

## New energy legislation introduces tribal opportunities

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### **What are the new energy opportunities on the horizon for Indian tribes in this Congress?**

Over the years, Congress has tried to reform and invigorate Native American energy programs. Real change could be on the horizon with Senator Hoeven's bill, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (S. 245). Just after Thanksgiving, the Senate passed S. 245 by a unanimous voice vote. The bill is currently assigned to the House Committee on Natural Resources and the Committee on Energy and Commerce and has been referred to the Subcommittee on Indian, Insular, and Alaska Native Affairs and the Subcommittee on Energy and Natural Resources. The bill aims to allow Indian tribes to exercise greater self-determination over the development of energy resources on their lands, and strives to provide them with financial and technical resources towards that end. One central purpose of the bill is to reinvigorate the previously dormant Tribal Energy Resource Agreement (TERA) program.

### **Will TERA reforms bring this program back to life?**

In the Energy Policy Act of 2005, Congress attempted to remove the federal bureaucratic oversight of tribal energy initiatives with the establishment of the TERA program. TERA provides tribes with the authority to issue leases, business agreements, and rights-of-way for energy projects on their lands. Unfortunately, the program never functioned. Faced with bureaucratic hurdles in the application process, concerns about the United States' waiver of its trust responsibility and liability, and mandatory tribal environmental review requirements, no tribes participated.

S. 245 attempts to address some of these concerns. The bill streamlines the approval process for resource agreements by providing a "deemed approved" deadline on the Department of the Interior (Interior) of 271 days, and specifies limited circumstances when the Secretary can disapprove an application. Once a resource agreement is approved, the tribe or tribal organization can manage its energy resources without required Interior approval on every lease, right-of-way or business agreement. The bill adds new threshold requirements before Interior can disapprove a request. Now Interior needs to provide a "detailed explanation" for the disapproval, specific revisions that would address the concerns, and an opportunity for the tribe to resubmit. The bill expands situations where a tribe or tribal organization can issue leases, rights-of-way, or business agreements to include electric generation, production or transmission from renewable resources, pooling unitizations or communitization arrangements.

The bill also introduces a new certification process for tribal energy development organizations. This includes a 90-day “deemed approved” provision. It also requires approval when a tribe has had clean audits for the past three years under self-governance or a self-determination contract involving tribal management of lands, and when the organization is subject to certain requirements regarding tribal ownership interests and tribal jurisdictional control.

A small change was also made to the tribal environmental review process. Instead of imposing on tribes the requirement that they evaluate all significant environmental effects and mandate mitigation measures, the new language requires the tribes to provide an opportunity for public comment on significant environmental impacts and to respond to such comments before approving a lease, right-of-way, or business agreement. Existing language requiring that the TERA ensure “compliance with all applicable environmental laws” remains in the law.

Lastly, the bill adds new language to reaffirm existing language that the United States’ trust responsibility remains intact, subject to only a few express exceptions. The bill also adds new language to specify that the United States still has potential liability with regard to matters outside of a tribe’s “negotiated terms” in resource agreements, including “the failure of the Secretary to perform an obligation of the Secretary under this section.”

### **More funds and expertise to work with?**

The bill expands assistance opportunities. It directs Interior to provide technical assistance to tribes and tribal organizations on energy development plans, including renewables and electrification, as well as provide funds for those tribes operating under energy resource agreements. Interior also can issue grants on a competitive basis for new programs involving well spacing or energy efficiency programs.

Interior also must provide to the tribes any funds it would normally use to run the tribal energy program through the use of annual funding agreements. This requirement is subject to the availability of appropriations and is based on development of a regulatory formula.

The bill also directs the Department of Energy (DOE) to provide grants and open its loan guarantee program to not just tribes, but also tribal energy development organizations. The bill further mandates that DOE make available to tribes the full array of technical and scientific resources of the DOE National Laboratories.

### **Other opportunities for streamlining tribal projects?**

The bill requires the Federal Energy Regulatory Commission to give tribes preference in the award of preliminary hydroelectric licenses; establishes a biomass demonstration project for tribal forest lands; and authorizes tribes or a certified third party appraiser to conduct appraisals of the fair market value of tribal mineral resources in lieu of Interior.

### **What lies ahead?**

If S. 245 passes Congress in 2018, it will be the first major piece of Indian minerals energy legislation in over a decade. The affected federal agencies will need to turn over the reins in some respects to interested tribes and more efficiently provide critical funds and expertise. Success in implementing the legislation will depend on private industry building bridges with interested tribes to explore new opportunities to partner in joint economic endeavors under this new framework, should it become law.

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