

Calendar No. 244

106TH CONGRESS }
1st Session }

SENATE

{ REPORT
{ 106-132

AMENDING PUBLIC LAW 105-188 TO PROVIDE FOR THE MINERAL LEASING OF CERTAIN INDIAN LANDS IN OKLA- HOMA

—————
AUGUST 2, 1999.—Ordered to be printed
—————

Mr. CAMPBELL, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 944]

The Committee on Indian Affairs, to which was referred the bill (S. 944) to amend Public Law 105-188 to provide for the mineral leasing of certain Indian lands in Oklahoma, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 944 is to amend Public Law 105-188, an Act to Permit the Mineral Leasing of Indian Land Located Within the Fort Berthold Indian Reservation in Any Case in Which There is Consent From a Majority Interest In the Parcel of Land Under Consideration For Lease, which allows the Secretary of the Interior to approve leases of allotted lands on the Fort Berthold Indian Reservation, pursuant to the authority of the Mineral Leasing Act 1909,¹ as amended, where more than 50 percent of those owning the mineral estate of an allotment have agreed to a lease for oil or gas. Under the provisions of S. 944, the Secretary may also approve such leases if they are lands held in trust as part of the former Indian reservations of any of the following seven Indian tribes: the Comanche Indian Tribe; the Kiowa Indian Tribe; the Apache Tribe; the Fort Sill Apache Tribe of Oklahoma; the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie); the

¹ Act of March 3, 1909, 35 Stat. 783, 25 U.S.C. § 396.

Delaware Tribe of Western Oklahoma; or the Caddo Indian Tribe, all located in Oklahoma.

BACKGROUND

P.L. 105–188 was enacted during the 105th Congress in response to concerns that current law may require unanimous approval of all those who own undivided fractional interests in an allotment before it can be leased, leaving otherwise attractive parcels of land passed over for oil and gas development.² The economic and opportunity costs attributable to this dynamic prove great, particularly for those tribes with potentially exploitable mineral resources. This was occurring even though the Fort Berthold Indian Reservation was located in an area that was subject of significant oil and gas exploration. The source of this difficulty can be traced to the now-discredited policy of Allotment. Under the Allotment policy, approximately 100 million acres of land held in trust for Indian tribes passed from tribal ownership. Some of this land was declared surplus and sold directly to non-Indians by the Federal government. A great deal of this land was conveyed to individual tribal members in allotments of approximately 160 acres or less. Originally, these lands were conveyed with restrictions against alienation to protect the equitable owners of these lands from losing title, and the beneficial use of the land. However, through sale, fraud, chicanery, and manipulation of the system that was ostensibly created to protect Indians, these interests were often lost.

Even where tribal members retain ownership of allotted lands, problems traced to the allotment policy persist. In particular, this policy allowed state probate laws to determine the intestate disposition of allotments, displacing inherent tribal authority over a tribe's members and their property, and ignoring tribal culture and traditions. Non-trust property could be passed to each succeeding generation in a manner consistent with each tribe's laws, practices, and traditions, but trust property was conveyed pursuant to state laws that were often unfamiliar, and which Indian tribes and their members were unable to alter or affect. As a result, testamentary dispositions were rarely made for allotted lands. State probate law governing real estate generally provided that each successive generation received equal undivided co-tenancies with no rights of survivorship. As a result, as each generation passed the undivided fractional interests in each allotment were further splintered. The Deputy Solicitor for the Department of Interior, explained:

The cause of this fractionation was that Congress enacted probate laws which provided that as individual Indian owners died, their property descended to their heirs as undivided fractional interests in the land. So if you do the math quickly, if an Indian owner had a 160-acre allot-

²A federal district court in New Mexico issued an unreported opinion refusing to allow a non-unanimous lease of allotted lands. In that case, both the process for negotiating the lease and the lease itself were found to be a breach of the Secretary's trust obligation. In addition, the case involved more than non-consenting owners, some of the owners of undivided interests were adamantly opposed to the lease. *McClanahan v. Hodel*, 14 Indian Law Reporter 3113 (D. N.M. 1987). As discussed further, at least two federal statutes provide explicit authority for the leasing of allotted lands without unanimous approval. It is fair to say that the full range of the Secretary's authority to approve leases without the explicit consent of all those owning each undivided interest in an allotment has neither been fully explored nor definitively resolved.

ment and died and had four heirs, the heirs did not inherit 40 acres each; each inherited a 25 percent interest in the 160-acre allotment. When they died, assuming that each had four heirs, each of the sixteen heirs inherited a 6.25 percent interest. If you take that just one generation more, and assuming that each of the heirs had four heirs, each of the 64 owners then had a 1.56 percent share. And this exponential fractionation occurs with each successive generation.³

As this statement indicates, fractionation increases geometrically and as the size of each interest shrinks, the value of the interest also shrinks. As a result, each new generation of owners must commit their time and resources toward keeping track of increasing smaller, and less valuable interests in lands. The difficulty presented to the economical use of such lands is obvious. Although the Bureau of Indian Affairs has a responsibility to provide allotment owners with information about their interest, it is less likely that these owners will assist the Bureau of Indian Affairs (BIA) with the task (for example by keeping the BIA informed of changes in their address or by engaging in estate planning) if these fractional interests hold little value. Conversely, the more Congress and the Department of Interior can do to facilitate use of these lands, the more valuable these interests will be and the more likely it will be that the owners of fractional interests will be in a better position to take control of and extract value from these lands.

THE NEED FOR LEGISLATION

S. 944 is one example of a proposal that is intended to increase the value of allotted lands by making it possible for the mineral interests of these lands to be leased if more than 50 percent of those owning the mineral interest approve such a lease. By making it clear that unanimity is not required, those interested in developing the oil and gas resources on these lands will not be dissuaded from considering or moving forward with these plans simply because it is unlikely that it will be possible to contact and obtain the approval of each of the owners of each allotment.

Federal statutes either fail to explicitly allow the leasing of allotments without unanimous consent or they impose procedural impediments and limitations for when a lease can be approved without the consent of every person who owns an undivided interest. Understandably, this situation makes potential lessors reluctant to commit resources to trying to lease allotted lands if their efforts could potentially be stymied by a party owning less than 1% of the undivided interest in an allotment. By making it clear that a lease may be approved by the Secretary even if absolute unanimity is not achieved, the Committee believes that this significant impediment will be removed; an impediment which has caused a number of potential lessors to refuse to even consider (much less makes bids upon) these allotted lands for development.

Records indicate that land bases of each of the seven tribes included in S. 944 were extensively allotted to individual members.

³Sen. Rep. 105-205, quoting the statement of Deputy Solicitor Edward B. Cohen before the Committee on October 6, 1997.

In addition, the ownership of the allotments on these former reservations is highly fractioned. In such situations, requiring unanimous approval is arguably equivalent to placing a prohibition on the leasing of these lands.

A. Prior legislation addressing landowner consent

The approach taken in S. 944 represents a “second wave” in addressing consent requirements for allotted lands. The “first wave” addressed some situations where those owning undivided interests had not been determined, could not be located, or could not reach an agreement on lease.

A 1940 Act is an example of such “first wave” approach. In 1940, Congress enacted 54 Stat. 745, (25 U.S.C. §380) to allow for the leasing of allotments without requiring unanimous consent approval. But this law specifically excluded leases for “oil and gas mining purposes.” In addition, the law is only applicable to two distinct situations: the original allottee was deceased and either the heirs or devisees were not determined or the heirs and devisees were not determined or the heirs and devisees have been located “and such lands are not in use by any of the heirs and the heirs have not been able during the three months’ period to agree upon a lease.”⁴ Although this provision allows leases without unanimous approval, it still allows even the smallest minority interest holder to frustrate the decision of those holdings an overwhelming majority interest, at least temporarily. In addition, there is some evidence that some BIA agency or area offices may still require 100% approval before approving leases.⁵ Such a practice would violate the terms of federal statutes and the modern trend of federal policy.

In 1955 Congress added a proviso to the Mineral Leasing Act of 1909 (25 U.S.C. § 396), which allows for leasing for all types of minerals, without full consent.⁶ This proviso, however, was restricted to circumstances where the heirs were either not determined or could not be located. In another section of the same Act, however, Congress made § 380 applicable to § 396, but did not remove the provision making § 380 inapplicable to oil and gas leases. Thus, explicit authority for the approval of oil and gas leases involving allotted lands without unanimous consent appears to be limited to the proviso of § 396. (Other minerals could, of course, be leased under the terms of § 380.) Specific authority for non-unanimous leases is necessary in the oil and gas content for two reasons. First, with the exception of Ft. Berthold, present law does not specifically authorize the Secretary to approve leases, if one fractional interest holder fails or refuses to consent to the lease, even if that person holds only a very small fractional interest. Also, even if § 380 were applicable to oil and gas leases, it would require three months of inactivity before a lease could be approved by the Secretary, even when the majority of the landowners have reached an agreement on a lease. This long and cumbersome delay rarely inures to the benefit of either the majority or minority interest holders, especially

⁴The phrase “such lands are not in use by any of the heirs” is the source of the “use rights” discussed in footnote 9.

⁵See the text accompanying footnote 8.

⁶Act of August 9, 1955, 69 Stat. 540.

when a working majority has agreed to a lease, and the Secretary is still responsible for reviewing leases as a trustee.

The 1994 American Indian Agriculture Resources Management Act⁷ (AIARMA) and P.L. 105–188 represent the “second wave” of legislation, which clarifies that unanimous approval is not a prerequisite for Secretarial approval of leases, nor are owners required to wait three months if a majority of them have agreed to sign a lease. In the Committee report accompanying the AIARMA, the House Committee on Natural Resources Committee explained why this policy was necessary:

[The AIARMA] also recognizes that the owners of a majority interest in trust land may enter into a lease agreement that binds the other owners if they are assured fair market value for their land. The Committee intends this provision to address the issue of highly fractioned undivided heirship lands lying idle due to the number of ownerships interests in one parcel of land. The Committee has received testimony from the Comanche Indian tribe of Oklahoma, members of the Fort Still Apache tribe of Oklahoma, and the Indian Soil Conservation Association which indicate that a major problem faced by Indian allottees is the Bureau of Indian Affairs requirement that 100 percent of the owners agree to a negotiated lease agreement. Although the current regulations [25 CFR 162.6(b)] allow owners of a majority interest in the land to bind the other owners, many BIA Area Offices still adhere to a 100 percent consent requirement. This is particularly a problem in Oklahoma where witnesses testified about certain tracts of land with over three hundred owners. The Committee has included this provision to break the gridlock and allow individual Indian landowners to bring their lands into production.⁸

The purpose of these statutes is to preclude a “tyranny of the minority” that could result if parties owning even less than 1% of the undivided interests in an allotment could preclude the leasing of these lands. To be sure, such legislation has not gone so far as divesting “heirs and devisees” of their “use rights;” but neither have those acts explicitly expanded these rights to those who obtain an interest in an allotment by conveyance.⁹

⁷P.L. 103–177, Act of Dec. 3, 1993.

⁸H.R. Rep. 103–367, 103rd Cong., 1st. Sess. (1993).

⁹The statutory basis for “use rights” is 25 U.S.C. § 380, which appears to condition the BIA’s authority to approve the lease of allotted lands without majority approval upon a finding that “such lands are not in use by any of the heirs.” This requirement is included in the regulations that prescribe the Secretary’s authority to approve leases. See 25 C.F.R. § 162.2(a) (1997). Presumably, such “use rights” have little application in the oil and gas context. In general, the scope of these use rights has been limited to the direct heirs and devisees of the original allottee. See, e.g., *Fenner v. Acting Billings Area Director*, 29 I.B.I.A. 116 (1996) (holding that an Indian may not acquire use rights through the purchase of an interest in allotted lands). It is therefore surprising and potentially troubling that the Interior Board of Indian Appeals interpreted the AIARMA as conferring use rights on purchasers. *Randall Emm and William Frank v. Phoenix Area Director*, 30 I.B.I.A. 72 (1996). Rather than strengthening the relative authority of landowners when a consensus on leasing is reached by the majority, this interpretation could (potentially) expand the number of minority interest holders who could frustrate the wishes of a working majority. There is no legislative history that supports such an extension of use rights.

LEGISLATIVE HISTORY

S. 944 was introduced on May 3, 1999 by Senator James M. Inhofe (Oklahoma) and referred to the Committee on Indian Affairs. On June 16, 1999, Senator Orrin G. Hatch (Utah) was added as a co-sponsor.

SUMMARY OF PROVISIONS

As enacted during the 105th Congress, the definition of “Indian lands” in P.L. 105–188 is limited to the Fort Berthold Indian Reservation, for purposes of the Act. S. 944 would amend that definition to include the following lands within any of the former Indian reservations of each of the following seven Indian tribes: the Comanche Indian Tribe; the Kiowa Indian Tribe; the Apache Tribe; the Fort Sill Apache Tribe of Oklahoma; the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie); the Delaware Tribe of Western Oklahoma; and the Caddo Indian Tribe, all located in Oklahoma.

S. 944 would also amend the title of P.L. 105–188 to include “certain former Indian Reservation in Oklahoma.”

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, in an open business session on June 16, 1999, by voice vote, ordered the bill reported to the Senate, with the recommendation to pass S. 944.

SECTION-BY-SECTION ANALYSIS

Section 1 amends P.L. 105–188 by including the names of seven Indian tribes located in western Oklahoma: the Comanche Indian Tribe; the Kiowa Indian Tribe; the Apache Tribe; the Fort Sill Apache Tribe of Oklahoma; the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie) located in Oklahoma; the Delaware Tribe of Western Oklahoma; or the Caddo Indian Tribe.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 569, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 22, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office, has prepared the enclosed cost estimate for S. 944, a bill to amend Public Law 105–188 to provide for the mineral leasing of certain Indian lands in Oklahoma.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 944—A bill to amend Public Law 105-188 to provide for the mineral leasing of certain Indian lands in Oklahoma

S. 944 would modify the conditions under which the Secretary of the Interior may approve a mineral lease or agreement that affects individually owned Indian land on certain former Indian reservations in Oklahoma. Under current law, approval of such leases requires the consent of all of the individuals that have an undivided interest in a property. This bill would ease that requirement by making the Secretary's approval contingent upon the consent of a simple majority of individual owners. Once approved by the Secretary, an agreement would be binding on all owners of the property, and any receipts would be distributed in proportion to each owner's interest in the property.

Based on information from the Bureau of Indian Affairs, CBO estimates that implementing this legislation would not significantly affect discretionary spending. CBO estimates that implementing S. 944 would have no effect on direct spending or receipts, because any income resulting from agreements approved under this legislation would be paid directly to the Indian owners or to the appropriate tribal government. Hence, pay-as-you-go procedures would not apply to the bill.

S. 944 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact is Megan Carroll. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 944 will have a minimal impact on regulatory requirements and that the enactment of S. 944 will reduce the amount of paperwork associated with the leasing of lands within the seven former Oklahoma Indian reservations covered by the bill.

EXECUTIVE COMMUNICATIONS

The Committee received a letter from the Department of Interior, which is reprinted below, providing the views of the Administration on S. 944.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, July 27, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR CHAIRMAN CAMPBELL: Two years ago, the Department provided supportive testimony on S. 1079, the precursor to Public Law 105-188, which permits the mineral leasing of individually allotted Indian land within the Fort Berthold Indian Reservation when there is consent from a majority interest in the parcel of land under consideration for lease. We are in support of the enactment of S. 944, a bill to amend Public Law 105-188 to also provide for similar mineral leasing of certain Indian lands in Oklahoma. We consider S. 944 a well intentioned move to make allotted lands competitive in an area of the country where oil and gas development provides a significant part of the income that many Indian land owners receive. We understand that the Oklahoma Tribes included within this legislation support this legislation.

Although we support enactment of S. 944, we are seriously concerned about the lack of progress in addressing the issue of fractionated ownership of Indian lands generally. As you know, this problem is one of the major impediments to economic development and prosperity in Indian Country. If it is not confronted and resolved expeditiously in a constructive manner, it will undermine all of the efforts we are making to resolve past mismanagement of Indian trust assets.

Fractionated ownership of land is a problem caused by peculiarities in federal Indian law. With the passing of each generation, the heirs of the original allottees continue to acquire interests in land which are undivided; i.e., parcels of land which are not separately identified in a specific owner. As the number of owners increases in these parcels, the administration of the land becomes increasingly more difficult. Approximately 80 percent of the Bureau of Indian Affairs' real estate services budget is used to administer less than 20 percent of the lands under its jurisdiction.

The Administration proposed a broader legislative solution (H.R. 2743) to fractionated ownership in the 105th Congress. As referenced in testimony for a joint hearing before this Committee and the House Resources Committee on H.R. 3782, the Tribal Trust Fund Settlement Act on July 22, 1998, increased fractionation of Indian lands is "one of the root causes of our trust asset management difficulties." Unfortunately, H.R. 2743 was not reported out by the House Resources Committee and no further action occurred on it in the 105th Congress. Staff discussions on a similar proposal have been occurring for the past several months and I understand that your Committee intends to introduce its own version of a general fractionation bill shortly. The Administration is very supportive of this effort and interested in working with you to ensure passage of a mutually acceptable bill before the end of the 106th Congress.

The Act of March 3, 1909 (25 U.S.C. 396) provides that consent of all owners of a tract of trust or restricted land must be obtained prior to approval of a mineral lease by the Secretary of the Interior.

As a consequence of this statutory requirement, firms engaged in mineral exploration and development are less likely to lease Indian lands because of the costs associated with locating and acquiring the consent of all owners to a parcel of Indian land. The result is that the Indian owners do not gain maximum economic benefit from their trust lands. This 100 percent consent requirement is not found in other laws governing the use of Indian lands. For instance, rights of way across Indian land can be granted by the Secretary when a majority of the interests consent; and surface leases may be granted by the Secretary when the owners of the land are unable to agree upon a lease. Timber issues likewise require less than 100 percent participation. Title 25 U.S.C. § 406 provides:

Upon request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

While agricultural and timber uses are renewable resources in contrast to mineral reserves which are depletable and thus non-replaceable, the rationale for majority consent still applies. The Department believes the 1909 statute did not contemplate the ownership of Indian land becoming as highly fractionated as now exists, or that the statute would foreclose mineral development on significant amounts of allotted lands. Unlike other early statutes, the 1909 provision has not been amended since enactment to conform with contemporary times.

The Office of Management and Budget has advised that there is no objection to the submission of this legislative report from the standpoint of the Administration's program.

Sincerely,

KEVIN GOVER
Assistant Secretary—Indian Affairs.

EFFECT ON EXISTING LAW

S. 944 will modify the manner in which 25 U.S.C. 396 applies to the approval by the Secretary of the Interior of leases of allotted land on the former Indian reservations of the Comanche Indian Tribe; the Kiowa Indian Tribe; the Apache Tribe; the Fort Sill Apache Tribe of Oklahoma; the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie); the Delaware Tribe of Western Oklahoma; and the Caddo Indian Tribe, all located in Oklahoma. Like P.L. 105-188, S. 944 is also intended to supercede any contrary requirement or interpretation of the Indian Mineral Development Act of 1982, P.L. 97-82 or any other statute. It also eliminates any statutory requirement for public auctions or advertised sales for leases of allotted land for oil and gas purposes.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 944 will result in the following changes in P.L. 105-188, with

existing language which is to be deleted in black brackets and the new language to be added in italic:

(a) IN GENERAL.—

(1) DEFINITIONS.—In this section:

(A) INDIAN LAND.—The term “Indian land” means an undivided interest in a single parcel of land that—

【(i) is located within the Fort Berthold Indian Reservation in North Dakota; and】

(i) *is located within—*

(I) *the Fort Berthold Indian Reservation in North Dakota; or*

(II) *a former Indian reservation located in Oklahoma of—*

(aa) *the Comanche Indian Tribe;*

(bb) *the Kiowa Indian Tribe;*

(cc) *the Apache Tribe;*

(dd) *the Fort Sill Apache Tribe of Oklahoma;*

(ee) *the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie) located in Oklahoma;*

(ff) *the Delaware Tribe of Western Oklahoma; or*

(gg) *the Caddo Indian Tribe; and*

(ii) is held in trust or restricted status by the United States.

* * * * *

And in the title of P.L. 105–188, by making the following change: “An Act to permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation *and certain former Indian Reservations in Oklahoma* in any case in which there is consent from a majority interest in the parcel of land under consideration for lease.”