

**TESTIMONY
OF
MIKE BLACK
DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
HOUSE NATURAL RESOURCES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
ON
H.R. 1548, NATIVE AMERICAN ENERGY ACT**

APRIL 26, 2013

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Mike Black and I am the Director of the Bureau of Indian Affairs (BIA) at the Department of the Interior (Department). I am pleased to be here today to present the Department's views regarding H.R. 1548, Native American Energy Act.

I. Introduction

A stronger America depends on a growing economy that creates jobs. No area holds more promise than investments in American energy. Success depends on the country's ability to pursue an all-of-the-above energy strategy. And as part of President Obama's all-of-the-above energy strategy, the Department is committed to expanding on Indian lands safe and responsible oil and gas development, and clean, low cost, reliable, and secure energy supplies. Implementing President Obama's all-of-the-above energy strategy in Indian Country has the potential to assist the United States with increasing domestic energy supplies but also with improving the economy of many Indian tribes and Alaska Native villages.

Generally, Indian people have consistently ranked near the bottom of every economic, social and health indicator. Energy development on Indian lands represents a near-term solution for many tribes to promote economic development, small business, capital investment, Indian-owned businesses, and job creation for their tribal members.

While the Department supports the concepts of streamlining federal regulations to increase energy development on Indian lands, the Department cannot support H.R. 1548.

II. Administrative Efforts to Increase Energy Development in Indian Country

Administratively, the Department continues to promote conventional and clean energy development in Indian Country. An example of clean energy development is the Department's recent approval of a solar energy project on Moapa Band of Paiute's trust lands in Nevada. This milestone project is the first-ever, utility-scale solar project approved for development on tribal lands. The Tribe's agreement with the Los Angeles City Council for a 25-year power purchase

agreement will provide enough energy to power over 100,000 Los Angeles households. Likewise, the Department's approval of a fee-to-trust application from the Three Affiliated Tribes to build a refinery is an example of our efforts to promote the thoughtful development of conventional resources. If all required approvals are obtained this would be the first new refinery built in the U.S. in more than 30 years.

To date, the Department holds in trust 55 million surface acres and 57 million acres of subsurface mineral estates throughout Indian Country. Under the Office of the Assistant Secretary - Indian Affairs, the BIA is responsible for developing, implementing and reviewing bureau-wide policies, plans, processes, environmental impact studies, industry leasing and development activities, and other functions related to development and production of energy and mineral resources on Indian lands.

On January 4, 2013, the Department finalized the federal leasing regulations for the 55 million surface acres the federal government holds in trust for Indian tribes. The new regulations will further encourage and spur economic development in Indian Country. The Department took a meaningful step forward by identifying specific processes, with enforceable timelines, through which BIA must review leases. The regulation establishes separate, simplified processes for residential, business, and renewable energy development, so that, for example, a lease for a single family home is distinguished from a large solar energy project.

As a follow up to its work overhauling regulations addressing residential, business, and wind and solar resource leasing on Indian land, Indian Affairs is working to revise its regulations to address rights-of-way on Indian land. Indian Affairs expects to distribute a draft revised rule to tribal leaders for discussion and publish a proposed rule by the end of 2014. The goal of the revisions is to streamline the process for obtaining BIA approval of rights-of-way and to modernize the regulations to address both the types of rights-of-way needed and the technology available in the 21st century.

III. H.R. 1548, Native American Energy Act

H.R. 1548 seeks to reduce federal regulation of energy development on Indian lands. Summarized below are the Department's views on each of the sections.

A. Appraisal Reform

H.R. 1548 provides that when Secretarial approval is required for a transaction involving Indian land or trust assets, the Secretary, the affected Indian tribe, or a certified third-party appraiser with a contract with the Indian tribe, may complete any required appraisal relating to fair market value. The bill also provides that the Secretary has 30 days after receipt of the appraisal to approve or disapprove the appraisal, and if the Secretary has made no decision after 60 days the appraisal is deemed approved. H.R. 1548 enables an Indian tribe to waive requirements for an appraisal by resolution or other unambiguous indication of tribal intent by the tribal governing body, including an express waiver of any claims for damages it might have against the United States as a result of the lack of an appraisal. Finally, the bill provides that the Secretary shall

develop regulations, including standards the Secretary will use to approve or disapprove appraisals.

While the Department could support timelines, such as those in the recently approved business leasing regulations, for approval or disapproval of appraisals, the Department has a number of concerns with the bill's provisions regarding appraisals.

The Department is unable to support the 30-day timeline for Secretarial review of appraisals because the Department may not have the resources to approve or disapprove every appraisal in 30 days. The bill provides that the Secretary has 30-days to approve or disapprove an appraisal, but after 60 days the appraisal will be deemed approved if the Secretary has not acted. The Department questions whether the extra thirty-day time period is a grace period. In addition, the bill does not specify who pays for appraisals when they are not conducted by the Secretary.

B. Standardization

H.R. 1548 provides that each Department agency that is involved in oil and gas activities on Indian lands use a uniform system of reference numbers and tracking number systems for oil and gas wells.

The Department has explored internally using a uniform system of reference numbers and tracking number systems for oil and gas wells, but has concluded that an effort to make uniform the lease numbering system would create a significant cost and would require considerable reprogramming. BIA will explore options that would make specialists available to provide oil and gas assistance in Indian Country where requested and needed.

C. Environmental Review of Major Federal Actions on Indian Lands

H.R. 1548 seeks to amend the National Environmental Policy Act (NEPA) to limit review of and comment on projects to members of the Indian tribe and any other individual residing within the affected area. The bill also requires the Council on Environmental Quality (CEQ), in consultation with Indian tribes, to develop regulations limiting review and describing affected areas for specific major Federal actions.

Although the Department supports streamlining the NEPA process for Indian land, the Department is concerned with the provision that limits review of, and comment to, members of the Indian tribe and any other individual residing within the affected area. NEPA emphasizes public involvement, giving Americans a role in decisions that impact lands and resources over which federal agencies exercise management and stewardship responsibilities. The amendment to NEPA seems contrary to NEPA itself and gives way to several questions:

- an amendment to NEPA would apply to all actions (not just those related to energy) and could have far-reaching consequences on the way the Department does business;
- NEPA's robust public involvement aspect is deeply embedded in the law, regulations, policy, and guidance, a change would require revisions to existing NEPA regulations to

provide for this new requirement and could have the opposite effect of the stated intention of reducing federal regulations;

- this amendment could artificially limit involvement of interested parties and scope of environmental analysis for direct, indirect, and cumulative effects on a variety of resources, for example, potentially eliminating the ability of other tribes with claims to the area to review and comment;
- the language is unclear and leaves considerable room for interpretation on allowing review and comment only by “members of the Indian tribe” and “other individuals residing within the affected area” and presents procedural difficulties to identify the appropriate parties; and,
- the amendment may also exclude from commenting other Indian tribes with cultural interests in an area.

The Department is also concerned the proposed NEPA amendment would not provide adequate consideration of the impacts of energy-related projects on tribal lands that are also National Park Service (NPS) lands and ensure the conservation of those resources at a level of protection afforded to other lands under NPS.

D. Bureau of Land Management Oil and Gas Fees

Section 6 of H.R. 1548 provides that the Bureau of Land Management (BLM) is not to collect any fee for (1) an application for a permit to drill (APD) on Indian land; (2) to conduct any oil or gas inspection activity; or (3) on any oil and gas lease for nonproducing acreage on Indian land.

Congress directed the BLM to collect a \$6,500 fee per new application for permit to drill, on public, Indian, and other federal lands, as a mechanism to recover from appropriated funds some of the costs of processing APDs. In FY 2011, the BLM processed 891 APDs on Indian lands, resulting in \$5.8 million collected in APD fees (\$6,500 x 891). If Sec. 6(1) were enacted, appropriated funds would be required to cover the BLM’s costs to process APDs on Indian lands.

The provisions in Sec. 6 (2), collecting fees for conducting oil and gas inspections, and Sec. 6 (3), collecting fees on oil or gas leases for nonproducing acreage, would have no impact on current BLM practice because the BLM does not currently collect fees for these activities. In the future, should Congress approve a fee for these purposes, as proposed in the FY 2014 President’s budget, the BLM would not be able to charge a fee for inspections on Indian land, nor charge a fee to encourage production of leased acreage on Indian land. Inspections would be conducted using appropriated funds.

E. Bonding Requirements and Nonpayment of Attorneys’ Fees to Promote Indian Energy Projects

In an energy-related action, H.R. 1548 penalizes unsuccessful plaintiffs by:

- imposing damages on a plaintiff who obtains a preliminary injunction or administrative stay, but does not prevail on the merits, to be paid to the defendant who opposed the injunction or stay and was harmed by its issuance;
- requiring a bond by any party plaintiff who seeks a preliminary injunction or administrative stay in an energy related action and, if the party plaintiff does not prevail on the merits, this section imposes liability for damages on the plaintiff to a party defendant who opposed the injunction or stay and was harmed by its issuance;
- prohibiting a court from issuing a preliminary injunction and an agency from granting an administrative stay, unless otherwise specifically exempted by federal law, until the plaintiff posts a surety or cash equivalent;
- providing that no awards may be made under the Equal Access to Justice or under 28 U.S.C. § 2412, and no funds may be obligated or expended from the Claims and Judgment Fund of the U.S. Treasury to pay fees or expenses to any plaintiff related to an energy related action.

The Department is very concerned with this provision because, according to the Department's Solicitors Office, very few approved Indian energy-related projects are challenged in court, so the Department does not see any urgency in enacting this provision.

The Department is also concerned with requiring bonds for damages in certain actions under the Administrative Procedures Act (APA). Such a rule would be of limited application, since stays and preliminary injunctions, at least in the Department and most courts, are only granted upon a showing of, *inter alia*, likelihood of success on the merits. *See*, e.g., 43 C.F.R. § 4.21(b), and *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

The Department is also concerned that the effect of such a provision for damages, together with the categorical denial of attorneys fees under the Equal Access to Justice Act, even where the plaintiff has substantially prevailed, would severely chill the exercise of legitimate due process rights and would stop many otherwise meritorious actions to challenge unwise decisions, even on energy-related projects in Indian Country.

F. Tribal Biomass Demonstration Project

H.R. 1548 provides that for years 2013 through 2017 the Secretary will enter into stewardship contracts or other agreements with Indian tribes to carry out demonstration projects to promote biomass energy production on Indian forest land and in nearby communities by providing reliable supplies of woody biomass from federal land.

The Department is unclear as to what is meant by “in nearby communities” and questions whether it means nearby Indian communities. The Department recommends deletion of the word “woody” so that this provision could apply to other forms of biomass from federal forest and range lands. In addition, for consistency across agencies, the Department recommends adding a definition of “biomass” similar to the one used by the U.S. Department of Energy.

“An energy resource derived from organic matter. These included wood, agricultural waste, and other living-cell material that can be burned to produce heat energy. They also include algae, sewage, and other organic substances that may be used to make energy through chemical processes.”¹

H.R. 1548 does not provide adequate consideration of the impacts of energy-related projects on tribal lands that are also National Park Service (NPS) lands and does not provide the National Park Service the ability to comment on those potential impacts. As a result, NPS units that include Indian trust lands should be explicitly excluded from the provisions of this bill to ensure the conservation of those resources at a level of protection afforded to other lands under the National Park System.

In the absence of that exclusion, NPS offers the following comment on section 8. The projects authorized by section 8 would be carried out by providing reliable supplies of woody biomass from federal land. The NPS believes these projects are inappropriate for park lands and NPS lands should be excluded from this section. Additionally, if a project takes place in nearby communities that might impact NPS lands, NPS should be consulted prior to those projects being approved.

G. Tribal Resource Management Plans

H.R. 1548 provides that activities conducted or resources harvested or produced under a tribal resource management plan or an integrated management plan the Secretary approves under the National Indian Forest Management Act or American Indian Agricultural Resource Management Act is considered a sustainable management practice. The Department has no position on this provision.

H. Leases of Restricted Lands for the Navajo Nation

H.R. 1548 would amend 25 U.S.C. § 415(e)(1) enabling the Navajo Nation to lease lands for 99 years, instead of 25 years, for business or agricultural purposes, and enables the Navajo Nation to lease lands for the exploration, development, or extraction of mineral resources, including geothermal resources, for 25 years, except that such lease may include an option to renew for one additional term not to exceed 25 years.

The Department supports the proposed extension of the authority of the Navajo Nation to lease its land without Secretarial approval to the 99-year term consistent with the term of leases that require Secretarial approval.

We are concerned, however, with the grant of authority for mineral leases for a term of 25 years with a 25 year renewal. Most tribal mineral leases throughout Indian country are granted under the terms of the Indian Mineral Leasing Act (IMLA), 25 U.S.C. §§ 396a-g, which allows for a primary term of up to ten years and as long thereafter as minerals are produced in paying

¹ See www1.eere.energy.gov/biomass/glossary_full_text.html#biomass.

quantities. Almost all of the non-IMLA leases are issued under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108, which allows the tribe to negotiate the term, although those terms generally end up similar, if not identical to, terms under the IMLA.

More importantly, however, the proposed lease term, unlike the IMLA, would allow possession of the Nation's land for up to fifty years with no obligation for the company to develop the land, even to drill an exploratory well. This would run completely contrary to the purpose of the IMLA. The Department is concerned with such a proposal.

I. Non-Applicability of Certain Rules

H.R. 1548 precludes the applicability of any rule promulgated by the Department regarding hydraulic fracturing on Indian lands without the express consent of the beneficiary on whose land is held in trust or restricted status.

While the intent of the provision may be to obtain the consent of tribal governments and individual Indians when their interests are impacted, the Department is concerned with the amendment's effect on the Secretary of the Interior's trust responsibility. BLM's rule was intended to fulfill the Department's role in ensuring the safe and effective use of fracturing techniques on Indian lands, while making Indian minerals profitable.

Furthermore, the Department is concerned about the scope and practical application of this amendment. First, the Department would assume that the amendment would not apply to rules of general applicability promulgated by the Department, such as those under the Endangered Species Act (ESA), but would appreciate some clarification from Congress.

Of more concern, however, is the difficulty of implementation. A regulation would be very difficult to write in the abstract without any indication that it would ever be applicable to any concrete situation. Furthermore, while the entity consenting for tribal land would be obvious, the process for consent on fractionated land would not. Application of the rule to some undivided joint interests in an entire tract but not others may be unworkable, precisely because the interests are undivided.

IV. Conclusion

The Department appreciates the Chairman's efforts in crafting H.R. 1548 so as to pave the way for greater energy development in Indian Country. The Department has reviewed Indian energy bills from the 112th and 113th Congresses, and has developed general concepts to streamline energy development in Indian Country, such as cost recovery authority from energy developers and certain amendments to Tribal Energy Resource Agreements, and would welcome assisting the Subcommittee with developing these concepts in the context of H.R. 1548 or a new bill, if requested.

This concludes my prepared statement. I will be happy to answer any questions the Subcommittee may have.