

Indian Tribal Energy and Self-Determination Act of 2005

**Are We on the Brink of Change in Resource Management on
Native American Lands?**

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Professor Steven Wolf
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by
Michael Baker
Jessica Edick
Julia Raybould
Ned Shalanski

Introduction

Last August, President George W. Bush signed into law the Energy Policy Act of 2005. Title V of this law, known as the Indian Tribal Energy and Self Determination Act, addresses relations between Native American tribes and the federal government, by granting tribes more control over the development of their lands. However, a history of legislative deception and discrimination foster doubt that this law will be different. Through an analysis of the federal trust relationship, the current political agenda, stakeholders, and comparison to discourses on environmental governance, this legislation shows the potential to positively affect Native American energy resource management on tribal lands.

Background

By the mid-twentieth century, it was clear that United States government would not deliver Native Americans justice. Still fresh in the minds of many were the *Indian Removal Act* of 1830 and the *Dawes Act* of 1887, considered the most blatant acts of Congressional neglect to Native Americans. Both statutes raped Native Americans of their land, forcibly breaking up tribes and families to make way for early settlers. By 1934, the federal government unfairly appropriated over one hundred million acres of Indian land from these two acts alone.

In 1968 two hundred Native Americans gathered together to form AIM (American Indian Movement). Over subsequent years, AIM led the struggle for Native American civil rights. This culminated in 1973 with the Siege at Wounded Knee. For seventy-one days at the Pine Ridge Indian Reservation, part of the Oglala Sioux Native Reservation in southern South Dakota, AIM led the siege against BIA and Tribal Council forces. Its demands included a Congressional investigation into the misuse of Oglala Sioux funds by

the BIA and Department of the Interior. The hundreds of arrests and beatings that resulted inspired Native Americans to seek observed civil rights (Highfill, 2002).

The Siege at Wounded Knee inspired the formation of NANRDF (Native American Natural Resources Development Foundation) in 1974 and CERT (The Council of Energy Resources Tribes) in 1975. These two organizations coordinated their efforts to manage and market energy resources such as oil and coal. (Venables 4) In particular, CERT became a stumbling block for federal bureaucracies like the BIA and energy companies that historically had manipulated Native Nations for energy resources. Cornell Professor Robert Venables writes, “There is no doubt that CERT was a necessary antidote to cynical government leasing policies.” (Venables 5) The founding of CERT during the seventies paralleled the increase in activities towards Self-Determination policy (Utter, 2006). Self-determination is defined as the “decision-making control over one’s own affairs and the policies that affect one’s life” (O’Brien, 1989). Since the 1970s there has been an increase in legislation, regarding Native American rights, self-determination, and control over their energy resources. (See Appendix for Native American legislation timeline.)

Despite the success of organizations like CERT, federal mistreatment still occurred throughout the seventies and into the eighties and nineties. The administration of President Ronald Regan would prove especially neglectful of Native American rights. In particular, Regan’s administration was causal to the “Navajos’ Second Long Walk.” This forced removal of Navajo and Hopi Indians from their lands beginning in the 1970s and proceeding into the 1980s was again spurred by energy greed. In order to deal with the Navajos and Hopis separately, so as to minimize organized rebuttal efforts, Congress passed the Navajo and Hopi Land Settlement Act in 1974. This bill divided the Joint Use

Area between the two nations, land the two nations historically mutually used, thus breaking up energy claims from there which may have arisen. To discourage organized Indian protest, the Hopi Tribal Council, then a pawn for the BIA and Department of Energy, initiated a federally funded housing development project. Venables writes, “The project intended to build homes and lay pipes on lands below the mesas so as to break up several sacred ceremonial pathways, destroy sacred sites, and disrupt the traditional Hopi method of assigning land for cornfields and homes according to plans.” (6) Despite collective efforts by Native Americans, in the end, government, pressured by large energy corporations, seized Hopi and Navajo lands and removed more than ten thousand Native Americans from their lands (Venables 8).

From a glance at past regulation and management strategies by the BIA as well as state and tribal agencies, the tribes with energy resources have a cumulative loss of millions of dollars in royalties from oil and gas (Utter, 1993). Indian land trusts include 56,000,000 acres with large mineral deposits of coal, oil, gas and uranium. Over a quarter of the Native American population reside on reservations which have energy resources (Utter, 1993). Recent trends in legislation portray a possible shift in the federal-tribal relationship as self-determination appears more attainable.

Recent Legislation: The Energy Policy Act of 2005

Originally, the Energy Policy Act was introduced in 2003, but the arrival of the prescription drug bill pushed it off the agenda (Bilas, 2006). The Energy bill was re-introduced in April of 2005, and passed into law on August 8, 2005 (LOC, 2006). The most relevant parts of the legislation to Native American resource management are Sections 2603 and 2604 under Title V – Indian Energy, and Section 1813 under Title XVIII – Studies.

Section 2604 grants more authority and independence to Native American tribes in the pursuit of business agreements, leases and rights of way related to energy resources on their land. Section 2604(b) holds that “an Indian tribe may, at the discretion of the Indian tribe, enter into a lease or business agreement for the purpose of energy resource development on tribal land,” which indicates that the decisions regarding any energy resources belong to the tribe. The section continues to read that these decisions “shall not require review by or approval of the Secretary [of the Interior] if …” the lease or business agreement is executed pursuant to a tribal energy resource agreement approved by the Secretary, and the term of the agreement does not exceed 30 years or 10 years in the case of production of oil or gas resources (Energy Policy Act 2005).

This section also establishes Tribal Energy Regulation Agreements (TERA) which allows Native Americans to control energy resource development projects occurring on their land once they have gained overall approval from the Bureau of Indian Affairs (BIA). In the past, tribes had to receive permission from the BIA for every small action performed on their land. TERA removes the historically oppressive oversight by the BIA on all tribal actions, and in theory, as a tribe demonstrates its ability over time to develop resources in an environmentally sound and reliable manner, the BIA will approve even greater control (Bilas, 2006). Before obtaining a TERA, the tribe must prove its ability to monitor its own resources, and the resulting environmental impacts.

Also, in the new law, Section 2603 allows tribal nations to receive Energy Department grants which have only been available to states in previous years (Reese, 2005). Tribes may use funds in any manner that falls under the general provision of developing the tribes’ ability to enhance or support tribal energy regulation, enforcement or development. Examples from the law include “the development and enforcement of

tribal laws (including regulations) relating to tribal energy resource development... [or] the development of technical infrastructure to protect the environment" (Energy Policy Act, 2005, 176). According to supporters, the act is intended to help provide energy and boost the economy for these nations, and provide an additional source of energy for those not living on tribal lands as well (Reese 2005).

The most controversial aspect of the bill is Section 1813 that requires the Department of the Interior (DOI) and the Department of Energy (DOE) to conduct a joint study that analyzes the historic rates of compensation for any type of Right of Way (ROW). ROW contracts describe the leasing to energy companies the right to use tribal land to transmit energy through pipes or cables, or the exploration and development of energy resources on tribal land. Historically, development of energy resources has left the land spoilt, environmentally contaminated, and tribes without true compensation. Transmission of energy resources has led to massive spills and contamination of the air, water and land (Lester, 2005). Congress incorporated this study into the law as a compromise between industry and tribes interests (Bilas, 2006). Industry worries that ROW permits that soon expire not be renewed. Tribes threatened not to renew them if the prices they received were not higher. For example, since the seventies, the Rosebud Sioux tribe has received only \$14,000 for a ROW contract, in which high voltage lines cross their reservation in perpetuity for 25 miles (Haukus, 2006).

Agenda Setting

With a history of neglect, a variety of forces, not simply tribal stakeholders must have driven the inclusion of tribal interests in the Energy Policy Act of 2005. In fact, one primary driving force was the increasing demand for domestic energy supplies, including alternative and renewable sources (Bush, 2006, Bilas 2006). In a letter from President

George W. Bush to the American public, he considers a set of “energy challenges” and offers possible measures to take in response. These challenges include promoting energy conservation, repairing and modernizing our energy infrastructure, and increasing our energy supplies in ways that protect and possibly improve the environment. According to President Bush, the increase in worldwide demand, as well as political and geological instability, threatens our oil supplies in other nations and thus it is critical for America to turn to domestic energy sources (Bush, 2006). The past black outs and other energy crises in California exemplify a growing concern over energy resources. Since, comprehensive energy legislation is not common, western politicians supported the act despite the sections that were not in their interest such as the steps towards Native American self-determination through greater control of their energy resources (Bilas, 2006).

Currently, the US imports 58% of its total crude oil from other countries. In recent years especially this threat has become increasingly realistic, sending oil prices into record highs of no lower than \$40 per barrel since February 2005 (Bush, 2006). According to David Lester, Executive Director of CERT, Tribal lands could provide an important domestic source of fossil fuels. Though only 2% of US land is tribally owned, these lands contain more than 30% of US fossil fuel deposits (Reese, 2005). In addition to these fossil fuel reserves, tribal lands also represent a valuable source for renewable energy resources, such as solar or wind energy, as well as alternative forms of energy such new ethanol technology provided by crops and other biomass (Haukas, 2006).

The legislation was backed by western utility companies, western state congressmen, and tribal non-governmental organizations like CERT, and driven onto the congressional agenda as Title V. CERT was interested in the legislation because they believed it was a step in the right direction for a self-determination policy (Bilas, 2006).

With the support of CERT, the bill became much more powerful, as CERT represents at least a segment of the Native American resource tribes' interests.

The energy industry lobbied Congress for support. Industry wanted Congress to use its powers of eminent domain to ensure the security of energy transmission and development. In order to make the rates the tribes charge more fair to the Native Americans, Congress mandated the DOI and DOE conduct a joint study, Section 1813. This ROW issue has brought about a large response from the Native American tribes it could possibly affect. The fairness of this study is under debate. The fact that Representative Barton sponsored the bill makes tribes uneasy about the true motives of the bill and the end result of the study. Representative Barton from Texas is thought to be "in bed with" industry, and though there is no sign of bad intentions, it leaves more reason to suspect the integrity of the motives behind the legislation (Bilas, 2006).

Possible Outcomes of the Legislation

An overview of the important legislative sections can only reveal so much. The important question is how the legislation will actually be implemented. The joint study to decide the rates of compensation for ROW permits will not be presented to Congress until August 8, 2007. The ability of tribes to take advantage of TERA regulations will not be known until years later. Whether the bill is masquerading as a step in the right direction of Native American independence and control of their energy resources, while in reality opening up the land to further exploitation by utility companies and the federal government, cannot be determined. Yet, the possible outcomes can be outlined.

There are actors on both side of the issue debating the impartiality of the joint study currently being conducted. Many Indian tribes and groups conclude "that the study is the underpinning of a larger agenda on the part of certain oil and gas companies in

anticipation of negotiation struggles with Indian tribes over compensation for rights-of-way over Indian lands.” (Devers and Garcia, 2006). The Rosebud Sioux argue that the organizations the study has been contracted out to are more inclined to listen to industry, and not support tribal interest (Haukas, 2006). Other tribes feel that they have been taken advantage of in the past and believe that this legislation will allow them to avoid this in the future, as long as “language that would grant rights-of-way without gaining tribal consent” is not included (Allan, 2005). The Blackfeet Nation feels that there is “not enough time to properly involve tribal interests in the process” since the study will only take place over a one year period (Tatsey and Thomas, 2006). On the other hand, Kinder Morgan Energy Partners feels that the work plan for the report will “provide direction towards balancing the need for equitable compensation with tribal self-determination and related tribal interests, and important energy needs and policies” (McClain, 2006). The range of opinions and the media surrounding the report bodes well in general for a fair decision. The high profile of historically, unjust federal treatment to Native Americans makes the government cautious of continuing that trend (Bilas, 2006).

In the end, underlying all legislation, are the motives of the American government and society to assimilate tribes and ensure continuous access to domestic energy resources. There has always been a history of paternalism, in which the US government acts as a giver of knowledge and tribes remain on unequal footing. With this inequitable mindset behind every piece of legislation, it is no wonder that most laws and programs are viewed as disastrous and that most tribes no longer wish to support any legislation related to Native Americans (Bilas, 2006).

Conclusion: On the cusp of change

In the 18th and 19th Century, Native Americans were wards of the government,

and had no rights as citizens over their land or resources. Starting in the 1930s, Native Americans gained citizenship and in 1970s the theory of self-determination was first envisioned in legislation. The logic of self-determination is similar to that of community-based resource management in which the people who live near the resource, benefit from its productivity are the best people to manage it. The enactment of the Indian Self-Determination and Education Act of 1975, gave tribes more authority over their internal affairs, but did not effect environmental management significantly. The development of energy resources still had to be approved by the BIA.

Thus, the mindset of environmental management over resources on tribal land in the past few decades can be compared to Mazmanian and Kraft's (M&K)description of Epoch I or Dryzek's Administrative Rationalism. According to M&K, the beginning of environmental policy began in the late 1960s with a top-down, centralized, regulatory approach through the federal government, especially the EPA (M&K, 1999). The EPA set standards for pollution emissions, regulatory frameworks were passed in the form of the Clean Water Act, the National Environmental Policy Act, and the Clean Air Act. Management of Native American land is comparable. The BIA, like the EPA, regulates all energy resource development on tribal land. Approval must be sought throughout the length of the project. The system is hierarchical. Deference is given to the agency who can better undertake environmental impact statements and other processes associated with energy resource development. Unlike Mazmanian and Kraft's description, the governance framework guiding resource management on Indian lands has not shifted significantly in the 1980s and 1990s to more flexible frameworks focused on either market mechanisms (Epoch II) or finding a harmony between state, market and society through a sustainability framework (Epoch III).

But, the Energy Policy Act of 2005 has the potential to change the governance framework by giving the tribes more authority and control over their resources. As established in Section 2604, TERA's allow tribes to begin a process of proving their ability to manage their own resources and thus, manage their own agreements without constant interference from the BIA. Similar to Mazmanian and Kraft's Epoch II, the role of the state as stated in the legislation, would transform to mainly that of oversight and funding as evident in the Section 2603 and 2604.

In fact, the move from Epoch I to Epoch II relies heavily on the results from the study on historic rates of compensation for ROW permits. A trend in the shift from Epoch I to Epoch II is the decrease in centralized control, the increase in state flexibility and the increase in participation at lower levels like the local government and citizens. As part of the process of completing the study, the DOI and DOE must allow a public comment period, which just ended in the beginning of April (Bilas, 2006). A number of tribes submitted their opinions, documentation and data during this period, and the decision of the federal agencies to incorporate that data will be pivotal in making the transformation in environmental governance. If tribal opinion is incorporated into the study, and the results presented before Congress appear fair, the legislation can be said to have effectively moved tribal resource management from Epoch I to Epoch II.

Overall, M&K's analysis of the progression of environmental governance through certain Epochs over a the last forty years does not fit with this environmental governance issue. The complexities surrounding Native American rights and the current era of energy instability has slowed the evolution of this issue and it remains in Epoch I. Yet, the fair implementation of Title V may catalyze the shift of tribal energy resource governance to M&K's Epoch II.

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Appendix A: Indian Legislation Timeline*

- 1830 Indian Removal Act** – Forcibly removed Indians from their lands in the east to allow further white settlement
- 1887 Dawes Allotment Act** – Legislation ostensibly to provide land for Indians during the Oklahoma land rush, actually it “anglicized” Indian names and robbed them of their land (Repealed in 1934).
- 1906 Burke Act** – Allowed the Secretary of the Interior to grant citizenship and Patent-in-fee simple to Indians and their land which then allowed the taxation and for the land to revert to the US upon the death of the grantee.
- 1908 *Winters v. the United States*** – Supreme Court case that ruled that the water rights on reservations must be sufficient to support human life and agriculture.
- 1934 Wheeler Howard Act or The Indian Reorganization Act** - A reversal of the Dawes Act’s privatization of common holdings of American Indians and a return to local self government on a tribal basis.
- 1974 Navajo and Hopi Land Settlement Act** – Divided what had previously been “joint use” land between the tribes to prevent an organized resistance to planned energy development.
- 1975 Indian Self-Determination and Education Act**
- 1978 *Santa Clara Pueblo v. Martinez*** - Supreme Court case that affirmed a First Nation’s right to identify its own members.
- American Indian Religious Freedom Act**
- Indian Child Welfare Act**
- 1979 Archaeological Resources Protection Act**
- 1988 Indian Gaming Regulatory Act**
- 1990 Native American Graves Protection and Repatriation Act**
- 1994 American Indian Management Reform Act**
- 2005 Indian Tribal Energy Development and Self-Determination Act**

*Not an all-inclusive list, meant to illustrate the change in attitude toward American Indians