112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–427

HELPING EXPEDITE AND ADVANCE RESPONSIBLE TRIBAL HOME OWNERSHIP ACT OF 2011

APRIL 16, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 205]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 205) to amend the Act titled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases", approved August 9, 1955, to provide for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2011" or the "HEARTH Act of 2011".

SEC. 2. APPROVAL OF, AND REGULATIONS RELATED TO, TRIBAL LEASES.

The first section of the Act titled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases", approved August 9, 1955 (25 U.S.C. 415), is amended as follows:

(1) In subsection (d)—

(A) in paragraph (4), by striking "the Navajo Nation" and inserting "an applicable Indian tribe";

(B) in paragraph (6), by striking "the Navajo Nation" and inserting "an Indian tribe";

(C) in paragraph (7), by striking "and" after the semicolon at the end;

(D) in paragraph (8)—

(i) by striking "the Navajo Nation";

(ii) by striking "with Navajo Nation law" and inserting "with applicable tribal law"; and

(iii) by striking the period at the end and inserting a semicolon; and

(E) by adding at the end the following:

"(9) the term 'Indian tribe' has the meaning given such term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a); and

"(10) the term 'individually owned allotted land' means a parcel of land that—

"(A)(i) is located within the jurisdiction of an Indian tribe; or

"(ii) is held in trust or restricted status by the United States for the benefit of an Indian tribe or a member of an Indian tribe; and

"(B) is allotted to a member of an Indian tribe.".

(2) By adding at the end the following:

"(h) TRIBAL APPROVAL OF LEASES.—

"(1) IN GENERAL.—At the discretion of any Indian tribe, any lease by the Indian tribe for the purposes authorized under subsection (a) (including any amendments to subsection (a)), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

"(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to 2 additional terms, each of which may not exceed 25 years; and

"(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years, if such a term is provided for by the regulations issued by the Indian tribe.

"(2) ALLOTTED LAND.—Paragraph (1) shall not apply to any lease of individually owned Indian allotted land.

"(3) AUTHORITY OF SECRETARY OVER TRIBAL REGULATIONS.—

"(A) IN GENERAL.—The Secretary shall have the authority to approve or disapprove any tribal regulations issued in accordance with paragraph (1).

"(B) CONSIDERATIONS FOR APPROVAL.—The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

"(i) are consistent with any regulations issued by the Secretary under subsection (a) (including any amendments to the subsection or regulations); and

"(ii) provide for an environmental review process that includes—

"(I) the identification and evaluation of any significant effects of the proposed action on the environment; and

"(II) a process for ensuring that—

"(aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and

"(bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

"(C) TECHNICAL ASSISTANCE.—The Secretary may provide technical assistance, upon request of the Indian tribe, for development of a regulatory environmental review process under subparagraph (B)(ii).

"(D) INDIAN SELF-DETERMINATION ACT.—The technical assistance to be provided by the Secretary pursuant to subparagraph (C) may be made available through contracts, grants, or agreements entered into in accordance with, and made available to entities eligible for, such contracts, grants, or agreements under the Indian Self-Determination Act (25 U.S.C. 450 et seq).

"(4) REVIEW PROCESS.—

"(A) IN GENERAL.—Not later than 120 days after the date on which the tribal regulations described in paragraph (1) are submitted to the Secretary, the Secretary shall review and approve or disapprove the regulations.

"(B) WRITTEN DOCUMENTATION.—If the Secretary disapproves the tribal regulations described in paragraph (1), the Secretary shall include written documentation with the disapproval notification that describes the basis for the disapproval.

"(C) EXTENSION.—The deadline described in subparagraph (A) may be extended by the Secretary, after consultation with the Indian tribe.

"(5) FEDERAL ENVIRONMENTAL REVIEW.—Notwithstanding paragraphs (3) and (4), if an Indian tribe carries out a project or activity funded by a Federal agency, the Indian tribe shall have the authority to rely on the environmental review process of the applicable Federal agency rather than any tribal environmental review process under this subsection.

"(6) DOCUMENTATION.—If an Indian tribe executes a lease pursuant to tribal regulations under paragraph (1), the Indian tribe shall provide the Secretary with—

"(A) a copy of the lease, including any amendments or renewals to the lease; and

"(B) in the case of tribal regulations or a lease that allows for lease payments to be made directly to the Indian tribe, documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (7).

"(7) TRUST RESPONSIBILITY.—

"(A) IN GENERAL.—The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1).

"(B) AUTHORITY OF SECRETARY.—Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe under paragraph (1).

"(8) COMPLIANCE.—

"(A) IN GENERAL.—An interested party, after exhausting of any applicable tribal remedies, may submit a petition to the Secretary, at such time and in such form as the Secretary determines to be appropriate, to review the compliance of the applicable Indian tribe with any tribal regulations approved by the Secretary under this subsection.

"(B) VIOLATIONS.—If, after carrying out a review under subparagraph (A), the Secretary determines that the tribal regulations were violated, the Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands.

"(C) DOCUMENTATION.—If the Secretary determines that a violation of the tribal regulations has occurred and a remedy is necessary, the Secretary shall—

"(i) make a written determination with respect to the regulations that have been violated;

"(ii) provide the applicable Indian tribe with a written notice of the alleged violation together with such written determination; and

"(iii) prior to the exercise of any remedy, the rescission of the approval of the regulation involved, or the reassumption of lease approval responsibilities, provide the applicable Indian tribe with—

"(I) a hearing that is on the record; and

"(II) a reasonable opportunity to cure the alleged violation.

"(9) SAVINGS CLAUSE.—Nothing in this subsection shall affect subsection (e) or any tribal regulations issued under that subsection.".

SEC. 3. LAND TITLE REPORTS.

(a) IN GENERAL.—The Bureau of Indian Affairs shall prepare and submit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate a report regarding the history and experience of Indian tribes that have chosen to assume responsibility for operating the Indian Land Title and Records Office (referred to in this section as the "LTRO") functions from the Bureau of Indian Affairs.

(b) CONSULTATION.—In conducting the review under subsection (a), the Bureau of Indian Affairs shall consult with the Department of Housing and Urban Development Office of Native American Programs and the Indian tribes that are managing LTRO functions (referred to in this section as the "managing Indian tribes").

(c) CONTENTS.—The review under subsection (a) shall include an analysis of the following factors:

(1) Whether and how tribal management of the LTRO functions has expedited the processing and issuance of Indian land title certifications as compared to the period during which the Bureau of Indian Affairs managed the programs.

(2) Whether and how tribal management of the LTRO functions has increased home ownership among the population of the managing Indian tribe.

(3) What internal preparations and processes were required of the managing Indian tribes prior to assuming management of the LTRO functions.

(4) Whether tribal management of the LTRO functions resulted in a transfer of financial resources and manpower from the Bureau of Indian Affairs to the managing Indian tribes and, if so, what transfers were undertaken.

(5) Whether, in appropriate circumstances and with the approval of geographically proximate Indian tribes, the LTRO functions may be performed by a single Indian tribe or a tribal consortium in a cost effective manner.

Amend the title so as to read:

A bill to amend the Act titled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases", approved August 9, 1955, to provide for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior, and for other purposes.

PURPOSE OF THE BILL

The purpose of H.R. 205, as ordered reported, is to amend the Act titled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases," approved August 9, 1955, to provide for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior.

BACKGROUND AND NEED FOR LEGISLATION

It might surprise most Americans to know that "Indian lands" are not actually owned by Indians: legal title to the lands are held by the federal government in trust for the benefit of Indians. Indians do enjoy exclusive use and benefit of their lands, but such enjoyment is limited because the government will not, as a general rule, authorize leases or other uses of such lands if they entail any more than minimal risks, as taxpayers may be held liable for any losses. Minimal risk has, predictably, yielded minimal benefits. On top of this, the Bureau of Indian Affairs (BIA), which is responsible for managing these lands, must work within a federal legal system rife with confusing, outdated, and inconsistent laws, regulations, and policies.

When traveling in the Western United States, where most Indian lands are located, it is not difficult to identify the boundaries of an Indian reservation: vacant space on one side, and development on the other. Private investment within Indian reservations—except in the anomalous case of Indian gaming (an issue not related to H.R. 205)—is about as scarce as it is in any nation where ownership of property is highly restricted by national governments. Investors cannot afford to wait the months or years it may take for BIA approval of a simple lease executed with a tribe. Investors simply put their money on the non-Indian side of the reservation.

Fortunately, there are exceptions. In reservations where tribes have wisely contracted with the BIA to manage their own lands, productivity and health of the property dramatically improve. Tribes with timberlands are now usually the ones with healthy forests, while the National Forest lands abutting a reservation are unhealthy and prone to wildfires. But even where a tribe manages

its lands under such a contract, in the end the BIA ultimately decides whether it may be leased.

The evolution of federal Indian land policy is long and complex. In the earliest days of the Union, Congress passed a series of laws restricting the alienation of Indian lands to "protect" tribes from losing their land base through coercion, fraud, and trade conducted in bad faith. Indians at that time were not considered U.S. citizens or experienced in Western practices of establishing ownership of land. These laws generally restricted a tribe from selling or leasing its land without permission from Congress. Over time, this federal policy began to take on the form of paternalism over tribes, which persists to this day.

The current federal statute governing the leasing of tribal lands is the Act of August 9, 1955 (25 U.S.C. 415), commonly called the Long-Term Indian Leasing Act. Under this Act, each and every lease of a tribe's lands must undergo federal review and approval by the Secretary of the Interior under a sprawling, burdensome set of regulations. For years, Indian Country has complained that under these regulations it takes too long for the Secretary to approve leases of tribal lands. It takes so long because the federal regulations are such that compliance with them requires a lot of time. A tribe who wants to govern its trust lands under free market principles cannot, in practice, do so. For example, if a lease approval by the Secretary constitutes a "major federal action affecting the quality of the human environment," then a full environmental impact statement under the National Environmental Policy Act (NEPA) must first occur, along with the usual delays and the opportunity for any group to file a lawsuit over the sufficiency of the environmental review. The result is a textbook example of impoverishment and joblessness caused by overregulation. Simple leases to build a home for an Indian family may take months to approve, frustrating the start, let alone completion, of needed housing projects. Private investment in virtually every kind of non-mineral and non-casino development project in Indian Country has been deterred to such an extent by the current system that unemployment rates exceeding 50% on reservations are common.

In 2000, the Long-Term Indian Leasing Act was amended to allow the Navajo Nation to lease its lands without the Secretary's approval as long as such leasing is executed under tribal regulations approved by the Secretary, in accordance with a few basic standards (see 25 U.S.C. 415(e)). Under the Navajo provision, the United States is absolved of liability for any losses sustained by any party to a lease executed under the tribe's regulations. The Navajo may perform their own environmental review of a lease rather than a full-blown NEPA review. If the Navajo fail to adhere to their regulations, the Secretary may intervene and rescind a lease or reassume leasing authority.

The Navajo amendment has enabled this tribe to lease its lands more easily than under a system where the Secretary reviews and approves each and every tribal lease. It has proven to be a success and has led other tribes to ask Congress for the same treatment. In fact, the Long-Term Indian Leasing Act has also been amended to enable a handful of other tribes to lease their lands for limited terms under more liberal standards that even the Navajo amendments.

H.R. 205 is modeled on the Navajo leasing amendments. Under the bill, any Indian tribe may lease its lands for any non-mineral development purpose without review and approval of the Secretary, as long as its leasing is conducted under tribal regulations that have been approved by the Secretary. The Secretary must approve a tribe's leasing regulations if they are "consistent with" the Department of the Interior's regulations governing tribal lands, including the opportunity for public notice and comment. Under the bill, taxpayers would not be liable for any loss sustained by any party to a tribal lease executed through a tribe's approved leasing regulations. H.R. 205 thus affords a tribe flexibility to adapt lease terms to suit its business and cultural needs, it enables a tribe to approve leases quickly and efficiently, and it protects taxpayers from liability for a tribe's business decisions.

The bill enjoys strong bipartisan Congressional support, and the support of the Administration, major tribal organizations including the National Congress of American Indians and the National American Indian Housing Council, and individual recognized tribes.

During the Committee markup of H.R. 205, an amendment was filed by Congressman Martin Heinrich (D–NM) that would have increased the difficulties for a tribe to lease its lands efficiently. As introduced, H.R. 205 requires the Secretary to approve tribal leasing regulations if they are "consistent with" the Secretary's own regulations for the leasing of tribal lands. This language is critical to ensure a tribe has the flexibility to write regulations that result in more expeditious lease approvals than what the Secretary's regulations result in. The Heinrich amendment would change "consistent with" to "meet or exceed." This means that a tribe would have to craft leasing regulations that are identical to, or more burdensome than, the Secretary's regulations. Rather than improve the bill, the amendment undercuts the incremental—yet important—policy step undertaken in H.R. 205.

Under the proposed Heinrich amendment, tribal regulations would have to be at least as demanding, restrictive, and controlling as the Interior regulations are . . . or more so. Indian Country did not ask for something that is going to be equally or more restrictive than a regulatory regime that is not working for them. Just before the Committee markup, the National Congress of American Indians, the oldest and largest national tribal government organization in the country, wrote the Committee to say it preferred the bill as introduced because the "Interior Solicitor's office will construe the amendment to require that tribal regulations must be identical to the Department's leasing regulations, or even more restrictive, and this would defeat the purpose of the legislation to increase tribal flexibility and speed up the leasing process." (November 16, 2011, letter from Jefferson Keel, President, National Congress of American Indians).

The Majority opposed the amendment because it would simply maintain the current level of regulatory control exercised by the Department of the Interior over a tribe's lands, defeating the purpose of the bill.

During the Committee markup of the bill, the Heinrich amendment was modified to eliminate the "meet or exceed" language. The Chairman and Ranking Member stated their intention to discuss the concerns of several Minority Members who believe the "meet or

exceed" language is needed by Indian Country. However, since the markup, not a single tribe or tribal organization is on record as requesting, let alone supporting, this language. Not even the Obama Administration has requested this change. In fact, since the bill was ordered reported, several tribal organizations submitted letters asking for expedited action on the bill with no mention of a need to amend it further.

The Majority is happy to discuss the Minority's concerns with the bill; however, absent any compelling justification, no further changes to the tribal leasing process are warranted.

Fortunately, the Majority was able to adopt an amendment to authorize technical assistance to tribes wishing to craft tribal leasing regulations. In addition, another amendment was adopted to require a Bureau of Indian Affairs (BIA) report on the history and experience of tribes taking over land title records functions from the BIA.

COMMITTEE ACTION

H.R. 205 was introduced on January 6, 2011, by Congressman Martin Heinrich (D–NM). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Indian and Alaska Native Affairs. On November 3, 2011, the Subcommittee held a hearing on the bill. On November 17, 2011, the Natural Resources Committee met to consider the bill. The Subcommittee on Indian and Alaska Native Affairs was discharged by unanimous consent. Congressman Martin Heinrich offered amendment designated .035, as modified, to the bill; the amendment was adopted by unanimous consent. Congressman Heinrich offered amendment designated .036 to the bill; the amendment was adopted by unanimous consent. The bill, as amended, was then ordered favorably reported to the House of Representatives by unanimous consent.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

CH.R. 205—Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2011

H.R. 205 would allow Indian tribes to enter into certain leases of trust lands without approval from the Bureau of Indian Affairs (BIA).[1] Based on information from the Department of the Interior, CBO estimates that implementing the legislation would have no significant effect on the federal budget. Enacting H.R. 205 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under current law, most tribes can lease trust lands to certain entities for up to 25 years, subject to the approval of BIA. Under the bill, tribes could enter into leases without BIA approval if those leases were subject to tribal regulations approved by the agency. Any lease granted under that authority would be limited to 25 years for agricultural use and business purposes and 75 years for other purposes. Any lease involving the exploration for or extraction of natural resources would still require approval from BIA. H.R. 205 would also authorize the Secretary of the Interior to provide technical assistance for the environmental review process. CBO expects that those provisions would have a negligible effect on BIA's workload.

H.R. 205 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting the legislation would benefit tribes by streamlining the process for leasing certain tribal lands.

On August 31, 2011, CBO transmitted a cost estimate for S. 703, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011, as ordered reported by the Senate Committee on Indian Affairs on July 28, 2011. The two pieces of legislation are similar, and the CBO cost estimates are the same.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. Based on information from the Department of the Interior, CBO estimates that implementing the legislation would have no significant effect on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill, as ordered reported, is to amend the Act titled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases," approved August 9, 1955, to provide for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior.

[1] Trust lands are tribally owned lands that are legally held by the federal government for the benefit of tribal governments or individual tribal members.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF AUGUST 9, 1955

(Commonly known as the "Indian Long-Term Leasing Act)

AN ACT To authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) * * *

* * * * * * *

(d) DEFINITIONS.—For purposes of this section—

(1) * * *

* * * * * * *

(4) the term "interested party" means an Indian or non-Indian individual or corporation, or tribal or non-tribal government whose interests could be adversely affected by a tribal trust land leasing decision made by [the Navajo Nation] *an applicable Indian tribe*;

* * * * * * *

(6) the term "petition" means a written request submitted to the Secretary for the review of an action (or inaction) of [the Navajo Nation] *an Indian tribe* that is claimed to be in violation of the approved tribal leasing regulations;

(7) the term "Secretary" means the Secretary of the Interior; [and]

(8) the term "tribal regulations" means [the Navajo Nation] regulations enacted in accordance [with Navajo Nation law] *with applicable tribal law* and approved by the Secretary[.]*;*

(9) the term "Indian tribe" has the meaning given such term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a); and

(10) the term "individually owned allotted land" means a parcel of land that—

(A)(i) is located within the jurisdiction of an Indian tribe; or

(ii) is held in trust or restricted status by the United States for the benefit of an Indian tribe or a member of an Indian tribe; and

(B) is allotted to a member of an Indian tribe.

* * * * * * *

(h) TRIBAL APPROVAL OF LEASES.—

(1) IN GENERAL.—At the discretion of any Indian tribe, any lease by the Indian tribe for the purposes authorized under subsection (a) (including any amendments to subsection (a)), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to 2 additional terms, each of which may not exceed 25 years; and

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years, if such a term is provided for by the regulations issued by the Indian tribe.

(2) ALLOTTED LAND.—Paragraph (1) shall not apply to any lease of individually owned Indian allotted land.

(3) AUTHORITY OF SECRETARY OVER TRIBAL REGULATIONS.—

(A) IN GENERAL.—The Secretary shall have the authority to approve or disapprove any tribal regulations issued in accordance with paragraph (1).

(B) CONSIDERATIONS FOR APPROVAL.—The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

(i) are consistent with any regulations issued by the Secretary under subsection (a) (including any amendments to the subsection or regulations); and

(ii) provide for an environmental review process that includes—

(I) the identification and evaluation of any significant effects of the proposed action on the environment; and

(II) a process for ensuring that—

(aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and

(bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

(C) TECHNICAL ASSISTANCE.—The Secretary may provide technical assistance, upon request of the Indian tribe, for development of a regulatory environmental review process under subparagraph (B)(ii).

(D) INDIAN SELF-DETERMINATION ACT.—The technical assistance to be provided by the Secretary pursuant to subparagraph (C) may be made available through contracts, grants, or agreements entered into in accordance with, and made available to entities eligible for, such contracts, grants, or agreements under the Indian Self-Determination Act (25 U.S.C. 450 et seq).

(4) REVIEW PROCESS.—

(A) IN GENERAL.—Not later than 120 days after the date on which the tribal regulations described in paragraph (1) are submitted to the Secretary, the Secretary shall review and approve or disapprove the regulations.

(B) WRITTEN DOCUMENTATION.—If the Secretary disapproves the tribal regulations described in paragraph (1), the Secretary shall include written documentation with the disapproval notification that describes the basis for the disapproval.

(C) EXTENSION.—The deadline described in subparagraph (A) may be extended by the Secretary, after consultation with the Indian tribe.

(5) FEDERAL ENVIRONMENTAL REVIEW.—Notwithstanding paragraphs (3) and (4), if an Indian tribe carries out a project or activity funded by a Federal agency, the Indian tribe shall have the authority to rely on the environmental review process of the applicable Federal agency rather than any tribal environmental review process under this subsection.

(6) DOCUMENTATION.—If an Indian tribe executes a lease pursuant to tribal regulations under paragraph (1), the Indian tribe shall provide the Secretary with—

(A) a copy of the lease, including any amendments or renewals to the lease; and

(B) in the case of tribal regulations or a lease that allows for lease payments to be made directly to the Indian tribe, documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (7).

(7) TRUST RESPONSIBILITY.—

(A) IN GENERAL.—The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1).

(B) AUTHORITY OF SECRETARY.—Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe under paragraph (1).

(8) COMPLIANCE.—

(A) IN GENERAL.—An interested party, after exhausting of any applicable tribal remedies, may submit a petition to the Secretary, at such time and in such form as the Secretary determines to be appropriate, to review the compliance of the applicable Indian tribe with any tribal regulations approved by the Secretary under this subsection.

(B) VIOLATIONS.—If, after carrying out a review under subparagraph (A), the Secretary determines that the tribal regulations were violated, the Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands.

(C) DOCUMENTATION.—If the Secretary determines that a violation of the tribal regulations has occurred and a remedy is necessary, the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide the applicable Indian tribe with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy, the rescission of the approval of the regulation involved, or the reassumption of lease approval responsibilities, provide the applicable Indian tribe with—

(I) a hearing that is on the record; and

(II) a reasonable opportunity to cure the alleged violation.

(9) SAVINGS CLAUSE.—Nothing in this subsection shall affect subsection (e) or any tribal regulations issued under that subsection.

* * * * * * *

ADDITIONAL VIEWS

H.R. 205 enables tribes to exercise their powers of inherent tribal sovereignty to lease their own lands without federal oversight under certain conditions. One of these conditions requires the Secretary of the Interior to approve or disapprove tribal regulations that would regulate leasing activity before leasing activity could begin. As introduced, the bill requires the Secretary to approve the tribal regulations if they are "consistent" with existing regulations issued by the Secretary and provide for an "environmental review process" that includes the identification of any "significant effects" of the lease on the environment.[1] Because this "process" could be inadequate for the broad purposes for which tribes are authorized to lease their lands without Secretarial approval under the legislation, Subcommittee staff, Mr. Heinrich's staff and key tribal organizations worked together on amendments that would enhance tribal authority to further develop the environmental review process under their regulations so that whether the leasing activity contemplated projects ranging from simple residential leasing to complex wind farm development, any tribal regulatory scheme submitted to the Secretary for approval would likely be considered adequate. In short, the goal in developing these amendments was to provide tribes with the necessary tools to provide flexible, yet appropriate, environmental review without imposing additional bureaucratic requirements on tribal governments or contribute to delay in the leasing process.

Two amendments to achieve this goal were proposed by Mr. Heinrich, one of which was accepted by the Republican Majority as part of a unanimous consent package. The first amendment authorizes tribes to seek the Secretary's technical assistance in developing a regulatory environmental review process, which may be made available using the self-determination contracting and compacting under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* It is the expectation that tribes with environmental review processes already in place, such as the Navajo Nation and Tulalip Tribes, could provide models for those tribes that seek to engage in similar leasing activities. But for tribes that seek to use HEARTH authority for different purposes, such as renewable energy development, they should be able to seek the guidance of their trustee, the United States, to assist in developing an environmental review process that is appropriate for those activities.

The second proposed amendment, which was rejected by the Majority, would have replaced language in the bill that requires tribal

[1] Notably, the bill authorizes a tribe to rely on the environmental review process of a federal agency if the tribe is carrying out a project or activity funded by that agency instead of relying on its own environmental review process under its regulations. This provision could be triggered, for example, when a tribe is required to conduct agency environmental review processes as a condition of receiving federal funding, such as the Department of Housing and Urban Development's required NEPA analysis for Indian Housing Block Grant recipients.

regulations to simply be "consistent" with existing federal regulations with language authorizing such regulations to "meet or exceed" any regulations issued by the Secretary. The "meet or exceed" language would trigger Secretarial review of its own regulations as a guidepost for examining tribes' proposed regulations, while giving tribes the authority to exceed the Bureau of Indian Affairs' (BIA) regulations, as appropriate, in an exercise of tribal sovereignty. The idea is that tribes know how to best manage their own lands and that the Secretary should take that into consideration when reviewing proposed tribal regulations for approval.

To be clear, the "meet or exceed" proposal was not intended to require the Secretary to ensure that tribal regulations mirror the BIA's regulations found at 25 CFR Part 162. Such a requirement would be inappropriate and frustrate the aims of the bill, which is to put tribes in the decision-making role and expedite surface leasing so responsible development can occur in tribal communities. The amendment was proposed in order to strike a balance between the need for adequate environmental review that is flexible to adjust to the variety of projects HEARTH authorizes and tribes' needs for economic development without unnecessary federal oversight. While this proposed amendment was ultimately not accepted, Chairman Hastings committed in a colloquy with Mr. Heinrich to work toward common ground on the "meet or exceed" issue with the Minority in order to provide baseline environmental standards on which tribes may rely by regulation, while providing the necessary flexibility for tribes to meet their own unique business development needs through leasing activity.

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