

**TESTIMONY OF
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BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON S. 2132,
THE “INDIAN TRIBAL ENERGY DEVELOPMENT AND
SELF-DETERMINATION ACT AMENDMENTS OF 2014.”**

APRIL 30, 2014

Good afternoon Chairman Tester, Vice-Chairman Barrasso and Members of the Committee. My name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony for the Department on S. 2132, the “Indian Tribal Energy Development and Self-Determination Act Amendments of 2014.” S. 2132 is legislation to amend the Indian Tribal Energy Development and Self-Determination Act of 2005.

The Department believes that it is appropriate to consider amendments to Title V of the Energy Policy Act of 2005, relating to tribal energy resource agreements (TERAs). The Energy Policy Act sought to increase tribal self-governance over energy development. That Act authorized TERA which are designed to shift authority for the review, approval, and management of leases, business agreements, and rights-of-way for energy development on tribal lands from the Federal government to participating tribes. Sadly, however, the Energy Policy Act has not been successful. Indeed, since promulgation of the Department’s TERA regulations in 2008, the Department has not received a single TERA application.

The Department supports the goal of increasing tribal self-governance in the area of energy and mineral development. The Department believes that environmentally responsible development of tribal energy resources is critical to the economic viability of many American Indian Tribes and to the sustainability of many Alaska Native villages. Energy and mineral development represents a near-term solution for many tribes to promote economic development, small business, capital investment, Indian-owned businesses, and job creation for tribal members. TERAs are designed to promote tribal sovereignty and economic self-sufficiency by establishing a process where tribes can assume a greater role in the development of their energy and mineral resources.

Key to a tribe’s ultimate success under a TERA is its capacity to perform the functions and responsibilities outlined in a TERA – functions and responsibilities historically performed by the Department. Under existing law, the Department plays a critical role in determining a tribe’s capacity to take on those functions. S. 2132 seeks among other things to simplify and expedite the TERA process. This is a laudable goal. While the Department supports this overall goal, the

Department would like to work with the Committee to further improve S. 2132 as described below.

Implementation of the 2005 Amendments

As noted, the current TERA regime has not been successful. This is not for lack of effort by the Department. Under current regulations, a tribe can request a pre-application meeting with the Office of Indian Energy and Economic Development (OIEED) to discuss any regulatory or administrative activities it might wish to exercise through a TERA. These informal pre-application meetings include discussion of the required content of a TERA application, such as identifying the energy resources the tribe anticipates developing; what capacity, management, and regulation will be needed to develop the energy resource; and potential mechanisms for building the capacity and pursuing other activities related to the energy resource the tribe anticipates developing. Since 2008, the Department has met with six tribes who have considered entering into a TERA. Of these tribes, one had active oil and gas development occurring on its reservation and was considering a TERA for further oil and gas development. The other tribes were considering renewable energy resource development. We understand that several tribes with renewable energy resources have expressed an interest in developing a TERA.

The Department supports several of the provisions in S. 2132:

- Sec. 101(a)(1)(E), requiring consultation with each applicable Indian tribe before adopting or approving a well spacing program or plan applicable to the energy resources of that Indian tribe or the members of that Indian tribe. The Department notes, however, that this consultation requirement could slow the timeframe for adoption or approval of well spacing programs or plans.
- Sec. 101(a)(4)(B), promoting cooperation with the Department of Energy's Office of Indian Energy Policy and Programs in providing assistance to tribes in development of energy plans. (The Department also believes that cooperation with other federal agencies is important and has made efforts to accomplish such cooperation, through the White House Native American Affairs Council.)
- Sec. 102(1) that adds "tribal energy development organization" as an eligible entity for grants under this section.
- Sec. 102(2) that adds "tribal energy development organization" as an eligible entity for technical assistance from the Department or eligible for financial assistance to procure technical assistance.
- Sec. 103(a)(1) that adds "production" to "facility" and specifically includes a facility that produces electricity from renewable energy resources. Energy resources developed on lands owned by individual Indians in fee, trust, or restricted status as well as energy resources developed on land owned by any other persons or entities may be included in leases, business agreements, and rights-of-way a tribe or tribal energy development

organization may approve as long as a portion of the energy resources have been developed on tribal land. The amendment also expands “facility to process or refine energy resources” to specifically include renewable energy resources and to add energy resources that are “produced from,” in addition to energy resources “developed on,” tribal land. The amendment includes pooling, unitization, or communitization of the energy mineral resource(s) of the tribe with energy mineral resource(s) owned by individual Indians in fee, trust, or restricted status or owned by any other persons or entities.

- Sec. 103, which expands purposes for rights-of-way under a TERA beyond pipelines, electric transmission or distribution lines that serve electric generation, transmission or distribution facilities located on tribal land to include those lines that also serve an electric production facility or a facility located on tribal land that extracts, produces, processes, or refines energy resources (not necessarily produced on tribal land) and lines that serve the purposes of or facilitate the purposes of any lease or business agreement entered into for energy resource production on tribal land.
- Sec. 103, which expands the time period for Secretarial approval of a revised TERA from 60 days to 90 days.
- Sec. 103, which provides that a Tribal Energy Resource Agreement remains in effect until rescinded by the tribe or Secretarial re-assumption.
- Sec. 103, which declines to waive the sovereign immunity of tribes.
- The Department also supports the provision that amends 25 U.S.C. 415(e) to allow the Navajo Nation to approve its own leases for business or agricultural purposes for 99 years. The Department is, however, concerned about the extent of the showing needed for the tribe to engage in mineral development (exploration, extraction and development) without Secretarial approval, as discussed further below.
- The Department supports the proposed changes to the existing environmental review process for TERAs, but we suggest that the Committee consider addressing environmental review similar to the approach Congress utilized in the HEARTH Act. Both the Department and the Council on Environmental Quality supported the HEARTH Act approach and the Department generally supports a similar approach here.

As noted, the Department is concerned with some of the provisions of S. 2132. The Department’s concerns include the following issues:

A. Allocation of liability.

We are concerned about a lack of clarity in S. 2132 in allocating liability for tribes that choose to utilize a TERA. According to its terms, the bill would amend 25 U.S.C. § 3504(e)(6) to state that nothing in the bill would change the liability of the Department for terms of any lease, business agreement, or right-of-way that is not a “negotiated term” or losses that are not the result of a

“negotiated term.” However, the definition of “negotiated term” does not clearly articulate how liability is allocated and the current language regarding the remaining trust responsibility does not provide sufficient clarity.

The Department believes that there is an easy fix to this problem. The Department recommends that the Committee replace the current and proposed amendment with the recently enacted liability provision in the HEARTH Act. This approach will clarify for both the Department and tribes the allocation of liability.

B. Determining “capacity”.

S. 2132 seeks to amend the statute’s capacity requirement by providing that a tribe satisfies the capacity requirement if it has carried out a self-determination contract or compact “relating to the management of tribal land.” We recommend that this approach be refined to ensure that the function performed pursuant to the self-determination contract or compact is appropriate given the broad array of functions that TERAs may implement.

The 2005 Act provides a framework under which tribal capacity includes not only managerial and technical capacity for developing energy resources (which necessarily includes realty, environmental, and oversight capabilities), but also managerial and technical capacity to account for energy production, experience in managing natural resources, and financial and administrative resources available for use by the tribe in implementing a TERA. Given the scope of functions that could be included in a TERA, successful administration of a self-governance contract or compact relating to the management of tribal lands may or may not be relevant to performing a particular TERA function.

For example, a self-governance contract for realty functions on a reservation largely devoted to grazing and residential use may not be indicative of regulating the development of oil and gas extraction. We recommend an approach that relies on experience with specific duties and compliance activities to demonstrate capacity for specific functions the tribe wishes to undertake with a TERA. Certainly prior participation in 638 contracts/compacts for specific duties and compliance activities is an important factor, but depending on the specific functions to be undertaken by a tribe in a TERA, it may not be the only factor that should be considered.

Additionally, the Department recommends, as an alternative, the Committee consider streamlining or eliminating capacity determinations. Under existing law the Secretary is required to determine “that the Indian Tribe has demonstrated that the Indian Tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe.” To date, no tribe has applied for a TERA, so we have no data on how much effort a tribe must expend for a positive capacity determination for the realty, environmental, and oversight activities it may assume.

However, enactment of the HEARTH Act eliminates this determination for entire categories of energy production. Because the HEARTH Act applies to surface leasing, it is now much simpler for tribes to pursue wind, solar and biomass energy projects without Secretarial approval. The

HEARTH Act's promotion of self-governance for surface leasing should be carried forward to mineral development. At a minimum, the Indian Energy Development and Self-Determination Act should be modified to limit TERAs to oil, gas, coal, geothermal, and other mineral-based energy projects, i.e., those that would require a lease under the Indian Mineral Leasing Act of 1938, a Minerals Agreement under the Indian Mineral Development Act of 1982, or a right-of-way under the Indian All Rights-of-Way Act of 1948.

If Congress maintains the capacity requirement because minerals are a limited and valuable resource, a TERA capacity determination could be based on whether the tribe contracts BIA realty functions in accordance with Pub.L. 93-638. Utilizing this approach would be a well-understood procedure for tribes, it would be useful to a tribe regardless of whether a TERA were ever obtained, and it is an important component to developing energy resources or entering into associated energy leases and rights-of-way.

As currently drafted, S. 2132 uses a similar standard (though not necessarily the contracting of BIA realty functions) as a "safe harbor" standard that would result in an automatic finding of tribal capacity. Successfully operating a 638 contract "relating to the management of tribal lands" for 3 years may not be, in and of itself, sufficient to demonstrate that the tribe involved is prepared to review, approve and manage leases, business agreements and rights-of-way for energy development. However, operating BIA's realty functions on tribal lands represents a component common to all energy development activities a tribe may want to undertake with a TERA. Amending the Indian Energy Development and Self-Determination Act to make this an explicit component of a favorable capacity determination would be clarify the requirement for applicant tribes and streamline the Department's review.

Tribal authority for approving tribal leases for residential and business purposes granted under the HEARTH Act may also serve as a clear capacity criterion for a Tribal Energy Resource Agreement under the Tribal Energy Development and Self-Determination Act of 2005. Such tribal authority is based on the tribe's submittal of, and the Secretary's approval of, tribal leasing regulations consistent with Departmental leasing regulations that also include environmental provisions for identification and evaluation of significant effects leasing may have on the environment and public notice and comment on the effects. While HEARTH Act authority for leasing does not require any capacity determination by the Secretary, tribes that have approved leasing regulations and have issued leases under that authority may be assumed to have both the structure (regulations) and the ability (personnel qualified to carry out the leasing functions) for basic leasing functions.

In addition, the tribal environmental regulations required under the HEARTH Act may form the basis for the environmental review process also required for a TERA under the ITEDSD Act. Other considerations for capacity for environmental review and compliance could include environmental personnel, experience of the Indian tribe in managing natural resources and financial and administrative resources available for use by the Indian tribe in implementing the approved tribal energy resource agreement of the Indian tribe. An amendment specifying tribal adoption of an environmental code that includes requirements under a TERA would provide clarity for a capacity determination.

We also believe that the proposed 120 day limit for the Department to determine capacity may not be adequate to comply with the notice requirement required by law. Currently, the Secretary must publish in the Federal Register a notice that a tribe has applied for a TERA with a copy of the TERA and request public comments. The process of seeking and considering public comments and to make appropriate changes in the TERA based on the public comments likely cannot be accomplished within 120 days unless the issue of capacity is excluded from the notice and comment requirement. As a result, we would request that the 120 period run only after the comment period has closed and, if additional changes are then necessary, only after a final TERA has been submitted.

C. The structure of the petition process.

The Department suggests that the Committee utilize a review process similar to that set forth in the HEARTH Act rather than construct a new review process that could lead to confusion and inconsistent administration. Aligning the statutory authorization for both processes would allow the Department to coordinate the corresponding regulations, thereby making the process more transparent and consistent for tribes and the public. The Department is comfortable with the different standing requirements for third party petitions concerning TERAs versus such petitions under the HEARTH Act.

D. Approval authority for TEDO's and Tribes without a TERA.

We have strong concerns about the proposed deletion of the TERA requirement for a lease, business agreement, or right-of-way entered into between a tribe and a tribal energy development organization (TEDO). This would be the first time that Congress has allowed for leases to be exempt from Secretarial approval based solely on the identity of the lessee, and not on any determination, either through a capacity determination under a TERA or through approval of regulations, that the tribe has a leasing program that can perform this responsibility.

E. Other Concerns.

While the Department has other minor concerns which it would be willing to discuss with Committee Staff, the concerns discussed above are the primary concerns.

Alternative Ideas

The following represent concepts the Department believes may work as alternatives to those in the current bill. We would be happy to help develop these concepts in the context of S. 2132 or a new bill, if requested.

1. Allow the tribes to recover costs from energy developers, e.g., environmental review costs, in the same manner that the Bureau of Land Management can.

The nature of this authority, and any limitations on it, would most likely require tribal consultation.

The BLM has the authority to enter into cost recovery agreements so that the labor costs of processing energy applications are funded by the applicants and not the Department. The BLM's cost recovery authority allows funds from developers to supplement existing appropriations. The BIA has a form of cost recovery authority in theory. However, any funds collected by the BIA must offset appropriated funding, so the authority provides no real benefit to tribes or the BIA in practice. One immediate concern tribes might have could be avoided, however, if this authority specifies that other annual funding for participating tribes, such as Tribal Priority Allocations, cannot be reduced as a consequence of proceeds from cost recovery.

BLM has used its cost-recovery funds to establish Renewable Energy Coordinating Offices (RECOs). The RECO teams include a dedicated Project Manager, a Planning and Environmental Coordinator and two Realty Specialists who process only renewable energy projects within their designated area. The Bureau of Indian Affairs could benefit from having its own independent cost recovery authority to gain revenues to pursue similar initiatives. Staffing issues continue to be an issue in the Department's processing of conventional energy development in Indian Country as well.

2. Specify that a tribe's initial TERA may be limited in scope, and thus complexity, with subsequent amendments to that TERA focusing only on new and additional responsibilities the tribe wishes to undertake.

As currently provided by law, TERA authority is defined by the resource(s) a tribe wants to develop (*e.g.*, oil and gas, solar) and/or the function the tribe wants to undertake (*e.g.*, entering into leases and business agreements, granting rights-of-way). We understand that the current law does not clearly provide a process for a tribe over time to add to its TERA functions without starting over and pursuing an entirely new TERA. It therefore would be helpful to clarify that a tribe that wants to perform only a limited function initially can phase in new, related functions over time as the tribe's capacity increases, by amending its initial, approved TERA and not by having to duplicate any of the still relevant elements of its initial TERA application. Thus, a tribe that wants to develop oil and gas resources will not feel obliged to demonstrate it has the capacity to handle all conceivable aspects of oil and gas development, from exploration to production to refinement, just to issue oil and gas leases. This is consistent with the way that the Department and the Navajo Nation have implemented the Navajo Nation Trust Land Leasing Act of 2000 [25 U.S.C. § 415(e)] and the way that the Department currently interprets the HEARTH Act of 2012.

Conclusion

Thank you for the opportunity to present the Department's views on S. 2132. I will be happy to answer any questions you may have.