



HOUSE COMMITTEE ON  
**NATURAL RESOURCES**  
CHAIRMAN BRUCE WESTERMAN

**To:** House Committee on Natural Resources Republican Members  
**From:** Indian and Insular Affairs Subcommittee staff, Ken Degenfelder  
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**Date:** Thursday, September 28, 2023  
**Subject:** Oversight Hearing: “*Tribal Autonomy and Energy Development: Implementation of the Indian Tribal Energy Development & Self-Determination Act*”

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The Subcommittee on Indian and Insular Affairs will hold an oversight hearing titled “*Tribal Autonomy and Energy Development: Implementation of the Indian Tribal Energy Development & Self-Determination Act*” on **Thursday, September 28, 2023, at 10:15 a.m. EDT in 1334 Longworth House Office Building.**

Member offices are requested to notify Ransom Fox ([Ransom.Fox@mail.house.gov](mailto:Ransom.Fox@mail.house.gov)) by 4:30pm on Wednesday, September 27, 2023, if their member intends to participate in the hearing.

## **I. KEY MESSAGES**

- Though largely undeveloped, energy resources on Indian land have significant potential for creating jobs and revenues in native communities, while also increasing a stable supply of energy resources for the United States as a whole.<sup>1</sup>
- Congress has sought to provide tools for tribes to take control of the approval of energy projects on tribal lands, particularly through Tribal Energy Resource Agreements (TERAs) which would remove the requirement for Secretarial approval on each energy project, allowing tribes to exercise self-determination.
- However, tribes have not been able to take full advantage of the TERA process despite streamlining and clarifications added pursuant to the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (ITEDSA 2017).
- Other provisions of the ITEDSA 2017 were also not fully implemented or taken advantage of by tribes, including the biomass demonstration program and Navajo Nation expanded leasing authorities.
- Hearing from tribal leaders on the challenges and barriers that tribes still face when seeking to develop conventional energy sources will inform Congress of what further actions could be taken to support tribal autonomy in energy development on tribal lands.

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<sup>1</sup> The Energy Wealth of Indian Nations. <https://www.perc.org/wp-content/uploads/old/GWBI-EnergyWealthIndianNations.pdf>.

## II. WITNESSES

- **The Hon. Melvin J. Baker**, Chairman, Southern Ute Indian Tribe, Ignacio, CO
- **Mr. Cody Desautel**, Executive Director, Confederated Tribes of the Colville Reservation, Nespelam, WA
- **Ms. Bidtah Becker**, Chief Legal Counsel, Office of the President and Vice President, Navajo Nation, Window Rock, AZ
- **Mr. Nicholas Lovesee**, Director of Policy, Native American Finance Officers Association, Washington D.C. [*Minority witness*]

## III. BACKGROUND

This hearing will focus on the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (ITEDSA 2017) and its implementation and effects. Tribal leaders have been invited to testify about ITEDSA 2017, where barriers to tribal self-determination and autonomy still exist when tribes seek to develop energy resources on their own tribal lands, and how tribal self-determination in energy policy can benefit tribes and tribal members.

Lands held or owned by tribal nations have enormous untapped energy and mineral resource development potential.<sup>2</sup> There are approximately 56 million acres of Indian lands of which 46 million acres belong to Indian tribes and over 10 million acres belong to individual Indians.<sup>3</sup> However, many Indian reservations contain large accumulations of known and prospective energy fuels, including around 30 percent of the coal reserves west of the Mississippi river, 20 percent of oil and gas reserves,<sup>4</sup> as well as five percent of the country's renewable energy resources.<sup>5</sup>

For decades, tribes and individual Indian landowners have consistently struggled with overbearing federal laws governing leases of their trust lands. Generally, federal law requires the approval of the Department of the Interior (DOI) before a lease between an energy developer and a tribe is deemed valid. For example, under the Indian Land Mineral Leasing Act of 1982,<sup>6</sup> an individual tribal member or tribe may only lease their trust lands for mineral development "subject to the approval of the Secretary of the DOI." Because of this standing rule, DOI developed increasingly complex and burdensome rules regarding the approval of leases on Indian land. The increase in rules often leads to National Environmental Policy Act<sup>7</sup> reviews, expensive applications for permits to drill, lengthy appraisals, and an increasing number of sluggish bureaucratic reviews across various government agencies. As the reviews begin to pile up, the ability to delay, appeal, or sue to slow down development on Indian lands increases exponentially.

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<sup>2</sup> Id.

<sup>3</sup> FY 2021 BIA budget justification at IA-TNR-17. [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA\\_FY2021\\_Greenbook-508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA_FY2021_Greenbook-508.pdf)

<sup>4</sup> The New Trail of Tears. Naomi Schaefer Riley. 2016.

<sup>5</sup> Dept. of Energy, Department of Energy Makes Up To \$11.5 Million Available for Energy Infrastructure Deployment on Tribal Lands. Press Release, Feb. 16, 2018. <https://www.energy.gov/articles/department-energy-makes-115-million-available-energy-infrastructure-deployment-tribal>.

<sup>6</sup> 25 U.S.C. 2101 et. seq.

<sup>7</sup> 42 U.S.C. 4321 et seq.

This ineffective bureaucratic process prevents tribes, including many historically impoverished communities, from tapping into the economic potential of the resources found on their tribal lands. Because tribes with large energy resources tend to live in or near rural areas, development of these resources is consistently one of the only ways tribes can provide jobs and revenue for the tribe and its members. Resource development also creates a thriving energy supply for the tribe and their surrounding region. Access to their energy resources would allow tribes to tap into their full economic potential.

Indian tribes that have been able to develop energy resources have shown that development of these resources offers one of the few non-governmental means available for them to create jobs, revenue streams, investments in the local community, and new energy supply to meet U.S. consumer demand.<sup>8</sup> Despite tribal lands holding an estimated 86 percent of untapped resources, poverty remains a reoccurring theme in Indian country.<sup>9</sup> The complex process that Indian tribes and individual Indians must go through in order to access energy reserves on their lands further exacerbates tribal community poverty and discourages private investment.<sup>10</sup>

Indian tribes that have been able to benefit from conventional energy resource development and energy projects despite the barriers to development, include the Southern Ute Indian Tribe, the Crow Nation, the Mandan, Hidatsa and Arikara Nation (MHA Nation), and the Navajo Nation. The Southern Ute Indian Tribe owns and operates five energy companies with much of the generated revenue being invested in its Growth Fund, which is estimated to be worth around \$4 billion.<sup>11</sup> The tribe's Red Willow Production Company operates oil, gas, and coal-bed methane extraction throughout the U.S.<sup>12</sup> Crow Nation, in Montana, has coal and natural resources that are worth an estimated \$27 billion<sup>13</sup> and leases their mineral rights in the Absaloka mine to Westmoreland Mining Holdings, who operates the mine. Revenue from Absaloka provided approximately half of the tribe's nonfederal budget in 2017.<sup>14</sup> MHA Nation has developed their oil and gas resources on the Fort Berthold reservation in North Dakota, creating jobs for the area, and royalties that are managed and dispersed to tribal members by the MHA Nation tribal business council.<sup>15</sup> In June 2023, MHA Nation further expanded their investment in conventional energy resources and purchased an idle pipeline from Enbridge to help deliver oil from wells on the reservation, to market.<sup>16</sup>

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<sup>8</sup> New Trail of Tears at 19; and Unlocking the Wealth of Indian Nations, Terry L. Anderson ed., Lexington Books (2016) at 108 [hereinafter Unlocking the Wealth of Indian Nations].

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Unlocking the Wealth of Indian Nations at 119.

<sup>12</sup> Id.

<sup>13</sup> Native American tribes dependent on fossil fuel resources rip Biden admin for double standard.

<https://www.foxnews.com/politics/native-american-tribes-dependent-fossil-fuel-resources-rip-biden-admin-double-standard>.

<sup>14</sup> Tribes That Live Off Coal Hold Tight to Trump's Promises. <https://www.nytimes.com/2017/04/01/us/trump-coal-promises.html>.

<sup>15</sup> North Dakota acquires Enbridge pipeline in \$5M deal. <https://tribalbusinessnews.com/sections/energy/14357-north-dakota-tribe-acquires-enbridge-pipeline-in-5m-deal>.

<sup>16</sup> North Dakota tribe buys idle oil pipeline from Enbridge. <https://www.kfyrtv.com/2023/06/10/north-dakota-tribe-buys-idle-oil-pipeline-enbridge/>.

The Navajo Nation created Navajo Transitional Energy Company (NTEC) as an LLC in 2013 as an autonomous commercial entity to “promote the development of the Navajo Nation’s resources and new sources of energy, power, transmission and attendant resources to develop the economic, financial, social and cultural well-being of the Navajo People and the Navajo Nation.”<sup>17</sup> The Navajo Nation directly benefits as the sole shareholder of NTEC. NTEC has achieved its initial objective to prevent the closure of the Navajo Mine and Four Corners Power Plant, which would have an outsized impact on the Navajo community.<sup>18</sup> It then went on to acquire a seven percent stake in Four Corners Power Plant and purchased three mines in Montana and Wyoming.<sup>19</sup> In 2022, NTEC contributed more than \$121 million to the Navajo Nation, more than 30 percent of the Navajo Nation’s annual General Fund.<sup>20</sup>

Other tribes have chosen to develop microgrid and renewable energy projects rather than conventional energy resources.<sup>21</sup> Part of this may be cultural, reflecting tribal values regarding land use, however it may also be that it has proven easier to obtain surface leases and financing for renewable energy projects.<sup>22</sup> The Biden administration has consistently emphasized the development of renewable energy projects and renewable energy jobs, at the expense of conventional energy projects and their contribution to local jobs and economies.<sup>23</sup> For example, in June 2023, the Biden administration issued a Public Land Order officially withdrawing 336,404.42 acres of federal mineral estate surrounding the Chaco Canyon National Historical Park for 20 years.<sup>24</sup> The decision has met stiff opposition from the Navajo Nation and Republican members of the Committee on Natural Resources alike as it would decrease domestic energy production and cost Navajo Nation tribal members who own impacted mineral rights in the area an estimated \$194.3 million over the next 20 years. The decision would also cost the American taxpayer over \$1 billion in that same time frame.<sup>25</sup> On July 13, the Committee on Natural Resources held a legislative hearing on H.R. 4374, introduced by Rep. Crane (R-AZ), to reverse the Biden administration’s Chaco Canyon decision.<sup>26</sup> More information on the hearing including witness testimony and a memo prepared by the committee can be found [here](#). The

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<sup>17</sup> Navajo Transitional Energy Company, NTEC Creation. [https://navenergy.com/cool\\_timeline/navajo-mine-acquisition/](https://navenergy.com/cool_timeline/navajo-mine-acquisition/); and Navajo Transitional Energy Company, Press Release: Navajo Transitional Energy Company Celebrates Its 10-Year Anniversary. <https://navenergy.com/navajo-transitional-energy-company-celebrates-10-year-anniversary/> [hereinafter Navajo Transitional Energy Company Celebrates Its 10-Year Anniversary].

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Indian Energy Success Stories. Office of Indian Energy Policy and Programs, Dept. of Energy. <https://www.energy.gov/indianenergy/listings/indian-energy-success-stories>.

<sup>22</sup> Id.

<sup>23</sup> See e.g., “FACT SHEET: Biden-Harris Administration Races to Deploy Clean Energy that Creates Jobs and Lowers Costs,” White House. Jan. 12, 2022. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/12/fact-sheet-biden-harris-administration-races-to-deploy-clean-energy-that-creates-jobs-and-lowers-costs/>. See also, House Natural Resources Oversight Hearing Memo, “Examining the Biden Administration’s Mismanagement of the Federal Onshore Oil and Gas Program,” Sept. 19, 2023. Available at: [https://naturalresources.house.gov/uploadedfiles/hearing\\_memo\\_-\\_sub\\_on\\_emr\\_ov\\_hrg\\_09.19.23.pdf](https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_sub_on_emr_ov_hrg_09.19.23.pdf).

<sup>24</sup> House Committee on Natural Resources Energy and Mineral Resources Subcommittee Hearing Memo, “Legislative Hearing on H.R. 4374 (Rep. Crane), the “Energy Opportunities for All Act,” July 13, 2023. Available at: [https://naturalresources.house.gov/uploadedfiles/hearing\\_memo\\_-\\_sub\\_on\\_emr\\_leg\\_hrg\\_on\\_hr\\_4374\\_07.13.23.pdf](https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_sub_on_emr_leg_hrg_on_hr_4374_07.13.23.pdf).

<sup>25</sup> Id.

<sup>26</sup> Id.

Committee on Natural Resources marked up H.R. 4374 on July 19, 2023. More information on the mark up of H.R. 4374 is available [here](#).

Republicans have consistently advocated for an all-of-the-above energy policy for the United States, and tribal communities can benefit from the same approach. Each tribe has its own unique culture, history, and location. Tribes should be allowed to determine whether and how energy resources are developed on tribal lands, further supporting tribal self-determination.

Without a focus by the United States government on an all-of-the-above energy approach, U.S. households run the risk of a lack of affordable and reliable energy. High energy prices disproportionately impact minority, low income, rural, and senior citizens the most, and many tribal communities throughout the U.S. fit these descriptors.<sup>27</sup> While there is little data on energy prices on Indian reservations and in native communities, it is well established that on American Indian reservations and in Alaska Native villages, native people pay higher prices for food in or near their communities.<sup>28</sup> Higher cost of living and higher inflation increases the challenge for Native Americans to live on the reservation within their home communities.<sup>29</sup>

#### *Recent Congressional Actions on Indian Energy Policy and Tribal Energy Resource Agreements*

Congress has enacted various Indian energy policies since the mid-2000s.<sup>30</sup> Generally, Congress has been supportive of providing additional self-determination authorities that give tribes more control over energy and natural resource development on their lands. However, that intention has not always been fully realized.

Under Title V of the Energy Policy Act of 2005,<sup>31</sup> entitled the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA 2005), Congress sought to put in place a process that allowed tribes to develop energy projects on their own lands. Through Tribal Energy Resource Agreements (TERAs), tribes were provided authority to take over some of the federal bureaucratic process. Under a TERA, a tribe may, without review and approval of the Secretary of DOI, lease and grant rights-of-way on its trust land for energy-related purposes, if these actions are conducted under tribal rules approved in advance by the Secretary of DOI. Such tribal rules shall be approved by the Secretary of DOI if they include appropriate conditions for the orderly conduct of leasing of trust lands by the tribe, a demonstration of the tribe's capacity to manage its resources, and a tribal environmental review process. Outside of certain duties for the Secretary to monitor the tribe's compliance with the TERA, a tribe can manage its energy resources on a day-to-day basis.<sup>32</sup>

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<sup>27</sup> Energy Poverty. <https://energypovertyprevention.org/energy-poverty/>.

<sup>28</sup> Study: Native Americans pay more, travel farther for food. <https://navajotimes.com/reznews/high-prices-for-food/>; See also Indian Country Food Price Index: Exploring Variation in Food Pricing Across Native Communities. [https://www.firstnations.org/wp-content/uploads/publication-attachments/Indian\\_Country\\_Food\\_Price\\_Index\\_6-30-2016\\_FINAL%20FIXED.pdf](https://www.firstnations.org/wp-content/uploads/publication-attachments/Indian_Country_Food_Price_Index_6-30-2016_FINAL%20FIXED.pdf).

<sup>29</sup> Poll: 69% of Native Americans say inflation is severely affecting their lives. <https://www.npr.org/2022/08/20/1117689118/poll-69-of-native-americans-say-inflation-is-severely-affecting-their-lives>.

<sup>30</sup> See P.L. 109-58.

<sup>31</sup> Id.

<sup>32</sup> Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress. <https://crsreports.congress.gov/product/pdf/R/R46446/4>.

However, soon after regulations implementing TERAs were promulgated in 2008, tribal stakeholders voiced concerns of the shortcomings of ITEDSA 2005, noting the approval process for oil and gas leasing was cumbersome, too many federal agencies were involved, and approval of leases took too long.<sup>33</sup> A 2015 Government Accountability Office (GAO) report confirmed the failings of ITEDSA 2005, particularly that no tribe had submitted a TERA to DOI to be approved.<sup>34</sup> Tribes cited three main issues that deterred them from entering into TERAs under ITEDSA 2005: 1) uncertainty about TERA regulations, particularly the lack of definition of “inherently federal functions”; 2) limited tribal capacity and costs associated with assuming federal agency activities; and 3) a complex application process.<sup>35</sup> Of particular concern was the lack of a definition of “inherently federal function,” since those functions could not be assumed by a tribe even if they had a TERA. Tribes were left with unanswered questions and DOI was unwilling to define “inherently federal function” because that could have government-wide implications.<sup>36</sup> A 2015 GAO report noted that six tribes (the Jicarilla Apache Nation, the Southern Ute Indian Tribe, the Campo Band of Diegueno Mission Indians, the Oglala Sioux Tribe, the Moapa Band of Paiute Indians, and the Standing Rock Sioux Tribe) requested pre-application meetings for establishing a TERA, yet none of them submitted a TERA for approval.<sup>37</sup>

To provide clarity and streamline the process for entering into a TERA, Congress enacted the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017<sup>38</sup> (ITEDSA 2017) in 2018.

Title I of ITEDSA 2017 contained improvements to Tribal Energy Resource Agreements (TERAs) and the process to obtain one. The improvements included:

- Defining a qualified tribe as any federally recognized tribe that has a self-determination contract or compact, or that has substantial experience in energy resource management;
- Placing the burden on DOI to deny a TERA, rather than approve;
- Providing an option for tribes to identify the functions they will carry out under their TERA, hopefully preemptively addressing what could be an “inherently federal function”;
- Reducing the NEPA-like requirements for TERAs to only include provisions to ensure compliance with an environmental review process, rather than also having to identify proposed mitigation measures as under the ITEDSA 2005 regulations; and
- Enacting a streamlined TERA approval process that requires DOI to approve or disapprove a TERA within 270 days.<sup>39</sup>

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<sup>33</sup> Id.

<sup>34</sup> Indian Energy Development: Poor Management by BIA has Hindered Energy Development on Indian Lands. <https://www.gao.gov/assets/gao-15-502.pdf>.

<sup>35</sup> Id. at 32

<sup>36</sup> Id.

<sup>37</sup> Indian Energy Development: Poor Management by BIA has Hindered Energy Development on Indian Lands. <https://www.gao.gov/assets/gao-15-502.pdf>.

<sup>38</sup> P.L. 115-325.

<sup>39</sup> 25 U.S.C., Sec. 3504; for a more in-depth, narrative discussion of the changes, see Ben Reiter. A New TERA: Why It’s Time to Revisit Tribal Energy Resource Agreements, 10 LSU J. of Energy L. & Resources 335 (2022). <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1246&context=jelr>.

DOI updated TERA regulations based on ITEDSA 2017 and finalized them in 2019.<sup>40</sup> However, no tribe has sought to have a TERA approved. The Southern Ute Indian Tribe may be the furthest along in the process as they have worked on a draft TERA, but the TERA has not been submitted to DOI for approval. The Committee believes this is likely because the 2019 DOI regulations do not clarify enough of the TERA process to provide tribes with certainty. Additionally, the ITEDSA 2017 may not go far enough to streamline the TERA process and further legislative action may be necessary.

#### *Other Relevant Indian Energy Provisions in ITEDSA 2017*

Title II of ITEDSA 2017 included an authorization for a tribal biomass demonstration project and expansion of leasing authority for certain tribes that could help pave the way for energy development projects on tribal lands.

Section 202 of ITEDSA 2017 established biomass demonstration projects for Indian tribes and Alaska Native corporations, and required at least four new demonstration projects be carried out from 2017 to 2021, with Indian tribes to be selected based on several enumerated criteria.<sup>41</sup> The Confederated Tribes of the Colville Reservation (Colville) helped to develop this section in part to assist with forest management.<sup>42</sup> However, by the time ITEDSA 2017 was signed into law and the demonstration project was established, little time remained for a tribe to participate in the program.<sup>43</sup> Tribal advocates have stated that no tribe accessed the program before the authorization had lapsed.

Colville is currently working with a local biomass plant outside of the authorities authorized under ITEDSA that can take forest biomass from the management of the tribe's forests.<sup>44</sup> Long-term, hurdles regarding transportation of source materials to production facilities, supply chain consistency and economic sustainability will need to be addressed to ensure forest biomass' place in the United States' renewable energy portfolio.<sup>45</sup> Among other legislation before the Committee, H.R. 2989, the Save our Sequoias Act introduced by Speaker Kevin McCarthy (R-CA), includes provisions to expand and support the creation of new markets for forest biomass and biochar.

Section 205 of ITEDSA 2017 provided expanded leasing authority for the Navajo Nation, granting the tribe the ability to authorize mineral leasing with a term not to exceed 25 years or, in

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<sup>40</sup> 25 CFR 244 et seq.

<sup>41</sup> P.L. 115-325, Sec. 202.

<sup>42</sup> Testimony of Jack Ferguson, Oversight Hearing on "Tribal Prosperity and Self-Determination through Energy Development" House Committee on Natural Resources.

[https://naturalresources.house.gov/uploadedfiles/testimony\\_ferguson\\_.pdf](https://naturalresources.house.gov/uploadedfiles/testimony_ferguson_.pdf).

<sup>43</sup> Eligibility Criteria for Tribal and Alaska Native Biomass Demonstration Projects Under the Indian Tribal Energy Development and Self-Determination Act. 84 FR 11486.

<https://www.federalregister.gov/documents/2019/03/27/2019-05502/eligibility-criteria-for-tribal-and-alaska-native-biomass-demonstration-projects-under-the-indian>.

<sup>44</sup> Communication between Subcommittee Staff and the Colville tribe, September 2023.

<sup>45</sup> Challenges related to biomass. <https://www.eubia.org/cms/wiki-biomass/biomass-resources/challenges-related-to-biomass/>.

the case of oil and gas, for 10 years, plus any additional time that “the Navajo Nation determines to be appropriate where oil or gas is produced in a paying quantity.”<sup>46</sup> However, according to the Navajo Nation there has not been significant progress in assuming this authority. A GAO mandated review of Section 205 is anticipated to be issued at the end of September 2023. Preliminary information from GAO to subcommittee staff has indicated capacity and funding issues preventing full use of this section by the Navajo Nation.<sup>47</sup> However, the Navajo Nation has indicated to subcommittee staff that bureaucratic complexity and issues regarding access to DOI’s leasing, production, and royalty databases were larger issues than capacity and funding.<sup>48</sup> The Committee will review the GAO report and utilize its findings to inform future legislative action.

### *Considerations for Congress*

As no tribe has sought to implement a TERA, hearing directly from tribes on the challenges they have experienced with the TERA process is a first step in the consideration of whether further legislation is needed. Possible ways tribes may indicate that Congress could make TERAs more appealing include finding ways to streamline the TERA process with a more explicit expediated timeline, or exploring avenues to provide certainty to tribes on defining inherently federal functions, while also preserving the federal government’s interest in retaining inherently federal functions.

Tribes have repeatedly stated concerns regarding the complexity of the TERA approval process and the need to ensure tribes receive additional support or technical assistance for overseeing energy projects after a TERA is entered into. Tribes may suggest post-TERA implementation support that would make TERAs more attractive for tribes. Congress can also further support Indian energy policy towards a more explicit all-of-the-above approach to ensure that federal resources are balanced among different types of energy development projects on tribal lands. This hearing will be an opportunity to hear from tribes as to how Congress can best support tribal communities that seek to develop the resources they have on their lands.

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<sup>46</sup> P.L. 115-325, Sec. 205.

<sup>47</sup> Communication between GAO and Subcommittee Staff, September 2023.

<sup>48</sup> Communication between Navajo Nation and Subcommittee Staff, September 2023.