Committee on Natural Resources
Rob Bishop, Chairman
Hearing Memorandum

October 3, 2016

To: All Natural Resources Committee Members

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

Hearing: Oversight field hearing titled "*Tribal Prosperity and Self-Determination through Energy Development"*

The Committee on Natural Resources will hold an oversight field hearing on **Tuesday, October 4, 2016 at 10:00 a.m.** in room 309 of the **New Mexico State Capitol, 490 Old Santa Fe Trail, Santa Fe, NM**. This hearing will focus on several themes, including: the beneficial impact of energy resource development on tribal economies; how tribes currently manage their energy resources; and obstacles such as federal regulations, delays, and lack of energy resource data and information that hinder the ability of tribes to realize the full potential of their energy resources for the benefit of their members and the country.

Policy Overview

- Though largely undeveloped, Indian energy resources hold a significant potential for creating jobs and revenues in tribal communities and Alaska Native villages, and for increasing a stable supply of energy resources for the country

- Federal regulations, poor federal management, and the absence of crucial data and surveys result in what the GAO has called "missed opportunities," "lost revenue," and "jeopardized viability of projects" for Indian tribes

- The federal government has not adequately assisted tribes seeking to increase their control over the management of energy resources of their lands because the government treats Indian lands as public land

Witnesses Invited

Panel

The Honorable James M. "Mike" Olguin
Tribal Council Member
Southern Ute Indian Tribe
Ignacio, CO

The Honorable Jack Ferguson
Confederated Tribes of the Colville Reservation
Representative, Intertribal Timber Council
Nespelem, WA

Mr. Louis Denetsosie
President & CEO
Navajo Nation Oil and Gas Co.
Window Rock, AZ

Mr. Richard Glenn
Executive VP, Lands & Natural Resources
Arctic Slope Regional Corporation (ASRC)
Barrow, AK

Mr. Eric Henson
Senior Vice President, Compass Lexecon
Research Affiliate, Harvard Project on American Indian Economic Development
Tucson, AZ

Background

Energy Resources on Indian Lands

The Department of the Interior holds title to 56 million acres of land in trust or restricted status for the benefit of American Indian tribes and individual Indians. In Alaska, Alaska Native Corporations (ANCs) own 44 million acres of land in fee (i.e., land not held in trust or restricted status by the United States). The ANCs obtained these lands in settlement of their aboriginal land claims under the Alaska Native Claims Settlement Act of 1971.

A number of Indian reservations contain large accumulations of known and prospective oil, gas, and coal resources. For FY 2015, over $829 million in royalties income was disbursed to Indian tribes; these royalties primarily came from oil, natural gas (including natural gas liquids) and coal.[1] Tribes also received an additional $4.3 million from bonuses (one time up-front payments) and annual rentals. The average lease bonus and royalty rate have increased from $36 per acre and 16.66 percent in 2006 to $5,500 per acre and 21.5 percent in 2014.[2]

[1] Bureau of Indian Affairs FY 2017 Budget Justification at IA- CED-22.
[2] *Ibid*, at IA-CED-25.

In Alaska, several ANCs are actively engaged in leasing their fee lands for mineral development, and in operating or servicing oil and gas facilities on State lands and in the National Petroleum Reserve-Alaska. Kaktovik Inupiat Corporation and ASRC own land in the 1002 Area of the Arctic National Wildlife Refuge (ANWR), one of the largest undeveloped onshore oil prospects in North America. Such lands cannot be leased for production until Congress lifts the hold on leasing in the entire 1002 Area.

Breakthroughs in the use of hydraulic fracturing to produce oil and gas from large hydrocarbon-bearing shale formations have given several historically impoverished tribes a major economic opportunity, and the successful use of this technology has contributed to the recent increases in oil and gas production on certain Indian lands.

There is substantial wind and solar potential on a number of Indian reservations. Only one reservation currently hosts significant solar facilities approved by the Department of the Interior, while several other tribes pursue similar projects on their reservations.[3]

Indian Energy Development Laws are often Obstacles to Energy Development

Tribes and individual Indian landowners regularly encounter obstacles not encountered on leases of private and state lands. Under federal law such as the Indian Land Mineral Leasing Act of 1982,[4] a tribe or individual Indian may lease trust lands for mineral development "*subject to the approval of the Secretary*." Pursuant to this restriction on Indian mineral leasing, the Department has imposed 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, and numerous other layers of dilatory bureaucratic review often involving multiple agencies. Each layer of review may give a federal agency or private special interest standing to delay or stop the permitting of Indian energy development, sometimes through filing appeals and lawsuits.

The current federal regulatory scheme obstructs historically impoverished tribes from fully realizing the huge economic potential of developing their natural resources. Because tribes with large energy resources tend to be located in rural areas, development of these resources offers one of the few non-government means available for them 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.

[3] https://www.doi.gov/pressreleases/secretary-jewell-approves-utility-scale-solar-project-tribal-land-nevada
[4] 25 U.S.C. 2101 et seq.

Many tribes have petitioned Congress to allow them the option to assume management of their lands for energy development. In 2005, Congress enacted the Indian Tribal Energy Development and Self-Determination Act within the Energy Policy Act of 2005 (EPACT).[5] This Act authorizes Tribal Energy Resource Agreements ("TERA") with the Secretary of the Interior. Under a TERA, a tribe may negotiate with the Secretary to assume the discretion to lease its land for energy development, without review and approval of the Secretary. However, to date no tribe has successfully entered into a TERA. According to the GAO, deterrents to tribes entering into TERAs include uncertainty about TERA regulations, limited tribal capacity, costs, and a complex application process.[6]

Hydraulic Fracturing

One of the major threats to oil and gas development on Indian lands is the final rule promulgated by the Bureau of Land Management (BLM) on March 26, 2015 to regulate hydraulic fracturing (HF) on federal lands. In the rule, the BLM treats land held in trust for Indians as federal land even though under federal law, the beneficial interest in trust land is vested *exclusively* in the Indian beneficiaries. The public does not have a legal right to the use of Indian trust lands without the consent of the Indian owners. The BLM's rule turns this fundamental tenet of federal Indian policy on its head.

At an April 19, 2012 Natural Resources Indian and Alaska Native Affairs Subcommittee oversight hearing[7], tribal leaders testified that 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 are intermixed in 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 rules govern.

At a July 15, 2015 Indian, Insular and Alaska Native Affairs Subcommittee hearing on the future of hydraulic fracturing on federal lands, a tribal leader testified that the tribe had approved its own hydraulic fracturing regulation on June 16, 2015.[8] Despite a federal regulation (25 C.F.R. §211.29) allowing a tribal regulation to supersede BLM regulations within the tribe's

[5] P.L. 109-58.
[6] http://www.gao.gov/assets/680/670701.pdf at 32.
[7] http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=289030
[8] http://naturalresources.house.gov/uploadedfiles/olguintestimony.pdf

jurisdiction, the BLM rule went into effect on June 24, 2015. On June 18, 2015, the tribe filed a lawsuit against the Department of the Interior citing that the Department acted unlawful in issuing the rule and did not recognize the tribe's superseding right to issue its own regulations.

The tribal lawsuit was later consolidated with several other state petitions challenging the BLM rule. On June 2016 in the U.S. District Court for the District of Wyoming,[9] the court ruled that the BLM lacked the statutory authority to promulgate those regulations. In the court's view, Congress assigned the responsibility for protecting drinking water supplies to the states. The case is on appeal to the U.S. Court of Appeals for the Tenth Circuit.

GAO Review of Energy Development on Indian Land

In June 2015, the Government Accountability Office (GAO) issued a report titled, "Indian Energy Development: Poor Management by BIA Has Hindered Energy Development of Indian Lands."[10] In its report, the GAO found that the Bureau of Indian Affairs (BIA) "management shortcomings," a complex regulatory framework, and tribes limited capacity and capital hinder tribes from realizing the potential of their energy resources. At the end of this memo are highlights of the GAO's report.

Recent Congressional Action

In the 114th Congress, the House and Senate have passed bills to reform federal regulations hindering tribal energy development and to promote tribal governance of their energy resources. H.R. 538 (Rep. Don Young of Alaska), the "Native American Energy Act", contains a range of provisions that:

- Streamline federal permitting for, and increases tribal control over, energy and other natural resource development on Indian lands
- Give tribes options for performing appraisals of their lands, including waiving the federal requirement for an appraisal
- Provide that the Department of the Interior's hydraulic fracturing rule shall not apply to Indian lands without the consent of the Indian owners
- Deter frivolous appeals and lawsuits filed by special interests seeking to use delay and block federal permits necessary for Native American energy projects
- Authorize a pilot project for the Navajo Nation to assume full control over the mineral leasing of its trust lands if Interior approves its tribal leasing program

[9] *Wyoming v. Dept. of the Interior*, (D. Wyo. June 21, 2016).
[10] http://www.gao.gov/assets/680/670701.pdf

- Promote tribal forest stewardship on overgrown Forest Service lands adjacent to Indian reservations

This legislation, developed after hearings and consultation with a number of Indian tribes and ANCs, is supported by the National Congress of American Indians, Intertribal Timber Council, and U.S. Chamber of Commerce. H.R. 538 passed the House of Representatives on October 8, 2015, on a 254-173 vote.

The Obama Administration does not support H.R. 538 because the bill "would undermine public participation and transparency of review of projects on Indian lands under the National Environmental Policy Act, set unrealistic deadlines and remove oversight for appraisals of Indian lands or trust assets, and prohibit awards under the Equal Access to Justice Act or payment of fees or expenses to a plaintiff from the Judgment Fund in energy-related actions."[11]

The Senate passed S. 209 (Sen. John Barrasso), "Indian Tribal Energy Development and Self-Determination Act Amendments of 2015" by unanimous consent on December 10, 2015. This bill has several provisions similar to those in the House bill.

Both bills were included in the S. 2012, the large Senate energy package, and the House amendment to it. The tribal energy provisions are currently part of the formal House-Senate conference on S. 2012.

[11] https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr538r_20151007.pdf

GAO: "Indian Energy Development --- Poor Management by BIA Has Hindered Energy Development on Indian Lands (June 2015)"

Highlights

1 – "Indian energy resources hold significant potential for development, but remain largely undeveloped." p. 1.

2 – "However, even with considerable energy resources, according to a 2014 Interior document, Indian energy resources are undeveloped relative to surrounding non-Indian resources." P. 1.

> e.g. in 2015, the Kumeyaay Wind Facility is the only utility scale wind facility on Indian lands. By comparison, by 2013 686 utility scale wind projects and 778 utility scale solar projects were on non-Indian land. Pp. 2-3.

3 – "In 2012, Interior's IG found that weaknesses in BIA's management of oil and gas resources contributed to a general preference by industry to acquire oil and gas leases on non-Indian lands over Indian lands." P. 6.

4 – "In particular, BIA does not have comprehensive data to identify ownership and resources available for development, does not have a documented process or data to track and monitor its review and response times, and some offices do not have the skills or adequate staff resources to effectively review energy-related documents." P. 18.

5 – "BIA does not have the data it needs to verify ownership of some oil and gas resources, easily identify resources available for lease, or easily identify where leases are in effect…In addition, Interior's Secretarial Order 3215 calls for BIA to maintain a system of records that identifies the location and value of Indian resources and allows for resource owners to obtain information regarding their assets in a timely manner. Further, according to Interior guidance, the determination of the legal boundaries of Indian trust lands is essential to ensure that property and resources are properly accounted for and protected. However, in some cases BIA cannot verify ownership because federal cadastral surveys --- the means by which land is defined, divided, traced, and recorded --- cannot be found or are outdated." P. 18.

6 – "According to an Interior official, the absence of a cadastral survey is not an isolated event. The official said he was aware of similar scenarios throughout Montana, North Dakota, Oklahoma, and Wyoming; however the extent of this deficiency is unknown because neither BIA nor BLMN maintains an inventory of Indian cadastral survey needs, as called for by Interior guidance issued annually since 2008….Without an inventory of needs, BIA does not know the magnitude of the problem or how to prioritize and target its limited resources." P. 19.

7 – "In addition, BIA does not have geographic information system (GIS) mapping data identifying resource ownership and use of resources, such as existing leases. Interior guidance identifies that efficient management of oil and gas resources relies, in part, on GIS mapping technology because it allows managers to easily identify resources available for lease and where leases are in effect. However, BIA's database for recording and maintaining historical and current data on ownership and leasing of Indian land and mineral resources --- the Trust Asset and Accounting Management System (TAAMS) --- does not include a GIS mapping component." P. 20.

8 – "According to a BIA official, without a GIS component, the process to identify transactions such as leases and ROW agreements for Indian land and resources can take significant time and staff resources to search paper records stored in multiple locations." P. 20.

> e.g. BIA told a tribal member that getting him information on existing leases and ROW agreements would cost the guy $1,422 and 48 hours of staff time.

9 – "In addition, officials from a few Indian tribes told us that they cannot pursue development opportunities because BIA cannot provide the tribe with data on the location of their oil and gas resources. According to a 2012 report, an inventory of Indian resources can provide a road map for expanding development opportunities."

10 – "According to Interior's 2014-2015 performance plan, it was to incorporate a GIS mapping component into TAAMS in fiscal year 2014. However, BIA officials told us the agency faced competing priorities and has delayed the incorporation of the GIS mapping component to fiscal year 2015. Without easily accessible data, such as provided in GIS mapping technology, BAIA will continue to face challenges to properly manage Indian energy resources and tribes could miss out on development opportunities." P. 20.

11 – Regarding BIA's review of a wind lease, "…in 2011, the President for the Rosebud Sioux Tribe in South Dakota, reported that it took 18 months for BIA to review a wind lease. According to the developer of the project, the review time caused the project to be delayed and result in the project losing an interconnection agreement with the local utility" P. 21.

12 – "In another example, in 2014, the Acting Chairman for the Southern Ute Indian Tribe reported that BIA's review of some of its energy-related documents took as long as 8 years. Specifically, as of April 30, 2014, the tribe had been waiting for at least 5 years for BIA to review 81 pipeline ROW agreements --- 11 of the 81 ROW applications had been under review for 8 years." P. 22.

> e.g. SUIT estimates that during these delays, prices for natural gas were at historic highs, causing the loss of an estimated $95 million to the tribe.

13 – "…in 2014, the agency developed the Realty Tracking System. According to BIA officials, this system provides the data needed to track reviews of surface leases. However the system does not track information for oil or gas leases or other key review activities associated with energy development, such as ROW agreements, and does not include comprehensive data on existing surface leases under review." P. 23.

14 – "According to Interior officials, while the potential for oil and gas development can be identical regardless of the type of land ownership --- such as state, private or Indian --- the added complexity of the federal process stops many developers from pursuing Indian oil and gas resources for development." P. 24.

15 – Regarding the added cost as a result of these federal processes, the GAO says that "…according to a representative from a private investment firm we interviewed, an oil or gas well that develops Indian resources generally costs almost 65 percent more for regulatory compliance than a similar well developing private resources." P. 25.

16 – Regarding NEPA compliance costs, the GAO says that "Interior officials told us that NEPA compliance reviews significantly increase the cost of conducting operations on Indian lands and, as a result, projects are moved to adjoining state or private lands where NEPA compliance is not required." P. 26.

17 – Regarding the HF rule compliance costs, the GAO says that "A few stakeholders also expressed concern that BLM's recent hydraulic fracturing rule applies to Indian oil and gas development, adding more federal regulation to development activities on Indian resources that are not generally applicable to private or state resources." P. 26.

18 – Regarding APD fees, the GAO says that "Indian oil and gas development can also be subject to higher fees than those for non-Indian resources. For example, development of Indian oil and gas resources is subject to BLM's $6,500 drilling permit fee. In comparison, development of private and state oil and gas resources may be subject to state drilling permit fees, which vary by state; for example, drilling permits in Montana cost $150 or less." P. 27.

19 – Other inhibitors include fractionated Indian land, inadequate capital, renewable tax credit useless for tribes, dual taxation, real or perceived concerns about tribal political stability and capacity, underdeveloped tribal legal infrastructure, remote areas, lack of transmission, etc. Pp. 28-32.

20 – Why no TERAs have been entered, p. 32.