

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**Prepared Statement of Honorable James M. “Mike” Olguin
Vice Chairman, Southern Ute Indian Tribal Council**

**On behalf of the
SOUTHERN UTE INDIAN TRIBE**

**Hearing on S. 1684, Indian Tribal Energy and
Self-Determination Act Amendments**

April 19, 2012

I. INTRODUCTION

Chairman Akaka, Vice Chairman Barrasso and distinguished members of the Committee, I am the Vice Chairman of the Southern Ute Indian Tribal Council, and it is my great honor to appear before you today on behalf of the Southern Ute Indian Tribe in support of S. 1684. Although this legislation was introduced approximately six months ago, we have been working closely with this Committee for more than three years in an effort to obtain legislation further empowering Indian tribes to address energy needs and energy development opportunities. We were active participants in field hearings and legislative discussions that led former Chairman Dorgan to introduce S. 3752 in the summer of 2010. While that proposed legislation did not become law, it served as a key building block for S. 1684, which is before you today. Throughout the intervening years, tribal leader after tribal leader has come before you to express concerns about extreme needs in Indian Country, both for improved access to energy and for economic development for their constituents. Today we hope that members of the Committee will collectively determine that the needs of Indian Country merit passage of S. 1684.

The first purpose of our testimony is to take a step back and re-visit the underlying reasons that led to introduction of both S. 3752 in the 111th Congress and S. 1684. Second, we believe it is important to review the factors leading to and the potential significance of Tribal Energy Resource Agreements (“TERAs”) as an optional vehicle of tribal self-determination. Third, we hope to show why suggested changes to Title V of the Energy Policy Act of 2005 are improvements that deserve your positive action.

For decades our leaders have had the privilege of working with this Committee and its staff. Even when differences on other political issues have divided Congress, this Committee has led the way in focusing on the needs of Indian Country and in attempting to craft solutions to those problems. We respectfully urge you to do so once again in passing S. 1684.

II. S. 3752 (111th Congress, 2d Session) and S. 1684

Because the process leading to S. 1684 has spanned such a considerable time and has included the introduction of two separate legislative measures addressing several of the same concerns, we believe it is worthwhile to review those two measures.

Investigative hearings before this Committee leading to introduction of S. 3752 addressed a number of critical problems that continue to exist today in Indian Country. First, the unacceptable, bureaucratic delays in federal approval of Indian mineral leases and drilling permits related to Indian mineral lands captured the attention of former Chairman Dorgan, whose own tribal constituents watched their non-Indian neighbors get rich from mineral resource development, as Indian lands remained unleased and undrilled month after month while awaiting federal approval and permitting. The punitive effect of those delays on the poorest individuals and communities in the Nation clearly impressed this Committee as unjustifiable. A number of the provisions of S. 3752 attempted to reduce such administrative burdens through such measures as: mandated interagency coordination of planning and decision-making; regulatory waiver provisions; relief from land transaction appraisal requirements; and the elimination of fees assessed by Bureau of Land Management for applications for permits to drill on Indian lands.

Other testimony received by this Committee prior to the introduction of S. 3752 reflected frustration regarding barriers to capital, expertise and facilities needed for tribes to proceed with alternative or renewable energy development. Again, the Committee attempted to address these concerns through a number of provisions including authorization for greater governmental technical assistance, reclassification of certain tribal agricultural management practices as sustainable management practices under federal laws, treating Indian tribes like State and municipal governments for preferential consideration of permits and licenses under the Federal Power Act hydroelectric provisions; expansion of the Indian Energy Loan Guaranty Program; and authorization for a tribal biomass demonstration project.

In response to other evidence demonstrating inadequate access of many Indian communities to energy services and weatherization assistance, S. 3752 authorized the Secretary of Energy to establish at least 10 distributed energy demonstration projects to increase the availability of energy resources to Indian homes and community buildings. Special 638 contract funding provisions were put in place for energy efficiency activities associated with tribal buildings and facilities. Section 305 of S. 3752 reflected a major revision of the Nation's weatherization program by authorizing direct grants to Indian tribes for weatherization activities.

S. 3752 also proposed significant revision of the Indian Land Consolidation Act to address practical problems in that act's administration and substantial expansion of the durational provisions of the non-mineral, long-term business leasing provisions of 25 U.S.C. § 415(a).

While this brief summary can by no means do justice to the myriad of matters addressed in the specific provisions of S. 3752, it is fair to state that it touched a wide array of Indian-related programs involving Indian energy issues.

In contrast, the scope of S. 1684 is considerably more narrow than S. 3752. Nonetheless, S. 1684 does contain provisions that equate tribes with States and municipalities for hydropower permits and licensing under the Federal Power Act [Sec. 201]. It also makes provision for biomass tribal demonstration projects [Sec. 202] and would provide considerably more modest, indirect access to weatherization program funding [Sec. 203] for Indian communities. It also encourages tribal energy resource development planning in coordination with the Department of Energy [Sec. 101]. It does not, however, address a number of matters contained in S. 3752, such as expansion of the Indian Energy Loan Guaranty Program, establishment of distributed energy demonstration projects, revision of the Indian Land Consolidation Act provisions, or expansion of the durational provisions of the non-mineral, long-term business leasing provisions of 25 U.S.C. § 415(a).

The differences in the two legislative measures in some measure reflect the apparent fiscal reality that increased authorizations for Indian programs will likely be meaningless due to constrictions in appropriation funding. Perhaps the biggest single difference in the two legislative measures is the emphasis in S. 1684 on amending the TERA provisions initially established in the Title V of the Energy Policy Act of 2005. For reasons discussed in more detail below, those changes merit the Committee's support. We urge those members of the Committee who sponsored S. 3752, which our Tribe fully supported, not to abandon S. 1684 because of its narrower scope. S. 1684 is badly needed in Indian Country.

III. TERAs and the Balancing of Tribal Self-Determination and Secretarial Review

On August 8, 2005, the Energy Policy Act of 2005 became law. Title V of this voluminous legislation, known as the "Indian Tribal Energy Development and Self-Determination Act of 2005," amended Title XXVI of the Energy Policy Act of 1992. One of the key provisions of Title V was Section 2604 [25 U.S.C. §3504], which created a mechanism pursuant to which electing tribes might ultimately be allowed to grant energy-related leases, enter into energy-related business agreements, and issue rights-of-way for pipelines and electric transmission facilities without specific approval by the Secretary of the Interior, subject to certain durational limitations. As a pre-condition to such authorization, a tribe and the Secretary of the Interior were first required to enter into a master agreement, or TERA, addressing the manner in which such a tribe would process such energy-related agreements or instruments.

Although the TERA concept did not become law until 2005, its genesis before this Committee occurred several years earlier, and our files show that our former Chairman Howard Richards, Sr. formally requested support for similar legislation in 2003. Earlier correspondence confirms that we had the same concerns about federal trust administration then that we have now. A memo from our legal counsel to the Committee's legal counsel dated June 30, 2002 states:

The problems with Secretarial approval of tribal business activities include an absence of available expertise within the agency to be helpful Some structural alternative is needed. The alternative should be an optional mechanism that allows tribes to elect to escape the bureaucracy for mineral development

purposes, provided the Secretary has a reasonable indication that an electing tribe will act prudently once cut free.

Much like the debates that surrounded passage of the Indian Mineral Development Act of 1982, the potential diminishment of the Secretary's role contemplated under a TERA caused considerable discussion before this Committee. We participated in those debates. Ultimately, with the encouragement of the National Congress of American Indians and the Council of Energy Resource Tribes, compromise was reached among this Nation's leaders on energy and Indian issues. Senator Bingaman and Senator Domenici and Senator Inouye and Senator Campbell reached agreements on a number of matters that paved the way for passage of this legislation in both houses of Congress. These legislative resolutions were reached only because of the overriding recognition that the system of Indian trust administration was broken and was condemning Indian people to an arbitrarily imposed future of impoverishment.

Despite the potential promise extended by Section 2604, no tribe has yet entered into a TERA. We have spent considerable time asking ourselves why. Clearly, the inadequacies of federal trust supervision persist and show no signs of marked improvement. Given the years that we have invested in pushing for the TERA alternative, it is worth identifying some of the reasons why no tribe has entered into a TERA. The following is a list of some of the reasons we have considered:

1. The regulations implementing Section 2604 diminished the scope of authority to be obtained by a TERA tribe by eliminating and reserving "inherent federal functions," an undefined term that potentially rendered the act meaningless.
2. Unlike 93-638 contracting, Section 2604 provided no funding to Indian tribes even though TERA contracting tribes would be assuming duties and responsibilities of the United States.
3. One of the statutory conditions for a TERA, the establishment of tribal environmental review processes requiring public comment, participation, and appellate rights with respect to specific tribal energy projects, was an unacceptable opening of tribal decisions to outside input and potential criticism.
4. Individual tribes lacked the internal capacity to perform the oversight functions potentially contemplated in a TERA or standards for measuring tribal capacity were vague or unclear.
5. The extensive process of applying for and obtaining a TERA was simply too consuming and distracting to merit disruption of ongoing tribal governmental challenges.

Clearly, this list is not exhaustive. The tragic consequence of no TERAs and continued reliance upon federal supervision, however, has been the incredible lost opportunity to develop Indian energy resources during the period between 2005 and today. Those development opportunities were extended to non-Indian mineral owners throughout vast regions of the country, where no federal approval was required for leasing or development. If one considers

that the price of natural gas in 2008 exceeded \$10 per mcf, and today is only one fifth of that price, those lost opportunities may not return for decades. We estimate that multi-year delays in approval of rights-of-way and drilling permits cost our Tribe more than \$90 million, and those practices are ongoing.

Our Tribe continues to believe that TERAs provide great potential as a vehicle for tribal self-determination. We remain extremely frustrated with the federal administrative impediments to making simple decisions, such as granting rights-of-way across our lands. The federal system on our Reservation is getting worse, not better, and, increasingly, we are spending more time fighting with the BIA about nonsensical directives and conditions for obtaining federal approvals. This is true even though we are considered one of the most commercially advanced tribes in the country, with operations in multiple states related to energy exploration and production, commercial real estate acquisition, real estate development, midstream gathering and treating, and private equity investment.

While S. 1684's provisions related to TERAs do not address all of the potential reasons listed above for no TERAs, they do eliminate some of those disincentives and also expand the use of TERAs for the benefit of Indian tribes.

IV. TERA Provisions of S. 1684

The major proposed revisions to current law affecting TERAs are found in Section 103 of S. 1684. The proposed changes are technical in many cases and cannot be easily understood without a side-by-side comparison of the existing law. We fully support the changes, however, and hope that the Committee considers them favorably. Some key changes include the following.

First, Section 103 expands the scope of TERAs to include leases and business agreements related to facilities that produce electricity from renewable energy resources.

Second, clarifying amendments also confirm that TERAs may extend to pooling and communitization agreements affecting Indian energy minerals.

Third, Section 103 expands on existing law related to direct development of tribal mineral resources when no third party is involved. Under existing law, because no federal approval for such activity is required, a tribe may lawfully engage in such activity, but few tribes have the capacity or internal expertise to do so directly. The expansion contemplated by Section 103 extends such an approval exemption to leases, business agreements and rights-of-way granted by a tribe to a tribal energy development organization in which the tribe maintains a controlling interest. This provision expands the opportunity for access to capital for direct tribal development without federal approval where the tribe continues to control the activity.

Fourth, Section 103 would make a proposed TERA effective after 271 days following submittal unless disapproved by the Secretary and would shorten the time-period for review of TERA amendments.

Fifth, Section 103 provides for a favorable tribal capacity determination based on a tribe's performance of 93-638 contracts or self governance compacts over a three year period without material audit exceptions.

Sixth, Section 103 allows for TERA funding transfers to be negotiated between the Secretary and the tribe based on cost savings occasioned by the Secretary as a result of a TERA.

Seventh, Section 103 confirms that TERA provisions are not intended to waive tribal sovereign immunity.

While Section 103 includes other clarifying provisions, these constitute the major changes to TERA requirements found in Section 2604 of existing law. The changes improve the scope and clarity of current statutory provisions.

Conclusion

Individually and on behalf of the Southern Ute Indian Tribe, I hope that these comments have been instructive as to why we strongly support S. 1684. We respectfully request that you move forward with this legislation on behalf of Indian Country.