

NATIVE AMERICAN ENERGY ACT

OCTOBER 23, 2018.—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. 210]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 210) 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 with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Native American Energy Act”.

SEC. 2. APPRAISALS.

(a) AMENDMENT.—Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) is amended by adding at the end the following:

“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.”.

(b) CONFORMING AMENDMENT.—The table of contents of the Energy Policy Act of 1992 (42 U.S.C. 13201 note) is amended by adding at the end of the items relating to title XXVI the following:

“Sec. 2607. Appraisal reforms.”.

SEC. 3. STANDARDIZATION.

As soon as practicable after the date of the enactment of this Act, the Secretary of the Interior shall implement procedures to ensure that each agency within the Department of the Interior that is involved in the review, approval, and oversight of oil and gas activities on Indian lands shall use a uniform system of reference numbers and tracking systems for oil and gas wells.

SEC. 4. ENVIRONMENTAL REVIEWS OF MAJOR FEDERAL ACTIONS ON INDIAN LANDS.

Section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) is amended by inserting “(a) IN GENERAL.—” before the first sentence, and by adding at the end the following:

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

“(1) REVIEW AND COMMENT.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the statement required under subsection (a)(2)(C) for a major Federal action regarding an activity on Indian lands of an Indian tribe shall only be available for review and comment by—

“(i) Indian tribes in the affected area and individual members of those tribes wherever they reside;

“(ii) Other individuals who reside in the affected area; and

“(iii) State and local governments within the affected area.

“(B) EXCEPTION.—Subparagraph (A) shall not apply to a statement for a major Federal action regarding an activity on Indian lands of an Indian tribe related to gaming under the Indian Gaming Regulatory Act.

“(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.”.

SEC. 5. JUDICIAL REVIEW.

(a) TIME FOR FILING COMPLAINT.—Any energy related action must be filed not later than the end of the 60-day period beginning on the date of the final agency action. Any energy related action not filed within this time period shall be barred.

(b) DISTRICT COURT VENUE AND DEADLINE.—All energy related actions—

(1) shall be brought in the United States District Court for the District of Columbia; and

(2) shall be resolved as expeditiously as possible, and in any event not more than 180 days after such cause of action is filed.

(c) APPELLATE REVIEW.—An interlocutory order or final judgment, decree or order of the district court in an energy related action may be reviewed by the United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit Court of Appeals shall resolve such appeal as expeditiously as possible, and in any event not more than 180 days after such interlocutory order or final judgment, decree or order of the district court was issued.

(d) LIMITATION ON CERTAIN PAYMENTS.—Notwithstanding section 1304 of title 31, United States Code, no award may be made under section 504 of title 5, United States Code, or under section 2412 of title 28, United States Code, and no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay any fees or other expenses under such sections, to any person or party in an energy related action.

(e) LEGAL FEES.—In any energy related action in which the plaintiff does not ultimately prevail, the court shall award to the defendant (including any intervenor-defendants), other than the United States, fees and other expenses incurred by that party in connection with the energy related action, unless the court finds that the position of the plaintiff was substantially justified or that special circumstances make an award unjust. Whether or not the position of the plaintiff was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the energy related action for which fees and other expenses are sought.

(f) DEFINITIONS.—For the purposes of this section, the following definitions apply:

(1) AGENCY ACTION.—The term “agency action” has the same meaning given such term in section 551 of title 5, United States Code.

(2) INDIAN LAND.—The term “Indian Land” has the same meaning given such term in section 203(c)(3) of the Energy Policy Act of 2005 (Public Law 109–58; 25 U.S.C. 3501), including lands owned by Native Corporations under the Alaska Native Claims Settlement Act (Public Law 92–203; 43 U.S.C. 1601).

(3) ENERGY RELATED ACTION.—The term “energy related action” means a cause of action that—

(A) is filed on or after the effective date of this Act; and

(B) seeks judicial review of a final agency action to issue a permit, license, or other form of agency permission allowing:

(i) any person or entity to conduct activities on Indian Land, which activities involve the exploration, development, production or transportation of oil, gas, coal, shale gas, oil shale, geothermal resources, wind or solar resources, underground coal gasification, biomass, or the generation of electricity; or

(ii) any Indian Tribe, or any organization of two or more entities, at least one of which is an Indian tribe, to conduct activities involving the exploration, development, production or transportation of oil, gas, coal, shale gas, oil shale, geothermal resources, wind or solar resources, underground coal gasification, biomass, or the generation of electricity, regardless of where such activities are undertaken.

(4) ULTIMATELY PREVAIL.—The phrase “ultimately prevail” means, in a final enforceable judgment, the court rules in the party’s favor on at least one cause of action which is an underlying rationale for the preliminary injunction, administrative stay, or other relief requested by the party, and does not include circumstances where the final agency action is modified or amended by the issuing agency unless such modification or amendment is required pursuant to a final enforceable judgment of the court or a court-ordered consent decree.

SEC. 6. TRIBAL BIOMASS DEMONSTRATION PROJECT.

The Tribal Forest Protection Act of 2004 is amended by inserting after section 2 (25 U.S.C. 3115a) the following:

“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 sub-

section (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.

“SEC. 4. TRIBAL FOREST MANAGEMENT DEMONSTRATION PROJECT.

“The Secretary of the Interior and the Secretary of Agriculture may carry out demonstration projects by which federally recognized Indian tribes or tribal organizations may contract to perform administrative, management, and other functions of programs of the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a et seq.) through contracts entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).”

SEC. 7. TRIBAL RESOURCE MANAGEMENT PLANS.

Unless otherwise explicitly exempted by Federal law enacted after the date of the enactment of this Act, any activity conducted or resources harvested or produced pursuant to a tribal resource management plan or an integrated resource management plan approved by the Secretary of the Interior under the National Indian Forest Resources Management Act (25 U.S.C. 3101 et seq.) or the American Indian Agricultural Resource Management Act (25 U.S.C. 3701 et seq.) shall be considered a sustainable management practice for purposes of any Federal standard, benefit, or requirement that requires a demonstration of such sustainability.

SEC. 8. LEASES OF RESTRICTED LANDS FOR THE NAVAJO NATION.

Subsection (e)(1) of the first section of the Act of August 9, 1955 (25 U.S.C. 415(e)(1); commonly referred to as the “Long-Term Leasing Act”), is amended—

(1) by striking “, except a lease for” and inserting “, including leases for”;

(2) in subparagraph (A), by striking “25” the first place it appears and all that follows and inserting “99 years;”;

(3) in subparagraph (B), by striking the period and inserting “; and”; and

(4) by adding at the end the following:

“(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.”.

SEC. 9. NONAPPLICABILITY OF CERTAIN RULES.

No rule promulgated by the Department of the Interior regarding hydraulic fracturing used in the development or production of oil or gas resources shall have any effect on any land held in trust or restricted status for the benefit of Indians except with the express consent of the beneficiary on whose behalf such land is held in trust or restricted status.

PURPOSE OF THE BILL

The purpose of H.R. 210 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

In the energy world, Indian tribes and individual Indian landowners regularly encounter obstacles not encountered on leases of private and State lands. In general, federal law requires the approval of the Department of the Interior (DOI) before a tribal lease with an energy developer is valid. For example, under the Indian Land Mineral Leasing Act of 1982,¹ a tribe or individual Indian may only lease their trust lands for mineral development subject to the approval of the Secretary of the Interior. Pursuant to this authority, DOI has developed sprawling rules for the approval of leases of Indian lands. The rules often trigger the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.) 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 meddle, interfere, delay, appeal, or sue to slow or stop permitting of energy development on Indian lands.

In a specific example, the Acting Chairman for the Southern Ute Indian Tribe in 2014 reported that the Bureau of Indian Affairs’ (BIA) review of some of its energy-related documents took as long as eight years. As of April 30, 2014, the Tribe had been waiting for at least five years for 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 official, had these rights-of-way applications been approved in a timely manner, the Tribe would have received revenue through various sources, including permitting fees, oil and gas severance 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 offi-

¹ 25 U.S.C. 2101 et seq.

cial reported that much of the estimated \$95 million in lost revenue will never be recovered by the Tribe.²

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

In June 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 this report, GAO documented and described serious shortcomings in DOI'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, 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 Moreover, GAO noted that while BIA created a Realty Tracking System to monitor leases of Indian lands, this system does not collect oil and gas activities nor use a standard approach to collect information.

Despite the 2015 report from GAO and its work with federal agencies responsible for fulfilling the management of the development of Indian energy resources, GAO listed Indian Energy on its biennial "high risk" list for waste, fraud and abuse in March 2017. GAO stated, "BIA has in recent years continued to mismanage Indian energy resources held in trust, thereby limiting opportunities for tribes and their members to use those resources to create economic benefits and improve their communities."⁶

RECENT CHANGES IN FEDERAL INDIAN LAW CONCERNING ENERGY

The Energy Policy Act of 2005⁷ 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 an approved TERA, a tribe could execute energy leases on its lands without review and approval by BIA and without day-to-day supervision of the lease by the government except for monitoring the tribe's compliance with the TERA.

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

³GAO-15-502.

⁴Id. at 1.

⁵Id. at 24.

⁶http://www.gao.gov/highrisk/improving_federal_management_serve_tribes/why_did_study

⁷25 U.S.C. 3501 et seq.

Even after a decade, no tribe has successfully entered into a TERA with the Secretary. The 2017 GAO report cited a few reasons for this failure, including: uncertainty about TERA regulations; limited tribal capacity and costs associated with assuming activities currently conducted by federal agencies; and a complex application process.⁸

ENERGY RESOURCES ON INDIAN LANDS

DOI holds 56 million acres of land in trust or restricted status for the benefit of Indian tribes and individual Indians. In Alaska, Alaska Native Corporations (ANCs) own 44 million acres of fee land (not under the jurisdiction of DOI). The ANCs obtained these lands in settlement of their aboriginal land claims under the Alaska Native Claims Settlement Act of 1971 (ANCSA).⁹

Several Indian reservations contain large accumulations of known and prospective mineral resources. According to the BIA, in 2015, over 418,881 ownership certification transactions formed the basis for monetary distributions in the amount of \$1.1 billion in mineral royalty payments and \$210 million in surface lease and related payments.¹⁰

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 and Arctic Slope Regional Corporation own significant land interests in the 1002 Area (coastal plain) of the Arctic National Wildlife Refuge (ANWR). They plan to develop the area's prospective and large oil and gas resources to advance the economic, social, and cultural well-being of the Inupiat Eskimo people who make up the majority of residents on the North Slope of Alaska.¹¹

There are high wind and solar prospects on a number of Indian reservations.¹² In 2013, DOI issued a final rule¹³ revising surface (non-mineral) leasing of Indian trust lands, including streamlining for approval of wind and solar projects. Despite wind and solar industries' heavy subsidies by the federal government, only one significant wind project is generating power on tribal lands.¹⁴

HYDRAULIC FRACTURING

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.¹⁵

However, one of the major threats to oil and gas development on Indian lands in recent years was the Bureau of Land Management (BLM) 2015 rule to regulate hydraulic fracturing (HF) on public

⁸ See GAO-15-502 at 32.

⁹ 43 U.S.C. 1617 et seq.

¹⁰ Fiscal Year 2018 Budget Justification, Bureau of Indian Affairs at IA-RES-10.

¹¹ file:///C:/Users/lpittman/Downloads/ASRC%20ANWR%20Brochure.pdf; http://www.newsminer.com/opinion/community_perspectives/alaskans-say-yes-to-drilling-in-anwr/article_a8f798da-a751-11e7-b12f-7b6aec5b9f9.html

¹² <https://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf>, at 3.

¹³ 25 C.F.R. Part 162.

¹⁴ <https://www.hcn.org/articles/federal-agency-shortcomings-stalling-solar-wind-tribal-winds>

¹⁵ <http://www.navajotimes.com/politics/2013/0513/052313fra.php>

lands.¹⁶ This rule deemed public lands to include land held in trust for Indians. While title to Indian trust lands is owned by the federal government in a technical legal sense, the beneficial interest in such lands is vested *exclusively* in the Indian beneficiaries. In other words, the public does not have a legal right to the use of Indian trust lands. The BLM's rule turned this fundamental tenet of federal Indian policy on its head.

At 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."¹⁷

At a 2015 hearing conducted by the Subcommittee on Energy and Mineral Resources to study the impacts of BLM's final HF rule,¹⁸ a tribal leader testified that the final rule fails to separate tribal lands from public lands.¹⁹

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.

A federal judge and the Trump Administration responded to the harmful Obama Administration HF rule. On June 21, 2016, the U.S. District Court for Wyoming struck down the rule, holding that BLM lacked Congressional authority to promulgate the regulation, thus blocking the implementation of the rule.²⁰ While the regulation was on hold, in March 2017, Department of the Interior Secretary Ryan Zinke directed BLM to review the HF rule. BLM subsequently published a proposed rule to rescind the 2015 HF rule, and in December 2017, BLM published a final rule rescinding the HF rule because "it imposes administrative burdens and compliance costs that are not justified."²¹

¹⁶ 80 Fed. Reg. 16128.

¹⁷ Oversight Hearing before the Subcommittee on Indian and Alaska Native Affairs (2012). Bureau of Land Management's Hydraulic Fracturing Rule's Impacts on Indian Tribal Energy Development. Statement of T.J. Snow, Chairman of the Blackfeet Nation, 112th Congress.

¹⁸ Oversight Hearing before the Subcommittee on Energy and Mineral Resources (2015). The Future of Hydraulic Fracturing on Federally Managed Lands. 114th Congress. Serial No. 114-15.

¹⁹ *Id.* at 4.

²⁰ <https://www.aogr.com/magazine/sneak-peek-preview/u.s.-district-court-in-wyoming-rejects-blms-fracturing-rule>

²¹ <https://www.gpo.gov/fdsys/pkg/FR-2017-12-29/pdf/2017-28211.pdf>

For now, the threat of the rule has been averted through the federal courts and the Trump Administration’s plans to rescind the Obama Administration rule that has been harmful to the interests of tribes with oil and gas resources. Because of the potential for the rule to be proposed by a future Administration, Congressional action to address the needs and interests of Indian tribes is necessary.

PREVIOUS CONGRESSIONAL ACTIONS ON INDIAN ENERGY

In the 112th Congress, the Subcommittee on Indian and Alaska Native Affairs held five²² Indian energy-related hearings. In the 113th Congress, the Natural Resources Committee reported H.R. 1548, the Native American Energy Act, which was included as part of larger energy packages which passed the House of Representatives.²³

In the 114th Congress, the House passed H.R. 538, a bill identical to H.R. 210, with bipartisan support. H.R. 538 was also included in the House-passed amendment to S. 2012, the North American Energy Security and Infrastructure Act of 2016.

H.R. 210 addresses concerns various Native American leaders have brought to the attention of the Committee on Natural Resources in earlier hearings and consultations. The bill helps tribes and Alaska Natives expedite and streamline the leasing and development of energy and other natural resources in cases where federal laws or policies are a hindrance to them.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

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

Section 2. Appraisals

Section 2 improves the process for appraising land and other assets held in trust by the United States for the benefit of Indian tribes. Under this provision, an appraisal of land or resources held in trust for the benefit of a tribe may, at the option of the tribe, be conducted by the Secretary of the Interior, the tribe, or a certified third-party appraiser. The Secretary is required to review and act on any appraisal submitted by a tribe or third-party appraiser within 30 days, and after 60 days of inaction by the Secretary, such appraisal is deemed approved.

Section 2 further provides, in the advancement of tribal self-determination and economic freedom, for an Indian tribe to have an option to waive any appraisal of its trust lands. For any such waiver to be effective, the tribe must clearly waive the necessity for an

²² Oversight Hearing before the Subcommittee on Indian and Native Alaska Affairs (2011). Tribal development of energy resources and the creation of energy jobs on Indian lands. 112th Congress; Legislative Hearing on H.R. 3975 before Subcommittee on Indian and Native Alaska Affairs (2012). 112th Congress; Oversight Field Hearing before the Subcommittee on Indian and Alaska Native Affairs (2012). Federal Laws and Policies Affecting Energy Prices in Rural Alaska and their Effects on Native Villages. 112th Congress; Oversight Hearing before the Subcommittee on Indian and Alaska Native Affairs (2012). Bureau of Land Management’s Hydraulic Fracturing Rule’s Impacts on Indian Tribal Energy Development. 112th Congress.

²³ See H.R. 2, the American Energy Solutions for Lower Costs and More American Jobs Act, 113th Congress (2014), and H.R. 1965, Federal Lands Jobs and Energy Security Act of 2013, 113th Congress.

appraisal to be conducted and waive any claims for damages it may have against the United States resulting from the lack of an appraisal. The intent of this section is to allow a tribe the same freedom as a private (non-tribal) entity to negotiate a business deal (e.g., leasing of its trust land) without the imposition of a federal mandate that may inhibit the completion of the deal.

Section 3. Standardization

Section 3 directs the Secretary of the Interior to standardize how the seven bureaus within DOI 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 1969²⁴ 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, any other individual residing within the affected area, and State and local governments 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.

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 a lawsuit filed by an entity that expects not to prevail on the merits of its claims, but to prevail through the imposition of delays and costs inherent in litigation that stymie the timely issuance of federal permits or approvals for Indian tribes or ANCs to develop energy resources.

Specifically, 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. Under this section, no taxpayer funds may be used to reimburse fees or expenses for plaintiffs filing these frivolous lawsuits, and the plaintiffs must pay fees and expenses to a defendant (other than the United States) unless they ultimately prevail, 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 2004²⁵ 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 fed-

²⁴ 42 U.S.C. 4332.

²⁵ Public Law 108–278.

eral 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 fees to claim a certification that the entity’s forest plan is “sustainable.”

Section 8. Leases of restricted lands for the Navajo Nation

Section 8 substantially enhances Navajo Nation leasing authority. Specifically, section 8 amends the Long-Term Leasing Act²⁶ to grant the Navajo Nation authority to lease its trust lands for mineral development without approval of the Secretary of the Interior if such mineral leasing is conducted pursuant to tribal regulations that have been approved by the Secretary. Under current law, the Navajo Nation may lease its trust lands for non-mineral purposes under the same conditions. Section 8 merely brings the tribe’s mineral leasing power into parity with its non-mineral leasing power. This provision advances Congress’s policy of promoting tribal self-determination as was done with the enactment of the HEARTH Act.²⁷

Section 8 would additionally permit the Navajo to lease its trust land for business or agricultural purposes for a term of up to 99 years (current law allows a term of up to 25 years with an option to renew for up to 25 years), and for mineral development for a term of up to 25 years with an option to renew for one additional term of up to 25 years.

Section 9. Nonapplicability of certain rules

Section 9 provides that no rule promulgated by DOI concerning hydraulic fracturing for the production of oil and gas resources shall have any effect on Indian trust land without the express consent of the Indian beneficiary.

COMMITTEE ACTION

H.R. 210 was introduced on January 3, 2017, by Congressman Don Young (R-AK). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittees on Indian, Insular and Alaska Native Affairs and Energy and Mineral Resources. On October 3, 2017, the Natural Resources Committee met to consider the bill. The Subcommittees were discharged by unanimous consent. Congressman Don Young offered an amendment designated #1; it was adopted by voice vote. No further amendments were offered and the bill, as amended, was ordered favorably reported to the House of Representatives, by a bipartisan roll call vote of 25 yeas and 15 nays on October 4, 2017, as follows:

²⁶ 25 U.S.C. 415.

²⁷ Public Law 112–151, the Helping Expedite and Advance Responsible Tribal Homeownership Act (2012).

Committee on Natural Resources

U.S. House of Representatives

115th Congress

Date: 10-04-17

Recorded Vote #: 6

Meeting on / Amendment on: FC Mark Up on Favorably Reporting H.R. 210 (Rep. Don Young of AK), To facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands, and for other purposes. "Native American Energy Act"

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman	X			Mr. Cook, CA	X		
Mr. Grijalva, AZ, Ranking Member		X		Mr. Soto, FL		X	
Mr. Young, AK, Chairman Emeritus	X			Mr. Westerman, AR	X		
Mrs. Napolitano, CA		X		Mr. McEachin, VA		X	
Mr. Gohmert, TX, Vice Chairman	X			Mr. Graves, LA	X		
Ms. Bordallo, Guam		X		Mr. Brown, MD		X	
Mr. Lamborn, CO	X			Mr. Hice, GA	X		
Mr. Costa, CA	X			Mr. Clay, MO	X		
Mr. Wittman, VA	X			Mrs. Radewagen, AS	X		
Mr. Sablan, CNMI		X		Mr. Gomez, CA		X	
Mr. McClintock, CA	X			Mr. LaHood, IL	X		
Ms. Tsongas, MA		X		Mr. Webster, FL	X		
Mr. Pearce, NM				Mr. Bergman, MI	X		
Mr. Huffman, CA		X		Ms. Cheney, WY	X		
Mr. Thompson, PA	X			Mr. Johnson, LA	X		
Mr. Lowenthal, CA		X		Ms. González-Colón, PR	X		
Mr. Gosar, AZ	X			Mr. Gianforte, MT	X		
Mr. Beyer, VA		X					
Mr. Labrador, ID	X						
Mrs. Torres, CA		X					
Mr. Tipton, CO	X						
Mr. Gallego, AZ							
Mr. LaMalfa, CA	X						
Ms. Hanabusa, HI		X					
Mr. Denham, CA							
Ms. Barragán, CA		X		TOTAL:	25	15	

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 AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 13, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 210, the Native American Energy Act.

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

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 210—Native American Energy Act

H.R. 210 would make several changes related to environmental laws, energy programs, and the management of mineral resources on Native American reservations. The bill would:

- Require the Department of the Interior (DOI) to approve or deny any appraisal of energy projects submitted by an Indian tribe within 30 days and allow tribes to waive the requirement for appraisals under specified circumstances;
- Require DOI to enter into contracts for energy demonstration projects using timber from federal forests that is not marketable;
- Authorize DOI and the Forest Service to enter into contracts with tribes for forest management demonstration projects; and
- Prohibit the payment of attorneys' fees under the Equal Access to Justice Act (EAJA) for lawsuits regarding energy projects on tribal lands.

CBO estimates that changing the appraisal process and authorizing contracts for demonstration projects would not have a significant effect on spending subject to appropriation.

Because H.R. 210 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; therefore, pay-as-you-go procedures apply. CBO estimates that any reduction in those payments under H.R. 210 would be insignificant—historically such payments have been small. Enacting H.R. 210 would not affect revenues. The provision affecting energy demonstration projects would not affect direct spending because the affected timber is nonmarketable and do not generate receipts to the government.

CBO estimates that enacting H.R. 210 would not increase net direct spending or on-budget deficits in one or more of the four consecutive 10-year periods beginning in 2028.

H.R. 210 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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

2. 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. Section 2 requires the Secretary of the Interior to develop regulations for implementing the appraisal reforms in section 2. Section 4 requires the Chairman of the Council on Environmental Quality to develop regulations to implement environmental reviews of major federal actions on Indian lands.

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.—

* * * * *

TITLE XXVI—INDIAN ENERGY RESOURCES

Sec. 2601. Definitions.

* * * * *

Sec. 2607. Appraisal reforms.

* * * * *

TITLE XXVI—INDIAN ENERGY

* * * * *

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.

* * * * *

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) *REVIEW AND COMMENT.—*

(A) *IN GENERAL.—Except as provided in subparagraph (B), the statement required under subsection (a)(2)(C) for a major Federal action regarding an activity on Indian lands of an Indian tribe shall only be available for review and comment by—*

- (i) Indian tribes in the affected area and individual members of those tribes wherever they reside;
- (ii) Other individuals who reside in the affected area;
- and
- (iii) State and local governments within the affected area.

(B) *EXCEPTION.*—Subparagraph (A) shall not apply to a statement for a major Federal action regarding an activity on Indian lands of an Indian tribe related to gaming under the Indian Gaming Regulatory Act.

(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.

* * * * *

TRIBAL FOREST PROTECTION ACT OF 2004

* * * * *

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.

SEC. 4. TRIBAL FOREST MANAGEMENT DEMONSTRATION PROJECT.

The Secretary of the Interior and the Secretary of Agriculture may carry out demonstration projects by which federally recognized Indian tribes or tribal organizations may contract to perform administrative, management, and other functions of programs of the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a et seq.) through contracts entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

ACT OF AUGUST 9, 1955

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 reassuming 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.

(f) Any contract, including a lease or construction contract, affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such contract. Such contracts shall be considered within the meaning of “commerce” as defined and subject to the provisions of section 1 of title 9, United States Code. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 9 to abide by the outcome of arbitration pursuant to the provisions of chapter 1 of title 9, sections 1 through 14, United States Code, shall be deemed to be a civil action arising under the Constitution, laws or treaties of the United States within the meaning of section 1331 of title 28, United States Code.

(g) LEASE OF TRIBALLY-OWNED LAND BY ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION.—

(1) IN GENERAL.—Notwithstanding subsection (a) and any regulations under part 162 of title 25, Code of Federal Regulations (or any successor regulation), subject to paragraph (2), the Assiniboine and Sioux Tribes of the Fort Peck Reservation may lease to the Northern Border Pipeline Company tribally-owned land on the Fort Peck Indian Reservation for 1 or more interstate gas pipelines.

(2) CONDITIONS.—A lease entered into under paragraph (1)—

(A) shall commence during fiscal year 2011 for an initial term of 25 years;

(B) may be renewed for an additional term of 25 years; and

(C) shall specify in the terms of the lease an annual rental rate—

(i) which rate shall be increased by 3 percent per year on a cumulative basis for each 5-year period; and

(ii) the adjustment of which in accordance with clause (i) shall be considered to satisfy any review requirement under part 162 of title 25, Code of Federal Regulations (or any successor regulation).

(h) TRIBAL APPROVAL OF LEASES.—

(1) IN GENERAL.—At the discretion of any Indian tribe, any lease by the Indian tribe for the purposes authorized under subsection (a) (including any amendments to subsection (a)), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary, if the 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 2 additional terms, each of which may not exceed 25 years; and

(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 regulations issued by the Indian tribe.

(2) ALLOTTED LAND.—Paragraph (1) shall not apply to any lease of individually owned Indian allotted land.

(3) AUTHORITY OF SECRETARY OVER TRIBAL REGULATIONS.—

(A) IN GENERAL.—The Secretary shall have the authority to approve or disapprove any tribal regulations issued in accordance with paragraph (1).

(B) CONSIDERATIONS FOR APPROVAL.—The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

(i) are consistent with any regulations issued by the Secretary under subsection (a) (including any amendments to the subsection or regulations); and

(ii) provide for an environmental review process that includes—

(I) the identification and evaluation of any significant effects of the proposed action on the environment; and

(II) a process for ensuring that—

(aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and

(bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

(C) TECHNICAL ASSISTANCE.—The Secretary may provide technical assistance, upon request of the Indian tribe, for development of a regulatory environmental review process under subparagraph (B)(ii).

(D) INDIAN SELF-DETERMINATION ACT.—The technical assistance to be provided by the Secretary pursuant to subparagraph (C) may be made available through contracts, grants, or agreements entered into in accordance with, and made available to entities eligible for, such contracts, grants, or agreements under the Indian Self-Determination Act (25 U.S.C. 450 et seq.).

(4) REVIEW PROCESS.—

(A) IN GENERAL.—Not later than 120 days after the date on which the tribal regulations described in paragraph (1) are submitted to the Secretary, the Secretary shall review and approve or disapprove the regulations.

(B) WRITTEN DOCUMENTATION.—If the Secretary disapproves the tribal regulations described in paragraph (1), the Secretary shall include written documentation with the disapproval notification that describes the basis for the disapproval.

(C) EXTENSION.—The deadline described in subparagraph (A) may be extended by the Secretary, after consultation with the Indian tribe.

(5) FEDERAL ENVIRONMENTAL REVIEW.—Notwithstanding paragraphs (3) and (4), if an Indian tribe carries out a project or activity funded by a Federal agency, the Indian tribe shall have the authority to rely on the environmental review process

of the applicable Federal agency rather than any tribal environmental review process under this subsection.

(6) DOCUMENTATION.—If an Indian tribe executes a lease pursuant to tribal regulations under paragraph (1), the Indian tribe shall provide the Secretary with—

(A) a copy of the lease, including any amendments or renewals to the lease; and

(B) in the case of tribal regulations or a lease that allows for lease payments to be made directly to the Indian tribe, documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (7).

(7) TRUST RESPONSIBILITY.—

(A) IN GENERAL.—The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1).

(B) AUTHORITY OF SECRETARY.—Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe under paragraph (1).

(8) COMPLIANCE.—

(A) IN GENERAL.—An interested party, after exhausting of any applicable tribal remedies, may submit a petition to the Secretary, at such time and in such form as the Secretary determines to be appropriate, to review the compliance of the applicable Indian tribe with any tribal regulations approved by the Secretary under this subsection.

(B) VIOLATIONS.—If, after carrying out a review under subparagraph (A), the Secretary determines that the tribal regulations were violated, the Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands.

(C) DOCUMENTATION.—If the Secretary determines that a violation of the tribal regulations has occurred and a remedy is necessary, the Secretary shall—

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

(ii) provide the applicable Indian tribe with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy, the rescission of the approval of the regulation involved, or the reassumption of lease approval responsibilities, provide the applicable Indian tribe with—

(I) a hearing that is on the record; and

(II) a reasonable opportunity to cure the alleged violation.

(9) SAVINGS CLAUSE.—Nothing in this subsection shall affect subsection (e) or any tribal regulations issued under that subsection.

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DISSENTING VIEWS

While we agree that development of tribal natural resources provides an opportunity for significant economic benefits in Indian country, H.R. 210 goes far beyond the reforms necessary to achieve tribal self-determination in energy development. H.R. 210 contravenes existing environmental protections and eliminates the critical check of the judiciary on the exercise of power by other branches of government.

H.R. 210 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, 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 to 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 activities, proposed water development projects, construction of solid waste facilities, and even construction of tribal class III gaming facilities.

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 redress 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.

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.

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.

For these reasons, we strongly oppose H.R. 210, 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.

RAÚL M. GRIJALVA,
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on Natural Resources.*

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