

## Expert Analysis

# A Big Leap Forward For Tribal Energy Development

By **Paul Moorehead and Brian Gunn** December 20, 2018, 11:26 AM EST

After eight years and several congresses, on Dec. 18, 2018, President Donald Trump signed into law the Indian Tribal Energy Development and Self-Determination Act Amendments, a bipartisan bill introduced by Sen. John Hoeven, R-N.D., chairman of the Senate Committee on Indian Affairs.

Enactment of the bill into law will usher in a new era in federal Indian law and policy. In many respects, the new law enshrines trust reform principles and mechanisms in the energy resource development context. Perfecting the bilateral Tribal Energy Resource Agreement, or TERA, process, the new law advances tribal authority and sovereignty and sharpens federal respect for tribal government prerogatives.

The last major rewrite occurred in 2005 as part of the Energy Policy Act of 1992 and the new law will overhaul how the federal Department of Energy and [U.S. Department of the Interior](#) go about managing their respective Indian energy portfolios. And just in time too — in February 2017, the [Government Accountability Office](#) issued a report that included the DOI's Indian energy program among the federal programs it considers “high risk.”

As America continues its push for energy dominance, energy tribes recognize the economic potential of their resources and continue to responsibly develop renewable and traditional energy resources.

The new law likewise acknowledges the enormous potential of Indian energy and puts forth an “all of the above” energy strategy that seeks to assist tribes with solar, wind, geothermal, oil, natural gas, coal and other energy resource development efforts.

Philosophically, the new law comports with the president's executive order from 2017 directing federal agencies to review their regulations and revise them to encourage energy development on federal and Indian lands. Secretary Ryan Zinke followed up with his own secretarial order, also in 2017, that aimed to accomplish the same objectives.



Paul Moorehead



Brian Gunn

The centerpiece of the law is a suite of reforms to the TERA mechanism enacted 13 years ago and designed to more fully respect tribal sovereignty and decision-making and lighten the heavy hand of the DOI when it comes to reviewing and approving resource development on trust lands.

Under the law, tribes opting to negotiate and approve their own leases, business agreements, rights of way and other documents without the review and approval of the Secretary of the Interior would submit a TERA for the DOI's approval. To demonstrate tribal capacity under the new law, a tribe could point to its successful implementation of a land- or resource-related Indian Self-Determination and Education Assistance Act contract and the secretary could deem the tribe to have the capacity to manage its TERA.

With an approved TERA, the tribe — not the secretary — would be in the driver's seat when it comes to negotiating with third parties for energy-related arrangements on its own trust lands. Importantly, the National Environmental Policy Act would not apply to these arrangements as there would be no federal decision-maker nor a major federal action. The submitting tribes would, however, need to have an environmental review process in place that accommodates public comment and input, much like the HEARTH Act requires for tribes managing their own surface leasing regimes.

The new law includes other progressive reforms that will encourage and assist willing tribes in their energy resource development efforts, including provisions to:

- Require the secretary to provide tribes with technical assistance to streamline energy development;
- Make intertribal organizations eligible for grants under the Indian energy education planning and management assistance program;
- Make tribal energy development organizations eligible for the multibillion dollar [U.S. Department of Energy](#)'s Tribal Energy Loan Guarantee Program;
- Place a 120-day limit on the secretary's decision to make decisions regarding TERAs submitted to him; and
- Direct the Secretary of Energy to collaborate with the Directors of the National Laboratories to make technical and scientific resources available to tribes for energy-related activities and projects.

Section 202 of the new law amends the Tribal Forest Protection Act of 2004 to create a biomass demonstration project that promotes biomass energy development and forest management by tribes on federal lands. Most notably, this provision requires the Secretaries of the Interior or Agriculture (for [U.S. Forest Service](#) land) to enter into a minimum of four long-term projects with Indian tribes for each authorized year of the project. Tribes would have the ability to utilize on-reservation forest management practices on the federal land where the activities would be carried out. In the House floor debate on the bill, Rep. Cathy McMorris Rodgers, R-Wash., noted that tribal land management practices are “more flexible and effective” than the practices

employed by federal land managers and that Section 202 would allow tribes to take a more active role in protecting on-reservation forests.

Overtaking the rule requiring tribes to work through their respective states to access Department of Energy weatherization grants, the new law also amends the Energy Conservation and Production Act to allow tribally designated housing entities (as defined by the Native American Housing Assistance and Self-Determination Act of 1996) to administer grants directly under one or two conditions: 1) upon request of the tribal organization to make grants directly or 2) if the department determines that low-income members would be better served by providing funds directly through tribal organizations rather than through a state.

Addressing complaints that tribes have made for years, section 204 of the new law reforms the federal appraisal process and amends the Energy Policy Act of 1992 to allow transactions relating to tribal mineral or energy resources to be prepared by the Interior Secretary, the affected tribe or a certified, third-party appraiser. Because securing an approved appraisal involves sometimes lengthy periods of time, the new law requires that the secretary review and approve the appraisal within 45 days of its submission. If the secretary disapproves an appraisal, the department needs to provide a notice of disapproval explaining the reason why and how it should be corrected.

The new law also includes several tribe-specific provisions including language expanding the authority of the [Navajo Nation](#) to enter into leases for “exploration, development, or extraction of any mineral resource” without the Interior Department’s approval. Those leases could last up to 25 years with an option to renew once. Leases that relate to the exploration, development or extraction of oil may not exceed more than 10 years, and business or agriculture leases may be for terms up to 99 years.

Another provision authorizes the [Crow Tribe](#) of Montana to enter into leases for up to 99 years without the approval of the Interior Secretary.

The new law has the kind of reforms tribes have been demanding for years and, taken together, will go a long way in helping tribes develop their own resources on their own lands in ways they see fit for their members and communities.

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*[Paul Moorehead](#) and [Brian Gunn](#) are principals at [Powers Pyles Sutter](#) and [Verville PC](#).*