation strategy by not later than 120 days after the date of submission. If the Secretary disapproves a proposed strategy the Secretary would provide to the Indian tribe the reasons for the disapproval and the Indian tribe may revise and resubmit the proposed strategy as many times as necessary.

Section 105 would limit the amount an Indian tribe may use for administrative expenses, excluding the cost of the reporting requirements, to an amount equal to the greater of 10 percent of the administrative expenses or $75,000.

An Indian tribe receiving a grant under section 105 would be required to submit to the Secretary a report describing the status of

development and implementation of the energy efficiency and conservation strategy and an assessment of energy efficiency gains within the jurisdiction of the Indian tribe.

Section 106. Conforming amendments

Section 106 would amend a number of conforming amendments to the Indian energy provisions of the 1992 EPA, many of which are intended to make other provisions consistent with the amendments made in sections 101, 102, and 103.

In addition, section 106 would amend 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 106 would amend section 2605(d)(1) of the 1992 EPA to require the Administrators of the Bonneville Power Administration and the Western Area Power Administration to provide technical assistance to Indian tribes seeking to use the high-voltage transmission system for delivery of electrical power.

Section 201. Issuance of preliminary permits and licenses

Section 201 of the draft bill would amend section 7(a) of the Federal Power Act. As written, the Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) 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) would authorize FERC to give the same preference to Indian tribes.

Section 201(b) states that the amendment made in subsection (a) will 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 includes provisions stating that subsection (a) will 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 202. Tribal biomass demonstration project

Section 202 of the Act would establish biomass demonstration projects for federally recognized Indian tribes and Alaska Native corporations to promote biomass energy production.

Subsection (b) of Section 202 would amend the Tribal Forest Protection Act of 2004 to promote biomass energy production on Indian forest land and in nearby communities.

Specifically, the amendment made by subsection (b) would require that 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. Subsection (b) would oblige the Secretary to enter into contracts to carry out at least four new demonstration projects annually over five fiscal years beginning in FY 2013.

Under subsection (b), the Secretary of the Interior and the Secretary of Agriculture would be required 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 would exclude 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 would be required to 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.

Subsection (c) of Section 202 would create one biomass demonstration project each year for 2013 through 2017 which would be substantially similar to the projects created under subsection (b), except this project would be for Alaska Native corporations and would not amend the Tribal Forest Protection Act of 2004.

Specifically, the amendment made under subsection (c) would require the Secretary, for each of the fiscal years 2013 through 2017, to enter into a stewardship contract or similar agreement, for a term of up to 20 years, and a renewal term of up to 10 years, with 1 or more Alaska Native corporations, to carry out a demonstration project to promote biomass energy production on forest land of the Alaska Native corporations and in nearby communities providing reliable supplies of woody biomass from federal land.

Under subsection (c), the Secretary would take into consideration a number of factors when considering a proposed demonstration project, all of which are the same or similar to the requirements under subsection (b). The amendment would exclude 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 draft bill would amend section 413(d) of the Energy Conservation and Production Act to provide direct Federal funding to Indian tribes for home weatherization.

Under current law, tribes are not eligible to receive direct Federal funding for home weatherization (the funding goes to the States) unless the Secretary of Energy makes two findings. First, the Secretary must find that a State is not providing the low-income members of an Indian tribe with assistance equivalent to that received by the State's other low-income residents. Second, the Secretary must determine that the low-income tribal members would be better served by providing funding to the tribe. If the Secretary makes these two findings, the Secretary reserves from the allocation to the State an amount that is no less than 100 percent and no more than 150 percent of the proportion of the low-income tribal members in such State to the total number of low-income people in such State. Currently, the Secretary reserves this funding from the allocations to the States of Arizona and New Mexico for the Navajo Nation and also reserves funding from the allocation to the State of Wyoming for the Northern Arapaho Tribe.

Section 204 of the Act would require the Secretary to make direct funding to the Indian tribe upon the request of the tribe if the Secretary determines that the low income members of the applicable Indian tribe would be equally or better served by a direct grant. The Secretary's discretion to determine the amount of the funding under current law would remain unchanged.

Section 204. Appraisals

Section 204 would amend Title XXVI of the Energy Policy Act of 1992 to allow appraisals relating to the fair market value of mineral or energy resources to be prepared by the Secretary, an Indian tribe, or a certified, third-party appraiser pursuant to a contract with the Indian tribe. Not later than 45 days after the date on which the Secretary receives an appraisal by or for an Indian tribe, the Secretary would be required to review and approve the appraisal unless the Secretary determines that the appraisal fails to meet standards created by the Secretary under this section. Furthermore, if the Secretary disapproves an appraisal, the Secretary would be 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 would amend subsection (e)(1) of the first section of the Long-Term Leasing Act to allow the Navajo Nation 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 the meets certain term limits. This section would also extend the maximum term for a business or agricultural lease under this subsection of the Long-Term Leasing Act to 99 years. For leases for exploration, development, or extraction of mineral resources, other than oil and gas resources, the maximum lease term is 25 years, with an option to renew for 1 additional term up to 25 years. For leases for the exploration, development, or extraction of an oil or gas resource, the maximum term is 10 years, plus any such additional period as the Navajo Nation determines to be appropriate in any case in which an oil or gas resource is produced in a paying quantity.

COMMITTEE RECOMMENDATION

On April 13, 2012, the Senate Committee on Indian Affairs convened a business meeting to consider S. 1684 and other measures. The Committee ordered the bill, as amended, be reported to the full Senate with the recommendation that the bill, as amended, do pass.

COST AND BUDGETARY CONSIDERATION

A cost estimate by the Congressional Budget Office is not yet available.

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 regu-

latory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S.1684 would have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

There have been no written Executive communications regarding the bill.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S.1684, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter printed in *italic*):

25 U.S.C.§ 3501 (Energy Policy Act of 1992)

§ 3501. Definitions

In this chapter:

* * * * * * *

[(11) The term "tribal energy resource development organization" means an organization of two or more entities, at least one of which is an Indian tribe, that has the written consent of the governing bodies of all Indian tribes participating in the organization to apply for a grant, loan, or other assistance under section 3502 of this title.**]**

(11) The term 'tribal energy development organization' means—

(A) 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 an organization incorporated pursuant to section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (25 U.S.C. 503) (commonly known as the 'Oklahoma Indian Welfare Act')); or

(B) any organization of 2 or more entities, at least 1 of which is an Indian tribe, that has the written consent of the governing bodies of all Indian tribes participating in the organization to apply for a grant, loan, or other assistance under section 2602 or to enter into a lease or business agreement with, or acquire a right-of-way from, an Indian tribe pursuant to subsection (a)(2)(A)(ii) or (b)(2)(B) of section 2604.

25 U.S.C. § 3502 (Energy Policy Act of 1992)

§ 3502. Indian tribal energy resource development

(a) DEPARTMENT OF THE INTERIOR PROGRAM.—

(1) To assist Indian tribes in the development of energy resources and further the goal of Indian self-determination, the Secretary shall establish and implement an Indian energy resource development program to assist consenting Indian tribes and **[**tribal energy resource development organizations**]** *tribal*

energy development organizations in achieving the purposes of this chapter.

(2) In carrying out the Program, the Secretary shall—

(A) provide development grants to Indian tribes and [tribal energy resource development organizations] *tribal energy development organizations* for use in developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land, and to properly account for resulting energy production and revenues;

(B) provide grants to Indian tribes and [tribal energy resource development organizations] *tribal energy development organizations* for use in carrying out projects to promote the integration of energy resources, and to process, use, or develop those energy resources, on Indian land;

(C) provide low-interest loans to Indian tribes and [tribal energy resource development organizations] *tribal energy development organizations* for use in the promotion of energy resource development on Indian land and integration of energy resources; [and]

(D) provide grants and technical assistance to an appropriate tribal environmental organization, as determined by the Secretary, that represents multiple Indian tribes to establish a national resource center to develop tribal capacity to establish and carry out tribal environmental programs in support of energy-related programs and activities under this chapter, including—

(i) training programs for tribal environmental officials, program managers, and other governmental representatives;

(ii) the development of model environmental policies and tribal laws, including tribal environmental review codes, and the creation and maintenance of a clearinghouse of best environmental management practices; and

(iii) recommended standards for reviewing the implementation of tribal environmental laws and policies within tribal judicial or other tribal appeals systems[.]*; and*

(E) consult with each applicable Indian tribe before adopting or approving a well spacing program or plan applicable to the energy resources of that Indian tribe or the members of that Indian tribe.

(3) There are authorized to be appropriated to carry out this subsection such sums as are necessary for each of fiscal years 2006 through 2016.

(4) PLANNING.—

(A) IN GENERAL.—In carrying out the program established by paragraph (1), the Secretary shall provide technical assistance to interested Indian tribes to develop energy plans, including—

(i) plans for electrification;

(ii) plans for oil and gas permitting, renewable energy permitting, energy efficiency, electricity generation, transmission planning, water planning, and other planning relating to energy issues;

(iii) plans for the development of energy resources and to ensure the protection of natural, historic, and cultural resources; and

(iv) any other plans that would assist an Indian tribe in the development or use of energy resources.

(B) COOPERATION.—In establishing the program under paragraph (1), the Secretary shall work in cooperation with the Office of Indian Energy Policy and Programs of the Department of Energy.

(b) DEPARTMENT OF ENERGY INDIAN ENERGY EDUCATION PLANNING AND MANAGEMENT ASSISTANCE PROGRAM.—

(1) The Director shall establish programs to assist consenting Indian tribes in meeting energy education, research and development, planning, and management needs.

(2) In carrying out this subsection, the Director may provide grants, on a competitive basis, to an Indian tribe, *intertribal organization,* or **[**tribal energy resource development organization**]** *tribal energy development organization for use in carrying out—*

(A) energy, energy efficiency, and energy conservation programs;

(B) studies and other activities supporting tribal acquisitions of energy supplies, services, and facilities, including the creation of tribal utilities to assist in securing electricity to promote electrification of homes and businesses on Indian land;

(C) activities to increase the capacity of Indian tribes to manage energy development and energy efficiency programs;

[(C)**]***(D)* planning, construction, development, operation, maintenance, and improvement of tribal electrical generation, transmission, and distribution facilities located on Indian land; and

[(D)**]***(E)* development, construction, and interconnection of electric power transmission facilities located on Indian land with other electric transmission facilities.

(3) TECHNICAL AND SCIENTIFIC RESOURCES.—In addition to providing grants to Indian tribes under this subsection, the Secretary shall 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.

[(3)**]***(4)*(A) The Director shall develop a program to support and implement research projects that provide Indian tribes with opportunities to participate in carbon sequestration practices on Indian land, including—

(i) geologic sequestration;

(ii) forest sequestration;

(iii) agricultural sequestration; and

(iv) any other sequestration opportunities the Director considers to be appropriate.

(B) The activities carried out under subparagraph (A) shall be—

(i) coordinated with other carbon sequestration research and development programs conducted by the Secretary of Energy;

(ii) conducted to determine methods consistent with existing standardized measurement protocols to account and report the quantity of carbon dioxide or other greenhouse gases sequestered in projects that may be implemented on Indian land; and

(iii) reviewed periodically to collect and distribute to Indian tribes information on carbon sequestration practices that will increase the sequestration of carbon without threatening the social and economic well-being of Indian tribes.

[(4)**]***(5)*(A) The Director, in consultation with Indian tribes, may develop a formula for providing grants under this subsection.

(B) In providing a grant under this subsection, the Director shall give priority to any application received from an Indian tribe with inadequate electric service (as determined by the Director).

(C) In providing a grant under this subsection for an activity to provide, or expand the provision of, electricity on Indian land, the Director shall encourage cooperative arrangements between Indian tribes and utilities that provide service to Indian tribes, as the Director determines to be appropriate.

[(5)**]***(6)* The Secretary of Energy may issue such regulations as the Secretary determines to be necessary to carry out this subsection.

[(6)**]***(7)* There is authorized to be appropriated to carry out this subsection $20,000,000 for each of fiscal years 2006 through 2016.

(c) DEPARTMENT OF ENERGY LOAN GUARANTEE PROGRAM.—

(1) Subject to paragraphs (2) and (4), the Secretary of Energy may provide loan guarantees (as defined in section 661a Title 2) for an amount equal to not more than 90 percent of the unpaid principal and interest due on any loan made to an Indian tribe *or a tribal energy development organization* for energy development.

(2) In providing a loan guarantee under this subsection for an activity to provide, or expand the provision of, electricity on Indian land, the Secretary of Energy shall encourage cooperative arrangements between Indian tribes and utilities that provide service to Indian tribes, as the Secretary determines to be appropriate.

(3) A loan **[**guarantee**]** *guaranteed* under this subsection shall be made by—

(A) a financial institution subject to examination by the Secretary of Energy; **[**or**]**

(B) an Indian tribe, from funds of the Indian tribe**[**.**]***; or*

(C) a tribal energy development organization, from funds of the tribal energy development organization.

(4) The aggregate outstanding amount guaranteed by the Secretary of Energy at any time under this subsection shall not exceed $2,000,000,000.

(5) [The Secretary of Energy may] *Not later than 1 year after the date of enactment of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2012, the Secretary of Energy shall* issue such regulations as the Secretary of Energy determines are necessary to carry out this subsection.

25 U.S.C. § 3503 (Energy Policy Act of 1992)

§ 3503. Indian tribal energy resource regulation

* * * * * * *

(c) OTHER ASSISTANCE.—

(1) In carrying out the obligations of the United States under this chapter, the Secretary shall ensure, to the maximum extent practicable and to the extent of available resources, that [on the request of an Indian tribe, the Indian tribe] *on the request of an Indian tribe or a tribal energy development organization, the Indian tribe or tribal energy development organization* shall have available scientific and technical information and expertise, for use in the regulation, development, and management of energy resources of the Indian tribe on Indian land.

(2) The Secretary may carry out paragraph (1)—

(A) directly, through the use of Federal officials; or

(B) indirectly, by providing financial assistance to an Indian tribe *or tribal energy development organization* to secure independent assistance.

25 U.S.C. § 3504 (Energy Policy Act of 1992)

§ 3504. Leases, business agreements, and rights-of-way involving energy development or transmission

(a) Leases and business agreements. In accordance with this section—

(1) an Indian tribe may, at the discretion of the Indian tribe, enter into a lease or business agreement for the purpose of energy resource development on tribal land, including a lease or business agreement for—

(A) exploration for, extraction of, processing of, or other development of the energy mineral resources of the Indian tribe located on tribal land; [or]

(B) construction or operation of—

[(i) an electric generation, transmission, or distribution facility located on tribal land; or]

(i) an electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land; or

(ii) a facility to process or refine energy resources, *at least a portion of which have been* developed on *or produced from* tribal land; [and] *or*

(C) pooling, unitization, or communitization of the energy mineral resources of the Indian tribe located on tribal land with any other energy mineral resource (including energy mineral resources owned by the Indian tribe or an indi-

vidual Indian in fee, trust, or restricted status or by any other persons or entities) if the owner of the resources has consented or consents to the pooling, unitization, or communitization of the other resources under any lease or agreement; and

[(2) a lease or business agreement described in paragraph (1) shall not require review by or the approval of the Secretary under section 81 of this title, or any other provision of law, if—

[(A) the lease or business agreement is executed pursuant to a tribal energy resource agreement approved by the Secretary under subsection (e);

[(B) the term of the lease or business agreement does not exceed—

[(i) 30 years; or

[(ii) in the case of a lease for the production of oil resources, gas resources, or both, 10 years and as long thereafter as oil or gas is produced in paying quantities; and

[(C) the Indian tribe has entered into a tribal energy resource agreement with the Secretary, as described in subsection (e), relating to the development of energy resources on tribal land (including the periodic review and evaluation of the activities of the Indian tribe under the agreement, to be conducted pursuant to subsection (e)(2)(D)(i)).]

(2) a lease or business agreement described in paragraph (1) shall not require review by, or the approval of, the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), or any other provision of law, if the lease or business agreement—

(A) was executed—

(i) in accordance with the requirements of a tribal energy resource agreement in effect under subsection (e) (including the periodic review and evaluation of the activities of the Indian tribe under the agreement, to be conducted pursuant to subparagraphs (D) and (E) of subsection (e)(2)); or

(ii) by the Indian tribe and a tribal energy development organization—

(I) for which the Indian tribe has obtained certification pursuant to subsection (h); and

(II) the majority of the interest in which is, and continues to be throughout the full term or renewal term (if any) of the lease or business agreement, owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes); and

(B) has a term that does not exceed—

(i) 30 years; or

(ii) in the case of a lease for the production of oil resources, gas resources, or both, 10 years and as long thereafter as oil or gas is produced in paying quantities.

[(b) Rights-of-way for pipelines or electric transmission or distribution lines. An Indian tribe may grant a right-of-way over tribal land for a pipeline or an electric transmission or distribution line without review or approval by the Secretary if—

[(1) the right-of-way is executed in accordance with a tribal energy resource agreement approved by the Secretary under subsection (e);

[(2) the term of the right-of-way does not exceed 30 years;

[(3) the pipeline or electric transmission or distribution line serves—

[(A) an electric generation, transmission, or distribution facility located on tribal land; or

[(B) a facility located on tribal land that processes or refines energy resources developed on tribal land; and

[(4) the Indian tribe has entered into a tribal energy resource agreement with the Secretary, as described in subsection (e), relating to the development of energy resources on tribal land (including the periodic review and evaluation of the activities of the Indian tribe under an agreement described in subparagraphs (D) and (E) of subsection (e)(2)).]

(b) RIGHTS-OF-WAY.—An Indian tribe may grant a right-of-way over tribal land without review or approval by the Secretary if the right-of-way—

(1) serves—

(A) an electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land;

(B) a facility located on tribal land that extracts, produces, processes, or refines energy resources; or

(C) the purposes, or facilitates in carrying out the purposes, of any lease or agreement entered into for energy resource development on tribal land; and

(2) was executed—

(A) in accordance with the requirements of a tribal energy resource agreement in effect under subsection (e) (including the periodic review and evaluation of the activities of the Indian tribe under the agreement, to be conducted pursuant to subparagraphs (D) and (E) of subsection (e)(2)); or

(B) by the Indian tribe and a tribal energy development organization—

(i) for which the Indian tribe has obtained certification pursuant to subsection (h); and

(ii) the majority of the interest in which is, and continues to be throughout the full term or renewal term (if any) of the right-of-way, owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes); and

(3) has a term that does not exceed 30 years.

(c) RENEWALS.—A lease or business agreement entered into, or a right-of-way granted, by an Indian tribe under this section may be renewed at the discretion of the Indian tribe in accordance with this section.

[(d) Validity. No lease, business agreement, or right-of-way relating to the development of tribal energy resources under this section shall be valid unless the lease, business agreement, or right-of-way is authorized by a tribal energy resource agreement approved by the Secretary under subsection (e)(2).]

(d) VALIDITY.—No lease or business agreement entered into, or right-of-way granted, pursuant to this section shall be valid unless the lease, business agreement, or right-of-way is authorized by subsection (a) or (b).

(e) TRIBAL ENERGY RESOURCE AGREEMENTS.—

[(1) On the date] *(1) IN GENERAL.—On the date* on which regulations are promulgated under paragraph (8), an Indian tribe may submit to the Secretary [for approval] a tribal energy resource agreement governing leases, business agreements, and rights-of-way under this section.

[(2) (A) Not later than 270 days after the date on which the Secretary receives a tribal energy resource agreement from an Indian tribe under paragraph (1), or not later than 60 days after the Secretary receives a revised tribal energy resource agreement from an Indian tribe under paragraph (4)(C) (or a later date, as agreed to by the Secretary and the Indian tribe), the Secretary shall approve or disapprove the tribal energy resource agreement.]

(2) PROCEDURE.—

(A) EFFECTIVE DATE.—

(i) IN GENERAL.—On the date that is 271 days after the date on which the Secretary receives a tribal energy resource agreement from an Indian tribe under paragraph (1), the tribal energy resource agreement shall take effect, unless the Secretary disapproves the tribal energy resource agreement under subparagraph (B).

(ii) REVISED TRIBAL ENERGY RESOURCE AGREEMENT.—On the date that is 91 days after the date on which the Secretary receives a revised tribal energy resource agreement from an Indian tribe under paragraph (4)(B), the revised tribal energy resource agreement shall take effect, unless the Secretary disapproves the revised tribal energy resource agreement under subparagraph (B).

[(B) The Secretary shall approve a tribal energy resource agreement submitted under paragraph (1) if—]

(B) DISAPPROVAL.—The Secretary shall disapprove a tribal energy resource agreement submitted pursuant to paragraph (1) or (4)(B) only if—

[(i) the Secretary determines that the Indian tribe has demonstrated that the Indian tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe;]

(i) the Secretary determines that the Indian tribe has not demonstrated that the Indian tribe has sufficient capacity to regulate the development of the specific 1 or more energy resources identified for development under the tribal energy resource agreement submitted by the Indian tribe;

(ii) a provision of the tribal energy resource agreement would violate applicable Federal law (including regulations) or a treaty applicable to the Indian tribe;

(iii) the tribal energy resource agreement does not include 1 or more provisions required under subparagraph (D); or

[(ii) the tribal energy resource agreement includes provisions required under subparagraph (D); and]

[(iii)]*(iv)* the tribal energy resource agreement [includes provisions that, with respect to a lease, business agreement, or right-of-way under this section—] *does not include provisions that, with respect to any lease, business agreement, or right-of-way to which the tribal energy resource agreement applies—*

(I) ensure the acquisition of necessary information from the applicant for the lease, business agreement, or right-of-way;

(II) address the term of the lease or business agreement or the term of conveyance of the right-of-way;

(III) address amendments and renewals;

(IV) address the economic return to the Indian tribe under leases, business agreements, and rights-of-way;

(V) address technical or other relevant requirements;

(VI) establish requirements for environmental review in accordance with subparagraph (C);

(VII) ensure compliance with all applicable environmental laws, including a requirement that each lease, business agreement, and right-of-way state that the lessee, operator, or right-of-way grantee shall comply with all such laws;

(VIII) identify final approval authority;

(IX) provide for public notification of final approvals;

(X) establish a process for consultation with any affected States regarding off-reservation impacts, if any, identified under subparagraph (C)(i);

(XI) describe the remedies for breach of the lease, business agreement, or right-of-way;

(XII) require each lease, business agreement, and right-of-way to include a statement that, if any of its provisions violates an express term or requirement of the tribal energy resource agreement pursuant to which the lease, business agreement, or right-of-way was executed—

(aa) the provision shall be null and void; and

(bb) if the Secretary determines the provision to be material, the Secretary may suspend or rescind the lease, business agreement, or right-of-way or take other appropriate action that the Secretary determines to be in the best interest of the Indian tribe;

(XIII) require each lease, business agreement, and right-of-way to provide that it will become effective on the date on which a copy of the executed lease, business agreement, or right-of-way is delivered to the Secretary in accordance with regulations promulgated under paragraph (8);

(XIV) include citations to tribal laws, regulations, or procedures, if any, that set out tribal remedies that must be exhausted before a petition may be submitted to the Secretary under paragraph (7)(B); *and*

[(XV) specify the financial assistance, if any, to be provided by the Secretary to the Indian tribe to assist in implementation of the tribal energy resource agreement, including environmental review of individual projects; and

[(XVI)**]**(*XV*) in accordance with the regulations promulgated by the Secretary under paragraph (8), require that the Indian tribe, as soon as practicable after receipt of a notice by the Indian tribe, give written notice to the Secretary of—

(aa) any breach or other violation by another party of any provision in a lease, business agreement, or right-of-way entered into under the tribal energy resource agreement; and

(bb) any activity or occurrence under a lease, business agreement, or right-of-way that constitutes a violation of Federal **[**or tribal**]** environmental laws.

(C) Tribal energy resource agreements submitted under paragraph (1) shall establish, and include provisions to ensure compliance with, an environmental review process that, with respect to *the approval of* a lease, business agreement, or right-of-way under this section, provides for, at a minimum—

(i) the identification and evaluation of all significant environmental effects (as compared to a no-action alternative), including effects on cultural resources;

[(ii) the identification of proposed mitigation measures, if any, and incorporation of appropriate mitigation measures into the lease, business agreement, or right-of-way;**]**

(ii) the identification of mitigation measures, if any, that, in the discretion of the Indian tribe, the Indian tribe might propose for incorporation into the lease, business agreement, or right-of-way;

(iii) a process for ensuring that—

(I) the public is informed of, and has an opportunity to comment on, the environmental impacts of the **[**proposed action**]** *approval of the lease, business agreement, or right-of-way;* and

(II) responses to relevant and substantive comments are provided, before tribal approval of the lease, business agreement, or right-of-way;

(iv) sufficient administrative support and technical capability to carry out the environmental review process; and

(v) oversight by the Indian tribe of energy development activities by any other party under any lease, business agreement, or right-of-way entered into pur-

suant to the tribal energy resource agreement, to determine whether the activities are in compliance with the tribal energy resource agreement and applicable Federal environmental laws[.]*; and*

(vi) the identification of specific classes or categories of actions, if any, determined by the Indian tribe not to have significant environmental effects.

(D) A tribal energy resource agreement between the Secretary and an Indian tribe under this subsection shall include—

(i) provisions requiring the Secretary to conduct a periodic review and evaluation to monitor the performance of the activities of the Indian tribe associated with the development of energy resources under the tribal energy resource agreement; and

(ii) if a periodic review and evaluation, or an investigation, by the Secretary of any breach or violation described in a notice provided by the Indian tribe to the Secretary in accordance with [subparagraph (B)(iii)(XVI)] *subparagraph (B)(iv)(XV),* results in a finding by the Secretary of imminent jeopardy to a physical trust asset arising from a violation of the tribal energy resource agreement or applicable Federal laws, provisions authorizing the Secretary to take actions determined by the Secretary to be necessary to protect the asset, including reassumption of responsibility for activities associated with the development of energy resources on tribal land until the violation and any condition that caused the jeopardy are corrected.

(E) Periodic review and evaluation under subparagraph (D) shall be conducted on an annual basis, except that, after the third annual review and evaluation, the Secretary and the Indian tribe may mutually agree to amend the tribal energy resource agreement to authorize the review and evaluation under subparagraph (D) to be conducted once every 2 years.

(F) A tribal energy resource agreement that takes effect pursuant to this subsection shall remain in effect to the extent any provision of the tribal energy resource agreement is consistent with applicable Federal law (including regulations), unless the tribal energy resource agreement is—

(i) rescinded by the Secretary pursuant to paragraph (7)(D)(iii)(II); or

(ii) voluntarily rescinded by the Indian tribe pursuant to the regulations promulgated under paragraph (8)(B) (or successor regulations).

(G)(i) The Secretary shall make a capacity determination under subparagraph (B)(i) not later than 120 days after the date on which the Indian tribe submits to the Secretary the tribal energy resource agreement of the Indian tribe pursuant to paragraph (1), unless the Secretary and the Indian tribe mutually agree to an extension of the time period for making the determination.

(ii) Any determination that the Indian tribe lacks the requisite capacity shall be treated as a disapproval

under paragraph (4) and, not later than 10 days after the date of the determination, the Secretary shall provide to the Indian tribe—

(I) a detailed, written explanation of each reason for the determination; and

(II) a description of the steps that the Indian tribe should take to demonstrate sufficient capacity.

(H) Notwithstanding any other provision of this section, an Indian tribe shall be considered to have demonstrated sufficient capacity under subparagraph (B)(i) to regulate the development of the specific 1 or more energy resources of the Indian tribe identified for development under the tribal energy resource agreement submitted by the Indian tribe pursuant to paragraph (1) if—

(i) the Secretary determines that—

(I) the Indian tribe has carried out a contract or compact under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.); and

(II) for a period of not less than 3 consecutive years ending on the date on which the Indian tribe submits the tribal energy resource agreement of the Indian tribe pursuant to paragraph (1) or (4)(B), the contract or compact—

(aa) has been carried out by the Indian tribe without material audit exceptions (or without any material audit exceptions that were not corrected within the 3–year period); and

(bb) has included programs or activities relating to the management of tribal land; or

(ii) the Secretary fails to make the determination within the time allowed under subparagraph (G)(i) (including any extension of time agreed to under that subparagraph).

[(3) The Secretary**]** *(3) NOTICE AND COMMENT; SECRETARIAL REVIEW.—The Secretary* shall provide notice and opportunity for public comment on tribal energy resource agreements submitted for approval under paragraph (1). The Secretary's review of a tribal energy resource agreement shall be limited to activities specified by the provisions of the tribal energy resource agreement.

[(4) If the Secretary**]***(4) ACTION IN CASE OF DISAPPROVAL.—If the Secretary* disapproves a tribal energy resource agreement submitted by an Indian tribe under paragraph (1), the Secretary shall, not later than 10 days after the **[**date of disapproval—**]** *date of disapproval, provide the Indian tribe with—*

[(A) notify the Indian tribe in writing of the basis for the disapproval;

[(B) identify what changes or other actions are required to address the concerns of the Secretary; and

[(C) provide the Indian tribe with an opportunity to revise and resubmit the tribal energy resource agreement.**]**

(A) a detailed, written explanation of—

(i) each reason for the disapproval; and

(ii) the revisions or changes to the tribal energy resource agreement necessary to address each reason; and

(B) an opportunity to revise and resubmit the tribal energy resource agreement.

[(5) If an Indian tribe] *(5) PROVISION OF DOCUMENTS TO SECRETARY.—If an Indian tribe* executes a lease or business agreement, or grants a right-of-way, in accordance with a tribal energy resource agreement [approved] *in effect* under this subsection, the Indian tribe shall, in accordance with the process and requirements under regulations promulgated under paragraph (8), provide to the Secretary—

(A) a copy of the lease, business agreement, or right-of-way document (including all amendments to and renewals of the document); and

(B) in the case of a tribal energy resource agreement or a lease, business agreement, or right-of-way that permits payments to be made directly to the Indian tribe, information and documentation of those payments sufficient to enable the Secretary to discharge the trust responsibility of the United States to enforce the terms of, and protect the rights of the Indian tribe under, the lease, business agreement, or right-of-way.

[(6)(A) In carrying out] *(6) SECRETARIAL OBLIGATIONS AND EFFECT OF SECTION.—*

(A) In carrying out this section, the Secretary shall—

(i) act in accordance with the trust responsibility of the United States relating to mineral and other trust resources; and

(ii) act in good faith and in the best interests of the Indian tribes.

[(B) Subject to] *(B) Subject only to* the provisions of subsections (a)(2), (b), and (c) waiving the requirement of Secretarial approval of leases, business agreements, and rights-of-way executed pursuant to tribal energy resource agreements [approved] *in effect* under this section, and the provisions of [subparagraph (D)] *subparagraphs (C) and (D),* nothing in this section shall absolve the United States from any responsibility to Indians or Indian tribes, including, but not limited to, those which derive from the trust relationship or from any treaties, statutes, and other laws of the United States, Executive orders, or agreements between the United States and any Indian tribe.

(C) The Secretary shall continue to fulfill the trust obligation of the United States *to perform the obligations of the Secretary under this section and* to ensure that the rights and interests of an Indian tribe are protected if—

(i) any other party to a lease, business agreement, or right-of-way violates any applicable Federal law or the terms of any lease, business agreement, or right-of-way under this section; or

(ii) any provision in a lease, business agreement, or right-of-way violates the tribal energy resource agree-

ment pursuant to which the lease, business agreement, or right-of-way was executed.

(D)(i) In this subparagraph, the term "negotiated term" means 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] *a tribal energy resource agreement in effect under this section.*

(ii) Notwithstanding subparagraph (B), the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement [approved by the Secretary] *in effect* under paragraph (2).

(iii) Nothing in this section absolves, limits, or otherwise affects the liability, if any, of the United States for any—

(I) term of any lease, business agreement, or right-of-way under this section that is not a negotiated term; or

(II) 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.

[(7) (A) In this paragraph] *(7) PETITIONS BY INTERESTED PARTIES.—*

(A) In this paragraph, the term "interested party" means any person (including an entity) that [has demonstrated] *the Secretary determines has demonstrated with substantial evidence* that an interest of the person has sustained, or will sustain, an adverse environmental impact as a result of the failure of an Indian tribe to comply with a tribal energy resource agreement of the Indian tribe [approved by the Secretary] *in effect* under paragraph (2).

(B) After exhaustion of [any tribal remedy] *all remedies (if any) provided under the laws of the Indian tribe,* and in accordance with regulations promulgated by the Secretary under paragraph (8), an interested party may submit to the Secretary a petition to review the compliance by an Indian tribe with a tribal energy resource agreement of the Indian tribe [approved by the Secretary] *in effect* under paragraph (2).

(C)(i) Not later than 20 days after the date on which the Secretary receives a petition under subparagraph (B), the Secretary shall—

(I) provide to the Indian tribe a copy of the petition; and

(II) consult with the Indian tribe regarding any noncompliance alleged in the petition.

(ii) Not later than 45 days after the date on which a consultation under clause (i)(II) takes place, the Indian tribe shall respond to any claim made in a petition under subparagraph (B).

(iii) The Secretary shall act in accordance with subparagraphs (D) and (E) only if the Indian tribe—

(I) denies, or fails to respond to, each claim made in the petition within the period described in clause (ii); or

(II) fails, refuses, or is unable to cure or otherwise resolve each claim made in the petition within a reasonable period, as determined by the Secretary, after the expiration of the period described in clause (ii).

(D)(i) Not later than 120 days after the date on which the Secretary receives a petition under subparagraph (B), the Secretary shall [determine whether the Indian tribe is not in compliance with the tribal energy resource agreement.] *determine—*

(I) whether the petitioner is an interested party; and

(II) if the petitioner is an interested party, whether the Indian tribe is not in compliance with the tribal energy resource agreement as alleged in the petition.

(ii) The Secretary may adopt procedures under paragraph (8) authorizing an extension of time, not to exceed 120 days, for making the [determination] *determinations* under clause (i) in any case in which the Secretary determines that additional time is necessary to evaluate the allegations of the petition.

(iii) Subject to subparagraph (E), if the Secretary determines that the Indian tribe is not in compliance with the tribal energy resource [agreement, the Secretary shall take such action as the Secretary determines to be necessary to ensure compliance with the tribal energy resource agreement, including] *agreement pursuant to clause (i), the Secretary shall only take such action as the Secretary determines necessary to address the claims of noncompliance made in the petition, including—*

(I) temporarily suspending any activity under a lease, business agreement, or right-of-way under this section until the Indian tribe is in compliance with the [approved] tribal energy resource agreement; or

(II) rescinding [approval of] all or part of the tribal energy resource agreement, and if all of the agreement is rescinded, reassuming the responsibility for approval of any future leases, business agreements, or rights-of-way described in [subsection (a) or (b)] *subsection 3(a)(2)(A)(i) or (b)(2)(A).*

(E) Before taking an action described in subparagraph (D)(iii), the Secretary shall—

(i) make a written determination that [describes the manner in which], *with respect to each claim made in the petition, how* the tribal energy resource agreement has been violated;

(ii) provide the Indian tribe with a written notice of the violations together with the written determination; and

(iii) before taking any action described in subparagraph (D)(iii) or seeking any other remedy, provide the Indian tribe with a hearing and a reasonable opportunity to attain compliance with the tribal energy resource agreement.

(F) An Indian tribe described in subparagraph (E) shall retain all rights to appeal under any regulation promulgated by the Secretary.

(G) Notwithstanding any other provision of this paragraph, the Secretary shall dismiss any petition from an interested party that has agreed with the Indian tribe to a resolution of the claims presented in the petition of that party.

(8) Not later than 1 year after August 8, 2005, the Secretary shall promulgate regulations that implement this subsection, including—

(A) criteria to be used in determining the capacity of an Indian tribe under paragraph (2)(B)(i), including the experience of the Indian tribe in managing natural resources and financial and administrative resources available for use by the Indian tribe in implementing the approved tribal energy resource agreement of the Indian tribe;

(B) a process and requirements in accordance with which an Indian tribe may—

(i) voluntarily rescind a tribal energy resource agreement approved by the Secretary under this subsection; and

(ii) return to the Secretary the responsibility to approve any future lease, business agreement, or right-of-way under this subsection;

(C) provisions establishing the scope of, and procedures for, the periodic review and evaluation described in subparagraphs (D) and (E) of paragraph (2), including provisions for review of transactions, reports, site inspections, and any other review activities the Secretary determines to be appropriate; and

(D) provisions describing final agency actions after exhaustion of administrative appeals from determinations of the Secretary under paragraph (7).

(f) NO EFFECT ON OTHER LAW.—Nothing in this section affects the application of—

(1) any Federal environmental law;

(2) the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.); or

(3) except as otherwise provided in this chapter, the Indian Mineral Development Act of 1982 (25 U.S.C. 2101 et seq.).

(g) FINANCIAL ASSISTANCE IN LIEU OF ACTIVITIES BY THE SECRETARY.—

(1) IN GENERAL.—Any amounts that the Secretary would otherwise expend to operate or carry out any program, function, service, or activity (or any portion of a program, function, service, or activity) of the Department that, as a result of an Indian tribe carrying out activities under a tribal energy resource agreement, the Secretary does not expend, the Secretary shall, at the request of the Indian tribe, make available to the Indian tribe in accordance with this subsection.

(2) ANNUAL FUNDING AGREEMENTS.—The Secretary shall make the amounts described in paragraph (1) available to an Indian tribe through an annual written funding agreement that

is negotiated and entered into with the Indian tribe that is separate from the tribal energy resource agreement.

(3) EFFECT OF APPROPRIATIONS.—Notwithstanding paragraph (1)—

(A) the provision of amounts to an Indian tribe under this subsection is subject to the availability of appropriations; and

(B) the Secretary shall not be required to reduce amounts for programs, functions, services, or activities that serve any other Indian tribe to make amounts available to an Indian tribe under this subsection.

(4) DETERMINATION.—

(A) IN GENERAL.—The Secretary shall calculate the amounts under paragraph (1) in accordance with the regulations adopted under section 103(b) of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2012.

(B) APPLICABILITY.—The effective date or implementation of a tribal energy resource agreement under this section shall not be delayed or otherwise affected by—

(i) a delay in the promulgation of regulations under section 103(b) of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2012;

(ii) the period of time needed by the Secretary to make the calculation required under paragraph (1); or

(iii) the adoption of a funding agreement under paragraph (2).

(h) CERTIFICATION OF TRIBAL ENERGY DEVELOPMENT ORGANIZATION.—

(1) IN GENERAL.—Not later than 90 days after the date on which an Indian tribe submits an application for certification of a tribal energy development organization in accordance with regulations promulgated under section 103(b) of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2012, the Secretary shall approve or disapprove the application.

(2) REQUIREMENTS.—The Secretary shall approve an application for certification if—

(A)(i) the Indian tribe has carried out a contract or compact under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.); and

(ii) for a period of not less than 3 consecutive years ending on the date on which the Indian tribe submits the application, the contract or compact—

(I) has been carried out by the Indian tribe without material audit exceptions (or without any material audit exceptions that were not corrected within the 3-year period); and

(II) has included programs or activities relating to the management of tribal land; and

(B)(i) the tribal energy development organization is organized under the laws of the Indian tribe and subject to the jurisdiction and authority of the Indian tribe;

(ii) the majority of the interest in the tribal energy development organization is owned and controlled by the Indian

tribe (or the Indian tribe and 1 or more other Indian tribes); and

(iii) the organizing document of the tribal energy development organization requires that the Indian tribe (or the Indian tribe and 1 or more other Indian tribes) own and control at all times a majority of the interest in the tribal energy development organization.

(3) ACTION BY SECRETARY.—If the Secretary approves an application for certification pursuant to paragraph (2), the Secretary shall, not more than 10 days after making the determination—

(A) issue a certification stating that—

(i) the tribal energy development organization is organized under the laws of the Indian tribe and subject to the jurisdiction and authority of the Indian tribe;

(ii) the majority of the interest in the tribal energy development organization is owned and controlled by the Indian tribe (or the Indian tribe and 1 or more other Indian tribes);

(iii) the organizing document of the tribal energy development organization requires that the Indian tribe (or the Indian tribe and 1 or more other Indian tribes) own and control at all times a majority of the interest in the tribal energy development organization; and

(iv) the certification is issued pursuant this subsection;

(B) deliver a copy of the certification to the Indian tribe; and

(C) publish the certification in the Federal Register.

(i) SOVEREIGN IMMUNITY.—Nothing in this section waives the sovereign immunity of an Indian tribe.

[(g)**]**(*j*) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary such sums as are necessary for each of fiscal years 2006 through 2016 to carry out this section and to make grants or provide other appropriate assistance to Indian tribes to assist the Indian tribes in developing and implementing tribal energy resource agreements in accordance with this section.

25 U.S.C. § 3506 (Energy Policy Act of 1992)

§3506. Wind and hydropower feasibility study

* * * * * * *

(c) REPORT.—Not later than 1 year after August 8, 2005, the Secretary of Energy, the Secretary, and the Secretary of the Army shall submit to Congress a report that describes the results of the study, including—

* * * * * * *

(3) if found feasible, recommendations for a demonstration project to be carried out by the Western Area Power Administration, in partnership with an Indian tribal government or tribal **[**energy resource development**]** *energy development* organization, and Western Area Power Administration customers to demonstrate the feasibility and potential of using wind energy

produced on Indian land to supply firming energy to the Western Area Power Administration; and

The Energy Policy Act of 1992 (25 U.S.C. § 3501 et seq.)

* * * * * * *

SEC. 2607. APPRAISALS.

(a) IN GENERAL.—For any transaction that requires approval of the Secretary and involves mineral or energy resources held in trust by the United States for the benefit of an Indian tribe or by an Indian tribe subject to Federal restrictions against alienation, any appraisal relating to fair market value of those resources required to be prepared under applicable law may be prepared by—

(1) the Secretary;

(2) the affected Indian tribe; or

(3) a certified, third-party appraiser pursuant to a contract with the Indian tribe.

(b) SECRETARIAL REVIEW AND APPROVAL.—Not later than 45 days after the date on which the Secretary receives an appraisal prepared by or for an Indian tribe under paragraph (2) or (3) of subsection (a), the Secretary shall—

(1) review the appraisal; and

(2) approve the appraisal unless the Secretary determines that the appraisal fails to meet the standards set forth in regulations promulgated under subsection (d).

(c) NOTICE OF DISAPPROVAL.—If the Secretary determines that an appraisal submitted for approval under subsection (b) should be disapproved, the Secretary shall give written notice of the disapproval to the Indian tribe and a description of—

(1) each reason for the disapproval; and

(2) how the appraisal should be corrected or otherwise cured to meet the applicable standards set forth in the regulations promulgated under subsection (d).

(d) REGULATIONS.—The Secretary shall promulgate regulations to carry out this section, including standards the Secretary shall use for approving or disapproving the appraisal described in subsection (a).

16 U.S.C. § 800 (Federal Power Act)

§ 800. Issuance of preliminary permits or licenses

(a) PREFERENCE.—In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by [States and municipalities] *States, Indian tribes, and municipalities,* provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

The Energy Policy and Conservation Act (42 U.S.C. 6321 et seq.)

* * * * * * *

SEC. 367. INDIAN ENERGY EFFICIENCY PROGRAM.

(a) DEFINITION OF INDIAN TRIBE.—In this section, the term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(b) PURPOSE.—The purpose of the grants provided under subsection (d) shall be to assist Indian tribes in implementing strategies—

(1) to reduce fossil fuel emissions created as a result of activities within the jurisdictions of eligible entities in a manner that—

(A) is environmentally sustainable; and

(B) to the maximum extent practicable, maximizes benefits for Indian tribes and tribal members;

(2) to increase the energy efficiency of Indian tribes and tribal members; and

(3) to improve energy efficiency in—

(A) the transportation sector;

(B) the building sector; and

(C) other appropriate sectors.

(c) TRIBAL ALLOCATION.—Of the amount of funds authorized to be appropriated for each fiscal year under section 365(f) to carry out this part, the Secretary shall allocate not less than 2.5 percent of the funds for each fiscal year to be distributed to Indian tribes in accordance with subsection (d).

(d) GRANTS.—Of the amounts available for distribution under subsection (c), the Secretary shall establish a competitive process for providing grants under this section that gives priority to projects that—

(1) increase energy efficiency and energy conservation rather than new energy generation projects;

(2) integrate cost-effective renewable energy with energy efficiency;

(3) move beyond the planning stage and are ready for implementation;

(4) clearly articulate and demonstrate the ability to achieve measurable goals;

(5) have the potential to make an impact in the government buildings, infrastructure, communities, and land of an Indian tribe; and

(6) maximize the creation or retention of jobs on Indian land.

(e) USE OF FUNDS.—An Indian tribe may use a grant received under this section to carry out activities to achieve the purposes described in subsection (b), including—

(1) the development and implementation of energy efficiency and conservation strategies;

(2) the retention of technical consultant services to assist the Indian tribe in the development of an energy efficiency and conservation strategy, including—

(A) the formulation of energy efficiency, energy conservation, and energy usage goals;

(B) the identification of strategies to achieve the goals—

(i) through efforts to increase energy efficiency and reduce energy consumption; and

(ii) by encouraging behavioral changes among the population served by the Indian tribe;

(C) the development of methods to measure progress in achieving the goals;

(D) the development and publication of annual reports to the population served by the eligible entity describing—

(i) the strategies and goals; and

(ii) the progress made in achieving the strategies and goals during the preceding calendar year; and

(E) other services to assist in the implementation of the energy efficiency and conservation strategy;

(3) the implementation of residential and commercial building energy audits;

(4) the establishment of financial incentive programs for energy efficiency improvements;

(5) the provision of grants for the purpose of performing energy efficiency retrofits;

(6) the development and implementation of energy efficiency and conservation programs for buildings and facilities within the jurisdiction of the Indian tribe, including—

(A) the design and operation of the programs;

(B) the identification of the most effective methods of achieving maximum participation and efficiency rates;

(C) the education of the members of an Indian tribe;

(D) the measurement and verification protocols of the programs; and

(E) the identification of energy efficient technologies;

(7) the development and implementation of programs to conserve energy used in transportation, including—

(A) the use of—

(i) flextime by employers; or

(ii) satellite work centers;

(B) the development and promotion of zoning guidelines or requirements that promote energy efficient development;

(C) the development of infrastructure, including bike lanes, pathways, and pedestrian walkways;

(D) the synchronization of traffic signals; and

(E) other measures that increase energy efficiency and decrease energy consumption;

(8) the development and implementation of building codes and inspection services to promote building energy efficiency;

(9) the application and implementation of energy distribution technologies that significantly increase energy efficiency, including—

(A) distributed resources; and

(B) district heating and cooling systems;

(10) the implementation of activities to increase participation and efficiency rates for material conservation programs, including source reduction, recycling, and recycled content procurement programs that lead to increases in energy efficiency;

(11) the purchase and implementation of technologies to reduce, capture, and, to the maximum extent practicable, use

methane and other greenhouse gases generated by landfills or similar sources;

(12) the replacement of traffic signals and street lighting with energy-efficient lighting technologies, including—

(A) light-emitting diodes; and

(B) any other technology of equal or greater energy efficiency;

(13) the development, implementation, and installation on or in any government building of the Indian tribe of onsite renewable energy technology that generates electricity from renewable resources, including—

(A) solar energy;

(B) wind energy;

(C) fuel cells; and

(D) biomass; and

(14) any other appropriate activity, as determined by the Secretary, in consultation with—

(A) the Secretary of the Interior;

(B) the Administrator of the Environmental Protection Agency;

(C) the Secretary of Transportation;

(D) the Secretary of Housing and Urban Development; and

(E) Indian tribes.

(f) GRANT APPLICATIONS.—

(1) IN GENERAL.—

(A) APPLICATION.—To apply for a grant under this section, an Indian tribe shall submit to the Secretary a proposed energy efficiency and conservation strategy in accordance with this paragraph.

(B) CONTENTS.—A proposed strategy described in subparagraph (A) shall include a description of—

(i) the goals of the Indian tribe for increased energy efficiency and conservation in the jurisdiction of the Indian tribe; and

(ii) the manner in which—

(I) the proposed strategy complies with the restrictions described in subsection (e); and

(II) a grant will allow the Indian tribe fulfill the goals of the proposed strategy.

(2) APPROVAL.—

(A) IN GENERAL.—The Secretary shall approve or disapprove a proposed strategy under paragraph (1) by not later than 120 days after the date of submission of the proposed strategy.

(B) DISAPPROVAL.—If the Secretary disapproves a proposed strategy under paragraph

(1)—

(i) the Secretary shall provide to the Indian tribe the reasons for the disapproval; and

(ii) the Indian tribe may revise and resubmit the proposed strategy as many times as necessary, until the Secretary approves a proposed strategy.

(C) REQUIREMENT.—The Secretary shall not provide to an Indian tribe a grant under this section until a proposed strategy is approved by the Secretary.

(3) LIMITATIONS ON USE OF FUNDS.—Of the amounts provided to an Indian tribe under this section, an Indian tribe may use for administrative expenses, excluding the cost of the reporting requirements of this section, an amount equal to the greater of—

(A) 10 percent of the administrative expenses; or

(B) $75,000.

(4) ANNUAL REPORT.—Not later than 2 years after the date on which funds are initially provided to an Indian tribe under this section, and annually thereafter, the Indian tribe shall submit to the Secretary a report describing—

(A) the status of development and implementation of the energy efficiency and conservation strategy; and (B) to the maximum extent practicable, an assessment of energy efficiency gains within the jurisdiction of the Indian tribe.

42 U.S.C. § 6863 (Energy Conservation and Production Act)

§ 6863. Weatherization program

* * * * * * *

(d) DIRECT GRANTS TO LOW-INCOME MEMBERS OF INDIAN TRIBAL ORGANIZATIONS OR ALTERNATE SERVICE ORGANIZATIONS; APPLICATION FOR FUNDS.—

[(1) Notwithstanding any other provision of this part, in any State in which the Secretary determines (after having taken into account the amount of funds made available to the State to carry out the purposes of this part) that the low-income members of an Indian tribe are not receiving benefits under this part that are equivalent to the assistance provided to other low-income persons in such State under this part, and if he further determines that the members of such tribe would be better served by means of a grant made directly to provide such assistance, he shall reserve from sums that would otherwise be allocated to such State under this part not less than 100 percent, nor more than 150 percent, of an amount which bears the same ratio to the State's allocation for the fiscal year involved as the population of all low-income Indians for whom a determination under this subsection has been made bears to the population of all low-income persons in such State.]

(1) RESERVATION OF AMOUNTS.—

(A) IN GENERAL.—Subject to subparagraph (B) and notwithstanding any other provision of this part, the Secretary shall reserve from amounts that would otherwise be allocated to a State under this part not less than 100 percent, but not more than 150 percent, of an amount which bears the same proportion to the allocation of that State for the applicable fiscal year as the population of all low-income members of an Indian tribe in that State bears to the population of all low-income individuals in that State.

(B) RESTRICTIONS.—Subparagraph (A) shall apply only if—

(i) the tribal organization serving the low-income members of the applicable Indian tribe requests that the Secretary make a grant directly; and

(ii) the Secretary determines that the low-income members of the applicable Indian tribe would be equally or better served by making a grant directly than a grant made to the State in which the low-income members reside.

(2) [The sums] *ADMINISTRATION.—The amounts* reserved by the Secretary [on the basis of his determination] under this subsection shall be granted to the tribal organization serving the [individuals for whom such a determination has been made] *low-income members of the Indian tribe,* or, where there is no tribal organization, to such other entity as [he] *the Secretary* determines has the capacity to provide services pursuant to this part.

(3) [In order] *APPLICATION.—In order* for a tribal organization or other entity to be eligible for a grant for a fiscal year under this subsection, it shall submit to the Secretary an application meeting the requirements set forth in section 6864 of this title.

(e) TRANSFER OF FUNDS.—Notwithstanding any other provision of law, the Secretary may transfer to the Director sums appropriated under this part to be utilized in order to carry out programs, under section 222(a)(12) of the Economic Opportunity Act of 1964 [42 U.S.C. 2809(a)(12)], which further the purpose of this part.

The Tribal Forest Protection Act of 2004 (25 U.S.C. § 3115a)

* * * * * * *

SEC. 2. TRIBAL FOREST ASSETS PROTECTION.

(a) DEFINITIONS.—[In this section] *In this Act:*

* * * * * * *

SEC. 3. TRIBAL BIOMASS DEMONSTRATION PROJECT.

(a) STEWARDSHIP CONTRACTS OR SIMILAR AGREEMENTS.—For each of fiscal years 2013 through 2017, the Secretary shall enter into stewardship contracts or similar agreements (excluding direct service contracts) with Indian tribes to carry out demonstration projects to promote biomass energy production (including biofuel, heat, and electricity generation) on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land.

(b) DEMONSTRATION PROJECTS.—In each fiscal year for which projects are authorized, at least 4 new demonstration projects that meet the eligibility criteria described in subsection (c) shall be carried out under contracts or agreements described in subsection (a).

(c) ELIGIBILITY CRITERIA.—To be eligible to enter into a contract or agreement under this section, an Indian tribe shall submit to the Secretary an application—

(1) containing such information as the Secretary may require; and

(2) that includes a description of—

(A) the Indian forest land or rangeland under the jurisdiction of the Indian tribe; and

(B) the demonstration project proposed to be carried out by the Indian tribe.

(d) SELECTION.—In evaluating the applications submitted under subsection (c), the Secretary shall—

(1) take into consideration—

(A) the factors set forth in paragraphs (1) and (2) of section 2(e); and

(B) whether a proposed project would—

(i) increase the availability or reliability of local or regional energy;

(ii) enhance the economic development of the Indian tribe;

(iii) result in or improve the connection of electric power transmission facilities serving the Indian tribe with other electric transmission facilities;

(iv) improve the forest health or watersheds of Federal land or Indian forest land or rangeland;

(v) demonstrate new investments in infrastructure; or

(vi) otherwise promote the use of woody biomass; and

(2) exclude from consideration any merchantable logs that have been identified by the Secretary for commercial sale.

(e) IMPLEMENTATION.—The Secretary shall—

(1) ensure that the criteria described in subsection (c) are publicly available by not later than 120 days after the date of enactment of this section; and

(2) to the maximum extent practicable, consult with Indian tribes and appropriate intertribal organizations likely to be affected in developing the application and otherwise carrying out this section.

(f) REPORT.—Not later than September 20, 2015, the Secretary shall submit to Congress a report that describes, with respect to the reporting period—

(1) each individual tribal application received under this section; and

(2) each contract and agreement entered into pursuant to this section.

(g) INCORPORATION OF MANAGEMENT PLANS.—In carrying out a contract or agreement under this section, on receipt of a request from an Indian tribe, the Secretary shall incorporate into the contract or agreement, to the maximum extent practicable, management plans (including forest management and integrated resource management plans) in effect on the Indian forest land or rangeland of the respective Indian tribe.

(h) TERM.—A contract or agreement entered into under this section—

(1) shall be for a term of not more than 20 years; and

(2) may be renewed in accordance with this section for not more than an additional 10 years.

25 U.S.C. § 415

§ 415. Leases of restricted lands

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(e) LEASES OF RESTRICTED LANDS FOR THE NAVAJO NATION.—

(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto[, except a lease for], *including a lease for* the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

[(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and]

(A) in the case of a business or agricultural lease, 99 years;

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations[.]*; and*

(C) in the case of a lease for the exploration, development, or extraction of mineral resource (including geothermal resources), 25 years, except that—

(i) any such lease may include an option to renew for 1 additional term of not to exceed 25 years; and

(ii) any such lease for the exploration, development, or extraction of an oil or gas resource shall be for a term of not to exceed 10 years, plus such additional period as the Navajo Nation determines to be appropriate in any case in which an oil or gas resource is produced in a paying quantity.

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