

## Legislative Update on Indian Tribal Energy Matters in the 112<sup>th</sup> Congress

### U.S. Department of Energy's Tribal Energy Review

By Paul Moorehead, Esq.  
Indian Tribal Governments Practice Group  
Drinker Biddle & Reath LLP

November 14, 2011

---

#### **I. Energy Development on Tribal Lands**

On October 12, 2011, Senate Committee on Indian Affairs Vice Chairman John Barrasso (R-WY) introduced the *Indian Tribal Energy Development and Self-Determination Act Amendments of 2011* (S.1684), to address barriers and improve energy resource development on tribal lands in efforts to facilitate economic development and job creation, and provide tribes greater control over the management and development of their own resources. The bill would:

- Authorize tribes to enter into Tribal Energy Resource Agreements (“TERAs”) more feasibly and with greater clarity by granting authority to tribes to review, approve and manage leases, business agreements and rights-of-way without the approval of the Interior Secretary if the tribe has sufficient capacity to regulate such development.
- Authorize the certification of Tribal Energy Development Organization(s) for assisting tribes in leasing, business agreements, and rights-of-way activities.
- Amend the *Federal Power Act* placing Indian tribes on equal footing as States and municipalities for preferences when preliminary permits or original licenses are awarded for hydroelectric projects, where no preliminary permit has been issued.
- Establish a Tribal Biomass Demonstration Project to promote biomass energy production on Indian forest land, rangelands and other Federal lands.
- Authorize tribes to receive direct weatherization funding from the Department of Energy.

S.1684 is pending before the Senate Committee on Indian Affairs (“SCIA”). A companion measure has not been introduced in the House, but we understand House Subcommittee on Indian and Alaska Native Affairs Chairman Don Young (R-AK) is actively compiling Indian energy legislation.

#### **II. Fiscal Year 2012 Appropriations and the Joint Select Deficit Reduction Committee**

##### a. Fiscal Year 2012 Appropriations

Already one month into Fiscal Year 2012 (FY2012), none of the FY2012 appropriations bills have been enacted into law. The Federal government is currently operating on a \$1.043 billion Continuing Resolution (“CR,” Pub.L.112-36) which expires this Friday, November 18, 2011.

The U.S. House of Representatives has passed six of the twelve spending bills, and moved nine through the House Appropriations Committee. In the United States Senate, eleven bills have been approved by the Senate Appropriations Committee and four by the full Senate.

While the House and Senate Appropriations Chairmen, Rep. Hal Rogers (R-KY) and Senator Daniel Inouye (D-HI), expressed their strong desire to move each spending bill to conference committee, with time running out, Senate appropriators are assembling packages of appropriations measures ("minibuses") that would allow a small number of funding bills with bipartisan support to advance. On November 1, 2011, the Senate passed a \$128 billion FY2012 appropriations minibus that combines the FY2012 spending bills for Agriculture (H.R.2112), Commerce-Justice-Science (S.1572), and Transportation, Housing and Urban Development (S.1596). The Senate-House Conference Committee is currently resolving differences in H.R.2112 and is expected to be approved by the end of this week. It is also expected that H.R.2112 will contain an additional CR to fund the Federal government through mid-December 2011.

#### U.S. Department of Energy

For programs and activities within the U.S. Department of Energy ("DoE"), the U.S. Senate is assembling the FY2012 spending bill for Energy and Water Development (H.R.2354; S.Rpt.112-75) in a second "minibus" along with two other spending measures: Financial Services (S.1573) and State-Foreign Operations (S.1601). H.R.2354 provides \$25.5 billion for programs within DoE, including \$1.8 billion for Energy Efficiency and Renewable Energy Programs ("EERE"), \$174 million for weatherization activities, and \$10 million for Tribal energy activities.

The House-passed Energy and Water Development bill (H.R.2354; H.Rpt.112-118) would provide \$30.6 billion for programs within DoE, including \$1.3 billion for EERE Programs, \$33 million for weatherization activities, and \$10 million for Tribal energy activities. It is expected that the second "minibus" will be approved by Congress before it adjourns for the Thanksgiving Holiday.

#### U.S. Department of the Interior

For programs and activities within the U.S. Department of the Interior ("DoI"), the FY2012 spending bill for the Interior-Environment (H.R.2584; H.Rpt.112-151) was reported out of the House Appropriations Committee and is pending on the House floor. This bill provides \$27.4 billion for the DoI, including \$918 million for the Bureau of Land Management ("BLM"); \$138 million for the Bureau of Ocean Energy Management ("BOEM"); \$14.9 million for Oil Spill Research; \$123 million for the Office of Surface Mining Reclamation and Enforcement ("OSMRE"); \$2.5 billion for environmental programs and management within the U.S. Environmental Protection Agency ("EPA"); and \$2.3 billion for the Bureau of Indian Affairs ("BIA"), including \$8.1 million for the Indian Guaranteed Loan Program.

On October 14, 2011, the Senate Subcommittee on Interior Appropriations released draft text of its FY2012 appropriations bill, proposing \$921 million for the BLM; \$6,500 new APD fees; \$60 million for the BOEM; \$133 million for the OSMRE; \$2.7 billion for environmental programs and management within the EPA; and \$2.3 billion for the BIA, including \$5 million for the

Indian Guaranteed Loan Program. It is unknown whether the draft spending measure will be considered through a mark-up by the Full Appropriations Committee due to contentious provisions that may be included in the bill related to the EPA.

b. Joint Select Committee on Deficit Reduction

With record high unemployment rates and the U.S. budget deficit for FY2011 at \$1.299 trillion, the second largest shortfall in history, the 12-member, bicameral Joint Select Committee on Deficit Reduction (“the Super Committee”) created by the *Budget Control Act* (Pub.L.112-25), is responsible to find \$1.2 to \$1.5 trillion in spending cuts by November 23, 2011. The Super Committee, while negotiating behind closed doors, requested recommendations from both the House and Senate Committees to strengthen the economy and reduce the deficit in respect to the Committees’ jurisdictions.

The Senate and House Committees with jurisdiction over Indian and Alaskan Native Affairs, submitted their proposals to the Super Committee. Stressing the high unemployment rate of 49 percent and health disparities in Indian communities, the SCIA, recommended exempting Indian programs from spending cuts. The SCIA also proposed the Super Committee adopt the *Carciari vs. Salazar* “fix” language to reaffirm the Interior Secretary’s authority to take land into trust for all Indian tribes.

The House Committee on Natural Resources’ majority stressed the importance of finding ways to reduce the Federal deficit while creating jobs. Their recommendations include opening energy production in the Artic National Wildlife Refuge (“ANWR”); increasing onshore and offshore energy production; disposing of surplus facilities and federal lands; and increasing access to timber and mineral resources on public lands.

The House Committee on Natural Resources’ minority provided several recommendations, including repealing tax breaks for oil and gas companies; increasing offshore oil and gas inspection fees; increasing onshore royalty rates; placing fees on non-producing oil and gas leases; and ending mandatory abandoned mine land payments to certified states and Indian tribes.

If the Joint Committee deadlocks or if Congress fails to approve its recommendations by December 23, 2011, \$1.2 trillion in spending cuts will be automatically triggered in January 2013. These reductions will be across-the-board cuts divided evenly between defense and non-defense, discretionary programs. The spending cuts will apply to Indian-related discretionary programs, including health care, energy development, education, housing, transportation, and public safety.

###

Paul Moorehead, Esq.  
(202) 230-5174  
[Paul.Moorehead@dbr.com](mailto:Paul.Moorehead@dbr.com)