

Before the  
US House of Representatives  
Committee on Natural Resources  
Subcommittee on Indian, Insular and Alaska Native Affairs

Tribal Prosperity and Self-Determination through Energy Development  
October 4, 2016

Statement of  
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and

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I would like to take a moment to thank you for the opportunity to speak to you today in beautiful Santa Fe. My name is Eric Henson, and I am a Senior Vice President at Compass Lexecon, which is an economics consulting firm with offices located around the world.<sup>1</sup> I primarily work out of the Compass Lexecon offices in Boston, MA and Tucson, AZ. In my economics consulting, I have worked on numerous projects involving oil and gas development, coal production, electric utilities, and the energy marketplace more broadly. A number of my consulting engagements have involved working with Native American tribes such as the Navajo Nation and the Crow Nation, both of which have substantial energy resources of the types at issue here. I also serve as a Research Affiliate with the Harvard Project on American Indian Economic Development,<sup>2</sup> and in that position I am engaged in an ongoing effort to understand what makes tribal economies work best.<sup>3</sup> I am a citizen of the Chickasaw Nation, and I grew up in one of the country's great oil producing regions, the Permian Basin of West Texas.<sup>4</sup>

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<sup>1</sup> Compass Lexecon is an international economics consulting firm and is part of FTI Consulting.

<sup>2</sup> Referred to herein as “HPAIED” or “Harvard Project.” The Harvard Project is based at Harvard’s John F. Kennedy School of Government in Cambridge, MA. We partner with the Native Nations Institute, which is located at the University of Arizona in Tucson, AZ. The Native Nations Institute provides executive education and leadership programs, uniquely tailored to senior executives and managers within Native communities.

<sup>3</sup> See, e.g., The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under US Policies of Self-Determination*, New York: Oxford University Press, 2008.

<sup>4</sup> I appear today not as a representative of Compass Lexecon or Harvard University. Furthermore, I have no financial interest in pending legislation that might impact my opinions in any way.

I have a Master's Degree in Public Policy from the John F. Kennedy School of Government at Harvard University, an MA in Economics from Southern Methodist University, and a BBA in Business Economics from the University of Texas at San Antonio. I attended Harvard as the Kennedy School's Christian Johnson Native American Fellow. I have been engaged in Indian affairs since graduate school; my Master's thesis at Harvard examined the importance of a uniform commercial code for economic development on the Crow Reservation.<sup>5</sup> I've had the great privilege of visiting many of the tribal lands we will be discussing today.

## **THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT**

Since its inception in 1987, the Harvard Project has collaborated with Native Nations to understand how and why tribal economies, social institutions, and political systems either succeed or fail. At the Harvard Project, my colleagues and I undertake research and teaching specifically tailored to meet the needs of tribal communities and tribal leadership.

One of the major questions the Harvard Project has been grappling with is: How is it that, despite widely-cited poverty and social distress, which is prevalent across numerous American Indian reservations, more and more tribes have been able to cast off the bonds of external economic dependence? We have seen an increasing number of tribes taking part in what we have often referred to as an "Indian Renaissance," where dynamic self-sustaining economies are created by tribal actions. These economies are built upon, and supported by, vibrant political and social institutions. The success stories are wide-ranging, from the property development and management of the Tulalip Tribes in Washington State, to sustained energy-based projects at Southern Ute, to the diverse array of professional and construction services offered by Ho Chunk, Inc. in Nebraska. Many tribes have begun actively challenging century-long economic paradigms and demonstrating effective self-determination and governance. It is curious that, contemporaneously, a number of other tribes experience continued economic hardship, high unemployment, rampant social and physical health challenges, and the like. What might be the causes of the striking economic and social divergences within Indian Country?

In the first years of HPAIED, the founding researchers recognized that what was needed in Indian Country was not additional unsolicited interference from outsiders, but culturally-specific educational programs and research, developed for tribes, and undertaken hand-in-hand with tribal governments. The results of these studies are channeled back to those who must deal with the daily challenges of improving the economies and social conditions in Native communities (i.e., Indian people working in Indian Country).

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<sup>5</sup> A copy of my curriculum vitae is attached as Appendix A.

In accordance with the above-mentioned approach, graduate students at the Kennedy School of Government and at the Native Nations Institute (working in close coordination with tribes) have completed several hundred projects and field research reports, many of which were on matters specifically requested by the tribes. These field projects have ranged from welfare reform at the Navajo Nation to bison ranching at Cheyenne River, and from judicial reform at Hualapai to ski resort management for the White Mountain Apache. As part of our organization's mission, many of these reports are available on our website from which all tribes can learn.<sup>6</sup>

Another important facet of the Harvard Project's work is our *Honoring Nations* program. *Honoring Nations* is a competitive awards program that identifies, celebrates, and shares outstanding success stories in tribal governance. We honor tribes that exemplify successful tribal governance, and to date the Harvard Project has recognized tribal governmental programs ranging from the Eastern Band of Cherokee for their Tribal Sanitation Program (in 1999), to the Effective Law Enforcement Program of the Gila River Police Department (in 2003), to the Seniors Skilled Nursing Facility at the Tohono O'odham Hospice (in 2008), to the Tribal Fisheries Department at Nez Perce (in 2015). Since 1999, we have honored about 130 tribal governmental initiatives.<sup>7</sup> HPAIED remains committed to empowering Native Nations through identifying the common characteristics of tribes that are successfully charting a course towards a socially, culturally, politically, and economically healthy future.

## RESEARCH FINDINGS

Prior to the 1980s, there was a notable lack of research pertaining to economic development in Indian Country. The small amount that was available contained at least two consistent themes: First, the overriding focus of thinking and policymaking was on what the federal government could do to create jobs, raise income, and increase household wealth. This helped contribute to the unbalanced relationship between the Bureau of Indian Affairs ("BIA"), other federal programs, and the tribes, which often became dependent on federal funding and expertise.

Second, the federal policies and programs that did exist within Indian Country constituted what we refer to as a "Planner's Approach" to economic and community development. The Planner's Approach was simplistic in treating economic development as a fundamental question

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<sup>6</sup> See the Harvard Project website at <http://www.hpaied.org/>.

<sup>7</sup> For more examples, see "Honoring Nations: Directory of Honored Programs 1998-2010," *Honoring Nations Program*, The Harvard Project on American Indian Economic Development, at pages 9 and 11, at <http://hpaied.org/sites/default/files/documents/finalhndirectory.pdf>.

of resources and expertise, as opposed to one of incentives and institutions. Viewing the world through the lens of the Planner's Approach, academics, government officials, and tribal leaders interpreted the underdevelopment seen on reservations as stemming from a lack of access to financial capital, technical skills, and managerial expertise. The Planner's Approach typically provided grants and loans in a well-intended effort to stimulate economic development. However, this heavy-handed approach was driven by federal budget allocations and has had a strong adverse impact on many Native communities. This approach created a world in which grant writers were always in short supply and tribal politics revolved around which elected officials could most effectively capture (or perhaps extract), funds from the federal government. Under the Planner's Approach, what was originally intended to be a solution to underdevelopment instead seems to have perpetuated it, degrading the core tenets of economic development into a series of rent-seeking behaviors.<sup>8</sup>

A fundamental flaw of the Planner's Approach was the erroneous assumption that a nation's economic development is a mechanical process that can be achieved by way of the imposition of a predetermined blueprint. While it is advisable and even advantageous to plan ahead, it is an exercise of hubris to think that one can "plan" an economy, in the sense of expecting tribal councils, national legislatures, or federal planners to correctly select a portfolio of businesses, projects, and activities that will not only survive, but will meet the needs of tribal citizens, and will thrive over time.<sup>9</sup>

The discussion above raises one obvious question: If one cannot "plan" an economy to arrive at productive and sustainable development, what is the alternative? While there is no predetermined blueprint for success, there are some general tenets for effective, long-term economic development, and these tenets are now being demonstrated by a large number of tribes in Indian Country. We have found that these tenets of sustainable development are applicable to developing nations the world over, and are being acted upon by many successful tribes in Indian Country. A discussion of these tenets is found below, and in contrast to the Planner's Approach,

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<sup>8</sup> "Rent seeking" is a term from economics and occurs when an organization or individual(s) seeks to obtain economic gain from others without reciprocating in the form of further wealth creation.

<sup>9</sup> Consider the natural experiment of the German economies after World War II. The parts of former Germany subjected to market forces (i.e., West Germany) became a powerhouse of development in post-war Europe. The parts of the former Germany subjected to centralized planning (i.e., East Germany) stagnated and the citizenry had to be forcefully restrained from leaving for better opportunities elsewhere. For a discussion in the context of Indian Country, see, the Statement of Joseph P. Kalt, *Establishing a Tribal Development Corporation, Before the United States Senate Committee on Indian Affairs*, September 20, 2004 (hereinafter, "2004 Kalt Testimony"), noting that "Economic development is an organic process. In an environment in which opportunities are subject to the vicissitudes of competition and continually changing marketplace conditions, economic development occurs as the sum of small, adaptive decisions of myriad individuals who by luck or preparation are in the right place at the right time to take advantage of unplanned prospects. Economic development is much more analogous to tenacious plants looking for places to pop up and take root, than to an engineered system."

we refer to tribes that are building their communities under these principles as governments engaged in a “Nation Building” process.<sup>10</sup>

**Institutions Matter:** The nature of a society’s institutions, whether social, cultural, and/or governmental, determines the incentives around productive or unproductive activity. Within the scope of our research, the Harvard Project and the Native Nations Institute have consistently found that a tribe’s economic development is anemic, or worse, unless the tribe’s institutions personify at least three characteristics. The key attributes are:

- *A Rule of Law.* A respect for tribal law and the establishment of legitimate means for dispute resolution.
- *Separation of Politics from Day-to-Day Administration and Business Affairs.* Enterprises and economic transactions are free from societal politics and power struggles.
- *Efficient Bureaucracy.* Clarity of procedures, good record-keeping, efficient administration processes, reliable computer networks, and the like.

**Culture Matters:** Given the importance of institutions within a society, the social norms and worldview of the citizens that interact with those institutions also matter.<sup>11</sup> This lesson, observed repeatedly in our research with Native Nations, is an important tenet regarding economic development. The importance of local conditions and political willpower in building and promoting effective institutions as part of economic development cannot be ignored. However, our research in Indian Country indicates that, for governing institutions to provide the foundation upon which sustained economic development can take place, there first must be a *cultural match*.<sup>12</sup>

One can think of cultural match as the consonance between the structure of a society’s formal institutions of governance (and its economic development initiatives) and its underlying norms of political power and authority (i.e., culture).<sup>13</sup> In order to function effectively, a society’s institutions and corresponding economic development must be consistent with underlying cultural, political, and organizational norms. Simply put, they must be seen as legitimate in the eyes of the society’s citizenry.

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<sup>10</sup> For more information on the Nation Building approach, see: The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under US Policies of Self-Determination*, New York: Oxford University Press, 2008, starting at page 26.

<sup>11</sup> Miriam Jorgensen, *Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development*, Doctoral Dissertation, May 2000, at page 129.

<sup>12</sup> 2004 Kalt Testimony at pages 13-14.

<sup>13</sup> 2004 Kalt Testimony at page 14.

**Sovereignty Matters:** Self-determination is a key issue within Indian Country and its importance to economic development cannot be overlooked. There are four inseparable issues connecting sovereignty and self-determination to economic and community development within Indian Country. They are:

- *Design issues.* Without self-determination, it is impractical (and perhaps impossible) to change institutions so that they more closely match those of Native Nations and their unique economic needs.
- *Ownership issues.* Absent a strong sense of ownership, it is unquestionably difficult to get a local community involved and interested in the payoff from tribal economic investments.
- *Accountability issues.* Linked closely with the concept of ownership, those making the investments and program decisions need to be held accountable for how all federal (and tribal) resources are used.
- *Leadership development issues.* There are an increasing number of astute, capable, highly experienced leaders emerging within Indian Country. This is demonstrated by tribes (and tribal leadership) taking charge of issues irrespective of historical (or concurrently existing) federal support.

After years of research, it has become clear that tribes must have autonomy in order to foster institutions that are a cultural match for their societies. Successful tribal governments all exhibit effective institutions paired with a cultural match. We have come to believe that this is why policies of sovereignty and self-determination have been the only strategy that has shown any prospect of breaking the patterns of poverty and dependence that became so familiar on reservations from the late 1800s until at least the 1990s. It is only logical that it requires self-rule for a culture to put in place institutions that are a cultural match. Thus, we can restate the uniform qualities that have marked successful economic development in Indian Country as aggressive assertions of sovereignty, resulting in self-governed institutions that are characterized by a cultural match. It has repeatedly been shown that, when a tribe takes control of its institutions and runs them in congruence with its own cultural norms, the result is a set of economic, social, and political systems that work for its citizens.<sup>14</sup> Continued dependence on the federal government for grants and guidance removes accountability for tribal leadership and undermines the processes necessary for stable and lasting economic development. The negative results of such dependence should not be surprising.

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<sup>14</sup> Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," *Joint Occasional Papers on Native Affairs*, No. 2003-02, 2003.

## ENERGY DEVELOPMENT ON NATIVE AMERICAN LANDS

The importance of furthering Native American economic development and reducing federal dependence can be highlighted by looking the socioeconomic conditions of Native American tribes. Consider a few basic statistics, illustrated in Figures 1 and 2. As shown in Figure 1, the annual per-capita income of American Indians living on the reservations has been consistently lower than (and often less than half that of) the US average. In the period between 2006 and 2010, American Indians living on reservations had an average per-capita income of \$12,459, compared to the national average of \$26,893. Family poverty levels reflect this same shortfall: despite a decrease from 1990 to 2010, the family poverty rate for Native Americans in the 2006-2010 time period was 33.5% for the Navajo Nation and 31.7% for reservations other than Navajo, approximately three times the US average for that same time period (see Figure 2). Figure 3 further highlights income disparities for Native Americans, with particular focus on the Crow and Navajo Nations. As the figure shows, approximately 40% of Crow and Navajo people were living in poverty in 2014, relative to the 15% nationally.<sup>15</sup> A potential contributing factor to this income disparity in 2014 could be that employment rates for many tribes, including some of the energy-producing tribes, lag behind the national average (see Figure 4). Lagging socioeconomic indicators such as these persist across energy-producing tribes; consider, for example, the Blackfeet, Sioux and Tohono O’odham tribes, which, like the Navajo and Crow Nations, are all endowed with substantial natural resources. Unemployment rates for these tribes are consistently much higher than the national average across the United States (unemployment data from 2007 to 2014 are shown by Figure 5). In 2012, the unemployment rate gap was the highest shown (at 14.2%); in 2008 the divergence in unemployment rates was “merely” 7.6%.

It is striking that these socioeconomic conditions were (and are) present on these reservations, despite the tribes’ abundance of valuable and accessible natural resources. The wealth of available resources available to select tribes is detailed in Figure 6. Data for all tribes indicate that Indian lands hold almost 30% of the nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and natural gas reserves.<sup>16</sup> These resources are estimated to be worth approximately \$1.5 trillion.<sup>17</sup> Figure 7 further illustrates how important tribal energy resources are. As this figure shows, potential production of important commodities such as coal, uranium, and oil and natural gas is substantial. The largest producing states do in fact generate more of each of these energy sources than the potential from tribal lands, but the potential from tribal lands eclipses the second largest producing states (that is,

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<sup>15</sup> The US Census, American Community Survey (“ACS”) 5-year data are presented for Figures 3 and 5, because the US Census typically provides the most complete and reliable data available.

<sup>16</sup> Shawn Regan and Terry L. Anderson, “Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development,” Property and Environment Research Center, February 2014 (hereinafter referred to as “PERC Report”) at page 4.

<sup>17</sup> PERC Report at page 4.

tribal production of coal could be greater than that of West Virginia, tribal production of uranium could be greater than that of Texas, and tribal production of oil and gas could be greater than that of North Dakota).

In addition to coal, uranium, oil, and gas, tribal lands also hold large potential renewable energy resources. Wind, solar, geothermal and hydroelectric energy are all accessible in many tribal areas, but relatively few examples exist to demonstrate successful development of renewable energy supplies. For example, the US Department of Energy notes that “Overall, the analysis shows that the technical potential on tribal lands is about 6% of the total national technical generation potential. This is disproportionately larger than the 2% tribal lands in the United States, indicating an increased potential density for renewable energy development on tribal lands.”<sup>18</sup> The potential that tribal energy development represents is largely untapped; the Department of the Interior indicates that only 2.1 million acres of Indian lands are being developed for their energy resources, while an additional 15 million acres with energy potential remain undeveloped. In other words, 88% of Indian surface lands have resources that could provide tremendous economic and social benefits to a number of tribes, but have yet to be developed.

Our meeting today has been arranged so that we can discuss the potential for enhancing energy development on American Indian lands by reducing federal regulations that impede the process. By any measure, the potential resource base found on tribal lands is substantial. These largely untapped assets offer significant and unique prospects for individual citizens as well as entire tribal communities; successful energy development represents important revenue streams and higher socioeconomic standards for a number of tribes. If tribes choose to pursue energy development, they can see benefits from well-managed development such as well-paying jobs, substantial royalty and tax revenues to the tribes, and greater access to critical healthcare and social services, among several others. If these resources remain effectively inaccessible to tribes, then what is already a set of complex and difficult socioeconomic challenges that face the most economically disadvantaged people in the country could easily degrade further.<sup>19</sup>

The bill we are discussing today, HR 538, looks to streamline energy development on tribal lands by decreasing federal oversight and regulation. Lessening the need for this regulation and oversight moves toward tribal autonomy and self-governance, and as the research noted above indicates, successful tribal development will depend on enhanced tribal decision-making authority over governmental and economic policies that affect tribal lands and

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<sup>18</sup> E. Doris, A. Lopez and D. Beckley, “Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands,” US Department of Energy, February 2013, at pages 1-2.

<sup>19</sup> Maura Grogan, Rebecca Morse and April Youpee-Roll, “Native American Lands and Natural Resource Development,” Revenue Watch Institute, 2011, at pages 6-7.

resources.<sup>20</sup> Promoting opportunities for tribal self-determination and governance is something the federal government has tried to do over the last several decades, but has largely fallen short of in regard to energy development.

Congressional efforts to facilitate energy development on tribal lands include the Indian Tribal Energy Development and Self-Determination Act (“ITEDSA”) of 2005 (which is part of the Energy Policy Act of 2005). This legislation was an attempt to give tribes the option to exercise greater authority over their own energy resources. Under the ITEDSA, something known as the Tribal Energy Resource Agreement (“TERA”) allows a tribe, at its own discretion, to enter into leases, business agreements and right-of-way agreements for energy development on their lands without review or approval from the Secretary of the Interior. However, as is well known, not a single tribe has entered into a TERA agreement, about a decade after passage of the Act. This lack of adoption of TERAs is due to factors such as uncertainty about some of the TERA regulations and a complicated, confusing, and time-consuming application process.<sup>21</sup>

In contrast to the unutilized TERA, the more recent Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (“HEARTH”) provides a model which should help tribes accelerate the leasing of tribal surface lands.<sup>22</sup> My understanding is that HEARTH has as its foundation ideas that were articulated in earlier limited legislation authorizing tribes such as the Navajo Nation to independently lease surface lands without Secretarial approval for each individual lease; HEARTH extended these rights to all tribes.<sup>23</sup> In the context of energy, HEARTH allows for projects that lease only surface land and does not extend tribal leasing authority over subsurface extraction or exploration. Energy projects on surface land are often renewable energy projects, such as utility-scale solar or wind farms. While it is promising that under HEARTH tribes can implement their own regulations governing the leasing of Indian lands (including for renewable energy development), such projects have not yet taken off on tribal lands. As of March 2015 only one utility-scale wind facility was in operation on tribal

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<sup>20</sup> Stephen Cornell and Joseph P. Kalt, “Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn’t,” *Joint Occasional Papers on Native Affairs* No. 2005-02, 2006, at pages 14-15.

<sup>21</sup> *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, United States Government Accountability Office, June 15, 2015 (“GAO Report”), at pages 32-33.

<sup>22</sup> HEARTH does not cover subsurface leasing or the ability to grant rights-of-way (Code of Federal Regulations, Title 25 – Indians, at §162.006(b)(1)).

<sup>23</sup> Monte Mills, “New Approaches to Energy Development in Indian Country,” *The Federal Lawyer*, April 2016 (“Mills Report”) at page 53. Under HEARTH, the Pueblo of Sandia was the second tribe (after the Federated Indians of Graton Rancheria) to be approved for tribal regulations on their land (US Department of the Interior, “Secretary Salazar Signs Historic Agreement in New Mexico to Help Spur Economic Development in Indian Country,” March 14, 2013). The Governor of the Pueblo, Victor Montoya, said at the time he expected HEARTH to aid with elimination of red tape and quicker negotiations with companies looking to lease land. With the help of HEARTH, the Pueblo has been working to develop its airport and improve its retail center (*Albuquerque Journal*, “A ‘historic day’ at pueblo,” March 15, 2013).

land, with one more such facility and one utility-scale solar facility under construction at that time.<sup>24</sup> This is in stark contrast with the significant developments in utility-scale wind and solar capacity in the United States. Data indicate that in the decade between 2004 and 2013, 686 utility-scale wind projects and 778 utility-scale solar projects were constructed nationally.<sup>25</sup> This difference between renewable capacity added nationally and on tribal lands illustrates the need to create further provisions for tribes to develop their energy resources.

HR 538 takes the HEARTH provision of tribal surface land leasing one step further, specifically in the context of energy development and the Navajo Nation. Section 8 of the proposed bill contains a provision to allow the Navajo Nation to lease tribal land for the exploration, development, or extraction of mineral resources without federal approval. This would allow for the Navajo Nation to engage in energy development beyond projects limited to the surface (i.e., such as utility-scale solar and wind facilities). It is possible that the Navajo Nation will benefit from such a provision as it is a tribe with substantial natural resources, and a capable governmental bureaucracy. However, Section 8 appears to be narrow in scope; it does not extend the subsurface leasing rights to tribes more broadly and somewhat constrains the Navajo Nation's ability to fully exploit energy projects as the Nation sees fit. Allowing tribes to develop and control their own resources has, in certain instances, been tremendously successful. Consider the example of the Red Willow Production Company, which is owned and operated by the Southern Ute tribe in Colorado. Red Willow, which engages in oil extraction in a number of geographic areas and produces throughout the Western US and offshore in the Gulf of Mexico, is but one of five energy companies operated by the Southern Ute tribe. The success of the tribe's energy endeavors has allowed it to create a growth fund worth billions of dollars, and to provide sizeable dividends to the tribe's citizens over a number of years.<sup>26</sup> Extending this section of HR 538 to tribes beyond the Navajo Nation, in a way that maintains the trust responsibility held by the US towards tribes, could promote significant economic and energy development on tribal lands.

In addition to the provision for Navajo subsurface leasing without federal approval, HR 538 sets out to reduce the time required for the approval process and lessen the potential for legal challenges (for example, imposing binding time limits on the appraisal and approval processes could significantly speed up the time taken to greenlight a project and prevent bureaucratic delays). Tribal energy development projects that have been stymied in the past have caused significant economic damages to tribes, and have led to skepticism in pursuing tribal projects among nontribal industry participants in the energy market. Streamlining the federal appraisal process could make it easier for tribes to undertake energy development in pursuit of tribally-

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<sup>24</sup> GAO Report at page 2.

<sup>25</sup> GAO Report at page 3.

<sup>26</sup> PERC Report at pages 17-18.

driven economic development and determination.<sup>27</sup> Similarly, language limiting legal fees that might be recovered by those bringing legal challenges to energy project could help insulate tribal energy development projects from costly delays, but may also have unintended consequences through chilling judicial access for parties that have legitimate standing to challenge certain developments.

While tribes such as the Southern Ute are benefiting from energy development, research has noted that some tribes that engage in the natural resource industries are often overly and unjustly burdened by the current system. Cumbersome regulations and/or past mismanagement by the federal government deter some tribes from proceeding with energy development. Complying with unwieldy federal regulations and application processes can be incredibly time-intensive and complex, and mismanagement and delays of energy projects cost tribes a significant amount of revenues. Consider one example of bureaucratic impediments that have stymied energy development for tribes such as the Crow Nation. In January 2005, the Crow Tribal Council approved an oil and gas lease on tribal lands,<sup>28</sup> but development of the resource was blocked until September 2007 due to the excessively slow review and approval process in place at the BIA.<sup>29</sup> Additionally, the Crow Nation reports that BIA's records for surface and mineral ownership are repeatedly missing or out-of-date.<sup>30</sup> Persisting issues and inefficiencies, layers of regulatory oversight, lack of access to markets, higher-than-elsewhere permitting costs, and persistent infrastructure challenges create an environment of uncertainty and contribute to lackluster economic development.<sup>31</sup>

Due to these bureaucratic inefficiencies and challenges, the BIA is not always able to aid tribal energy development to the best of its capabilities. The BIA is extremely important for the

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<sup>27</sup> Mills Report at page 57. National Congress of American Indians, "Policy Update, 2016 Mid-Year Conference," 2016, at pages 13-14.

<sup>28</sup> Clair Johnson, "Crow Tribe signs lease with oil exploration firm," *Billings Gazette*, May 16, 2005, at <http://billingsgazette.com/news/state-and-regional/montana/crow-tribe-signs-lease-with-oil-exploration-firm/article85763605-8812-5993-a56d-8717f7c71bff.html>. See also, "Crow Tribe Signs oil and gas development deal," May 17, 2005, at <http://www.indianz.com/News/2005/008205.asp>.

<sup>29</sup> *Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands, Before the House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs*, 112<sup>th</sup> Cong. (2011), Statement of Scott Russell, Secretary of the Crow Nation, at page 13. Delayed approval of oil and gas leases can have a particularly detrimental impact on the potential revenues earned from energy development projects in a world of falling oil and gas prices. In cases where oil and gas prices have fallen significantly in the long waiting period between application submission and BIA approval, tribes have seen development opportunities abandoned. Development efforts not completed have effectively forced certain tribes to forego the potentially significant revenues that would have started flowing at higher price levels.

<sup>30</sup> See, e.g., *On Improving Tribal-Corporate Relation in the Mining Sector: A White Paper on Strategies for Both Sides of the Table*, HPAIED, April 2014, at <http://hpaied.org/sites/default/files/documents/miningrelations.pdf>, at page 91.

<sup>31</sup> Joseph P. Kalt, "The Mining of Crow nation Coal: Economic Impact on Crow Reservation, Big Horn County and Montana," February 4, 2014, at page 2.

administration and management of tribal land held in trust by the federal government, and its smooth and timely functioning is essential for tribal energy development. An understaffed and overburdened BIA impedes tribes from capitalizing on their own resources. In recent discussions I have had with those working on the ground in energy development for tribes, I have heard differing views on the BIA's role. For example, I have found several instances where a lack of funding, staffing, and expertise at the BIA acts as a roadblock to the timely energy development that tribes seek; I have also found that there are instances where tribes look to the BIA for its built-in expertise and assistance in leasing oil and gas properties, and report that the area BIA office works quickly and efficiently.<sup>32</sup> As tribal experiences with the BIA are not positive across the board, it is important to reduce inefficiencies and streamline the BIA's approval and appraisal process. This can be accomplished by using federal appropriations to provide the BIA with more of the funding it needs to increase its staff and expertise and by providing incentives for quick and timely action by existing BIA offices.

Other options to alleviate the congestion at the BIA include the possibility of administering block grants and/or setting up additional offices that serve as "one-stop shops" for tribes for appraisals, regulation enforcement, and administration of lands held in trust by the federal government. In recent discussions I have had with tribes engaged in energy development, the idea of block grants, or funding directly to certain tribes to carry out functions typically performed by the BIA, was largely well-received as a potential way to improve efficiency in tribal leasing for energy development. These types of grants could provide a given tribe with a fixed amount of funding for the tribe to hire third-party appraisers, to hire experts to assist in negotiating agreements with outside investors and developers, and to review royalty rate provisions and distribute royalty payments.<sup>33</sup> Consider the bottleneck that the appraisal process has often become. By giving tribes funding to cover what it costs to do the appraisals itself, in some circumstances the BIA could alleviate the backlog in reviewing lease applications, and reduce the financial burden of increasing its own staffing to handle a larger number of applications (and overcome existing backlogs where such backlogs exist). Additionally, more "one-stop shop" offices like the Federal Indian Minerals Leasing Office ("FIMO") situated at the Four Corners Region serving the Navajo, Hopi, Ute and Zuni tribes should be set up. This office is the first of its kind, and both its proximity to tribes and its understanding of conditions on the ground uniquely position it to help streamline and accelerate projects on tribal lands.<sup>34</sup> Directing funding to the establishment of such offices could be beneficial to energy development for tribes

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<sup>32</sup> I note that the positive BIA feedback I have recently heard involves energy leases on tribal lands that are not reservation lands.

<sup>33</sup> US Department of the Interior, "Tribal Grant Program to Assess, Evaluate and Promote Development of Tribal Energy and Mineral Resources."

<sup>34</sup> Office of Natural Resources Revenue, Department of the Interior, "Federal Indian Minerals Office," March 31, 2016 at <http://www.onrr.gov/IndianServices/fimo.htm>.

by further alleviating congestion at the BIA and providing tribes with more accessible expertise.<sup>35</sup>

Energy development is an important goal for tribes, and granting them the ability to capitalize on their own resources without federal impediments will go a long way toward improving socioeconomic conditions for a number of tribes. This is evidenced by the significant gains in wealth for those tribes who have been able to develop and operate their own energy projects and by the significant losses for those tribes whose efforts have been stymied by failures in the current federal system for oversight of these important energy developments. Streamlining energy development and minimizing federal oversight that is inefficient will empower tribes to control their own lands in a more efficient and beneficial manner. At the same time, it is important to proceed with any new legislation in a way that maintains the trust responsibility held by the US government toward the tribes. The goal is not to upend the balance of responsibility but to create a business optimal environment for the tribes and help them benefit from the resources on their lands. There are several ways to work towards this, such as extending the subsurface leasing provisions included in HR 538 to tribes beyond the Navajo Nation, by providing the BIA with more funding to increase its staff and reduce the backlog of lease applications, by providing block grants to tribes for third-party appraisers, and by establishing more “one-stop shop” offices such as the FIMO.

The efforts I have described here can help promote the development of Native American energy resources, resulting in benefits to Native Nations and individual tribal citizens, through both enhanced economic development opportunities and more efficient exploitation of the energy resources we are all collectively fortunate to have within the boundaries of the United States. Clearly, this is an issue that is worthy of serious consideration by the US Congress, and I thank you for allowing me to take part in this important discussion.

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<sup>35</sup> Another “one-stop shop” is the still-nascent Indian Energy Service Center in Denver, CO. The Service Center will include personnel from several relevant segments of the Department of the Interior, and is expected to provide expertise, policy guidance, standardized procedures, and technical assistance as needed by tribes (see, e.g., Written Testimony of Lawrence Roberts, *United States Government Accountability Office Report, “Indian Energy Development – Poor Management by BIA has Hindered Energy Development on Indian Lands,” Before the United States Senate Committee on Indian Affairs*, October 21, 2015). While the “one-stop shops” noted here might be beneficial, there are also potential drawbacks to consider. If not executed properly, these offices may exacerbate existing bottlenecks to energy development by simply consolidating them into one location, such as Denver. Offices of this type may also draw experienced technical advisers away from field offices where those personnel might have made a greater impact working more directly with the tribes located nearer the area offices.