

Georgetown Law School, where he was managing editor of the Law Review. Out of law school, Mark clerked for Judge James Hunter of the Third Circuit Court of Appeals, and Supreme Court Justice William Rehnquist. He is currently a partner at Wiggin and Dana in New Haven, where he has worked since 1976. He has served as lead counsel on more than 60 appeals in State and Federal courts, and has argued before the United States Supreme Court.

Mark has been listed as one of the Best Lawyers in America since 1991. He was endorsed by the Connecticut Bar Association as exceptionally well qualified to be a District Judge, and has been unanimously rated as Well Qualified by the American Bar Association.

Forgive the pun, but this is an open and shut case. Mark Kravitz has the intellect, the independence, and the integrity to do this job and do it well. I am confident he will carefully read and apply the laws of the United States in Federal court, abiding only by the law—not by any ideology, passion, or prejudice. He will be an exemplary judge. I urge my colleagues to confirm him today.

Mr. HATCH. Madam President, I rise today in support of Mark R. Kravitz to be a United States District Judge for the District of Connecticut. I am confident that with his accomplishments and experience, Mr. Kravitz will make an excellent Federal judge. After graduating from Georgetown University Law Center, where he was managing editor of the Georgetown Law Journal, Mr. Kravitz clerked for the Honorable James Hunter III of the U.S. Court of Appeals for the Third Circuit. He then went on to clerk for the Honorable William H. Rehnquist on the U.S. Supreme Court.

Mr. Kravitz has spent the bulk of his legal career at the firm of Wiggin & Dana in New Haven, CT, where he is currently a partner. He also serves as an adjunct professor of law at the University of Connecticut School of Law and has also been a visiting lecturer at Yale University Law School. For the past 12 years, Mr. Kravitz has been recognized in the publication "The Best Lawyers in America." He enjoys the support of both home State Democrat Senators and was unanimously approved by the Judiciary Committee. I urge my colleagues to vote in favor of this exceptional nominee.

I yield back our remaining time.

Mr. LEAHY. Madam President, I yield back the remaining time.

I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Mark R. Kravitz, of Connecticut, to be United States District Judge for the District of Connecticut? The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Illinois (Mr. FITZGERALD) is necessarily absent.

Mr. REID. I announce that the Senator from South Carolina (Mr. HOLLINGS) and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "Yea".

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 97, nays 0, as follows:

[Rollcall Vote No. 217 Ex.]

YEAS—97

Akaka	Dodd	Lugar
Alexander	Dole	McCain
Allard	Domenici	McConnell
Allen	Dorgan	Mikulski
Baucus	Durbin	Miller
Bayh	Edwards	Murkowski
Bennett	Ensign	Murray
Biden	Enzi	Nelson (FL)
Bingaman	Feingold	Nelson (NE)
Bond	Feinstein	Nickles
Boxer	Frist	Pryor
Breaux	Graham (FL)	Reed
Brownback	Graham (SC)	Reid
Bunning	Grassley	Roberts
Burns	Gregg	Rockefeller
Byrd	Hagel	Santorum
Campbell	Harkin	Sarbanes
Cantwell	Hatch	Schumer
Carper	Hutchison	Sessions
Chafee	Inhofe	Shelby
Chambliss	Inouye	Smith
Clinton	Jeffords	Snowe
Cochran	Johnson	Specter
Coleman	Kennedy	Stabenow
Collins	Kohl	Stevens
Conrad	Kyl	Sununu
Cornyn	Landrieu	Talent
Corzine	Lautenberg	Thomas
Craig	Leahy	Voinovich
Crapo	Levin	Warner
Daschle	Lieberman	Wyden
Dayton	Lincoln	
DeWine	Lott	

NOT VOTING—3

Fitzgerald Hollings Kerry

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the President will be notified of the Senate's action.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will return to legislative session.

ENERGY POLICY ACT OF 2003—  
Continued

AMENDMENT NO. 876, AS MODIFIED

Mr. REID. Madam President, I ask unanimous consent that the time be equally divided and that Senator FEINSTEIN control our time and Senator COCHRAN control the time on the other side.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Who yields time?

Mr. REID. Madam President, on behalf of Senator FEINSTEIN, I yield to the Senator from Washington 4 minutes.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Ms. CANTWELL. Thank you, Madam President.

I am here to support the Feinstein amendment, which I am pleased to co-sponsor. It is a very important piece of legislation. I thank my colleague for her hard work on this very important issue. We have all heard about the dysfunctions in our western regional power market and how it has cost our western economy more than \$35 billion.

Madam President, it was more than a year ago that the Senator from California and I stood on the floor to have this debate with many of my colleagues. During the Omnibus Appropriations bill in 2000, Congress granted an exemption from regulatory scrutiny for businesses such as EnronOnline and electronic trading platforms. Unsurprisingly, Enron was chief among its boosters in lobbying for this language. Even though Congress listened to Enron and not the President's Working Group on Financial Markets, which opposed this exemption.

Now we have history. What has happened? We know that the Enron loophole has caused quite a bit of a problem. In fact, in light of evidence which during last year's debate was just beginning to emerge, we have found that the markets for energy derivatives and the physical energy prices and supplies have caused a problem. In the West, we had huge spikes. We have had a long and vigorous floor debate about this amendment.

There were many detractors who basically said at the time there was no conclusive evidence that Enron manipulated western energy markets and there was no need to proceed. This year, we have heard a lot about how Enron in fact has manipulated markets.

Less than a month after the Senate passed this comprehensive Energy bill with this language in it, Enron's "smoking gun" memos were released detailing a number of the company's schemes for driving up the prices. My colleagues are aware that Enron has continued to release various amounts of information about this unbelievable scandal and manipulation of prices.

Just last week, another Enron trader was arrested. And the complaint of Federal prosecutors said they are uncovering even more details of ploys to manipulate energy prices. We wanted evidence. We got it. In a long-awaited report, the Federal Energy Regulatory Commission concluded this spring that manipulation was "epidemic" in the western market during the crisis of 2000-2001.

But more specifically, in a staff report the Federal Energy Regulatory Commission detailed the manner in which EnronOnline helped Enron to game the California markets. The Commission concluded that "the relationship between the financial and physical energy products . . . provides the opportunity to manipulate the

physical markets and profit in the financial markets.’’

Further, the Federal Energy Regulatory Commission estimated that EnronOnline allowed the company to reap more than \$500 million in additional profits. There it is, right from the Federal Commission: EnronOnline allowed them to reap those additional profits.

As we approach this very important issue in a vote here in a few minutes, my colleagues need to step up and close this loophole that the President’s Working Group on Financial Markets first argued against because it said we didn’t have real credibility on manipulation. Now we have the credibility, and we have a Federal Commission pointing to the fact that EnronOnline was responsible for part of this market manipulation.

I urge my colleagues to support the Feinstein amendment.

The PRESIDING OFFICER. Who yields time?

Mr. COCHRAN. Madam President, I yield such time as he may consume to the Senator from Idaho, Mr. CRAPO.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAPO. Thank you, Madam President. I will be very brief.

I want to reiterate, once again, we are not here dealing with a question of whether those who did try to and succeeded in manipulating markets should be held accountable for that. We are talking about what is the correct way to regulate the derivatives market in our country.

I would like to read into the RECORD, once again, a portion of a letter which we have just received signed by the Secretary of the Department of the Treasury, John W. Snow; Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System; William H. Donaldson, Chairman of the U.S. Securities and Exchange Commission; and James E. Newsome, Chairman of the Commodity Futures Trading Commission. They write:

Dear Senators Crapo and Miller:

Thank you for your letter of June 10, 2003, requesting the views of the President’s Working Group on Financial Markets on proposed Senate Amendment # 876 to S. 14, the pending energy bill. As this amendment is similar to a proposed amendment on which you sought the views of the PWG last year, we reassert the positions expressed in the PWG’s response dated September 18, 2002, a copy of which is enclosed. The proposed amendment could have significant unintended consequences for an extremely important risk management market—serving businesses, financial institutions, and investors throughout the U.S. economy. For that reason, we believe that adoption of this amendment is ill-advised.

And this next paragraph responds directly to the allegations that there is some manipulation in the market and there is a loophole there. They go on to say:

We would also point out that, since we wrote that letter last year, various federal agencies have initiated actions against wrongdoing in energy markets.

I do not have time to go through the list of wrongdoing they have initiated action against, but they conclude in their letter:

These initial actions alone make clear that wrongdoers in the energy markets are fully subject to the existing enforcement authority of federal regulators.

This amendment will not be helpful to our economy. It will take away one of the needed elements of our economy that gives it the dynamic nature that it has, to be able to resist some of the difficult burdens that the economy has faced in the last several years.

Madam President, I ask unanimous consent that the letter I just referred to dated June 11, 2003, and an additional letter dated September 18, 2002, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF THE TREASURY,  
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. SECURITIES AND EXCHANGE COMMISSION, COMMODITY FUTURES TRADING COMMISSION,  
*Washington, DC, June 11, 2003.*

Hon. MICHAEL D. CRAPO,  
*U.S. Senate, Russell Senate Office Building, Washington, DC.*

Hon. ZELL B. MILLER,  
*U.S. Senate, Dirksen Senate Office Building, Washington, DC.*

DEAR SENATORS CRAPO AND MILLER: Thank you for your letter of June 10, 2003, requesting the views of the President’s Working Group on Financial Markets (PWG) on proposed Senate Amendment No. 876 to S. 14, the pending energy bill. As this amendment is similar to a proposed amendment on which you sought the views of the PWG last year, we reassert the positions expressed in the WPG’s response dated September 18, 2002, a copy of which is enclosed. The proposed amendment could have significant unintended consequences for an extremely important risk management market—serving businesses, financial institutions, and investors throughout the U.S. economy. For that reason, we believe that adoption of this amendment is ill-advised.

We would also point out that, since we wrote that letter last year, various federal agencies have initiated actions against wrongdoing in the energy markets. As you note, the CFTC has brought formal actions against Enron, Dynegy, and El Paso for market manipulation, wash (or roundtrip) trades, false reporting of prices, and operation of illegal markets. The Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Department of Justice have also initiated formal actions in the energy sector. Some of these actions have already resulted in substantial monetary penalties and other sanctions. These initial actions alone make clear that wrongdoers in the energy market are fully subject to the existing enforcement authority of federal regulators.

The Commodity Futures Modernization Act of 2000 brought important legal certainty to the risk management marketplace. Businesses, financial institutions, investors throughout the economy rely upon derivatives to protect themselves from market volatility triggered by unexpected economic events. This ability to manage risks makes the economy more resilient and its importance cannot be underestimated. In our judgment, the ability of private counterparty surveillance to effectively regulate these

markets can be undermined by inappropriate extensions of government regulation.

Yours truly,

JOHN W. SNOW,  
*Secretary, Department of the Treasury.*

WILLIAM H. DONALDSON,  
*Chairman, U.S. Securities and Exchange Commission.*

ALAN GREENSPAN,  
*Chairman, Board of Governors of the Federal Reserve System.*

JAMES E. NEWSOME,  
*Chairman, Commodity Futures Trading Commission.*

DEPARTMENT OF TREASURY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. SECURITIES AND EXCHANGE COMMISSION, COMMODITY FUTURES TRADING COMMISSION,  
*Washington, DC, September 18, 2002.*

Hon. MICHAEL D. CRAPO,  
*U.S. Senate, Russell Senate Office Building, Washington, DC.*

Hon. ZELL B. MILLER,  
*U.S. Senate, Dirksen Senate Office Building, Washington, DC.*

DEAR SENATORS CRAPO AND MILLER: In response to your letter of September 13, we write to express our serious concerns about the legislative proposal to expand regulation of the over-the-counter (OTC) derivatives markets that has recently been proposed by Senators Harkin and Lugar.

We believe that the OTC derivatives markets in question have been a major contributor to our economy’s ability to respond to the stresses and challenges of the last two years. This proposal would limit this contribution, thereby increasing the vulnerability of our economy to potential future stresses.

The proposal would subject market participants to disclosure of proprietary trading information and new capital requirements. We do not believe a public policy case exists to justify this governmental intervention. The OTC markets trade a wide variety of instruments. Many of these are idiosyncratic in nature. These customized markets generally do not serve a significant price discovery function for non-participants, nor do they permit retail investors to participate. Public disclosure of pricing data for customized OTC transactions would not improve the overall price discovery process and may lead to confusion as to the appropriate pricing for other transactions, as terms and conditions can vary by contract. The rationale for imposing capital requirements is unclear to us, and the proposal’s capital requirements also could duplicate or conflict with existing regulatory capital requirements.

The trading of these instruments arbitrages away inefficiencies that exist in all financial and commodities markets. If dealers had to divulge promptly the proprietary details and pricing of these instruments, the incentive to allocate capital to developing and finding markets for these highly complex instruments would be lessened. The result would be that the inefficiencies in other markets that derivatives have arbitrated away would reappear.

It is also unclear who would benefit from the proposed disclosures and regulations other than whoever simply copied existing products and instruments for their own short-term advantage. Weakening the protection of proprietary intellectual property rights in the market arena would undercut a complex of highly innovative markets that is among this nation’s most valuable assets.

While the derivatives markets may seem far removed from the interests and concerns of consumers, the efficiency gains that these markets have fostered are enormously important to consumers and to our economy. We urge Congress to protect these market's contributions to the economy, and to be aware of the potential unintended consequences of current legislative proposals.

Yours truly,

PAUL H. O'NEILL,  
*Secretary, Department  
of Treasury.*

HARVEY L. PITT,  
*Chairman, U.S. Securities  
and Exchange  
Commission.*

ALAN GREENSPAN,  
*Chairman, Board of  
Governors of the  
Federal Reserve System.*

JAMES E. NEWSOME,  
*Chairman, Commodity  
Futures Trading  
Commission.*

Mr. CRAPO. Madam President, I encourage my colleagues to vote against the amendment.

The PRESIDING OFFICER. Who yields time?

The Senator from New Mexico.

Mr. DOMENICI. Madam President, do they have any time left on their side?

The PRESIDING OFFICER. Fifty-five seconds.

Mrs. FEINSTEIN. I yield our time to the Senator from Iowa.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. HARKIN. Madam President, I join Senator FEINSTEIN as a cosponsor of her amendment to strengthen Federal oversight of energy markets. I strongly support the amendment's provisions enhancing the ability of the Commodity Futures Trading Commission to investigate and punish fraud and manipulation in over-the-counter markets in energy derivatives and derivatives based on other "exempt commodities" under the Commodity Exchange Act.

As chairman of the Committee on Agriculture, Nutrition and Forestry during the last Congress, I held a hearing on the scope of the CFTC's authority to insure market transparency and prevent fraud and manipulation in markets in OTC derivatives based on "exempt commodities," such as energy and metals, following passage of the CFMA. Following that hearing, Senator LUGAR and I worked closely with Senator FEINSTEIN on an earlier version of this amendment to improve it. At the beginning of the 108th Congress, Senator FEINSTEIN introduced S. 509, incorporating the work we did within the Agriculture Committee last summer and fall. The only difference between S. 509 and this amendment is that S. 509 was drafted to fill a gap in oversight created by the CFMA and fully and clearly affirm the CFTC's authority to oversee trading in all "exempt commodities"—OTC energy and metals derivatives as well as derivatives based on other commodities such as broadband and weather—whereas this amendment now does not change

the treatment of metals derivatives. I have some concerns about this approach. Metals, like energy, are commodities of finite supply. They are equally susceptible to market manipulation and should therefore be subject to the same level of oversight. The legislative process often requires compromise in order to make progress toward important policy goals, however, and because I hope this amendment will result in significant progress in addressing a problem created by the CFMA, I support it.

The CFMA amended the Commodity Exchange Act in a number of positive ways, based for the most part on the recommendations of the President's Working Group on Financial Markets issued in 1999. The President's Working Group recommended that certain transactions involving financial derivatives be excluded from the CFTC's jurisdiction. The President's Working Group did not recommend a similar exclusion for transactions involving energy and metals derivatives, or other commodities of finite supply.

During 1999 and 2000, as legislation was being developed in the Senate, there was discussion of the issue of oversight of energy and metals derivatives markets, and Senator LUGAR who was at the time chairman, and I both supported, in the committee, a version of the legislation that was consistent with the recommendations of the President's Working Group, and excluded only financial derivatives—not energy and metals derivatives—from the CFTC's jurisdiction. The bill codified an exemption, with specific safeguards, for certain commodities such as energy and metals, but clearly retained the CFTC's authority to investigate and act against fraud and manipulation.

The final version of the CFMA included in the omnibus appropriations bill in December 2000 differed from our committee bill regarding energy and metals derivatives markets. I supported the CFMA, although I had some concerns about its treatment of energy and metals products, because I thought it had a number of very positive features, and on the whole was a good bill. I still believe so. It is important that we not undermine the legal certainty that legislation brought to the OTC derivatives markets. I would not support this amendment if I thought it would do that. But I do believe it is important to close the loophole that has resulted in an important segment of the overall OTC derivatives market—that is, derivatives based on energy and other "exempt commodities," as the CFMA defined them—being completely excluded from oversight. At the time of passage of the CFMA, many Members of Congress believed these exempt commodities would no longer be subject to most requirements of the Commodity Exchange Act, but they certainly did not believe these commodities would be removed entirely from oversight by the CFTC or any other agency, which is what has happened.

We know now that this lack of oversight has resulted in harm to consumers. Last August, the Federal Energy Regulatory Commission, FERC, issued a report finding significant evidence that Enron used its unregulated OTC electronic trading platform, Enron Online, to manipulate natural gas prices to increase its revenue. This manipulation affected prices not only for Enron's trading partners but industry-wide, as reporting firms used price information displayed electronically on Enron Online as a significant source of natural gas pricing data. And a recent report prepared by the Minority Staff of the U.S. Senate Permanent Subcommittee on Investigations, after a year-long investigation on crude oil price volatility, found that crude oil prices are similarly affected by trading on unregulated OTC markets, and that the lack of information on prices and large positions in OTC markets makes it difficult if not impossible to detect price manipulation. This report concluded that routine market disclosure and oversight of the OTC energy derivatives markets are essential to halt manipulation before economic damage is inflicted upon the market and the public.

This amendment will provide the CFTC with the authority it needs to require routine market disclosure and ensure effective oversight of the OTC energy derivatives markets and markets for other "exempt commodities," such as broadband and weather derivatives. The amendment clarifies that the CFTC has anti-fraud and anti-manipulation authority over transactions in "exempt commodities" other than metals. This amendment is not regulatory overreaching by any means. It just gives the CFTC the authority it needs to establish adequate notice, transparency, reporting, record-keeping, and other transparency requirements which are the minimum needed to allow the agency to effectively police OTC markets in energy derivatives, and thereby detect and deter fraud and manipulation of these markets. It also increases criminal and civil penalties for manipulation, including "wash" or "round trip" trades.

It is clear that the impact of OTC energy derivatives markets reaches well beyond the immediate parties to the transactions. Derivatives play an increasingly important role in the diverse range of energy markets, which are in turn critical to our overall economy. We must ensure the integrity of these markets and restore shareholder, investor, and consumer confidence in them. This amendment moves us in that direction, and I urge my colleagues to support it.

Madam President, this amendment basically closes a small loophole that was left in the Commodity Futures Modernization Act passed in the year 2000. We saw what happened with Enron. And what happened is, Enron Online was used to influence energy prices far beyond Enron. This impacted

consumers not only on the West Coast but in my State and all over the United States.

As a result, we looked at this amendment last year. Both Senator LUGAR and I looked at it. We had a hearing on it last year in the Agriculture Committee.

This amendment, I believe, does exactly what we want it to do; that is, to make sure the Commodity Futures Trading Commission—

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HARKIN. Madam President, I ask unanimous consent for 30 more seconds to complete my sentence.

Mr. DOMENICI. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DOMENICI. Madam President, how much time is on this side?

The PRESIDING OFFICER. Two minutes 39 seconds.

Mr. DOMENICI. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Iowa.

Mr. HARKIN. I just wanted to say, this gives the CFTC the authority again to provide the oversight they need to make sure we have integrity in these markets for derivatives based on energy, but also for derivatives based on other things, too, such as weather and broadband. It is a step in the right direction to provide that oversight and transparency.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. Madam President, what this amendment really does is transfer some new power and authority to the Federal Energy Regulatory Commission to regulate some of these highly sophisticated and important markets. They have never done this before. There is no expertise, background, or experience in the Federal Energy Regulatory Commission to do the things this amendment would have them do. So that is not plugging a loophole. It may be creating a bigger one. It may be counterproductive. That is what I am suggesting the Senate should consider.

Look at the letter that has been signed by Alan Greenspan, by John Snow, the Secretary of the Treasury, by the head of the Securities and Exchange Commission. These are the people who understand the impact of this amendment on our economy and on our economic power in the world today.

This is serious business. I am hopeful the Senate will look carefully. The amendment appears to grant FERC authority with respect to derivatives, but it leaves a jurisdictional gap. The amendment would replace regulatory certainty with regulatory uncertainty. It is a bad amendment and it ought to be defeated.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Madam President, do we have any time remaining on our side?

The PRESIDING OFFICER. One minute 21 seconds.

Mr. DOMENICI. I yield the Senator from Wyoming the remainder of our time.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Madam President, I do want to point out we debated this issue a year ago. The conclusion was these are professionals dealing with professionals. The people who have the oversight over it do have oversight and are taking advantage of that oversight.

We also passed Sarbanes-Oxley in the meantime. And if the Feinstein amendment were to be adopted, it would lead to some confusion over exactly who has jurisdiction.

I know this is an extremely difficult issue. This is my third time debating it. I do know how to spell it now. But it is a very complicated issue, and it is not something we ought to be doing in a reaction that will result in over-reaction. So I ask that we vote against this amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Madam President, I yield back any time we have on our side.

The PRESIDING OFFICER. Time is yielded back.

Mr. DOMENICI. I move to table the amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Massachusetts (Mr. KERRY) is necessarily absent.

I further announced that, if present and voting, the the Senator from Massachusetts (Mr. KERRY) would vote "nay".

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 55, nays 44, as follows:

[Rollcall Vote No. 218 Leg.]

YEAS—55

Alexander	DeWine	Murkowski
Allard	Dole	Nelson (NE)
Allen	Domenici	Nickles
Bayh	Ensign	Pryor
Bennett	Enzi	Roberts
Bond	Frist	Santorum
Breaux	Graham (SC)	Sessions
Brownback	Grassley	Shelby
Bunning	Gregg	Smith
Burns	Hagel	Snowe
Campbell	Hatch	Specter
Carper	Hutchison	Stevens
Chambliss	Inhofe	Sununu
Cochran	Kyl	Talent
Coleman	Landrieu	Thomas
Collins	Lincoln	Thomas
Cornyn	Lott	Voinovich
Craig	McConnell	Warner
Crapo	Miller	

NAYS—44

Akaka	Durbin	Levin
Baucus	Edwards	Lieberman
Biden	Feingold	Lugar
Bingaman	Feinstein	McCain
Boxer	Fitzgerald	Mikulski
Byrd	Graham (FL)	Murray
Cantwell	Harkin	Nelson (FL)
Chafee	Hollings	Reed
Clinton	Inouye	Reid
Conrad	Jeffords	Rockefeller
Corzine	Johnson	Sarbanes
Daschle	Kennedy	Schumer
Dayton	Kohl	Stabenow
Dodd	Lautenberg	Wyden
Dorgan	Leahy	

NOT VOTING—1

Kerry

The motion was agreed to.

Mr. DOMENICI. Madam President, I move to reconsider the vote.

Mr. REID. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 880

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. ALEXANDER. Madam President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Tennessee [Mr. ALEXANDER], for himself, Mr. SANTORUM, Mr. CORNYN, Ms. LANDRIEU, Mr. BINGAMAN, and Mr. DOMENICI, proposes an amendment numbered 880.

Mr. ALEXANDER. Madam President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To require a report from the Secretary of Energy on natural gas supplies and demand)

Page 52, after line 22, insert:

“SECTION . NATURAL GAS SUPPLY SHORTAGE REPORT.

“(a) REPORT.—Not later than six months after the date of enactment of this act, the Secretary of Energy (“Secretary”) shall submit to the Congress a report on natural gas supplies and demand. In preparing the report, the Secretary shall consult with experts in natural gas supply and demand as well as representatives of State and local units of government, tribal organizations, and consumer and other organizations. As the Secretary deems advisable, the Secretary may hold public hearings and provide other opportunities for public comment. The report shall contain recommendations for federal actions that, if implemented, will result in a balance between natural gas supply and demand at a level that will ensure, to the maximum extent practicable, achievement of the objectives established in subsection (b).

“(b) OBJECTIVES OF REPORT.—In preparing the report, the Secretary shall seek to develop a series of recommendations that will result in a balance between natural gas supply and demand adequate to—

“(1) provide residential consumers with natural gas at reasonable and stable prices;

“(2) accommodate long-term maintenance and growth of domestic natural gas dependent industrial, manufacturing and commercial enterprises;

“(3) facilitate the attainment of natural ambient air quality standards under the Clean Air Act;

"(4) permit continued progress in reducing emissions associated with electric power generation; and

"(5) support development of the preliminary phases of hydrogen-based energy technologies

"(C) CONTENTS OF REPORT.—The report shall provide a comprehensive analysis of natural gas supply and demand in the United States for the period from 2004 to 2015. The analysis shall include, at a minimum,—

"(1) estimates of annual domestic demand for natural gas that takes into account the effect of federal policies and actions that are likely to increase and decrease demand for natural gas;

"(2) projections of annual natural gas supplies, from domestic and foreign sources, under existing federal policies;

"(3) an identification of estimated natural gas supplies that are not available under existing federal policies;

"(4) scenarios for decreasing natural gas demand and increasing natural gas supplies comparing relative economic and environmental impacts of federal policies that—

"(A) encourage or require the use of natural gas to meet air quality, carbon dioxide emission reduction, or energy security goals;

"(B) encourage or require the use of energy sources other than natural gas, including coal, nuclear and renewable sources;

"(C) support technologies to develop alternative sources of natural gas and synthetic gas, including coal gasification technologies;

"(D) encourage or require the use of energy conservation and demand side management practices; and

"(E) affect access to domestic natural gas supplies; and

"(5) recommendations for federal actions to achieve the objectives of the report, including recommendations that—

"(A) encourage or require the use of energy sources other than natural gas, including coal, nuclear and renewable sources;

"(B) encourage or require the use of energy conservation or demand side management practices;

"(C) support technologies for the development of alternative sources of natural gas and synthetic gas, including coal gasification technologies; and

"(D) will improve access to domestic natural gas supplies."

Mr. ALEXANDER. Madam President, I offer an amendment on behalf of Senator SANTORUM, Senator CORNYN, Senator LANDRIEU, Senator BINGAMAN, the ranking member of our committee, and Senator DOMENICI, the chairman of our committee has joined the amendment as well, which I deeply appreciate.

This is an amendment about the emerging natural gas crisis. It would require the Secretary of Energy, within 6 months from the date of enactment of this Energy bill, to submit a report on natural gas supplies and demand. I offer this amendment because I believe it will help us deal with what I am afraid is an emerging natural gas crisis. If that were to occur, we would be able to protect our jobs, heat or cool our homes at reasonable costs, and clean our air to the standard that we wish.

As chairman of the Subcommittee on Energy, working with our chairman of the full committee, I intend to help schedule hearings as soon as possible on this emerging crisis. This report and these hearings should help us take a hard, honest look at what we do short term and long term.

Alan Greenspan is usually a little difficult to interpret when he testifies but he was not difficult to understand on May 21 when he testified before the Joint Economic Committee. This is what he said about natural gas:

In contrast, prices for natural gas have increased sharply in response to very tight supplies. Working gas in storage is presently at extremely low levels, and the normal seasonal rebuilding of these inventories seems to be behind the typical schedule. The colder-than-average winter played a role in producing today's tight supply as did the inability of heightened gas well drilling to significantly augment net marketed production. Canada, our major source of gas imports, has little room to expand shipments to the United States. Our limited capacity to import liquefied natural gas effectively restricts our access to the world's abundant supplies of natural gas. The current tight domestic natural gas market reflects the increases in demand over the past two decades. That demand has been spurred by myriad new uses for natural gas in industry and by the increased use of natural gas as a clean-burning source of electric power.

I asked Mr. Greenspan to elaborate on that, and I will not read all of his remarks but this is the way he began his response to my question on May 21:

Senator Alexander, I am surprised at how little attention the natural gas problem has been getting. Because it is a very serious problem. It's partly the result of new technologies employed in the areas of growing technologies and the whole exploratory procedures which embarked over the last decade or so.

He talked about our contradictory Federal policies. This is not some abstract issue. The price of natural gas was \$3.50 or so last summer. It spiked to \$9 or better in the winter. Today it is \$6.25 or so. That affects the cost of heating and cooling our homes, but it affects our jobs in a big way.

For example, someone from a large chemical industry in our State came to see me a few weeks ago when gas prices spiked up. The thousands of employees there had taken a voluntary 3-percent cut in their pay. The management had taken a 6-percent cut in their pay. They were worried about the price of natural gas which is a raw material for that chemical industry.

It does not just affect the chemical industry. In California, for example, where not much coal is burned because it pollutes the air, natural gas effectively sets the price of electricity. So this emerging crisis in natural gas affects jobs in the whole economy, as we have been debating.

There are answers but we have contradictory policies. We have plenty of gas but no access to the gas. We have a lot of alternatives, and we are trying to encourage them, but when we talk about windmills, we think we may want a limit on the number of windmills we want to see. When we talk about nuclear, we have very close votes because people are skeptical about nuclear power. When we talk about coal, it pollutes the air. When we talk about drilling more oil, we vote no about going to Alaska. When we consider liq-

uid gas from overseas, we are worried it might blow up in big terminals on the sea coast. And hydrogen we all are for but it is 20 years away.

The bottom line: We have contradictory policies short term. This could slow down our recovery and keep unemployment high and hurt our jobs long term. It could mean electric rates go sky high and our manufacturing jobs go to Mexico and China. We need to take an honest, hard look at the consequences of our failure to achieve a balance of natural gas and its alternatives, and I hope this report required by this amendment will help do just that. I will work with the chairman, with the ranking member, to make certain our committee hearings help do that, as well.

I yield the floor.

Mr. DOMENICI. Madam President, I understand that amendment will be accepted on both sides.

Mr. BINGAMAN. Madam President, that is correct. We support the amendment and urge its passage.

Mr. DOMENICI. The Senator from Louisiana asked if she might speak for 1 minute.

Ms. LANDRIEU. I understand the amendment offered by my colleague from Tennessee will be accepted. That is good. It is a good amendment and certainly should be part of this bill.

Since I am in the Chamber, I wish to speak a minute in support of the amendment and add to the record he has so ably outlined. In one case in Louisiana—and there are many cases, but in one case Louisiana Ammonia Producers has gone from, in 1998, 9 companies employing more than 3,500 people to 3 companies employing fewer than 1,000 people. Part of the reason for this tremendous decline at a time when we are trying to create jobs instead of losing them is the rising price of natural gas. The price of natural gas, because supplies are so tight, in the first quarter of 2003, was \$5.91 a million Btu's, a 129 percent increase over the average price for the first quarter of the previous 10 years.

The Senator from Tennessee is absolutely right. A commission to study ways to increase the supply of natural gas is critical and important if we are going to keep the companies, large and small, in this country competitive.

I yield the floor.

Mr. DOMENICI. Madam President, I congratulate the Senator. The first comment was on a question the Senator put to Dr. Greenspan and his response about being surprised at how little attention was being paid to matters. We are quite proud that this committee started paying attention to natural gas as soon as we convened this year. Our first hearings indicated, through our experts, that we were going to have a serious shortage. We were questioning even then; that was only 3 or 4 months ago.

We have nothing further.

The PRESIDING OFFICER. If there is no further debate, the question is on

agreeing to the amendment of the Senator from Tennessee.

The amendment (No. 880) was agreed to.

Mr. DOMENICI. I move to reconsider the vote.

Mr. BINGAMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. REID. Madam President, staff is retyping the proposed agreement, but to save time I wonder if we could go to the Bingaman amendment. Originally, the plan was to vote on Bingaman and the Burma matter after debate was completed on both issues. We have an objection on our side to doing that. We could go to the Bingaman amendment immediately, have 40 minutes of debate equally divided, then following that have a vote on or in relation to the Bingaman amendment, and then go to the Burma matter after that.

Mr. DOMENICI. I ask Senator CAMPBELL if that is all right.

Mr. CAMPBELL. That is fine.

Mr. DOMENICI. We have no objection.

AMENDMENT NO. 881

(Purpose: To provide for a significant environmental review process associated with the development of Indian energy projects, to establish duties of the federal government to Indian tribes in implementing an energy development program, and for other purposes)

Mr. BINGAMAN. I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN], for himself, Mr. INOUE, and Mr. DASCHLE, proposes an amendment numbered 881.

Mr. BINGAMAN. Madam President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under "Text of Amendments.")

Mr. BINGAMAN. Madam President, this is an amendment I am offering on behalf of myself and Senator INOUE. It is an amendment that will make several changes in section 303 of the Indian energy title in this legislation that is pending before the Senate.

First, a little background on these issues so my colleagues understand what is at stake. Title III of S. 14 contains a very strong Indian energy title. It would provide tribes with the financial and technical assistance they need to help them develop and utilize energy resources on Indian land.

This title III represents a combination of sections from two separate bills. One was introduced by Senator CAMPBELL; the other was introduced by Senator INOUE and myself. I very much appreciate the willingness of the majority to work with us and include in the bill now before the Senate a

number of sections from the Bingaman-Inouye bill. Most of these measures were included as part of last year's Senate-passed Energy bill and were generally agreed to in the House-Senate conference without controversy. Unfortunately, as we all know, those sections did not become law.

Notwithstanding the general support that exists for the Indian energy title in this bill, there is one section that is fairly controversial. That is the subject of our amendment. It is section 2604. It would authorize tribes to enter into leases and business agreements and issue rights-of-way for energy development projects on tribal lands without the separate approval of the Secretary of the Interior. These leases and business agreements and rights-of-way would involve a broad range of energy projects, including oil and gas extraction, powerplants development and construction, and even some mining activity would be covered under the language in the bill. This activity could take place on any tribal trust lands, not just those on reservation but also lands that have been designated as tribal trust lands off reservation. There are many of those, as we know.

There is no disagreement on whether we should allow tribes to exercise more control over development on tribal lands. There is, however, a disagreement on how we go about that.

The present language in section 2604 raises two significant issues. The first is that by eliminating the Secretarial approval of leases and agreements and rights-of-way, section 2604 eliminates the "major Federal action" determination that triggers the application of the National Environmental Policy Act, NEPA. This effectively waives the analysis and the public participation requirements that are in that law. It thereby reduces the ability to protect the interests of both those residing on reservations and those residing in adjacent communities.

While a substantial environmental review process is included in section 2604, it is limited in the range of impacts that require review. It does not require the implementation of mitigation measures. It does not require any changes in response to the concerns of affected tribal members or the concerns of local communities.

Obviously, eliminating NEPA is a concern to many national and local environmental groups and also to some Native American organizations that have weighed in with strong letters on the issue. It is also of concern to the counties around the country. In a letter dated May 14 of this year, the National Association of Counties is calling for section 2604 to be modified so that a NEPA analysis is completed for each new energy project that goes forward on Indian lands.

There is a bipartisan group of attorneys general representing the States of Arizona, New Mexico, Nevada, North Dakota, Utah, Wyoming, and Connecticut that have also expressed

strong concerns about the diminishment of environmental review for tribal energy resource development projects. They have expressed their views in a letter dated June 9 of this year. In that letter they wrote:

While we understand that this provision is intended to promote the worthy goals of tribal self-determination and sovereignty, we are concerned that it goes too far in facilitating significant development activity without ensuring that adequate protections exist for affected communities and adjacent lands. Section 2604 represents a significant change in the law that could have serious implications for the States that we represent. We therefore urge the provision be amended to ensure that significant energy development activity on tribal lands continues to be subject to meaningful environmental review, including an ability for State and local governments to participate in the process.

The concern expressed by those attorneys general and the counties underscores the fact that without some applicable Federal law related to the significant development activity contemplated under this section 2604, it is unclear what standard is to apply. Some have argued that tribal lands should be treated just as private lands are and tribes should be free, as private landowners are, to go forward with development projects. In my view, that is not a good analogy because private lands are subject to State and local laws; tribal lands are not. We are all aware that a private landowner has requirements by virtue of State and local law that do not apply on tribal lands. Tribal law can and should apply to energy development on tribal lands, but at the same time Congress has a responsibility to ensure that certain Federal parameters are in place.

The second issue that is raised by this section 2604 is that the language in the section undermines the Secretary's trust responsibility to Indian tribes. A number of tribes have expressed strong concerns about the language which appears to change the traditional trust relationships between the Federal Government and Indian tribes. Tribal concern is driven by a decision 3 months ago by the U.S. Supreme Court in the case of *United States v. Navajo Nation*. The Supreme Court specifically addressed the Federal trust responsibility and the standard for ensuring that statutes affecting Native Americans contain fiduciary duties by which the Federal Government as trustee can be held accountable for its actions that may have serious and negative impacts on tribal interests.

Section 2604, the subject of our amendment here, as currently drafted does not meet the standards established by the Supreme Court. In fact, it goes in the opposite direction. It diminishes the Federal Government's trust responsibility and accountability to tribes. This is inconsistent with the current Federal policy of tribal self-determination and self-governance. These policies, in effect since the landmark Indian Self-Determination Act of 1975,

clearly preserved the Federal trust responsibility and accountability to tribes while facilitating tribal control over Federal Indian programs.

The amendment Senator INOUE and I are offering addresses both the environmental review question I talked about and the trust responsibility issues, as well as other miscellaneous matters, in the hope that we can improve the final Indian energy title from a tribal perspective, from an environmental perspective, from a State perspective, and from a local perspective.

With respect to the environmental issue, the amendment does the following four things:

No. 1, it ensures sufficient time for the Secretary to review the proposed tribal energy resource agreements without a waiver of Federal environmental laws.

No. 2, it improves the environmental review process so that it is comparable to the standards required under NEPA, while maintaining tribal control over that review.

No. 3, it removes language limiting who can petition for a review of the implementation of tribal energy resource agreements.

No. 4, it requires Congress to review and reauthorize this section of the program 7 years from now, without it just continuing indefinitely.

With respect to trust responsibility, the amendment deletes language that would prevent the tribes from asserting claims against the Secretary of the Interior related to the Secretary's approval of tribal energy resource agreements. It also eliminates a broad waiver that limits the liability of the United States for any losses associated with the leases or with agreements or with rights-of-way.

The language being eliminated is unacceptable to a large number of Indian tribes. Because of the language, the Navajo Nation, the largest tribe in our country and the one involved in this recent Supreme Court decision that I described, stated in a letter they sent to us dated June 4 that the "tribal energy proposal must be defeated."

The letter goes on to say that the language, if successfully included in the bill:

... would be a virtual endorsement by the Indian tribes' trustee itself [of course, that is the Federal Government], of the fraud, dishonesty, and unethical treatment that was the subject of the Navajo Nation's claim against the United States, and would open the door for future similar conduct by Federal officials.

The Jicarilla Apache Tribe, in a letter dated April 28, stated that the provisions currently in the bill "are inconsistent with the United States' trust relationship with Indian tribes . . ." This is a quotation from their letter. They go on to say they would "actually turn the current legal and political relationship between Indian tribes and the United States Government on its head."

In addition to deleting most of the offending language, our amendment

also established Secretarial duties to the tribes in implementing section 2604. In light of the United States v. Navajo Nation decision, we view this language as necessary to maintain a trust relationship in which the Federal Government has some accountability to the tribes electing to enter into agreements under section 2604. The language we are proposing to add is taken directly from the existing self-determination law and therefore relies on longstanding precedent.

Finally, our amendment includes a number of minor changes that are technical. I believe it is a good, constructive improvement to the bill, and I urge my colleagues to support it.

Madam President, let me ask, how much time remains on our side?

The PRESIDING OFFICER. The Senator has used 10 minutes.

Mr. BINGAMAN. I reserve the remainder of my time and yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Colorado.

Mr. CAMPBELL. Madam President, I rise in opposition to the Bingaman amendment. I will try to go through this as quickly as I can because I know Senator DOMENICI also wants to speak.

On Thursday I introduced an amendment and withdrew it yesterday. That amendment was supported by the National Congress of American Indians, which is over 300 tribes, the Council of Energy Resource Tribes, which represents 50 additional tribes, and the U.S. Eastern and Southern Tribes, which represents 50. It was supported by five New Mexico Pueblos, including the Jicarilla Apache Tribe of New Mexico, the National Tribal Environmental Council, which represents 180 tribes, and the U.S. Chamber of Commerce.

I pulled that back yesterday to refine some of the language but will be reintroducing it shortly—tomorrow or as soon as I can, as soon as we revise a little bit of the language.

Let me point out this chart I have over here. Under existing law, current law, we have a real disparity among tribes. Tribes are treated like individuals in that, if they own land and want to develop the land for minerals or oil or gas, they could do it without complying with NEPA as individual owners or States can. If the Secretary gets involved by virtue of the tribe signing some agreement with an outside entity, she has to then approve the lease or not approve the lease.

What has happened is that wealthy tribes have had the ability to develop their own resources. I live on one reservation, the Southern Ute Reservation, and they do that; they don't have to comply with NEPA. Most tribes are not that wealthy and have to seek an outside partner. Basically, that puts them at a terrific disadvantage for developing their own resources.

I will not go into all resources now under Indian land because I did go through that the other day, but it is very clear that a great deal of Amer-

ican unutilized oil, natural gas, coal, and other minerals are under Indian land now. We are talking about a people who have 70 percent unemployment in some cases, so they definitely need the jobs and help as well as America needs the energy to become less dependent on foreign energy.

In any event, let me go through the Bingaman amendment a little, if I may. We spoke about 2604 primarily. As I understand it, and as I believe, Senator BINGAMAN's amendment would force the statutory NEPA equivalent upon all tribes. As it is now, some are not required to go through NEPA, as I just mentioned.

Also, it will create an unfunded mandate that will completely defeat the goal of facilitating energy development on tribal lands and diminish tribal sovereignty.

I take strong issue with another aspect of the Bingaman amendment having to do with the liability of the United States for tribal decisions. Under title III, along with the power to create approved leases, agreements, and rights-of-ways without Secretarial approval, the tribes have the responsibility for the decisions they make.

Mr. BINGAMAN's amendment in effect de-links the two, eliminating the language that says the Secretary will not be liable for losses arising under the terms of the leases the tribe negotiates on its own. That would mean he would keep the Secretary on the hook for those losses arising from lease terms negotiated by the tribe, even though the Secretary had nothing to do with the negotiations. I don't think that is very good policy, frankly.

Paradoxically, Senator BINGAMAN's amendments would give the Secretary of the Interior authority to negotiate a tribe's remedies against the United States for breach of its duties under the tariff on a tribe-by-tribe basis.

I know of one tribe—I believe two now—the Navajo, that supported the Bingaman amendment but opposes this one. But I think it has very little to do with section 2604. It has more to do with court cases recently which did not go their way. As I understand it, they really want some language that would effectively bail them out of losing that court case.

The vast majority of tribes support the amendment that I introduced the other day.

I think it is a particularly dangerous idea. In some instances, speaking of the Secretary's obligations, the Secretary might effectively negotiate away her obligations, although by including a provision that says the tribe will have no remedies against the United States, the Bingaman amendment expressly allows her to do that without limitation.

Do the obligations referred to in the Bingaman amendment include the trust obligation? They must because there are no obligations on the part of the Secretary mentioned in his amendment other than duty to conduct annual trust evaluations.

I point out that in the amendment I offered the other day, in section 2604 there was some question about whether it decreased trust responsibility. I know my colleagues can read as I can. Let me read, on page 14, section (6)(a), line 19:

Nothing in this section shall absolve the United States from any responsibility to Indians or Indian tribes, including those which derive from the trust relationship or from any treaties, Executive Orders, or agreements between the United States and any Indian tribe.

The Secretary shall continue to have trust obligation to ensure the rights of an Indian tribe are protected in the event of a violation of Federal law or the terms of any lease, business agreement or right-of-way under this section or any other party to any such lease, business agreement or right-of-way.

Under the amendment which I introduced and which I will reintroduce, these trust responsibilities are very well protected.

Finally, Senator BINGAMAN's amendment would sunset section 2604 in 7 years. I think that has somewhat of a chilling effect. First of all, if a tribe wants to avail itself of section 2604 as an alternative to the status quo, it will have to make considerable effort to develop this relationship and agreement to demonstrate its capacity to be able to develop its minerals resources.

Under the Bingaman amendment, the alternative procedure would evaporate in 7 years. Very frankly, the tribe advances to self-determination would evaporate right with it. I think that would effectively prevent any tribe from pursuing the section 2604 alternatives.

Senator BINGAMAN, as I understand his amendment, believes that section 2604 effectively waives NEPA. It does not. The language in the amendment expressly states that the Secretary must review the direct effects of her approving agreement under the provisions of NEPA. That means even though the tribe, when it is making agreements with an outside entity, will have to comply with NEPA upfront, before the Secretary can approve that agreement, she has to subscribe and conform to all NEPA provisions.

The other provisions in the section require an opportunity for public and local governmental input and comment.

The Senator mentioned some opposition from local communities. This is also taken care of under 2604, and it must ensure compliance with all applicable environmental laws in 2604.

The Bingaman amendment also states that there is a tribal concern for section 2604 as it undermines the trust responsibility. I have already dealt with that.

But, clearly, the United States is only held harmless from losses arriving from terms negotiated by a tribe operating under an approved agreement. Hopefully, as we move forward, we will be able to deal with the Navajo problem.

I understand the Navajo. It is a very important tribe. And I have many

friends in the tribe who are very willing to do that.

Very frankly, when we talk about the responsibility of the Federal Government to Indians, let me go back a little bit and refresh my colleagues' memory about how tough they have had it in this Nation.

This Government, as you know, took by hook or crook—and usually at gunpoint—roughly 98 percent of all the land from the American Indians. This Government also reduced the very proud, independent people to the poorest ethnic group in America with the highest unemployment rate, the highest degree of poor health, the highest high school dropout rate, and the highest suicide rate among any other group. This Government also has time and again told the Indians: We know what is best for you whether you like it or not.

That is basically what I think the Bingaman amendment does. We will stifle your religious beliefs, destroy your culture, relocate and relegate you to a life of poverty and deprivation, as happened in the 1950s under the Terminations Act and the Relocation Act. We will drive you through a time bordering on ethnic cleansing, and we will not let you be a citizen in your own land—until 1924. That is when Indians got the right to vote in the United States.

Through all of those years, the few threads of hope Indians clung to were that they would not lose what little they had left. And a few things that gave them hope were closely held beliefs about so-called Mother Earth, their belief in a creator, and that all things will get better. And one in particular was that U.S. Government promise; that promise is called "trust responsibility."

For the past 30 years, since the Nixon Doctrine of Self-Determination, American Indians have been making small strides. But in their culture, they are rather big gains considering how far they have come. It has been an endless struggle to try to share in the same American dream that Members of this body take for granted.

In my view, the Bingaman amendment would literally strip tribes of 30 years of that direction of self-determination and would circumvent the trust responsibilities this Government has to tribes because it would force the statutory equivalent of NEPA on all decisions they make with their own land. As I mentioned, it is an unfunded mandate.

I say to my colleagues in this body that if you want to keep American Indians on their knees, unable to provide jobs for their families and facing a dead end future, then vote for the Bingaman amendment. If you believe that fairness should be right for all Americans, including Indians, to do best what they can with their own resources and for their own people, vote against the Bingaman amendment and help me craft a better alternative,

which is the one I mentioned that I introduced and pulled back and which I am going to reintroduce, and which already has the support of the vast majority of Indian people in this Nation.

I yield the floor. I thank my colleague, Senator DOMENICI, for giving me time.

Mr. DOMENICI. Mr. President, how much time do we have on our side?

The PRESIDING OFFICER. Ten minutes 30 seconds.

Mr. DOMENICI. I will use 7 minutes and leave 3 minutes.

First, I congratulate the distinguished Senator CAMPBELL from the State of Colorado. I don't believe I could say it any better.

In a nutshell, the Bingaman amendment is not good for the Indians in the United States. If we are crafting a bill here that says we want them to develop their energy resources, the amendment before us takes the unprecedented step of applying the NEPA process to the Indian tribes just as if they were the Federal Government.

This amendment goes well beyond current environmental regulations and adds unnecessary regulations and costs to the tribal energy projects.

This proposal is opposed by numerous Indian tribes and tribal associations that are already burdened by the lease approval process through the Federal bureaucracy.

I will read a list of Indian tribes and associations that I would assume do not favor the Bingaman amendment because they were in favor of the amendment alluded to by the distinguished Senator, Mr. CAMPBELL, with whom I was going to cosponsor, for they all refer to it:

The National Congress of American Indians, the Council of Energy Resource Tribes, National Tribal Environmental Council, Southern Ute Tribe, Cherokee Nation, Chickasaw Nation, Native American Energy Group, Mohegan Tribe, Five Sandoval Indian Pueblos, Dine Power Corporation, Jicarilla Apache Nation, and the U.S. Chamber of Commerce.

I ask unanimous consent that this list be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

TRIBAL LETTER SUPPORTING CAMPBELL/  
DOMENICI AMENDMENT TO TITLE III

1. National Congress of American Indians (NCAI)—Is the largest and oldest Tribal organization.
2. Council of Energy Resource Tribes (CERT)—Represents over 50 tribes interested in developing energy resources.
3. National Tribal Environmental Council—Represents 180 tribes on environmental matters.
4. Southern Ute Tribe (Colorado).
5. Cherokee Nation (Oklahoma).
6. Chickasaw Nation (Oklahoma).
7. Native American Energy Group (Wyoming).
8. Mohegan Tribe (Connecticut).
9. Five Sandoval Indian Pueblos (New Mexico).
10. Dine Power Corporation—A Navajo Corporation (New Mexico, Arizona).

11. Jicarilla Apache Nation (New Mexico).  
12. U.S. Chamber of Commerce.

Mr. DOMENICI. Mr. President, the amendment will do the following:

It will force the tribes to pay the cost of NEPA, extend the bureaucratic delays of energy projects, and diminish tribal sovereignty.

There isn't a tribe in the country that would volunteer for this program because it doesn't do anything to improve their current process. So why would they volunteer to join it?

I am confused by the purpose of the amendment. If the intention is to mandate that the tribes comply with NEPA for every single lease or permit, why not offer an amendment to strike the entire Indian energy title and argue for the status quo?

This amendment goes far beyond existing law and expands NEPA beyond the scope of the Federal Government to cover tribes, independent of any Federal action.

By requiring an environmental impact statement to be performed for every lease, it will impose a cost of hundreds of thousands of dollars to be financed by the tribes. A cost they should not have to afford.

If adopted, the amendment would encourage the generation of paper, not the generation of natural gas and crude oil and coal, which I thought we were here supposed to do.

The objective of title III has to be to help the tribes by streamlining current lease approval processes that have hampered investment and the development of the Indian tribal lands as far as energy is concerned.

Senator CAMPBELL and I have worked closely with the tribes to craft a careful compromise that will protect the trust responsibility of the Secretary and the environment. That bill will be offered later, but it is not the bill pending before the Senate. It is a bill you will know because it will bear the name of the distinguished chairman of the Committee on Indian Affairs, Senator CAMPBELL.

The Secretary's approval of the tribes' energy resource agreement will trigger NEPA if the Secretary of the Interior believes it will have a significant impact on the environment. Once an energy resource agreement is approved, tribes will not be required to seek Secretarial approval but will be required to comply with relevant environmental laws, just like any other landowner.

Senator CAMPBELL and I have worked with tribes to ensure that the trust relationship between tribes and the Secretary of the Interior is protected.

This proposal is embodied in the Campbell-Domenici amendment which will be offered at a later date.

The Bingaman amendment, however, would require the Secretary of the Interior to take full responsibility for all liability incurred by tribes—even if the Secretary wasn't party to the negotiations. That simply doesn't make sense.

However, a separate and conflicting provision in this amendment allows the

Secretary to negotiate all remedies to the Secretary's trust responsibility in the energy resource agreement.

As I read it this will give the Secretary authority to drive a hard bargain with individual tribes that are desperate to gain the Secretary's approval of their energy resource agreement. Of course, this will vary from tribe to tribe and further confuse the trust issues.

I believe a more simple solution is to ensure that tribes take full responsibility for the leases and business agreements they negotiate. The Secretary will not be liable for anything she is not a party to, but will continue to conduct annual trust evaluation to ensure that the assets are protected.

Such a solution as included in the Campbell amendment has the support of many tribes.

I am not aware that the administration has reviewed the Bingaman amendment and I am not aware of how many tribes support Senator BINGAMAN's amendment.

The current system has failed to stimulate investment on Indian land, despite the resource potential.

The Bingaman amendment will only exacerbate this problem and continue to restrict the quest for Tribal self-determination.

I urge my colleagues to oppose the Bingaman amendment.

I will state, I would not be offering these kinds of remarks in any normal situation regarding the relationship between the Indian people, the Federal Government, and third parties. But clearly when you have an energy bill, and the purpose of the bill is to have a section in it that will encourage, will cause, will say to the Indian people, we want you to be players, participants, owners of energy, so that you can be part of America's energy solutions and become owners in that solution, then I think we cannot adopt the laws that are as restrictive as the ones proposed in the amendment that is pending.

I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). The Senator from Hawaii.

Mr. INOUE. Mr. President, I rise this moment to speak in favor of an amendment proposed by my dear friend from New Mexico, Senator BINGAMAN.

I find it rather uncomfortable and sad that my remarks may be counter to that of my colleague from New Mexico, my dear friend, Mr. DOMENICI, and my colleague, the chairman of the Indian Affairs Committee.

Mr. President, as you know, there is a longstanding relationship between the United States and the sovereign Indian nations that won exercise, exclusive dominion, and control over lands that now comprise our great country.

The large body of Federal Indian law is known as trust responsibility, and it was first given expression by the Chief Justice of the United States Supreme Court, John Marshall, in 1832. This relationship is premised upon the sov-

ereignty of the Indian nations, a sovereignty that existed well before the U.S. Government was formed, and it is memorialized in the United States Constitution.

This trust relationship that has always formed the course of dealings between the U.S. and Indian tribes is well understood and beyond debate. The United States holds legal title to lands that it held in trust for Indian tribes. Accordingly, activities affecting Indian lands and resources have always been subject to approval by the Secretary of the Interior Department, acting as the principal agent for the United States. That is the law of the land.

In the Congress, we have always understood the United States trust responsibility as being derived from treaties, statutes, regulations, executive orders, rulings, and agreements between the Federal Government and Indian tribal governments. We have legislated on this basis. The courts have issued rulings on this basis. And until recently the executive branch has premised policy on this basis and promulgated regulations on this fundamental principle of law.

However, in the arguments before the U.S. Supreme Court earlier this year, the Government took the position that the duties of the U.S., as trustee for Indian lands and resources, exist only as they may be spelled out in statute, and are legally enforceable only if a statute provides a remedy for any breach of the trust.

The Supreme Court accepted the Government's argument that the duties of the trustee must be spelled out in statute, but ruled that as long as the Government had complete management control over the trust land or trust resources at issue, then the trustee's duties could be legally enforced and there could be a damage remedy for a breach of the Government's trust duties.

Tribal governments are also paying keen attention to the arguments that are being advanced by the Government in pending legislation over the management of funds which are held in trust by the United States for individual Indians and Indian tribes. Most of us have heard of the assertions in this case in which it maintained that the Government is unable to account for more than \$2 billion in Indian trust funds.

With the Government's advocacy for a new perspective on the United States trust responsibility, it is readily apparent why the eyes of Indian country are sharply focused on the tribal provisions of this bill and the amendments that are the subject of our discussion today.

Native America wants to see what position the Congress will adopt as it relates to the ongoing viability of the trust relationship. They are closely scrutinizing our words and our actions in the context of this measure to determine whether they signal a departure from the traditional and well-established principles of the United States trust responsibility.

That is why I believe it is incumbent upon us to make sure we understand what is at stake in this debate. There has always been, and likely always will be, a tension between a greater measure of tribal control and a diminished Federal presence in Indian country, one that has to be reconciled in each distinct area. But the reality is that as long as the United States holds legal title to Indian lands, the Federal Government and tribal governments will have to work together on these matters.

Not all tribal governments have managed their resources, and not all of those who do seek to develop those resources. But for those that do, we well understand that they would want to reduce the amount of time that is customarily involved in securing the Secretary's approval of leases of tribal land and grants of right of way over Indian lands.

Can this be accomplished without altering or diminishing the trust relationship? I believe it can. The tribal industry resource agreements that are authorized, the amendment that we consider today, can serve as an instrument for defining and adapting this relationship to accommodate the unique circumstances of each tribe's energy resource development objectives.

But should the United States trust responsibility for Indian lands and resources be waived? I am not aware of any tribal government that supports an unlimited waiver of the United States trust responsibility. Certainly, one of the largest land-based tribes in the United States, the Navajo Nation, has made it clear that it will not countenance such a waiver.

Indian country has a long history and a long memory. That history documents the sad reality that there have been too many times in the past when those who did not have the best interests of Indian country in mind have exploited tribal lands and resources and then walked away.

In those instances, tribal governments and the United States shared a common interest in addressing the damage to tribal lands and in pursuing those who caused the damage.

Mr. President, I think it is clear that the provisions of this title as currently formulated, and if not further amended, will foreclose the cause of action when there is damage to tribal lands. So I join my colleague, Senator BINGAMAN, in sponsoring this amendment because I believe strongly in Federal Indian responsibility for Indian lands, and the resources must be maintained and strengthened, not diminished.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Colorado is recognized.

Mr. CAMPBELL. How much time do we have?

The PRESIDING OFFICER. The Senator has consumed 16 minutes.

Mr. CAMPBELL. We have 20 minutes; correct?

The PRESIDING OFFICER. It is the understanding of the Chair that no agreement has been reached about the time limit on this amendment.

Mr. CAMPBELL. Mr. President, I will just make a couple of comments. Senator INOUE and I have been friends for a great number of years. When he was chairman, and now as the ranking member, we have worked on an awful lot of Indian legislation together.

With all due respect, I think he might be mistaken about what 2604 did. In fact, maybe something else, too, and that is simply this. Tribes, generally, if they are not absolutely sure of themselves when they enter into agreements, or when they are dealing with the Federal Government, hire pretty sophisticated attorneys to do the research for them. All of these different groups, including the National Congress of American Indians, representing over 300 tribes; the Council of Energy Resource Tribes, representing over 50 tribes; the U.S. Eastern and Southern Tribes, representing over 50 tribes; the Pueblos of New Mexico; the Jicarilla Apache Tribe of New Mexico; and the National Tribal Environmental Council have had attorneys look at 2604 and, clearly, none of them has said anything about erosion of trust responsibility because—and I mentioned earlier—it is stated in 2604, on page 14, line 18 through page 15, line 3, that, if anything, tribal trust relationship is strengthened under 2604, which is the amendment I introduced the other day and am going to reintroduce.

Unlike the Bingham amendment, which I think, frankly, weakens trust responsibility—as near as I can tell, the language in his amendment weakens it. That is one of the questions: which one strengthens it and which one weakens it? My belief is that 2604 would be strengthened with the language I will be reintroducing.

The other one is NEPA. I do not believe, frankly, that tribes are off the hook for NEPA unless they want to develop resources with their own money on their own land without outside agreements or Secretarial approval. Once the Secretary looks into it, or agrees to take it up after they have reached some negotiated agreement, she has to conform with all NEPA requirements. That is clear in 2604. Nobody is off the hook from NEPA for trust responsibility.

One more thing. Under 2604, which hasn't been mentioned, and the amendment that I introduced and will reintroduce, no tribe needs to participate in this agreement at all. It is totally voluntary, tribe by tribe. Senator BINGAMAN mentioned that the Navajo Nation was not supportive of 2604 and my amendment. That is all right; they don't have to participate. This is open for the tribes that want to, and those that do not want to don't have to.

As I understand the Bingham amendment, they are all going to be caught in the same net. That is, they will all be required to come up with the

money, as Senator DOMENICI mentioned, to subscribe to NEPA even before they reach an agreement. They don't have the money to do that. All it is going to do is prevent tribes from moving forward in this Nation.

I have no further comments. I yield the floor.

Mr. DOMENICI. Mr. President, I thought we agreed to 20 minutes on each side.

Mr. BINGAMAN. That is my understanding. I was hoping we would have a vote right away. How much time remains on each side?

The PRESIDING OFFICER. The majority has consumed 20 minutes.

Mr. DOMENICI. They want to set it aside and go to the Burma measure. We had 20 minutes on each side, but they want to proceed to the Burma debate and vote, stacked, with yours going first.

Mr. BINGAMAN. I thought the agreement was that we would have a vote on ours.

Mr. DOMENICI. They want to stack them.

Mr. REID. Mr. President, we entered into an agreement, and we all thought there was going to be a vote following this 40 minutes of debate. The majority leader was not part of that agreement. In deference to him, we will not push our 40-minute vote. We will agree to go to that. That time is gone now, isn't it?

The PRESIDING OFFICER. The majority has used 20 minutes.

Mr. BINGAMAN. We were anxious to get a vote. Senator SCHUMER wanted to be here for a vote. He had to leave. He indicates he will have to leave.

Mr. REID. He has left.

Mr. BINGAMAN. I request that we do our vote so he can be here later on. Is that acceptable?

Mr. DOMENICI. What was the request again?

Mr. BINGAMAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BINGAMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BINGAMAN. How much time would remain on our side if we had entered into that agreement?

The PRESIDING OFFICER. Two minutes.

Mr. BINGAMAN. I will use those 2 minutes.

Mr. President, the underlying bill, which we are trying to amend here, has in it really clear language that essentially lets the Secretary of the Interior off the hook. It eliminates responsibilities that the Secretary of the Interior would otherwise have. It says the United States shall not be liable for any loss or injury sustained by any party, including an Indian tribe, or any member of an Indian tribe, to a lease,

business agreement, right-of-way, executed in accordance with the tribal energy resource agreements approved under this subsection.

Then it says that on approval of a tribal energy resource agreement of an Indian tribe, under paragraph 1, the Indian tribe shall be estopped from asserting a claim against the United States on the grounds that the Secretary should not have approved this agreement.

That is a clear statement by the Congress—if that becomes law—that the Secretary of the Interior is off the hook. This may be on Indian trust land. It may be that the Secretary of the Interior is the trustee of that Indian trust land. We are saying in this language—if we don't amend it by the amendment Senator INOUE and I have prepared, we are saying that the Secretary of the Interior is off the hook and the Indian tribe has no one to go to for any kind of remedy. I don't think we intend to do that.

Senator INOUE and I have put together an amendment we believe keeps trust responsibility with the Federal Government, where it should be. It sets up a good procedure that the tribe can work with the Federal Government. The tribe still has decisions, makes decisions over these energy development projects, but clearly the Federal Government needs to be part of that and needs to have responsibility for seeing that decisions are in the best interest of the tribe.

Mr. President, I think this is a good amendment. I hope that once we do get to a vote, whenever that occurs, we will see this amendment adopted. It will strengthen the bill, and I hope very much we can approve it.

I yield the floor.

Mr. JEFFORDS. I rise in support of the amendment offered by Senator BINGAMAN.

His amendment does not go as far as I would wish, because it does not fully preserve the integrity of NEPA or the Endangered Species Act.

These two Federal statutes, which are under the jurisdiction of the Environment and Public Works Committee, have been cornerstones for the protection of environmental quality for decades. Section 2604 of the bill negates or weakens application of these laws to most energy development on tribal lands.

Section 2604 would allow tribes to grant leases or rights-of-way for mineral development, electric generation, transmission or distribution facilities or facilities to process energy resources of any sort on tribal lands.

The tribes could do this without the approval of the Secretary of the Interior.

This would effectively remove the current legislative authority of the Department of the Interior over these matters.

Under existing law, the oversight of the Secretary of the Interior over energy development on tribal lands trig-

gers a variety of Federal permitting requirements which will ensure that NEPA, section 7 of the Endangered Species Act, and a variety of other Federal laws will apply to these activities.

Removal of the Secretary's approval authority over many of these actions would have a number of consequences.

First, it would mean that Federal NEPA laws would no longer apply. It would also mean that the section 7 Federal consultation provisions of the Endangered Species Act would cease to apply.

This is particularly significant in that tribal lands are often adjacent to some of the most protected and pristine Federal lands, including wildlife refuges, wilderness areas, and National Parks. Wholesale changes in the application of the Federal mineral leasing and development laws—and potentially a host of environmental laws—to tribal lands, could have significant impacts on adjacent sensitive lands, air quality, water quality and wildlife.

Because of their sovereign immunity and special trust status, tribes are also generally exempt from many State environmental and other laws, to which private lands are subject.

Section 2604 represents a sweeping reversal of years and years of established environmental and energy laws, many of which are within the jurisdiction of the Senate Environment and Public Works Committee. Our committee has never held hearings on this, nor had the opportunity to examine the extent to which this language would weaken or amend Federal environmental laws, or laws relating to the development of commercial nuclear power.

My preference would be to insert language which I filed yesterday, which would clarify that Federal environmental and nuclear laws would continue to apply to these tribal lands, regardless of removing the approval of the Secretary of the Interior under the Indian Mineral Development Act.

However, because I think that the language offered by Senator BINGAMAN has a greater chance for success, I will vote in favor of his amendment.

At a minimum, his amendment would remove any implicit waiver of Federal environmental laws and would create an environmental review process to be conducted by tribes to ensure at least some modicum of public involvement in what could possibly be massive energy development on tribal lands.

Section 2604 creates an unprecedented lack of Federal oversight for development with potentially massive environmental impacts, and I urge my colleagues to adopt Senator BINGAMAN's amendment.

The PRESIDING OFFICER. Who seeks recognition?

The Senator from New Mexico.

Mr. DOMENICI. Mr. President, we yield back our time on our side. I move to table the Bingaman amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Massachusetts (Mr. KERRY) is necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "nay".

The PRESIDING OFFICER (Ms. COLLINS). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 52, nays 47, as follows:

[Rollcall Vote No. 219 Leg.]  
YEAS—52

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nickles
Bennett	Enzi	Roberts
Bond	Fitzgerald	Santorum
Brownback	Frist	Sessions
Bunning	Graham (SC)	Shelby
Burns	Grassley	Smith
Campbell	Gregg	Snowe
Chafee	Hagel	Specter
Chambliss	Hatch	Stevens
Cochran	Hutchison	Sununu
Coleman	Inhofe	Talent
Collins	Kyl	Thomas
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—47

Akaka	Dorgan	Levin
Baucus	Durbin	Lieberman
Bayh	Edwards	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Nelson (FL)
Breaux	Harkin	Nelson (NE)
Byrd	Hollings	Pryor
Cantwell	Inouye	Reed
Carper	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Sarbanes
Corzine	Kohl	Schumer
Daschle	Landrieu	Stabenow
Dayton	Lautenberg	Wyden
Dodd	Leahy	

NOT VOTING—1

Kerry

The motion was agreed to.  
Mr. DOMENICI. Mr. President, I move to reconsider the vote.

Mr. CAMPBELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DOMENICI. I yield to the Senator from Colorado.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. CAMPBELL. I thank my colleagues for voting for this on the last motion to table. I know it is a difficult vote for some of my colleagues. I want to reintroduce tomorrow the amendment I spoke to earlier. I want to assure Senator BINGAMAN and Senator INOUE, who have worked on a lot of different Indian issues with us in the past, that if the language on trust is not strong enough, I will be more than happy to review that and work with you to make it even stronger and also to try to clarify the language dealing with NEPA.

The PRESIDING OFFICER. The Senator from Kentucky.