BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

Prepared Statement of Honorable Matthew J. Box, Chairman

SOUTHERN UTE INDIAN TRIBE

Hearing on Indian Energy Promotion and Parity

April 22, 2010

I. INTRODUCTION

Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee on Indian Affairs, I am Matthew Box, the Chairman of the Southern Ute Indian Tribe. I am honored to appear before you today to provide testimony regarding the discussion draft of the "Indian Energy Promotion and Parity Act of 2010," initially distributed to the public on March 12, 2010. The discussion draft is another step forward in our longstanding effort to level the playing field of opportunity when it comes to Indian energy development. We have also reviewed a second discussion draft of possible Amendments to the Energy Policy Act of 1992 dated April 16, 2010, which also contains some very positive suggestions. This statement presents our comments to each of those discussion drafts.

II. BACKGROUND

The Southern Ute Indian Reservation ("Reservation") consists of approximately 700,000 acres of land in southwestern Colorado within the Four Corners area. Our Reservation, which is a checkerboard of land ownerships, is located in the northern San Juan Basin, a prolific natural gas producing region. We collect royalties and severance taxes from our leased lands; however, we also generate substantial revenues from our oil and gas operating company and our gas gathering and treating companies, which conduct activities both on and off the Reservation. We are also actively involved in renewable energy development both on and off the Reservation.

In October of last year, our testimony outlined the challenges that we have faced and overcome in developing our energy resources. We have worked closely with this Committee to identify institutional obstacles to the successful development of energy resources in Indian country. We appreciate your willingness to address these issues. As we have stated repeatedly

to anyone who will listen to us, "We are the best protectors of our own resources and the best stewards of our own destiny; provided that we have the tools to use what is ours." Both of the discussion drafts reflect steps forward for energy development in Indian country.

III. GENERAL COMMENTS TO DISCUSSION DRAFT OF MARCH 12, 2010

The following comments reflect our general reaction to each of the three titles set forth in the March 12th discussion draft. We also believe that it may be helpful to the Committee to understand the context for our reaction to different sections of the discussion draft.

A. Findings and Purpose

Initially, we agree with the findings and purposes set forth in Section 2 of the discussion draft. We agree that outdated laws and regulations have impeded the development of energy resources in Indian country. We also believe that the principal purposes of this legislation should be to remove those legislative and regulatory obstacles and to provide incentives for the development of renewable and non-renewable energy resources in Indian country.

B. Title 1—Energy Planning

With respect to Title 1 of the discussion draft, there are some provisions of this title that we believe are critical improvements, others that are interesting, and some that we would oppose in their current form. We strongly support and urge you to retain Title 1, Section 103 (Predevelopment Feasibility Activities). This section allows temporary facilities to be installed on Indian land for purposes of data collection, without approval of the Secretary of the Interior or the Secretary of Energy, so long as the facilities will be removed and the testing activities concluded within two years. Inclusion of this section responds directly to testimony at field hearings regarding the bottleneck in obtaining Federal approval for the installation of temporary facilities on Indian land needed to evaluate the feasibility of wind power facilities. We would, however, suggest that the duration of the testing period be subject to renewal if needed to complete feasibility studies.

We also strongly support Title 1, Section 106 (Appraisals), although we would expand its provisions. This section would eliminate the requirement for the Secretary of the Interior to conduct appraisals of trust assets to be used in Indian energy development transactions if such appraisals are being conducted by a tribe pursuant to a contract under the Indian Self-Determination and Education Assistance Act ("638 Contract") or by a certified third party

appraiser under a contract with the tribe. The issue addressed by this section relates to current Interior regulations that call for a federal appraisal for many real property transactions, including the granting of rights-of-way across Indian lands. From a staffing perspective, the scope of the task makes prompt compliance impossible, which causes inordinate delays in processing rights-of-way needed in the conduct of ordinary business.

Additionally, however, the federal appraisal standards are inflexible. For example, a number of years ago our Tribe consented to the grant of a right-of-way to a telecommunications company that paralleled a major public highway leading to our headquarters. Our compensation was to be the exclusive use of strands of high-speed, fiber optic cable for transmission of electronic information needed to serve our extensive governmental and commercial operations. Obviously, this form of compensation did not fit easily into standard Federal valuation methodologies. Only through extraordinary efforts were we able to convince the BIA to grant the right-of-way, and, even then, the BIA was extremely reluctant to proceed. Our use of those fiber optic cables, however, has been extensive. In order to avoid similar delays in the future, we urge the Committee to expand the instances in which Federal appraisals can be avoided to include situations in which the tribal government expressly waives an appraisal. Additionally, we believe that individual appraisals are unnecessary when a tribe has legislatively adopted compensation schedules for categories of land that correspond to area land values. Our Tribe generally uses surface damage compensation fees based on different land classifications, which the BIA now allows us to rely upon in lieu of actual appraisals. Statutory confirmation of the acceptability of this approach would be helpful.

We also support Title 1—Sections 105 (Department of Energy Indian Energy Education Planning and Management Assistance), 107 (Technical Assistance and National Laboratories), 108 (Preference for Hydroelectric Preliminary Permits), and 109 (Study on Inclusion of Indian tribes in National and Regional Electric Infrastructure Planning). Each of these sections would be useful measures for tribes seeking to expand energy resource development.

We question the need for Title 1—Section 101 (Indian Energy Development Offices), which would authorize the creation of up to three offices as one stop shops of multiple Department of the Interior agencies with administrative jurisdiction over aspects of Indian energy development, including the BIA, the BLM, that National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Reclamation, the MMS, and the Office of Special Trustee. The

Indian Energy Development Offices would be set up in regions of significant Indian energy resource activity or potential, and, through centralized staffing, the Indian Energy Development Offices would presumably be better able to handle Indian energy development than current administrative structures. Although the establishment of Indian Energy Development Offices has been advocated by others in the Indian community, we seriously question the need for or the long-term viability of these multi-agency offices. All of the administrative agencies at the Department of the Interior share the federal trust responsibility. With the exception of the BIA, all of those offices also have responsibilities for activities on a variety of federal lands. Our experience indicates that when dealing with officials from non-BIA agencies, such as the BLM or the MMS, much can be accomplished through officials held in high regard and occupying positions of broad authority within their agencies, who have an awareness and sensitivity to Indian matters. We fear that, because of their value to their agencies for dealing with multiple issues, such officials would not be the ones selected to fill positions in Indian Energy Development Offices. With guidance from the Secretary, we believe that prioritization of Indian trust matters and inter-agency cooperation can be effectively addressed without the creation of Indian Energy Development Offices.

We are concerned that this legislation may not be the appropriate vehicle for considering matters addressed in Title 1—Section 102 (Indian Energy Program Integration Demonstration Projects). Section 102 establishes an elaborate process under which multiple federal agencies would be compelled to survey and report to the Secretary regarding Indian related programs within their departments. Following publication of these multiple programs, an Indian tribe could present a plan to the Secretary under which the tribe would propose to carry out those multiple programs in an integrated fashion with funding derived from the multiple agencies. In some respects, Section 102 appears to be an expansion of the 638 Contract process beyond the Department of the Interior with respect to community development and energy related matters. It is ambitious in scope and would clearly require greater inter-agency cooperation and coordination with respect to Indian-related programs. While Section 102 reflects worthwhile objectives, we are concerned that this proposal will require the involvement of multiple congressional committees and, because of its scope, may result in delays in congressional approval of other provisions in this legislation that are long overdue with respect to Indian energy development.

Our greatest concern extends to Title 1—Section 104 (Comprehensive Energy Resource Planning). In our view Section 104 undermines the fundamental underpinnings of the Indian Tribal Energy Development and Self-Determination Act of 2005, particularly the amendments to the Title XXVI of the Energy Policy Act of 1992 now found at 25 U.S.C. § 3504. In order to understand our position on Title 1—Section 104 of the discussion draft, it is helpful to review what Congress and Indian tribes attempted to achieve in Title V of the Energy Policy Act of 2005.

Because Indian energy leases, business agreements, and rights-of-way generally require the approval of the Secretary, and because such approval constitutes Federal action, consideration of such a Federal action triggers compliance with the National Environmental Policy Act of 2005 ("NEPA"). NEPA is a procedural statute designed to ensure that Federal agencies evaluate alternatives to a proposed Federal action, taking into consideration the potential environmental and social impacts of the alternatives and the views of the public. Except for the United States Government, no owner of land in the United States, other than an Indian tribe or an Indian allottee, is subject to NEPA with respect to land use transactions. Unlike Indian lands, which are owned beneficially by Indian tribes or Indian individuals, other Federal and public lands are generally owned for the benefit of the public at large. Many tribal representatives have felt that application of NEPA to tribal land use decisions unfairly encroaches on tribal sovereignty. To be sure, Indian tribes are bound to substantive environmental protection laws of general application when Congress has indicated its intent to bind tribes. So long as a proposed energy lease, business agreement, or right-of-way was to be performed in compliance with those substantive laws, however, the evaluation of multiple alternatives to a tribal land use decision and inclusion of the public in second-guessing a tribe's decision were objectionable. Further, in the context of energy development, the NEPA process penalized tribes. Energy development on private lands adjoining tribal land does not require NEPA compliance. Thus, while Federal officials undertook detailed evaluation of alternatives to a tribal energy lease, for example, tribal oil and gas resources were being drained by their neighbors. Particularly for tribes, like the Southern Ute Indian Tribe, with sophisticated energy and environmental staffs and decades of proven success, the NEPA review process was frustrating and damaging.

After several years of legislative consideration, Congress offered tribes the alternative reflected in Section 2604 of the Energy Policy Act of 2005, through the vehicle known as a "Tribal Energy Resource Agreement" ("TERA"). A TERA is a master agreement which may be entered into between a tribe with demonstrated capacity and the Secretary. Upon entering into a TERA, an energy-related lease, business agreement, or right-of-way with a TERA-tribe no longer requires Secretarial approval, and, thus, no longer requires NEPA review. In place of NEPA, however, Congress required that a TERA-tribe establish a tribal environmental review process that allows for limited public participation. Under the statute, a TERA would also permit a Tribe to assume Federal administrative functions related to review and operation of energy development on tribal lands.

Inexplicably, Title 1—Section 104 appears to increase rather than decrease application of NEPA in Indian country. Section 104 establishes mechanisms, utilizing 638 Contracting, under which Indian tribes may undertake preparation of comprehensive programmatic environmental review documents related to energy resource development. These programmatic environmental review documents are themselves subject to NEPA review. Even if a tribe were to participate under Section 104, nothing in the discussion draft would eliminate Secretarial approval or subsequent NEPA review of an actual energy lease, business agreement, or right-of-way proposed in conformity with the programmatic NEPA planning document. Significantly, Section 104 would also re-write the prior TERA statute to now require that a tribal TERA environmental review process satisfy new Federal standards to be developed by the Office of Indian Energy and Economic Development. In our view, Section 104 is a step backwards, not a step forward.

In summary, with respect to Title 1 of the March 12th discussion draft our position is as follows:

Section 101 (Indian Energy Development Offices) – Seriously question.

Section 102 (Indian Energy Program Integration Demonstration Projects) – Seriously question

Section 103 (Predevelopment feasibility activities) – Strongly support, but would allow for renewals.

Section 104 (Comprehensive energy resource planning) – Strongly oppose

Section 105 (DOE Indian energy education planning) – Support

Section 106 (Appraisals) – Strongly support, but would expand

Section 107 (Technical assistance from DOE National Laboratories) – Support

Section 108 (Preference for hydroelectric preliminary permits) – Support

Section 109 (Study on inclusion in electrical infrastructure planning) – Support

C. Title II—Energy Development and Energy Efficiency

Title II—Section 201(Leases and Rights-of-Way on Indian Land) proposes a number of statutory changes designed to address existing statutes affecting Indian mineral and non-mineral leasing and rights-of-way. The first issue addressed by Section 201(a) and (b) is to confirm that a mineral lease of allotted or tribal land may also include an associated right-of-way without the necessity of a separate right-of-way document. We generally support this proposal; however, we also believe that this provision requires a drafting change. Specifically, in addressing the contemporaneously issued right-of-way under the Allottee Mineral Leasing Act of March 3, 1909 ((25 U.S.C. § 396), Section 201(a)(2)(B)(i) would eliminate the separate approval of "the applicable Indian tribe . . . pursuant to the Act of February 5, 1948 (25 U.S.C. 323 et seq.)." See page 34, lines 14-17 of the March 12th discussion draft. This provision should be changed to confirm that any proposed right-of-way crossing tribal land issued contemporaneously with an oil and gas lease of allotted land, must be separately approved by the applicable Indian tribe pursuant to the Act of February 5, 1948 (25 U.S.C. § 323 et seq.). Since passage of the Indian Reorganization Act of 1934 ("IRA"), Congress has consistently recognized that tribal consent is a pre-condition to the valid use of tribal land. That consistent treatment should not be altered in this provision.

The second issue, which is addressed in Section 201(c) and (d) of the March 12th discussion draft, is the duration of leases that may be issued by tribes under the Long-Term Leasing Act (25 U.S.C. § 415(a)) or by tribal corporations chartered under Section 17 of the IRA (25 U.S.C. § 477). Section 201(c) and (d) would expand the terms of those durational provisions, and, because they would increase the options available to tribes, we support those provisions.

Title II—Section 202 (Application for Permit to Drill Fees Not Applicable) of the March 12th discussion draft would confirm that increased fees imposed by the Bureau of Land Management for each application for a permit to drill ("APD") submitted to that agency would not apply to APDs submitted with respect to Indian lands. We support this change.

Title II—Section 203 (Distributed Energy and Community Transmission Demonstration Projects) of the March 12th discussion draft would authorize the Director of the Office of Indian Energy Policy and Programs for the Department of Energy to conduct not less than 5

demonstration projects to increase the availability of energy resources to Indian tribes and Alaskan Natives. We support this proposal.

Title II—Section 204 (Environmental Review) authorizes participating Indian tribes to undertake NEPA review for energy projects developed on tribal land that would otherwise be applicable to the Secretary of Energy if the Secretary of Energy were conducting that activity with respect to a Federal project. We do not clearly understand the context of this provision, but surmise that it is intended to address NEPA compliance that might arise in the context of a DOE loan or grant to an Indian tribe for an Indian energy project. We object to the purpose as stated to the extent that it suggests that NEPA should apply to "all energy projects developed on tribal land." See page 41, lines 5-12 of March 12th discussion draft. In that regard, if a tribe undertakes such activity directly without a lease or other instrument requiring Secretary of the Interior approval, then NEPA would not typically apply to the tribe's direct energy development activity, and we do not believe that the statement of purpose in Section 204 should conflict with existing law. A more accurate statement of purpose, consistent with existing law, would be to ensure that NEPA review for Indian energy projects is completed with respect to the Secretary of Energy's actions, when applicable. In addressing that substantive issue, we submit that the best approach would be to exempt NEPA review by the Secretary of Energy with respect to any such projects on tribal land that do not require NEPA review by the Secretary of the Interior and to also authorize the Secretary of Energy to rely upon and concur in NEPA review undertaken by the Secretary of the Interior when applicable under existing law. Notwithstanding the positive approach authorizing delegations to tribes to conduct NEPA review undertaken on behalf the Secretary of Energy, the current language of Section 204 implicitly doubles the NEPA review that must be undertaken in instances in which both the Secretary of the Interior and the Secretary of Energy have some involvement. We believe that the assumptions underlying Section 204 should be more carefully examined and that a more constructive solution to non-duplication of NEPA review for actions involving multiple Federal agencies should be pursued.

We generally support Title II—Section 205 (Department of Energy Loan Guarantee Program), which would provide clarification and assist in implementation of loan guarantees by the DOE for Indian energy projects proposed by Indian tribes or tribal energy resource development organizations.

We also support Title II—Section 206 (Inclusion of Indian Tribes in State Energy Conservation Plan Program), which would expand tribal participation in energy conservation planning programs currently available to states.

Additionally, we support Title II—Section 207 (Home Weatherization Assistance) which would expand access for home weatherization assistance to tribes and would increase the administrative role of the Secretary of the Interior for such programs.

We also support Title II—Section 208 (Tribal Forest Assets Protection), which would provide for tribal demonstration projects related to use of woody biomass for electrical power generation and distribution.

In summary, with respect to Title II of the March 12th discussion draft our position is as follows:

Section 201 (Leases and rights-of-way on Indian land) – Support with drafting revision.

Section 202 (Application for permit to drill fees not applicable) – Strongly support.

Section 203 (Distributed energy demonstration projects) – Support.

Section 204 (Environmental Review) – Oppose unless substantially revised.

Section 205 (DOE loan guarantee program) – Support.

Section 206 (Inclusion of tribes in state conservation programs) – Support.

Section 207 (Home weatherization assistance) – Support.

Section 208 (Tribal forest assets protection) – Support.

D. Title III—Energy Financing

Title III—Section 301 (Transfer by Indian tribes of credit for electricity produced from renewable resources) creates a special rule allowing an Indian tribe's ownership interest in a renewable energy facility to be treated as that of a co-owner for purposes of allocating production tax credits under Section 45 of the Internal Revenue Code. We strongly support this provision; however, we also believe that additional provisions should be included in any final legislation to reflect the indirect participation of an Indian tribe. Currently, there is an economic disincentive for Indian tribes to acquire or retain ownership interests in renewable energy facilities because there is no way to monetize production tax credits associated with the tribe's ownership interest. Production tax credits are a critical component in the economics of renewable energy projects. Our tribe is the sole owner or member of an alternative energy limited liability company that has attempted to invest in major wind projects in the West. The

absence of tax credits attributable to our ownership interests adversely affects the economic viability of those projects if we participate. Additionally, under existing law, tribal participation complicates the structure and the timing of our potential investments.

It is our understanding that the intended result of Section 301 would be to allow an Indian tribe to transfer the tax credits associated with power production from a renewable energy facility and attributable to the tribe's ownership interest to the taxpaying partner. Currently, the proposal addresses only the transfer of energy production, and we hope that final legislative language eliminates any ambiguity with respect to the assignable character of the production tax credits, while allowing the tribe to retain the sales revenue attributable to its ownership percentage.

With regard to such facilities, it is most likely that a taxpaying partner and an Indian tribe, or a business entity wholly owned by the tribe, would form a special purpose entity, such as a limited liability company, which would own the renewable energy facility. Tax liabilities would typically track ownership percentages in the limited liability company. Use of such special purpose entities is a common and accepted way to limit general (non-tax) liability for the participating partners beyond the value of the assets of the project. We urge the Committee to consider modifying the definition of "Indian tribe" for purpose of Section 45 of the Internal Revenue Code to also include a business entity wholly owned by an Indian tribe. See page 56, line 22 through page 57, line 8 of March 12th discussion draft. Modification of the definition would allow for the following structure: (i) owner of renewable energy facility is a limited liability company; (ii) owners or members of the limited liability company that owns the renewable energy facility, are (x) a wholly-tribally owned business entity, and (y) a taxpaying entity. We urge the Committee to give Indian tribes the same business flexibility that other investors possess by allowing for the tribe's participation to be indirect rather than direct ownership of a portion of the facility.

We also strongly support Title III—Section 302 (Investment Tax Credits), which we understand would allow investment tax credits attributable to an Indian tribe's ownership interest in an energy property to be monetized. This provision would clearly provide increased tax incentives for energy investment in Indian country, while also encouraging ownership retention by an Indian tribe in such projects. Again, for the same reasons discussed with respect to Title III—Section 301, above, we would urge the Committee to consider language that would allow

the contemplated allocation of basis to flow from an Indian tribe's wholly-owned business entity to the other investor so that tribes would have the option of holding ownership of an energy property indirectly rather than only directly through the tribal government. This treatment would, for example, be consistent with the use of tribal corporations under Section 17 of the IRA.

Title III—Section 303 (Permanent Extension of Depreciation Rules for Property on Indian Reservations) is another provision of Title III that we strongly support. Use of accelerated depreciation under Section 168(j) of the Internal Revenue Code has encouraged investment in Indian country, and tribal leaders have repeatedly requested that the accelerated depreciation rules be made permanent with respect to on-reservation investments. Again, with respect to utility scale investments, accelerated depreciation is a key factor in economic feasibility. As with Section 301 and Section 302 above, we would urge the Committee to incorporate language permitting a disproportionate allocation of depreciation to a taxpaying partner of an Indian tribe or a business entity wholly owned by the tribe.

We also support Title III—Section 304 (Permanent Extension of Indian Employment Credit). Permanent extension of the Indian employment credit under Section 45A of the Internal Revenue Code would continue to encourage employers in Indian country to hire Indians.

Finally, we also support the statutory changes reflected in Title III—Section 305 (Extension of Grants for Specified Energy Property in Lieu of Tax Credits). These proposed changes would extend the time periods during which investors in qualified renewable energy equipment could make such investments and request grants in lieu of tax credits under Section 1603 of division B of the American Recovery and Reinvestment Act of 2009. Additionally, this section would make Indian tribes eligible for such grants. Currently, tribes are not eligible for this favorable tax treatment, yet they are looked to by their communities for leadership with respect to such investments.

In summary, with respect to Title III of the March 12th discussion draft our position is as follows:

Section 301 (Transfer by Indian tribes of renewable energy production tax credits) – Strongly support, but also urge modification to include wholly-owned business entities of tribes.

Section 302 (Investment tax credits) – Strongly support, but also urge modification to include wholly-owned business entities of tribes.

Section 303 (Permanent extension of depreciation rules) – Strongly support but also urge modification to include assignments of depreciation from Indian tribes or wholly-owned business entities of tribes.

Section 304 (Permanent extension of Indian employment credit) – Support.

Section 305 (Extension of grants under 1603 of ARRA) – Support.

E. Title IV—Amendments to Indian Energy Policy Laws

Title IV—Section 401(Amendments of Indian Energy Policy Laws) proposes a number of clarifying changes to the Energy Policy Act of 2005, some of which would help implement changes addressed in previous sections of the March 12th discussion draft. We have no objections to those changes; however, our previous comments regarding Section 101 (Indian Energy Development Offices) should be considered with respect to Section 401(b) of the discussion draft.

IV. GENERAL COMMENTS TO DISCUSSION DRAFT OF APRIL 16, 2010

The April 16th discussion draft addresses two principal matters: (i) Amendments to the Indian Land Consolidation Act (25 U.S.C. §§ 2201 et seq.) and (ii) Amendments to the Energy Policy Act of 1992 (25 U.S.C. §§ 3501 et seq.). Our remarks are limited to the proposed amendments to the Energy Policy Act. As our previous comments have indicated, our Tribe was a vigorous supporter of Title V of the Energy Policy Act of 2005, including the provisions allowing for a TERA between the Secretary and a qualified Indian tribe. Our support for the TERA provisions was driven not only by frustrations in obtaining prompt NEPA review for energy related transactions requiring Secretarial approval, but was also motivated by our belief that our internal capabilities in evaluating such transactions exceeded those of the BIA. Since the mid-1970s, we have taken a hands-on approach to management and development of our energy resources. Our extensive staff includes geologists, engineers, land specialists, environmental specialists, information technology experts, and lawyers. Our successful operations in energy development have not been limited to on-Reservation activities, but have also included exploration and production activities in more than 10 states and the Gulf of Mexico. For us, the costs associated with delays in obtaining Secretarial approval were not offset by added value arising from Secretarial review.

Notwithstanding our support for the TERA provisions contained in 25 U.S.C. § 3504, neither our Tribe nor any other tribe has yet entered into a TERA. There are a number of reasons why no TERA has yet been completed. First, the process of adoption of implementing regulations took several years. Second, the regulations once promulgated withheld from tribes the opportunity to assume "inherently Federal functions" related to their lands. This term was not mentioned as a limitation in the statute and remains undefined in the regulations. The regulations also left unanswered how the Secretary would measure tribal capacity. Third, tribes remain reluctant to include the public in a tribal environmental review process. Fourth, the financial expense of taking over Federal administrative duties is imposing and TERAs provided no funding mechanism. And fifth, TERAs are viewed by some tribal leaders as relieving the Federal government of its trust duties, primarily because of the Federal government's poor performance of those duties.

The April 16th discussion draft proposes statutory changes that address some of the factors mentioned above, and we generally support the proposed modifications. The remaining comments address specific provisions contained in the April 16th discussion draft.

A. Definitions (25 U.S.C. § 3501)

The April 16th draft would supplement the definition of "tribal energy resource development organization," which is an organization of two or more entities, at least one of which is an Indian tribe, to allow such an organization to enter into a lease or business agreement, or acquire a right-of-way from an Indian tribe under specific circumstances subsequently addressed in the statute. It should be noted that one of the suggestions contained in Section 401 of the March 12th discussion draft would amend the term "sequestration" set forth in 25 U.S.C. § 3501(10). We are supportive of both of those definitional changes.

B. Amendments to 25 U.S.C. § 3504(a)(2) and 3504(b)

The proposed amendments to 25 U.S.C. §§ 3504(a)(2) and 3504(b) would significantly and beneficially expand the instances in which energy leases, business agreement, and rights-of-way involving tribal land could be entered into without Secretarial approval. So long as the Indian tribe retained majority control of the energy lease, business agreement or right-of-way throughout the duration of the instrument, and provided that a tribe had successfully carried out its responsibilities over a 7-year period under a land use-related 638 Contract, Secretarial approval would not be required. We strongly support this approach. First, it substantially

eliminates the uncertainty associated with measuring tribal capacity under the TERA mechanism. Second, it eliminates the Secretarial approval process when the affected, qualified tribe retains ownership and control over the activities being conducted on tribal land.

C. Amendments to 25 U.S.C. § 3504(e) (TERA Requirements)

The changes to 25 U.S.C. § 3504(e) found on pages 17, 18, and 19 of the April 16 discussion draft are largely clarifying measures, which we support. We also support the additions of 25 U.S.C. § 3504(e)(2)(F) and (G), which add certainty to the TERA disapproval process and tribal capacity determinations for tribes with track records of positive performance under the 638 Contract or self-governance programs of the Indian Self Determination and Education Assistance Act. The changes to 25 U.S.C. § 3504(e)(6) maintain the basic concept of retained Federal trust responsibility reflected in the existing statute, but affirmatively restate the circumstances under which Federal liability for breach of those duties will exist. We believe that this clarification will provide meaningful assurance to Indian tribes considering the TERA option.

D. Proposed 25 U.S.C. § 3504(g)

This proposed addition would include a funding component to TERAs that is lacking under existing law, by incorporating the 638 Contracting and self-governance mechanisms and applying them to TERAs. Addressing the administrative cost issue associated with TERAs is a significant positive development.

E. New Provisions Related to APD Fees

Unlike the discussion draft of March 12th, the fee provisions of April 16th would allow APD fees associated with Indian lands to continue to be collected; however, the use of those fees by the BLM would be required to address permitting and inspection costs associated with development of Indian lands. While we support the discussion draft provisions of March 12th, the provisions of the April 16th draft are a significant improvement over existing BLM practices.

Conclusion

The two discussion drafts addressing Indian energy issues are responsive to concerns raised by tribes in testimony already presented to this Committee. We have been honored by your interest and by our inclusion in the process. We hope that our comments are useful to the Committee in refining and formally introducing legislation on these matters in the near future.