112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–692

NATIVE AMERICAN ENERGY ACT

OCTOBER 23, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3973]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3973) to facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Native American Energy Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 3. APPRAISALS.

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

"SEC. 2607. APPRAISAL REFORMS.

"(a) OPTIONS TO INDIAN TRIBES.—With respect to a transaction involving Indian land or the trust assets of an Indian tribe that requires the approval of the Secretary, any appraisal relating to fair market value required to be conducted under applicable law, regulation, or policy may be completed by—

"(1) the Secretary;

"(2) the affected Indian tribe; or

"(3) a certified, third-party appraiser pursuant to a contract with the Indian tribe.

"(b) TIME LIMIT ON SECRETARIAL REVIEW AND ACTION.—Not later than 30 days after the date on which the Secretary receives an appraisal conducted by or for an Indian tribe pursuant to paragraphs (2) or (3) of subsection (a), the Secretary shall—

"(1) review the appraisal; and

"(2) provide to the Indian tribe a written notice of approval or disapproval of the appraisal.

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

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

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

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

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

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

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

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

"Sec. 2607. Appraisal reforms.".

SEC. 4. STANDARDIZATION.

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

SEC. 5. ENVIRONMENTAL REVIEWS OF MAJOR FEDERAL ACTIONS ON INDIAN LANDS.

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

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

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

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

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

"(4) CLARIFICATION OF AUTHORITY.—Nothing in the Native American Energy Act, except section 8 of that Act, shall give the Secretary any additional authority over energy projects on Alaska Native Claims Settlement Act lands.".

SEC. 6. INDIAN ENERGY DEVELOPMENT OFFICES.

Section 2602(a) of the Energy Policy Act of 1992 (25 U.S.C. 3502(a)) is amended—

(1) by redesignating paragraph (3) as paragraph (4);

(2) by inserting after paragraph (2) the following:

"(3) INDIAN ENERGY DEVELOPMENT OFFICES.—

"(A) ESTABLISHMENT.—To assist the Secretary in carrying out the Program, the Secretary shall establish within the Department of the Interior not less than 5 offices.

"(B) NAMING.—Each office established under subparagraph (A) shall be known as an 'Indian Energy Development Office'.

"(C) LOCATION.—The Secretary shall locate each Indian Energy Development Office—

"(i) within a regional or agency office of the Bureau of Indian Affairs; and

"(ii) to the maximum extent practicable, in an area in which there exists a high quantity of tribal energy development opportunities, as determined by the Secretary in consultation with Indian tribes.

"(D) DIRECTORS.—Each Indian Energy Development Office established under this paragraph shall be headed by a director.

"(E) DUTIES.—The director of each Indian Energy Development Office shall—

"(i) provide energy-related information and resources to Indian tribes and tribal members;

"(ii) coordinate meetings and outreach among Indian tribes, tribal members, energy companies, and relevant Federal, State, and tribal agencies;

"(iii) oversee, and ensure the timely processing of, Indian energy applications, permits, licenses, and other documents that are subject to development, review, or processing by—

"(I) the Bureau of Indian Affairs;

"(II) the Bureau of Land Management;

"(III) the National Park Service;

"(IV) the United States Fish and Wildlife Service;

"(V) the Bureau of Reclamation;

"(VI) the Minerals Management Service; or

"(VII) the Office of Special Trustee for American Indians of the Department of the Interior; and

"(iv) consult with Indian tribes that will be served by an Indian Energy Development Office to determine what services, information, facilities, or programs would best expedite the responsible development of energy resources.

"(F) STAFF.—Each Indian Energy Development Office established under this paragraph shall be adequately staffed to meet the demand for energy permitting in the region or agency where the office is established.".

SEC. 7. BLM OIL AND GAS FEES.

The Secretary of the Interior, acting through the Bureau of Land Management, shall not collect any fee for any of the following:

(1) For an application for a permit to drill on Indian land.

(2) To conduct any oil or gas inspection activity on Indian land.

(3) On any oil or gas lease for nonproducing acreage on Indian land.

SEC. 8. BONDING REQUIREMENTS AND NONPAYMENT OF ATTORNEYS' FEES TO PROMOTE INDIAN ENERGY PROJECTS.

(a) IN GENERAL.—A plaintiff who obtains a preliminary injunction or administrative stay in an energy related action, but does not ultimately prevail on the merits of the energy related action, shall be liable for damages sustained by a defendant who—

(1) opposed the preliminary injunction or administrative stay; and

(2) was harmed by the preliminary injunction or administrative stay.

(b) BOND.—Unless otherwise specifically exempted by Federal law, a court may not issue a preliminary injunction and an agency may not grant an administrative stay in an energy related action until the plaintiff posts with the court or the agency a surety bond or cash equivalent—

(1) in an amount the court or agency decides is 30 percent of that amount that the court or agency considers is sufficient to compensate each defendant opposing the preliminary injunction or administrative stay for damages, including but not limited to preliminary development costs, additional development costs, and reasonable attorney fees, that each defendant may sustain as a result of the preliminary injunction or administrative stay;

(2) written by a surety licensed to do business in the state in which the Indian Land or other land where the activities are undertaken is situated; and

(3) payable to each defendant opposing the preliminary injunction or administrative stay, in the event that the plaintiff does not prevail on the merits of the energy related action, Provided, that, if there is more than one plaintiff, the court or agency shall establish the amount of the bond required by this Subsection for each plaintiff in a fair and equitable manner.

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

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

(1) ADMINISTRATIVE STAY.—The term "Administrative Stay" means a stay or other temporary remedy issued by a Federal agency, including the Department of the Interior, the Department of Agriculture, the Department of Energy, the Department of Commerce, and the Environmental Protection Agency.

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

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

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

(B) seeks judicial review of a final agency action (as defined in section 702 of title 5, United States Code), to issue a permit, license, or other form of agency permission allowing:

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

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

(4) ULTIMATELY PREVAIL ON THE MERITS.—The phrase "Ultimately prevail on the merits" means, in a final enforceable judgment on the merits, the court rules in the plaintiff's favor on at least one cause of action which is an underlying rationale for the preliminary injunction, and does not include circumstances where the final agency action is modified or amended by the issuing agency unless such modification or amendment is required pursuant to a final enforceable judgment of the court or a court-ordered consent decree.

SEC. 9. TRIBAL BIOMASS DEMONSTRATION PROJECT.

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

"SEC. 3. TRIBAL BIOMASS DEMONSTRATION PROJECT.

"(a) IN GENERAL.—For each of fiscal years 2013 through 2017, the Secretary shall enter into stewardship contracts or other agreements, other than agreements that are exclusively direct service contracts, with Indian tribes to carry out demonstration projects to promote biomass energy production (including biofuel, heat, and electricity generation) on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land.

"(b) DEFINITIONS.—The definitions in section 2 shall apply to this section.

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

"(d) ELIGIBILITY CRITERIA.—To be eligible to enter into a contract or other agreement under this subsection, an Indian tribe shall submit to the Secretary an application—

"(1) containing such information as the Secretary may require; and

"(2) that includes a description of—

"(A) the Indian forest land or rangeland under the jurisdiction of the Indian tribe; and

"(B) the demonstration project proposed to be carried out by the Indian tribe.

"(e) SELECTION.—In evaluating the applications submitted under subsection (c), the Secretary—

"(1) shall take into consideration the factors set forth in paragraphs (1) and (2) of section 2(e) of Public Law 108–278; and whether a proposed demonstration project would—

"(A) increase the availability or reliability of local or regional energy;

"(B) enhance the economic development of the Indian tribe;

"(C) improve the connection of electric power transmission facilities serving the Indian tribe with other electric transmission facilities;

"(D) improve the forest health or watersheds of Federal land or Indian forest land or rangeland; or

"(E) otherwise promote the use of woody biomass; and

"(2) shall exclude from consideration any merchantable logs that have been identified by the Secretary for commercial sale.

"(f) IMPLEMENTATION.—The Secretary shall—

"(1) ensure that the criteria described in subsection (c) are publicly available by not later than 120 days after the date of enactment of this section; and

"(2) to the maximum extent practicable, consult with Indian tribes and appropriate intertribal organizations likely to be affected in developing the application and otherwise carrying out this section.

"(g) REPORT.—Not later than September 20, 2015, the Secretary shall submit to Congress a report that describes, with respect to the reporting period—

"(1) each individual tribal application received under this section; and

"(2) each contract and agreement entered into pursuant to this section.

"(h) INCORPORATION OF MANAGEMENT PLANS.—In carrying out a contract or agreement under this section, on receipt of a request from an Indian tribe, the Secretary shall incorporate into the contract or agreement, to the extent practicable, management plans (including forest management and integrated resource management plans) in effect on the Indian forest land or rangeland of the respective Indian tribe.

"(i) TERM.—A stewardship contract or other agreement entered into under this section—

"(1) shall be for a term of not more than 20 years; and

"(2) may be renewed in accordance with this section for not more than an additional 10 years.".

SEC. 10. TRIBAL RESOURCE MANAGEMENT PLANS.

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

SEC. 11. LEASES OF RESTRICTED LANDS FOR THE NAVAJO NATION.

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

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

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

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

(4) by adding at the end the following:

"(C) in the case of a lease for the exploration, development, or extraction of mineral resources, including geothermal resources, 25 years, except that any such lease may include an option to renew for one additional term not to exceed 25 years.".

SEC. 12. NONAPPLICABILITY OF CERTAIN RULES.

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

PURPOSE OF THE BILL

The purpose of H.R. 3973, as ordered reported, is to facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development of Indian lands.

BACKGROUND AND NEED FOR LEGISLATION

The Department of the Interior holds 56 million acres of land in trust or restricted status for the benefit of American Indian tribes and individual Indians. A number of reservations contain large accumulations of known and prospective mineral resources. In Fiscal Year 2011, excluding bonus bids and rents, $433.3 million in royalties from oil and gas leasing of Indian lands were paid to Indian tribes and allottees from the sale of 19.6 million barrels of oil, 143.4 million gallons of natural gas liquids, and 255.4 billion cubic feet of natural gas. Also, royalties of $74.45 million were paid to tribes from the sale of 21.5 million tons of coal produced from their lands.

Additional, detailed public information regarding the subsurface mineral resources in Indian lands is sparse. According to Department of Energy data, tribal lands conservatively hold an estimated 890 million barrels of oil and 5.4 trillion cubic feet of natural gas. These figures appear to be based on a 2004 report and thus may not reflect new discoveries and the recent breakthroughs in the use of hydraulic fracturing to produce oil and gas from large hydrocarbon-bearing shale formations.

A number of Indian reservations are located in areas with highly favorable conditions for the production of electricity from wind, solar, geothermal resources. Other reservations (particularly in the Pacific Northwest and in the Southwest) have large timber bases with ample supplies of biomass that could be converted to fuels or electricity.

Development of Indian energy presents obstacles not encountered on private and state lands. In general, federal law requires the approval of the Department before a lease a tribe enters into with an energy developer is valid. For example, under the Indian Land Mineral Leasing Act of 1982 (25 U.S.C. 2101 et seq.), a tribe or individual Indian may only lease his lands for mineral development "subject to the approval of the Secretary." Pursuant to this authority, the Department developed sprawling rules for the approval of leases of Indian lands. The rules often trigger National Environmental Policy Act (NEPA) reviews, lengthy appraisals, expensive applications for permits to drill (in the case of oil and gas), and numerous other layers of dilatory bureaucratic review often involving other agencies. Each layer of review gives a federal agency bureaucrat, a political appointee, or a special interest an opportunity to meddle, interfere, delay, appeal, or sue.

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

In the State of Alaska, a number of Alaska Native Corporations (ANCs) selected settlement lands containing large quantities of oil, gas, and coal resources. Congress required the ANCs to select their lands from available public domain land in Alaska. The result is that many ANC lands consist of non-contiguous parcels within larger federal land units, such as the Arctic National Wildlife Refuge (ANWR), where Native lands in the northern coastal plain hold some of the largest prospective oil resources in North America. By law, the Natives may not produce oil from these private lands within ANWR until Congress enacts a law opening the federal lands of ANWR. Other ANC parcels are situated within other federal areas. This means federal permits are frequently required to construct pipelines and other necessary infrastructure for the Alaska Natives to derive beneficial use of their settlement lands. Such federal permitting is anything but certain or easy.

H.R. 3973, the Native American Energy Act, contains several provisions which address concerns that various Native American leaders brought to the attention of the Committee. The legislation helps tribes and Alaska Natives expedite and streamline the leasing and development of energy and other natural resources in cases where federal laws or policies are a hindrance. A section-by-section analysis of H.R. 3973 is provided below.

During Full Committee consideration of the bill, the committee defeated an amendment in the nature of a substitute (ANS) offered by Congressman Ben Luján (D–NM). The Chairman of the Subcommittee on Indian and Alaska Native Affairs, Congressman Don Young (R–AK), explained that the basis for majority opposition to the ANS was not with the substance of the language, it contained non-objectionable provisions championed by the Ranking Republican of the Senate Indian Affairs Committee, Senator Mike Barrasso (R–WY), but with the form in which the amendment was offered. The amendment would delete all the provisions in H.R. 3973 as introduced, provisions that were specifically requested by Indian tribes and Alaska Native leaders and are viewed as necessary to remove obstacles blocking them from developing tribal energy resources.

During Full Committee consideration of the bill, the Committee adopted an amendment offered by Congressman Young to prohibit any rule promulgated by the Department of the Interior regulating hydraulic fracturing from applying to lands held in trust for Indians without the consent of the Indian owners. Hydraulic fracturing is a commonly used well stimulation technique in the oil and gas industry. Recent advances in the technique have made unconventional or "tight" oil and gas deposits—including enormous shale formations—commercially viable. While operators on private and state lands reap the rewards of such development, it is incumbent on Congress to ensure tribes, through tribal regulation of their lands, have every opportunity to reap such benefits as well. Unfortunately, by its actions the Department of the Interior must disagree.

The Bureau of Land Management (BLM) proposed a rule to regulate hydraulic fracturing on "public lands," a term which the Department of the Interior wrongly deems to include lands the United States holds in trust for the exclusive use and benefit of Indians. While federal law does impose certain duties on the Department to manage Indian lands, the hydraulic fracturing (HF) rule will be im-

posed without the consent of the tribes even though the rule may adversely affect their interests. This is opposed to Congress's long-running policy of promoting self-determination for Indians.

Worse, tribes reported to the Committee that the Obama Administration failed to adhere to Executive Order 13175 of November 6, 2000. As explained by President Obama in a November 5, 2009, memorandum to all federal agencies, "[E]xecutive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes." While Executive Order 13175 does not create any legally enforceable rights or claims, President Obama has held three highly publicized White House Tribal Nation Conferences where promises to carry out the government's consultation obligations were repeatedly stressed.

Moreover, on December 1, 2011, the Department issued a press release stating: "Secretary of the Interior Ken Salazar and Assistant Secretary-Indian Affairs Larry Echo Hawk today announced a Tribal Consultation Policy for the Department of the Interior, launching a new era of enhanced communication with American Indian and Alaska Native tribes."

While this announcement was welcome news to tribes, the Secretary forgot to tell the BLM. In an April 19, 2012, hearing the Subcommittee held on the proposed HF rule, tribes that want to allow HF denounced the agency for failing to consult with them while the new policy was under development. In the hearing, it was disclosed that a forum hosted by Secretary Salazar on November 30, 2010, to launch public discussion of an HF policy, did not include any tribes—but it did include then Assistant to the President for Energy and Climate Change, Carol Browner, the Natural Resources Defense Council and Trout Unlimited.

The proposed HF rule could drive oil and gas operators from Indian lands and deprive historically impoverished tribes of a needed source of private investment, tribal royalty revenues, and high-wage jobs. Tribes opposed to the proposed rule lodged three basic objections: (1) the Department wrongly considers land it holds in trust for Indians to be "public lands" for the purpose of the draft rule; (2) the BLM did not adequately consult with tribes in violation of Administration policy and a Secretarial Order; and (3) the rule will result in new delays and paperwork burdens and will thus drive industry away from leasing Indian lands.

On reservations where Indian trust lands and non-Indian fee lands form a "checker board" pattern, an oil and gas operator would have no incentive to produce oil on an Indian lease if he could simply move his operation a few feet away to the non-Indian fee land, where more reasonable State HF rules apply. Thus, the BLM rule will deprive tribes of jobs for members, dry up royalties for tribal government coffers, and weaken already impoverished reservation economies, while industry will find other lands where more reasonable HF rules apply.

In the hearing, a number of tribal leaders and an executive with a tribal oil and gas subsidiary testified on the HF rule. All the tribal leaders were dissatisfied with the level of consultation conducted

by the Department of the Interior, and most were strongly opposed to the rule.

T.J. Show, Chairman of the Blackfeet Tribal Business Council, began his testimony by noting that "Blackfeet Tribe, like numerous other large land-based Tribes, suffers from an unemployment rate that reaches 70 to 80 percent" and that the Tribe has "determined that development of the large pools of oil and natural gas . . . is the most viable option to improve the Reservation economy, to provide jobs to Tribal members, to provide necessary services on the Reservation, and to bring some measure of improvement to the standard of living of Blackfeet tribal members." Mr. Show also said that the rule that BLM developed, "will create additional burdens to an already burdensome process that will likely delay and possibly prevent beneficial development of Blackfeet oil resources." Most importantly, Show said that, "BLM developed a rule that seriously impacts Indian Country energy development without regard to the consultation process."

Irene Cuch, Chairwoman of the Ute Tribal Business Committee, testified that in writing the HF rule BLM's "actions do not uphold its obligations under the federal trust responsibility and do not fulfill the Department's long-standing and ongoing commitment to consult with Indian tribes."

Tex G. Hall, Chairman of the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation, which is located squarely on top of the Bakken formation in North Dakota, one of the largest onshore oil fields on the continent, reminded the Subcommittee that, "Since energy development began on the Reservation we have struggled with the federal bureaucracy for every single oil and gas permit," and that "BLM's proposed regulations may add so much delay, uncertainty and cost to the oil and gas permitting process that they may be forced to pull their drilling rigs off the Reservation." Mr. Hall credits tribal energy development for creating, "in excess of 10,000 jobs." Finally, like many of the witnesses, Hall noted the lack of BLM consultation and that, "BLM's actions to date have given me and other tribes the impression that tribal input is not desired or only minimally needed even though there is strong evidence that the proposed regulations will cost the MHA Nation and the surrounding community a sizable number of jobs and money."

James M. "Mike" Olguin, Vice Chairman, Southern Ute Indian Tribal Council, explained that, "Added regulatory burdens to the development of tribal minerals discourage development on Indian lands and provide a direct incentive to operators to lease and drill on offsetting non-Indian lands because of the associated cost savings." Olguin was surprised that the "concept of meaningful consultation has been shortchanged by the BLM," and that, "notwithstanding our requests and suggestions, BLM proceeded to develop draft proposed regulations in isolation."

Wilson Groen, President and Chief Executive Officer of the Navajo Nation Oil and Gas Company, told the Subcommittee that, "A Federal rule relating to hydraulic fracturing will result in additional and extraordinary delays that could take the Interior Board of Land Appeals a year or more to decide."

Two other tribal witnesses did not necessarily oppose the proposed HF rule. However, one of the tribal leaders with the Sho-

shone Business Council of the Wind River Reservation criticized the BLM for a lack of meaningful consultation on it, and the other tribal leader with the Turtle Mountain Band of Chippewa noted that his tribe banned HF.

It should be clear that it is the view of the Committee that a tribe is within its rights to ban HF on its own lands. The question is whether an HF rule opposed by a tribe should be imposed on any tribe's lands without its consent. The Young amendment to ban the HF rule from applying to Indian lands without the consent of the Indian owner upholds the long-standing federal policy of promoting tribal self-determination.

There may be a concern as to who regulates HF on tribal lands. In practice, an oil and gas operator generally follows state rules regarding HF while on tribal lands. While such rules cannot be imposed on the tribe itself and while tribes do not support the imposition of state law on their lands, the current framework nonetheless ensures appropriate regulation of industry practices until a tribe applies its own rules regarding HF on their lands.

COMMITTEE ACTION

H.R. 3973 was introduced on February 7, 2012, by Congressman Don Young (R–AK). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Energy and Mineral Resources and the Subcommittee on Indian and Alaska Native Affairs. On February 15, 2012, the Subcommittee on Energy and Mineral Resources held a hearing on the bill. On May 16, 2012, the Full Natural Resources Committee met to consider the bill. The Subcommittees were discharged by unanimous consent. Congressman Young offered an amendment to the bill; the amendment was adopted by voice vote. Congressman Ben Luján (D–NM) offered an amendment in the nature of a substitute to the bill; the amendment was not adopted by a bipartisan rollcall vote of 13 to 23, as follows:

Committee on Natural Resources
U.S. House of Representatives
112th Congress

Date: May 16, 2012 Recorded Vote #: 22

Meeting on / Amendment: **HR 3973** - An Amendment in the Nature of a Substitute offered by Mr. Lujan was NOT AGREED TO by a roll call vote of 13 yeas and 23 nays.

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Hastings, WA Chairman		X		*Mr. Heinrich, NM*	X		
Mr. Markey, MA Ranking				**Mr. Benishek, MI**		X	
Mr. Young, AK		X		*Mr. Lujan, NM*	X		
Mr. Kildee, MI	X			**Mr. Rivera, FL**			
Mr. Duncan of TN				*Ms. Sutton, OH*	X		
Mr. Defazio, OR	X			**Mr. Duncan of SC**		X	
Mr. Gohmert, TX				*Ms. Tsongas, MA*			
Mr. Faleomavaega, AS				**Mr. Tipton, CO**		X	
Mr. Bishop, UT		X		*Mr. Pierluisi, PR*			
Mr. Pallone, NJ	X			**Mr. Gosar, AZ**		X	
Mr. Lamborn, CO		X		*Mr. Garamendi, CA*	X		
Mrs. Napolitano, CA	X			**Mr. Labrador, ID**		X	
Mr. Wittman, VA				*Ms. Hanabusa, HI*			
Mr. Holt, NJ	X			**Ms. Noem, SD**		X	
Mr. Broun, GA		X		*Mr. Tonko, NY*	X		
Mr. Grijalva, AZ	X			**Mr. Southerland, FL**		X	
Mr. Fleming, LA		X		**Mr. Flores, TX**		X	
Ms. Bordallo, GU	X			**Mr. Harris, MD**		X	
Mr. Coffman, CO		X		**Mr. Landry, LA**			
Mr. Costa, CA	X			**Mr. Runyan, NJ**		X	
Mr. McClintock, CA		X		**Mr. Johnson, OH**		X	
Mr. Boren, OK		X		**Mr. Amodei, NV**		X	
Mr. Thompson, PA		X					
Mr. Sablan, CNMI							
Mr. Denham, CA		X					
				TOTALS	13	23	

Congressman Young offered a second amendment to the bill; the amendment was adopted by voice vote. The bill, as amended, was then adopted and ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

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

Section 2. Table of Contents

This section contains the table of contents for the bill.

Section 3. Appraisals

Section 3 allows an appraisal of Indian land, at the option of a tribe, to be conducted by the Secretary of the Interior, the tribe, or a certified third-party appraiser. Under this section, an appraisal conducted by an Indian tribe or certified third-party appraiser is deemed approved if the Secretary fails to approve or disapprove it within 60 days. This section also permits a tribe to waive an appraisal by the Secretary of the Interior.

Section 4. Standardization

This section directs the Secretary of the Interior to standardize the way the seven bureaus of the Department of the Interior track oil and gas activities on Indian lands.

Section 5. Environmental reviews of major federal actions on Indian lands

Section 5 provides that for any environmental impact statement required under the National Environmental Policy Act of 1969 for a major federal action on a tribe's lands, such statement shall be available for public review and comment only by members of the Indian tribe and by any other individual residing within the affected area.

Section 6. Indian energy development offices

This section directs the Secretary of the Interior to establish no less than five Indian energy development offices across Indian Country. These offices would have a director and staff that would coordinate transactions among Indian tribes, tribal members, energy companies, and relevant federal, State, and tribal agencies.

Section 7. BLM oil and gas fees

Section 7 prohibits BLM from collecting any fees for an application for a permit to drill on Indian land, to conduct any oil or gas inspection activity on Indian land and on any oil or gas lease for nonproducing acreage on Indian land. Currently, the Department of the Interior deems Indian land it holds "in trust" to be federal land public land for the purpose of assessing various oil and gas fees. This is inconsistent with the principle of federal "trust" land because the beneficial owner of such land is a tribe or Indian, not the public. Such fees can discourage private investment on Indian lands.

Section 8. Bonding requirements and nonpayment of attorneys' fees to promote Indian energy projects

Section 8 is intended to reduce the incidence of frivolous legal actions filed by those seeking to block energy development on Indian or Alaska Native Corporation (ANC) land, or energy development by an Indian tribe or ANC on any land. This provision does not affect anyone's ability to file a legal action (such as a lawsuit in federal court or administrative appeal in an agency). Rather, it makes a plaintiff liable for damages sustained by a defendant when the plaintiff obtains a preliminary injunction or administrative stay but does not ultimately prevail on the merits of his legal action.

The measure also prohibits a federal court or agency from issuing a preliminary injunction or administrative stay unless the plaintiff posts a bond representing 30% of the amount sufficient to compensate the defendant for damages.

Finally, Section 8 prohibits taxpayer dollars from being used to pay court costs and attorneys fees of those who file legal actions against energy development benefiting Native Americans.

Section 9. Tribal biomass demonstration project

This section amends the Tribal Forest Protection Act of 2004 to create a demonstration project for Indian tribes to promote biomass energy production on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from federal land.

Section 10. Tribal resource management plans

Section 10 treats a tribe's forest practices to be "sustainable" for all federal purposes if the tribe's land is managed under a tribal resource management plan or an integrated resource management plan. This addresses a problem in which third-party groups charge an entity substantial, recurring fees to claim a certification that the entity's forest plan is "sustainable."

Section 11. Leases of restricted lands for the Navajo Nation

This section enhances Navajo Nation leasing authority.

The Indian Long-Term Leasing Act (25 U.S.C. 415) requires separate review and approval for each lease of a tribe's land, triggering a lengthy, detailed review by the federal bureaucracy, and the potential preparation of an environmental review under the National Environmental Policy Act. Since 2000, Congress has amended 25 U.S.C. 415 to permit several tribes to conduct non-mineral leasing without Secretarial review when certain conditions are met.

One of these amendments added subsection (e) to the Indian Long-Term Leasing Act (25 U.S.C. 415(e)). This authorizes the Navajo Nation to execute each of its non-mineral leases without review of the Secretary if the leasing is conducted under tribal regulations that have been approved by the Secretary. Business or agricultural leases may be for 25 years with an option to renew for up to two additional 25-year terms. All other non-mineral leases may be for 75 years.

Section 11 of H.R. 3973 amends 25 U.S.C. 415(e) to include mineral and geothermal leases in the types of leases the Navajo Nation may execute under Navajo regulations approved by the Secretary. The terms of such leases may be for 25 years with an option to renew for one term of up to 25 years.

The section also amends 25 U.S.C. 415(e) to permit the Navajo to execute 99-year leases for business or agricultural purposes.

Section 12. Nonapplicability of certain rules

This section provides that no rule promulgated by the Department of the Interior regarding hydraulic fracturing used in the development or production of oil or gas resources shall have any effect on any Indian trust land except with the express consent of the Indian owner.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

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

COMPLIANCE WITH HOUSE RULE XIII

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

H.R. 3973—Native American Energy Act

Summary: H.R. 3973 would make several changes related to environmental laws, energy programs, and the management of mineral resources on Native American reservations. CBO estimates that implementing the bill would cost $58 million over the 2013–2017 period, assuming appropriation of the necessary amounts.

Pay-as-you-go procedures apply because enacting the legislation would affect direct spending. However, CBO estimates that the net effects would be insignificant over the 2013–2022 period. Enacting H.R. 3973 would not affect revenues.

H.R. 3973 would impose an intergovernmental and private-sector mandate, as defined in the Unfunded Mandates Reform Act (UMRA), by requiring plaintiffs, including public and private entities, to post a bond when seeking a preliminary injunction to stop energy-related activities on Native American energy projects. CBO estimates that the costs for public and private entities would probably fall below the annual thresholds established in UMRA ($73 million and $146 million, respectively, in 2012, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3973 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2013	2014	2015	2016	2017	2013–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	11	11	12	12	12	58
Estimated Outlays	9	13	12	12	12	58

Basis of estimate: For this estimate, CBO assumes that the legislation will be enacted near the end of 2012 and that the necessary amounts will be appropriated for each fiscal year. Estimated outlays are based on historical spending patterns for similar programs.

H.R. 3973 would direct the Department of the Interior (DOI) to establish at least five Indian Energy Development Offices to provide energy-related resources and information to tribes and to oversee the processing of applications and permits for energy projects on tribal lands. Based on information provided by DOI, CBO estimates that each office would cost about $2 million annually to operate when fully staffed. CBO estimates that this provision would cost $43 million over the 2013–2017 period.

The bill would prohibit the Bureau of Land Management (BLM) from collecting fees for: applications for a permit to drill (APD) for oil or gas on tribal lands, oil or gas inspections on tribal lands, or nonproducing oil or gas leases on tribal lands. Under current law, BLM charges $6,500 to process each APD. In 2011, BLM collected about $3 million in APD fees for projects on Indian lands. BLM does not currently collect fees for oil or gas inspections or for nonproducing leases on tribal lands.

Those fees are authorized to be collected in annual appropriation acts, and therefore, the fee amounts are an offset to discretionary spending. CBO estimates that this provision of H.R. 3973 would reduce collections by $15 million over the 2013–2017 period. That reduction in future collections for drilling permits would have the effect of increasing future net discretionary spending, assuming that future appropriation acts are consistent with the provisions of H.R. 3973.

CBO estimates that implementing other provisions of H.R. 3973 would have an insignificant impact on federal spending. Those provisions would:

- Require DOI to act on any appraisal of energy projects required under current law within 30 days and allow tribes to waive the requirement for appraisals under specified circumstances;
- Require DOI to use a uniform reference system for tracking oil and gas wells;
- Restrict the review of and the comments on environmental impact statements of projects on tribal lands to members of the tribe and residents of the area;
- Make plaintiffs who obtain injunctions against energy projects on tribal lands but do not prevail on the merits of the case liable to the defendant for damages. Under the bill, plaintiffs would be required to post a bond with the court for 30 percent of the amount required to compensate defendants before the court could issue an injunction;

- Require DOI to contract for four biomass-demonstration projects annually through 2017 using timber from federal forests that is not marketable;
- Designate any practice done in accordance to a tribe's resource management plan as a sustainable practice with respect to federal benefits and standards; and
- Authorize the Navajo Nation to enter into commercial and agricultural leases for up to 99 years. Under the bill, the Navajo Nation also would be authorized to enter into mineral resource leases without DOT approval for 25 years. Any income resulting from those leases would be paid directly to the tribal owners or to the appropriate tribal government and would have no significant impact on the federal budget.

Pay-As-You-Go Considerations: Enacting H.R. 3973 would affect direct spending; therefore, pay-as-you-go procedures apply. The legislation would prohibit payments of attorneys' fees under the Equal Access to Justice Act for lawsuits regarding energy projects on tribal lands. A portion of those payments comes from the Treasury Department's Judgment Fund and is recorded in the budget as direct spending. Based on information provided by the Government Accountability Office, CBO estimates that any reduction in direct spending as a result of the bill would be insignificant. Enacting H.R. 3973 would not affect revenues.

Intergovernmental and private-sector impact: H.R. 3973 would impose an intergovernmental and private-sector mandate by requiring plaintiffs, including public and private entities, to post a bond when seeking a preliminary injunction to stop energy-related activities on Native American energy projects. Preliminary injunctions are issued rarely and only in cases where compensation awarded by the court could not equal the potential personal damage or damage to property. The amount of the bond would be determined by the court and would be equal to 30 percent of the potential losses incurred by the defendant as a result of the injunction. The cost of the mandate would be the purchase price of required bonds, typically 10 percent of the bond amount. Based on the number of injunctions that would require such bonds and the aggregate value of the bonds that would have to be purchased to reach the annual thresholds, CBO estimates that the costs for public and private entities would probably fall below the annual thresholds established in UMRA ($73 million and $146 million, respectively, in 2012, adjusted annually for inflation).

Estimate prepared by: Federal Costs: Martin von Gnechten; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Mann Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. CBO estimates that implementing the bill would cost $58 million over the 2013–2017 period, assuming appropriation of the necessary amounts.

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

EARMARK STATEMENT

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

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

ENERGY POLICY ACT OF 1992

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Energy Policy Act of 1992".

(b) TABLE OF CONTENTS.—

TITLE XXVI—INDIAN ENERGY

* * * * * * *

SEC. 2602. INDIAN TRIBAL ENERGY RESOURCE DEVELOPMENT.

(a) DEPARTMENT OF THE INTERIOR PROGRAM.—

(1) * * *

* * * * * * *

(3) INDIAN ENERGY DEVELOPMENT OFFICES.—

(A) ESTABLISHMENT.—To assist the Secretary in carrying out the Program, the Secretary shall establish within the Department of the Interior not less than 5 offices.

(B) NAMING.—Each office established under subparagraph (A) shall be known as an "Indian Energy Development Office".

(C) LOCATION.—The Secretary shall locate each Indian Energy Development Office—

(i) within a regional or agency office of the Bureau of Indian Affairs; and

(ii) to the maximum extent practicable, in an area in which there exists a high quantity of tribal energy development opportunities, as determined by the Secretary in consultation with Indian tribes.

(D) DIRECTORS.—Each Indian Energy Development Office established under this paragraph shall be headed by a director.

(E) DUTIES.—The director of each Indian Energy Development Office shall—

(i) provide energy-related information and resources to Indian tribes and tribal members;

(ii) coordinate meetings and outreach among Indian tribes, tribal members, energy companies, and relevant Federal, State, and tribal agencies;

(iii) oversee, and ensure the timely processing of, Indian energy applications, permits, licenses, and other documents that are subject to development, review, or processing by—

(I) the Bureau of Indian Affairs;

(II) the Bureau of Land Management;

(III) the National Park Service;

(IV) the United States Fish and Wildlife Service;

(V) the Bureau of Reclamation;

(VI) the Minerals Management Service; or

(VII) the Office of Special Trustee for American Indians of the Department of the Interior; and

(iv) consult with Indian tribes that will be served by an Indian Energy Development Office to determine what services, information, facilities, or programs would best expedite the responsible development of energy resources.

(F) STAFF.—Each Indian Energy Development Office established under this paragraph shall be adequately staffed to meet the demand for energy permitting in the region or agency where the office is established.

[(3)] *(4)* There are authorized to be appropriated to carry out this subsection such sums as are necessary for each of fiscal years 2006 through 2016.

* * * * * * *

SEC. 2607. APPRAISAL REFORMS.

(a) OPTIONS TO INDIAN TRIBES.—With respect to a transaction involving Indian land or the trust assets of an Indian tribe that requires the approval of the Secretary, any appraisal relating to fair market value required to be conducted under applicable law, regulation, or policy may be completed by—

(1) the Secretary;

(2) the affected Indian tribe; or

(3) a certified, third-party appraiser pursuant to a contract with the Indian tribe.

(b) TIME LIMIT ON SECRETARIAL REVIEW AND ACTION.—Not later than 30 days after the date on which the Secretary receives an ap-

praisal conducted by or for an Indian tribe pursuant to paragraphs (2) or (3) of subsection (a), the Secretary shall—

(1) review the appraisal; and

(2) provide to the Indian tribe a written notice of approval or disapproval of the appraisal.

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

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

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

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

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

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

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

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NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

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TITLE I—DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

* * * * * * *

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

(A) * * *

* * * * * * *

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

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

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

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

(4) CLARIFICATION OF AUTHORITY.—Nothing in the Native American Energy Act, except section 8 of that Act, shall give the Secretary any additional authority over energy projects on Alaska Native Claims Settlement Act lands.

* * * * * * *

TRIBAL FOREST PROTECTION ACT OF 2004

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SEC. 3. TRIBAL BIOMASS DEMONSTRATION PROJECT.

(a) IN GENERAL.—For each of fiscal years 2013 through 2017, the Secretary shall enter into stewardship contracts or other agreements, other than agreements that are exclusively direct service contracts, with Indian tribes to carry out demonstration projects to promote biomass energy production (including biofuel, heat, and electricity generation) on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from Federal land.

(b) DEFINITIONS.—The definitions in section 2 shall apply to this section.

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

(d) ELIGIBILITY CRITERIA.—To be eligible to enter into a contract or other agreement under this subsection, an Indian tribe shall submit to the Secretary an application—

(1) containing such information as the Secretary may require; and

(2) that includes a description of—

(A) the Indian forest land or rangeland under the jurisdiction of the Indian tribe; and

(B) the demonstration project proposed to be carried out by the Indian tribe.

(e) SELECTION.—In evaluating the applications submitted under subsection (c), the Secretary—

(1) shall take into consideration the factors set forth in paragraphs (1) and (2) of section 2(e) of Public Law 108–278; and whether a proposed demonstration project would—

(A) increase the availability or reliability of local or regional energy;

(B) enhance the economic development of the Indian tribe;

(C) improve the connection of electric power transmission facilities serving the Indian tribe with other electric transmission facilities;

(D) improve the forest health or watersheds of Federal land or Indian forest land or rangeland; or

(E) otherwise promote the use of woody biomass; and

(2) shall exclude from consideration any merchantable logs that have been identified by the Secretary for commercial sale.

(f) IMPLEMENTATION.—The Secretary shall—

(1) ensure that the criteria described in subsection (c) are publicly available by not later than 120 days after the date of enactment of this section; and

(2) to the maximum extent practicable, consult with Indian tribes and appropriate intertribal organizations likely to be affected in developing the application and otherwise carrying out this section.

(g) REPORT.—Not later than September 20, 2015, the Secretary shall submit to Congress a report that describes, with respect to the reporting period—

(1) each individual tribal application received under this section; and

(2) each contract and agreement entered into pursuant to this section.

(h) INCORPORATION OF MANAGEMENT PLANS.—In carrying out a contract or agreement under this section, on receipt of a request from an Indian tribe, the Secretary shall incorporate into the contract or agreement, to the extent practicable, management plans (including forest management and integrated resource management plans) in effect on the Indian forest land or rangeland of the respective Indian tribe.

(i) TERM.—A stewardship contract or other agreement entered into under this section—

(1) shall be for a term of not more than 20 years; and

(2) may be renewed in accordance with this section for not more than an additional 10 years.

ACT OF AUGUST 9, 1955

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) * * *

* * * * * * *

(e)(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto**[**, except a lease for**]**, *including leases for* the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

(A) in the case of a business or agricultural lease, **[**25 years, except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and**]** *99 years;*

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations**[**.**]***; and*

(C) in the case of a lease for the exploration, development, or extraction of mineral resources, including geothermal resources, 25 years, except that any such lease may include an option to renew for one additional term not to exceed 25 years.

* * * * * * *

DISSENTING VIEWS

H.R. 3973 imposes a number of changes on existing law or agency practice, all allegedly aimed at streamlining energy development on Indian lands. While we agree that development of tribal natural resources provide an opportunity for significant economic benefits in Indian country, H.R. 3973 overreaches in pursuit of its purported goal by eliminating much-needed federal protections under the National Environmental Policy Act (NEPA) and by weakening important legal devices for those seeking environmental justice. In a blatant attempt to chill litigation, H.R. 3973 requires a claimant to post a significant bond in order to bring claims that a court initially determines would succeed on the merits, and prevents recovery of attorneys' fees in cases challenging energy projects. Even absent these offending provisions, H.R. 3973 is still inadequate to address comprehensive reforms identified by a broad coalition of tribes, including the National Congress of American Indians (NCAI). The bill instead focuses on a few priorities that even fewer tribes have supported on the record. For these reasons, H.R. 3973 should be rejected by the House.

Section 5 of this legislation would amend NEPA by mandating that Environmental Impact Statements "for any major federal action" on Indian lands by an Indian tribe "shall only be available for review and comment by the members of the Indian tribe and by any other individual residing within the affected area." This limitation severely curtails public involvement in proposed federal projects that may affect the environment—a central tenet of NEPA—thus contributing to uninformed decision making at the federal level. And because "affected area" is undefined in the bill, uniform application of the provision is doubtful and invites legal scrutiny by those individuals who may be negatively impacted by a proposed project but who were artificially excluded from review and comment. Section 5 could therefore lead to lawsuits that further delay development of tribal energy projects—an outcome that is contrary to the stated goal of this legislation. Finally, by its own terms, Section 5 is applicable to more than energy projects; it applies to *any* major federal project on Indian land by Indian tribes. Such actions include, but are not limited to, proposed mining contracts, proposed water development projects, construction of solid waste facilities, and even construction of tribal class III gaming facilities. The negative impact of this provision's waiver of NEPA protections for not just energy-related but any type of federal action on Indian lands cannot be overstated.

Section 8 of this legislation prevents rightful judicial review of energy projects on Indian lands in three significant ways. First, it makes members of the public who bring claims that a court initially determines to be successful on the merits potentially liable for massive damages. This "loser pay" provision slams the court-

house door shut by making it difficult, if not impossible, for members of the public—even tribal members whose homelands may be impacted by a major federal action of any kind—from bringing suits to prevent environmental harm. Members of the Navajo Nation, for example, experienced firsthand the destruction caused by environmental disaster near Gallup, New Mexico, when United Nuclear Corporation's Church Rock uranium mill tailings disposal pond breached its dam and over 1000 tons of radioactive mill waste and approximately 93 million gallons of mine effluent flowed into a nearby river. Widespread radioactive contamination from this disaster near Navajo lands persist to this day; if H.R. 3973 were law at the time of this disaster, tribal victims without the financial capacity to file suit would have been barred from the courthouse. To be sure, we cannot support a bill that prevents legitimate claims from being brought by victims of environmental disasters caused by energy development projects simply because they cannot afford their day in court.

Second, Section 8 requires claimants to post a 30 percent bond in an amount a court determines is "sufficient to compensate each defendant opposing the preliminary injunction or administrative stay for damages" for costs associated with the lawsuit. The cost of obtaining a bond that equals 30 percent of a lawsuit's proposed damages could be staggering, especially for large-scale commercial energy projects, and would likely bar legitimate claims from being filed in the first instance.

Third, Section 8 prevents recovery of attorneys' fees in cases challenging federal action on Indian lands, making it difficult for potential claimants to secure legal representation. And because this section defines "energy related action" broadly, its restrictive judicial review provisions would apply equally to energy projects done in partnership with an Indian tribe even on non-tribal lands *anywhere* in the country. This provision invites the partnering of energy corporations with Indian tribes for the purpose of limiting judicial review, creating a significant loophole for these companies for virtually consequence-free development.

H.R. 3973's judicial review limitations are clearly intended to chill litigation to the detriment of bona fide claimants, and they undermine the real teeth of NEPA by making the availability of injunctive relief when an agency fails to fulfill the statute's procedural requirements all but disappear. Any legislation that would keep legitimate claims from being brought by victims of environmental disasters simply because they lack financial resources and furthermore prevents application of NEPA as H.R. 3973 would, should not be allowed to advance in the House.

There is a better legislative solution to breaking down tribal energy development barriers, one that is supported by NCAI and subject to extensive review by tribes from across the country. Title I of S. 1684, the Indian Tribal Energy Development and Self-Determination Act Amendments, would begin to address the energy development lag in Indian country by enhancing tribal control over the management and development of tribes' own trust resources based on existing law. The Energy Policy Act of 2005 authorizes tribes to enter into leases and other business agreements for energy resource development and grant rights of way without prior

federal approval under Tribal Energy Resource Agreements (TERAs). But due to a burdensome and complex application process, no tribe has successfully applied for a TERA in the seven years that tribes have had this authority.

Title I of S. 1684 amends the TERA process by streamlining the criteria for approval, setting time limits for the approval process and shifting the burden from the tribe to the federal agency to disapprove a TERA application. It also provides for a new approach to tribal energy development with the introduction of Tribal Energy Development Organizations (TEDOs), which a tribe could form in lieu of entering into a TERA with DOI in order to develop tribal energy resources with more tribal autonomy.

During Committee markup of H.R. 3973, Representative Luján (D–NM) offered an amendment in the nature of a substitute (ANS) that would have replaced H.R. 3973 with Title I of S. 1684. Despite being based on a Senate Republican bill introduced by Senator Barrasso (R–WY) and cosponsored by four other Republicans, House Committee Republicans voted the ANS down unanimously.

We oppose H.R. 3973 because it contravenes existing environmental protections and eliminates the critical check provided by the judiciary on the exercise of power by other branches of government. It is also insufficient legislation to address the breadth of reforms needed to reduce government barriers to energy development for Indian tribes.

EDWARD J. MARKEY.
RUSH D. HOLT.
PAUL TONKO.
GRACE F. NAPOLITANO.
RAÚL M. GRIJALVA.
BEN RAY LUJÁN.

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