

NATIVE AMERICAN ENERGY ACT

OCTOBER 1, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 538]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 538) to facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 538 is to facilitate the development of energy on Indian lands by reducing federal regulations that impede tribal development of Indian lands.

BACKGROUND AND NEED FOR LEGISLATION

Obstacles to Indian Energy Development

Tribes and individual Indian landowners regularly encounter obstacles not encountered by private and state landowners in the development of their lands. In general, federal law requires the approval of the Secretary of the Interior (generally through the Bureau of Indian Affairs (BIA)) for a tribe or individual Indian to execute a lease agreement on land the United States holds in trust for the respective tribe or individual. Such is the case with respect to energy development on Indian trust lands. Under the Indian Land

Mineral Leasing Act of 1982 (25 U.S.C. 2101 et seq.), a tribe or individual Indian may lease their trust lands for mineral development “*subject to the approval of the Secretary.*” Pursuant to this authority, the Department of the Interior developed sprawling rules for the approval of leases of Indian lands. The rules often trigger National Environmental Policy Act (“NEPA”) reviews, lengthy appraisals, expensive applications for permits to drill, and numerous other layers of dilatory bureaucratic review often involving multiple agencies. Each layer of review gives federal or private special interests an opportunity to interfere, delay, appeal, or sue to slow or stop permitting of natural resource development on Indian lands.

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

In one example, the Chairman of the Crow tribe in 2013 stated the following:

BIA records for surface and mineral ownership are often erroneous, missing, and out of date. These problems cause significant delay in preparation of environmental documents and land records necessary for project evaluation and development. The BIA lacks the staffing necessary to provide accurate information on Reservation surface and mineral ownership, and to resolve additional questions that arise. This makes our projects less competitive with off-reservation development. Many companies view this, in addition to other problems, as another prohibitive cost of doing business on the Crow Reservation. . . . However, despite our best efforts, BIA staff shortages and [Office of Special Trustee] appraisal requirements have resulted in a much more difficult and time-consuming process in developing a large energy project on the Crow Reservation than would be the case off-reservation. The delays and added costs have hindered the development of energy projects of all scales in the past, and have been a major source of frustration for project developers as well as for the Crow Nation and its citizens.¹

A representative of the Southern Ute Indian Tribe in 2014 described the delays inherent in the BIA’s review of some of its energy-related documents. As of April 30, 2014, the tribe had been waiting at least five years for the BIA to review 81 pipeline rights-of-way agreements; 11 of the 81 rights-of-way applications had been under review for eight years. According to the Southern Ute witness, had these rights-of-way applications been approved in a timely manner, the tribe would have received revenue through various sources, including tribal permitting fees, oil and gas severance

¹H.R. 1548, Native American Energy Act. Statement for the Record of Chairman Darren Old Coyote, Crow Nation. Hearing before Subcommittee on Indian and Alaska Native Affairs, 113th Congress (2013).

taxes, and royalties. The official noted that, during the period of delay, prices for natural gas rose to an historic high but had since declined. Therefore, the official reported that much of the estimated \$95 million in foregone revenue would never be recovered by the tribe.²

On June 8, 2015, the Government Accountability Office (GAO) released a report titled *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*.³ In its report, the GAO documented serious shortcomings in the Interior Department's administration of energy development on Indian lands, shortcomings that "can increase costs and project development times, resulting in missed development opportunities, lost revenue, and jeopardized viability of projects."⁴

For example, the GAO described how one tribe estimated it had lost out on more than \$95 million in revenues it could have earned due to delays. Further, as the report states, "According to Interior officials, while the potential for oil and gas development can be identical regardless of the type of land ownership—such as state, private or Indian—the added complexity of the federal process stops many developers from pursuing Indian oil and gas resources for development."⁵

The GAO had found that ". . . in 2014, the agency developed the Realty Tracking System. According to BIA officials, this system provides the data needed to track reviews of surface leases. However the system does not track information for oil or gas leases or other key review activities associated with energy development, such as ROW [right-of-way] agreements, and does not include comprehensive data on existing surface leases under review."⁶

Recent changes in federal Indian law concerning energy

The Energy Policy Act of 2005 (25 U.S.C. 3501 et seq.) authorized tribes to enter into Tribal Energy Resource Agreements (TERA) with the Secretary of the Interior. Under a TERA, a tribe would develop energy leasing rules that, after review and approval by the Secretary of the Interior, would govern the tribe's leasing of its lands for energy development purposes. Under a TERA approved by the Secretary, a tribe could execute energy leases on its lands without review and approval by the BIA and without day-to-day supervision of the lease by the government except the Secretary's duty to monitor the tribe's compliance with the TERA.

After a decade since passage, no tribe has successfully entered into a TERA with the Secretary. The GAO report cited a few reasons, which include: (1) uncertainty about TERA regulations; (2) limited tribal capacity and costs associated with assuming activities currently conducted by federal agencies; and (3) a complex application process.⁷

²S. 2132, the Indian Tribal Energy and Self-Determination Act Amendments. Statement of the Honorable James Mike Olguin, Acting Chairman, Southern Ute Indian Tribal Council on behalf of the Southern Ute Indian Tribe, 113th Congress.

³GAO-15-502.

⁴Id. at 1.

⁵Id. at 24.

⁶Id. at 23.

⁷See GAO-15-502 at 32.

Energy resources on Indian lands

The Department of the Interior holds 56 million acres of land in trust or restricted status for the benefit of American Indian tribes and individual Indians. In Alaska, Alaska Native Corporations (ANCs) own 44 million acres of fee land (not under the jurisdiction of the Department of the Interior). The ANCs obtained these lands in settlement of their aboriginal land claims under the Alaska Native Claims Settlement Act of 1971 (ANCSA, 43 U.S.C. 1617 et seq.).

A number of Indian reservations contain large accumulations of known and prospective mineral resources. In 2013 alone, royalty revenues paid to Indian tribes and individual Indian allottees from mineral development was in excess of \$970 million.⁸ The two largest components of this amount came from the sale of nearly 30 million barrels of oil and more than 200 billion cubic feet of gas.

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

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

Additionally, there are high wind and solar prospects in a number of Indian reservations. In 2013, the Department issued a final rule⁹ revising surface (non-mineral) leasing of Indian trust lands, including streamlining for approval of wind and solar projects. Also, wind and solar industries have been heavily subsidized by the government. In spite of these efforts, only one significant wind project is generating power on tribal lands.¹⁰ The GAO report cited, as previously observed, that in 2011, the Rosebud Sioux Tribe in South Dakota reported that it took 18 months for the BIA to review a wind lease.

Hydraulic fracturing

One of the major threats to oil and gas development on Indian lands is the Obama Administration's rule to regulate hydraulic fracturing (HF) on public lands, a rule promulgated by the Bureau of Land Management (BLM) of the Department of the Interior. For the purposes of this rule, the BLM has deemed public lands to include land held in trust for Indians. Though title to Indian trust lands is owned by the federal government in a technical legal sense, the beneficial interest in such lands is vested *exclusively* in the Indian beneficiaries. In other words, the public does not have a legal right to the use of Indian trust lands. The BLM's HF rule turns this fundamental tenet of federal Indian policy on its head.

⁸ Fiscal Year 2016 Budget Justification, Bureau of Indian Affairs, IA-CED-8.

⁹ 25 C.F.R. Part 162.

¹⁰ <https://www.hcn.org/articles/federal-agency-shortcomings-stalling-solar-wind-tribal-winds>

What is remarkable is the Obama Administration's inconsistency in its treatment of Indian trust lands. For purposes of mineral development, the Administration treats Indian trust lands as public land. But for purposes of the cultivation and commercial sale of marijuana—activities prohibited by federal criminal law—the Obama Administration has determined to use its discretion not to enforce such laws on Indian lands on the grounds that such lands are uniquely under the sovereign control of their tribal owners.¹¹ On the surface, it would appear the Administration believes the production and sale of illegal drugs presents a better long-term economic model for Indian tribes to follow than mineral extraction. Aside from the question whether this is sound federal Indian policy, the Administration's view regarding the status of Indian lands—not “sovereign” for energy development but “sovereign” for marijuana production—is inconsistent.

In an April 19, 2012, Subcommittee on Indian and Alaska Native Affairs oversight hearing, tribal leaders testified that the proposed HF rule could further drive oil and gas operators from Indian lands and deprive historically impoverished tribes of a needed source of private investment, tribal royalty revenues, and high-wage jobs. Tribes opposed to the proposed rule lodged three basic objections: (1) the Department wrongly considers land it holds in trust for Indians to be “public lands” for the purpose of the draft rule; (2) the BLM did not adequately consult with tribes in violation of Administration policy and a Secretarial Order; and (3) the rule will result in new delays and paperwork burdens and will thus drive industry away from leasing Indian lands. As one tribal witness explained, “BLM's proposed rule to address public outcry for activities on public lands overreaches its goal and infringes on tribal sovereign authority to make decisions concerning development on reservation lands.”¹²

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

More recently, on July 15, 2015, the Subcommittee on Energy and Mineral Resources held an oversight hearing to contemplate the impacts of BLM's final rule¹³ regulating hydraulic fracturing on Federal lands.¹⁴ In the hearing, a tribal leader testified that the final rule wrongly fails to separate tribal lands from public lands.¹⁵

Need for H.R. 538

The Native American Energy Act addresses concerns various Indian tribal and Alaska Native leaders brought to the attention of the Committee in previous hearings and consultations. H.R. 538

¹¹ See Memo from U.S. Department of Justice Executive Office for United States Attorneys to All U.S. Attorneys, dated October 28, 2014; See Also, “U.S. won't stop Native Americans from growing, selling pot on their lands,” by Timothy M. Phelps, Los Angeles Times, December 11, 2014.

¹² <http://naturalresources.house.gov/uploadedfiles/showtestimony04.19.12.pdf>

¹³ 80 Fed. Reg. 16128.

¹⁴ The Future of Hydraulic Fracturing on Federally Managed Lands. Hearing before the Subcommittee on Energy and Mineral Resources, 114th Congress (2015).

¹⁵ *Id.*, 4.

helps tribes and Alaska Natives expedite and streamline the leasing and development of energy and other natural resources (such as timber) in cases where federal laws or policies are a hindrance to them. A section-by-section analysis follows to explain the specific provisions to improve tribal self-governance over natural resources held in trust for the benefit of their communities and for future generations of American Indians and Alaska Natives.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 sets forth the short title, the “Native American Energy Act.”

Section 2. Appraisals

Section 2 sets forth that an appraisal of Indian land, at the option of a tribe, is permitted to be conducted by the Secretary of the Interior, the tribe, or a certified third-party appraiser. The Secretary must act within 30 days by both reviewing the appraisal and providing the Indian tribe a written notice of approval or disapproval. Should the Secretary fail to approve or disapprove an appraisal within 60 days, the appraisal of the Indian land shall be deemed approved.

Section 2 further provides that an Indian tribe may waive any appraisal as long as the tribe provides the Secretary: a written resolution, statement, or unambiguous indication of intent which is approved by the governing body of the tribe, and an unambiguous indication of intent must include an express waiver by the tribe of claims it may have against the United States.

Subsection (e) of section 2 sets forth that the definition of appraisal includes estimates of value. Subsection (f) sets forth that the Secretary shall develop regulations for implementing the appraisal process of Indian land for energy development. These regulations must include standards by which appraisals are approved or disapproved.

Section 3. Standardization

Section 3 directs the Secretary of the Interior to standardize how the seven bureaus within Department of Interior track oil and gas activities on Indian lands.

Section 4. Environmental reviews of major federal actions on Indian lands

Section 4 amends Section 102 of the National Environmental Policy Act of 1969¹⁶ to provide that for any environmental impact statement required for a major federal action on a tribe’s lands, such statement shall be available for public review and comment only by members of the Indian tribe and by any other individuals residing within the affected area. Section 4 additionally sets forth that the Chairman of the Council on Environmental Quality shall develop regulations to implement this section. This amendment addresses complaints from several tribes that certain federal laws—including NEPA—treat Indian-owned lands as public lands.

¹⁶42 U.S.C. 4332

Section 5. Judicial review

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

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

Section 6. Tribal biomass demonstration project

Section 6 amends the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a.) to create a demonstration project for Indian tribes to promote biomass energy production on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land. This would provide new tools to tribes to ensure neighboring federal forestlands or rangelands are healthy and do not threaten reservation lands with wildfire or disease.

Section 7. Tribal resource management plans

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

Section 8. Leases of restricted lands for the Navajo Nation

Section 8 enhances Navajo Nation leasing authority by amending subsection (e)(1) of the first section of the Long-Term Leasing Act (25 U.S.C. 415.) requires a separate review and approval by the Secretary of the Interior for each non-mineral lease of a tribe's land, triggering a lengthy, detailed review by the federal bureaucracy, and the potential preparation of an environmental review under NEPA. In the 112th Congress, the HEARTH Act¹⁷ was enacted to allow any tribe to develop non-mineral leasing rules, and when such rules are approved by the Secretary, the tribe may then execute leases without further Departmental involvement. 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 max-

¹⁷ See Public Law 112–151, the *Helping Expedite and Advance Responsible Tribal Homeownership Act*, 112th Congress.

imum 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.

Section 9. Nonapplicability of certain rules

Section 9 set forth that no rule promulgated by the Department of the Interior regarding hydraulic fracturing for the production of oil and gas resources shall have any effect on Indian owned land unless there is an expressed consent of the Indian beneficiary.

COMMITTEE ACTION

H.R. 538 was introduced on January 26, 2015, by Congressman Don Young (R-AK). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Energy and Mineral Resources and the Subcommittee on Indian, Insular and Alaska Native Affairs. On September 9, 2015, the Natural Resources Committee met to consider the bill. The Subcommittees were discharged by unanimous consent. Congressman Raúl M. Grijalva (D-AZ) offered Amendment designated 042 was not adopted by a bipartisan roll call vote of 10 yeas and 22 nays, as follows:

Committee on Natural Resources
U.S. House of Representatives
114th Congress

Date: 09-10-15

Recorded Vote # 1

Meeting on / Amendment on: Grijalva_042 to HR 538 (Yrep. Don Young) "Native American Energy Act"

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman		X		Mr. LaMalfa, CA		X	
<i>Mr. Grijalva, AZ, Ranking Member</i>	X			<i>Mrs. Dingell, MI</i>	X		
Mr. Young, AK		X		Mr. Denham, CA		X	
<i>Mrs. Napolitano, CA</i>				<i>Mr. Gallego, AZ</i>	X		
Mr. Gohmert, TX				Mr. Cook, CA		X	
<i>Mrs. Bordallo, Guam</i>	X			<i>Mrs. Capps, CA</i>			
Mr. Lamborn, CO		X		Mr. Westerman, AR		X	
<i>Mr. Costa, CA</i>	X			<i>Mr. Polis, CO</i>			
Mr. Wittman, VA		X		Mr. Graves, LA		X	
<i>Mr. Sablan, CNMI</i>				<i>Mr. Clay, MO</i>	X		
Mr. Fleming, IA		X		Mr. Newhouse, WA		X	
<i>Mrs. Tsongas, MA</i>	X			Mr. Zinke, MT		X	
Mr. McClintock, CA				Mr. Hice, GA			
<i>Mr. Peirluisi, Puerto Rico</i>				Ms. Radewagen, AS		X	
Mr. Thompson, PA		X		Mr. MacArthur, NJ		X	
<i>Mr. Huffman, CA</i>		X		Mr. Mooney, WV		X	
Mrs. Lummis, WY		X		Mr. Hardy, NV			
<i>Mr. Ruiz, CA</i>	X						
Mr. Benishek, MI		X					
<i>Mr. Lowenthal, CA</i>	X						
Mr. Duncan, SC		X					
<i>Mr. Cartwright, PA</i>	X						
Mr. Gosar, AZ		X					
<i>Mr. Beyer, VA</i>							
Mr. Labrador, ID		X					
<i>Mrs. Torres, CA</i>				TOTALS	10	22	

No additional amendments were offered and the bill was ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 23 yeas and 12 nays on September 10, 2015, as follows:

Committee on Natural Resources
U.S. House of Representatives
114th Congress

Date: 09-10-15

Recorded Vote # 2

Meeting on / Amendment on: **On favorably reporting H.R. 538 (Yrep. Don Young) "Native American Energy Act"**

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman	X			Mr. LaMalfa, CA	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mrs. Dingell, MI</i>		X	
Mr. Young, AK	X			Mr. Denham, CA	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Gallego, AZ</i>		X	
Mr. Gohmert, TX				Mr. Cook, CA	X		
<i>Mrs. Bordallo, Guam</i>		X		<i>Mrs. Capps, CA</i>			
Mr. Lamborn, CO	X			Mr. Westerman, AR	X		
<i>Mr. Costa, CA</i>	X			<i>Mr. Polis, CO</i>		X	
Mr. Wittman, VA	X			Mr. Graves, LA	X		
<i>Mr. Sablan, CNMI</i>				<i>Mr. Clay, MO</i>		X	
Mr. Fleming, LA	X			Mr. Newhouse, WA	X		
<i>Mrs. Tsongas, MA</i>		X		Mr. Zinke, MT	X		
Mr. McClintock, CA				Mr. Hice, GA	X		
<i>Mr. Peirluisi, Puerto Rico</i>				Ms. Radewagen, AS	X		
Mr. Thompson, PA	X			Mr. MacArthur, NJ	X		
<i>Mr. Huffman, CA</i>		X		Mr. Mooney, WV	X		
Mrs. Lummis, WY	X			Mr. Hardy, NV			
<i>Mr. Ruiz, CA</i>		X					
Mr. Benishek, MI	X						
<i>Mr. Lowenthal, CA</i>		X					
Mr. Duncan, SC	X						
<i>Mr. Cartwright, PA</i>		X					
Mr. Gosar, AZ	X						
<i>Mr. Beyer, VA</i>							
Mr. Labrador, ID	X						
<i>Mrs. Torres, CA</i>				TOTALS	23	12	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 538—Native American Energy Act

H.R. 538 would make several changes related to environmental laws, energy programs, and the management of mineral resources on Native American reservations. CBO estimates that implementing H.R. 538 would have no significant effect on federal spending. The bill would:

- Require the Department of the Interior (DOI) to act on any appraisal of energy projects required under current law within 30 days and allow tribes to waive the requirement for appraisals under specified circumstances. Based on information from DOI, CBO estimates that implementing that section would not significantly affect the federal cost of the appraisal process.
- Require DOI to use a uniform reference system for tracking oil and gas wells. DOI already uses the American Petroleum Institute's well-numbering system to identify and track oil and gas wells; therefore, CBO estimates that implementing that provision would have no cost to DOI.
- Restrict the review of and comments on environmental impact statements of projects on tribal lands to members of the tribe and residents of the area. Based on information from DOI, CBO estimates this provision would not significantly change the agency's workload and that implementing it would not have a significant affect on DOI's budget.
- Require DOI to enter into contracts for energy demonstration projects using timber from federal forests that is not marketable. Because the timber affected under the bill would not be marketable, enacting the legislation would not affect timber receipts to the federal government. Additionally, CBO estimates that implementing the projects would not have a significant effect on DOI's operations.
- Authorize the Navajo Nation to enter into commercial and agricultural leases for up to 99 years. Under the bill, the Navajo Nation also would be authorized to enter into mineral re-

source leases without DOI's approval for 25 years. Any income resulting from those leases would be paid directly to the tribal owners or to the appropriate tribal government and would not be recorded on the federal budget. Approving longer leases would not add to DOI's workload or operating costs.

- Prohibit the payment of attorneys' fees under the Equal Access to Justice Act (EAJA) for lawsuits regarding energy projects on tribal lands. Based on information about the history of such payments provided by the Government Accountability Office, CBO estimates that any savings from prohibiting such payments would be insignificant.

Because H.R. 538 would prohibit the federal government from paying attorneys' fees under the EAJA for lawsuits regarding energy projects on tribal lands, enacting the bill would affect direct spending and pay-as-you-go procedures apply. A portion of those payments comes from the Claims and Judgment Fund and is recorded in the budget as direct spending. CBO estimates that any reduction in those payments under H.R. 538 would be insignificant because historically such payments have been small. Enacting H.R. 538 would not affect revenues.

H.R. 538 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. The Congressional Budget Office estimates "[e]nacting H.R. 538 would not affect revenues."

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to facilitate the development of energy on Indian lands by reducing federal regulations that impede tribal development of Indian lands.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman believes that this bill directs an executive branch official to conduct two specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in

any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

ENERGY POLICY ACT OF 1992

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) * * *

(b) TABLE OF CONTENTS.—

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TITLE XXVI—INDIAN ENERGY RESOURCES

Sec. 2601. Definitions.

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Sec. 2607. Appraisal reforms.

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TITLE XXVI—INDIAN ENERGY RESOURCES

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SEC. 2607. APPRAISAL REFORMS.

(a) *OPTIONS TO INDIAN TRIBES.*—With respect to a transaction involving Indian land or the trust assets of an Indian tribe that requires the approval of the Secretary, any appraisal relating to fair market value required to be conducted under applicable law, regulation, or policy may be completed 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) *TIME LIMIT ON SECRETARIAL REVIEW AND ACTION.*—Not later than 30 days after the date on which the Secretary receives an appraisal conducted by or for an Indian tribe pursuant to paragraphs (2) or (3) of subsection (a), the Secretary shall—

- (1) review the appraisal; and
- (2) provide to the Indian tribe a written notice of approval or disapproval of the appraisal.

(c) *FAILURE OF SECRETARY TO APPROVE OR DISAPPROVE.*—If, after 60 days, the Secretary has failed to approve or disapprove any appraisal received, the appraisal shall be deemed approved.

(d) *OPTION TO INDIAN TRIBES TO WAIVE APPRAISAL.*—

(1) An Indian tribe wishing to waive the requirements of subsection (a), may do so after it has satisfied the requirements of paragraphs (2) and (3).

(2) An Indian tribe wishing to forego the necessity of a waiver pursuant to this section must provide to the Secretary a written resolution, statement, or other unambiguous indication of tribal intent, duly approved by the governing body of the Indian tribe.

(3) The unambiguous indication of intent provided by the Indian tribe to the Secretary under paragraph (2) must include an express waiver by the Indian tribe of any claims for damages it might have against the United States as a result of the lack of an appraisal undertaken.

(e) *DEFINITION.*—For purposes of this subsection, the term “appraisal” includes appraisals and other estimates of value.

(f) *REGULATIONS.*—The Secretary shall develop regulations for implementing this section, including standards the Secretary shall use for approving or disapproving an appraisal.

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NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

* * * * *

TITLE I—DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

* * * * *

SEC. 102. (a) *IN GENERAL.*—The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man’s environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

(b) REVIEW OF MAJOR FEDERAL ACTIONS ON INDIAN LANDS.—

(1) IN GENERAL.—For any major Federal action on Indian lands of an Indian tribe requiring the preparation of a statement under subsection (a)(2)(C), the statement shall only be available for review and comment by the members of the Indian tribe and by any other individual residing within the affected area.

(2) REGULATIONS.—The Chairman of the Council on Environmental Quality shall develop regulations to implement this section, including descriptions of affected areas for specific major Federal actions, in consultation with Indian tribes.

(3) DEFINITIONS.—In this subsection, each of the terms “Indian land” and “Indian tribe” has the meaning given that term in section 2601 of the Energy Policy Act of 1992 (25 U.S.C. 3501).

(4) CLARIFICATION OF AUTHORITY.—Nothing in the Native American Energy Act, except section 6 of that Act, shall give the Secretary any additional authority over energy projects on Alaska Native Claims Settlement Act lands.

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TRIBAL FOREST PROTECTION ACT OF 2004

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SEC. 3. TRIBAL BIOMASS DEMONSTRATION PROJECT.

(a) IN GENERAL.—For each of fiscal years 2016 through 2020, the Secretary shall enter into stewardship contracts or other agreements, other than agreements that are exclusively 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) DEFINITIONS.—The definitions in section 2 shall apply to this section.

(c) DEMONSTRATION PROJECTS.—In each fiscal year for which projects are authorized, the Secretary shall enter into contracts or other agreements described in subsection (a) to carry out at least 4 new demonstration projects that meet the eligibility criteria described in subsection (d).

(d) ELIGIBILITY CRITERIA.—To be eligible to enter into a contract or other agreement under this subsection, 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.*
- (e) *SELECTION.—In evaluating the applications submitted under subsection (c), the Secretary—*
- (1) *shall take into consideration the factors set forth in paragraphs (1) and (2) of section 2(e) of Public Law 108-278; and whether a proposed demonstration project would—*
- (A) *increase the availability or reliability of local or regional energy;*
- (B) *enhance the economic development of the Indian tribe;*
- (C) *improve the connection of electric power transmission facilities serving the Indian tribe with other electric transmission facilities;*
- (D) *improve the forest health or watersheds of Federal land or Indian forest land or rangeland; or*
- (E) *otherwise promote the use of woody biomass; and*
- (2) *shall exclude from consideration any merchantable logs that have been identified by the Secretary for commercial sale.*
- (f) *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.*
- (g) *REPORT.—Not later than one year subsequent to the date of enactment of this section, 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.*
- (h) *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 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.*
- (i) *TERM.—A stewardship contract or other 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.*
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**ACT OF AUGUST 9, 1955 (COMMONLY REFERRED TO AS
THE LONG-TERM LEASING ACT)**

AN ACT To authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Pueblo of Santa Ana (with the exception of the lands known as the "Santa Ana Pueblo Spanish Grant"), the reservation of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Moapa Indian Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Burns Paiute Reservation, the Kalispel Indian Reservation and land held in trust for the Kalispel Tribe of Indians, the Puyallup Tribe of Indians, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, the Yavapai-Prescott Community Reservations, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Viejas Indian Reservation, the Tulalip Indian Reservation, the Navajo Reservation, the Cabazon Indian Reservation, the Muckleshoot Indian Reservation and land held in trust for the Muckleshoot Indian Tribe, the Mille Lacs Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society, leases of the the lands comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington, and lands held in trust for the Las Vegas Paiute Tribe of Indians, and lands held in trust for the Twenty-nine Palms Band of Luiseno Mission Indians, and lands held in trust for the Reno Sparks Indian Colony, lands held in trust for the Torres Martinez Desert Cahuilla Indians, lands held in trust for the Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria, lands held in trust for the Confederated Tribes of the Umatilla Indian Reservation, lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon, land held in trust for the Coquille Indian Tribe, land held in trust for the Confederated Tribes of Siletz Indians, land held in trust for the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, land held in trust for the Klamath Tribes, and land held in trust for the Burns Paiute Tribe, and lands held in trust for the

Cow Creek Band of Umpqua Tribe of Indians, land held in trust for the Prairie Band Potawatomi Nation, lands held in trust for the Cherokee Nation of Oklahoma, land held in trust for the Fallon Paiute Shoshone Tribes, lands held in trust for the Pueblo of Santa Clara, land held in trust for the Yurok Tribe, land held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Yurok Tribe, lands held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Confederated Tribes of the Colville Reservation, lands held in trust for the Cahuilla Band of Indians of California, lands held in trust for the confederated Tribes of the Grand Ronde Community of Oregon, and the lands held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and leases to the Devils Lake Sioux Tribe, or any organization of such tribe, of land on the Devils Lake Sioux Reservation, and lands held in trust for Ohkay Owingeh Pueblo which may be for a term of not to exceed ninety-nine years, and except leases of land held in trust for the Morongo Band of Mission Indians which may be for a term of not to exceed 50 years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Any lease by the Tulalip Tribes, the Puyallup Tribe of Indians, the Swinomish Indian Tribal Community, or the Kalispel Tribe of Indians under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, (2) if the term of the lease does not exceed thirty years, with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the Secretary of the Interior, or (3) if the term does not exceed seventy-five years (including options to renew), and the lease is executed under tribal regulations approved by the Secretary under this clause (3).

(c) LEASES INVOLVING THE HOPI TRIBE AND THE HOPI PARTITIONED LANDS ACCOMMODATION AGREEMENT.—Notwithstanding subsection (a), a lease of land by the Hopi Tribe to Navajo Indians on the Hopi Partitioned Lands may be for a term of 75 years, and may be extended at the conclusion of the term of the lease.

(d) DEFINITIONS.—For purposes of this section—

(1) the term “Hopi Partitioned Lands” means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on the date of enactment of this subsection);

(2) the term “Navajo Indians” means members of the Navajo Tribe;

(3) the term “individually owned Navajo Indian allotted land” means a single parcel of land that—

(A) is located within the jurisdiction of the Navajo Nation;

(B) is held in trust or restricted status by the United States for the benefit of Navajo Indians or members of another Indian tribe; and

(C) was—

(i) allotted to a Navajo Indian; or

(ii) taken into trust or restricted status by the United States for an individual Indian;

(4) the term “interested party” means an Indian or non-Indian individual or corporation, or tribal or non-tribal government whose interests could be adversely affected by a tribal trust land leasing decision made by an applicable Indian tribe;

(5) the term “Navajo Nation” means the Navajo Nation government that is in existence on the date of enactment of this Act or its successor;

(6) the term “petition” means a written request submitted to the Secretary for the review of an action (or inaction) of an Indian tribe that is claimed to be in violation of the approved tribal leasing regulations;

(7) the term “Secretary” means the Secretary of the Interior;

(8) the term “tribal regulations” means regulations enacted in accordance with applicable tribal law and approved by the Secretary;

(9) the term “Indian tribe” has the meaning given such term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a); and

(10) the term “individually owned allotted land” means a parcel of land that—

(A)(i) is located within the jurisdiction of an Indian tribe;

or

(ii) is held in trust or restricted status by the United States for the benefit of an Indian tribe or a member of an Indian tribe; and

(B) is allotted to a member of an Indian tribe.

(e)(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto, except a lease for, including leases 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 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 resources, including geothermal resources, 25 years, except that any such lease may include an option to renew for one additional term not to exceed 25 years.

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

(3) The Secretary shall have the authority to approve or disapprove tribal regulations referred to under paragraph (1). The Secretary shall approve such tribal regulations if such regulations are consistent with the regulations of the Secretary under subsection (a), and any amendments thereto, and provide for an environmental review process. The Secretary shall review and approve or disapprove the regulations of the Navajo Nation within 120 days of the submission of such regulations to the Secretary. Any disapproval of such regulations by the Secretary shall be accompanied by written documentation that sets forth the basis for the disapproval. Such 120-day period may be extended by the Secretary after consultation with the Navajo Nation.

(4) If the Navajo Nation has executed a lease pursuant to tribal regulations under paragraph (1), the Navajo Nation shall provide the Secretary with—

(A) a copy of the lease and all amendments and renewals thereto; and

(B) in the case of regulations or a lease that permits payment to be made directly to the Navajo Nation, documentation of the lease payments sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (5).

(5) The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1), including the Navajo Nation. Nothing in this paragraph shall be construed to diminish the authority of the Secretary to take appropriate actions, including the cancellation of a lease, in furtherance of the trust obligation of the United States to the Navajo Nation.

(6)(A) An interested party may, after exhaustion of tribal remedies, submit, in a timely manner, a petition to the Secretary to review the compliance of the Navajo Nation with any regulations approved under this subsection. If upon such review the Secretary determines that the regulations were violated, the Secretary may take such action as may be necessary to remedy the violation, including rescinding the approval of the tribal regulations and re-assuming responsibility for the approval of leases for Navajo Nation tribal trust lands.

(B) If the Secretary seeks to remedy a violation described in subparagraph (A), the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide the Navajo Nation with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy or the rescission of the approval of the regulation involved and the reassumption of the lease approval responsibility, provide the Navajo Nation with a hearing on the record and a reasonable opportunity to cure the alleged violation.

* * * * *

DISSENTING VIEWS

Tribal lands hold great potential for domestic energy production. Yet tribes often cannot harness the full economic development potential of their natural resources because of longstanding bureaucratic hurdles. H.R. 538 aims to address some of these hurdles by proposing a number of changes to existing law or agency practice, all purportedly aimed at fostering energy development on Indian lands. While we agree that development of tribal natural resources provides an opportunity for significant economic benefits in Indian country, H.R. 538 goes far beyond the reforms necessary to achieve tribal self-determination in energy development. H.R. 538 contravenes existing environmental protections and eliminates the critical check of the judiciary on the exercise of power by other branches of government.

H.R. 538 is flawed in three significant ways. First, H.R. 538 overreaches by limiting informed decision-making at the federal level through misguided curtailment of the National Environmental Policy Act (NEPA). Section 4 of the bill would amend one of the Nation's bedrock environmental laws to limit review of and comment on proposed projects to members of the affected Indian tribe and other individuals residing within an undefined 'affected area.' This limitation severely restricts public involvement in proposed federal projects that may affect the environment—a central tenet of NEPA—thus contributing to uninformed decision making at the federal level. Arbitrarily limiting such review and comment would prevent even other Indian tribes with cultural ties in these so-called affected areas from commenting on a proposed project.

Furthermore, because "affected area" is undefined in the bill, uniform application of the term is doubtful and invites legal scrutiny by those individuals who may be negatively impacted by a proposed project but excluded from review and comment. Application could therefore lead to lawsuits that further delay development of tribal energy projects—an outcome that is contrary to the stated goal of this legislation. Notably, Section 4 is applicable to more than energy projects; it applies to any major project on Indian lands by an Indian tribe, including but not limited to, proposed mining contracts, proposed water development projects, construction of solid waste facilities, and even construction of tribal class III gaming facilities.

Second, Section 5 of the bill weakens important legal devices for those seeking environmental justice. It prevents recovery of attorneys' fees in cases challenging energy projects, and makes a claimant who fails to succeed on the merits of a suit potentially liable to the defendant for attorneys' fees and costs. These requirements make it extremely difficult, if not impossible, for members of the public—even tribal members whose homelands may be impacted by a major federal action of any kind—to prevent or seek judicial re-

dress for environmental harm caused by an energy project on Indian land. We cannot support a bill that prevents legitimate claims from being brought by victims of environmental disasters caused by energy development projects simply because they cannot afford their day in court.

Moreover, Section 5 applies to non-Indian land when a tribe partners with an energy company to develop natural resources anywhere in the United States. This troubling provision incentivizes energy companies to partner with tribes simply for the benefit of skirting NEPA and profiting from restricted judicial review, thus creating a significant loophole for virtually unregulated development.

Lastly, Section 9 of the bill specifically prevents any fracking rule promulgated by the Department of the Interior from applying to Indian lands without the express consent of the owner. In practice, this provision would create an immediate regulatory void—a concern even the Majority has acknowledged because State laws that regulate hydraulic fracturing cannot be imposed on the tribe unless the tribe expressly waives sovereignty. Adequate protection of human health and the environment in hydraulic fracturing activities on tribal lands is therefore a serious concern when tribal owners do not consent.

During Full Committee markup, Ranking Member Grijalva (D-AZ) offered an amendment that would have provided a targeted fix to the unfortunate *Carcieri v. Salazar* decision. The amendment would clarify the Secretary of the Interior’s authority to take land into trust for all federally recognized Indian tribes when the acquisitions are made for energy development purposes. Unfortunately, the amendment failed by a vote of 10–22. It has been six long years since the *Carcieri v. Salazar* decision cast a shadow over Indian Country, and—despite much rhetoric from the majority—we have still neither heard nor voted on any legislation in this Congress that would remedy the situation. As the top priority for Indian Country, the *Carcieri v. Salazar* decision must be addressed.

In sum, the judicial review limitations contained in H.R. 538 are clearly intended to chill litigation to the detriment of bona fide claimants and undermine the real “teeth” of NEPA by making the availability of injunctive relief all but disappear. For these reasons, we strongly oppose H.R. 538, a bill that would prevent full application of NEPA, as well as keep legitimate claims from being brought by victims of environmental disasters simply because they lack financial resources.

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