



Testimony
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U.S. Senate

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INDIAN ENERGY DEVELOPMENT

Actions Needed to Address BIA Management Challenges

Statement of Frank Rusco, Director, Natural
Resources and Environment

Chairman Barrasso, Vice-Chairman Tester, and Members of the Committee:

I am pleased to be here today to discuss our recent report on the development of Indian energy resources.¹ As you know, Indian energy resources hold significant potential for development and, for some Indian tribes and their members, energy development already provides economic benefits, including funding for education, infrastructure, and other public services. According to Department of the Interior (Interior) data, in fiscal year 2014, development of Indian energy resources provided over \$1 billion in revenue to tribes and individual Indian resource owners. However, even with considerable energy resources, according to a 2014 Interior document, Indian energy resources are underdeveloped relative to surrounding non-Indian resources.

Development of Indian energy resources is a complex process that may involve a range of stakeholders, including federal, tribal, and state agencies. Interior's Bureau of Indian Affairs (BIA), through its various regional, agency, and other offices, has primary authority for managing Indian energy development and, in many cases, holds final decision making authority. Federal management and oversight of Indian energy development is to be conducted consistent with the federal government's fiduciary trust responsibility to federally recognized Indian tribes and individual Indians.² However, in recent decades, Indian tribes and individual Indians have asserted that Interior has failed to fulfill its trust responsibility, mainly with regard to the management and accounting of tribal and individual trust funds and trust assets. For example, Interior recently settled numerous "breach of trust" lawsuits, including *Cobell v.*

¹GAO, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, [GAO-15-502](#) (Washington, D.C.: June 8, 2015).

²The federal trust responsibility is a fiduciary obligation on the part of the United States to federally recognized Indian tribes and tribal members. The Supreme Court has recognized a general trust relationship with Indian tribes since 1831. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The trust responsibility originates from the unique, historical relationship between the United States and Indian tribes and consists of the "highest moral and legal obligations" that the federal government must meet to ensure the protection of tribal and individual Indian lands, assets and resources, but is legally enforceable only to the extent it is specifically defined by federal laws. See *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942), and *United States v. Jicarilla Apache Nation*, 564 U.S. ___, 131 S. Ct. 2313 (2011).

Salazar, one of the largest class action suits filed against the United States.³

Federal policy has supported greater tribal autonomy and control by promoting and supporting opportunities for increased tribal self-determination and self-governance, including promoting tribal oversight and management of energy resource development on tribal lands. For example, in 2005, Congress passed the Indian Tribal Energy Development and Self-Determination Act (ITEDSA), part of the Energy Policy Act of 2005, to provide an option for federally recognized tribes to exercise greater control of decision-making over their own energy resources.⁴ The ITEDSA provides for interested tribes to pursue a Tribal Energy Resource Agreement (TERA)—an agreement between a tribe and the Secretary of the Interior that allows the tribe, at its discretion, to enter into leases, business agreements, and right-of-way (ROW) agreements for energy resource development on tribal lands without review and approval by the Secretary. However, no tribe has entered into a TERA with Interior, and shortcomings in BIA’s management that we identified in our June 2015 report highlight the need for tribes to build the capacity to perform the duties that would enable them to obtain greater tribal control and decision-making authority over the development of their resources.⁵

In this context, my testimony today discusses the findings from our June 2015 report on Indian energy development. Accordingly, this testimony addresses the factors that have (1) hindered Indian energy resource development and (2) deterred tribes from seeking TERAs. In addition, I will highlight several key actions that we recommended in our report that Interior can take to help overcome challenges associated with the administration and management of Indian energy resources.

³*Cobell v. Salazar* was a class action lawsuit initially filed in 1996 by Elouise Cobell, a member of the Blackfeet Tribe, and others against the federal government concerning Interior’s management of individual Indian trust fund accounts. Those accounts contain funds from leases of Indian land, some of which involve energy development. The settlement in *Cobell* required congressional authorization, which was provided in the Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066 (2010).

⁴Federally recognized tribes have a government-to-government relationship with the United States and are eligible to receive certain protections, services, and benefits by virtue of their unique status as Indian tribes.

⁵[GAO-15-502](#).

To conduct the work for our June 2015 report, we reviewed and synthesized literature including more than 40 reports, conference proceedings, hearings statements, and other publications from federal and tribal governments; industry; academics; and nonprofit organizations. We also obtained available data on key dates associated with the review and approval of energy-related documents for planned or completed utility-scale renewable projects from several BIA regional and local officials, tribal officials, and industry representatives. Further, we interviewed a nongeneralizable sample of stakeholders representing 33 Indian tribes, energy development companies, and numerous federal agencies and organizations, including officials from BIA, Office of Indian Energy and Economic Development, Department of Energy, National Renewable Energy Laboratory, and the Bureau of Land Management (BLM).⁶ We did not evaluate tribal activities or actions to govern the development of their resources or assess any potential barriers to energy development such actions or activities may pose. Our June 2015 report includes a detailed explanation of the scope and methodology used to conduct our work.

We conducted the work on which this testimony is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Shortcomings in BIA's Management and a Variety of Other Factors Have Hindered Indian Energy Development

Factors, such as shortcomings in BIA's management and additional factors generally outside of BIA's management responsibilities—such as a complex regulatory framework, tribes' limited capital and infrastructure, and varied tribal capacity—have hindered Indian energy development. Specifically, according to some of the literature we reviewed and several stakeholders we interviewed, BIA's management has three key shortcomings.

⁶Within BIA, we interviewed officials from all 12 BIA regional offices and 9 BIA agency offices.

First, BIA does not have the data it needs to verify ownership of some oil and gas resources, easily identify resources available for lease, or easily identify where leases are in effect, inconsistent with Interior's Secretarial Order 3215, which calls for the agency to maintain a system of records that identifies the location and value of Indian resources and allows for resource owners to obtain information regarding their assets in a timely manner. The ability to account for Indian resources would assist BIA in fulfilling its federal trust responsibility, and determining ownership is a necessary step for BIA to approve leases and other energy-related documents. However, in some cases, BIA cannot verify ownership because federal cadastral surveys—the means by which land is defined, divided, traced, and recorded—cannot be found or are outdated. It is additionally a concern that BIA does not know the magnitude of its cadastral survey needs or what resources would be needed to address them.

We recommended in our June 2015 report that the Secretary of the Interior direct the Director of the BIA to take steps to work with BLM to identify cadastral survey needs.⁷ In its written comments on our report, Interior did not concur with our recommendation. However, in an August 2015 letter to GAO after the report was issued, Interior stated that it agrees this is an urgent need and reported it has taken steps to enter into an agreement with BLM to identify survey-related products and services needed to identify and address realty and boundary issues. In addition, the agency stated in its letter that it will finalize a data collection methodology to assess cadastral survey needs by October 2016.

In addition, BIA does not have an inventory of Indian resources in a format that is readily available, such as a geographic information system (GIS). Interior guidance identifies that efficient management of oil and gas resources relies, in part, on GIS mapping technology because it allows managers to easily identify resources available for lease and where leases are in effect. According to a BIA official, without a GIS component, identifying transactions such as leases and ROW agreements for Indian land and resources requires a search of paper records stored in multiple locations, which can take significant time and staff resources. For example, in response to a request from a tribal member with ownership interests in a parcel of land, BIA responded that locating the information

⁷[GAO-15-502](#).

on existing leases and ROW agreements would require that the tribal member pay \$1,422 to cover approximately 48 hours of staff research time and associated costs. In addition, officials from a few Indian tribes told us that they cannot pursue development opportunities because BIA cannot provide the tribe with data on the location of their oil and gas resources—as called for in Interior’s Secretarial Order 3215. Further, in 2012, a report from the Board of Governors of the Federal Reserve System found that an inventory of Indian resources could provide a road map for expanding development opportunities.⁸ Without data to verify ownership and use of resources in a timely manner, the agency cannot ensure that Indian resources are properly accounted for or that Indian tribes and their members are able to take full advantage of development opportunities.

To improve BIA’s efforts to verify ownership in a timely manner and identify resources available for development, we recommended in our June 2015 report that Interior direct BIA to take steps to complete GIS mapping capabilities.⁹ In its written comments in response to our report, Interior stated that the agency is developing and implementing applications that will supplement the data it has and provide GIS mapping capabilities, although it noted that one of these applications, the National Indian Oil and Gas Evaluation Management System (NIOGEMS), is not available nationally. Interior stated in its August 2015 letter to GAO that a national dataset composed of all Indian land tracts and boundaries with visualization functionality is expected to be completed within 4 years, depending on budget and resource availability.

Second, BIA’s review and approval is required throughout the development process, including the approval of leases, ROW agreements, and appraisals, but BIA does not have a documented

⁸Board of Governors of the Federal Reserve System, *Growing Economies in Indian Country: Taking Stock of Progress and Partnerships, A Summary of Challenges, Recommendations, and Promising Efforts* (April 2012). This report was the result of a series of workshops that included nine federal agencies, four Federal Reserve Bank partners, and representatives from 63 Indian tribes. The effort was focused on economic development in Indian Country.

⁹According to Interior’s 2014-2015 performance plan, it was to incorporate a GIS mapping component into its Trust Asset and Accounting Management System in fiscal year 2014.

process or the data needed to track its review and response times.¹⁰ In 2014, an interagency steering committee that included Interior identified best practices to modernize federal decision-making processes through improved efficiency and transparency.¹¹ The committee determined that federal agencies reviewing permits and other applications should collect consistent data, including the date the application was received, the date the application was considered complete by the agency, the issuance date, and the start and end dates for any “pauses” in the review process. The committee concluded that these dates could provide agencies with greater transparency into the process, assist agency efforts to identify process trends and drivers that influence the review process, and inform agency discussions on ways to improve the process.

However, BIA does not collect the data the interagency steering committee identified as needed to ensure transparency and, therefore, it cannot provide reasonable assurance that its process is efficient. A few stakeholders we interviewed and some literature we reviewed stated that BIA’s review and approval process can be lengthy. For example, stakeholders provided examples of lease and ROW applications that were under review for multiple years. Specifically, in 2014, the Acting Chairman for the Southern Ute Indian Tribe testified before this committee that BIA’s review of some of its energy-related documents took as long as 8 years. In the meantime, the tribe estimates it lost more than \$95 million in revenues it could have earned from tribal permitting fees, oil and gas severance taxes, and royalties. According to a few stakeholders and some literature we reviewed, the lengthy review process can increase development costs and project times and, in some cases, result in missed development opportunities and lost revenue. Without a documented process or the data needed to track its review and response

¹⁰In 2014, an interagency Steering Committee developed in response to Executive Order 13604 identified best practices to modernize federal decision-making processes. The committee found that federal agencies reviewing permits and other applications should collect consistent data, including the date the application was received, the date the application was considered complete by the agency, the issuance date, and the start and end dates for any “pauses” in the review process.

¹¹This government-wide initiative was developed in response to Executive Order 13604 and was led by an interagency Steering Committee, which is composed of Deputy Secretaries or their equivalent from 12 federal agencies, including the Department of the Interior. In 2014, the Steering Committee released an implementation plan for the Presidential Memorandum on Modernizing Infrastructure Permitting. Executive Order 13604 calls for agencies to improve federal permitting and review processes.

times, BIA cannot ensure transparency into the process and that documents are moving forward in a timely manner, or determine the effectiveness of efforts to improve the process.

To address this shortcoming, we recommended in our June 2015 report that Interior direct BIA to develop a documented process to track its review and response times and enhance data collection efforts to ensure that the agency has the data needed to track its review and response times. In its written comments, Interior did not fully concur with this recommendation. Specifically, Interior stated that it will use NIOGEMS to assist in tracking review and response times. However, this application does not track all realty transactions or processes and has not been deployed nationally. Therefore, while NIOGEMS may provide some assistance to the agency, it alone cannot ensure that BIA's process to review energy-related documents is transparent or that documents are moving forward in a timely manner. In its August 2015 letter to GAO, Interior stated it will try to implement a tracking and monitoring effort by the end of fiscal year 2017 for oil and gas leases on Indian lands. The agency did not indicate if it intends to improve the transparency of its review and approval process for other energy-related documents, such as ROW agreements and surface leases—some of which were under review for multiple years.

Third, some BIA regional and agency offices do not have staff with the skills needed to effectively evaluate energy-related documents or adequate staff resources, according to a few stakeholders we interviewed and some of the literature we reviewed. For instance, Interior officials told us that the number of BIA personnel trained in oil and gas development is not sufficient to meet the demands of increased development. In another example, a BIA official from an agency office told us that leases and other permits cannot be reviewed in a timely manner because the office does not have enough staff to conduct the reviews. We are conducting ongoing work for this committee that will include information on key skills and staff resources at BIA involved with the development of energy resources on Indian lands.

According to stakeholders we interviewed and literature we reviewed, additional factors, generally outside of BIA's management responsibilities, have also hindered Indian energy development, including

- a complex regulatory framework consisting of multiple jurisdictions that can involve significantly more steps than the development of

private and state resources, increase development costs, and add to the timeline for development;

- fractionated, or highly divided, land and mineral ownership interests;
- tribes' limited access to initial capital to start projects and limited opportunities to take advantage of federal tax credits;
- dual taxation of resources by states and tribes that does not occur on private, state, or federally owned resources;
- perceived or real concerns about the political stability and capacity of some tribal governments; and
- limited access to infrastructure, such as transmission lines needed to carry power generated from renewable sources to market and transportation linkages to transport oil and gas resources to processing facilities.

A Variety of Factors Have Deterred Tribes from Entering into TERAs

A variety of factors have deterred tribes from pursuing TERAs. Uncertainty associated with Interior's TERA regulations is one factor. For example, TERA regulations authorize tribes to assume responsibility for energy development activities that are not "inherently federal functions," but Interior officials told us that the agency has not determined what activities would be considered inherently federal because doing so could have far-reaching implications throughout the federal government. According to officials from one tribe we interviewed, the tribe has repeatedly asked Interior for additional guidance on the activities that would be considered inherently federal functions under the regulations. According to the tribal officials, without additional guidance on inherently federal functions, tribes considering a TERA do not know what activities the tribe would be assuming or what efforts may be necessary to build the capacity needed to assume those activities.

We recommended in our June 2015 report that Interior provide additional energy development-specific guidance on provisions of TERA regulations that tribes have identified as unclear.¹² Additional guidance could include examples of activities that are not inherently federal in the energy development context, which could assist tribes in identifying capacity building efforts that may be needed. Interior agreed with the

¹²[GAO-15-502](#).

recommendation and stated it is considering further guidance but did not provide additional details regarding issuance of the guidance.

In addition, the costs associated with assuming activities currently conducted by federal agencies and a complex application process were identified by literature we reviewed and stakeholders we interviewed as other factors that have deterred any tribe from entering into a TERA with Interior. Specifically, through a TERA, a tribe assuming control for energy development activities that are currently conducted by federal agencies does not receive federal funding for taking over the activities from the federal government. Several tribal officials we interviewed told us that the tribe does not have the resources to assume additional responsibility and liability from the federal government without some associated support from the federal government.

In conclusion, our review identified a number of areas in which BIA could improve its management of Indian energy resources and enhance opportunities for greater tribal control and decision-making authority over the development of their energy resources. Interior stated it intends to take some steps to implement our recommendations, but we believe Interior needs to take additional actions to address data limitations and track its review process. We look forward to continuing to work with this committee in overseeing BIA and other federal programs to ensure that they are operating in the most effective and efficient manner.

Chairman Barrasso, Ranking Member Tester, and Members of the Committee, this concludes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contacts and Staff Acknowledgement

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or ruscof@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Christine Kehr (Assistant Director), Alison O'Neill, Jay Spaan, and Barbara Timmerman made key contributions to this testimony.

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