

# Committee on Natural Resources

Rob Bishop Chairman  
Markup Memorandum

November 12, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff  
Subcommittee on Indian, Insular and Alaska Native Affairs (x6-9725)

Markup: **S. 245 (Sen. John Hoeven)**, A bill to amend the Indian Tribal Energy Development and Self Determination Act of 2005, and for other purposes.  
**November 15, 2018 at 9:30 a.m.; 1324 Longworth House Office Building**

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## **S. 245 (Sen. John Hoeven), “*Indian Tribal Energy Development and Self-Determination Act Amendments of 2017*”**

### **Summary of the Bill**

S. 245 was introduced by Sen. John Hoeven on January 30, 2017. The bill would amend certain provisions of the Energy Policy Act of 2005,<sup>1</sup> primarily impacting the process by which a tribe may obtain Tribal Energy Resource Agreements (TERA). Additional provisions in the bill would provide tribal energy activities and projects with greater access to Department of Energy technical and scientific resources, establish a biomass demonstration project, and streamline the energy appraisal and permitting processes. The provisions contained in the bill are intended to help tribes exercise greater self-determination in the production of energy on their lands.

### **Cosponsors**

Sen. John Barrasso (R-WY), Sen. Jerry Moran (R-KS), Sen. James Lankford (R-OK), Sen. Michael Enzi (R-WY), Sen. Cory Gardner (R-CO), Sen. Heidi Heitkamp (D-ND)

### **Background**

#### ***Difficulties in Developing Indian Energy***

For decades, tribes and individual Indian landowners have consistently struggled with overbearing federal laws governing leases of their trust lands. Generally, federal law requires the approval of the Department of the Interior before a lease between an energy developer and a tribe is deemed valid. For example, under the Indian Land Mineral Leasing Act of 1982,<sup>2</sup> an individual tribal member or tribe may only lease their trust lands for mineral development “subject to the approval of the Secretary [of the Interior]”. Because of this standing rule, the Department of the Interior developed increasingly complex and burdensome rules regarding the

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<sup>1</sup> Pub. L. No. 109-58, 119 Stat. 594.

<sup>2</sup> 25 U.S.C. 2101 et. seq.

approval of leases on Indian land. The increase in rules often leads to National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) reviews, expensive applications for permits to drill, lengthy appraisals, and an increasing number of layers of sluggish bureaucratic review often across various government agencies. As the reviews begin to pile up, the ability to delay, appeal, or sue to slow development on Indian lands increase exponentially.

This cumbersome bureaucratic design continuously hurts tribes, including many historically impoverished communities, from tapping into the economic potential of the resources found on their tribal lands. Because tribes with large energy resources tend to live on or near rural areas, development of these resources is consistently one of the only ways tribes can provide jobs and constant revenue for the tribe and its members as well as a thriving energy supply for themselves and the surrounding community. Full access to these energy resources could allow tribes to tap into their full economic potential.

In June of 2015, the Government Accountability Office (GAO) authored a report titled, “Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands”.<sup>3</sup> Throughout the report, GAO outlined various shortcomings of the Department’s management of energy development on Indian lands that, in numerous situations “can increase costs and project development times, resulting in missed development opportunities, lost revenue, and jeopardized viability of projects.”

These repeated instances of stifling Indian energy development lead to GAO placing Indian energy on its biennial “high risk” list for waste, fraud, and abuse in March 2017. In the report, GAO stated, “BIA has in recent years continued to mismanage Indian energy resources held in trust, thereby limiting opportunities for tribes and their members to use those resources to create economic benefits and improve their communities.”<sup>4</sup>

### ***Tribal Energy Resource Agreements***

Tribal Energy Resource Agreements (TERAs) were authorized under the Energy Policy Act of 2005.<sup>5</sup> Under a TERA, a tribe may, without review and approval of the Secretary of the Interior, lease and grant rights-of-way on its trust land for energy-related purposes if these actions are conducted under tribal rules approved in advance by the Secretary of the Interior. Such tribal rules shall be approved by the Secretary if they include appropriate conditions for the orderly conduct of leasing of trust lands by the tribe, a demonstration of the tribe’s capacity to manage its resources, and a tribal environmental review process. Outside of certain duties for the Secretary to monitor the tribe’s compliance with the TERA, a tribe can manage its energy resources on a day-to-day basis without the constant day-to-day governance of the lease by Interior agencies.

Removing a layer of federal agency oversight of trust lands creates a greater incentive for the productive development of a tribe’s energy resources, benefiting its members, creating job

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<sup>3</sup> <https://www.gao.gov/products/GAO-15-502>

<sup>4</sup> [https://www.gao.gov/highrisk/improving\\_federal\\_management\\_serve\\_tribes/why\\_did\\_study](https://www.gao.gov/highrisk/improving_federal_management_serve_tribes/why_did_study)

<sup>5</sup> 25 U.S.C. 3501 et. seq.

opportunities for a tribe's community and for those living in the surrounding community, and increasing the supply of energy resources to fuel the United States' economy.

More than a decade after the passage of the Energy Policy Act of 2005, no tribe has successfully applied for and a received a TERA. GAO cited a few reasons for this result, some of which include uncertainty surrounding TERA regulations promulgated by the Department of the Interior, limited tribal capacity and the costs of taking on activities currently controlled by federal agencies, and a complex application process.

### **Previous Committee Actions on Indian Energy**

In the 112<sup>th</sup> Congress, the Subcommittee on Indian and Alaska Native Affairs held five<sup>6</sup> Indian energy-related hearings. In the 113<sup>th</sup> Congress, Rep. Don Young (R-AK) introduced H.R. 1548, the Native American Energy Act. The Natural Resources Committee reported the bill and included an amended version as part of a larger energy package which passed the House.<sup>7</sup> In the 114<sup>th</sup> Congress, H.R. 538, the Native American Energy Act, passed the House on October 8, 2015, with bipartisan support and was then referred to the Senate Committee on Indian Affairs. No further action occurred on the standalone bill; however, H.R. 538 was included in the House passed amendment to S. 2012, the North American Energy Security and Infrastructure Act of 2016. No further action occurred in the conference to S. 2012 before the end of the 114<sup>th</sup> Congress.

In the 115<sup>th</sup> Congress, the Natural Resources Committee marked up H.R. 210 on October 4, 2017. On December 4, 2017, the Senate passed S. 245. H.R. 210 contains similar but not identical legislative language to S. 245.

### **Need for Legislation**

For several years Congress has heard from concerned Indian tribes that certain Federal laws governing the development of tribal energy resources are complex and often lead to significant cost, delay and uncertainty for all parties to tribal energy transactions. These costs, delays, and uncertainties tend to discourage development of tribal trust energy resources and drive development investments to private or non-tribal lands that are not subject to these same federal laws.

Title V of the Energy Policy Act of 2005 (which authorized TERAs) was intended to address these concerns by removing much of the bureaucracy and shifting the approval requirements for these transactions from the Secretary of the Interior to Indian tribes. However, as previously noted, no tribe has successfully undertaken energy lease management of its trust

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<sup>6</sup> <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=229900>  
<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=240525>  
<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=278663>  
<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=286987>  
<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=289030>

<sup>7</sup> See H.R. 2, the American Energy Solutions for Lower Costs and More American Jobs Act, 113<sup>th</sup> Congress (2014), and H.R. 1965, Federal Lands Jobs and Energy Security Act of 2013 (2013).

lands under the TERA process. Title I of S. 245 contains significant amendments to the law authorizing TERAs to facilitate a tribe's application for and the Secretary's approval of them.

S. 245 would also remove other federal disincentives to developing tribal trust energy resources and assist Indian tribes interested in pursuing the development of these resources consistent with the federal policy of promoting Indian self-determination. A description of these provisions follows.

### **Major Provisions of S. 245**

#### *Section 1. Short Title.*

This act may be cited as the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017.

#### Title I – Indian Tribal Energy Development and Self-Determination Act Amendments

#### *Section 101. Indian Tribal Energy Resource Development.*

- Amends the Energy Policy Act of 1992<sup>8</sup> by directing the Secretary of the Interior to provide tribes with any technical assistance necessary for planning energy resource development programs.
- The Indian energy education planning and management assistance program under the Department of Energy (DOE) is expanded so intertribal organizations can be eligible for the offered grants. The grants can also be used to upgrade tribes' capacity to oversee energy development and efficiency programs.
- Tribal energy development organizations will also be eligible for DOE energy development loan guarantees.

#### *Section 103. Tribal Energy Resource Agreements.*

- Amends Section 2604 of the Energy Policy Act of 1992 in numerous ways relating to TERAs. Section 103 also changes the requirements for determining if a tribe has the capacity to operate a TERA. It not only requires the Secretary of the Interior to make the determination, but also places a 120-day time limit on the decision. A tribe is deemed to have sufficient capacity to operate a TERA if the tribe has a preexisting record of operating environmental programs and the tribe has successfully carried out approval of surface leases without any compliance violations.
- Subsection (a)(1) outlines that an applicable lease or business agreement may also directly include electricity-producing facilities that run on renewable resources, if a portion of such resources have been produced or developed on tribal land. It also permits

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<sup>8</sup> 25 U.S.C. 3502(a).

leases and agreements that include provisions on communitization, voluntary pooling, or unitization of an Indian tribe's energy resources with resources from another party.

- Subsection (a)(1) also provides that an agreement between a TERA and a tribe does not require the approval of Secretary if the lease or agreement is for a term that does not exceed 30 years (or in the case of an oil or gas lease, 10 years).
- Subsection (a)(2) broadens “applicable right-of-way” to include facilities to produce electricity via renewable resources. It also provides that a right-of-way between an Indian tribe and a TERA for a lease or agreement that does not exceed 30 years is not required to be reviewed or approved by the Secretary.
- Subsection (a)(4) provides that a TERA takes effect 271 days after submission by an Indian tribe unless the Secretary of the Interior directly disapproves of it before then. A subsequent TERA submission takes effect unless rejected by the Secretary in 90 days before it takes effect. The reasons for rejection of a TERA by the Secretary must be one of the following: the Indian tribe has failed to demonstrate capacity for the agreement, the TERA would “violate applicable Federal law or an existing treaty of the Indian tribe”, or the TERA does not include any provisions mandated by Section 2604(e) of the Energy Policy Act of 1992.
- Subsection (a)(6) requires the Secretary of the Interior to provide funding to an Indian tribe in an amount equal to any savings that the United States will realize because of the Indian tribe carrying out a TERA. The funding would be made available under a separate funding agreement. This section also provides the requirements for certification as a tribal energy development organization.

*Section 104. Technical Assistance for Indian Tribal Governments.*

- This section requires the Secretary of Energy to work with the Directors of the National Laboratories to make all technical and scientific resources of the DOE available for tribal energy projects and activities.

*Section 105. Conforming Amendments.*

- Amends the Energy Policy Act of 1992 to make it consistent with the amendments previously made by Sections 101, 102, and 103 of S. 245. It also expands the definition of tribal energy development organization to include business organizations that are wholly owned by an Indian tribe.

Title II – Miscellaneous Amendments

*Section 201. Issuance of Preliminary Permits or Licenses.*

- Amends the Federal Power Act<sup>9</sup> to require the Federal Regulatory Commission (FERC) to give tribes, in addition to States and municipalities, preference for the receipt of preliminary hydroelectric licenses.

*Section 202. Tribal Biomass Demonstration Project.*

- Amends the Tribal Forest Protection Act of 2004<sup>10</sup> to create a demonstration project for Indian tribes and Alaska Natives to promote biomass energy production on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from federal land.

*Section 203. Weatherization Program.*

- The Energy Conservation and Production Act<sup>11</sup> is amended by changing requirements for direct home weatherization grants to tribes. While the amount authorized to be reserved from State funding remains whole, direct funding requested by a tribal organization and approved by the Secretary of Energy (if it is deemed that low-income members of the Indian tribe would be better served by the direct funding than through the State) is authorized.
- Creates an expectation that a tribally-designated housing entity in good standing under the Native American Housing Assistance and Self-Determination Act of 1996<sup>12</sup> would automatically qualify as equally or better serving low-income tribal members.

*Section 204. Appraisals.*

- This section facilitates the appraisal of a tribe's trust or restricted lands for any transaction relating to the energy resources of such lands. Under Section 204, an appraisal may be conducted by the Secretary of the Interior, by a tribe or by a third-party appraiser contracted by a tribe.
- The Secretary has 45 days to review and approve any such appraisal, unless the appraisal fails to meet set standards set forth in subsection (d). Upon disapproval, the Secretary must give written notice to the tribe, as well as a detailed list of why the appraisal failed and steps to take to correct the deficiency leading to its disapproval.

*Section 205. Leases of Restricted Lands for Navajo Nation.*

- Enhances Navajo Nation leasing authority. The Indian Long-Term Leasing Act<sup>13</sup> requires separate review and approval for each non-mineral lease of a tribe's land, triggering a lengthy, detailed review by the federal bureaucracy, and the potential preparation of an

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<sup>9</sup> 16 U.S.C. 800(a)

<sup>10</sup> 25 U.S.C. 3115(a) et. seq.

<sup>11</sup> 42 U.S.C. 6863(d)

<sup>12</sup> 25 U.S.C. 4101 et. seq.

<sup>13</sup> 25 U.S.C. 415.

environmental review under the National Environmental Policy Act. In the 112<sup>th</sup> Congress, the HEARTH Act<sup>14</sup> was enacted to allow any tribe to develop non-mineral leasing rules, and when such rules are approved by the Secretary of the Interior, the tribe may then execute leases without further Departmental involvement. It also increases the maximum amount of time commercial and agricultural leases can be signed by Navajo Nation on projects that do not require prior Interior approval (from 25 years to 99 years).

- This section allows the Navajo Nation to execute mineral and geothermal leases in a manner similar to the HEARTH Act. The terms of such leases may be for 25 years with an option to renew for one term of up to 25 years.
- Amends 25 U.S.C. 415(e) to permit the Navajo to execute 99-year leases for business or agricultural purposes.

*Section 206. Extension of Tribal Lease Period for the Crow Tribe of Montana.*

- Amends the Long-Term Leasing Act to allow the Crow Tribe of Montana to enter into leases of their land held in trust for a term up to 99 years.

*Section 207. Trust Status of Lease Payments.*

- Creates provisions for money held by the Department of the Interior in connection with the review and approval of a sale, lease, permit, or other conveyance of Indian land, unless the money originates from competitive bidding. If so, only money paid by the successful bidder will be held in trust.
- All contracts or other conveyance described in this section, along with all income produced from investment related to it, will be distributed to the Indian tribe or individual Indian landowners.

**Cost**

The CBO has estimated that S. 245 would have no effect on the federal budget except for the demonstration program established in Section 202, which would allow for Indian tribes to use nonmarketable timber from neighboring federal lands to be used for biomass energy development. The cost is estimated to be \$1 million, subject to appropriation.<sup>15</sup>

**Administration Position**

Unknown.

**Anticipated Amendment**

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<sup>14</sup> See P.L. 112-151, the *Helping Expedite and Advance Responsible Tribal Homeownership Act* (2012).

<sup>15</sup> <https://www.cbo.gov/publication/52693>.

None.

[Effect on Current Law \(Ramseyer\)](#)