Enabling Tribal Development:

A Look at Current Legislative Efforts in the Mineral & Energy Sectors

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I. Introduction

Congress tasked the Department of the Interior (Interior) to "assist Indian tribes in the development of energy resources and further the goal of Indian self-determination."[1] With tribal lands holding the potential to generate almost $1 trillion in revenues from undeveloped reserves of coal, natural gas, and oil, in addition to substantial solar and wind reserves that could provide power nation-wide, effective policy that enables tribes to develop these resources is paramount to their future growth and prosperity.[2] Over the years, Interior has implemented an array of programs to facilitate the development of tribal resources; however, there is a growing sentiment that the existing framework is not sufficiently supporting this policy.

Over the past eight years, a bill entitled the Native American Energy Act (NAEA) has been circulating in the House of Representatives. Its stated purpose is "to facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands."[3] Congress's last attempt to accomplish a similar goal was the creation of the Tribal Energy Resource Agreement (TERA) process. Its goal was to facilitate development of tribal resources by creating a process for tribes to manage major aspects of resource development on their lands without the approval of the Secretary of Interior (Secretary). However, the NAEA and other bills, like the Indian Tribal Energy Development and Self-Determination Act, reflect a

[1] 25 U.S.C. § 3502(a)(1).
[2] Energy & Minerals, National Congress of American Indians, http://www.ncai.org/policy-issues/land-natural-resources/energy-and-minerals.
[3] H.R. 210, 115th Cong. (2017).

growing sentiment among representatives that current efforts are failing and more can be done to encourage energy and mineral development on tribal lands. This article will analyze and compare these bills to discern which aspects of tribal energy and mineral development are currently subject to Congressional scrutiny, and what impacts these proposed legislative changes would have on the current processes for tribal natural resource development.

II. Summary of H.R. 210

The latest iteration of the NAEA was introduced as H.R. 210 on January 3, 2017 by Representative Don Young of Alaska. H.R. 210 seeks to facilitate the development of energy resources on Indian lands by loosening appraisal requirements, narrowing environmental and judicial review, requiring biomass demonstration projects, and exempting most Indian lands from Interior's hydraulic fracking rules.

The first substantive section amends Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. § 3501 et seq.) by adding section 2607, entitled "appraisal reforms."[4] These appraisal reforms would give tribes the option to conduct their own fair market value appraisals in transactions involving their lands or trust assets,[5] and it puts time limits on the Secretary to approve or disapprove such appraisals. The appraisals section also allows tribes to waive appraisal requirements so long as the tribe waives any claims for damages against the United States for the lack of such an appraisal.

[4] H.R. 210 § 2.

[5] The language of this provision does not expressly limit appraisal reforms to appraisals dealing solely with energy or mineral development. Rather, this language appears to modify appraisals for all purposes, including residential and business leases.

The section entitled "Environmental Reviews of Major Federal Action on Indian Lands" would amend the National Energy Policy Act (NEPA).[6] For actions undertaken by a tribe on Indian land, H.R. 210 would allow only members of the tribe, individuals within the affected area, and state, federally recognized tribal, and local governments to participate in the NEPA process. Importantly, this provision narrows the NEPA process for all types of tribal actions on Indian land, beyond energy development, although it does expressly preserve full NEPA review for tribal actions under the Indian Gaming Regulatory Act.

The section of H.R. 210 addressing judicial review would bar energy related actions filed later than sixty days after a final agency action and names the United States District Court for the District of Columbia as the sole venue for such actions.[7] It also awards legal fees to defendants in these actions should the plaintiff not prevail, unless the court finds the plaintiff's position was substantially justified or would be unjust. Additionally, it seeks to place a time limit on both the District Court and the Court of Appeals by requiring review within 180 days of a claim being filed or appealed.

H.R. 210 also includes a section devoted to encouraging the development of biomass energy production on tribal lands.[8] This portion of the bill amends the Tribal Forest Protection Act of 2004 (25 U.S.C. § 3115(a)). It requires the Secretary to enter into agreements with tribes to carry out demonstration projects that promote biomass energy production. The Secretary would be required to ensure at least four such projects would be carried out each fiscal year.

[6] H.R. 210 § 4.
[7] H.R. 210 § 5.
[8] *Id*. § 6.

A portion of H.R. 210 also modifies leases of Navajo Nation tribal lands.[9] This section, limited to Navajo Nation trust or restricted fee lands, would amend 25 U.S.C. § 415(e)(1) by removing the requirement that leases for the exploration, development, or extraction of mineral resources receive the approval of the Secretary. It would also change the maximum length of a business or agricultural lease from 25 to 99 years, and it would set leases for the exploration, development, or extraction of mineral resources to 25 years with an option for an additional 25-year period.

The final section of H.R. 210 exempts lands held in trust or restricted status for the benefit of Indians from all Interior rules regarding hydraulic fracturing used in the development or production of oil or gas resources.[10] Interior hydraulic fracturing rules would still apply if the beneficiaries of such lands expressly consent to the applicability of such rules. H.R. 210 also contains provisions that would standardize naming conventions for oil and gas wells[11] and deem as sustainable management practices any activities undertaken pursuant to a tribal resource management plan.[12]

III. Summary of S. 245

The Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 was introduced as S. 245 on November 30, 2017. Like H.R. 210, S. 245 seeks to facilitate development of energy and mineral resources on tribal land. However, while containing almost

[9] *Id*. § 8.
[10] H.R. 210 § 9.
[11] This section would require the Secretary to implement procedures that ensure all departments within Interior that are involved in the review, approval, and oversight of oil and gas activities use a uniform system of reference numbers and tracking systems for oil and gas wells.
[12] Under H.R. 210, any activity conducted or resources harvested or produced pursuant to tribal resource management plans or integrated resource management plans approved by the Secretary pursuant to 25 U.S.C. § 3101 or 25 U.S.C. § 3701 would be considered sustainable management practices for the purposes of any Federal standard, benefit, or requirement that requires a demonstration of such sustainability.

the exact language as H.R. 210 regarding biomass demonstration projects, appraisals, and leases of restricted lands for the Navajo Nation, the bulk of S. 245 concerns changes to the TERA scheme, access to technical assistance for tribes, and the creation of a tribally created entity known as a tribal energy development organization.

Under the existing TERA framework, a tribe is permitted to enter into leases, agreements, and rights-of-way (ROWs) to develop its energy and mineral resources without approval of the Secretary. The TERA process is long and complex.[13] S. 245 amends the TERA process by setting a 270-day time constraint on the Secretary to approve or disapprove a TERA application.[14] If a decision is not reach in 270 days, the application is deemed approved. Additionally, S. 245 would limit Secretarial disapproval to when 1) a TERA provision violates applicable federal law or an applicable treaty, or 2) the TERA fails to include required information such as public notification of final approvals or requirements for environmental review.[15] S. 245 also adds a new mechanism whereby any money saved by Interior from the implementation of a TERA could, at the request of a tribe, be put into a fund for that TERA tribe to use.[16]

S. 245 also provides technical assistance to tribes by ensuring access to technical and scientific resources of the Department of Energy (DOE). The bill directs the Secretary to work with directors of the National Laboratories to make available all the technical and scientific resources of the DOE for tribal energy development.[17]

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[13] *See* Tera Application and Review Process, OpenEI.org, https://openei.org/wiki/File:TERA_flowchartTEEIC.pdf
[14] S. 245 § 103(d)(2)(A)(i).
[15] *Id*. § 103(d)(2)(B).
[16] *Id*. § 103(g).
[17] *Id*. § 104.

A major change set forth by S. 245 would be the creation of tribal energy development organizations (TEDOs).[18] TEDOs would give tribes an alternate route to securing the benefits of a TERA; namely, the ability to enter into leases, agreements, and ROWs without the approval of the Secretary. To be designated a TEDO, a tribe must have carried out a contract or compact for at least three consecutive years by the date of the TEDO application. Additionally, the tribe must have carried out the contract or compact without material audit exceptions, organized the new TEDO under its own laws, and own and control the majority interest of the new TEDO. Non-Indians may have an ownership interest in the TEDO. The tribe must also include a statement that the TEDO shall be subject to laws of the tribe.

IV. Analysis of H.R. 210 and S. 245

Both H.R. 210 and S. 245 seek to facilitate the tribal development of tribal resources. However, H.R. 210 faces potential criticisms for setting legally questionable time constraints on Article III judges, broadly altering the scope of NEPA, and imposing undue burdens on individual Indian land beneficiaries who wish to preserve the applicability of Interior's fracking rules. S. 245 avoids these concerns while still incorporating the other substantive components of H.R. 210, and it focuses on modifying existing federal-tribal processes rather than reinventing the process. Therefore, S. 245 appears to have a better likelihood of passage in Congress.

a. H.R. 210

H.R. 210 has three main provisions that are problematic. Namely, mandating time limits for decisions by Article III courts, ambiguity in the term "affected area" under NEPA review, and

[18] *Id*. § 103(h).

language in its fracking provision that would make it very difficult for individual Indian allottees to maintain Interior's fracking rules over fractionated landholdings.

Section 5 subsections (b)(2) and (c) attempt to set time limits of no more than 180 days for tribal energy related actions to be resolved. This creates a potential separation of powers issue where Congress would be attempting to control the internal procedures of the judicial branch.[19] Moreover, Section 5 has no language enforcing these time limitations, or what would happen if a court failed to decide a case within the 180-day timeframe. Therefore, even if a bill with such language passed, there are questions of enforceability.

Section 4 of H.R. 210 amends NEPA and limits involvement in any major Federal action on Indian lands to those in the "affected area" of an action. In turn, "affected area" is to be defined by the Chairman of the Council on Environmental Quality (Chairman) in consultation with Indian tribes. This section raises a host of potential issues. Pursuant to its language, section 5 amends NEPA for *all* major Federal actions on Indian lands, not just the energy related actions that constitute the bill's overall focus. Further, section 5 empowers the Chairman to effectively define the scope of the entire NEPA process for all major Federal actions across all tribal lands. The bill's lack of concrete standards for how the Chairman may define "affected area" or how the Chairman should engage in tribal consultation, along with its implicit but seemingly unacknowledged transformation of how NEPA would be implemented across tribal lands, should give pause to legislators and observers alike.

Section 9 removes all Interior rules regarding fracking from application to Indian lands unless the beneficiaries of the land gives their express consent for the rules to apply. This

[19] *See* 16A AM. JUR. 2D *Constitutional Law* § 261.

language may seem benign, but the fractionalization[20] of many allotted Indian lands, whereby parcels within a reservation are held in trust for a number of individuals, who are in some cases deceased or unknown, would make it administratively burdensome and perhaps nearly impossible for Indians wishing to keep Interior's fracking rules to satisfactorily offer their consent. Effectively, Section 9 has the potential to remove Interior's fracking rules from many Indian lands regardless of whether the Indian beneficiaries truly want the rules to apply or not. Together, these three problematic areas of H.R. 210 would likely make some legislatures wary of supporting the bill.

b. S. 245

Contrasting H.R. 210, S. 245 attempts to facilitate and encourage tribal resource development by remodeling frameworks already in place and creating an additional vehicle for tribes to utilize. It should be noted that S. 245 does incorporate H.R. 210's language creating biomass demonstration projects, modifying the appraisal process, and changing lease terms of restricted lands for the Navajo Nation. However, S. 245's greatest impacts would come from its changing of the current TERA process and the creation of TEDOs.

The current TERA process is by no means efficient or effective. A 2015 Government Accountability Office (GAO) report entitled "Indian Energy Development, Poor Management by BIA Has Hindered Energy Development on Indian Lands" details the ineffectiveness of the TERA process.[21] It reported that in the decade leading up to the publishing of the report, no tribe

[20] *See Fractionated Ownership of Indian Lands*, Tribal Law and Policy Institute, http://www.tribal-institute.org/lists/fractionated_ownership.htm and *Indian Energy Development, Poor Management by BIA Has Hindered Energy Development on Indian Lands*, Gov't Accountability Off. 28 (June 2015), https://www.gao.gov/assets/680/670701.pdf.

[21] *See Indian Energy Development, Poor Management by BIA Has Hindered Energy Development on Indian Lands*, Gov't Accountability Off. (June 2015) (GAO Report), https://www.gao.gov/assets/680/670701.pdf.

had entered into a TERA. GAO determined that three of the primary deterrents to tribes securing TERAs were (1) uncertainty about TERA regulations, (2) limited tribal capacity and costs associated with assuming activities currently conducted by federal agencies, and (3) a complex application process.[22] In a period where the development of utility-scale wind and solar projects has exploded in states across the west, as of 2015, only one utility-scale wind project was operational on tribal lands.[23] It is clear that the current framework is ineffective and tribes have been unable to develop their energy resources. S. 245 attempts to begin the process of overhauling TERA and creates a new vehicle, the TEDO, that will expedite tribal energy development.

S. 245 changes the TERA process by effectively assuring that a complete TERA application will be approved. The 270-day auto approval language coupled with language limiting the reasons the Secretary may disapprove a TERA work to ensure that once a tribe has assembled a complete TERA, it is almost guaranteed to be approved. This language is undoubtedly important to streamline potential TERA applications; however, more will be needed to make TERAs viable option for tribes.

Even with S. 245's changes to the TERA process, it will likely remain an unattractive choice for tribes wishing to develop their energy resources due to persistent uncertainties and concerns with the environmental review process and opportunities for public comment. TERAs require a tribe to have its own environmental review process in place before the Secretary grants its TERA. The environmental review process required by Interior is robust and almost mirrors the comprehensive review under NEPA.[24] Concerningly for tribes, after creating their own

[22] *Id*. at 32–34.
[23] GAO Report at 2.
[24] *See* 25 C.F.R. § 224.63(c).

environmental review process to satisfy the requirements for a TERA, the TERA application itself must go through NEPA review. Though no tribe has gotten to this stage as of 2015, tribes would be easily dissuaded from expending their own limited resources to create a framework for robust environmental review only to still be required to go through NEPA.

Moreover, requiring tribes to go through public notice and comment for all proposed energy development projects has both practical and tribal self-determination concerns. The practical concerns lie in drawing out approval processes that could ultimately doom development of potential energy projects. GAO gave one example of this occurring where BIA took 18 months to review a wind lease. Because BIA took so long to review, the developer lost an interconnection agreement with the local utility and is now unable to proceed.[25] Additionally, tribal self-determination concerns arise in opening the process to public comment because the public includes non-tribal members under current regulations.[26] The GAO report notes that tribes are justifiably concerned about possibly incurring liability from non-tribal members and delays of projects under such a definition.[27]

Even under S. 245's amended TERA framework, which sets agency approval deadlines and limits agency discretion to disapprove a TERA application, tribes would still be unlikely to attempt the process. A complex application process would remain that requires extensive environmental review and opens tribes to comment and delay by non-tribal members. The TERA process hinders energy development on tribal lands and puts tribes at a disadvantage relative to the states in which they are situated. States and private energy developers can locate energy projects off federal lands, escaping the bog of NEPA review and allowing for a boom in

[25] *See* GAO Report at 21.
[26] 25 C.F.R. § 224.30.
[27] *See* GAO Report at 32.

new energy projects. Accordingly, S. 245's most promising response is the creation of tribal energy development organizations, or TEDOs.

S. 245 creates TEDOs and gives leases or business agreements entered into by the TEDO the same exemptions from federal review as a TERA. Whereas TERAs institutionalize tribal energy programs to both negotiate and regulate individual actions to develop tribal energy resources, TEDOs are effectively tribally owned and controlled energy companies that could facilitate tribal and non-tribal business partnerships. Similar to TERAs, once a TEDO is federally approved, the tribe acting through the TEDO may thereafter enter into any number of leases or business agreements for the development of its resources—free from federal review. Furthermore, TEDOs provide tribes a more feasible pathway to developing resources where the application process, requiring a tribe to demonstrate that it has carried out a contract or compact for three years without material audit, appears much more straightforward then the TERA application process.

TEDOs would also give tribes equal footing compared with their state neighbors regarding environmental review. S. 245 requires no environmental review of a TEDO either before or after its approval.[28] Combined with the exemption from further federal review, TEDOs would be subject solely to the environmental review procedures voluntarily set in place by the tribe. Accordingly, S. 245 charges tribes to be the sole stewards of their environment in the context of energy and mineral development, and effectively treats tribal natural resources the same as state or private resources. This freedom would allow tribes, through a TEDO, to engage

[28] *See* S. 245 § 103(h)(2).

in the development of their natural resources without reliance on Interior review—avoiding lengthy bureaucratic waits and equalizing competition with their state and private counterparts.

V. Congressional Support for S. 245

S. 245 is a bi-partisan bill that appears to have great support. Sponsored by Senators Hoeven (R-ND), Barrasso (R-WY), McCain (R-AZ), Lankford (R-OK), Moran (R-KS), and Heitkamp (D-ND), S. 245 passed the Senate on November 29, 2017 without amendment by unanimous consent. It has since been sent to the House where it was currently before the Subcommittee on Energy and Mineral Resources, Subcommittee on Indian, Insular and Alaska Native Affairs, and Subcommittee on Energy. Additionally, Senator Hoeven, in his senate report on the bill, cites the 2015 GAO report and its findings as a driver of the need for S. 245.[29] While there has not been new action on S. 245 in 2018, the unanimous passing of S. 245 in the Senate and acknowledgement of GAO's findings give hope that reform for tribal energy development is on its way.

[29] *See* S. Rep. No. 115-84, at 5 (2017), https://www.congress.gov/115/crpt/srpt84/CRPT-115srpt84.pdf.