

Tribal Affairs Subcommittee

**Presentations of the Tribal Energy Subcommittee Planned for the
Meeting of the Royalty Policy Committee in Houston on February 28, 2018**

1. Leading Committee vote on the proposed name change of the Subcommittee, from “Tribal Affairs Subcommittee” to “Tribal Energy Subcommittee”
2. Status Updates for Future Recommendations to be Made by the RPC

Updates will be given on the work of each of the following four working groups:

a. TERA (Tribal Energy Resource Agreements) Working Group Update

The TERA working group is addressing specific changes that DOI needs to provide for additional guidance on the activities that would be considered inherently federal functions so that tribes would utilize TERAs. It will enhance the definition on what constitutes inherently federal functions. For example, it will determine whether ESA compliance can be implemented by tribes through a TERA or otherwise.

b. Model Statute Working Group Update

The Model Statute Working Group is exploring what a model Congressional statute might look like and how it would improve upon current statutes. (See Appendix A below for background.)

c. 1938 Act Working Group Update

1938 Act Working Group is considering what congressional changes to the 1938 Act are necessary so that tribes can take control over mineral leasing. (See Appendix B below providing background on the 1938 Act.)

d. Taxation Working Group Update

The Taxation Working Group is analyzing necessary updates to the Indian Trader Regulations to eliminate the economic barriers to energy development on tribal land. (See Appendix C, which provides a Briefing Summary of this analysis.)

Appendix A: Background on the Model Congressional Statute Working Group

Concept

Promoting both tribal self-determination and economic self-sufficiency through the development of natural resources, including minerals, has been the goal of the federal government since at least 1934. In the intervening 80+ years, three significant federal statutes and numerous other more narrowly focused laws have all sought to achieve those objectives, with varying degrees of success.

Despite a range of current statutory options, including the Indian Mineral Leasing Act, the Indian Mineral Development Act, and the Indian Tribal Energy Development and Self-Determination Act, Indian tribes continue to express concern about their ability to pursue development of their energy resources. A 2015 Government Accountability Office report (available [here](#)) highlighted many of these concerns, including the complexity of the regulatory and bureaucratic framework involved in tribal energy development. Although the challenges presented by this framework vary, the GAO report highlights the central role that the federal government plays in reviewing and approving various parts of the tribal development transaction.

As a result of the federal role in Indian tribal energy development (the extent of which varies depending on the specifically applicable statute), other federal laws are implicated, such as the National Environmental Policy Act and Endangered Species Act, and the National Historic Preservation Act, and development transactions may suffer from federal funding shortfalls or administrative issues.

Notwithstanding the potential problems posed by the federal government's role in Indian tribal energy development, the federal government's trust responsibility to Indian Country remains a central tenet of federal Indian law.¹ The federal government's role in tribal energy development is rooted in this responsibility and the trust obligation remains a central aspect of federal-tribal relations.

Therefore, any "Model Congressional Statute" regarding tribal energy/mineral development must balance the complications of federal involvement in the development process with the potential consequences of limiting federal involvement. In addition to pursuing other tasks, the Tribal Energy Subcommittee established a workgroup to explore what such a statute might look like and how it would complement existing statutory structures rather than replace them.

Work Product

The workgroup recognizes the challenge of the legislative (rather than executive agency or regulatory) focus of its objective. The workgroup aims to solicit input from the Tribal Energy Subcommittee and other stakeholders in order to maximize the efficacy of and support for any final proposal. The workgroup aims to begin with a list of principles or concepts that interested parties believe must be addressed in any comprehensive model statute. The workgroup has already begun compiling research and background materials to compile the first draft of such a list and proposes the following concepts for further discussion among interested parties:

¹ See, e.g., 25 U.S.C. § 5601.

Initial Draft List of Concepts to be Considered in Developing a Model Statute.

- Expressly recognizing tribal sovereignty and authority over tribal lands and resources;
- The distinct status of each federally recognized Indian tribe, including differences among governmental structures, land/property status (including subsurface interests), and technical capacity;
- Drafting a statute that avoids a “one size fits all” legislative approach;
- Developing avenues for the federal trust responsibility to be both responsive to Indian tribal energy development and other tribal priorities while still providing a robust federal role to serve and protect the best interests of tribes;
- Ensuring and respecting the need for tribal consent and self-governance, whether implemented through an opt-in/opt-out or individual tribal negotiations; and
- Allocating between an Indian tribe and the federal government any potential liability that may result from resource development decisions.

Timeline

The workgroup, with the input of the Subcommittee and federal partners, aims to develop a draft legislative concept proposal for a subsequent meeting of the full RPC. Therefore, the workgroup proposes the following timeline:

January 22-February 9: Survey and solicit input from Tribal Energy Subcommittee on principles/concepts.

February 9-23: Tribal Energy Subcommittee reviews draft principles prior to full RPC meeting make any addition to preliminary principles/concepts

February 28: Present proposed principles to full RPC for consideration and input.

April: Draft legislative proposal

May: Circulate draft proposal for review by Tribal Energy Subcommittee and revise

June 5-6: Present draft proposal to full RPC for consideration

Appendix B: Background on the 1938 Act

Amendment to the Act of May 11, 1938

The U.S. Supreme Court has repeatedly recognized tribal sovereignty in court decisions for more than 150 years. In 1831, the Supreme Court agreed, in *Cherokee Nation v. Georgia*, that Indian nations had the full legal right to manage their own affairs, govern themselves internally, and engage in legal and political relationships with the federal government and its subdivisions.

In 1942 Supreme Court Justice Felix Cohen wrote, "Indian sovereignty is the principle that those powers which are lawfully vested in an Indian tribe, are not delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which can never be extinguished."

Today, tribal governments still exist for the same reasons they were originally founded: To provide for the welfare of the Indian people.

Appendix C: Taxation Working Group of the Tribal Energy Subcommittee

Briefing Document on the Economic Barriers to Energy Development in Indian Country

1. Dual Taxation

Legal Background on Dual Taxation

Federal courts currently apply the “Bracker balancing test” to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted.² The balancing test requires a particularized examination of the relevant state, Federal, and tribal interests. In 2012 the Department of the Interior (DOI) determined that, in the case of leasing on Indian lands, the Federal and tribal interests are very strong, and so when DOI updated its regulations governing leasing on trust/restricted land, it included the provision: “162.017(b). Subject only to applicable Federal law, activities conducted under a lease of trust or restricted land that occur on the leased premises are not taxable by states or localities, regardless of who conducts the activities.”³ However, that provision does not establish a bright-line rule that activities conducted under a lease of trust or restricted land are not taxable by States or localities. Rather, the provision is intended to influence the decision in the direction of no state taxation when a Federal court applies the Bracker balancing in any given case. Consistent with DOI’s intention, there may be individual instances where a court determines that a state and locality cannot tax activities on leased trust/restricted property. Nevertheless, the mere uncertainty that the court could rule in the other direction, by allowing state and local taxation of these activities on Indian land, is often enough to drive away economic development in such areas.

In spite of Bracker balancing, however, Indian tribes have a recognized legal right to tax economic activity in Indian country, which has been upheld in a number of Supreme Court cases, including energy resource development (e.g. *Merrion*, *Kerr Magee*). In 1987 the Supreme Court handed down a decision in the *Cotton Petroleum* case which also upheld state authority to tax non-Indian oil and gas production from leases on Indian trust Land.

A Proposed Solution the Problem of Dual Taxation

DOI has moved to limit dual state taxation in business leases and rights of way—see 25 CFR Parts 162 and 169. A similar regulatory fix should be undertaken to eliminate dual taxation in the area of the energy development and affirming the tribes’ exclusive right to tax energy development on trust land. Recently the DOI solicited public comments on potential updates to the Indian Trader Regulations. These DOI regulations manage taxation on Indian lands.

2. Natural Gas Flaring

Background

² This balancing test is based on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

³ Residential, Business, and Wind and Solar Resource Leases on Indian Land Rule, section 162.017.

Indian tribes with significant oil and gas development are losing millions of dollars in royalty and tax revenue as a result of flared natural gas. The BIA has delegated authority to the BLM to regulate flaring on Indian land (25 CFR §§ 211.4, 212.4, 225.4). The problem is the BLM is a public land regulatory agency, BLM's current flaring regulations are inefficient and are not designed to adequately protect the interests of tribes and Indian mineral owners. The Secretary cannot fulfill his trust responsibility by lumping the federal trust responsibility together with federal public land policy. The two are distinctly separate and, in many cases, diametrically opposed. Tribes are in the best position to determine how to deal with the flaring problem, in consultation with their Indian mineral owners and industry partners.

A good part of the flaring problem is the lack of infrastructure to move gas from the well head to processing facilities or transmission lines, which in turn creates a better market for the gas. Affirming tribes' exclusive taxing authority by eliminating the threat of dual taxation would generate additional tax revenue for tribes to allow them to invest in needed physical and governmental infrastructure to process rights of way for pipelines and enhance the recovery and marketability of gas. This in turn generates more royalty and tax revenue for tribes and Indian mineral owners and more revenue for lessees.

Proposed Solution

DOI should support tribal self-government by recognizing and deferring to tribes as the primary regulatory authority, not the BLM. DOI regulations should be revised to give proper deference to the regulatory authority of the tribes and eliminate dual taxation to allow tribes to generate sufficient tax revenue to reinvest in the infrastructure that is needed to capture and create better markets for their natural gas resources.

3. Property Tax Transportation Allowance

Background

Current regulations of DOI's Office of Natural Resources Revenue allow property taxes as a transportation cost in the royalty valuation analysis. This results in a reduction in the value of oil and gas prior to the calculation of the mineral owner's royalty which equates to a lower royalty payment. Allowing state property taxes to reduce the Indian mineral royalty equates to an indirect tax on the royalty interest, which is a violation of Federal law.

Proposed Solution

DOI should eliminate the property tax allowance in the Federal royalty valuation regulations.

4. Restrictions on Tribal Tax Exempt Bonds

Background

One of the most important tools the government has to promote economic development is the ability to issue tax exempt bonds. Tax exempt bonds can be an important tool in promoting Indian energy development, especially the development of facilities to enhance the value of energy resources, such as refining and processing facilities, gathering and transportation facilities, etc. Under the Indian Tribal Governmental Tax Status Act, tribes are authorized to issue tax exempt bonds to finance some tribal infrastructure projects. However, current regulations restrict the authority of tribes to issue a tax exempt private activity bond when state and local governments are not so constrained.

Solution

The U.S. government should remove the regulatory restrictions on private activity bonds to allow Indian tribes to issue tax exempt bonds to the fullest extent allowed under the existing Act and, if necessary call on Congress to amend the Act to allow for the issuance of tax exempt private activity bonds to promote Indian energy development.

Tribal Affairs / Tribal Energy Subcommittee

Of the DOI Royalty Policy Committee



Report and Recommendations

Houston, Texas
February 28, 2018

Proposed Name Change from “Tribal Affairs Subcommittee” to “Tribal Energy Subcommittee”

Reasons:

- 1. The term “tribal affairs” could be rather ambiguous and encompass a wide range of topics, but our subcommittee is interested only in exploring topics that relate to tribal energy development.**
- 2. “American energy dominance” is a principle that is receiving a great deal of attention and interest these days, and our name change will help promote the concept as it relates to tribes.**
- 3. As the Royalty Policy Committee was established to promote the energy independence of the United States and to ensure fair value to the United States through royalty payments, and nearly all of the royalties that are collected by tribes involve energy production, this is an opportune time to address impediments to energy development on tribal lands..**

Focus Areas

- 1. To develop new options for Congress to consider so that tribes can take control over mineral leasing**
- 2. To develop Department of Interior (DOI) changes to the regulations that implement the Indian Tribal Energy Development and Self-Determination Act of 2005 so that tribes can control more aspects of mineral leasing through the option of Tribal Energy Resource Agreements (TERAs)**
- 3. To develop DOI changes to the Indian trader regulations to eliminate barriers to energy development in many tribal areas**

Working Groups

1. TERA

2. Model Statute

3. 1938 Act

4. Taxation

TERA Working Group Update

- 1. Addressing specific changes that DOI needs to make for additional guidance on the activities that would be considered “inherently federal functions” so that tribes would utilize TERAs.**
- 2. Enhancing the definition on what constitutes inherently federal functions.**
- 3. For example, determining whether ESA compliance can be implemented by tribes through a TERA or otherwise.**
- 4. Additional details are provided in a separate slide presentation.**

Model Statute Working Group Update

- 1. Exploring what a model Congressional statute might look like and how it would improve upon current statutes.**
- 2. Appendix A provides background on this effort.**

1938 Act Working Group Update

- 1. Considering what Congressional changes to the 1938 Act are necessary so that tribes can take control over mineral leasing.**
- 2. Appendix B provides background on the 1938 Act.**

Taxation Working Group Update

- 1. Analyzing necessary updates to the Indian Trader Regulations to eliminate the economic barriers to energy development on tribal land.**
- 2. Appendix C provides a Briefing Summary of this analysis.**

Preliminary Recommendation: TERA

Tribal Energy Subcommittee
Royalty Policy Committee

TERAs: Tribal Energy Resource Agreements

- ▶ Authorized through the Indian Tribal Energy Development and Self-Determination Act, Title V of the 2005 Energy Policy Act
- ▶ Authorizes Secretary of the Interior and a tribe to enter into a TERA
- ▶ Authorizes tribe to develop and approve its own leases, business agreements, or rights-of-way for a broad range of activities related to development of energy resources **without requiring secretarial approval** for each lease, agreement, or right-of-way

No Tribe Has Yet to Enter into a TERA: some of the hurdles

- ▶ Undefined limitation on the scope of TERA: a tribe cannot assume “inherently federal functions”
- ▶ Tribal Environmental Review Process, similar to the federal National Environmental Policy Act process
- ▶ Unknown funding for tribes to engage in NEPA like compliance
- ▶ Demonstration of tribal capacity
- ▶ Opportunity for Review and Comment of TERA

As of 2015, at least six (6) tribes had requested preapplication meetings to discuss establishing a TERA

Preliminary Recommendation: 2015 GAO Report Indian Energy Development

- ▶ For the Department of the Interior to provide additional energy development-specific guidance on provisions of TERA regulations that tribes have identified as unclear.
- ▶ Specifically:
 - ▶ TERA regulations authorize tribes to assume responsibility for energy development activities that are not “inherently federal functions.”
 - ▶ DOI has not provided guidance on what are non inherently federal functions
 - ▶ Lack of guidance prevents tribes from knowing what it can and cannot perform and where to build capacity

Preliminary Recommendation

- ▶ For the Department of the Interior to enhance the definition of what constitutes inherently federal functions and what functions tribes will be able to perform under a TERA.

Preliminary Recommendation is Provided because:

- ▶ Development of energy resources on tribal lands is critical to develop energy independence of the United States.
- ▶ Clarifying TERA is wholly within the authority of DOI to do.
- ▶ TERA is an existing tool that in theory can be refined relatively quickly so that it can fully utilized and tested as a tool for enhancing tribal flexibility in energy development.

TERA Work Group

- ▶ John Andrews
- ▶ Bidtah Becker
- ▶ Kathleen Sgamma
- ▶ Chris Stolte