

The following is a summary of the draft Indian energy bill that Senator Barrasso is considering for introduction. The draft is meant to encourage comments, suggestions and ideas from stakeholders for a bill that would facilitate the development of tribal energy resources. The Senator is seeking further input before deciding what ultimately should or should not be included in the bill.

**Summary of Discussion “Staff Draft”—  
*Indian Tribal Energy Development  
And Self-Determination Act Amendments of 2011***

The following is a summary of the more significant provisions of the discussion “staff draft” of a possible Indian energy bill. Most of provisions consist of potential amendments to the Indian energy title of the Energy Policy Act of 2005 (25 U.S.C. 3501 et seq.), although the draft also includes possible amendments to other acts as well—the National Indian Forest Resources Management Act (25 U.S.C. 3101 et seq.), the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a), and the American Indian Agricultural Resource Management Act (25 U.S.C. 3701 et seq.).

**I. Amendments to Title V of the 2005 Energy Policy Act (25 U.S.C. 3501 et seq.)**

*Background*

Title V of the 2005 Energy Policy Act provides willing Indian tribes with an alternative process for developing their reservations’ tribal energy resources.<sup>1</sup> By entering into a “tribal energy resource agreement” or “TERA” with the Secretary of the Interior, an Indian tribe may approve mineral or energy-related surface leases, business agreements, and rights-of-way without further approval of the Secretary. A TERA must include a number of terms and provisions applicable to the tribe’s energy leases, agreements, and rights of way, and the tribe must have its own environmental review laws in place for assessing the impacts of energy development under the TERA.

The draft bill would make a number of amendments to Title V to make it easier for tribes to use the TERA process as a vehicle for tribal energy development. The following is a summary of the more significant changes that the draft bill would make.

*Amendments to the TERA Approval Process*

Title V currently requires the Secretary to approve or disapprove a TERA within 270 days after the date on which the tribe submits it to the Secretary. The

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<sup>1</sup> See section 503 of the 2005 Energy Policy Act.

Secretary must either (1) approve the TERA if the Secretary finds that the TERA includes all of the provisions on the Title V checklist (i.e., provisions that address a variety of business and non-business issues), or (2) disapprove the TERA if the Secretary finds that it does not have all those provisions.

Under the draft bill, a TERA would automatically take effect 271 days after it is submitted by an Indian tribe *unless, before then, the Secretary disapproves it*. The Secretary would only have authority to disapprove the TERA if—and only if—the Secretary finds that the TERA fails to meet one or more of the items on the Title V checklist of TERA requirements. If the Secretary does not disapprove the TERA, it would automatically go into effect by operation of law, except to the limited extent that any provision of the TERA is inconsistent with applicable Federal law.

#### *Amendments Relating to the Capacity Determination*

The draft bill would also clarify and expedite the process by which the Secretary determines whether an Indian tribe has demonstrated sufficient capacity to enter into a TERA. Title V requires the Secretary to determine whether “the Indian tribe has demonstrated...sufficient capacity to regulate the development of energy resources” within the same 270-day time frame for approving the TERA. The draft bill would require the capacity determination to be made within 120 days after the TERA is submitted unless the Secretary and the tribe mutually agree to an extension of time.

The draft bill would also deem that an Indian tribe *has* sufficient capacity if (1) the tribe has a record of operating programs under the Indian Self-Determination and Education Assistance Act (ISDEA) for three consecutive years without material audit exceptions, *or* (2) the Secretary *fails* to make the capacity determination within the 120-day period or an agreed-to extension of the period.

#### *Amendments Relating to Funding*

In addition, the draft bill would add a new funding provision to Title V. The draft bill would require the Secretary to make available to the Indian tribe any funding that the Secretary would otherwise have expended to carry out any function, service, or activity that, as a result of the Indian tribe implementing a TERA, the Secretary no longer has to carry out. The draft bill would require the Secretary to provide such funding through an annual funding agreement negotiated and entered into apart from the TERA.

### *Waiver of U.S. Liability*

The draft bill would also clarify the intent of Congress with respect to the Title V waiver of liability under Title V. Currently, Title V waives the liability of the United States to any party for “any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way” executed pursuant in accordance with a TERA.

The draft bill would add a clarifying provision to the effect that nothing in Title V “absolves, limits, or otherwise affects the liability of the United States, if any, for any term of any lease, business agreement, or right-of-way...that is not a negotiated term” or “any losses that are not the result of a negotiated term, including losses resulting from the failure of the Secretary to perform an obligation of the Secretary” under Title V.

### *Leases and Agreements with Tribal Energy Development Organizations*

The draft bill would allow Indian tribes—*whether or not they have entered into a TERA with the Secretary*—to enter into leases or business agreements with, or to grant rights-of-way to, “tribal energy development organizations” that are majority owned and controlled by the Indian tribe without approval of the Secretary. The requirements would be that (1) the Indian tribe have a record of managing programs related to land under the ISDEA for three consecutive years without material audit exceptions, and (2) the tribe (or the tribe and 1 or more other tribes) own and control the majority interest in the tribal energy development organization throughout the full term of the lease, business agreement, or right-of-way. The draft bill would also establish a process for the Secretary to certify that an organization has these requirements.

### *Regulations to Implement Amendments*

The draft bill would require the Secretary to promulgate or update any regulations that are necessary to implement the changes made in the draft bill, including provisions to implement the process by which the Secretary would provide funding to an Indian tribe and the process for obtaining the Secretary’s certification that the tribe owns and controls the majority of the interest in a tribal energy development organization.

## **II. Other Amendments**

### *The National Indian Forest Resources Management Act (25 U.S.C. 3101 et seq.)*

The draft bill would amend the National Indian Forest Resources Management Act to state that forest management practices conducted pursuant to forest management plans approved by the Secretary of the Interior would be considered sustainable for the purposes of any applicable Federal standard or benefit requiring a demonstration of sustainability.

### *Section 2 of the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a)*

The draft bill would amend the Tribal Forest Protection Act of 2004 to require that the Secretary of the Interior carry out at least four demonstration projects to promote biomass energy production on Indian forest land and in nearby communities. The draft bill would authorize the Secretary to enter into, among other things, 20-year contracts or agreements with Indian tribes to harvest woody biomass from Federal land.

### *Sec. 101 of the American Indian Agricultural Resource Management Act (25 U.S.C. 3711)*

The draft bill would amend the American Indian Agricultural Resource Management Act to ensure that agricultural resource management practices conducted pursuant to agricultural resource management plans approved by the Secretary of the Interior would be considered sustainable for the purposes of any applicable Federal standard or benefit requiring a demonstration of sustainability.